IN THE DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT OF FLORIDA

CONSOLIDATED
Case No.: 2D05-4544
L.T. No.: 05-001295-CI-11
Case No.: 2D05-4546
L.T. No.: 05-000602-CI-11

Mortgage Electronic Registration Systems, Inc.,

Appellant,

v.

George Azize, et al.,

Appellees.

On Appeal from the Circuit Court
of the Sixth Judicial Circuit
in and for Pinellas County, Florida

APPELLANT'S INITIAL BRIEF

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STATUTES

MISCELLANEOUS

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I. PRELIMINARY PROCEDURAL STATEMENT

This appeal is brought by Mortgage Electronic Registration Systems, Inc. ("MERS") from two cases below that were consolidated by this Court for the purposes of briefing and assignment to a panel. The two cases are: *MERS v. Azize*, L.C. #05-001295-CI-11, Appeal No. 2D05-4544; and *MERS v. Boudreault*, L.C. #05-000602-CI-11, Appeal No. 2D05-4546. MERS will refer to the respective records as (Azize ___) and (Boudreault ___). Although the two cases were not consolidated at the trial level, the issues involve an identical Order to Show Cause, MERS' Memorandum of Law in Response to Order to Show Cause, transcript of the hearing for the Order to Show Cause, the Order of Dismissal, Order Regarding Standing, MERS' Motion for Reconsideration, and the Order Denying Reconsideration. When referring to these identical papers, MERS will refer to only (Azize __).

II. STATEMENT OF THE CASE AND FACTS

A. NATURE OF THE CASE

The appeal is from two final judgments holding that Complaints for mortgage foreclosures filed by Appellant MERS do not state a cause of action because MERS does not and cannot allege in its pleadings that it owns a "beneficial interest" in the negotiable instruments ("Notes") it seeks to enforce. In each case, MERS was the mortgagee of record, and the borrower had executed a

mortgage contract that expressly authorized MERS to foreclose in the event of a default. The trial court held that, as a matter of law, a party may not foreclose on property securing a negotiable Note unless that party has some beneficial interest in the Note itself. It has long been settled in Florida that, to foreclose on a promissory Note, the plaintiff need not have any beneficial interest in the Note. Rather, it is the "holder" of the Note or one authorized by the holder of the Note that is a proper party to foreclose. Despite these long-settled principles of Florida negotiable-instruments law, the trial court dismissed with prejudice *en masse* some twenty cases where MERS was the Plaintiff on the stated basis that MERS is not the real party in interest to foreclose because it lacks a beneficial interest in the underlying Notes. This appeal is from two of those twenty cases.

B. COURSE OF PROCEEDINGS

The defendant-borrowers in each case below borrowed money for the purchase of a home and signed a Note promising to pay the principal sum, plus interest, to the lender. (Azize 1-25, Boudreault 1-22). Each defendant-borrower signed a mortgage contract naming MERS as the mortgagee and, for purposes of enforcing the Note, assigned all right title and interest in his or her property to MERS. (Azize 6-25, Boudreault 6-24). Finally, each defendant-borrower specifically acknowledged in the mortgage itself that MERS is the proper party to foreclose and sell the property in the event of a default on the Note. (Azize 6-25,

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Boudreault 6-24). In each case, the defendant-borrower defaulted on the applicable Note by failing to make the required payment. (Azize 2, Boudreault 2).

Upon default, MERS initiated foreclosure actions to enforce the Notes. (Azize 1-25, Boudreault 1-24). As the named mortgagee of record, MERS has filed numerous foreclosure actions in Pinellas County, Florida and throughout the country. The two foreclosure Complaints filed by MERS below both allege the elements necessary to foreclose on real property. (Azize 1-25, Boudreault 1-24). The defendant-borrowers did not plead affirmatively that MERS is not the proper party, and they did not ask the Court to dismiss the Complaints because they failed to state a cause of action.

On different dates for each case, the trial court, *sua sponte*, issued an Order to Show Cause Why Complaint Should Not Be Dismissed For Lack of Standing ("Show Cause Order"). (Azize 49-51, Boudreault 147-149). The Show Cause Order states that it was rendered in "approximately fifteen cases" as a "standard" Order, and that "additional files will continue to be noticed as MERS files come to the Court's attention." *Id.* The Show Cause Order was thus rendered regardless of the allegations contained in any particular Complaint. *See id.* The trial court specifically ordered MERS to show cause why its foreclosure Complaints should not be dismissed because they were not filed by the proper plaintiff. (Azize 50-51).

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A hearing on the Show Cause Order was scheduled for July 26, 2005, at 3:00 p.m. for one hour. (Azize 51). Prior to the hearing, MERS submitted a Memorandum of Law in Response to the Order to Show Cause ("Memorandum of Law") demonstrating various factual and legal scenarios under which MERS is a proper party under Florida law to enforce Notes and bring foreclosure actions. (Azize 52-75). The July 26th hearing consisted only of argument by counsel, and thus it was not an evidentiary hearing. (Azize 76-174).

On August 18, 2005, the trial Court then rendered twenty identical Orders of Dismissal with Prejudice as to Mortgage Electronic Registration Systems, Inc. ("Orders of Dismissal") (*E.g.,* Azize 176-195). Each of the twenty Orders of Dismissal incorporated the Court's single Order Regarding Standing of MERS to Foreclose on Behalf of Others. ("Order Regarding Standing") (Azize 176-195).[1]

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[1] Apparently, the trial court ultimately issued its Show Cause Orders in twenty-eight cases. Of those, twenty were dismissed with prejudice, five were voluntarily dismissed based on loan reinstatements or otherwise, and one involved a bankruptcy. Two of the cases were not dismissed because they were in the "late stages." (Azize 194). It is not known how the two cases in the "late stages" of litigation are different from the twenty cases that were dismissed, given that the Court's ruling was based on the legal determination that MERS must have some beneficial interest in the Notes to be a proper party.

In the twenty cases before the trial court, including the two on appeal here, the court concluded that "the proper plaintiff has not brought the action," and dismissed the cases with prejudice as to MERS "for failure to state a cause of action." (Azize 175). The trial court held that "MERS is not a proper party to file a lawsuit to collect on the Notes" because MERS has no "beneficial interest" in the Notes. (Azize 17). The trial court concluded that, as a matter of law, in order to collect on the Notes and bring a mortgage foreclosure action, a plaintiff such as MERS must allege a beneficial interest in the Note. The ruling by the trial court was as follows.

> Accordingly, the Court finds that **MERS is not a proper party to file a lawsuit to collect on the notes where [MERS] has no beneficial interest**. MERS, as a corporation, does not have standing to sue on behalf of another corporation which other corporation remains to the file unknown.
>
> **Each of these [twenty] cases will be dismissed for failure to bring the action in the name of the real party in interest**. The Court is satisfied, based upon the presentation and the completeness of information available, that MERS is not capable under Florida law of satisfying the Court that MERS is a real party in interest capable of pursuing the interest of other corporations before the Court.
>
> The various [twenty] cases will be dismissed with prejudice as to MERS as a party in interest by separate Order with this Order being incorporated therein by reference. (emphasis added).

(Azize 17-18).

MERS then sought reconsideration of the Orders of Dismissal and an opportunity to amend the complaints, noting that the basis for dismissing all twenty complaints was the failure to state a cause of action. (Azize 217-221). Moreover, MERS objected to the procedure invoked by the trial court in arbitrarily selecting and adjudicating the merits of some twenty foreclosure actions with apparent disregard for the allegations in the Complaint. (Azize 217-221) Such arbitrary procedure amounts to a denial of due process and the right of access to the courts. Art. I, §§ 9, 21, Fla. Const.

