APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-20026
Summary Calendar

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee of the Residential Asset Securitization Trust 2007-A8, Mortgage Pass-Through Certificates, Series 2007-H under the Pooling and Servicing Agreement dated June 1, 2007,

Plaintiff - Appellant

v.

JOANNA BURKE; JOHN BURKE,

Defendants - Appellees

Appeal from the United States District Court for the Southern District of Texas

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(Filed Sep. 5, 2018)

Before DAVIS, HAYNES, and GRAVES, Circuit Judges.

PER CURIAM:

In this mortgage foreclosure suit filed by Deutsche Bank National Trust Company, a prior panel opinion

of this court reversed the magistrate judge and held that Deutsche Bank possessed a right to foreclose under a valid assignment of the deed of trust. We vacated the final judgment in favor of mortgagors, Joanna and John Burke, and remanded with instructions to determine whether Deutsche Bank met the remaining requirements to foreclose under Texas law. Pursuant to our mandate, the magistrate judge concluded that the Burkes' remaining challenges to the foreclosure suit lacked merit. Nevertheless, the magistrate judge proceeded to defy the mandate and contravene the law of the case doctrine by concluding that our prior opinion was clearly erroneous and that failure to correct the error would result in manifest injustice. He therefore rendered final judgment in favor of the Burkes for a second time. We REVERSE and RENDER judgment in favor of Deutsche Bank.

I. Background

The relevant facts leading up to this foreclosure suit, as described in our prior opinion, are as follows:

> Joanna Burke signed a Texas Home Equity Note in May 2007 promising to pay $615,000 plus interest to secure a loan from IndyMac Bank. The note was secured by a Texas Home Equity Security Instrument (deed of trust), signed by both Joanna and John, placing a lien on their property. Mortgage Electronic Registration Systems, Inc. (MERS) is the beneficiary named in the deed of trust.

> In the summer of 2008, the Office of Thrift Supervision closed IndyMac Bank and transferred substantially all of IndyMac Bank's assets to IndyMac Federal Bank, FSB. In the spring of 2009, the Federal Deposit Insurance Corporation [("FDIC")] placed IndyMac Federal in receivership, selling substantially all of its assets to OneWest Bank, FSB. . . . The Burkes made their loan payments until December 2009—their last attempted payment was returned by the bank.
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> . . . . In January 2011, MERS assigned the Burkes' deed of trust to Deutsche Bank. . . . In February 2011, OneWest Bank, the mortgage servicer for Deutsche Bank, notified the Burkes that because they had failed to cure the default on their loan, their mortgage was accelerated. The Burkes still did not make any payments.
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> In April 2011, Deutsche Bank sought a declaratory judgment in federal district court authorizing a non-judicial foreclosure sale pursuant to Texas law.

Deutsche Bank Nat'l Tr. Co. v. Burke, 655 F. App'x 251, 252 (5th Cir. 2016). Following a bench trial, the magistrate judge determined that Deutsche Bank did not possess the right to foreclose under the Burkes' deed of trust because the assignment was void and invalid. *Id.* at 253.

On appeal, we held that the magistrate judge's ruling was "based on the incorrect premise that when MERS assigned the deed of trust to Deutsche Bank,

acting per the assignment as 'nominee for IndyMac Bank,' it as beneficiary did not have authority to assign the deed of trust." *Id.* at 254. Both Texas law and our precedent make clear that, because the original deed of trust names MERS as a beneficiary, "MERS, acting on its own behalf as a book entry system and beneficiary of the Burkes' deed of trust, can transfer its right to bring a foreclosure action to a new mortgagee by a valid assignment of the deed of trust." *Id.* Most importantly for purposes of this appeal, we explained that merely because "the assignment did not state that MERS was acting in its capacity as beneficiary does not change our analysis." *Id.* We had "not found a single case from any Texas state court that has made this distinction." *Id.* at 254 n.1.

According to the magistrate judge, we clearly erred in concluding that MERS assigned *its* foreclosure rights as beneficiary under the deed of trust because MERS executed the assignment as "nominee," suggesting that MERS was acting only in an agency capacity for a principal rather than also in its capacity as beneficiary. Because IndyMac Bank's only known successor, IndyMac Federal Bank, had been placed in receivership prior to the assignment and Deutsche Bank had failed to show that the FDIC, as receiver, had sold the Burkes' note to another bank, the magistrate judge also concluded that there was no existing successor to IndyMac Bank. Thus, despite the fact that we had already examined the arguments on this point, the magistrate judge, perceiving no existing principal capable of assigning a right to foreclose, determined that

MERS's purported assignment of such rights as "nominee" was "void and absolutely invalid." Deutsche Bank timely appealed.

II. Standard of Review

"We review *de novo* a district court's interpretation of our remand order, including whether the law-of-the-case doctrine or mandate rule forecloses any of the district court's actions on remand." *Gen. Universal Sys., Inc. v. HAL, Inc.*, 500 F.3d 444, 453 (5th Cir. 2007) (quoting *United States v. Elizondo*, 475 F.3d 692, 695 (5th Cir. 2007)). "The mandate rule requires a district court on remand to effect our mandate and to do nothing else." *Id.* (quoting *United States v. Castillo*, 179 F.3d 321, 329 (5th Cir. 1999), *rev'd on other grounds*, 530 U.S. 120 (2000)). "Because the mandate rule is a corollary of the law of the case doctrine, it 'compels compliance on remand with the dictates of a superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court.'" *Id.* (quoting *Castillo*, 179 F.3d at 329). As a second panel reviewing an appeal after a remand following a prior panel's decision in the same case, we have explained that we will only "reexamine issues of law addressed by a prior panel opinion in a subsequent appeal of the same case" if "(i) the evidence on a subsequent trial was substantially different, (ii) controlling authority has since made a contrary decision on the law applicable to such issues, or (iii) the decision was clearly erroneous and would work a manifest injustice." *Hopwood v. Texas*,

236 F.3d 256, 272 (5th Cir. 2000). In practice, we have rarely used the last exception.

III. Discussion

The magistrate judge construed the third exception to the law of the case doctrine as a license to disagree with our legal analysis if, in his opinion, it was "clearly erroneous" and would "work a manifest injustice" if not overruled. The conduct here is extraordinary conduct that would lead to chaos if routinely done. Even assuming arguendo that a trial court can overrule an appellate court on the very legal point previously decided in the absence of intervening law or new facts, this case does not represent the sort of extraordinary circumstances required to disregard the prior panel's opinion. *See id.* at 272–73 ("Mere doubts or disagreement about the wisdom of a prior decision of this or a lower court will not suffice for this exception. To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must be dead wrong." (quoting *City Pub. Sera. Bd. v. Gen. Elec. Co.*, 935 F.2d 78, 82 (5th Cir. 1991))).

No one disputes that MERS had the authority to assign its beneficiary rights to Deutsche Bank, and that its dual role as beneficiary and nominee under the deed of trust is permissible. *Harris Cty. v. MERSCORP Inc.*, 791 F.3d 545, 558–59 (5th Cir. 2015). The prior panel opinion's conclusion that MERS transferred its beneficiary rights to Deutsche Bank through a valid assignment of the deed of trust despite being described

as "nominee" was not dead wrong. Neither the magistrate judge nor the Burkes cite any binding authority stating that MERS cannot simultaneously act as both beneficiary and nominee under the deed of trust.[1] Even if MERS were acting only as a nominee, as the magistrate judge purports, it still would not be clearly erroneous to conclude that MERS validly assigned the deed of trust on behalf of an existing successor of IndyMac Bank.[2] Because the FDIC could sell "all the real and personal property" of IndyMac Federal Bank, *see* 12 U.S.C. § 192, it necessarily had power to assign the rights under the note, including the foreclosure rights,[3]

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[1] Notably, the only federal district court to have addressed this issue concluded that "MERS always acts simultaneously as both beneficiary and nominee under the deed of trust." *DHI Holdings, LP v. Sebring Capital Partners, Ltd. P'ship*, No. 14:17-CV-2930, 2018 WL 2688474, at *2 (S.D. Tex. June 5, 2018).

[2] It is undisputed that a lender's failure does not preclude MERS's right to assign, as nominee, the deed of trust when there exists a successor or assign to the failed lender's right to foreclose under the deed of trust. *See L'Amoreaux v. Wells Fargo Bank, N.A.*, 755 F.3d 748, 750 (5th Cir. 2014).

[3] The case relied on by the magistrate judge to conclude that a failed bank in receivership could not be a valid assignor involved the death of a *person*. *Pool v. Sneed*, 173 S.W.2d 768, 775 (Tex. Civ. App.—Amarillo 1943, writ ref'd w.o.m.). The Burkes similarly rely on the Restatement (Third) of Agency § 3.07(4) for the proposition that an agency relationship generally "terminates" when the principal "ceases to exist or commence a process that will lead to cessation of existence." However, neither the magistrate judge nor the Burkes cited any case law suggesting that the FDIC as receiver of a failed bank could not be a valid assignor as the bank's successor. We likewise found no case reaching that result. Rather, courts that have addressed this issue have rejected the magistrate judge's conclusion and found that the FDIC, as receiver, was a successor to IndyMac Bank. *See Powe v. Deutsche*

see Concierge Nursing Ctrs., Inc. v. Antex Roofing, Inc., 433 S.W.3d 37, 45 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) ("The word 'assign' or 'assignment' in its most general sense means the transfer of property or some right or interest from one person to another.").

We also hold that even if the prior opinion was "dead wrong" and even if (assuming arguendo) the magistrate judge could then reexamine our ruling, no manifest injustice would result from following our mandate. To the contrary, the manifest injustice is that the Burkes have not made a payment on their mortgage since December 2009 despite continuing to live in the home. No one disputes that MERS, as beneficiary under the deed of trust, had the right to initiate foreclosure proceedings and to transfer that right by a valid assignment of the deed of trust. MERS attempted to assign that right to Deutsche Bank. The magistrate judge found no impediment to foreclosure other than a supposed defect in the assignment. Any such imperfection does not change the fact that MERS and its successors and assigns are entitled to foreclose on the Burkes' property. Given nearly a decade of free living by the Burkes, there is no injustice in allowing that foreclosure to proceed.

REVERSED and RENDERED.

Bank National Trust Co., No. 4:15-CV-661, 2016 WL 4054913, at *3 (E.D. Tex. July 29, 2016).

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-20026

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee of the Residential Asset Securitization Trust 2007-A8, Mortgage Pass-Through Certificates, Series 2007-H under the Pooling and Servicing Agreement dated June 1, 2007,

Plaintiff - Appellant-

v.

JOANNA BURKE; JOHN BURKE,

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Texas

Before DAVIS, HAYNES and GRAVES, Circuit Judges.

PER CURIAM:

Appellant Deutsche Bank National Trust Company filed a motion to modify the judgment of this court or remand for entry of foreclosure judgment. Appellees Joanna and John Burke responded; in their response, they also made requests for relief. Having considered all the filings, the court orders as follows:

IT IS ORDERED that the judgment of this court is modified to reflect a remand to the district court for the limited purpose of entering an order of foreclosure to effectuate this court's judgment; no other action is permitted by the district court in this case;

IT IS FURTHER ORDERED that all other pending motions of the parties are DENIED.

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

DEUTSCHE BANK NAT'L TRUST Co., as Trustee of the Residential Asset Securitization Trust 2007-A8, Mortgage Pass-Through Certificates, Series 2007-H under the Pooling and Servicing Agreement dated June 1, 2007, Petitioner,	§	
v.	§	CIVIL ACTION NO: H-11-1658
JOHN BURKE AND JOANNA BURKE, Defendants.	§	

FINAL DECLARATORY JUDGMENT

(Filed Dec. 21, 2017)

Judgment is rendered in favor of defendants John and Joanna Burke against plaintiff Deutsche Bank National Trust Co., as Trustee of the Residential Asset Securitization Trust 2007-A8, Mortgage Pass-Through Certificates, Series 2007-H under the Pooling and Servicing Agreement dated June 1, 2007 ("Deutsche Bank"). It is hereby ORDERED, ADJUDGED, and DECREED that neither Deutsche Bank nor any mortgage servicer acting on its behalf has the right to foreclose on the Burkes' residence at 46 Kingwood Greens Drive,

Kingwood, Texas. It is further ORDERED, ADJUDGED, and DECREED that at no time has Deutsche Bank possessed any right, title, or interest in the Burkes' note and security interest on this property executed on May 21, 2007.

Signed at Houston, Texas on December 21, 2017.

/s/ Stephen Wm Smith
Stephen Wm Smith
United States Magistrate Judge

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

DEUTSCHE BANK NAT'L TRUST CO., as Trustee of the Residential Asset Securitization Trust 2007-A8, Mortgage Pass-Through Certificates, Series 2007-H under the Pooling and Servicing Agreement dated June 1, 2007, Petitioner,	§	
v.	§	CIVIL ACTION NO: H-11-1658
JOHN BURKE AND JOANNA BURKE, Defendants.	§	

SECOND AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Dec. 21, 2017)

Plaintiff Deutsche Bank National Trust Co. sued to foreclose a lien created under the Texas Home Equity Amendment against defendants John Burke and Joanna Burke. Deutsche Bank seeks a declaration that it is vested with all title and interest in the property, as well as an order authorizing it to proceed with foreclosure pursuant to Texas Property Code § 51.002. The parties consented to magistrate judge jurisdiction.

After a bench trial on February 6, 2015, judgment was entered in favor of the Burkes. Findings of fact and

conclusions of law were entered in support of the judgment. Those findings and conclusions were later amended in light of the bank's post-trial motion, but the final judgment remained the same. That judgment was vacated on appeal, and the case remanded for further proceedings. The court now makes the following Second Amended Findings of Fact and Conclusions of Law. Any finding of fact that should be a conclusion of law is deemed a conclusion of law, and vice versa.

Findings of Fact

1. Deutsche Bank National Trust Company is a corporation with its principal place of business in Santa Ana, California, and brings this suit in its capacity as Trustee of the Residential Asset Securitization Trust 2007-A8, Mortgage Pass-Through Certificates, Series 2007-H under the Pooling and Servicing Agreement dated June 1, 2007 ("Deutsche Bank").

2. Defendants John and Joanna Burke are individuals and homeowners residing at 46 Kingwood Greens Drive, Kingwood, Texas 77339.

2007 Home Equity Loan

3. In 2007, the Burkes applied for a home equity loan, which was initially rejected by IndyMac Bank, F.S.B. because they had no income. (Dkt. 74, Tr. 81-82)

4. Some time later, a different representative of IndyMac Bank called to advise that the loan would be

approved, and that the Burkes' previous contact at the bank had been fired. (Tr. 82)

5. On May 21, 2007, Joanna Burke alone executed a note containing a promise to pay IndyMac Bank $615,000 plus interest in certain monthly installments in exchange for a loan from IndyMac Bank in that amount. (P.Ex. 3; D.Ex. 11;Tr. 36-37, 45-48)

6. The note was secured by a Texas Home Equity Security Instrument (a deed of trust) placing a lien on their home in Kingwood, Texas. (P.Ex. 1)

7. Under the deed of trust, John and Joanna Burke were the borrowers and IndyMac Bank was the secured lender as well as the loan servicer. (P.Ex. 1; Tr. 62-63)

8. At closing the Burkes signed an affidavit expressly representing that the amount of the loan did not exceed eighty percent (80%) of the fair market value of the property on the date the extension of credit was made. (D.Ex. 11) No evidence at trial was offered to contradict this representation.

9. The closing of the loan occurred more than twelve (12) days after the Burkes' initial loan application.

10. At all times relevant to this case, the Burkes were retired and had no employment income. (Tr. 81)

11. Four days after closing, the Burkes received a copy of the final loan application as well as all documents signed by the Burkes at closing. This documentation included an unsigned loan application form

falsely declaring that the borrowers' employment income was $10,416.67 monthly (or exactly $125,000 per year). (Tr. 79; D.Ex. 2)

12. This false income declaration was knowingly made by IndyMac because the Burkes never claimed any employment income during the loan process. (Tr. 80-82)

13. The Burkes promptly notified IndyMac of the inaccurate income figure, but no satisfactory answer was ever given. (Tr. 83-84)

Events of 2008-2009

14. On July 11, 2008, IndyMac Bank was closed by the Office of Thrift Supervision and substantially all of its assets were transferred to IndyMac Federal Bank, FSB. (P.Ex. 6)

15. During that year, the Burkes repeatedly complained to IndyMac Federal that their monthly payments were being placed in suspense, rather than applied towards the mortgage. (Tr. 51-52)

16. Also during this time, the Burkes applied for a loan modification, and were told that the borrower had to be three months in arrears in order to be eligible. (Tr. 54-55)

17. The Burkes withheld three monthly payments in accordance with those instructions, only to be told that the arrearage had to be paid in order to receive a

modification; arrangements were made to pay the arrearage, but no modification was approved. (Tr. 54-55)

18. On March 19, 2009, IndyMac Federal was placed in receivership by the FDIC and substantially all of its assets were sold. (P.Ex. 6, p. 4). All deposits were transferred to OneWest Bank, F.S.B., but there is no indication whether OneWest acquired any other assets of IndyMac Federal, in particular the Burke Note or Deed of Trust. (P.Ex. 6).

19. On June 15, 2009, plaintiff Joanna Burke filed a lawsuit in Harris County small claims court complaining about the conduct of IndyMac Federal referred to in paragraphs 13 through 15; the case was removed to federal court and ultimately dismissed. (Tr. 56)

20. The Burkes made payments on the note through December 2009. The last time they attempted payment, the bank returned their check to them. (Tr. 37-38, 60-62)

Events of 2010-2011

21. By letter dated March 9, 2010, IndyMac Mortgage Services gave the Burkes notice of default, and opportunity to cure the default by April 10, 2010. (P. Ex. 4; Tr.50)

22. On December 6, 2010, the Burkes filed suit in Harris County District Court against IndyMac Mortgage Services, Deutsche Bank, and Mortgage Electronic Registration Systems for breach of contract and predatory lending practices. (Cause No. 2010-79352,

133rd Judicial District Court). Following removal to this court, the case was dismissed by District Judge Lynn Hughes on March 3, 2011, subject to the condition that "if the case is re-filed, it must be re-filed in this court." (Tr. 57-58)

23. On January 20, 2011, Mortgage Electronic Registration Systems, Inc., acting as nominee for the lender IndyMac Bank, F.S.B., its successors and assigns, executed a document entitled "Assignment of Deed of Trust," purporting to assign all rights under the Burkes' loan agreement to Deutsche Bank. (P. Ex. 2)

24. The effective date of the purported assignment was backdated to April 9, 2010, one day prior to the default cure deadline set by the notice of default letter described above. (P. Ex. 2)

25. The language of the assignment, its signature block, and corporate acknowledgment repeatedly confirm the limited capacity in which the assignor was acting: "Mortgage Electronic Registration Systems, Inc., as nominee for, IndyMac Bank, F.S.B., its successors and assigns." (P.Ex. 2)

26. It is undisputed that IndyMac Bank, F.S.B. went defunct more than two years prior to this purported assignment. (P.Ex. 6)

27. IndyMac Bank's only successor was IndyMac Federal, which was also placed in receivership and sold nearly two years before this purported assignment. (P.Ex.6)

28. The "successors and assigns" to which the purported assignment refers are unknown, nor is there proof that MERS had an agency relationship with any such entity at the time the document was executed.

