

## NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse  
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June 29, 2011

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Re: *Sandra Graves v. Mortgage Electronic Registration Systems, Inc., et al.*  
Case No. CL-2010-17101

Dear Counsel:

This matter is before the Court on Defendant Mortgage Electronic Registration Systems' ("MERS") Demurrer. Upon consideration of the pleadings, arguments of counsel, and the applicable governing authorities, the Court sustains MERS's Demurrer.

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### Background<sup>1</sup>

This action arises from a residential mortgage foreclosure. Plaintiff Sandra Graves purchased the property located at 12750 Lavender Keep Circle, Fairfax, VA 22033 (the "Property") on June 25, 2004. To effectuate the transaction, Graves executed a promissory note ("Note") and deed of trust ("Deed of Trust"). The Deed of Trust identifies First American Mortgage as "Lender," MERS as "beneficiary," and John Romano as "Trustee."

Pertinent to this motion, the Deed of Trust also contains the following language:

(E) "MERS" . . . is a separate corporation that is acting solely for Lender and Lender's successors and assigns. MERS is the mortgagee under this [s]ecurity [i]nstrument . . .

(R) . . . The beneficiary of this [s]ecurity [i]nstrument is MERS (solely as nominee for Lender and Lender's successor and assigns) and the successors and assigns of MERS . . .

Borrower understands and agrees that MERS holds only legal title to the interests granted by [b]orrower in this [s]ecurity [i]nstrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successor 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 [p]roperty; and to take any action required of Lender including, but not limited to, releasing or cancelling this [s]ecurity [i]nstrument . . .

24. Lender, in its option, may from time to time remove Trustee and appoint a successor trustee . . .

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<sup>1</sup> This Court granted MERS's Motion Craving Oyer on March 11, 2011, which appended to the Complaint copies of the Deed of Trust, the Deed of Appointment of Substitute Trustee, and the Note. Therefore, the Court can consider these documents in deciding the instant demurrer. See *Smith v. Chesterfield Meadows Shopping Ctr. Assocs., L.P.*, 259 Va. 82, 85, 523 S.E.2d 834, 835 (2000) (a court may consider the contents of documents that are a part of the pleading, or mentioned in the pleading and produced pursuant to a motion craving oyer); *Wards Equip. Inc. v. New Holland N. America, Inc.*, 254 Va. 379, 382, 493 S.E.2d 516, 518 (1997) (same).

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In 2010, Graves began receiving demands for payment and threats of foreclosure from Defendant Atlantic Law Group ("ALG"), alleging that the Note was in default. On October 14, 2008, Graves, through counsel, sent ALG a "Qualified Written Request" ("QWR") pursuant to the Fair Debt Collection Practices Act and Section 6 of the Real Estate Settlement Procedures Act. Graves claims that "no adequate response to the QWR" was ever received.

On November 22, 2010, ALG sent a letter to Graves indicating that the Property was scheduled for foreclosure on December 6, 2010. This letter also contained a copy of the Deed of Appointment of Substitute Trustee ("DOAST") that ALG was using to effectuate the foreclosure. The DOAST was executed by MERS on November 11, 2010, and it states that:

THIS DEED OF APPOINTMENT OF  
SUBSTITUTE TRUSTEE is made . . . by [MERS]  
("Beneficiary").

WHEREAS, the Beneficiary is the holder of a Deed  
of Trust dated June 25, 2004, from [Graves] to certain  
trustees therein . . .

The Beneficiary does hereby appoint ALG Trustee,  
LLC as Substitute Trustee under the Deed of Trust.

Although ALG and MERS notified Graves and scheduled a foreclosure sale on December 6, 2010, the Property was never foreclosed upon. Indeed, Graves is still living in the Property. The foreclosure sale now appears on hold pending the outcome of this litigation.

On December 6, 2010, Graves filed the instant action alleging: (1) entitlement to a judgment declaring the foreclosure unlawful; (2) that MERS does not have authority to appoint a substitute trustee or effectuate a foreclosure; (3) that MERS and ALG committed negligence during the foreclosure process; and (4) a quiet title order removing the DOAST from the land records is necessary given the unlawful foreclosure. Graves' Complaint specifically includes the following counts:

Count I Declaratory Judgment as to MERS

Count II Negligence as to MERS and ALG

Count III Quiet Title as to MERS

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On February 11, 2011, Graves nonsuited ALG. Accordingly, the only remaining Defendant is MERS.

On March 18, 2011, MERS docketed the instant demurrer. At the conclusion of the hearing, the Court opted to take MERS's Demurrer under advisement and instructed both parties to submit supplemental briefs. The Court has now had the opportunity to review the pleadings, briefs, and testimony, and is prepared to rule as follows.