In its Order Denying MERS' Motion for Reconsideration, ("Order Denying Reconsideration"), the trial court states that it gave "careful consideration to" whether "MERS as an entity that holds no beneficial interest in the Notes whatsoever could possibly state a cause of action and qualify as a real party in interest." (Azize 223). The trial court concluded that "so long as MERS has no beneficial interest in the Note that leave to amend would be futile." *Id.* Thus, the trial court declined to have a hearing on MERS' Motion for Reconsideration, declined to permit MERS to amend its pleadings, and denied MERS' Motion for Reconsideration. MERS now appeals the Orders of Dismissal in *Azize* and *Boudreault.*

C. FACTS

1. Facts Establishing MERS As a Proper Party to Foreclose.

The Show Cause Order required MERS to demonstrate why generally in some twenty cases it was the "proper party" to foreclose on the property securing the Notes. The Show Cause Order made no mention of a lack of "beneficial interest" in the Notes as the reason MERS is not such a "proper party." In response, MERS submitted a Memorandum of Law (Azize 52-75) which proffered general facts as to who MERS is, and why MERS is a proper party to foreclose as the holder or transferee of the Notes, or as the nominee authorized by the holder of the Note to foreclose. The general facts proffered by MERS to the trial court in its Memorandum of Law follow.[2]

(a) Lenders and the Residential Mortgage Market

MERS is a company formed to play an integral part in a federally-established free-market system created to increase liquidity in the market for home loans. When a mortgage lender loans money to a home buyer, it obtains a promissory note in the form of a negotiable instrument from the borrower, as well as a mortgage instrument. The mortgage instrument is recorded in the local land

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[2] All of the facts recited below in Section C.1(a)-(c) were proffered by MERS in its Memorandum of Law or at the July 26th hearing. (Azize 52-75; 76-174). The trial court's ruling was thus not based on any evidence or lack thereof. Rather, the Court's decision was – of necessity – based solely on the pleadings and papers in the Court file.

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records. In almost all instances, however, the lender does not continue to hold the Note. Instead, the lender sells the Note into the secondary mortgage market, most often to one of the government or government-sponsored entities created by statute to purchase residential mortgage loans from banks and other lenders. *See* 12 U.S.C. §§ 1451-59, 1716-23 *et seq*. (creating the Government National Mortgage Association ("Ginnie Mae"), Federal National Mortgage Association ("Fannie Mae"), and Federal Home Loan Mortgage Corporation ("Freddie Mac")). In turn, these entities resell Notes into a tertiary mortgage-backed securities market, usually as part of a bundle of Notes held in trust for investors. As a result, the owners of the "beneficial interest" in these Notes can be thousands of people whose identities change as these negotiable instruments are sold and resold in these markets, and as the investors sell and resell their shares in the mortgage-backed securities.

Because of the secondary and tertiary mortgage markets, the original lender is then able to make the funds from the first sale of the Note available to additional home buyers. The availability of these funds is the specific and intended result of the statutes that created the government and government-sponsored entities – to increase funds for home ownership in the United States. *See* 12 U.S.C. §§ 1451, 1716. As a result of this fluid market, it became more

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difficult for the land records to reflect accurately the entity currently holding the lien.

(b) The Creation of MERS

In 1993, the Mortgage Bankers Association, Ginnie Mae, Fannie Mae, Freddie Mac and others in the real estate finance industry created an electronic registration system and clearinghouse that is similar to the process used with great success by the Depository Trust Company for the securities industry. MERS was formed to track both beneficial ownership interests in, and servicing rights to, mortgage loans as they change hands throughout the life of the loan. This tracking assists the mortgage banking industry by reducing questions regarding these contractual interests as they are bundled into mortgage-backed securities. In this manner, MERS facilitates liquidity in the secondary mortgage markets.

(c) How MERS Works

Upon the purchase of a home, as was the case in *Azize* and *Boudreault,* the borrower signs a mortgage contract that names MERS as the mortgagee (as "nominee" for the lender, its successors and assigns). In the mortgage contract, the borrower assigns their right, title and interest in the property to MERS. The borrower contractually agrees that, in the event of default, MERS is the proper party to foreclose on the home. The mortgage instrument is then recorded in the local land records with MERS as the named-mortgagee. When the

Note is sold by the original lender to others, the various sales of the notes are documented on the MERS® System. As long as the sale of the Note involves a member of MERS, MERS remains the named mortgagee of record, and continues to act as a nominee for the new Note-holder. This relationship is memorialized in the original mortgage instrument to which the borrower is a party (Azize 6-25), as well as in the MERS membership agreements. (Azize 59-60). If a member is no longer involved with the Note after it is sold, an assignment from MERS to the non-MERS member is recorded in the county where the real estate is located, and the Note is "deactivated" from the MERS® System.

As of July 2005, MERS was registering its name on more than 33,000[3] new mortgages every day. Almost every entity involved in home lending or servicing is a member of MERS.[4] The MERS® System electronically tracks mortgage servicing information, and, in so doing, fills an information void that the county clerks and other public records historically did not and currently do not

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[3] This was the number of new MERS mortgages that was proffered to the trial court at the July 26th hearing.

[4] In addition to Ginnie Mae, Fannie Mae and Freddie Mac, MERS Members include many national and international lenders, and many of the largest and most well-known title associations and insurance companies in the industry. A complete list of MERS Members is available on MERS' website at www.mersinc.org.

provide. It is this current and easily accessible information that assists borrowers, consumers, title insurers and lenders to promote low-cost home ownership.

2. Facts Specific to the Two Cases on Appeal.

(a) *MERS v. Boudreault* (L.C. #05-000602-CI-11)

On January 25, 2005, MERS filed its foreclosure Complaint against borrowers Carl and Heidi Boudreault and others, attaching as exhibits both the mortgage contract and the Note. (Boudreault 6-21, 22-24). The mortgage contract attached to the Complaint names MERS as the mortgagee. (Boudreault 6-21). The defendant-borrowers both signed the mortgage contract, and they both agreed that upon default of a payment MERS had the right to foreclose on the Note and sell the property.[5] (Boudreault 6-21). The Note was attached to the Complaint, and the Complaint specifically alleged that MERS holds the Note. (Boudreault 22-24). The Complaint, with the attached mortgage instrument and Note, plainly sets forth each of the elements necessary for a mortgage foreclosure cause of action.

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[5] The mortgage contract that the Boudreaults signed specifically states:

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

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For their part, the defendant-borrowers answered the Complaint in February 2005, but neither of them pled as a defense that MERS was not the real party in interest or that MERS was not a proper plaintiff. (Boudreault 40-45). By failing to plead specifically that MERS is not a proper party, the defendant-borrowers waived their right to assert that defense. The original Boudreault note, which was filed with the Court (Boudreault 22-24), was "indorsed in blank," thus making the note payable to bearer. Thus, MERS had possession of the original note and that note was payable to MERS. (Boudreault 80-101).

On June 6, 2005, the trial court issued the Show Cause Order requiring that MERS demonstrate why it is a proper party plaintiff. Like the other borrowers, the Boudreaults did not ask the Court to dismiss the Complaint because MERS was not the proper plaintiff. On July 11, 2005, MERS sought leave to amend the Complaint to state fully MERS' name in the pleading as "nominee for Chase Manhattan Corp." (Boudreault 195-221).

The trial court dismissed the Boudreault case with prejudice on August 18, 2005. The stated reason was that MERS was not the proper party and thus the *Boudreault* Complaint failed to state a cause of action. (Boudreault 174). The trial court, also on August 18th, denied MERS' motion for leave to amend to name Plaintiff MERS as nominee for Chase Manhattan. The Court ruled that "MERS will not be allowed as a plaintiff and Chase Manhattan Mort. Corp. is

unrepresented not properly before the court." (Boudreault 222). The trial court then denied MERS' request for leave to amend the Complaint because any amendment would be "futile." (Boudreault 230). This timely appeal of the Court's dismissal with prejudice of the *Boudreault* Complaint followed. (Boudreault 334-359).

(b) *MERS v. Azize* (L.C. #05-001295-CI-11)

On February 18, 2005, MERS filed its foreclosure Complaint against borrower George Azize and others, attaching as an exhibit the mortgage contract. (Azize 1-25). The mortgage contract attached to the Complaint names MERS as the mortgagee. (Azize 6). The defendant-borrower signed the mortgage contract, and he, like the Boudreaults, agreed that upon default of a payment, MERS had the right to foreclose and sell the property. (Azize 6-18).

The Complaint with the attached mortgage instrument alleged a cause of action for mortgage foreclosure and sought to re-establish the lost Note.[6] The defendant-borrower was duly served with the Summons and Complaint on February 26, 2005 (Azize 27, 42), but he did not respond. MERS then filed its

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[6] The claim to re-establish the lost Note does not affect the mortgage foreclosure cause of action. Section 673.3091 of the Florida Statutes states that "[a] person not in possession of an instrument is entitled to enforce the instrument if" the provisions of the statute are met. MERS specifically pled facts showing that each provision of the lost Note statute was met. (Azize 1).