29. By letter dated February 10, 2011, a law firm representing a mortgage servicer gave the Burkes notice of intent to accelerate the maturity of the debt under the note. The letter stated that OneWest Bank, FSB was the mortgage servicer representing the mortgagee, Deutsche Bank. (P.Ex. 5)

30. The only authenticated version of the Burke note in the record contains no indorsement of any kind. (P. Ex. 3; Tr. 45-48)

31. The current owner or holder of the Burke note is unknown, because no evidence was offered or admitted on this issue.

32. An unbroken chain of title from the lender to plaintiff Deutsche Bank has not been established on this record.

Conclusions of Law

1. Jurisdiction is based on diversity of citizenship, as there is complete diversity between the plaintiff and the defendants.

2. In determining whether a party is entitled to foreclose on a note, a federal court applies the substantive law of the forum state, in this case Texas. *Resolution*

Trust Corp. v. Starkey, 41 F.3d 1018, 1023 (5th Cir. 1995).

Validity of Home Equity Lien

3. The Burkes' loan was made pursuant to Art. XVI, Sec. 50(a)(6) of the Texas Constitution ("Texas Home Equity Amendment").

4. The Texas Home Equity Amendment requires, among other things, that a lien created thereunder may be foreclosed upon only by a court order. TEX. CONST. Art. XVI, Sec. 50(a)(6)(D).

5. Article XVI, Section 50 of the Texas Constitution imposes strict requirements for a valid homestead lien. Failure to comply with these requirements renders the lien invalid and unenforceable, unless and until the noncompliance is cured. *Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542, 543 (Tex. 2016).

6. Subsection 50(a)(6)(A) requires "a voluntary lien on the homestead created under a written agreement with the consent of each owner." There is no evidence that the lien on the Burkes' home was either involuntary, unwritten, or created without the Burkes' consent. No violation of this subsection was shown.

7. Subsection 50(a)(6)(Q)(v) requires that "at the time the extension of credit is made, the homeowner shall receive a copy of the final loan application and all executed documents signed by the owner at closing related to the extension of credit." The Burkes received these documents four days after closing. (Tr. 79) Because

there is no evidence that the extension of credit occurred before that date, no violation of this subsection was shown.

8. The inclusion of false or even fraudulent employment income information in the final loan application does not provide grounds to invalidate a home equity lien under the Texas Constitution.

9. Subsection 50(a)(6)(B) requires that the value of the total indebtedness not exceed 80% of the home total value. No violation of this subsection was shown.

10. Subsection 50(a)(6)(M)(i) requires that the loan must close no sooner than 12 days after the loan application. That requirement was satisfied here because the Burkes loan application was made on or about April 11, 2007, over a month before the closing. Although their initial application was turned down, it was later reactivated by the bank, and the Burkes' ratified that process by going forward with the loan transaction. The closing was the culmination of the same loan transaction initiated by the Burkes in April 2007.

11. Subsection 50(a)(6)(M)(ii) now requires that the loan must close no earlier than one day after the homeowner receives a copy of the loan application. However, this provision was not in effect at the time the Burkes' loan was closed, and thus provides no basis to invalidate the lien. *See* TEX. CONST. art. 16, § 50, historical notes (citing Acts 2007, 80th Leg., H.J.R. No. 72).

12. The Burkes' challenges to the home equity lien as noncompliant with various provisions of the Texas Constitution are without merit.

Invalidity of Assignment to Deutsche Bank

13. A party seeking to foreclose on a home equity loan has the burden to demonstrate its authority to prosecute the foreclosure. TEX. R. CIV. P. 736.1(d)(3)(B) (petition must describe "the authority of the party seeking foreclosure"); 736.6 ("the petitioner has the burden to prove by affidavits on file or evidence presented the grounds for granting the order").

14. Under the Texas Property Code, the only party entitled to initiate a non-judicial foreclosure sale is the mortgagee or the mortgage servicer acting on behalf of the current mortgagee. A "mortgagee" is defined as "(A) the grantee, beneficiary, owner, or holder of a security instrument; (B) a book entry system; or (C) if the security interest has been assigned of record, the last person to whom the security interest has been assigned of record." TEX. PROP. CODE § 51.0001(4).

15. When, as here, the party seeking to foreclose is not the original lender, that party must be able to trace its rights under the security instrument back to the original mortgagee. *See, e.g.*, *Leavings v. Mills*, 175 S.W.3d 301, 310 (Tex. App.—Houston [1st Dist.] 2004, no pet).

16. Texas courts follow the majority rule that an obligor may defend against an assignee's efforts to

enforce the obligation on any ground that renders the assignment void or absolutely invalid. *See Reinagel v. Deutsche Bank Nat. Trust Co.*, 735 F.3d 220, 225 (5th Cir. 2013) (citing *Tri-Cities Const., Inc. v. Am. Nat. Ins. Co.*, 523 S.W.2d 426, 430 (Tex. Civ. App. 1975); *Glass v. Carpenter*, 330 S.W.2d 530, 537 (Tex. Civ. App. 1959, writ ref'd n.r.e.).

17. Under Texas law, one method by which a party can establish its right to foreclose is to prove that it is the holder or owner of the note. *Miller v. Homecomings Financial, LLC*, 881 F. Supp. 2d 825, 829 (S.D. Tex. 2012). Deutsche Bank presented no evidence that it was the holder or owner of the Burke promissory note. The current holder or owner of the note is unknown.

18. Under Texas law, an assignment is a manifestation by the owner of a right to transfer such right to the assignee. *Hermann Hosp. v. Liberty Life Assur. Co.*, 696 S.W.2d 37, 44 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.). An existing right is a precondition for a valid assignment. *Pain Control Institute, Inc. v. GEICO Gen. Ins. Co.*, 447 S.W.3d 893, 899 (Tex. App. Dallas 2014, no pet.). An assignee stands in the shoes of the assignor but acquires no greater right than the assignor possessed. *John H. Carney & Assocs. v. Texas Prop. & Cas. Ins. Guar. Ass'n*, 354 S.W.3d 843, 850 (Tex. App. Austin 2011, pet. denied). An assignment cannot be made by a dead man; it is a transfer by one existing party to another existing party of some valuable interest. *Pool v. Sneed*, 173 S.W.2d 768, 775 (Tex. Civ. App.—Amarillo 1943, writ ref'd w.o.m.).

19. An agent is one who consents to the control of another, the principal, where the principal manifests consent that the agent shall act for the principal. *first Nat'l Acceptance Co. v. Bishop*, 187 S.W.3d 710, 714 (Tex. App.—Corpus Christi 2006, no pet.). Texas law does not presume agency, and the party who alleges it has the burden of proving it. *IRA Resources, Inc. v. Griego*, 221 S.W.3d 592, 597 (Tex. 2007).

20. A "nominee" is a kind of agent. *See* Black's Law Dictionary 1211 (10th ed. 2014) ("A person designated to act in place of another, usu. in a very limited way"). Under the deed of trust language, therefore, MERS is the "nominee" or agent for its principal IndyMac Bank. *Harris County v. MERSCORP Inc.*, 791 F.3d 545, 558-59 (5th Cir. 2015) (using the terms 'nominee' and 'agent' interchangeably when describing MERS' authority under typical deed of trust language).

21. Under the Burkes' deed of trust, MERS had the authority as "beneficiary" to foreclose on the property or transfer its right to bring a foreclosure action to a new mortgagee by a valid assignment of the deed of trust. At the same time, the deed of trust recognized MERS's authority to act as agent on behalf of the lender. "In other words, because of the duality of the note and lien, it is possible that MERS could simultaneously be the principal of the lien and the agent of the lender who holds the note." *Harris County v. MERSCORP, Inc.*, 791 F.3d at 558-59.

22. Under Texas law, there is a presumption that if an agent signs a contract for a disclosed principal, he

does not intend to make himself a party to the contract. Unless an ambiguity is created by some contrary manifestation in the body of the instrument itself, parol evidence is not admissible to show that the agent is or the principal is not a party to the instrument. *Cavaness v. General Corp.*, 283 S.W.2d 33 (Tex. 1955); *Northern Propane Gas Co. v. Cole*, 395 F.2d 1, 4 (5th Cir. 1968); *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1207 (5th Cir. 1975); *Martin v. Xarin Real Estate, Inc.* 703 F.3d 883, 891 (5th Cir. 1983); 3 Tex. Jur. 3d Agency § 310 (June 2017 update).

23. The purported 2011 deed of trust assignment to Deutsche Bank unambiguously shows that MERS was acting solely in its capacity as agent on behalf of a disclosed principal, IndyMac Bank, its successors and assigns. P.Ex. 2. Nothing in the body of the assignment suggests that MERS intended to act as principal on its own behalf. Nor did the bank offer any parol evidence to contradict the unambiguous language of the assignment. Therefore, MERS was not a party to the 2011 assignment.

24. Because the language of the assignment is unambiguous as to the contracting parties, it made no difference that MERS possessed an interest in the subject matter of the assignment. *Cavaness*, 283 S.W.3d at 38. For the same reason, MERS did not become a party to the contract merely because its disclosed principal was a nonexistent corporation. *Id.* at 37.

25. IndyMac Bank was closed in 2008. Its successor was IndyMac Federal Bank, but that entity was

likewise placed in receivership in March 2009, nearly two years before the 2011 assignment. P.Ex. 6. Substantially all of its assets were sold, but to whom they were sold, and whether the Burke note was among those assets, are matters of sheer speculation on this record. *See Priesineyer v. Pacific Southwest Bank*, 917 S.W.2d 937, 940 (Tex. App.—Austin 1996, no writ) (refusing to presume that note once held by failed bank was among unspecified assets transferred to new bank). On this record, there was no existing "successor" to IndyMac Bank at the time of the 2011 assignment.

26. There is no evidence that, prior to being placed in receivership, IndyMac Bank or its successor IndyMac Federal Bank assigned the Burke note to anyone.

27. The purported assignment of January 20, 2011 is void and absolutely invalid for the following reasons: (A) the putative assignor, IndyMac Bank, F.S.B., had been defunct for more than two years at the time of execution, and therefore had no legal existence or capacity to act; (B) the party executing the assignment, Mortgage Electronic Registration Systems, Inc., acted solely in its capacity as "nominee for lndyMac Bank F.S.B., its successors and assigns," not in its own behalf or any other capacity; and (C) the record does not reflect who the successors or assigns might be, whether they had any rights under the Burkes' note or security instrument, and if so how they obtained those rights.

28. Accordingly, the court concludes that neither Deutsche Bank nor any mortgage servicer acting on

its behalf has the right to foreclose on the Burkes' Kingwood residence.

29. The court further concludes that at no time has Deutsche Bank possessed any right, title, or interest in the Burkes' note and security interest executed on May 21, 2007.

Signed at Houston, Texas on December 21, 2017.

/s/ Stephen Wm Smith
Stephen Wm Smith
United States
Magistrate Judge

APPENDIX 5

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

DEUTSCHE BANK NAT'L TRUST CO., AS TRUSTEE OF THE RESIDENTIAL ASSET SECURITIZATION TRUST 2007-H UNDER THE POOLING AND SERVICING AGREEMENT DATED JUNE 1, 2007, *Petitioner*,	§	
v.	§	CIVIL ACTION
JOHN BURKE AND JOANNA BURKE, *Defendants*.	§	NO: H-11-1658

OPINION ON REMAND

(Filed Dec. 21, 2017)

Judge Learned Hand believed that above the portals of every courthouse should be inscribed the famous admonition of Oliver Cromwell: "I beseech ye in the bowels of Christ, think that ye may be mistaken."[1] This opinion is written in that spirit.

I. Procedural Background

Deutsche Bank brought this suit to foreclose on a home equity lien. After a bench trial in 2015, this court ruled in favor of the homeowners, holding that

[1] Learned Hand, Morals in Public Life (1951).

Deutsche Bank based its foreclosure claim entirely upon a deed of trust assignment which was void and invalid. Dkt. 94. Among other deficiencies, the purported assignment was executed by an entity (MERS) acting solely as agent for a principal (IndyMac Bank) that no longer existed. After entry of judgment, Deutsche Bank filed a motion to alter or amend the judgment, which was denied in a written opinion.[2] One of the arguments considered and rejected was that MERS had executed the assignment as a principal on its own behalf, rather than merely as agent on behalf of a disclosed principal. *Id.* at 960.

On appeal the Fifth Circuit disagreed, concluding in an unpublished opinion that MERS had validly assigned its right to foreclose under the deed of trust to Deutsche Bank. The final judgment was vacated and the case remanded to this court "to determine whether Deutsche Bank met the remaining requirements to foreclose under Texas law and, if so, grant a final judgment for Deutsche Bank and rule on any outstanding request for attorneys' fees." *Deutsche Bank Nat'l Trust Co. v. Burke*, No. 15-20201, slip op. at 7 (5th Cir. July 19, 2016).

Upon remand, this court directed the parties to submit additional briefing on whether Deutsche Bank had satisfied the requirements of the Texas Constitution for a valid and enforceable home equity lien. Dkt. 119. The parties were also directed to consider the

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[2] *See Deutsche Bank Nat'l Trust Co. v. Burke*, 117 F. Supp. 3d 953 (S.D. Tex. 2015).

impact of a recent decision by a Texas appellate court upon the panel's ruling.

For reasons explained below, the court finds that the Burkes' constitutional challenges to the lien have no merit. However, binding Texas Supreme Court precedent,[3] as well as at least three Fifth Circuit decisions adhering to that precedent,[4] compel the conclusion that the panel's *Erie* guess about the validity of the assignment is clearly erroneous and, if followed, would work a manifest injustice.

II. Validity of Lien under the Texas Constitution

When the Burkes initially applied to IndyMac Bank for a home equity loan in 2007, they were turned down. Both were then retired, and neither had employment income. Sometime later, another representative of IndyMac Bank called to advise that the loan would be approved, and that the Burkes' previous contact at the bank had been fired. On May 21, 2007, Joanna

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[3] In a diversity case such as this, Texas substantive law governs the interpretation of contracts. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). To determine state law, federal courts look to the final decisions of the state's highest court. *Transcon Gas Pipe Line Corp. v. Transp. Ins. Co.*, 953 F.2d 985, 988 (5th Cir. 1992).

[4] In the Fifth Circuit, the rule of orderliness generally forbids one panel from overruling a prior panel. *Teague v. City of Flower Mound*, 179 F.3d 377, 383 (5th Cir. 1999). This rule extends to conflicting language in the subsequent case. *Arnold v. U.S. Dept. of Interior*, 213 F.3d 193, 196 n.4 (5th Cir. 2000) ("under the rule of orderliness, to the extent that a more recent case contradicts an older case, the newer language has no effect.").

Burke signed a note promising to repay a loan from Indymac Bank in the amount of $615,000 plus interest, secured by a deed of trust placing a lien on the Burkes' homestead in Kingwood, Texas. Four days after closing, the Burkes received loan documents from IndyMac, including an unsigned loan application falsely claiming that the Burkes had employment income of $10,416.67 per month. Because the Burkes had never claimed any employment income during the loan process, they promptly notified the bank of the error. The bank took no steps to cure that defect.

Article XVI Section 50 of the Texas Constitution imposes exacting requirements for a homestead lien in Texas. A constitutionally noncompliant lien is invalid unless and until the noncompliance is cured. *Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542, 543 (Tex. 2016). The Burkes maintain that the home equity lien failed to satisfy the requirements of Section 50 in several respects:

> 1.The application for the extension of credit was not voluntary, written, and consented to by the homeowners, in violation of Tex. Const. art. XVI, § 50(a)(6)(A), (Q)(v);
>
> 2.The lender failed to cure the defect in the loan application after notice from the homeowners, violating § 50(a)(6)(Q)(x);
>
> 3.The value of the total indebtedness exceeded 80% of the home's total value, violating § 50(a)(6)(B);

> 4.The loan closed sooner than 12 days after the borrower applied for it, violating § 50(a)(6)(M)(i);
>
> 5.The loan closed sooner than one day after the homeowner received a copy of the loan application, violating § 50(a)(6)(M)(ii); and
>
> 6.The lender failed to provide a copy of the loan application documents at closing, as required by § 50(a)(6)(Q)(v).

Dkt. Nos. 121, 131. For reasons explained below, none of these challenges have merit.

The first two challenges center on the bank's falsification of the Burkes' employment income on the unsigned loan application. While this may well be evidence of the bank's intent to defraud underwriters and subsequent investors, it does not signify a violation of the cited constitutional provisions.[5] Subsection 50(a)(6)(A) requires "a voluntary lien on the homestead created under a written agreement with the consent of each owner." It says nothing about the loan application, which may be given orally or electronically and need not be submitted in writing. *Cerda v. 2004-EQRI L.L.C.*, 612 F.3d 781, 788-89 (5th Cir. 2010) (citing 7 Tex. Admin. Code § 153.12(2)). The other cited provision, Subsection 50(a)(6)(Q)(v), requires only that the owner receive a copy of the final loan application as well as all documents signed by the owner at closing. Those requirements were met here. While the final loan application may have contained incorrect (and

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[5] The Burkes' counsel conceded the point at the status conference on remand. Dkt. 126 at 5.

even fraudulent) information, it was the final loan application, and it was provided to the borrowers as required.

The third challenge – excessive loan to home value ratio – is unsupported by evidence at trial. At closing the Burkes signed an affidavit in which they expressly represented that the amount of the loan "does not exceed eighty percent (80%) of the fair market value of the Property on the date the Extension of Credit is made." *See* Texas Home Equity Affidavit and Agreement § I.E. (attached as Ex. A to D.Ex. 11). The amount of the loan was $615,000, and no evidence was introduced at trial suggesting that this loan amount exceeded 80% of fair market value. Nor did the Burkes offer evidence to justify disregarding the representation of value made in their affidavit at closing.

The closing date challenges (items 4 and 5) are similarly without merit, but for different reasons. The alleged violation of Subsection 50(a)(6)(M)(i) – that the loan must close no earlier than 12 days after the loan application – hinges on the assertion that the Burkes never applied for the loan they received. They contend that their initial loan application was turned down, and they never reapplied. However, the most natural interpretation of the events here is that they constituted a single loan transaction – after the initial rejection, the Burkes' loan application was simply reactivated by the bank, and the Burkes ratified that process by going forward with the loan transaction. *See Cerda*, 612 F.3d at 789 (holding that a final loan amount higher than originally applied for did not

trigger another 12-day waiting period, since it was all "part of the same loan transaction."). As for the alleged violation of Subsection 50(a)(6)(M)(ii) – that the loan must close no less than one business day after the date the homeowner receives a copy of the loan application – the bank correctly observes that this provision of the Texas Constitution did not take effect until December 4, 2007, more than six months *after* the Burkes' loan was closed. *See* TEX. CONST. art. 16, § 50, historical notes (citing Acts 2007, 80th Leg., H.J.R. No. 72). Thus the closing date challenges are not well taken.

The sixth and final challenge is the failure to provide a copy of the final loan application "at closing." This contention misreads Subsection 50(a)(6)(Q)(v), which provides as follows:

> (v) *at the time the extension of credit is made*, the owner of the homestead shall receive a copy of the final loan application and all executed documents signed by the owner at closing related to the extension of credit[.]

(emphasis added). The final loan application is thus not due at closing, but "at the time the extension of credit is made." This wording makes clear that these two dates are not necessarily synonymous. This makes sense, because the borrower's mandatory three-day revocation period renders it unlikely that the actual extension of credit will occur the same day as the closing. The record in this case does not disclose exactly when the extension of credit was made. It is undisputed the Burkes received the loan application four days after closing. Transcript (Dkt. 74) at 79. Absent

proof that credit was actually extended before that date, there is no basis to invalidate the lien on this ground.