### Analysis

#### *Standard on Demurrer*

The function of a demurrer is to test the legal sufficiency of the claims stated in the challenged complaint. *Thompson v. Skate Am., Inc.*, 261 Va. 121, 128, 540 S.E.2d 123, 126 (2001). Although a demurrer does not admit the correctness of the complaint's conclusions of law, it does "admit[] the truth of all material facts that are properly pleaded, facts which are impliedly alleged, and facts which may be fairly and justly inferred." *Id.* Therefore, when considering a demurrer, "the sole question to be decided by the trial court is whether the facts thus pleaded, implied, and fairly and justly inferred are legally sufficient to state a cause of action against the defendant." *Id.*, 540 S.E.2d at 126-27. A demurrer presents only a question of law to be decided by the court. *Tazewell County Sch. Bd. v. Snead*, 198 Va. 100, 103, 92 S.E.2d 497, 500 (1956).

When a demurrant's motion craving oyer has been granted, the court in ruling on demurrer may consider the facts alleged as amplified by any written attachment added to the record on the motion. *Hechler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. 396, 398, 337 S.E.2d 744, 746 (1985). Moreover, a court considering a demurrer may ignore a party's factual allegations contradicted by the terms of an authentic, unambiguous document admitted through craving oyer. *Wards Equip. Inc. v. New Holland N. America, Inc.*, 254 Va. 379, 382, 493 S.E.2d 516, 518 (1997).

With these principles in mind, the Court will address whether the factual allegations in Graves' Complaint are, as a matter of law, sufficient to state a claim against MERS under Counts I, II, or III.

#### *Count I – Declaratory Judgment*

"The purpose of the declaratory judgment statute is to provide a mechanism for resolving uncertainty in controversies over legal rights, without requiring one party to invade the asserted rights of another in order to permit an ordinary civil

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action for damages." *Umstatted v. Centex Homes, G.P.*, 274 Va. 541, 548, 650 S.E.2d 527, 531 (2007) (citing Va. Code § 8.01-191). Here, Graves asserts that she is entitled to declaratory relief because MERS lacks authority to enforce the terms of the Deed of Trust; specifically, MERS is without authority to appoint a substitute trustee to foreclose on the Property. Therefore, Graves is asking the Court for a judgment declaring the pending foreclosure action invalid. Graves makes several arguments as to why MERS has no authority to enforce the terms of the Deed of Trust, and the Court rejects each of these arguments in turn.

First, Graves' argues that MERS has no authority to enforce the terms of the Deed of Trust because MERS is not the lender who, according to Graves, is the only party authorized to remove and appoint substitute trustees to foreclose on the Property. This argument fails in light of the security instruments themselves. The plain language in the Deed of Trust authorizes MERS to foreclose on the Property in the event that Graves defaulted on the loan. The Deed of Trust states that "[t]he beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS." The Deed of Trust also provides 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 these interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender . . . .

Furthermore, the Deed of Trust states that the lender, at its option, may from time to time remove trustee and appoint a successor trustee. Thus, under the Deed of Trust, MERS has two roles: beneficiary and nominee for lender. By signing the Deed of Trust, Graves agreed that MERS, as nominee for lender and lender's successors and assigns, has the right to foreclose on the Property and recognizes that MERS could take any action required of lender. Deeds of trust are treated as contracts, and nothing under Virginia law appears to prohibit a lender and borrower from agreeing to allow a third party, such as MERS, to enforce the terms of a deed of trust.

Graves, nonetheless, argues that the Deed of Trust only authorizes MERS to exercise the rights of the lender "if necessary to comply with law or custom," and MERS lacked authority to appoint a substitute trustee in this case because no law or custom compelled it to act. The Court finds this argument unavailing. The "if necessary to comply with law or custom" language does not, as Graves asserts, require that the nominee have the power to act only when directed by law; rather,

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the nominee may act on behalf of the lender as authorized by the Deed of Trust. It is this document that explicitly defines the nominee's powers and is binding on the parties under Virginia contract law, and the Deed of Trust in this case specifically authorizes MERS to appoint a substitute trustee whenever the lender could act. A review of the Deed of Trust makes clear that MERS had the authority to appoint successor trustees.

Graves further argues that Virginia Code § 55-59(9) prohibits MERS from appointing a substitute trustee to conduct the foreclosure proceedings in this case. Section 55-59(9) states "[t]he party secured by the deed of trust, or the holders of greater than fifty percent of the monetary obligations secured thereby, shall have the right and power to appoint a substitute trustee or trustees for any reason." Va. Code Ann. § 55-59(9) (2011). According to Graves, MERS lacks the power to appoint a substitute trustee because it is not entitled to greater than fifty percent of the obligations due under the Note. Graves, however, signed the Deed of Trust, which clearly states that MERS is also the nominee of the lender and may act on behalf of the lender to foreclose on the Property in the event of a default. Furthermore, when a deed of trust provides otherwise the statutory requirements in § 55-59 are inapplicable. See Va. Code Ann. § 55-59(9). Here, the Deed of Trust specifically authorizes MERS to appoint a substitute trustee to conduct foreclosure proceedings. The Court, therefore, rejects this argument.