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Motion for Default on May 27, 2005 – some three months after Azize defaulted. On June 7th, the trial court issued its Show Cause Order requiring that MERS demonstrate why it is a proper party.[7] Azize did not ask the court to dismiss the Complaint because MERS was not the proper plaintiff, and Azize did not affirmatively plead that MERS lacked standing to bring a mortgage foreclosure action. Indeed, to date, Azize has not appeared in this case. Following the hearing on the Show Cause Order, the trial court dismissed the Azize case with prejudice, again, on the stated basis that MERS was not a proper party and thus the *Azize* Complaint failed to state a cause of action. (Azize 175). The trial court then denied MERS' Motion for Reconsideration which asked for leave to amend the Complaint. (Azize 222). As in *Boudreault*, this timely appeal followed.

III. SUMMARY OF THE ARGUMENT

The error committed by the trial court was its ruling that a party must own a beneficial interest in a Note in order to enforce it. Florida law has been the same for more than a century – a beneficial interest in the Note is **not** necessary to enforce the Note and foreclose on the property that secures its payment. This legal

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[7] As mentioned, the trial court issued a "standard" Order to Show Cause in "approximately fifteen" cases and dismissed twenty cases pursuant to that Order. The Order to Show Cause, however, was rendered on different dates, *e.g.*, June 6th in *Boudreault* and June 7th in *Azize*. It appears that the only common point in any of the cases in which the Order to Show Cause was issued is that MERS was the plaintiff in each such case.

principle has been consistently reaffirmed throughout the evolution of the law on commercial paper – from the early cases relying on the common law of bills and negotiable instruments, to the enactment and judicial interpretation of the Uniform Negotiable Instrument Law and its modern descendent, Florida's Uniform Commercial Code ("UCC"). There is more than one hundred years of Florida case law holding that a person may enforce the Note and foreclose **without** any beneficial interest therein.

In *Boudreault*, MERS had possession of and was the "holder" of the Note that secured the mortgage naming MERS as the mortgagee and was authorized by contracts with both the borrower and the lender to foreclose. Under these circumstances, Florida law is quite clear that MERS is a proper party to foreclose. *Troupe v. Redner*, 652 So. 2d 394, 395 (Fla. 2d DCA 1995) ("To foreclose upon a promissory note, the plaintiff must be the 'holder' in order to be the real party in interest.") In stark contrast to the trial court's Order, Florida law in no way requires a party foreclosing on property securing a note to have a beneficial interest in the Note. *See Jones v. Central Hanover Bank & Trust*, 147 So. 895, 896 (Fla. 1933) ("one who holds the full legal title to a [Note] may maintain an action thereon . . . , **notwithstanding he has no beneficial interest in the proceeds**.") (emphasis added); *see also,* § 673.3011, Fla. Stat. (2005) (The "person entitled to enforce" the Note is the holder – "even though the person is not

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the owner of the instrument.") Accordingly, the trial court's Order of Dismissal in *Boudreault* should be reversed so that MERS may proceed to foreclose even though MERS has no beneficial interest in the Note.

The trial court also erred by failing to uphold the right of an authorized nominee of a note holder to foreclose under Florida law. MERS is the named mortgagee on the mortgage contract in which all borrowers stipulate that MERS has the right to foreclose as the nominee for the lender who is the original owner and holder of the Note. The mortgage contract specifically states that MERS can act as the nominee of the lender in order to foreclose. Under these circumstances, Florida Rule of Civil Procedure 1.210(a) is clear that MERS may bring an action on behalf of the real party in interest (who is the holder of the Note). Fla. R. Civ. P. 1.210(a) ("[A] party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought."); *Durrant v. Dayton*, 396 So. 2d 1225, 1226 (Fla. 4th DCA 1981) ("[I]t is very clear that [Rule 1.210(a)] means just what it says and that a nominal contracting party . . . is permitted, at his option, to bring an action in his own name, without joining the real party in interest."). As an authorized nominee of the note holder in *Azize*, MERS is a proper party to foreclose. Thus, the Order

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of Dismissal in *Azize* should be reversed so that MERS may proceed to foreclose even though MERS has no beneficial interest in the Note.

The trial court's misunderstanding of the substantive law on both commercial paper and the right to sue under Rule 1.210 also led the Court to make three procedural errors. First, the Court did not apply the proper standard for dismissal for failure to state a claim. The two Complaints below alleged all of the necessary elements to state a mortgage foreclosure action, and those allegations must be taken as true in order to dismiss for failure to state a claim. The trial court improperly relied on unidentified "documents in the file" for its decision, without confining itself to the four corners of the Complaint. Second, the dismissals were invalid because any challenge as to whether MERS was the proper party was waived in both actions when the defendant-borrowers failed to raise it as a defense. Third, the trial court did not afford MERS the opportunity to cure any "pleading deficiencies," but instead made a blanket ruling that MERS could never have standing because it has no beneficial interest in the Notes.

As a result of the legal errors below, MERS asks this Court to reverse the court's dismissal of the Complaints in *Azize* and *Boudreault*, with instructions that allow MERS to proceed as a proper party.

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IV. ARGUMENT

A. APPLICABLE STANDARD OF REVIEW

The trial court's dismissal of the Complaints with prejudice as to MERS raises questions of law. Where appellate review concerns questions of law, the standard of review is uniformly *de novo*. *First Protective Ins. Co. v. Featherston*, 906 So. 2d 1242 (Fla. 2d DCA 2005). A review of the trial court's three orders (Orders of Dismissal, Order Regarding Standing, and Order Denying Reconsideration) show that the Complaints were dismissed – as a matter of law – because the trial court concluded that MERS was not a proper party, and thus the Complaints failed to state a cause of action because MERS does not own a "beneficial interest" in the Note. The same standard – *de novo* review – follows even if one considers each of the sub-components of the dismissal with prejudice as a separate order.

1. Standard of Review for Dismissal of Complaints for Failure to State a Cause of Action Is *De Novo*.

Dismissal for failure to state a cause of action is reviewed *de novo*. *Trotter v. Ford Motor Credit Corp.*, 868 So. 2d 593, 594 (Fla. 2d DCA 2004) ("We review an order of dismissal for failure to state a cause of action *de novo*."). The conclusion that *de novo* review is appropriate is buttressed by the fact that the trial court's decision was based on purely legal grounds.

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The Order Regarding Standing, which is incorporated into the Orders of Dismissal, found "that MERS is not a proper party to file a lawsuit to collect on the Notes where the corporation has no beneficial interest [in the Notes]," and that "MERS is not capable under Florida law of satisfying the Court that MERS **is a real party in interest**..." (Azize 192-193) (emphasis added). The question of whether a party must have a beneficial interest in a negotiable instrument to enforce it involves interpreting case law and Florida's Uniform Commercial Code. § 673.1011, Fla. Stat. (2005) (Florida's Uniform Commercial Code – Negotiable Instruments). Judicial interpretation of statutes and case law are legal matters that are reviewed *de novo*. *B.Y. v. Dept. of Children & Families*, 887 So. 2d 1253, 1255 (Fla. 2004).

2. Standard of Review for Standing Issues or Conclusions That a Plaintiff Is Not a Proper Party Is *De Novo*.

The Order Regarding Standing and the Order Denying Reconsideration also found that MERS was not a proper party because it does not own the beneficial interest in the Notes. The standard of review for issues of standing or real parties in interest is *de novo*. *Fox v. Professional Wrecker Operators of Florida, Inc.*, 801 So. 2d 175, 179 (Fla. 5th DCA 2001) (issue of standing is addressed *de novo)*.