For all these reasons, the Burkes' contention that the home equity lien was constitutionally deficient must be rejected.

III. Validity of Assignment under Texas Common Law

Nevertheless, this court remains convinced that Deutsche Bank is not entitled to foreclose on the Burkes' property, because the assignment underlying its claim is void. Acutely aware that the panel reached the opposite conclusion, this court accepts that the basis for its earlier judgment was misunderstood. The balance of this opinion aims to correct that misunderstanding, and show how starkly the panel's conclusion deviates from binding precedent of both the Texas Supreme Court and the Fifth Circuit. *See Seagraves v. Wallace*, 69 F.2d 163, 164-65 (5th Cir. 1934) ("An appellate court . . . ought to have power to do justice according to law, and should be more ready to correct its own previous error, if such clearly appears, than to correct the errors of the District Court. Justice is better than consistency.").

As a preliminary matter, this court will address the very limited circumstances under which a lower court may properly disregard an appellate court's instructions on remand.

A. Law of the Case

Under the law of the case doctrine, an issue of law or fact decided on appeal may generally not be re-examined either by the district court on remand or by the appellate court on a subsequent appeal. *Illinois Central Gulf R.R. v. International Paper Co.*, 889 F.2d 536, 539 (5th Cir. 1989). The doctrine follows from the sound public policy that litigation should have an end. *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967) (*citing Roberts v. Cooper*, 61 U.S. 467, 481 (1857)). It is an exercise of judicial discretion, not a limit on judicial power. *See Messinger v. Anderson*, 225 U.S. 436, 444 (1912).

The law of the case doctrine is not absolute, and has several recognized (if narrow) exceptions. The Fifth Circuit has explained that "a prior decision of this court will be followed without re-examination . . . unless (i) the evidence on a subsequent trial was substantially different, (ii) controlling authority has since made a contrary decision of the law applicable to such issues, or (iii) the decision was clearly erroneous and would work a manifest injustice." *North Mississippi Communications, Inc. v. Jones*, 951 F.2d 652, 656 (5th Cir. 1992).

A corollary of the law of the case doctrine, known as the mandate rule, provides that a lower court on remand must implement both the letter and the spirit of the appellate court's mandate. *See Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1370 (5th Cir. 1992). Again, this rule is not absolute, even upon lower courts. *See*

United States v. Becerra, 155 F.3d 740, 753 (5th Cir. 1998) ("Consequently, unless one of the exceptions to the law of the case doctrine applies, the district court [is] bound to follow our mandate . . . ").

For reasons explained below, this case falls squarely within the third exception. The unpublished panel opinion contradicts not only long-settled Texas law, but also several published decisions of the Fifth Circuit. Unless the decision is reversed, it will work a manifest injustice upon the Burkes, as well as other Texas residents who might be turned out of their homes in similar circumstances.

B. The 2011 Assignment

Deutsche Bank's right to foreclose hinges entirely[6] upon a 2011 assignment from the original lender, IndyMac Bank. This document, a one-page standard

[6] Texas law provides other ways for a mortgagee to prove its right to foreclose, such as by showing that it holds the note. *See Miller v. Homecomings Financial, LLC*, 881 F. Supp. 2d 825, 829 (S.D. Tex. 2012). The current holder of the Burkes' note was never established at trial, as no bank representatives were called to testify (indeed, no bank representative bothered to attend). Counsel for the bank initially offered a copy of the note purporting to contain an endorsement in blank, but withdrew the document in the face of an authenticity objection. 117 F. Supp. 3d at 954-56. In an attempt to show that the bank had fraudulently altered documents, the Burkes offered as D.Ex. 12 various versions of the note (including the endorsed version), but no authenticated note endorsed in blank was ever admitted. Nor was there any evidence, via testimony or otherwise, that the bank held such a note.

form prepared by Deutsche Bank's attorneys, contained the following signature block:

> MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR, INDYMAC BANK, F.S.B., ITS SUCCESSORS AND ASSIGNS
>
> By: /s/
> Brian Burnett Assistant Secretary

P.Ex. 2. Below that, in equally prominent lettering, was a corporate acknowledgment that Mr. Burnett was acting in his capacity as "Assistant Secretary of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR, INDYMAC BANK, F.S.B., ITS SUCCESSORS AND ASSIGNS." *Id.* Via this signature and corporate acknowledgment, IndyMac Bank is plainly identified as the principal, with MERS signing merely in the capacity as "nominee," or agent[7] for IndyMac.

The body of the assignment[8] further confirms this understanding of MERS' agency relationship to the

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[7] A "nominee" is a kind of agent. *See* Black's Law Dictionary 1211 (10th ed. 2014) ("A person designated to act in place of another, usu. in a very limited way"). The Fifth Circuit has used the two terms interchangeably when describing MERS' authority under the typical deed of trust language. *Harris County v. MERSCORP Inc.*, 791 F.3d 545, 558-59 (5th Cir. 2015).

[8] "FOR VALUE RECEIVED, receipt of which is acknowledged, Mortgage Electronic Registration Systems, Inc., as nominee for the lender, its successor and assigns, PO Box 2026, Flint, MI 48501-2026, tel. (888)679-MERS, and existing under the law of Delaware, mortgagee of record of that one certain loan agreement evidenced by a promissory note and security instrument or

transaction. Rather than beneficiary or assignor, it refers to MERS merely "as nominee for the lender, its successor and assigns." Moreover, the assignment purports to transfer "all rights accrued under said Loan Agreement," defined as both the promissory note and the deed of trust. MERS has never claimed to have any rights under the promissory note. It follows that MERS was not the intended assignor, because only IndyMac Bank possessed "all rights" under both the note and the deed of trust.

This absence of ambiguity regarding MERS' role as agent in this transaction was tacitly conceded at trial. Deutsche Bank never contended in its pleadings or proposed pretrial order that the assignment (drafted by its own lawyers) was ambiguous on this point. No witnesses were called to offer parol testimony that, despite the wording used, MERS had intended to sign as principal on its own behalf. At the close of the bench trial, this court candidly explained its concerns:

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deed of trust dated 05/21/2007 (the "Loan Agreement"), in the amount of $615,000.00, made or granted by JOANNA BURKE AND JOHN BURKE (Borrower) and recorded as CLERK'S FILE NO. 20070322928, in the official real property records of HARRIS County, Texas, GRANTS, ASSIGNS, AND TRANSFERS all rights accrued and to accrue under said Loan Agreement to DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE OF THE RESIDENTIAL ASSET SECURITIZATION TRUST 2007-A8, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-H UNDER THE POOLING AND SERVICING AGREEMENT DATED JUNE 1, 2007, 1761 EAST ST. ANDREW PLACE SANTA ANA, CA 94705." P.Ex. 2.

> THE COURT: MERS is not doing it in its own name here. MERS is acting as nominee for IndyMac Bank. They're an agent for an entity that no longer exists; right?
>
> Mr. JACOCKS: Under the terms of the Deed of Trust and the Property Code, Texas Property Code, MERS is a beneficiary and nominee for both the originating lenders and its successors and assigns under the expressed language of this particular Deed of Trust and Texas law, and it does allow the holder or the assignee of the Deed of Trust to initiate foreclosure proceedings.
>
> THE COURT: The nominee. That they were acting as nominee. They were not acting as beneficiary.
>
> MR. JACOCKS: Okay.
>
> THE COURT: That's what the Assignment says. The Assignment doesn't say: MERS, in our capacity as beneficiary, is transferring the interest in this document or instrument. They're saying: We're acting on behalf of IndyMac Bank, an entity which no longer exists. So that's what troubles me about this.

Tr. at 93-94. Counsel for the bank acknowledged the point, but offered no rebuttal or counter-argument. *Id.* at 95.

Consistent with its comments at trial, this court issued findings and conclusions that MERS had acted solely in its limited capacity as nominee, and thus had not assigned its own rights under the deed of trust to

Deutsche Bank.[9] Whether MERS *possessed* the authority to assign its rights as beneficiary under the deed of trust was never doubted;[10] the critical issue was whether MERS *exercised* that authority—and on that score the assignment left no room for doubt.

C. The Panel Opinion

On appeal, Deutsche Bank did not directly confront the problematic wording of the assignment, and instead pursued a strategy of misdirection. The bank shifted attention to the deed of trust, falsely implying that this court had ruled that under that document MERS lacked authority either to foreclose or to assign that right to another. The bank's brief viciously assaulted this straw man,[11] tearing it limb from limb. But at the end of the day the actual language of the

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[9] Other arguments raised by the bank were also considered and rejected by this court, but those findings and conclusions were not considered by the panel.

[10] *See, e.g.*, 117 F. Supp. 3d at 960 n.8 (expressly assuming "(1) that MERS was not required to act solely as nominee for the lender under the Deed of Trust, and (2) that MERS had contractual authority under its member agreements to make assignments in its own name, and not merely 'as nominee' for its member entities.").

[11] *See* Appellant's Brief, Statement of the Issues, at 2:

> I. If authorized under a deed of trust, can MERS or its assignee foreclose on property, under Texas law, without demonstrating that it also holds the note?
>
> II. When MERS is both the beneficiary of a security instrument as well as the nominee of a lender, does the lenders' [sic] dissolution negate MERS' authority to execute an assignment of the security instrument?

assignment was left standing, unscathed except for the occasional misquotation.[12]

Even so, aided perhaps by the Burkes' *pro se* status, the strategy appears to have worked. Declaring that this court's reasons for invalidating the assignment "all misunderstand our precedent and Texas law," the panel resurrected the bank's scarecrow:

> The first three reasons [given by the magistrate judge] are all based on the incorrect premise that when MERS assigned the deed of trust to Deutsche Bank, acting per the assignment as "nominee for IndyMac Bank," it as beneficiary *did not have authority* to assign the deed of trust.

Deutsche Bank, No. 15-20201, slip op. at 5 (emphasis added). The panel opinion continued in the same vein:

> However, the original deed of trust named MERS as a beneficiary, and Texas law and our precedent make clear that MERS, acting on its own behalf as a book entry system and the beneficiary of the Burkes' deed of trust, *can* transfer its right to bring a foreclosure action to a new mortgagee by a valid assignment of the deed of trust.

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[12] At several points, Deutsche Bank's brief pretended the assignment read that MERS transferred all of "its" rights under the Loan Agreement. *Id.* at 4, 8, 23. And when quoting the actual language of the assignment, the bank omitted the "as nominee" limitation. *Id.* at 8 ("[MERS] GRANTS, ASSIGNS, AND TRANSFERS all rights accrued and to accrue under said Loan Agreement to Deutsche Bank . . . ").

Id. (emphasis added). Once again, a correct statement of Texas law. *See also Harris County v. MERSCORP Inc.*, 791 F.3d 545, 558-59 (5th Cir. 2015) ("In other words, because of the duality of the note and lien, it is possible that MERS could simultaneously be the principal of the lien and the agent of the lender who holds the note."). Of course, the fact that MERS *could* wear the hat of principal or agent under the 2007 deed of trust says nothing about which hat MERS *did* wear when it executed the 2011 assignment.

The panel answered the hat question in conclusory fashion:

> Here, MERS assigned *its* right to foreclose under the deed of trust to Deutsche Bank. That the assignment did not state that MERS was acting in its capacity as beneficiary does not change our analysis.

Deutsche Bank, No. 15-20201, slip op. at 5-6 (emphasis added). In other words, the actual wording of the assignment made no difference.

Disregarding unambiguous language is not a normal tenet of contract construction, yet the panel offered no Texas case law or doctrinal justification for doing so here. In a footnote, the panel cited an unpublished Fifth Circuit decision involving a similarly worded assignment by MERS as nominee. *Casterline v. OneWest Bank, F.S.B.*, 537 F.App'x 314 (5th Cir. 2013). But Casterline never contested the validity of that assignment, so the issue of MERS' capacity as principal or agent was never considered (much less decided) by

that court. *Id.* at 317 ("Casterline has not challenged the assignment of the Security Instrument [by MERS] to OneWest.").

More important, even if *Casterline* had held that words of capacity in signing a contract could be ignored, such a ruling would have contradicted a long line of Texas and Fifth Circuit precedent, as the next section will demonstrate.

D. Principles of Agency Law and Contracting Parties

More precisely stated, the question is a simple one: was MERS a party to this contract? If it signed as principal, MERS was a party and its rights were assigned; if it signed merely as agent for IndyMac, then MERS was not a party and only IndyMac's rights (or those of its "successors and assigns") could have been transferred.

This is not a particularly novel issue in the law of agency and contracts. What follows is a brief survey of two centuries of common law on this question, commencing before Texas joined the Union. The polestar of the inquiry has always been the parties' intent, starting with the language of the agreement itself—and often ending there, when the parol evidence rule applies. *See Cavaness v. General Corp.*, 283 S.W.2d 33, 39 (Tex. 1955).

1. Common Law

It is fitting to begin with Chief Justice John Marshall's decision in *Hodgson v. Dexter*, I Cranch [5 U.S.] 345 (1803). Shortly after the War Department was moved to Washington D.C., its building was destroyed by fire. The lessor of the building (Hodgson) sought to hold the Secretary of War personally liable for breach of covenant, pointing to Dexter's personal seal beside his signature on the lease. Justice Marshall rejected the claim, finding that other language in the lease negated an intent to contract on his own behalf. "The whole face of the agreement then manifests very clearly a contract made entirely on public account, without a view, on the part of either the lessor or the lessee, to the private advantage or responsibility of Mr. Dexter." *Id.* at 365.

Justice Joseph Story, riding circuit, faced a similar issue in *Thayer v. Wendell*, 1 Gall. 37, 23 Fed. Cases 905 (C.C.D. Mass. 1812). The suit was for breach of covenant in a deed of conveyance of land, and defendant Wendell had executed the deed as surviving executor of the testator. The covenant at issue began with this recitation: "And in my capacity aforesaid, but not otherwise, I do covenant. . . ." Justice Story had no difficulty disposing of the claim. "[T]he first rule of construction is, that every deed is to be construed according to the intent of the parties. Now what was the apparent intent of the parties? Certainly . . . that the defendant should not be personally bound." It made no difference that this construction would leave the plaintiff with no remedy. "We are not at liberty to

reject any words, which are used in a contract, when they are sensible in the place where they occur. . . ." *Id.* at 906.

Following the lead of these prominent jurists, the law became settled that determining the parties to a contract was a matter of contract interpretation no different than any other. *See, e.g.*, *Hewitt v. Wheeler*, 22 Conn. 557, 562-63 (1853) ("[T]he *intention*, when ascertained, is the true and only rule in these, as in other contracts, written or unwritten. We want only to know what the parties, by the language used, intended to declare.") (emphasis in original). In his famous Commentaries, Chancellor James Kent declared: "It is a general rule, standing on strong foundations, and pervading every system of jurisprudence, that, where an agent is duly constituted, and names his principal, and contracts in his name, the principal is responsible, and not the agent." 2 Kent, Commentaries on American Law, p. 492 (1st ed. 1828).

This common law maxim has survived intact into the modern era. The first Restatement of Agency in 1933 recited the familiar rule:

> **§ 320 Principal Disclosed**
>
> Unless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract.

The Restatement further provided that the parol evidence rule applies to the question of whether an agent is or is not a party, just as it does to any other issue of

contract interpretation. Restatement of Agency § 323(1) (1933). Essentially the same principles were carried forward in the next version of the Restatement issued in 1958. *See* Restatement (Second) of Agency § 155 (1958) ("In the absence of manifestations to the contrary therein, an unsealed written instrument is interpreted as the instrument of the principal and not of the agent if, from a consideration of it as a whole, it appears that the agent is acting as agent for a principal whose name appears as such.").

2. Texas Law

The first Texas Supreme Court case to reach the issue toed the common law line. In *Heffron v. Pollard,* 11 S.W. 165 (Tex. 1889), a seller sued Heffron for breach of a contract to buy pipe. Heffron denied he was party to the contract, contending that he signed as agent for another (Fry), using the words "J.W. FRY, per HEFFRON." The seller offered testimony purporting to show that Heffron, though signing in the name of Fry, had really intended to contract on his own behalf. The Supreme Court held that such parol evidence could not be used to vary the plain meaning of the contract:

> As to the legal effect of this contract upon its face there can be no doubt. It discloses the names and relation of all the parties connected with it. It binds Fry, the principal, and does not bind Heffron, the agent . . . Is it permissible, in order to bind him, to show by parol testimony an intention exactly contrary to that expressed on the face of the writing,

> namely, that Heffron was bound by it, and that Fry was not bound? In our opinion, this cannot be done without violating a cardinal rule of evidence.

11 S.W. at 166-67. Texas courts have consistently applied the *Heffron* parol evidence rule to all manner of contracts, including real property transactions. *See, e.g.*, *Farrier v. Hopkins*, 112 S.W.2d 182, 183 (Tex. 1938) (no liability for an undisclosed principal not named in a deed of conveyance or a negotiable instrument such as a vendor's lien note).

The most current and comprehensive treatment of this issue by the Texas Supreme Court is *Cavaness v. General Corp.*, 283 S.W.2d 33 (Tex. 1955). Cavaness was the owner of certain patent rights, and entered an agreement to license those rights in exchange for royalty payments. Instead of executing the agreement in his own name, Cavaness made the agreement in the name of a non-existent company called D-A-M Company, and signed the contract as "President" of that company. When the royalty payments were not forthcoming, Cavaness brought suit individually on his own behalf, claiming to be the real contracting party notwithstanding the contrary language of the contract.

Writing for a unanimous court, Justice Garwood rejected the claim, applying the parol evidence rule of *Heffron v. Pollard*:

> The same decision appears to us to establish that a writing such as that in the instant case reflects the status of the purported agent

> (petitioner) as a nonparty with sufficient clarity to make the Parol Evidence Rule applicable to proof that he is a party. Certainly a person recited and acknowledged as acting merely as a corporate officer is no more likely to be contracting for himself personally than is one recited to be acting as agent for another individual. The elaborate instant writing, with its corporate acknowledgment, and lacking any individual acknowledgment, thus perhaps even more clearly excludes the petitioner as a party than did the brief and unacknowledged agreement in the Heffron case.

283 S.W.2d at 38. The Court emphasized that this ruling was consistent with the Restatement of Agency, Section 323, as well as the explanatory comments. *Id.* at 37.

Two additional aspects of the *Cavaness* decision are significant. First, it made no difference to the result that Cavaness himself, as owner of the patent rights in question, held a personal interest in the subject matter of the contract. According to the Court, if the terms of the contract exclude the agent as a party, the parol evidence rule controls, whether or not the agent holds a personal stake in the matter: "We see no reason why the Rule should not apply in the one case as in the others. . . ." *Id.* at 38.

Nor did it make any difference that the nominal principal—"D-A-M Company"—never existed, either before or after the contract was executed. The court

expressly endorsed the view of the Restatement that, when the contract language is unambiguous, parol evidence is not admissible "although the effect is to show that the purported principal is nonexistent." *Id.* at 37 (quoting Comment b., Sec. 326).

Cavaness remains good law to this day,[13] its teachings frequently applied in Texas courts.[14] The Fifth Circuit has frequently recognized *Cavaness* as controlling authority. The first such case was *Northern Propane Gas Co. v. Cole*, 395 F.2d 1 (5th Cir. 1968). The dispute was over a covenant not to compete in a corporate buyout contract between the acquirer, Northern Propane, and Economy Gas & Supply, a local dealer being acquired. More specifically, the question was whether in

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[13] 3 Tex. Jur. 3d Agency § 310 (June 2017 Update) ("Where an unambiguous contract is executed and signed by an agent in the principal's name, extrinsic evidence is generally not admissible to show that the agent, in executing the agreement, intended to bind him- or herself only, instead of the principal." (citing *Cavaness*)).

