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MEMORANDUM

TO: Clerks of Superior Court (Please share with your SP staff)

FROM: Peter E. Powell, Legal Counsel

SUBJECT: Foreclosures Involving Mortgage Electronic Registration Systems, Inc. (MERS)

This memorandum addresses recent questions regarding the status of Mortgage Electronic Registration Systems, Inc. ("MERS") in foreclosure proceedings in North Carolina. MERS is a company founded by various mortgage lenders and secondary market participants to hold title to mortgage liens on behalf of lenders. MERS is often named as a "nominee" on deeds of trust securing home loans made in North Carolina. However, its nominee status does not make any difference with regards to whether it is the holder of the note and has the right to foreclose.

MERS should be treated like any other note-holder seeking to foreclose in North Carolina. As such, MERS may foreclose on a deed of trust when it satisfies the requirements of N.C.G.S. § 45-21.16(d) by presenting evidence to the Clerk that: (1) it is the holder of the promissory note; (2) the loan is in default; (3) the deed of trust provides for the foreclosure remedy; and (4) notice has been given to borrower and others entitled to notice. The questions that have arisen revolve around how the foreclosing party shows that it is the holder of the note. In determining whether MERS is the holder, the Clerks should apply the same standards as would be applied to any note holder.

Obviously, the original lender or a subsequent lender (assignee) may foreclose a deed of trust in a power of sale proceeding. There is no need or requirement that an assignment of a deed of trust be recorded. See G.S. § 47-17.2. Under North Carolina law, when the note is duly assigned or transferred, the rights under the deed of trust follow the note. As a result, whichever party is holder of the note is entitled to foreclose under the deed of trust.

Any note holder, including the original lender (payor), may assign the note by endorsement. This is typically done by an endorsement on the reverse side of the note (just the way a check is endorsed) or on the face of the note. If the note is properly assigned/endorsed, the deed of trust follows the indebtedness and the holder of the note is entitled to foreclose under power of sale. An endorsement may be either "in blank" or to a specified person or entity, as follows:

"Pay to the order of:

/s/ Joe Mortgage Mann
President, First National Bank" (This is a blank endorsement.)

OR

"Pay to the order of:

Mortgage Electronic Registration Systems, Inc.

/s/ Joe Mortgage Mann
President, First National Bank" (This is an endorsement to a specific assignee.)

If the endorsement is in blank, then whoever has possession of the note is the holder. In the specific endorsement example above, Mortgage Electronic Registration Systems, Inc. is the holder. A note also may be endorsed by an "allonge." This is separate document that contains the endorsement and is attached to the note. Whether by endorsement on the note or on the allonge, MERS can be the holder, and may foreclose if it establishes the three other evidentiary issues: that the loan is in default, the deed of trust provides for the foreclosure remedy, and notice has been provided to the borrower and all other parties entitled to notice.

To summarize how Clerks should proceed in confirming whether the foreclosing entity is entitled to foreclose on a Deed of Trust:

1. Original Lender is Foreclosing. When the original lender is the foreclosing entity, foreclosure counsel or the trustee need to produce, as evidence: (i) the original or a copy of the recorded Deed of Trust; (ii) the original or a copy of the note; (iii) an affidavit

that the indebtedness is outstanding; and (iv) proof that notice has been provided to the borrower and all other parties entitled to notice.

2. MERS is Foreclosing. When MERS is the foreclosing entity, they must proceed as a subsequent lender, and foreclosure counsel or the trustee need to produce, as evidence: (i) the original or a copy of the recorded Deed of Trust; (ii) the original or copy of the note endorsed in blank or specifically endorsed or assigned to MERS; (iii) an affidavit reciting that MERS is the holder and that the debt is outstanding; and (iv) proof that notice has been provided to the borrower and all other parties entitled to notice.

If the original note, as endorsed, is produced, the affidavit need not recite that MERS is the holder, as they are obviously in possession of the note. If the original note is not produced, and the endorsement is in blank, then the affidavit should recite that the foreclosing party is the holder.

3. Other Entity is Foreclosing. When any subsequent lender or servicer other than MERS is the foreclosing entity, foreclosure counsel or the trustee need to produce, as evidence: (i) the original or a copy of the recorded Deed of Trust; (ii) the original or a copy of the note endorsed in blank or specifically endorsed or assigned to the foreclosing lender or servicer; (iii) an affidavit reciting that the subsequent lender is the holder and that the indebtedness is outstanding; and (iv) proof that notice has been provided to the borrower and all other parties entitled to notice.

If the original note, as endorsed, is produced, the affidavit need not recite that the subsequent lender is the holder, as they are obviously in possession of the note. If the original note is not produced, and the endorsement is in blank, then the affidavit should recite that the foreclosing party is the holder.

In conclusion, the above suggested procedures are applicable to all foreclosures, no matter who brings the proceeding. MERS should be treated exactly as any other holder of indebtedness would be under the North Carolina foreclosure statutes. However, without a proper assignment or endorsement as described above, MERS or any subsequent lender, cannot be established as the holder of a note in which the original lender is the proper party. Merely being named as a “nominee” in the original deed of trust is not sufficient. If you should have any further questions concerning this matter please feel free to call me at 919-715-4907 or Pamela Best at 919-715-4849.