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B. A BENEFICIAL INTEREST IN A NOTE IS IMMATERIAL TO ENFORCEMENT OF THE NOTE AND FORECLOSURE

The express and repeated holding of the trial court is that MERS is not a proper party to enforce a note because MERS has no beneficial interest in the Note.[8] The trial court did not cite a single case or Florida Statute to support this understanding of the law on Notes and foreclosures. Nor could it, because, in fact, the law in Florida for more than a century is completely to the contrary – foreclosure has long been permitted regardless of questions of beneficial interest. Indeed, if the trial court's decision is allowed to stand, it will amount to an abrupt

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[8] In deciding that "MERS is not a proper party to file a lawsuit to collect the Notes where [MERS] has no beneficial interest" in those notes, the use of the term "beneficial interest in the Notes" undoubtedly referred to a person with some right or expectancy in the proceeds from the Note, as compared to legal title to the Notes. In other words, the persons with beneficial interests in the Notes are those who are entitled to its proceeds. *See* Black's Law Dictionary 828 (8th ed. West 2004). A person with a "beneficial interest" in a Note is often described as a beneficial or equitable owner of the Note. See Order Regarding Standing at 7: ("MERS doesn't have the beneficial interest in the Note. It travels back through the members of MERS, who will disburse it to the entities who are entitled to the proceeds. And those [entities] would be what I refer to as the beneficial interests, or the beneficial owners of the Notes whoever the entities are that own the interest to the proceeds of that Note.)" (quoting counsel for MERS) (Azize 182); *id.* at 10 (The Court referring to the "real party in interest" as "the one who's going to get the money....") (Azize 185). Therefore, in holding that MERS is not the proper party because it does not have a beneficial interest in the Note, the court held that, in addition to having the legal or statutory right to enforce the Note, a party must also allege and prove its right to retain some or all of the underlying proceeds from the Note.

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and unprecedented departure from more than a century of carefully-developed Florida law.

1. Florida's Case Law Without Exception Holds That Beneficial Interest in Notes Is Not Necessary to Enforce Notes and Foreclose.

Under Florida law, the proper party to foreclose is the holder of the Note or an authorized representative of the holder of the Note – not the beneficial owner of it. Indeed, this very Court, based on Florida Supreme Court precedent, clearly specified who may be the real party in interest in order to foreclose:

> **To foreclose upon a promissory note, the plaintiff must be the "holder" in order to be the real party in interest.** *Withers v. Sandlin*, 36 Fla. 619, 18 So. 856 (1896); *Laing v. Gainey Builders, Inc.*, 184 So. 2d 897 (Fla. 1st DCA 1966). The "holder" is the "person who is in possession of a document of title or an instrument or an investment security drawn, issued or endorsed to him or to his order or to the bearer or in blank." § 671.201(20), Fla. Stat. (1993) (emphasis added).

Troupe v. Redner, 652 So. 2d 394, 395-96 (Fla. 2d DCA 1995). Thus, this Court has recognized, in order to foreclose, it is the holder of the Note or the representative of the holder of the Note that may foreclose. A holder of the Note or its nominee is not the person who has a "beneficial interest" in the Note, but rather the person in possession or the person "entitled to enforce" the Note. *See* § 673.3011, Fla. Stat. (2005) ("person entitled to enforce an instrument means…**[t]he holder of the instrument...[or a] nonholder in possession**…[and

a] person **may be a person entitled to enforce the instrument even though the person is not the owner** of the instrument or is in wrongful possession") (emphasis added). Thus, Florida's Uniform Commercial Code expressly contemplates that someone other than the "owner" or "beneficiary" may enforce the Note.

A brief history of Florida law on this issue illuminates both the development of the rule described above, and just how long it has been settled. The Florida Supreme Court in 1895 stated that:

> The law is now too well settled to admit of longer controversy that an action on a bill or note payable to bearer, or indorsed in blank, **may be maintained in the name of the nominal holder who is not the owner by the owner's consent**; and that possession by such nominal holder is *prima facie* evidence of his right to sue, and **cannot be rebutted by proof that he has no beneficial interest,** or by anything else but proof of *mala fides*. (emphasis added.)

McCallum v. Driggs, 35 Fla. 277, 289, 17 So. 407, 411 (1895) ("*McCallum*") (quoting 2 Daniel, Neg. Inst. § 1191). *See* John W. Daniel, *A Treatise on the Law of Negotiable Instruments* Vol. 3 §§ 1367-68 (Joseph M. Perillo ed., 7th ed., Baker, Voorhis & Co. 1933).

In fact, it is interesting to observe that the Supreme Court's decision in *McCallum* was itself the culmination of centuries of the evolution of the law of negotiable instruments. Historically, negotiable instruments, and the

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accompanying right to bring an action thereon without proof of an underlying beneficial interest, were the first common-law exception to the long-standing rule against assignment of choses in action; the first reported case being decided in 1602. William E. Britton, *Handbook of the Law of Bills and Notes*, p. 2 (2d ed., West 1961). Britton notes that by 1896 the Uniform Negotiable Instrument Law had been adopted in fourteen states – Florida among them – and that by 1924 it had been adopted in all states. *Id.* at 11. The Uniform Negotiable Instrument Law, consistent with previous common-law decisions and the decision in *McCallum*, provided that the holder of an instrument who has no beneficial interest therein may sue upon the instrument. *Id.* at § 77 (citing to more than twenty cases, including *Jones v. Central Hanover Bank & Trust Co.*, 147 So. 895 (Fla. 1933) ("one who holds the full legal title to a [Note] . . . may maintain an action thereon . . . notwithstanding he has no beneficial interest in the proceeds")).[9] In fact, at its most basic level, Florida law regarding the right of a party to sue on a

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[9] *See also* Auckland, *Uniform Commercial Code Services* at section 3-301:2 which states, in part:

> The holder of an instrument may sue in his own name to enforce payment, **even though he is not the owner**. (citations omitted.) Language found in some courts' opinions to the effect that the plaintiff must plead and prove that he is the single 'owner and holder' of the instrument in order to enforce payment is clearly misguided. (citation omitted.) **The holder need only plead and prove that he is a holder in order to be entitled to enforce payment.** (citations omitted.) (emphasis added.)

Note without a beneficial interest therein dates from at least 1868,[10] and has been a constant through Florida's adoption of the Uniform Negotiable Instrument law in 1897-98, and Florida's adoption of the Uniform Commercial Code in 1967.

When the issue arose during the foreclosure-ridden Great Depression, this most basic rule survived challenge. The Florida Supreme Court's holding in *Munck v. Manatee River Bank & Trust Co.*, 165 So. 57, 59 (Fla. 1935) is instructive, and noteworthy for the emphatic manner in which it re-affirmed the rule:

> The rule is steeled that when a mortgage secures a promissory note executed to a named party the fact that other persons may have an interest in it is immaterial in foreclosure proceedings, as it is not necessary to make them parties in such a suit. *Platt v. Miller*, 72 Fla. 92, 72 So. 482 (Fla. 1916). *Platt v. Miller* also accords with the negotiable instruments law. Courts do not generally inquire into the right of the plaintiff to sue in his own right or in that of a trustee, **but the one holding possession is accorded the right to foreclose**. *Chestnut v. Robinson*, 85 Fla. 87, 95 So. 428 (Fla. 1923). A like rule applies to trustees foreclosing for bondholders. *Winer v. Trust Co. of Florida*, 98 Fla. 726, 124 So. 35; *Busch v. City Trust Co.*, 101 Fla. 392, 134 So. 226 (Fla. 1931). (emphasis added.)

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[10] *Gregory v. McNealy*, 12 Fla. 578, 1868 WL 1403 *3 (1868) (Fla. 1868) (holding that "[n]o doctrine is better established than that possession of a note payable to bearer by an agent or trustee is sufficient to sustain an action at law **in his own name**.") (emphasis added.)

The Court in *Munck* explained that the previous foreclosure action to enforce the Note in no way addressed the beneficial ownership rights as between the foreclosing Note-holder and the party that claimed a one-third interest in the proceeds of the Note. *Id.* The Court referred to the question of beneficial ownership as a "collateral" interest with which the enforcement action had no concern. *Id.*

This historical review reveals a doctrine – beneficial interests in the Note are not necessary to foreclose – that has remained constant from very early common law, up through multiple revisions of the UCC, and related uniform statutory schemes. Modern Florida decisions are no exception. Florida courts have repeatedly made clear that beneficial interests in, or beneficial ownership of, a Note is not necessary in order to enforce a Note and foreclose. Rather, as this Court stated in *Troupe*, it is the "holder" of the note who has the right to enforce the note and foreclose. *See, e.g., Booker v. Sarasota, Inc.*, 707 So. 2d 886 (Fla. 1st DCA 1998) ("in order to be the real party in interest on a promissory note, the plaintiff must be the holder of the note") citing *Troupe*, 652 So. 2d at 395-96 citing § 671.201;[11] *Rauch, Weaver, Millsaps, Bigelow & Co. v. Central Bank &*

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[11] Section 671.201 (20), Fla. Stat. (1993) remains substantively unchanged in 2005: "'Holder,' with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an

Trust Co. of Miami, 453 So. 2d 459 (Fla. 3d DCA 1984) (a law firm, as holder of a promissory note, was held to be **the proper party to enforce it on behalf of the beneficiaries**); *Your Construction Center Inc. v. Gross,* 316 So. 2d 596 (Fla. 4th DCA 1975) (holding that, where a Note and mortgage name as payee a single trustee from a foreign trust, that trustee is entitled to maintain an action on the Note on behalf of the trust beneficiary); *Overseas Development Corp v. Krause*, 323 So. 2d 679 (Fla. 3d DCA 1975) (where a single trustee of a trust was named on the Note as "Nominee of the Trustees …" the trustee had standing to foreclose).

Florida law hardly stands as an exception to the rule that beneficial interests in notes are immaterial to one's right to foreclose. Indeed, the law is virtually the same in all fifty States. Like Florida, these States have adopted the Negotiable Instruments Act, and then the Uniform Commercial Code.[12]

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instrument payable to an identified person, if the identified person is in possession." § 671.201(20), Fla. Stat. (2005).

[12] *See, e.g., Jackson T. Fulgham Co., v. Stewart Title Guar. Co.*, 649 S.W.2d 128 (Tex. App. Dallas 1983) (a holder of a note, even if not the owner thereof, may enforce the note); *Caballero v. Wilkinson*, 367 So. 2d 349 (La. 1979) (although holder of bearer note was not the owner he could sue makers for payment notwithstanding that record did not show that he was specifically authorized by the owners to sue for payment); *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 450 P.2d 166 (Wash. 1969) (holder of negotiable instrument may sue thereon in his own name and payment to him in due course discharges instrument; and **it is not necessary for holder to first establish that he has some beneficial interest in proceeds**); *Hubby v. Willis Agency, Inc.*, 283 P.2d 1080, 1082 (Colo. 1955) ("The payee and holder of a promissory note may maintain an action thereon **even if he is not**

2. Florida's Statutes Confer the Holder of the Note With the Right to Enforce the Note and Foreclose.

This rule that beneficial interests are not necessary is not just a product of caselaw and history. Indeed, Florida's current statutes adopting the Uniform Commercial Code make it abundantly clear that it is the "holder" of the note or one authorized on its behalf that may enforce the Note and foreclose. To this end, the Florida legislature specifically enacted laws that state one need not be the owner of the note in order to enforce it. Consider the following Florida statutes[13] and official comments:

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the beneficial owner of the negotiable instrument sued on, even though he is only a nominal payee and the beneficial interest of equitable ownership is another person."); *Wick v. Cleveland Securities Corp.* 50 N.E.2d 351, 352 (Ohio App. 1943) ("A person who is a holder within the meaning of pertinent provisions of the Negotiable Instruments Act is entitled to sue **notwithstanding he is without beneficial interest** and a general code provision required every action to be prosecuted in the name of the real party in interest."); *Howell v. Flora* 127 P.2d 721, 721 (Kan. 1942) ("Under Negotiable Instruments Law, it is the legal title to negotiable paper and **not the beneficial interest therein which controls as to proper parties plaintiff** in suit for collection thereof."); *Northwestern Nat. Bank & Trust Co. v. Hawkins,* 286 N.W. 717 (Minn. 1939) ("Even a nominal payee or title holder, **although having no beneficial interest**, may maintain an action on a promissory note."); *Hoff v. Dougherty*, 243 Ill. App. 159, 1927 WL 4002 (Ill. App. 2 Dist.) ("In a suit on a promissory note, **proof that the plaintiff has no beneficial interest in the note is not a bar to the suit**,") (emphasis added); *McGowan v. People's Bank*, 185 Ky. 20, 213 S.W. 579 (1919) (denial of beneficial ownership is no defense to enforcement of a promissory note).

[13] These provisions, along with § 673.2051 Fla. Stat. (2005) (note indorsed payable to bearer), are the statutory authority that gives rise to a right to

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- 673.3011 Person entitled to enforce instrument

  The term "person entitled to enforce" an instrument means:
  (1) **The holder of the instrument;**
  (2) **A nonholder in possession of the instrument** who has the rights of a holder;

  A person may be a person entitled to enforce the instrument **even though the person is not the owner** of the instrument. (emphasis added.)

- § 673.2031 Transfer of Instrument; rights acquired by transfer:

  (1) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of **giving to the person receiving delivery the right to enforce the instrument.**

  (2) Transfer of an instrument, whether or not the transfer is a negotiation, **vests in the transferee any right of the transferor to enforce the instrument ...** (emphasis added.)

- § 673.2031 (3-203), Uniform Commercial Code Comment

  [A] Person who has an ownership right in an instrument might not be a person entitled to enforce the instrument. For example, suppose X is the owner and holder of an instrument payable to X. X sells the instrument to Y but is unable to deliver immediate possession to Y. Instead, X signs a document conveying all of X's right, title, and interest in the instrument to Y. Although the document may

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collect on a note on which MERS is "not mentioned" and has no beneficial interest. *Compare* Order Regarding Standing, p. 16 ("The provisions of the Uniform Commercial Code do not support the mention of MERS in the Mortgage and labeling MERS as a "mortgagee" as giving rise to a right to collect on a Note on which MERS is not mentioned and in which MERS acknowledges it has no beneficial interest.").

> be effective to give Y a claim to ownership of the instrument, **Y is not a person entitled to enforce the instrument until Y obtains possession of the instrument.** (emphasis added.)

There can be no doubt under Florida's statutory scheme that the enforcement of a Note and foreclosure on interests securing that Note are vested with the "person entitled to enforce the note" – which is the holder of the Note, a transferee of the Note who has possession, or one who is authorized to bring such action by the note holder.[14] Thus, when determining the proper party to enforce a Note, the law is simply not interested in determining who may have an underlying right in the proceeds of the Note, or who is the beneficial interest owner in the Note.

3. Florida's Law Regarding Who Has the Right to Enforce the Note Is Backed by Strong Policy Reasons.

There are also sound policy reasons behind the many decades of law divorcing proof of a beneficial interest from the requirements to enforce a Note. These reasons go to the root of the commercial purpose of negotiable instruments, which seek to prevent the imposition of any burden on a note-holder that is not

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[14] A foreclosure action is, of course, an action to enforce the note. *See Bobby Jones Garden Apartments v. Connecticut Mut. Life Ins. Co.*, 202 So. 2d 226 (Fla. 2d DCA 1967) (Basic purpose of foreclosure is to fully subject the security pledged to the payment of the obligation.) Moreover, MERS is the mortgagee on the mortgage contract, and the borrowers contractually agree that MERS is the proper party to foreclose. *See Smith v. FDIC*, 61 F.3d 1552 (11th Cir. 1995), *reh. den.*, 71 F.3d 884, *appeal aft. rem.*, 84 F.3d 437 (Mortgage is interest in property created by contract, and thus action to enforce that lien is clearly contract action.)

expressly found in the statute. The Supreme Court of Florida expressed this policy as far back as 1846, stating that Notes "being assignable by endorsement or delivery, circulating from hand to hand, in accordance with the liberal and comprehensive notions of commercial policy, and entering into every day transactions of life, every consideration demands that no restraint should be placed upon their free circulation by the enforcement of a principle of defence, not set forth in the plain words of the act, and in restraint of the remedy at common law." *White v. Camp,* 1 Fla. 94, 1846 WL 1003 (1846).[15]

Every bit of authority holds that beneficial interest or beneficial ownership is not a factor in the enforcement and foreclosure of negotiable

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[15] In fact, commercial reliance on the rationale underlying this policy is so strong that it has been the catalyst for recent changes in other sections of the UCC. Revised Article 9 of the Florida UCC expressly provides for securitization of the proceeds of a negotiable instrument. §679.3121, Fla. Stat. (2005). Thus, even if the original lender sues on a Note originally made payable to it, (appearing to be the model foreclosure complaint in the eyes of the trial court), in reality, it would be both expected and acceptable if third parties had perfected security interests in the Note securing a debt of the lender and recorded on a UCC-1 filing statement. *Id.* (allowing for perfection by filing or possession). Thus, the original lender whose name is on the Note would not "own" the proceeds or beneficial interest in the Note. Often Notes are secured with mortgage-backed securities. *See* W. Rodney Clement, Jr. Baxter Dunaway, Revised Article 9 and Real Property, 36 Real Prop. Prob. & Tr. J. 509, 528 (2001) ("Lenders commonly sell promissory notes secured by mortgages on real property shortly after closing. They may sell the notes to institutions that bundle large numbers of notes and issue mortgage-backed securities. The changes in Revised Article 9 are designed to make it easier to secure these assets.").