Graves asserts one additional argument for why MERS has no authority to enforce the terms of the Deed of Trust. According to Graves, the Deed of Trust's plain text forbids anyone but the lender from appointing a substitute trustee and foreclosing on the property. Graves' argument here is a bit complicated, and rests on the interpretive canon that "expressing one item of a commonly associated group or series excludes another left unmentioned." *United States v. Vonn*, 535 U.S. 55, 65 (2002).

As Graves points out, the Deed of Trust defines the term "Lender" as First American Mortgage and quite clearly specifies when actors besides the Lender may take actions to administer the deed of trust. For example, Section 7 allows the "Lender or its agent" to make "reasonable entries upon and inspections of the Property," and Section 22 requires the "Lender or Trustee" to give notice to the borrower if the Lender decides to sell the property. But the deed of trust allows only the "Lender" to "invoke[ ] the power of sale" (in Section 22) and "appoint a successor trustee" (in Section 24). Thus, argues Graves, while the parties allowed the Lender's agents and trustees to stand in the Lender's shoes for some purposes, the parties did not see fit to extend the powers of sale and appointment. Accordingly, because the Deed of Trust specifies that only the Lender can appoint a substitute trustee, MERS lacks authority to take such action.

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This argument fails when read with other provisions of the Deed of Trust that clearly provide MERS may exercise all rights and interests of the Lender or its successors and assigns. Indeed, the interpretation advanced by Graves would render irrelevant the first paragraph of the Deed of Trust that states "MERS (as nominee for Lender and Lender's successor 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 [p]roperty; and to take any action required of Lender . . . ." The better reading — and the one that comports with common sense — is to read the Deed of Trust as a whole. *See Wards*, 254 Va. at 384, 493 S.E.2d at 519 ("A contract must be construed as written and as a whole with all parts being harmonized whenever possible."); *Paramount Termite Control Co., Inc. v. Rector*, 238 Va. 171, 174-75, 380 S.E.2d 922, 925 (1989) (same). Considering the Deed of Trust as a whole, it is clear that its terms grant MERS authority to appoint a substitute trustee and enforce the terms of the Deed of Trust.

Additionally, several federal decisions in Virginia have examined and dismissed these exact arguments raised by Graves. *See Tapia v. United States Bank, N.A.*, 718 F. Supp. 2d 689, 696-697 (E.D. Va. 2010); *Ramirez-Alvarez v. Aurora Loan Servs., LLC*, No. 01:09cv1306, 2010 U.S. Dist. LEXIS 116995, at \*7-8 (E.D. Va. July 21, 2010). For example, in *Ruiz v. Samuel I. White, P.C., et al.*, No. 1:09-cv-688, 2009 U.S. Dist. LEXIS 115455, at \*1 (E.D. Va. Dec. 11, 2009), the court found that MERS, as nominee and beneficiary, had the authority to appoint successor trustees under the plain terms of the deed of trust. In *Ruiz*, a homeowner who defaulted on her mortgage loan alleged MERS lacked authority to appoint a substitute trustee to conduct a foreclosure proceeding on her property. *Id.* The court dismissed the claim because, according to the deed of trust, "MERS (as nominee for Lender and Lender's successors and assigns) ha[d] the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property." *Id.* at \*2. The court further held that "[t]he 'if necessary to comply with law or custom' language [in the deed of trust] does not . . . require that the nominee have the power to act only when directed by law . . ." *Id.* at \*1. Similarly, in the current suit, Graves' allegation that MERS has no right to foreclose on the Property fails.

Although Graves contends that MERS has no authority under the Deed of Trust to enforce its provisions or appoint a successor trustee, this argument is contrary to the language in the Deed of Trust and the prevailing law in Virginia. As such, Graves' allegation that the pending foreclosure action is invalid on such grounds is untenable. Therefore, MERS's Demurrer as to Count I is sustained.

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### *Count II – Negligence*

Under Count II, Graves alleges that “MERS has negligently presumed its authority to enforce the terms of the Deed of Trust, when it is not the successor in interest to the lender . . . .” Count II further asks the Court to “award damages . . . in an amount reasonable to compensate” Graves for her financial losses resulting from said negligence.