[14] *See, e.g.*, *Fleming Associates, L.L.P. v. Barton*, 425 S.W.3d 560, 573 (Tex. App. – Houston [14th Dist.] 2014, pet. denied); *Hull v. S. Coast Catamarans, L.P.*, 365 S.W.3d 35, 45 (Tex. App. – Houston [1st Dist.] 2011, pet. denied); *Barker v. Brown*, 772 S.W.2d 507, 510 (Tex. App. – Beaumont 1989, no writ); *FDIC v. K-D Leasing Co.*, 743 S.W.2d 774, 775-76 (Tex. App. – El Paso 1988, no writ); *Priest v. First Mortgage Co. of Texas, Inc.*, 659 S.W.2d 869, 872 (Tex. App. – San Antonio 1983, writ ref'd n.r.e.); *Jordan v. Rule*, 520 S.W.2d 463, 465 (Tex. Civ. App. – Houston [1st Dist.] 1975, no writ) ("A written contract may itself afford the highest evidence of the identity of the contracting parties and the terms of the agreement," citing *Detroit Fidelity & Surety Co. v. First Nat'l Bank*, 66 S.W.2d 406, 407 (Tex. Civ. App. – Fort Worth 1933, no writ)).

addition to binding Economy as a corporate entity, the covenant also bound Mike Cole, its president and sole stockholder. Cole had signed the contract as president of the company.

In his inimitable style, Judge John Brown began by describing the case as a "sort of man bites dog situation." *Id.* Unlike the typical scenario where the author of a boiler plate adhesion contract seeks to enforce its harsh literal terms, the corporate plaintiff here "[a]ssert[s] with dead earnestness that its own form contract, filled in by its own responsible and presumably articulate representative of considerable responsibility, is ambiguous in its reference to the identity of all the parties to be bound by it." *Id.* at 1. Applying Section 323 of the Restatement of Agency as approved in *Cavaness*, Judge Brown had little trouble disposing of the case:

> Structured as the contract was with the purposeful insertion of the corporate name and the corporate title of the signatory agent, there is no basis whatsoever for holding that there was either an intention to hold Mike Cole personally responsible or any basis for any genuine doubt thereon.

Id. at 4.

Similarly, in *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200 (5th Cir. 1975), the court overturned a default judgment against an individual for breach of a contract related to a letter of credit

issued by the bank. The agreement was plainly signed by the individual as agent for the corporation only:

> "South East Construction Co., Ltd. (Handwritten)
> By: (Printed) Jack D. Baize (Handwritten)"

Citing *Heffron, Cavaness*, and similar authorities, Judge Wisdom recited the familiar rule:

> Construction of this contract must begin with the presumption that if an agent signs a contract for a disclosed principal, he does not intend to make himself a party to the instrument.
>
> * * *
>
> Unless an ambiguity is created by some contrary manifestation in the body of the instrument itself, parol evidence is not admissible to show that the agent is or the principal is not a party to the instrument, except where the plaintiff seeks to reform the contract.

Id. at 1207. The court also quoted from the treatise of Professor Seavey, who had served as the Reporter for the Restatement of Agency:

> If the parties are spelled out unambiguously, as where the agent signs 'P by A' or 'A for P', parol evidence can not be introduced to show the intent to make the agent a party or the principal not a party, except where reformation is sought.

Id. Finding no ambiguity in the agent's signature, the court vacated the judgment against the individual agent.

The Fifth Circuit reaffirmed the continuing vitality of this line of precedent in an opinion written by Judge Garwood, the son of the Texas Supreme Court justice who had authored *Cavaness*. In *Martin v. Xarin Real Estate, Inc.*, 703 F.2d 883 (5th Cir. 1983), the corporate defendant was sued for breach of contract to purchase a shopping center. The corporation attempted to avoid liability by claiming that it had signed the contract merely as the agent for the real buyer, who was known to the seller but not named in the contract. Once again, the parol evidence rule proved fatal to the claim:

> Nothing in the contract shows or gives the impression that Xarin is acting as agent for another; rather the contract negates any such impression. Where, as here, a written contract is signed in the name of a party who happens to be acting as an agent, but the contract gives no indication that any agency exists or that the party is signing other than as a principal or with any other qualifications, the agent is bound even though the other contracting party knows the identity of his principal . . . In such a case, parol evidence is inadmissible to show that it was the intention of the parties thereto that the agent not be personally bound, for such evidence would contradict the written contract.

Id. at 891.

The Fifth Circuit has applied these same contract and agency rules in jurisdictions other than Texas. *See, e.g., Gulf Shores Leasing Corp. v. Avis Rent-A-Car*

System, Inc., 441 F.2d 1385, 1391 (5th Cir. 1971) (applying Louisiana law); *U.S. Shipping Board Emergency Fleet Corp. v. Galveston Dry Dock & Constr. Co.*, 13 F.2d 607, 611-12 (5th Cir. 1926) (applying federal law). As Judge Brown observed in *Northern Propane*, the principles embodied in *Cavaness* are "not surprising," and "find general acceptance in Texas and elsewhere." 395 F.2d at 2.

Little purpose would be served by extending this recitation of pertinent precedent. The point is that the common law rules for determining the parties to a contract have been settled for more than two hundred years. Few common law principles possess a more impeccable pedigree.

E. Irreconcilable Conflict With *Cavaness*

The panel opinion simply cannot be reconciled with *Cavaness*. Texas law presumes that a self-described agent signing a contract for a disclosed principal does not intend to make himself a party to the instrument. Yet the panel held that the explicit declaration of agent capacity did not matter in construing the contract. *Deutsche Bank*, No. 15-20201, slip op. at 6-7 ("That the assignment did not state that MERS was acting in its capacity as beneficiary does not change our analysis.").

To be fair, the panel did not say that an express declaration of agency on the signature line was *never* relevant in determining the parties to a contract. Perhaps the panel viewed this case as an exception to the general rule. If so, the opinion made no attempt to

explain the contours of this exception, which is perhaps unsurprising given the appellant's mis-framing of the case. A few possibilities come to mind, though none are consistent with *Cavaness* or otherwise supported by Texas law.

One possible rationale is that, after all, MERS did possess rights of its own in the property under the deed of trust. Yet this was also true of Cavaness, who in fact owned the patent rights that were transferred by the licensing agreement at issue. Cavaness had argued that an exception to the general rule should apply when the agent has an interest in the subject of the contract, citing some older cases.[15] The *Cavaness* court acknowledged that an agent's personal interest in the subject matter might be relevant when the "name as used in [the] agreement is inherently ambiguous." 283 S.W.2d at 38. But when, as in the case before it, the agreement was "quite unambiguous" that Cavaness had chosen to sign as agent and not principal, the parol evidence rule forbade any proof to the contrary. *Id.* ("We see no reason why the [Parol Evidence] Rule should not apply in the one case as in the others").

Another possible rationale is that, at the time of the assignment, MERS and Deutsche Bank were likely aware that IndyMac Bank did not exist as a corporate entity. But the same was true in *Cavaness* – according to the petition all involved knew that the purported principal (D-A-M Company) did not exist. 283 S.W.2d

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[15] *See, e.g.*, *Martin v. Hemphill*, 237 S.W. 550 (Tex. Com. App. 1922).

at 35-36. As the *Cavaness* court noted, there was some authority for the proposition that when an agent purports to make a contract with another for a principal whom both know to be nonexistent, the agent is a party "unless otherwise agreed." Restatement of Agency, section 326. But, as *Cavaness* also explained, this qualification means that the parol evidence rule still governs when the contract is unambiguous:

> As stated in Sec. 323, if it appears unambiguously in an integrated contract that the agent is not a party, parol evidence is not admissible to show the contrary intent and, except in the case of a negotiable instrument, *this is so although the effect of the evidence is to show that the purported principal is nonexistent.*

283 S.W.2d at 37 (quoting Restatement of Agency section 326, Comment b) (emphasis added). Thus, it made no difference in *Cavaness* that the disclosed principal was a nonexistent corporation, and it makes no difference here.

Finally, the panel may have believed that MERS enjoys a unique status under the law, operating under a special dispensation from ordinary rules that bind other legal actors. Under this view, MERS always acts simultaneously as both beneficiary and nominee under the deed of trust. Like the two-headed fictional character Zaphod Beeblebrox,[16] MERS is a single integrated

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[16] *See* Douglas Adams, *The Hitchhiker's Guide to the Galaxy* (First Ballantine Books Edition: November 1995). Beeblebrox was the figure-head President of the Imperial Galactic Government, a position which also blurred the line between official and

entity who happens to wear two opposing hats, one labeled "Principal" and the other "Agent." The difficulty with the dual capacity theory as an *Erie* guess[17] is that no Texas court at any level has ever adopted it. Moreover, a recent opinion by the Fourteenth Court of Appeals in Houston gives no reason to doubt that MERS, like any other legal entity, can act sometimes as principal only, and sometimes as agent only:

> In *Nueces County* [*v. MERSCORP Holdings, Inc.*, No. 2:12-CV-00131, 2013 WL 3353948 (S.D. Tex. 2013)] the court determined that MERS was acting merely as the nominee or agent of a lender, and in that limited capacity had no power to assign the note to itself. *Id.* at *6. By contrast, the evidence in this case shows that Irwin assigned the note to MERS as a beneficiary, not as a nominee or agent for another lender.

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representative capacities: "Only six people in the Galaxy knew that the job of Galactic President was not to wield power but to attract attention away from it." *Id.* at 40. The comparison of MERS to a two-faced fictional entity is not uncommon. *See* Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 Wm. & Mary L. Rev. 111, 113 (2011) ("Like Janus, MERS is two-faced: impenetrably claiming to both own mortgages and act as an agent for others who also claim ownership.").

[17] In the absence of a final decision by the state's highest court, it is the duty of the federal court to determine, in its best judgment, how the state's highest court would decide the issue presented. *American Int'l Specialty Lines Ins. Co. v. Canal Indemnity Co.*, 352 F.3d 254, 260 (5th Cir. 2003). This can include consideration of decisions by lower appellate courts in the state. *West v. American Telephone & Telegraph Co*, 311 U.S. 223, 237 (1940).

EverBank, N.A. v. Seedergy Ventures, Inc., 499 S.W.3d 534, 540-41 (Tex. App. – Houston [14th Dist.] 2016, n.p.h.). Admittedly, the factual scenario in *Everbank* differs in some respects from the case at bar.[18] Even so, the court's opinion affords no reason to doubt that the ordinary rules of principal and agency apply to MERS as they do to any other legal entity in Texas.

IV. Conclusion

This opinion unavoidably assumes a posture of defiance that is profoundly uncomfortable for the author. After nearly forty years of working within this circuit at the bar or on the bench, every natural instinct is to salute and obey. Nevertheless, in view of the long common law tradition and precedents just described, it is difficult to imagine that jurists of reason could debate whether MERS was a party to the 2011 assignment.[19]

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[18] *EverBank* was an appeal from a summary judgment that voided a deed of trust. The court ultimately concluded that, although the assignee of the deed of trust did not demonstrate its right to foreclose based on the deed of trust, the assignee conclusively established its standing to foreclose as holder of the note. 499 S.W.3d at 536.

[19] To eliminate any possible doubt, an appropriate course might be to certify the question to the Texas Supreme Court under Texas Rule of Appellate Procedure 58.1. The Fifth Circuit has occasionally invoked this procedure for home equity lien cases under the Texas Constitution. *See, e.g., Doody v. Ameriquest Mortgage Co.*, 49 S.W.3d 342 (Tex. 2001); *Stringer v. Cendant Mortgage Corp.*, 23 S.W.3d 353 (Tex. 2000); *cf. Priester v. JP Morgan Chase Bank, N.A.*, 708 F.3d 667 (5th Cir. 2013), *abrogated by Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542, 548 (Tex. 2016).

Respectfully, this court concludes that the panel decision regarding the validity of the 2011 assignment is clearly erroneous. It contradicts binding authority from the Texas Supreme Court in violation of *Erie*, and disregards previous Fifth Circuit decisions, in violation of the circuit's rule of orderliness. The court further concludes that the panel opinion would work a manifest injustice to the Burkes and other Texas homeowners.

Final judgment will be rendered in favor of the Burkes, together with amended findings of fact and conclusions of law consistent with this opinion.

Signed at Houston, Texas on December 21, 2017.

/s/ Stephen Wm Smith
Stephen Wm Smith
United States
Magistrate Judge

APPENDIX 6

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-20026

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee of the Residential Asset Securitization Trust 2007-A8, Mortgage Pass-Through Certificates, Series 2007-H under the Pooling and Servicing Agreement dated June 1, 2007,

Plaintiff - Appellant

v.

JOANNA BURKE; JOHN BURKE,

Defendants - Appellees

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 4:11-CV-1658

(Filed Jul. 19, 2016)

Before REAVLEY, HAYNES, and HIGGINSON, Circuit Judges.

STEPHEN A. HIGGINSON, Circuit Judge:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Joanna and John Burke borrowed $615,000 from IndyMac Bank, with Joanna alone executing a note containing a promise to pay. The Burkes stopped making payments on this loan in December 2009; sixteen months later, Deutsche Bank, the holder of the Burkes' deed of trust, sought a declaratory judgment authorizing a non-judicial foreclosure sale pursuant to Texas law. After briefing and a bench trial, the magistrate judge held that Deutsche Bank could not foreclose on the Burkes' property, finding that "at no time has Deutsche Bank possessed any right, title, or interest in the Burkes' note and security interest." Deutsche Bank timely appealed.

BACKGROUND

Joanna and John Burke applied for a home equity loan in early 2007, but were denied by IndyMac Bank because they had no income—they were retired. Representatives at IndyMac Bank soon changed their mind, however, and notified the Burkes that their loan would be approved. Joanna Burke signed a Texas Home Equity Note in May 2007 promising to pay $615,000 plus interest to secure a loan from IndyMac Bank. The note was secured by a Texas Home Equity Security Instrument (deed of trust), signed by both Joanna and John, placing a lien on their property. Mortgage Electronic Registration Systems, Inc. (MERS) is the beneficiary named in the deed of trust.

In the summer of 2008, the Office of Thrift Supervision closed IndyMac Bank and transferred substantially all of IndyMac Bank's assets to IndyMac Federal Bank, FSB. In the spring of 2009, the Federal Deposit Insurance Corporation placed IndyMac Federal in receivership, selling substantially all of its assets to OneWest Bank, FSB. During this period, the Burkes started having trouble with their loan. They complained that their monthly payments were being placed in suspense rather than being applied towards their mortgage. The Burkes tried to arrange a loan modification, but were told that they had to be three months in arrears to be eligible. They went three months in arrears according to these instructions, were told to pay the arrearage to get the modification, and arranged to pay the arrearage—but did not get the modification. In the summer of 2009, Joanna Burke sued former Secretary of the Treasury Timothy Geithner because of IndyMac Federal's conduct. Joanna ultimately withdrew the suit. The Burkes made their loan payments until December 2009—their last attempted payment was returned by the bank.

IndyMac Mortgage Services notified the Burkes in March 2010 that their loan was in default, giving them approximately thirty days to cure the default by paying $14,282.48 in overdue payments and late fees. The Burkes did not make any payments. In December 2010, the Burkes sued IndyMac Mortgage Services, MERS, and others in Texas state court for breach of contract and predatory lending practices. This second suit was removed to federal court and dismissed in

March 2011 because the Burkes did not wish to pursue the case. In January 2011, MERS assigned the Burkes' deed of trust to Deutsche Bank. The assignment listed April 9, 2010, as the effective date: nine months prior to the date on which it was executed. In February 2011, OneWest Bank, the mortgage servicer for Deutsche Bank, notified the Burkes that because they had failed to cure the default on their loan, their mortgage was accelerated. The Burkes still did not make any payments.

In April 2011, Deutsche Bank sought a declaratory judgment in federal district court authorizing a non-judicial foreclosure sale pursuant to Texas law. The parties consented to magistrate judge jurisdiction, who found for the Burkes. Deutsche Bank timely appealed. After reviewing the briefs, record, and applicable case law, we VACATE the Amended Final Declaratory Judgement in favor of the Burkes and REMAND for further proceedings.

DISCUSSION

I.

Following a bench trial, we review legal determinations de novo and findings of fact for clear error. *Rabo Agrifinance, Inc. v. Terra XXI Ltd.*, 583 F.3d 348, 352 (5th Cir. 2009).

II.

Deutsche Bank sought an order authorizing it to proceed with a non-judicial foreclosure sale pursuant to Texas Property Code § 51.002. The Burkes contend—and the magistrate judge held—that Deutsche Bank did not establish its right to foreclose on the Burkes' property under Texas law. In Texas, borrowers like the Burkes execute two documents to obtain a home equity loan: "(1) a promissory note that creates the borrower's legal obligation to repay the lender, and (2) a deed of trust that grants the lender a lien on the property as security for the debt." *Harris Cty. Tex. v. MERSCORP Inc.*, 791 F.3d 545, 549 (5th Cir. 2015). This court has repeatedly held that, under Texas law, the note and the deed of trust (also called a lien) are distinct obligations, each providing the right of foreclosure. *See, e.g.*, *Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 255 (5th Cir. 2013) ("Where a debt is 'secured by a note, which is, in turn, secured by a lien, the lien and the note constitute separate obligations.'" (quoting *Aguero v. Ramirez*, 70 S.W.3d 372, 374 (Tex. App.—Corpus Christi 2002, pet. denied))).

Here, the magistrate judge erred in finding that Deutsche Bank did not possess the right to foreclose under the Burkes' deed of trust. "Under Texas law, a non-judicial foreclosure may be initiated by the current mortgagee including: 'the grantee, beneficiary, owner, or holder of a security instrument;' a 'book entry system;' or 'the last person to whom the security interest has been assigned of record.'" *Farkas v. GMAC Mortg., L.L.C.*, 737 F.3d 338, 342 (5th Cir. 2013)

(quoting Tex. Prop. Code § 51.0001(4)). MERS assigned the Burkes' mortgage to Deutsche Bank—the new mortgagee—by an Assignment of Deed of Trust dated January 20, 2011. By this assignment, Deutsche Bank now held "a perfected security interest in the [Burkes] property," including "the right to invoke the power of sale." *Harris Cty.*, 791 F.3d at 556; *see also Farkas*, 737 F.3d at 342 ("Our holding in *Martins* permits MERS and its assigns to bring foreclosure actions under the Texas Property Code. Deutsche Bank became the mortgagee as defined under Section 51.0001(4) by valid and recorded transfer of the deed[] of trust and therefore was an appropriate party to initiate non-judicial foreclosure actions.").

The magistrate judge found four reasons why the Assignment of Deed of Trust from MERS to Deutsche Bank was "void and absolutely invalid":

> (A) the putative assignor, IndyMac Bank, F.S.B., had been defunct for more than two years at the time of execution, and therefore had no legal existence or capacity to act; (B) the party executing the assignment, [MERS], acted solely in its capacity as "nominee for IndyMac Bank F.S.B., its successors and assigns," not in its own behalf or any other capacity; (C) the document does not specify who the successors or assigns might be, whether they had any rights under the Burkes' note or security instrument, and if so how they obtained those rights; and finally (D) the curious backdating of the document [] confirms the suspicion that this document

> was generated to obscure the chain of title inquiry rather than to illuminate it.

Because he determined that the assignment was void, the magistrate judge held that "there is no way to tell which entity, if any, currently possesses the right to foreclose on the Burkes' property lien." These four reasons, however, all misunderstand our precedent and Texas law. The first three reasons—(A) through (C) listed above—are all based on the incorrect premise that when MERS assigned the deed of trust to Deutsche Bank, acting per the assignment as "nominee for IndyMac Bank," it as beneficiary did not have authority to assign the deed of trust. However, the original deed of trust named MERS as a beneficiary, and Texas law and our precedent make clear that MERS, acting on its own behalf as a book entry system and the beneficiary of the Burkes' deed of trust, can transfer its right to bring a foreclosure action to a new mortgagee by a valid assignment of the deed of trust. *See Farkas*, 747 F.3d at 342. Here, MERS assigned its right to foreclose under the deed of trust to Deutsche Bank. That the assignment did not state that MERS was acting in its capacity as beneficiary does not change our analysis. *See, e.g., Allen v. Bank of Am., N.A.*, No. EP-14-CV-429-KC, 2015 WL 1726986, at *8 (W.D. Tex. Apr. 15, 2015) ("MERS had every right to assign its interest in the Property to Deutsche Bank. Moreover, the fact that [the lender] filed for bankruptcy some four years after the Security Instrument was executed does not

deprive MERS of its previously acquired authority to assign its interest to a third party.").[1]

The fourth reason—that the assignment was backdated, listed as (D) above—is not supported by Texas law. At least two Texas Courts of Appeals have considered this very question, and both have held that an assignment may have a retroactive "effective date." *See Transcon. Realty Inv'rs, Inc. v. Wicks*, 442 S.W.3d 676, 680 (Tex. App.—Dallas 2014, pet. denied) ("Although assignments are usually effective on the date on which they are signed, there is no language in the lease which would require that the assignment only be effective upon execution."); *see also Crowell v. Bexar Cty.*, 351 S.W.3d 114, 118-19 (Tex. App.—San Antonio 2011, no pet.). As in *Wicks*, there is no language

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[1] The assignment in *Casterline v. OneWest Bank, F.S.B.*, 537 F. App'x 314, 317 (5th Cir. 2013) (unpublished), was nearly identical to the assignment in the present case. In both assignments, MERS purported to be acting "as nominee for" the lender rather than specifically stating that it was acting pursuant to its authority as a book entry system and beneficiary of the deed of trust. Here, as in *Casterline*, we do not find that to be prohibitive (and we note that we have not found a single case from any Texas state court that has made this distinction). *Stone v. Sledge*, 26 S.W. 1068, 1069 (Tex. 1894), the case cited by the magistrate judge, is inapposite. That case involved the rights of husbands and wives in conveying property, and, as the magistrate judge noted, declared "wholly inoperable" a deed signed by a spouse who was not named as grantor in the body of the deed. In this case, MERS was named *both* a beneficiary and "as nominee for" the lender in the deed of trust. It is unquestionable that MERS, as the beneficiary of a security instrument and a book entry system, "had the authority to transfer the Security Instrument together with the power to foreclose to another party." *Casterline*, 537 F. App'x at 317; *see also Martins*, 722 F.3d at 225.

identified to us in the Burkes' deed of trust prohibiting retroactive assignment. The deed of trust was assigned to MERS, and then by MERS—validly—to Deutsche Bank, which did not need the note to foreclose on the Burkes' property. *See Martins*, 722 F.3d at 255. The magistrate judge erred in finding that Deutsche Bank did not possess the right to foreclose under the Burkes' deed of trust.

CONCLUSION

For the foregoing reasons, we VACATE the final judgement and REMAND to the district court to determine whether Deutsche Bank met the remaining requirements to foreclose under Texas law and, if so, grant a final judgment for Deutsche Bank and rule on any outstanding request for attorneys' fees.

APPENDIX 7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DEUTSCHE BANK NAT'L TRUST CO., as Trustee of the Residential Asset Securitization Trust 2007-A8, Mortgage Pass-Through Certificates, Series 2007-H under the Pooling and Servicing Agreement dated June 1, 2007, *Plaintiff*,	§	
v.	§	CIVIL ACTION: 4:11-CV-01658
JOHN BURKE and JOANNA BURKE, *Defendants*.	§	

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Jul. 31, 2015)

Plaintiff Deutsche Bank National Trust Co. sued to foreclose a lien created under the Texas Home Equity Amendment against defendants John Burke and Joanna Burke. Deutsche Bank seeks a declaration that it is vested with all title and interest in the property, as well as an order authorizing it to proceed with foreclosure pursuant to Texas Property Code § 51.002. The parties consented to magistrate judge jurisdiction.

A bench trial was conducted on February 6, 2015. The court now makes the following findings of fact and conclusions of law. Any finding of fact that should be a conclusion of law is deemed a conclusion of law, and vice versa.

Findings of Fact

1. Deutsche Bank National Trust Company is a corporation with its principal place of business in Santa Ana, California, and brings this suit in its capacity as Trustee of the Residential Asset Securitization Trust 2007-A8, Mortgage Pass-Through Certificates, Series 2007-H under the Pooling and Servicing Agreement dated June 1, 2007 ("Deutsche Bank").

2. Defendants John and Joanna Burke are individuals and homeowners residing at 46 Kingwood Greens Drive, Kingwood, Texas 77339.

2007 Home Equity Loan

3. In 2007, the Burkes applied for a home equity loan, which was initially rejected by IndyMac Bank, F.S.B. because they had no income. (Tr. 81-82)

4. Some time later, a different representative of IndyMac Bank called to advise that the loan would be approved, and that the Burkes' previous contact at the bank had been fired. (Tr. 82)

5. On May 21, 2007, Joanna Burke alone executed a note containing a promise to pay IndyMac Bank

$615,000 plus interest in certain monthly installments in exchange for a loan from IndyMac Bank in that amount. (Tr. 36-37)

5. The note was secured by a Texas Home Equity Security Instrument (a deed of trust) placing a lien on their home in Kingwood, Texas. (P.Ex. 1)

7. Under the deed of trust, John and Joanna Burke were the borrowers and IndyMac Bank was the secured lender as well as the loan servicer. (P.Ex. 1; Tr. 62-63)

8. At all times relevant to this case, the Burkes were retired and had no employment income. (Tr. 81)

9. Four days after closing, the Burkes received loan documentation from IndyMac, including an unsigned loan application form falsely declaring that the borrowers' employment income was $10,416.67 monthly (or exactly $125,000 per year). (Tr. 79; D.Ex. 2)

10. This false income declaration was knowingly made by IndyMac because the Burkes never claimed any employment income during the loan process. (Tr. 80-82)

11. The Burkes promptly notified IndyMac of the inaccurate income figure, but no satisfactory answer was ever given. (Tr. 83-84)

Events of 2008-2009

12. On July 11, 2008, IndyMac Bank was closed by the Office of Thrift Supervision and substantially all of

its assets were transferred to IndyMac Federal Bank, FSB. (P.Ex. 6)

13. During that year, the Burkes repeatedly complained to IndyMac Federal that their monthly payments were being placed in suspense, rather than applied towards the mortgage. (Tr. 51-52)

14. Also during this time, the Burkes applied for a loan modification, and were told that the borrower had to be three months in arrears in order to be eligible. (Tr. 54-55)

15. The Burkes withheld three monthly payments in accordance with those instructions, only to be told that the arrearage had to be paid in order to receive a modification; arrangements were made to pay the arrearage, but no modification was approved. (Tr. 54-55)

16. On March 19, 2009, IndyMac Federal was placed in receivership by the FDIC and substantially all of its assets were sold. (P. Ex. 6, p. 4). All deposits were transferred to OneWest Bank, F.S.B., but there is no indication whether OneWest acquired any other assets of IndyMac Federal, in particular the Burke Note or Deed of Trust. (P. Ex. 6).

17. On June 15, 2009, plaintiff Joanna Burke filed a lawsuit in Harris County small claims court complaining about the conduct of IndyMac Federal referred to in paragraphs 13 through 15; the case was removed to federal court and ultimately dismissed. (Tr. 56)

18. The Burkes made payments on the note through December 2009; the last time they attempted payment,

the bank returned their check to them. (Tr. 37-38, 60-62)

Events of 2010-2011

19. By letter dated March 9, 2010, IndyMac Mortgage Services gave the Burkes notice of default, and opportunity to cure the default by April 10, 2010. (P. Ex. 4; Tr.50)

20. On December 6, 2010, the Burkes filed suit in Harris County District Court against IndyMac Mortgage Services, Deutsche Bank, and Mortgage Electronic Registration Systems for breach of contract and predatory lending practices. (Cause No. 2010-79352, 133rd Judicial District Court). Following removal to this court, the case was dismissed by District Judge Lynn Hughes on March 3, 2011, subject to the condition that "if the case is re-filed, it must be re-filed in this court." (Tr. 57-58)

21. On January 20, 2011, Mortgage Electronic Registration Systems, Inc., acting as nominee for the lender IndyMac Bank, F.S.B., its successors and assigns, executed a document entitled "Assignment of Deed of Trust," purporting to assign all rights under the Burkes' loan agreement to Deutsche Bank. (P. Ex. 2)

22. The effective date of the purported assignment was conveniently backdated to April 9, 2010, one day prior to the default cure deadline set by the notice of default letter described above. (P. Ex. 2)

23. The language of the assignment, its signature block, and corporate acknowledgement repeatedly confirm the limited capacity in which the assignor was acting: "Mortgage Electronic Registration Systems, Inc., as nominee for, IndyMac Bank, F.S.B., its successors and assigns." (P.Ex. 2)

24. It is undisputed that IndyMac Bank, F.S.B. went defunct more than two years prior to this purported assignment. (P.Ex. 6)

25. IndyMac Bank's only successor was IndyMac Federal, which was also placed in receivership and sold nearly two years before this purported assignment. (P.Ex.6)

26. The "successors and assigns" to which the purported assignment refers are unknown, nor is there proof that MERS had an agency relationship with any such entity at the time the document was executed.

27. By letter dated February 10, 2011, a law firm representing a mortgage servicer gave the Burkes notice of intent to accelerate the maturity of the debt under the note. The letter stated that OneWest Bank, FSB was the mortgage servicer representing the mortgagee, Deutsche Bank. (P.Ex. 5)

28. The current holder or owner of the Burke Note is unknown. An unbroken chain of title from the lender to plaintiff Deutsche Bank has not been established on this record.

Conclusions of Law

1. Jurisdiction is based on diversity of citizenship, as there is complete diversity between the plaintiff and the defendants.

2. In determining whether a party is entitled to foreclose on a note, a federal court applies the substantive law of the forum state, in this case Texas. *Resolution Trust Corp. v. Starkey*, 41 F.3d 1018, 1023 (5th Cir. 1995).

3. The Burkes' loan was made pursuant to Art. XVI, Sec. 50(a)(6) of the Texas Constitution ("Texas Home Equity Amendment").

4. The Texas Home Equity Amendment requires, among other things, that a lien created thereunder may be foreclosed upon only by a court order. TEX. CONST. Art. XVI, Sec. 50(a)(6)(D).

5. Deutsche Bank seeks a declaratory judgment declaring the rights and obligations of the Burkes with respect to the loan and the property, and in particular seeks a final judgment authorizing a non-judicial foreclosure sale under Section 51.002 of the Texas Property Code. Dkt. 1, ¶¶ 9, 10.

6. Under the Texas Property Code, the only party entitled to initiate a non-judicial foreclosure sale is the mortgagee or the mortgage servicer acting on behalf of the current mortgagee. A "mortgagee" is defined as "(A) the grantee, beneficiary, owner, or holder of a security instrument; (B) a book entry system; or (C) if the security interest has been assigned of record, the last

person to whom the security interest has been assigned of record." Tex. Prop. Code § 51.0001(4).

7. When, as here, the party seeking to foreclose is not the original lender, that party must be able to trace its rights under the security instrument back to the original mortgagee. *See, e.g. Leavings v. Mills*, 175 S.W.3d 301, 310 (Tex.App.—Houston [1st Dist.] 2004) (no pet).

8. Texas courts follow the majority rule that an obligor may defend against an assignee's efforts to enforce the obligation on any ground that renders the assignment void or absolutely invalid. *See Reinagel v. Deutsche Bank Nat. Trust Co.*, 735 F.3d 220, 225 (5th Cir. 2013) ("A contrary rule would lead to the odd result that Deutsche Bank could foreclose on the Reinagels' property even though it is not a valid party to the deed of trust or promissory note") (citing *Tri-Cities Const., Inc. v. Am. Nat. Ins. Co.*, 523 S.W.2d 426, 430 (Tex. Civ. App. 1975); *Glass v. Carpenter*, 330 S.W.2d 530, 537 (Tex. Civ. App. 1959)); *Murphy v. Aurora Loan Servs., LLC*, 699 F.3d 1027, 1033 (8th Cir. 2012) (recognizing that mortgagors can defend against foreclosure by establishing a fatal defect in the purported mortgagee's chain of title).

9. The only evidence offered by Deutsche Bank to establish its right to foreclose as mortgagee is the purported Assignment of Deed of Trust executed on January 20, 2011 (P.Ex. 2). Deutsche Bank presented no evidence regarding any negotiation or assignment of the underlying note, or who the current holder or owner of that note might be.

10. The purported assignment of January 20, 2011 is void and absolutely invalid for the following reasons: (A) the putative assignor, IndyMac Bank, F.S.B., had been defunct for more than two years at the time of execution, and therefore had no legal existence or capacity to act; (B) the party executing the assignment, Mortgage Electronic Registration Systems, Inc., acted solely in its capacity as "nominee for IndyMac Bank F.S.B., its successors and assigns," not in its own behalf or any other capacity; (C) the document does not specify who the successors or assigns might be, whether they had any rights under the Burkes' note or security instrument, and if so how they obtained those rights; and finally (D) the curious backdating of the document by nine months—its "effective" date preceded the default cure date by exactly one day—confirms the suspicion that this document was generated to obscure the chain of title inquiry rather than to illuminate it.

11. A proper chain of title inquiry requires proof of "an unbroken chain of assignments" from the original mortgagee to the party claiming the right to foreclose. *Leavings*, 175 S.W.3d at 310. On this record, there is no way to tell which entity, if any, currently possesses the right to foreclose on the Burkes' property lien. IndyMac Bank's immediate successor, IndyMac Federal, was shut down in 2009, and substantially all of its assets were sold. Nothing in the record indicates whether the Burkes' note and security interest were among the specific assets transferred to IndyMac Federal, or to OneWest Bank, or perhaps to some other entity along the way.

12. Accordingly, the court concludes that neither Deutsche Bank nor any mortgage servicer acting on its behalf has the right to foreclose on the Burkes' Kingwood residence.

13. The court further concludes that at no time has Deutsche Bank possessed any right, title, or interest in the Burkes' note and security interest executed on May 21, 2007.

Signed at Houston, Texas on July 31, 2015.

/s/ Stephen Wm Smith
Stephen Wm Smith
United States Magistrate Judge

APPENDIX 8

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DEUTSCHE BANK NAT'L TRUST CO., as Trustee of the Residential Asset Securitization Trust 2007-A8, Mortgage Pass-Through Certificates, Series 2007-H under the Pooling and Servicing Agreement dated June 1, 2007,	§	
Plaintiff,	§	
v.	§	CIVIL ACTION 4:11-CV-01658
JOHN BURKE and JOANNA BURKE,	§	
Defendants.	§	

MEMORANDUM AND ORDER

(Filed Jul. 31, 2015)

Before the court is plaintiff Deutsche Bank National Trust Company's Rule 59(e) motion to alter or amend the court's judgment in this home equity loan foreclosure case. (Dkt. 84). A hearing on this motion was held on June 29, 2015, and Deutsche Bank was given an opportunity to file a supplemental brief. (Dkt. 90). Deutsche Bank asks the court to vacate its March 13, 2015 final declaratory judgment in favor of the Burkes. (Dkt. 77).

That judgment was based on findings and conclusions that Deutsche Bank had failed to prove chain of title back to the original lender, now defunct. The sole proof on which the bank relied – a purported assignment from "MERS as nominee for the lender, its successors and assigns" – was held void, because the assignor did not exist when the document was signed. Deutsche Bank's motion raises five arguments, which will be considered in turn. The motion is denied.

1. Holder of the Note

Deutsche Bank's first argument is based on a misrepresentation of the trial record. Deutsche Bank claims that it introduced into evidence the Burke note indorsed in blank by the original lender (IndyMac Bank), thereby establishing its right to foreclose as holder of the Note. (Dkt. 84, at 4). This claim is baseless, because, as the trial transcript makes clear, the only version of the Note successfully introduced by Deutsche Bank at trial contained no indorsement of any kind.

It is true that a version of the Note originally offered by Deutsche Bank as Plaintiff's Exhibit 3 contained an undated stamp block below the borrower's signature, which reads "Pay to the Order Of [left blank] Without Recourse IndyMac Bank, F.S.B." and is signed by "Cathy Powers Vice President." (Dkt. 69, at 30). At trial, the defendants vigorously objected to this document (as well as others) on lack of authentication grounds. Tr. 6-12, 29-30. The Burkes argued that the

stamp block containing the Cathy Powers signature was not a part of the Note as originally executed, and instead offered a copy of the unendorsed Note as one of their own exhibits, Defendants' Exhibit 11. Prior to taking testimony, the Court sustained the defendants' authenticity objections to all of Deutsche Bank's exhibits other than Exhibits 1 and 2, which were certified copies of the Home Equity Security Instrument and the Assignment, respectively. Tr. 34 ("Your Exhibit 1 and 2 are admitted. But your other exhibits, the ones that are not authenticated at this point are not."). Thus, from the very beginning of trial, Deutsche Bank's counsel was on notice that if it wanted to introduce its version of the Note indorsed in blank, some proof of authentication would be necessary.[1]

Deutsche Bank never offered such proof at trial; in fact it called no witnesses of its own, aside from the Burkes themselves. At the close of the Bank's counsel's examination of Joanna Burke, the following exchange occurred with the Court:

> MR. JACOCKS: Okay. I don't have any further questions for her. I offer my copy of the note and my copy of the Notice of Acceleration that was sent to Joanna Burke at the property address into evidence as Exhibits 2 and 3 – I mean 3 and 4.

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[1] Actually, Deutsche Bank should have anticipated this issue well before trial, because its motion for summary judgment was denied on this very ground. *Deutsche Bank Nat'l Trust Co. v. Burke*, No. 4:11-cv-01658, 2014 WL 4649879 (S.D. Tex. Sept. 16, 2014).

THE COURT: Well, you didn't ask her about your Exhibits 3 and 4.

MR. JACOCKS: Exhibit 3 was the note and I did ask her several questions –

THE COURT: About that document? I didn't hear you say anything about Plaintiff's Exhibit 3 or Plaintiff's Exhibit 4, and that's what I'm concerned about.

MR. JACOCKS: Okay.

THE COURT: Because I know we have overlap, but when you talk about one set of exhibits and ask questions about that, and now you're moving to introduce another set of exhibits, I'm afraid that's going to confuse the record, because I'm confused at this point.

MR. JACOCKS: *I'll unconfuse it. I'll offer their Defendant's Exhibit 4 into evidence, as well as their copies of the note into evidence* –

THE COURT: *Okay.*

MR. JACOCKS: *– as Exhibit 3 is for the note.* And if there are multiple copies the next number will be 4. And the acceleration is also part of what they're – they've sought to have admitted into evidence.

THE COURT: All right. So your Plaintiff's Exhibit 3 is where, what exhibit number for the defendants?

MR. JACOCKS: I need the binder back.

THE COURT: Okay, go ahead.

MR. JACOCKS: *The note is in plaintiff's binder and it's Exhibit – Defendant's Exhibit No. 11.*

THE COURT: All right.

MR. JACOCKS: And again, the only objection I have to that entire – to that entire offering to them is that last page.

THE COURT: The last sheet, I understand. Okay. So it's in – okay. *So your Plaintiff's Exhibit 3 is that portion of Defendant's Exhibit 11 that consists of the note dated May 21, 2007?*

MR. JACOCKS: *That's correct.*

* * *

THE COURT: . . . Plaintiff's Exhibit 3 is admitted.

Tr. 45-48 (emphasis added).

In other words, the bank's counsel withdrew its original Exhibit 3 – i.e., the Note with the blank indorsement – and substituted in its place a revised Exhibit 3 taken from Defendants' Exhibit 11 – i.e., the Note minus any indorsement. This absence of documentary proof mirrors the lack of any testimonial evidence of holder status. Given its utter failure of proof, Deutsche Bank's continuing assertion of a right to foreclose as holder of the Note is not just groundless, it is

frivolous. On this trial record the current holder of the Burke Note remains a mystery.[2]

2. The L'Amoreaux *Decision*

In its second argument, Deutsche Bank relies upon the Fifth Circuit's recent foreclosure decision in *L'Amoreaux v. Wells Fargo Bank, N.A.*, 755 F.3d 748 (5th Cir. 2014). In that case the homeowner challenged the validity of a deed of trust assignment from MERS to Wells Fargo, on the grounds that MERS was purporting to act as a nominee only for the original lender (Cornerstone), which had ceased to exist at the time of the assignment. Rejecting that challenge, the Fifth Circuit explained:

> Although Cornerstone had ceased to exist at the time of the assignment, the Deed of Trust explicitly contemplates MERS's continuing to act as nominee for Cornerstone's "successors and assigns." It is undisputed that Cornerstone Corporation endorsed the Note to Wells Fargo [prior to Cornerstone's demise]. At that

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[2] At oral argument on this motion, the Bank's counsel asserted that the Note was registered on the MERS system, which electronically tracks note transfers among MERS-member banks and entities, and that any interested party could log on to the MERS website to determine which entity owns the note. *See Harris County v. MERSCORP Inc.*, No. 14-10392, 2015 WL 3937927, at *1 (5th Cir. June 26, 2015) (describing MERS tracking system for note assignments). Deutsche Bank's failure to offer any such readily available chain-of-title evidence from the MERS registry is therefore especially telling. If those records supported the Bank's claim, they presumably would (and should) have been presented to this Court long ago.

> point, MERS became a nominee for Wells Fargo. MERS thus continued to have the authority to assign its rights under the Deed of Trust.

755 F.3d at 750.[3]

Thus, the critical fact in *L'Amoreaux* was the prior indorsement of the note to Wells Fargo. Based on that earlier transaction, Wells Fargo became Cornerstone's "assign," and MERS thereby acquired the authority to act as nominee for that entity in transferring the Deed of Trust. In this case, however, that critical element is missing. As shown above, Deutsche Bank introduced no proof whatever of a prior transaction by which it acquired any rights in the Note. Absent such proof, *L'Amoreaux* is not controlling. Here MERS was acting on behalf of a defunct entity (IndyMac Bank), and its purported assignment was therefore void and invalid under the Texas common law of assignments, as explained below.

An assignment is a manifestation by the owner of a right to transfer such right to the assignee. *Hermann Hosp. v. Liberty Life Assur. Co.*, 696 S.W.2d 37, 44 (Tex. App. – Houston [14th Dist.] 1985). An existing right is a precondition for a valid assignment. *Pain Control Institute, Inc. v. GEICO Gen. Ins. Co.*, 447 S.W. 3d 893, 899 (Tex. App. – Dallas 2014). An assignee "stands in the shoes" of the assignor but acquires no greater right

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[3] In a footnote, the Court observed that "the assignment of the Note independently provided authority for Wells Fargo to foreclose." 755 F.3d at 750 n.1.

than the assignor possessed. *John H. Carney & Assocs. v. Texas Prop. & Cas. Ins. Guar. Ass'n*, 354 S.W. 3d 843, 850 (Tex. App. – Austin 2011). An assignment cannot be made by a dead man; it is a transfer by one existing party to another existing party of some valuable interest. *Pool v. Sneed*, 173 S.W.2d 768, 775 (Tex. Civ. App. – Amarillo 1943).

These common law principles pose an insurmountable barrier for Deutsche Bank on this record. There is simply no proof of an existing assignor with an existing right in the property capable of being assigned in 2011. It is undisputed that IndyMac Bank had been "dead" since 2008, several years prior to the 2011 assignment. (P.Ex. 6, at p.1). Thus, any post-mortem transaction by that entity would be a nullity under *Pool v. Sneed*.[4]

Deutsche Bank fares no better under the "successors and assigns" clause. The only apparent "successor" to IndyMac Bank was IndyMac Federal Bank, but that entity was likewise shuttered in March 2009, nearly two years before the 2011 assignment. (P.Ex. 6). Even had that entity survived to 2011, substantially all of its assets had already been disposed of by that time. According to the FDIC notice admitted as Plaintiff's

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[4] The court recognizes that this conclusion may be in tension with some federal district court cases cited in the bank's motion. Such cases are not binding precedent, unlike the Texas appellate decisions cited above. Moreover, federal trial court opinions lack persuasive power in a diversity case governed by substantive state law, unless they directly engage and distinguish contrary state court precedent. For these reasons, this court respectfully declines to consider them in depth. *See Miller v. Homecomings Financial, LLC*, 881 F.Supp.2d 825, 831 (S.D. Tex. 2012).

Exhibit 6, "On March 19, 2009, IndyMac Federal was placed in receivership and substantially all of its assets were sold." (Id. at p.4) To whom those assets were sold, and whether the Burke Note was among those assets, are matters of sheer speculation on this record.[5] *See Priesmeyer v. Pacific Southwest Bank, F.S.B.*, 917 S.W.2d 937, 940 (Tex. App. – Austin 1996) (refusing to presume that note once held by failed bank was among unspecified assets transferred to FSLIC and then to new bank). For all this record shows, there was no existing "successor" to IndyMac Bank at the time of the 2011 assignment.

That leaves only the question of IndyMac Bank "assigns." Logically, there are only two possibilities here, neither of which are any help to Deutsche Bank: either there was no assignee, in which case the 2011 assignment is necessarily void for reasons already given; or, there was an assignee, in which case there is necessarily *another, prior* assignment not found in this record. In other words, the 2011 assignment would merely be the last link in a chain of title consisting of at least two (and possibly more) links. If indeed there is such a gap in the chain of "assigns," Deutsche Bank's claim fails under Texas assignment law. *See e.g. Pain Control Institute, Inc. v. GEICO*, 447 S.W.3d at 899 (an existing right in the assignor is a precondition for a

[5] Elsewhere the FDIC notice states that all deposits of IndyMac Federal were transferred to OneWest Bank FSB. But the record is silent whether OneWest bought any other assets of IndyMac Bank, in particular the Burke Note or Deed of Trust. (P.Ex. 6, at p. 1). No party to this litigation has claimed that OneWest was a "successor" to the lender.

valid assignment); *Leavings v. Mills*, 175 S.W.3d 301, 310 (Tex. App. – Houston [1st Dist.] 2004) (party seeking to enforce note must show "unbroken chain of assignments" to the original mortgagee); *Jernigan v. Bank One, Texas, N.A.*, 803 S.W.2d 774, 777 (Tex. App. – Houston [14th Dist.] 1991) ("possibility of an intermediate transfer" precludes judgment as a matter of law concerning bank's capacity to sue on note).

Although not specifically raised or discussed in *L'Amoreaux*, there is yet another fatal flaw in Deutsche Bank's proof under Texas law. Even if some entity had been shown to be a "successor or assign" to the original lender, nothing in this record proves that MERS was a nominee or agent[6] for that particular entity. As the Texas Supreme Court has said, "Texas law does not presume agency, and the party who alleges it has the burden of proving it." *IRA Resources, Inc. v. Griego*, 221 S.W.3d 592, 597 (Tex. 2007), citing *Buchoz v. Klein*, 184 S.W.2d 271, 271 (Tex. 1944).

Under Texas law, an agent is one who consents to the control of another, the principal, where the principal manifests consent that the agent shall act for the principal. *First Nat'l Acceptance Co. v. Bishop*, 187 S.W.3d 710, 714 (Tex. App. – Corpus Christi 2006). The

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[6] In legal terms, a "nominee" is a kind of agent. *See* BLACK'S LAW DICTIONARY 1211 (10th ed. 2014) ("A person designated to act in place of another, usu. in a very limited way"). The Fifth Circuit has used the terms "nominee" and "agent" interchangeably when describing MERS authority under typical deed of trust language. *Harris County v. MERSCORP Inc.*, No. 14-10392, 2015 WL 3937927, at *10 (5th Cir. June 26, 2015).

party claiming agency must prove the principal has (1) the right to assign the agent's task and (2) the right to control the means and details by which the agent will accomplish the task. *Laredo Medical Group v. Lightner*, 153 S.W.3d 70, 72 (Tex. App. – San Antonio 2004); *Lyons v. Lindsey Morden Claims Mgmt., Inc.*, 985 S.W.2d 86, 90 (Tex. App. – El Paso 1998); *Schultz v. Rural/Metro Corp.*, 956 S.W.2d 757, 760 (Tex. App. – Houston [14th Dist.] 1997).

In the specific context of trespass to try title suits, Texas courts have long held that a party has no authority to execute a deed or contract on behalf of unnamed "heirs" or other parties not specifically named in the instrument. *See Baldwin v. Goldfrank*, 31 S.W. 1064, 1067 (Tex. 1895) (upholding exclusion of deed where "names of heirs for whom [the attorney-in-fact] purported to act appeared neither in the body nor the signature to the instrument"); *Stephens v. House*, 257 S.W. 585, 591 (Tex. Civ. App. – Galveston 1923) (administrator of estate not authorized to bind unnamed heirs, despite recitation in contract that administrator acted "for myself and the heirs to the estate of the aforesaid Mary Owens"); *see also Thompson v. Houston Oil Co.*, 37 F.2d 687, 689 (5th Cir. 1930) (conveyance ineffective to pass title as to parties not named either in the body of the instrument or under signature of grantor acting under power of attorney, citing *Baldwin*).

Here, Deutsche Bank claims that MERS executed the 2011 assignment as agent for the lender's

"successors and assigns." (*See* Dkt. 84, at 7).[7] Therefore it was Deutsche Bank's burden under Texas law to prove the existence of that principal/agency relationship in 2011. Under the precedents cited above, the mere reference to IndyMac Bank's "successors or assigns" is insufficient, because it fails to specify the names of those persons or entities (assuming they even existed). Nor has Deutsche Bank submitted any extrinsic evidence which might identify MERS's principal. From other cases the court might take notice that MERS acts as "common agent" for its member mortgage lenders. *See Harris County v. MERSCORP Inc.*, No. 14-10392, 2015 WL 3937927 (5th Cir. June 26, 2015). But that is no help here, because nothing in the record negates the possibility that the rights to the Burke Note and/or Deed of Trust were transferred to a non-member of MERS, with whom MERS has no principal/agent relationship.

In sum, *L'Amoreaux* does not undermine this court's judgment in favor of the Burkes because (1) there is no record evidence of a prior assignment of the lender's interest in the Note or Deed of Trust, (2) there is no record evidence that any purported assignor existed at the time of the 2011 assignment; and (3) there is no record evidence of a principal/agency relationship between MERS and any "successor or assign" of the lender when the assignment was executed.

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[7] Deutsche Bank also contends that MERS executed the 2011 assignment on its own behalf as "beneficiary" under the Deed of Trust. This argument is considered and rejected in part 5, below.

3. No Recording Requirement for Assignments

Deutsche Bank's third argument is a red herring. Nothing in the Court's findings and conclusions suggests or assumes that under Texas law an assignment of a deed of trust must be recorded in the local county clerk's office to be effective. Many Texas intermediate appellate courts may be cited for the proposition that an assignment need not be recorded in order to bind the parties to that instrument. *See e.g.*, *Roper v. Citi-Mortgage, Inc.*, No. 03-1100887-CV, 2013 WL 6465637 (Tex. App. – Austin 2013); *Denson v. First Bank & Trust of Cleveland*, 728 S.W.2d 876, 877 (Tex. App. – Beaumont 1987); *see also Harris County v. MERSCORP Inc.*, No. 14-10392, 2015 WL 3937927 (5th Cir. June 26, 2015) (making an "*Erie* guess" that the Texas Supreme Court would interpret Texas Local Government Code § 192.007 as imposing no duty to record assignments of deeds of trust when the interests in related promissory notes are transferred).

Texas law is clear that chain-of-title need not be proven by official recordation. Proof of assignment may be by testimony as well as by documentation. *Priesmeyer v. Pac. Sw. Bank, F.S.B.*, 917 S.W.2d 937, 939 (Tex. App. – Austin 1996). Nevertheless, *some* proof is required, and Deutsche Bank has offered none – beyond, that is, a single problematic assignment that is ineffective for the various reasons explained here.

4. Standing to Challenge Assignment

Deutsche Bank asserts that the Burkes have no standing to challenge the 2011 assignment, citing *Reinagel v. Deutsche Bank Nat'l Trust Co.*, 735 F.3d 220 (5th Cir. 2013). But *Reinagel* expressly recognized that Texas courts have long followed the majority rule that a homeowner is allowed "to challenge the chain of assignments by which a party claims a right to foreclose. . . ." *Id.* at 224. It is true that in Texas an obligor cannot defend against an assignee's efforts to enforce the obligation on a ground that merely renders the assignment "voidable at the election of the assignor," such as a fraudulent signature by an unauthorized corporate agent. *Id.* at 225. The problem here is not a voidable defect that a defrauded assignor might choose to disregard – it is the absence of a valid assignor (*i.e.* a real entity owning the right to be assigned) in the first place. *Cf. L'Amoreaux v. Wells Fargo Bank, N.A.*, 755 F.3d 748, 750 (5th Cir. 2014) (considering homeowner's challenge to validity of MERS assignment on its merits, implicitly rejecting bank's "voidable" argument).

Indeed, it is misleading to characterize this as a question of defendants' "standing," as though the Burkes were asserting an affirmative defense on which they bore the burden of proof. Texas law is clear that a party seeking to foreclose on a home equity loan bears the burden to demonstrate its authority to prosecute the foreclosure. *See, e.g.*, Tex. R. Civ. P. Rule 736.1(d)(3)(B) (petition must describe "the authority of the party seeking foreclosure"); Rule 736.6 ("the petitioner has the burden to prove by affidavits on file or

evidence presented the grounds for granting the order [allowing foreclosure]"). When the entity seeking to foreclose was not party to the original transaction, then that entity must be able to trace its right to foreclose back to the original mortgagee. *See e.g. Leavings v. Mills*, 175 S.W.3d 301, 310 (Tex. App. – Houston [1st Dist.] 2004) (party seeking to enforce note must show "unbroken chain of assignments" to the original mortgagee); *Miller v. Homecomings Financial, LLC*, 881 F.Supp.2d 825, 829 (S.D. Tex. 2012) (citing cases).

Given its failure to offer any chain of title proof other than the facially invalid 2011 assignment, Deutsche Bank has not shown that it is a real party in interest here. Deutsche Bank was a stranger to the original transaction between the Burkes and their lender in 2007, and, on this trial record, Deutsche Bank remains a stranger to this day.

5. The Dual Capacity Argument

In its supplemental brief, Deutsche Bank asserts that MERS was also acting in its own behalf as "beneficiary" under the Deed of Trust when it executed the 2011 assignment. A court's primary duty in construing a written contract is to ascertain the true intention of the parties as expressed in the language of the document itself. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). In this document, the name of the assignor, "Mortgage Electronic Registration Systems, Inc." appears three (3) times – in the body of the assignment, above the signature line, and in the corporate acknowledgement. Each time, MERS's name is immediately followed by

the phrase "as nominee for" the lender, IndyMac Bank, its successor and assigns. P. Ex. 2. Nowhere does this document hint that MERS intended to convey its own rights,[8] or that it was acting as principal rather than as agent for other entities.

Moreover, in the context of real estate transactions, Texas has long followed the common law rule that "in order to convey by grant, the party possessing the right must be the grantor, and use apt and proper words to convey to the grantee, and merely signing and sealing and acknowledging an instrument in which another person is grantor, is not sufficient." *Agric. Bank v. Rice*, 45 U.S. 225, 4 How. 225, 242 (1846). Applying this rule in an early case, the Texas Supreme Court declared as "wholly inoperative" a deed signed by a spouse who was not named as grantor in the body of the deed. *Stone v. Sledge*, 26 S.W. 1068, 1069 (Tex. 1894). The bank's position here is less compelling than that rejected in *Stone*, because "MERS as beneficiary" appears neither in the signature line nor in the body of the 2011 assignment.

Later Texas case law clarified that "[w]hile the premises of the deed must disclose certainly who the grantors are, . . . [t]he requirement of the rule is met if, from the deed in its entirety, enough is shown from which, by the aid of extrinsic evidence, the names of

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[8] For purposes of this motion only, the court assumes without deciding (1) that MERS was not required to act solely as nominee for the lender under the Deed of Trust, and (2) that MERS had contractual authority under its member agreements to make assignments in its own name, and not merely "as nominee" for its member entities.

the grantors can be made certain." *Texas Pac. Coal & Oil Co. v. Patton*, 238 S.W. 202 (Tex. Comm. 1922), quoting *Creosoted Wood Block Paving Co. v. McKay*, 211 S.W. 822, 824 (Tex. Civ. App. – Dallas 1919) (internal quote marks omitted). Deutsche Bank presented no such extrinsic evidence at trial. The sole evidence is the assignment itself, drafted by Deutsche Bank's law firm,[9] which repeatedly declares that MERS was acting in a single, representative capacity – "as nominee for the lender, its successor and assigns."

Words matter, especially in real estate transactions. *See Univ. Sav. Ass'n v. Springwoods Shopping Ctr.*, 644 S.W.2d 705, 706 (Tex. 1982) ("the terms set out in a deed of trust must be strictly followed"); *see also Mathis v. DCR Mortg. III Sub I, L.L.C.*, 389 S.W.3d 494, 507 (Tex. App. – El Paso, 2012) ("The rules of interpretation that apply to contracts also apply to notes and deeds of trust."). Based on the words of the 2011 assignment, MERS was no more acting on its own behalf than was the bank's own law firm.

6. Conclusion

Given its day in court, Deutsche Bank was content to risk its entire claim on a single problematic document. For reasons explained above, that gambit failed. Long-established Texas common law principles of agency, assignment, real property, and contract interpretation apply to all litigants, banks included.

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[9] The firm's name appears in the upper left-hand corner of the document. P. Ex. 2.

Deutsche Bank's motion to alter or amend the judgment must therefore be denied.[10]

There remains one additional matter. In the last sentence on the last page of its last brief to this court, Deutsche Bank asks to reopen the trial record to provide "the wet ink original of the Note or testimony affirming Deutsche Bank's status as holder of the Note." (Dkt. 90, at 7). No authority or excuse is offered for this breathtakingly late request. Even assuming such evidence exists, Deutsche Bank does not pretend that it is "newly discovered", nor that the bank was excusably ignorant about it until after trial despite using due diligence to discover it. *See* 11 WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 2808 (2012). After four years of litigation, including court-ordered mediation and trial on the merits, the time for such a *deus ex machina* maneuver has long since passed. The Burkes are entitled to the finality of judgment that our judicial process is intended to provide. The bank's request for a do-over is denied.

Signed at Houston, Texas, on July 31, 2015.

/s/ Stephen Wm Smith
Stephen Wm Smith
United States
Magistrate Judge

[10] However, the court will issue amended findings and conclusions to better comport with the record evidence, as well as an amended final judgment.

APPENDIX 9

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DEUTSCHE BANK NAT'L TRUST CO., as Trustee of the Residential Asset Securitization Trust 2007-A8, Mortgage Pass-Through Certificates, Series 2007-H under the Pooling and Servicing Agreement dated June 1, 2007, *Plaintiff*,	§	
v.	§	CIVIL ACTION 4:11-CV-01658
JOHN BURKE and JOANNA BURKE, *Defendants*.	§	

ORDER TO SUPPLEMENT THE RECORD

(Filed Jun. 24, 2016)

On June 9, 2016, the Fifth Circuit issued its opinion reversing the final judgment in favor of the Burkes and remanding the case to determine whether Deutsche Bank met the remaining requirements to foreclose under Texas law. *Deutsche Bank Nat'l Trust Co. v. Burke*, No. 15-20201 (slip op. June 9, 2016). However, the opinion contains a mistake of fact which may be material to the court's analysis of the case. After consultation with the office of the Fifth Circuit Clerk, this court has

been authorized to issue this order to bring the matter to the attention of the Fifth Circuit panel.

I.

At several points in its opinion, the panel asserted that MERS granted foreclosure authority to Deutsche Bank as the "mortgage servicer." *See* Slip. Op. at 4 ("MERS assigned the Burkes' mortgage to Deutsche Bank – the mortgage servicer – by an Assignment of Deed of Trust dated January 20, 2011."); *id.* at 5 n.1 ("It is unquestionable that MERS, as a book-entry system, can 'grant the mortgage servicer the authority to foreclose.' *Martins*, 722 F.3d at 225. MERS did so here."); *id.* at 5-6 ("Texas law and our precedent make clear, however, that MERS, acting on its own behalf as a book entry system and the beneficiary of the Burkes' deed of trust, can 'grant the mortgage servicer the authority to foreclose.' ").

This assertion is incorrect. The mortgage servicer for the Burkes' loan was One West Bank, a non-party to this litigation. Amended Findings of Fact and Conclusions of Law, ¶27 (Dkt. 94 at 5). Counsel for Deutsche Bank has conceded the mistake, acknowledging that Deutsche Bank was not the mortgage servicer. *See* Transcript of Status Hearing of June 16, 2016 (attached as Exhibit A) at pp. 3-5 (Dkt. 106).

II.

There are good reasons to think the mistake may be material to the panel's holding. The panel relied heavily on *Martins v. BAC Home Loans Servicing, L.P.*, 772 F.3d 249 (5th Cir. 2013), which involved a *mortgage servicer's* authority to foreclose on a home. *Martins* is quoted repeatedly in the panel opinion, most prominently for the following proposition:

> The Texas Property Code permits MERS, as a book entry system and the beneficiary named in the Burkes' deed of trust, 'either (1) to grant the mortgage servicer the authority to foreclose or, if MERS is its own mortgage servicer, (2) to bring the foreclosure action itself.' [*Martins*] at 255.

Slip op. at 4. The panel opinion also quotes *Martins* for the proposition that "the mortgage servicer need not hold or own the note" in order to foreclose. *Id.* These passages – undeniably correct as a matter of Texas law – have no bearing on this case, because Deutsche Bank claims to be acting as mortgagee, not mortgage servicer.

On a correct understanding of the record, then, *Martins* is not controlling. Nor does *Martins* purport to answer the central issue in this case, which is not whether MERS *can* assign away its beneficial interest in a deed of trust; the question is whether it actually *did* so by its 2011 assignment, which was executed solely in its capacity as nominee.

Although the Texas Supreme Court has yet to construe an assignment by "MERS as nominee," there is ample Texas case law on determining the status of a contracting party as principal or agent. Indeed, the issue is routine fodder for the ordinary canons of contract interpretation. When the instrument unambiguously reflects the signer's capacity, it is enforced as written. *See, e.g.*, *Barker v. Brown*, 772 S.W.2d 507, 510 (Tex. App. – Beaumont 1989, no writ); *FDIC v. K-D Leasing Co.*, 743 S.W.2d 774, 776 (Tex. App. – El Paso 1988, no writ) (citing *Priest v. First Mortgage Co. of Texas, Inc.*, 659 S.W.2d 869 (Tex. App. – San Antonio 1983, writ ref'd n.r.e.)); *Detroit Fidelity & Surety Co. v. First Nat'l Bank of Wichita Falls*, 66 S.W.2d 406, 407 (Tex. Civ. App. – El Paso 1933, no writ) ("A written contract is high evidence of the identity of the contracting parties"). When the identity of the contracting party is unclear on the face of the agreement, parol evidence may be considered. *See Jordan v. Rule*, 520 S.W.2d 463, 465 (Tex. App. – Houston [1st Dist.] 1975, no writ).

Texas courts are hardly unique in this respect. *See Gulf Shores Leasing Corp. v. Avis Rent-A-Car System, Inc.*, 441 F.2d 1385, 1391 & n.11 (5th Cir. 1971) (applying Louisiana law); *U.S. Shipping Board Emergency Fleet Corp. v. Galveston Dry Dock & Constr. Co.*, 13 F.2d 607, 611-12 (5th Cir. 1926) (federal law). The controlling principles are no different than those applied by the U.S. Supreme Court more than two hundred years ago. *Hodgson v. Dexter*, 1 Cranch 345, 364 (1803) (Marshall, C.J.) ("whole face of the agreement

then manifests very clearly a contract made entirely" by secretary of war in his representative capacity).

The Texas Supreme Court recently found it appropriate to depart from common law principles in a home equity case – but that departure was in favor of the homeowner, not the lender, based on "elaborate consumer protection measures" built into the home-equity amendment of the Texas Constitution. *See Wood v. HSBC Bank U.S.A., N.A.*, No. 14-0714, 2016 WL 2993923, *6 (Tex. May 20, 2016). Even so, it is conceivable that the Texas Supreme Court would decide to exempt MERS from long-standing contract/agency principles applicable to everyone else. In any case, the justification for such an *Erie* prediction will be better supported when based on a correct understanding of the record.

Accordingly, the Clerk is ORDERED to transmit this Order (including the attached transcript) to the Clerk of the United States Court of Appeals for the Fifth Circuit for filing as a supplement to the appellate record in Case No. 15-20201.

Signed at Houston, Texas on June 24, 2016.

/s/ Stephen Wm Smith
Stephen Wm Smith
United States
Magistrate Judge

APPENDIX 10

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

* * * * *

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee of the Residential Asset Securitization Trust 2007-A8, Mortgage Pass-Through Certificates, Series 2007-H under the Pooling and Servicing Agreement Date	*	NO. H-11-CV-1658
	*	Houston, Texas
	*	2:01 p.m. – 2:39 p.m.
	*	June 29, 2015
vs.	*	
JOANNA and JOHN BURKE	*	

* * * * *

MOTION HEARING

BEFORE THE HONORABLE STEPHEN W. SMITH
UNITED STATES MAGISTRATE JUDGE

* * * * *

Proceedings recorded by electronic sound recording
Transcript produced by transcription service.

* * *

[18] THE COURT: But why – I mean, if that's so, why didn't I see a computer printout tracking the assignment of this mortgage interest within the pool or at any given point in time? Because I wasn't

given that. Because it seems to have gone through several [19] different entities. It seems to have passed from IndyMac to IndyMac Fed to OneWest, and then at some point in time we're back –

MR. HOPKINS: I think the answer to your question is because lawyers on this side of this docket, in handling mortgage cases, are focused on proving up the Deed of Trust. And to a "t", lawyers are going to say: Why are we looking at the note when Texas law allows us to enforce our rights as a mortgagee under the Deed of Trust?

THE COURT: But you have to be the current mortgagee under the Texas property laws.

MR. HOPKINS: Yes.

APPENDIX 11

John Burke and Joanna Burke
46 Kingwood Greens Dr
Kingwood, Texas 77339
Tel: 281 812 9591

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION

Civil Action No. 4: 11-cv-01658

Deutsche Bank National Trust Co., as The Residential Asset Securitization Trust 2007-A8, Mortgage Pass-Through Certificates, Series 2007-H Under the Pooling and Servicing agreement dated June 1 2007	)))))))))	DEFENDANTS RESPONSE TO PLAINTIFF'S SUPPLEMENTAL, BRIEFING IN SUPPORT TO ALTER AND/OR AMEND THE JUDGMENT

Plaintiff

vs.

John Burke and Joanna
Defendants'.

DEFENDANTS RESPONSE TO PLAINTIFF'S SUPPLEMENTAL BRIEFING IN SUPPORT TO ALTER AND/OR AMEND THE JUDGMENT

(Filed Jul. 27, 2015)

* * *

The Forged Assignment cannot be reinstated on Appeal or any Motions, Pleadings or Supplemental Brief by the Plaintiffs as it is tainted due to the fact it's a Fraudulent Instrument

Plaintiffs have referred to a forged assignment by Mers, which was intentionally and fraudulently backdated to allow the Plaintiff to foreclose by deception. Plaintiffs claim it is not required to prove their case, however, if properly reviewed in context of the whole facts in this case, it was a premeditated and calculated act, in preparation of this law suit filed by Deutsche in 2011. The Hon. Judge Smith correctly identified this counterfeit instrument and the staged regeneration of this assignment by Deutsche with a specific date, to obscure the chain of title inquiry "rather than illuminate it". Therefore, a fabricated and manipulated assignment (a fraudulent instrument) cannot qualify as legal evidence or arguments that can be considered by the court.

The Assignment states;

> "For value received Mortgage Electronic Registration Systems Inc. as Nominee for the Lender No lender is identified . . . its successor . . . was. . . . the Bankruptcy Trustee of FDIC when the original lender, who holds the Note IndyMac Mortgage was made BANKRUPT TO Deutsche Bank National Trust Co as Trustee of The Residential Asset Securitization Trust Company Pass As Trustee of The Residential Asset Securitization Trust 2007-A8 Mortgage Through Certificates Series 2007-H Under The Pooling And Servicing

> agreement dated June 1 2007 1781 At Andrews Place Santa Ana Ca 94705. N.B. This trust in accordance with Internal Revenue Service and SEC Regulatory rules closed on the date stated June 1 2007."

The Trust was already Closed

It is impossible to transfer into a Trust that closed four years earlier.

Why would Deutsche assign a default mortgage 3 years and 7 months after the trust had closed and in accordance with the legal regulations which it now contradicts? The answer is because it never happened. It was all part of the planned fraud from loan origination to foreclosure.

As the Trust prospectus states, the Loan file complete with Deed of Trust and Promissory note was transferred by the original lender to the Trust Custodian. Through a series of cash sales with receipts which confirm payment of the sales (and not just book entries – only actual cash sales are acceptable) to protect The Trust from Bankruptcy. According to the Trust Prospectus they already have the complete file and was already closed in 2007.

Robo Signers

Mers have no employees. Mr. Brian Burnett who signed the Burkes' Assignment on behalf of Mers, was at that time an employee of IndyMac / OneWest Bank.

He was a known Robo-signer who was employed by the original lender but has robo-signed for many other banks/mortgage companies throughout continental USA.[7]

A deposition by Ms. Erica Johnson Seck, Attorney and Vice President of OneWest Bank, revealed how this was possible.[8] Lender Processing Services (LPS) provided all the BOGUS Assignments and paperwork for the fraudulent foreclosures.

---

[7] The law requires that the beneficiary execute and notarize and record a substitution for a valid substitution of trustee to take effect. Thus, if the Assignment of Deed of Trust/Mortgage is robo-signed, the sale is void. If the substitution of trustee is robo-signed, the sale is void. If the Notice of Default is Robo-Signed, the sale is void. Robo-signing is illegal in all 50 states, hence all 50 Attorney Generals' became involved in this scheme.

[8] See OneWest Bank, F.S.B. v Drayton 2010 NY Slip Op 20429 [29 Misc 3d 857]

APPENDIX 12

[SEAL]

The Supreme Court of Texas

201 West 14th Street Post Office Box 12248
Austin TX 7871
Telephone: 512/463-1312 Facsimile: 512/463-1365

March 7, 2019

Sent via email

Mr. and Mrs. Burke
46 Kingwood Greens Dr.
Kingwood, TX 77339
kajongwe@gmail.com

Dear Mr. and Mrs. Burke:

I received your request. dated March 5, 2019, for a certified copy of the Task Force on Judicial Foreclosure Rules's November 7, 2007 meeting transcript. The Court does not have a certification process and is not

required to certify records under Rule 12 of the Rules of Judicial Administration. However, I've enclosed a copy of the transcript in the form it was received by the Court.

Sincerely,

/s/ Jaclyn Daumerie
Jaclyn Daumerie
Rules Attorney

Enclosures

* * * * * * * * * * * * * * *

MEETING OF THE

TASK FORCE ON JUDICIAL

FORECLOSURE RULES

November 7, 2007

* * * * * * * * * * * * * * *

Taken before D'Lois L. Jones, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 7th day of November, 2007, between the hours of 9:36 a.m. and 11:46 a.m., at the Winstead, Sechrest & Minick, 401 Congress, Suite 2400, Austin, Texas 78701.

* * *

[26] system that everybody is familiar with today where loans are bought and sold, and that's basically what MERS is. Its just a listing of who has all the beneficial ownership interest in a mortgage, and that's going to be the investor, it's going to be the mortgage servicer, going to be the subservicers. It gives you four or five, six pieces of corroborating information about the borrower and that particular loan. I mean, it has the detail on their status sheet that says, "This is when the loan was made, here is the borrower, and here's the amount of the loan." I mean, all that information is right there so that if the loan is registered on MERS its real easy to determine all the different parties in the transaction, and that's the way the world's going, so maybe that's kind of the place we need to be going.

MR. BAGGETT: But MERS is in D.C. and it's national and –

MR. BASTIAN: Yeah. It is the book entry that's referenced in 51.001 as the book the book entry system. That's what MERS is.

HONORABLE MARK DAVIDSON: Well, all I'm saying is I don't – I see reasons for the rule to be one way or the other, but I think the rule should be clearer as to whether capacity, standing, ability, power, call it what you will, has to be affirmatively proven within the [27] four corners of the papers filed with the court or whether the verified application without any paperwork being attached is enough to require a judge to sign the request for relief.

MR. BAGGETT: Right. That's fair.

MR. BARRETT: Judge, I think that's a very good point. This is Mike Barrett, and I know we've had this difficulty. There really isn't such a document, and maybe, Larry, you might explain mortgage servicing rights because the servicer usually acquired their position in the file through the purchase of MSRs. There is an organized market in MSRs that really makes up maybe as much as 40 to 50 percent of any mortgage company's assets, and they acquired this – their status of being a servicer through the purchase of an MSR most of the time, or they did it themselves, they created their own loan. So finding a document that says, "I am the owner and holder. and I hereby grant to the servicer the right to foreclose in my name" is an impossibility in 90 percent of the cases. So we're going to have

to deal with that particular issue, and an understanding of who the servicer is and what an MSR is may be important to the transaction.

MR. BAGGETT: Okay. Judge.

HONORABLE BRUCE PRIDDY: Yeah, in Dallas we've wrestled with this issue, and I think most of the [28] courts in Dallas require some sort of assignment of the note to the applicant so the applicant is actually the person or the entity that has the rights under the –

MR. BAGGETT: Judge Davidson, can you hear that?

HONORABLE MARK DAVIDSON: Most of it.

MR. BAGGETT: Speak up.

HONORABLE BRUCE PRIDDY: And what the – happens is they just execute a document like Mr. Barrett says doesn't exist. They just create one for the most part sometimes, and the servicer signs it themselves saying that it's been transferred to whatever entity they name as the applicant. I think we can avoid a lot of problems if we specifically allow the servicer standing under Rule 736, because I think it's – we don't specifically allow the servicer to proceed, and I think if we tie in with the Property Code provision that the servicer can proceed with foreclosure if certain circumstances are met, if we tie into that in the rule I think we'll avoid a lot of these problems.

MR. BAGGETT: Yeah, I think you might be right because whatever vehicles we have, you do have a servicer if there's multiple parties, and that is the most logical entity to go forward. We just need – if we're going to do that, we need to figure out how we do it [29] cleanly so that everybody understands it.

Manny, did you have a comment you want to make? Larry, you want to talk?

MR. TEMPLE: Mike suggested I do that and then he did it so well there's nothing for me to add. That really tells you what the servicers do, and I just wonder if you added into Rule 736 in what has to be pled just a statement that the person, the movant, is either the owner or is the servicer with the power from the owner to –

MR. BAGGETT: Yeah.

MR. TEMPLE: – therefore proceed.

MR. BAGGETT: And swear to that as part of the application process. Judge, would that do it?

HONORABLE BRUCE PRIDDY: Perhaps.

MR. BAGGETT: Okay.

HONORABLE BRUCE PRIDDY: One of the other concerns I have is that most of the applications, the rule says it can be on information – it can be on personal knowledge or information and belief, if they state the basis for information and belief. Nearly all of the applications I see are on personal knowledge, and

you can tell that there's no way that one person can have personal knowledge of everything that's in there.

MR. BAGGETT: That's true.

[30] MR. BARRETT: Exactly.

HONORABLE BRUCE PRIDDY: It's just – to me, I think we need to massage it a little bit and not encourage folks who do this, because it really kind of devalues the idea of personal knowledge in my court because of what they're saying they have personal knowledge to they can't possibly have personal knowledge to.

MR. BAGGETT: That's probably right.

HONORABLE BRUCE PRIDDY: And so I would like to have some tweaks of that.

MR. BAGGETT: And we shouldn't write the rule in a way that they can't possibly comply with it. That's not very smart.

HONORABLE BRUCE PRIDDY: Right. But they can do it if they do it on information and belief and just say that it's based on their records, but no one does that. They just say they have personal knowledge, and you can't have personal knowledge that a loan occurred in 1978.

MR. BARRETT: That is exactly right. Some of these companies are servicing six million mortgages. The records with those mortgages are spread out in cities across America. The clerk who is preparing the document the judge refers to is usually an employee for

less than a [31] year or two, and there's no way they know, so you're absolutely right, Judge.

MR. BAGGETT: Yeah, but we also – we've also got to write it in a way that they take enough time and effort to make sure that it really is the right servicer doing it. I don't want to go so far on the other side that they just say "slap it on them" once they get in the door, and that's all you've got to do. They ought to take – it's a foreclosure. They ought to take time to make sure it's the servicer that's doing it. Whatever that means. Okay. Other comments?

MR. REDDINGS: Mike?

MR. BAGGETT: Yeah.

MR. REDDING: Mike, I was just looking at 736. You know, there is no definition of "applicant" in it.

MR. BAGGETT: Well, I don't remember what it says.

MR. BASTIAN: That's exactly right.

MR. BAGGETT: Yeah, that's true. Maybe we just define "applicant," and the applicant really would be the mortgage servicer.

MR. BASTIAN: Yeah.

MR. REDDING: Or the mortgagee.

MR. BAGGETT: Or owner and holder or [32] mortgage servicer.

MR. BASTIAN: And the definitions to 51.002 were done after Rule 735 and 736 were drafted. and that's one of the things that we asked the Supreme Court to look to, is to marry those two ideas and make 735 and 736 now a master definition in the foreclosure statute.

MR. BAGGETT: Yeah, that's right.

MR. BASTIAN: And what we're talking about would probably be taken care of. I mean, it needs to be more specific, but –

MR. BAGGETT: Yeah, because the mortgage servicer definition that y'all dealt with is in the probate – I mean, in the real property law, not in the rules. So we clearly need to make the rules reflect what's in the foreclosure law, and maybe that's a way to do it. What do you say, chief?

MR BASTIAN: No, I agree. Because that's who the borrower is making their payments to, that's who they assume is the mortgage servicer. I mean, I've tried a bunch – or had a bunch of these hearings before judges, and they think the person that they're making their own home loan payment to is the owner and holder of the note. It's always the mortgage servicer. I mean, they don't even know that, so and that's kind of the fail-safe because that's who the borrower expects to be [33] enforcing this note, not some, you know, Bank of New York as trustee for series XYZ home equity loan –

MR. BAGGETT: Pool No. 216.

MR. BASTIAN: That just creates problems.

MR. REDDING: Well, the other problem – Judge, this is Tim Redding. The other problem that I see – and, Tommy you and I talk about it regularly – that we have a bunch of servicers that are corporations or trusts attempting to foreclose on behalf of other trusts using a power of attorney, and I don't think that's really proper. I mean, we all kind of turn a blind eye to it, but I think that's an issue that's out there that somebody could use to potentially attack a foreclosure.

MR. NEWBURGER: That's what basically happened in Florida where MERS has been held as being unauthorized practice of law by a few judges when they filed foreclosures.

MR. BAGGETT: Speak up. Speak up, Manny, so the judge can hear you.

MR. NEWBURGER: That's what's happened in Florida where some judges have decided that MERS' attempt to conduct a foreclosure as the applicant was an unauthorizerd practice of law. Now, they've got some really good arguments for why they think that's wrong, but that's been a major battleground over that state.

* * *

APPENDIX 13

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
WHITE PLAINS DIVISION

IN RE:	
CYNTHIA CARSSOW FRANKLIN,	**CHAPTER 13**
Debtor	**CASE NO. 10-20010 (RDD)**
CYNTHIA CARSSOW FRANKLIN,	
Plaintiff,	
-against-	
WELLS FARGO BANK, N.A., AND FEDERAL HOME LOAN MORTGAGE CORPORATION,	**ADV. PRO. NO.16-08246 (RDD)**
Defendants.	

PLAINTIFF'S SECOND AMENDED COMPLAINT

Plaintiff Cynthia Carssow Franklin files this First Amended Complaint seeking a declaratory judgment that the lien securing the property that is the subject of Defendant Wells Fargo's claim no. 1 filed in the

above-captioned Chapter 13 case is void by operation of 11 U.S.C. § 506(d), and Plaintiff also seeks in this amended complaint to recover her actual damages, punitive damages, attorneys' fees and costs, and appropriate punitive sanctions against Defendant Wells Fargo for its outrageous, fraudulent, and vexatious conduct in connection with Plaintiff's Chapter 13 bankruptcy case:

INTRODUCTION

1. This lawsuit represents the culmination of nearly six years of litigation between the Plaintiff, Cynthia Franklin, and the alleged servicer of her mortgage loan, Wells Fargo. This Court is already thoroughly versed in the basic facts underlying Ms. Franklin's disputed mortgage loan, having presided over and decided the objection to Wells Fargo's proof of claim, including an extraordinary number of related motions and other filings in connection with Plaintiff's Chapter 13 bankruptcy case. As a consequence of the Court's disallowance of Wells Fargo's proof of claim, this lawsuit aims to declare the lien against Ms. Franklin's Texas home to be void pursuant to 11 U.S.C. § 506(d).

2. However, resolution of the claim objection is not all this lawsuit seeks to accomplish. Ms. Franklin also seeks recovery of her substantial actual damages incurred as a result of Wells Fargo's and its counsel's egregious abuses of the bankruptcy process in connection with the litigation of Wells Fargo's proof of claim

in this case, as well as an award of appropriate and significant punitive damages and/or punitive sanctions against Wells Fargo in order to deter Defendants and their industry peers from engaging in the practices that have needlessly multiplied and complicated this matter.

3. As detailed herein, and as experienced first-hand by the Court, Wells Fargo has dissembled, hidden, and openly misrepresented critical facts regarding Wells Fargo's status relative to Ms. Franklin's mortgage loan, as well as the nature, authenticity, and content of Wells Fargo's records with respect to Ms. Franklin's mortgage loan. Wells Fargo has continually urged inconsistent and irreconcilable legal positions, repeatedly altering its legal strategy, as well as its factual claims, whenever its tactics have been thwarted by adverse court rulings.

* * *

APPENDIX 14

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CASE No.: 50 2008 CA 018165 XXXX MB

INDYMAC BANK, F.S.B.,

Plaintiff,

-vs-

GALINA MALERMAN; UNKNOWN SPOUSE OF GALINA MALERMAN; UNKNOWN TENANT(S) IN POSSESSION OF THE SUBJECT PROPERTY; NATIONAL CITY BANK; 610 CLEMATIS CONDOMINIUM ASSOCIATION, INC.,

Defendants.

DEPOSITION OF ERICA A. JOHNSON-SECK

Thursday, February 5, 2009
1:03 – 4:24 p.m.

1655 Palm Beach Lakes Boulevard
Suite 500
West Palm Beach, Florida 33401

Reported By:
Kristina McCollum
Notary Public, State of Florida
J. Consor & Associates
1655 Palm Beach Lakes Boulevard, Suite 501
West Palm Beach, Florida 33401
Phone: 561-682-0905

[2] APPEARANCES:
On behalf of the Defendant:

THOMAS E. ICE, ESQ.
ICE LEGAL, P.A.
1975 Sansburys Way
Suite 115
West Palm Beach, Florida 33411
561-793-5658

On behalf of the Plaintiff:

LAURA M. CARBO, ESQ.
KAHANE & ASSOCIATES, P.A.
1815 Griffin Road
Suite 104
Dania, Florida 33004
954-920-4000

- - - - - -

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[3] - - - - - -

EXHIBITS

- - - - - -

[4] PROCEEDINGS

- - -

Deposition taken before Kristina McCollum, Professional Reporter and Notary Public in and for the State of Florida at Large, in the above cause.

- - -

Thereupon,

(ERICA A. JOHNSON-SECK)

having been first duly sworn or affirmed, was examined and testified as follows:

THE WITNESS: Yes.

DIRECT EXAMINATION

BY MR. ICE:

Q. Can you state your full name for the record, please?

A. Erica Antoinette Johnson-Seck.

Q. And what is your business address?

A. 7700 West Palmer Lane, building D; Austin, Texas 7829.

Q. What is your business telephone number?

A. (512)250-3721.

Q. What business is at that address?

A. Indymac Federal Bank Servicing; late-stage servicing, default servicing site.

Q. And you are an employee of Indymac Federal

* * *

[37] to your deposition and ask you if you recognize that document.

(Defendant's Exhibit C was marked for identification.)

A. Yes – wait. Well, yes. Yes, I remember.

Q. Okay. This is an e-mail from the Evan Wagner who is the vice president of corporate communications –

A. Yes.

Q. – of Indymac, correct?

A. Yes.

Q. And it was to all employees, correct?

A. Yes.

Q. Did you receive this as an e-mail?

A. I did.

Q. I want to draw your attention to the part that I highlighted down there where it talked about the FDIC takeover and that this, being July 11th, was the last day of business for Indymac Bank, correct?

A. That's right.

Q. Okay. Now that was a Friday?

A. Uh-huh; yes.

Q. The following Monday is when you signed the affidavit of lost note, correct?

A. Yes.

Q. And you signed as an officer of Indymac Bank, [38] correct?

A. Yes.

Q. Which, at that time, was out of business?

A. Yes.

Q. Okay.

A. But –

Q. Go ahead.

A. But the FDIC told us that things that were in process for a certain number of days would still happen business as usual in Indymac Federal Bank until they can get the new delegation of authority out which happened after the 14th.

Q. It happened about a week later, correct?

A. Yes.

Q. Or so, when the FDIC appointed maybe you recall the name of whoever became the CEO.

A. Yes.

Q. Who was that, Roy-Somebody?

A. It's on the tip of my tongue. Do you need that information? It's on the tip of my tongue; sorry.

I can't think of it. I can't think of it.

Q. And I apologize. I didn't bring that particular document with me.

Well, the point I wanted to make was when they did that they did a retroactive corporate resolution [39]

back to the 14th allowing you, among others, to sign documents on behalf of the conservatorship.

Do you recall that?

A. Yes.

Q. There's two problems here. Not only did Indymac Bank cease to exist, Indymac Federal Bank was in conservatorship, correct?

A. Yes.

Q. Which means you didn't have authority on the 14th to sign on behalf of Indymac Bank or Indymac Federal Bank, correct?

A. I don't know that to be correct.

Q. When they did this retroactive approval giving you signing powers, did they not say that when you sign you have to sign as the attorney in fact for either the FDIC as conservator or Indymac Federal Bank?

A. No.

Q. How did they tell you you could sign?

A. In some states we do sign attorney in fact because of the way the nature of the foreclosure is. In other states we signed Indymac Federal Bank, FSB.

Q. Okay.

A. After substitution was filed.

Q. Well, my question is really directed to the 14th because this is the Monday after Indymac Bank [40] ceased to exist, correct?

A. Yes.

Q. And when you went to work Monday morning, who did you work for?

A. The FDIC.

Q. And it was your understanding when you went to work and you signed this some time that day that you were permitted to go ahead and sign on behalf of, as an officer, of a corporation that no longer existed?

A. Yes. I was – we were told that business as usual until the new corporate resolution came out. And the feds, FDIC, did not want us to have hiccups in the foreclosure or the bankruptcy process while they were getting prepared or getting organized.

Q. Do you have the authority today to sign on behalf of Indymac Bank as opposed to Indymac Federal Bank?

A. I don't know.

Q. Do you continue to sign – since the 14th, have you continued to sign on behalf of Indymac Bank?

A. I may have on the 14th and through 'till – we had to give the attorneys, our foreclosure and bankruptcy attorneys, an amount of time, I want to say it

APPENDIX 15

Brian Burnett
AVP – Foreclosure at OneWest Bank

Austin, Texas Area

Current	• **AVP Foreclosure at OneWest Bank**
Past	• Senior Vice President, Loss Mitigation at MOS Group Inc. • Process Engineering Specialist at Law Office of Marshall Watson • Owner at Aflac
Education	• University of Nevada-Las Vegas
Recommendations	**7** recommendations
Connections	**181** connections
Industry	Banking

10-CV-01952-MAN

Brian Burnett's Summary

Experience working in mortgage servicing, investor relations, default servicing, judicial/non judicial firms, outsourcing, mortgage insurance, foreclosures, bankruptcy, loss mitigation, associate development, training, human relations.

Accomplished – reduced timelines and cost through process analysis, implementing procedural changes,

and placing strong leaders into essential roles to support the growth of the company.

Brian Burnett's Specialties:

Leadership and associate development, processes analysis, loss and exposure reduction.

Brian Burnett's Experience

AVP – Foreclosure
OneWest Bank
(Privately Held; Banking industry)
August 2009 – Present (1 year 2 months)

Senior Vice President, Loss Mitigation
MOS Group Inc.

(Privately Held; Financial Services industry) January 2009 – July 2009 (7 months)

> MOS Recovery's challenge is recouping lost monies for their clients. MOS Recovery helps the client and borrower achieve a satisfactory solution to their delinquency

Process Engineering Specialist

Law Office of Marshall Watson

APPENDIX 16

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12-50569

JOSEPH A, REINAGEL, JR.; DIA J. REINAGEL,

Plaintiffs - Appellants

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY,

Defendant - Appellee

Appeal from the United States District Court
for the Western District of Texas

(Filed Jul. 11, 2013)

* * *

JAMES E. GRAVES, JR., Circuit Judge, concurring in the judgment only:

I concur in the judgment and write separately to express three concerns with the majority's opinion. First, I disagree with the majority that the first assignment was valid and that "Texas courts tend to follow the Restatement." Indeed, Texas courts have not "expressly adopted" the Restatement's note-follows-the-mortgage presumption precisely because longstanding United States Supreme Court and Texas precedent

requires that a foreclosing party be the holder of the promissory note in order to foreclose. Carpenter v. Longan, 83 U.S. 271, 274 (1872) ("The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity."); accord Nat'l Live Stock Bank v. First Nat'l Bank, 203 U.S. 296, 306 (1906); Baldwin v. State of Mo., 281 U.S. 586, 596 (1930) (Stone, J., concurring); see also Cadle Co. v. Regency Homes, Inc., 21 S.W.3d 670, 674 (Tex. App. 2000) (holding that, in order to foreclose, the party seeking to enforce the note must show it is the owner and holder of the note).[1]

Applying Texas law, this court has also held that the assignor must assign the promissory note, not just the mortgage:

> The rule is fully recognized in this state that a mortgage to secure a negotiable promissory note is merely an incident to the debt, and passes by assignment or transfer of the note. . . . The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries

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[1] This, of course, does not require the owner and holder of the note to produce the actual original note at the time of foreclosure. Cf. Cadle Co., 21 S.W. 3d at 674 (citing Commercial Serv. of Perry, Inc. v. Wooldridge, 968 S.W.2d 560, 564 (Tex. App. 1998) ("To collect on a promissory note, a plaintiff must establish: (1) the existence of the note in question, (2) the defendant signed the note, (3) the plaintiff is the owner and holder of the note, and (4) a certain balance is due and owing on the note.").

> the mortgage with it, while an assignment of the latter alone is a nullity.

Kirby Lumber Corp. v. Williams, 230 F.2d 330, 333 (5th Cir. 1956) (quoting Van Burkleo v. Sw. Mfg. Co., 39 S.W. 1085, 1087 (Tex. Civ. App. 1896); Gough v. Home Owners Loan Corp., 135 S.W.2d 771 (Tex. Civ. App. 1939)). The United States District Court for the Northern District of Texas recently came to the same conclusion. See McCarthy v. Bank of Am., NA, 2011 WL 6754064 at *3-4 (N.D. Tex. Dec. 22, 2011) (requiring foreclosing party to be holder of promissory note, not just holder of mortgage). Indeed, the courts have a reason for adopting these requirements—the note is the obligation and the mortgage secures the obligation. It is only logical that a lender must hold the obligation in order to foreclose on the security for that obligation. Nevertheless, I concur in the judgment because the majority correctly holds that Texas courts have never expressly adopted the Restatement's note-follows-the-mortgage presumption. Moreover, since the second assignment was valid, there is no need to decide the validity of the first assignment.

Second, I do not agree that the Reinagels' forgery argument is a red herring. Acknowledging a document at a different time or place than what was in fact the case is included in the Texas Penal Code's definition of "forge." Tex. Penal Code § 32.21(a)(1)(A). And forgery makes an assignment void, not voidable. See, e.g., Garcia v. Garza, 311 S.W.3d 28, 44 (Tex. App. 2010);

Bellaire Kirkpatrick Joint Venture v. Loots, 826 S.W.2d 205, 210 (Tex. App. 1992). I disagree with the majority that, even if the acknowledgment was improper, it did not invalidate the second assignment because assignments are not required to be notarized in Texas. This is immaterial—regardless of whether Bryan Bly was required to sign the original assignment in wet ink or to have his signature notarized, the Reinagels claim that his signature was notarized at a time or place different than where Bly actually was.[2] This satisfies the definition of "forge" under the Texas Penal Code. The

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[2] The Reinagels claim that Bly admitted in his own deposition testimony from another case that his signature was "scanned" onto documents and then notarized as an original and recorded. Nevertheless, Bobbie Jo Stoldt, the Florida notary that purportedly witnessed Bly's execution of the second assignment in Pinellas County, Florida, attested in the assignment's certificate of acknowledgment that Bly acknowledged the assignment "before me this 13th day of February in the year 2009." (emphasis added). She also attested that Bly was "personally known to me to be the Vice President of Citi Residential Lending, Inc. . . . "

Florida law requires a notary to, inter alia, include in the certificate of acknowledgment the "venue stating the location of the notarization," "the exact date of the notarial act," and attest that "[t]hat the signer personally appeared before the notary public at the time of the notarization." Fla. Stat. § 117.05(4). Thus, it appears that, if Bly was not in Stoldt's presence because his signature was "scanned," the notarization also violated Florida's notary law. In addition, the law states that "[a] notary public may not notarize a signature on a document unless he or she personally knows, or has satisfactory evidence, that the person whose signature is to be notarized is the individual who is described in and who is executing the instrument." Id. § 117.05(5).

Reinagels, however, did not sufficiently plead or brief this argument, having raised it for the first time in their reply brief. United States v. Ramirez, 557 F.3d 200, 203 (5th Cir. 2009) ("This court does not entertain arguments raised for the first time in a reply brief."). Because the Reinagels have waived the argument, I concur in the judgment.

Third, while the majority is technically correct that "courts invariably deny mortgagors third-party status to enforce PSAs", the Reinagels are not seeking third-party status to enforce the PSA. Instead, the Reinagels "point to defects in the securitization process as evidence that neither title nor possession of the note passed to the [party] who sought to foreclose their mortgages. Thus, the Plaintiffs seek only to use the breaches as evidence that the party seeking to foreclose is not the owner of their note." Ball v. Bank of N.Y., 2012 WL 6645695 at *4 (W. D. Mo. Dec. 20, 2012) (permitting homeowners to challenge foreclosures based on violation of the PSA). It makes very little sense that the Reinagels have a right to challenge the assignments based on fraud but lack the right to challenge the assignments based on a violation of the PSA. In my view, both bases for challenging the assignments are valid, and should be considered on the merits. Nevertheless, given the lack of evidence that the Reinagels

may be subject to double-collection,[3] I concur in the judgment.

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[3] The Ball court announced that its conclusion was supported by caselaw "which held that a debtor generally lacks standing to contest the validity of an assignment of debt, except if the debtor will be prejudiced. One form of prejudice is the potential that the debtor will be exposed to multiple judgments." Id. at *5 (emphasis added) (citing, inter alia, Barker v. Danner, 903 S.W.2d 950, 955 (Mo. Ct. App. 1995) ("[T]he only interest of the obligor being that he shall be required to pay his debt to but one person."); Livonia Prop. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC, 399 F. App'x 97, 102 (6th Cir. Oct. 28, 2010) ("Obligors have standing to raise these claims because they cannot otherwise protect themselves from having to pay the same debt twice.")). "In fact," continued the court, "this is the very possibility that possession of the note is meant to prevent." Id. (citing In re Washington, 468 B.R. 846, 853 (Bankr. W.D. Mo. 2011) ("Possession of the note insures that this creditor, and not an unknown one, is the one entitled to exercise rights under the deed of trust, and that the debtor will not be obligated to pay twice.")). Here, however, the Reinagels admit they made their payments to Deutsche Bank and had been attempting to negotiate the amount of those payments with Deutsche Bank. Thus, there is no indication that the Reinagels were confused as to which lender to pay, or that a significant possibility exists of Argent attempting to collect on the note.