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instruments. Thus, this Court should reverse the Orders of Dismissal that were based solely on MERS' failure to allege some beneficial interest in the Notes.

C. MERS IS A PROPER PARTY

The trial court's Show Cause Order was rendered under the guise that MERS is never a proper party to foreclose regardless of the allegations contained in the Complaint. Indeed, in some twenty-eight cases MERS was ordered to explain why it is a proper party to foreclose. The trial court, however, did not rule on the issues raised in its own Show Cause Order. Rather, the trial court seized on MERS' lack of a beneficial interest in the Notes to invent a legal principle that requires all parties, not just MERS, to have such beneficial interests in order to foreclose. As amply shown, the trial court's "beneficial interest requirement" is simply wrong as a matter of law. In fact, however, MERS is and can most definitely be a proper party to enforce the Note and foreclose.

MERS properly responded to the issues raised by the Show Cause Order by establishing that it was a proper party to foreclose in these cases.[16] As noted, the borrowers contractually agreed that MERS is the proper party to foreclose. In *Boudreault*, MERS is the proper party because it has possession and

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16 Show Cause Order, p. 2 ("The Court has serious reservations as to whether MERS is a proper party . . . . The Court orders that this matter be presented to the Court at a return hearing on the Order to Show Cause why this case should not be dismissed for not being brought by the proper party.").

is the holder of the Note indorsed in blank, and because it was authorized by the lender to foreclose. In *Azize*, MERS is also the proper party, as the nominee authorized to foreclose by the lender, or note owner and holder, making it a proper party. In other instances, possession of the Note was transferred to MERS with the intent that MERS collect on the Note and foreclose.

1. MERS Is Authorized by Both the Borrowers and the Lenders to Foreclose.

Boudreault and Azize – the borrowers – signed the mortgage naming MERS as the mortgagee. (Boudreault 6-21, Azize 6-25). ("MERS is the mortgagee under this Security Instrument.") Under Florida law, such mortgage is a contract that creates rights and obligations. *David v. Sun Federal Savings & Loan Assoc.*, 461 So. 2d 93, 95 (Fla. 1984). *See also, Smith v. FDIC,* 61 F.3d at 156. The mortgage contract states that MERS holds "legal title to the interests granted by the borrower in the Mortgage." Critically, the borrower "understands and agrees" that "MERS (as nominee for the Lender") has the right to exercise any or all of the interests "granted in Mortgages, "**including. . . the right to foreclose and sell the property**." (emphasis added). The borrowers thus have contractually agreed that MERS is the proper party to foreclose.

The mortgage contract also references the Lender, and makes clear that MERS is acting on behalf of the Lender. Each Lender mentioned in the Note and Mortgage is a member of MERS, and such membership is governed by

binding agreements between MERS and the Lender. Most important, MERS and the Lender contractually agree that MERS is the mortgagee of record (thereby holding legal title to the mortgage lien) and that MERS may initiate foreclosure proceedings on behalf of the Lender.[17]

The result then is that the borrowers have agreed that MERS is the proper party to foreclose, and MERS has been specifically authorized by the respective Lender to initiate the foreclosure proceedings filed below. Under such circumstances, Florida law holds that MERS is indeed a proper party to foreclose. *See, e.g., Winter v. Trust Co. of Florida*, 124 So. 35 (Fla. 1929) (the bondholders expressly authorized the trustee to foreclose the mortgage upon default making it unnecessary for numerous bondholders to be made parties); *Parr v. Ft. Pierce Bank & Trust Co.*, 130 So. 445 (Fla. 1930) ("It is contended that the [plaintiff] is estopped from maintaining the present [foreclosure] suit because the bank was not made a party." Position held to be "untenable" because the complaint and exhibits show the bank **conveyed all rights in mortgage** to plaintiff); *Smith v. Massachusetts Mut. Life Ins. Co.*, 156 So. 498, 507 (Fla. 1934) (not necessary to

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[17] MERS Membership is governed by three binding agreements: (1) the Rules of Membership, (2) the Terms and Conditions and (3) the Procedures Manual (the "Agreements"). Rules of Membership, Rule 3, Section 3(a); Rule 8; Rule 2, Section 6; Terms and Conditions, paragraph 3. (Azize 59-60).

make bondholder parties to foreclosure where the trust deed expressly authorized the trustee to foreclose in case of default).

MERS is thus a proper party to foreclose as authorized by **both** the Lender and the borrower. And MERS initiated the foreclosure actions below (1) as the holder of the Note or (2) as the nominee authorized to foreclose by the owner and holder of the Note.

(a) MERS Is the Proper Party As the "Holder" of the Note

In *Boudreault*, MERS has possession of a Note that is "indorsed in blank." (Boudreault 80-83). As a result, MERS is the holder of the Note with the statutory authority to enforce it, and may bring the foreclosure action as the real party in interest.

A note "indorsed in blank" is payable to the bearer. § 673.2051(2), Fla. Stat. (2005) ("When indorsed in blank, an instrument becomes payable to bearer"); *see also City of Stuart v. Green, C.C.A.*, 91 F.2d 603 (5th Cir. 1937) (same, interpreting Florida law). By MERS having possession of a note indorsed in blank, MERS is considered to be the "holder" of the Note. § 671.201(20), Fla. Stat. (2005) ("'Holder . . . means the person in possession if the instrument is payable to bearer."); *Troupe*, 652 So. 2d at 395 ("The 'holder' is the person who is in possession of . . . an instrument . . . endorsed to the bearer or in blank.").

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As holder of the Boudreault Note, MERS possesses legal title in the Note in order to enforce it and MERS may collect on the Note even though it is **not** the "owner." § 673.3011, Fla. Stat. (2005) ("A person may be a person entitled to enforce the instrument **even though the person is not the owner of the instrument.**...") (emphasis added); *see also Jones v. Central Hanover Bank & Trust Co.*, 110 Fla. 69, 147 So. 895 (1933) (one who holds the full legal title to a note may bring an action thereon, **notwithstanding he has no beneficial interest in the proceeds**). Therefore, consistent with this Court's decision in *Troupe*, in cases such as *Boudreault* where MERS has possession of the Note indorsed in blank, MERS is the holder of the Note, who is "entitled to enforce" the Note – making MERS a real party in interest and a proper party to bring the mortgage foreclosure action. *Troupe*, 652 So. 2d at 394-395 ("To foreclose upon a promissory note, the plaintiff must be the 'holder' in order to be the real party in interest.)[18]

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[18] Not only is MERS the holder of the Note indorsed in blank, MERS is authorized to foreclose by the Borrower and the Lender. Florida law holds that such authorization by either the borrower or the Lender is not necessary when one holds a Note indorsed in blank. *See Busch v. City Trust Co.*, 134 So. 226 (Fla. 1931) (where a trust deed or mortgage is executed and delivered to secure the payment of numerous bonds made "payable to bearer," and there is no express provision in the trust deed or mortgage specifically authorizing the trustee to foreclose, trustee may foreclose such deed or mortgage without joining the holders of such bonds – even in

(b) MERS Is the Authorized Nominee of the Lender Foreclosing a Mortgage Made in the Name of MERS.

MERS is a proper party to bring the foreclosure action as a nominee authorized to foreclose by the Lender. As a member of MERS, the Lender has authorized MERS to bring the foreclosure action on its behalf. Moreover, MERS is, *albeit* perhaps nominal, the contracting party on the mortgage with the borrower. Under these circumstances, Florida Rule of Civil Procedure 1.210(a) permits foreclosure actions to be brought in the name of MERS. Rule 1.210(a) provides in pertinent part:[19]

> Every action may be prosecuted in the name of the real party in interest, but a personal representative, administrator, guardian, trustee of an express trust, **a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought....**(emphasis added).

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absence of terms specifically authorizing such trustee to foreclose in his name only.)

[19] Florida adopted a real party in interest statute in 1881 that was almost identical to Rule 1.210. *See* Ch. 4201, Laws of Fla. (1927) ("Any civil action at law may be maintained in the name of the real party in interest. This shall not be deemed to authorize the assignment of a thing in action not arising out of contract. An executor, administrator, trustee of an express trust (including a person with whom or in whose name contract is made for the benefit of another, or when expressly authorized by statute), may sue without joining with him the person for whose benefit the action is prosecuted.").

Rule 1.210(a) specifically permits an action to be brought in the name of someone other than the real party in interest but who acts for the real party in interest. *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178, 1183 (Fla. 3d DCA 1985). Thus, MERS, as a nominee authorized to foreclose by the Lender and Note-holder may bring an action on behalf of the Lender in MERS' name as specifically authorized by Rule 1.210.

Florida courts recognize instances where a party may bring an action in its name for the benefit of another. *See, e.g., Kumar Corp.*, 462 So. 2d at 1185; *see also* Trawick's Florida Practice and Procedure, § 4-2 (2005) ("A nominee may be a party."). As stated in *Durant,* 396 So. 2d at 1226, "[i]t is very clear that [Rule 1.210] means just what it says and that a **nominal contracting party**...is permitted, at his option, to bring an action in his own name, without joining the real party in interest." (emphasis added).[20]

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[20] The legal principles of "standing" and "real party in interest" overlap. In its broadest sense, standing is having "a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Sierra Club v. Morton,* 405 U.S. 727, 731-32 (1972); *Argonaut Insurance Co. v. Commercial Standard Insurance Co.,* 380 So. 2d 1066 (Fla. 2d DCA), *rev. denied,* 389 So. 2d 1108 (Fla. 1980). Such stake in the controversy need not be an economic one. *Association of Data Processing Service Organizations Inc. v. Camp*, 387 U. S. 150 (1970). There can be no doubt that MERS – as the contracting party on the mortgage and as the named mortgagee – has a sufficient stake in the controversy.

In *Kumar*, a seller delivered goods to a shipper from whom they were stolen. *Id.* The agreement between the seller and buyer was unclear as to who bore risk of the loss, and neither party had purchased insurance. *Id.* The Third District held that even if the buyer was the real party in interest, Kumar Corp., the seller, was entitled to bring suit on behalf of the buyer as its authorized agent. *Id.* at 1185. The Court reasoned that Rule 1.210 permits an action to be prosecuted in the name of someone other than the real party in interest if that party is acting for and on behalf of the real party in interest. *Id.* at 1183 (Where a plaintiff maintains an action on behalf of the real party in interest, "its action cannot be terminated on the ground that it lacks standing."). The Court in *Kumar* did not rely on the contractual relationship between the seller and buyer. Rather, the Court specifically held that a "**nominal party, such as an agent, may bring suit in its own name for the benefit of the real party in interest**." (emphasis added). *Id.* at 1185.[21]

The Eleventh Circuit Court of Appeals recognized a loan servicer as a "real party in interest" with standing to sue for the benefit of the lender. *Greer v.*

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[21] Rule 1.120(a) also provides that a party expressly authorized by statute may bring an action in its own name. Florida's UCC specifically authorizes certain persons to enforce actions on the Notes. As discussed, MERS is statutorily authorized as a "person entitled to enforce a note." § 673.3011, Fla. Stat. (2005). *See,* § IVB2, *infra.*

O'Dell, 305 F.3d 1297, 1302 (11th Cir. 2002) ("The sole issue before us is whether a loan servicer is a 'real party in interest' with standing to conduct, through licensed counsel, the legal affairs of the investor relating to the debt that it services. We answer this question in the affirmative."). A loan servicer and MERS have very similar legal interests in a mortgage loan – both are authorized to foreclose by the Note owner and holder.

In sum, MERS is the proper party to bring these foreclosure actions as the authorized nominee of the lender and as the party who entered into the mortgage contract on behalf of the lender. *See Kumar,* 462 So. 2d at 1185; *see also Greer*, 305 F.3d at 1302.[21]

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[21] Circuit courts throughout the State of Florida have allowed MERS to foreclose in its name as the nominee of the Lender. *See MERS, as Nominee for Countrywide Home Loans, Inc. v. Foster*, No. 2004-3956 (Fla. 4th Cir. Ct. Dec. 17, 2004) ("[A]ppropriate definition of nominee in this case includes MERS' capacity to seek judicial foreclosure of mortgages, on behalf of Countrywide. Countrywide is **not** an indispensable party because **it is a party by way of its representation by MERS as its nominee.)** (emphasis added); *MERS, as Nominee for Countrywide Home Loans, Inc. v. Foster*, 12 Fla. L. Weekly 648a (Fla. 4th Cir. Ct. Apr. 8 2005) (Rule 1.210 permits nominee to sue in its own name and MERS may bring a foreclosure action for the benefit of Lender); *MERS v Davidson*, No. 04-14422 (Fla. 11th Cir. Ct. Sept. 8, 2005) ("The equities of this action are with Plaintiff MERS, as Nominee for Chapel Mortgage, and the Court finds Plaintiff MERS has standing in this case."); *MERS v. George*, No. 2004-6501 (Fla. 4th Cir. Ct. Aug. 17, 2005) (MERS is allowed to bring foreclosure action in its own name as nominee for the lender, its successors and assigns); *MERS v. Quijano*, No. 04-1588 (Fla. 9th Cir. Ct. Dec. 13, 2004) ("Plaintiff [MERS] has standing to maintain this action."); *MERS v. Morales*, No. 03-6492 (Fla.

(c) MERS Is the Proper Party As the Transferee in Possession of the Note

There are also instances where the Note was transferred by the lender to MERS with the intent that MERS enforce the Note. Thus, MERS would have possession of the Note with the same rights as the transferor, *i.e.*, the lender, to enforce the Note. § 673.2031(2), Fla. Stat. (2005) ("Transfer of instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as holder in due course."); § 673.3011, Fla. Stat. (2005) ("The term 'person entitled to enforce' an instrument means… (2) a nonholder in possession of the instrument who has the rights of a holder."). In cases where the Note is transferred to MERS for the purpose of enforcement, but without a special endorsement or endorsement in blank, MERS has whatever right the transferor had in the Note. *Ederer v. Fisher*, 183 So. 2d 39 (Fla. 2d DCA 1966) (transfer without endorsement passes such title as the transferor had). In such cases, MERS is entitled to enforce the Note to the same extent that the assignor or transferor could enforce the Note and becomes vulnerable to the same defenses which were good against the transferor. *Id.*

For purposes of standing to enforce a Note, the UCC does not distinguish between a holder in due course, a bearer of an instrument indorsed in

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13th Cir. Ct. Nov. 5, 2004) (denied Defendant's Motion to Dismiss that claimed MERS as a nominee lacked standing).

blank, a transferee in possession to enforce the instrument, an assignment on separate paper, or a special endorsement. Each is equally granted standing to sue. *See* §§ 673.2051(2), 673.2031(2), Fla. Stat. (2005); *City of Stuart*, 91 F.2d 603; *Ederer*, 183 So. 2d 39; 11 Am. Jur. 2d *Bills and Notes* § 235 (2005) ("A person who comes within any of the categories listed in the statute is entitled to enforce an instrument and it is immaterial whether the person is the owner of the instrument…").[22] MERS may thus also enforce the Note and foreclose as a "non-holder" in possession of the Note.

2. The Goal Of *Res Judicata* Is Met When MERS Is the Party Plaintiff.

The purpose of the real party in interest rule is to "protect the defendant against a subsequent action by the party actually entitled to recovery, and to ensure generally that the judgment will have its proper effect as *res judicata*." *Greer,* 305 F.3d at 1303*; see Dollar Systems Inc. v. Detto*, 688 So. 2d 470 (Fla. 3d DCA 1997) (court required amendment of complaint to show

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[22] There are distinctions between a holder in due course and other recognized holders or parties with the rights of a holder. § 673.3061, Fla. Stat. (2005) ("A person taking an instrument, other than a person having rights of a holder in due course, is subject to a claim of a property or possessory right in the instrument or its proceeds."). Such distinctions are relevant only with regard to the defenses available to the maker of the Note against the party enforcing it. These distinctions are, however, not germane as to who is the proper party to foreclose.

representative capacity). This purpose is satisfied when the party on whose behalf the suit is brought ratifies the action. *Kumar Corp.*, 462 So. 2d at 1185.

The *res judicata* purpose of the real party in interest rule is more than satisfied. First, MERS is named in the original mortgage contract as the party to bring a foreclosure action on behalf of the lender, its successors and assigns. Second, MERS' role as a nominee acting on behalf of the Lender is embodied in contracts between MERS and all of its members. If a borrower doubts MERS' relationship or MERS' authorization from the lender, these publicly available agreements can be produced. MERS only brings foreclosure actions on behalf of its members, to whom MERS is contractually bound to bring such actions at the member's request. All of these things amply demonstrate that the Lender has directed MERS' action and that the borrower has acknowledged MERS' right to foreclose.

Finally, the statutory requirements of any suit on a Note remove the potential for any subsequent action by a party entitled to recovery proceeds from the Note because such party would be required to present the Note. § 673.5011 (2)(b), Fla. Stat. (2005); *National Loan Investors v. Joymar Associates*, 767 So. 2d 549 (Fla. 3d DCA 2000) ("lender is required to either present the original [Note] or give satisfactory explanation for the lender's failure to present it"). Thus, in the end, the Note must either be presented or if the Note is lost the plaintiff must

satisfy the Court as to its rights and possession in accordance with the statute. § 673.3091, Fla. Stat. (2005) ("Enforcement of lost, destroyed, or stolen instrument"). Once a Note is presented and taken out of circulation, or once a court satisfies itself as to the requirements of the lost note statute, there is no subsequent action that can be brought and any action by MERS will have its full *res judicata* effect.

D. THE COMPLAINTS PLED THE NECESSARY ELEMENTS TO STATE A MORTGAGE FORECLOSURE ACTION

Above, MERS demonstrated that the trial court's stated legal basis for dismissal is at odds with a long line of Florida precedent and statutes, including those in effect today. In fact, the Complaints in *Azize* and *Boudreault* pled what is required in the form complaint approved by the Florida Supreme Court. *Compare* Fla. R. Civ. P. Form 1.944, *with* the Complaints below (Azize 1-25, Boudreault 1-24). This Court holds that a complaint following a form approved by the Supreme Court states a cause of action. *Muller v. Muller*, 205 So. 2d 558 (Fla. 2d DCA 1967); *see* Fla. R. Civ. P. 1.900(b) ("Forms are sufficient for the matters covered by them.") Moreover, the Complaints attached the MERS mortgage contract as an exhibit. Thus, the content of the mortgage is pled in the Complaint,

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which means the Complaint alleges that MERS is the mortgagee and that the defendant-borrowers agree that MERS is the proper party to foreclose.[23]

The Order Regarding Standing makes vague and general references to inconsistencies between the allegations contained in the Complaint and "documents within the Court file." (Azize 177). A review of "the contents of the file" is expressly prohibited when deciding whether a Complaint states a cause of action. It is axiomatic that in ruling on whether a complaint states a cause of action, "the trial court **must** confine itself strictly to allegations contained within the four corners of the complaint." *McWhirter, Reeves v. Weiss*, 704 So. 2d 214, 215 (Fla. 2d DCA 1998) (emphasis added). The trial court must then take as true all of the allegations contained in the Complaint. *Mettler, Inc. v. Ellen Tracy, Inc.*, 648 So.2d 253, 255 (Fla. 2d DCA 1994) ("In reviewing an order dismissing a complaint for failure to state a cause of action this court must look only to the four corners of the complaint, accepting the allegations of the complaint as true and resolving all reasonable inferences in favor of the plaintiff."). It appears that the trial court overlooked this fundamental rule of law by reviewing evidence and

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[23] Fla. R. Civ. P. 1.130(b) ("Any exhibit attached to a pleading shall be considered a part thereof for all purposes."); *Fidelity and Cas. Co. of New York v. L.F.E. Corp.*, 382 So. 2d 363 (Fla. 2d DCA 1980) (Exhibits attached to pleadings are considered part of the pleadings.)

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information beyond the four corners of the complaints, including "documents in the files" and affidavits in support of summary judgment motions.[24]

The trial court, however, did not find any inconsistencies between the allegations contained in the *Azize* and *Boudreault* Complaints and the "documents within the Court file." [25] *See generally* Order Regarding Standing. Moreover, the exhibits attached to the pleadings in *Azize* and *Boudreault* did not contradict the allegations contained in the Complaints, and the court did not identify any such

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[24] *See Surat v. Nu-Med Pembroke, Inc.*, 632 So.2d 1136 (Fla. 4th DCA 1994) (Minimal procedural safeguards are required by due process, especially when the Court, *sua sponte,* dismisses an action for failure to state cause of action.). The court in *Surat* also questioned the trial Court's right to, *sua sponte,* dismiss a Complaint for failure to state a cause of action. *See id. generally* at 1136-1138.

[25] The trial court also erred to the extent its decision requiring that MERS must have a beneficial interest is linked to MERS not being the real party in interest. Complaints do not need to plead any facts relating to the real party in interest or a party's capacity to sue. Fla. R. Civ. P. 1.120 ("It is not necessary to aver the capacity of a party to sue . . . the authority of a party to sue . . . in a representative capacity or the legal existence of an organized association of persons that is made a party . . . .) Thus, the trial court could not conclude from the Complaints alone that MERS is not a proper party. In addition, the issue of standing or being a proper party is an affirmative defense that must be pled by a defendant or the issue is waived. *See Krivanek v. Take Back Tampa Political Committee* 625 So. 2d 840, 842 (Fla. 1993) ("The issue of standing should have been raised as an affirmative defense before the trial court, and [the] failure to do so constitutes a waiver of that defense."). None of the defendants below pled affirmatively that MERS is not the proper party, that MERS is not the real party in interest, or that MERS lacked standing, nor did any of the defendants below seek dismissal of the Complaint for such reasons.

contradictions. The result is that if the allegations in the Complaints are taken as true, which they must be, those Complaints state a mortgage foreclosure action.

Finally, even if this defense was properly raised, the trial court should not have dismissed the Complaints **with prejudice** because they failed to allege MERS' standing or representative capacity or that MERS is a proper party. *See Wittington Condominium Apartments v. Vraemar Corporation*, 313 So. 2d 463, 466 (Fla. 4th DCA 1975) (Insufficiency of pleadings to allege the proper representation capacity is not a basis for a final dismissal until an opportunity to amend had been granted, and there is an inability to comply therewith).[26]

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[26] To the extent the trial court's dismissal of the Complaint was because of "pleading deficiencies," inconsistent allegations, and the like, MERS should have also been given an opportunity to cure those deficiencies by amending the Complaints. *See Kapley v. Borchers,* 714 So. 2d 1217, 1218 (Fla. 2d DCA 1998) ("Where a party may be able to allege additional facts to support its cause of action or to support another cause of action based on a different legal theory, dismissal with prejudice is an abuse of discretion."); *Countryside Christian Center, Inc. v. City of Clearwater,* 542 So. 2d 1037, 1038 (Fla. 2d DCA 1989) ("Appellant admits that the complaint was deficient, but argues that it should have been granted leave to amend. We agree. It is error for a trial court to dismiss a complaint with prejudice where the complaint is not clear that the complaint cannot be amended."); *Highlands County School Bd. v. K. D. Hedin Const., Inc.,* 382 So. 2d 90, 91 (Fla. 2d DCA 1980) ("The trial court properly dismissed the amended complaint for failure of the School Board to allege sufficient ultimate facts. However, dismissal with prejudice cannot be justified on this basis alone.").

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V. CONCLUSION

Because there is absolutely no requirement in Florida law that a party must allege and prove a beneficial interest in a negotiable instrument in order to enforce that instrument and foreclose on the secured property, and because MERS is a proper party to bring these mortgage foreclosure actions, this Court should reverse the trial courts Orders of Dismissal and Order Regarding Standing and remand each case so that MERS may proceed as a proper party to foreclose.

Respectfully submitted,

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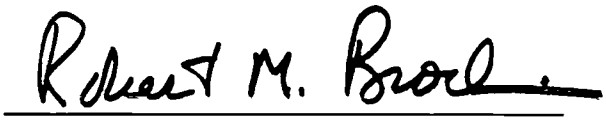

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CERTIFICATE OF SERVICE

I certify that the original and three copies of the foregoing *Appellant's Initial Brief* were sent to the Clerk of the Second District Court of Appeals, and a copy was served via U.S. Mail on January 20th, 2006, to each of the parties listed on the attached Service List.

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CERTIFICATE OF COMPLIANCE PURSUANT TO FLORIDA RULE OF CIVIL APPELLATE PROCEDURE 9.210(A)(2)

I hereby certify that this brief was composed and printed in 14 point Times New Roman font in compliance with the font requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2).

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