A plaintiff who seeks to establish actionable negligence must plead the existence of a legal duty, violation of that duty, and proximate causation which results in injury. *Delk v. Columbia/HCA Healthcare Corp.*, 259 Va. 125, 132, 523 S.E.2d 826, 830 (2000) (citations omitted). Although an allegation of negligence is sufficient without specifying the particulars of negligence, *see* Va. Sup. Ct. R. 3:18, a plaintiff must still allege facts sufficient to support each element. *See Rodriguez v. N. Va. Elec. Coop.*, 79 Va. Cir. 266, 270 (Loudoun 2009) (Chamblin, J.).

The Court sustains MERS’s Demurrer as to Count II on the same grounds discussed above. Graves makes the same arguments in support of Count II as presented in Count I, namely that MERS lacks authority to enforce the Deed of Trust. As discussed in the analysis above, these arguments fail because the Deed of Trust specifically authorizes MERS to enforce the Deed of Trust and appoint a substitute trustee. Additionally, the facts alleged fail to demonstrate the existence of any legal duty on the part of MERS. Accordingly, MERS’s Demurrer as to Count II is sustained.

### *Count III – Quiet Title*

It is well established in Virginia law that equity has inherent jurisdiction to quiet title to land and remove a cloud therefrom. *Day v. Vaughn & Usilton, Inc.*, 193 Va. 168, 171, 67 S.E.2d 898, 901 (1951). An action to quiet title is based on the premise that a person with good title to certain real or personal property should not be subjected to various future claims (i.e. clouds) against that title. *Maine v. Adams*, 277 Va. 230, 238, 672 S.E.2d 862, 866 (2009). A plaintiff asserting a quiet title claim must plead and prove that she has superior title to the property over the defendant. *See id.*

In the instant count, Graves claims that she is entitled to an order striking the land records MERS filed while executing the invalid foreclosure. Specifically, Graves is asking that the Court “enter an order directing the clerk to strike/remove the [DOAST].” Graves asserts two distinct arguments under this count, and, as explained below, neither of these arguments has merit.



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First, Graves reasserts the same arguments raised in Count I, namely that MERS lacked authority to enforce the Deed of Trust or appoint a substitute trustee. Thus, argues Graves, the Court should strike the DOAST and any other land records MERS filed to effectuate the invalid foreclosure. As discussed in the analysis above, these arguments fail because the Deed of Trust specifically authorizes MERS to enforce the Deed of Trust and appoint a substitute trustee.

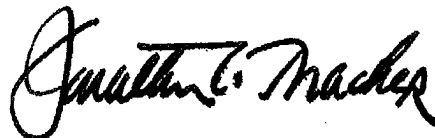
Second, Graves argues that the DOAST is void because MERS made untruthful assertions in the document. According to Graves, MERS falsely identified itself in the DOAST as the "Beneficiary" of the Deed of Trust, and thus the Court should strike this record. This argument, however, fails in light of the language contained in the Deed of Trust. The term "beneficiary," as set forth in the Deed of Trust, includes MERS's nominee status. The Deed of Trust specifically states that "[t]he beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) . . ." Graves signed and agreed to the Deed of Trust, which expressly provides that the beneficiary, MERS, was also the nominee of the lender. Accordingly, by executing the DOAST and identifying itself as the "beneficiary," MERS was complying with the designation and status provided in the Deed of Trust. Therefore, Graves' argument that MERS's designation as "beneficiary" was a misstatement is fundamentally flawed.

Given the Court's foregoing discussion, the Court has no basis to award the relief sought by Graves in Count III. Therefore, MERS's Demurrer as to Count III is sustained.

### Conclusion

For the reasons set forth above, MERS's Demurrer is sustained as to Counts I, II, and III. An order is enclosed.

Sincerely,



Jonathan C. Thacher  
Circuit Court Judge, Fairfax County

Enclosure

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

SANDRA GRAVES, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 MORTGAGE ELECTRONIC )  
 REGISTRATION SYSTEMS, INC., ET AL., )  
 )  
 Defendants. )

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ORDER

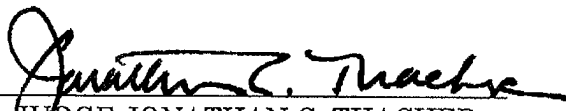
THIS MATTER came to be heard on Defendant Mortgage Electronic Registration Systems, Inc.'s Demurrer; and

IT APPEARING to the Court for the reasons stated in the Court's Letter Opinion of June 29, 2011, that the Demurrer should be sustained; it is therefore

ORDERED that the Court's Letter Opinion of June 29, 2011, is incorporated into this Order; it is further

ORDERED that Defendant's Demurrer is SUSTAINED with prejudice.

ENTERED this 29<sup>th</sup> day of June, 2011.

  
 JUDGE JONATHAN C. THACHER

In order to expedite the disposition of this matter, endorsement of this Order by counsel of record for the parties is waived in the discretion of the Court pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia.