2012 WL 811507 (N.D.Tex.) (Trial Motion, Memorandum and Affidavit)
United States District Court, N.D. Texas,
Dallas Division.

DALLAS COUNTY, TEXAS, et al., Plaintiffs,

v.

MERSCORP, INC. et al., Defendants.

No. 3:11-CV-02733-O.
March 9, 2012.

Memorandum in Support of Defendants' Joint Motion to Dismiss

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INTRODUCTION

In this putative class action filed on behalf of all Counties in the State of Texas, the three Plaintiff counties contend that Defendants [1] have recorded false documents in the land records the counties maintain and have failed to record other documents, allegedly required to be recorded, thereby depriving the Counties of recording-fee revenue. At issue are mortgages and deeds of trust in which lenders and borrowers agreed that Mortgage Electronic Registration Systems, Inc. ("MERS") would serve as beneficiary (on deeds of trust) or mortgagee (on mortgages), as nominee for the lender and successor holders of the underlying promissory note ("MERS Mortgages"). The agreement enables MERS to track transfers of the notes without need for creating successive, parallel assignments of the security instrument -- which avoids unnecessary errors and delays, and, by easing burdens on loan sales, promotes the freeing up of capital for financial institutions to lend to others. As discussed below, and unsurprisingly given the obvious advantages of the MERS system, the Texas Legislature has explicitly approved of MERS' appearance as mortgagee or beneficiary in security instruments recorded in county land records.

The Counties' First Amended Complaint frames many causes of action, but each rests on one of two theories. First, they contend MERS has no real interest in loans, and so designating it as mortgagee or beneficiary is an untrue statement. Second, the Counties claim that even if MERS is allowed to be designated as a party to the security instrument, any assignment of the underlying note (or other action affecting the loan) must be reflected with a parallel assignment of the security, which then must be recorded with a fee paid to them. The Court should dismiss this suit, because (1) there is no misrepresentation as the Texas Legislature affirmatively allows MERS to appear as mortgagee or beneficiary; and (2) there is no duty to record assignments, or other documents, since Texas's property recording system is permissive, not mandatory.

First, no false, fraudulent or otherwise wrongful activity occurred by filing security instruments naming MERS as beneficiary or mortgagee. To the contrary, the Texas Legislature adopted a statute authorizing a book entry system to serve as a secured party on Texas security instruments, Tex. Prop. Code §§ 51.0001(1) & (4), and the courts in this State have held that MERS qualifies under that statute. *See Malikyar v. BAC Home Loans Servicing, LP,* 2011 WL 5837262, at *3-5 (E.D. Tex. Oct. 28, 2011), *adopted* 2011 WL 5920888 (E.D. Tex. Nov. 21, 2011); *Richardson v. CitiMortgage, Inc.,* 2010 WL 4818556, at *5 (E.D. Tex. Nov. 22, 2010); *Sposіti v. Fed. Nat'l Mortg. Ass'n,* 2011 WL 5977319, at *3-5 (E.D. Tex. Nov. 3, 2011) ("MERS is a mortgagee under the Texas Property Code"), *adopted* 2011 WL 5975824 (E.D. Tex. Nov. 29, 2011); *Hornbuckle v. Countrywide Home Loans, Inc.,* 2011 WL 1901975, at *4 (Tex. App. -- Fort Worth May 19, 2011, no pet.); *Allen v. Chase Home Fin., LLC,* 2011 WL 2683192, at *3 (E.D. Tex. June 10, 2011); *McAllister v. BAC Home Loans Servicing, LP,* 2011 WL 2200672, at *5 (E.D. Tex. Apr. 28, 2011). The Court should likewise reject the Counties' main theory that false activity occurred because MERS was listed as beneficiary or mortgage in security instruments.

Second, Defendants were not required to create and record assignments when interests in loans registered on the MERS system are transferred. The Texas Property Code, which contains the various statutes concerning recording interests in land, *allows* parties to record interests in land to protect their interests but does not *require* that any recording occur. [2] The Texas land recording system is thus permissive rather than mandatory in nature. [3] Moreover, the Property Code does not require or contemplate that an underlying promissory note (or interests in it) be recorded, as a promissory note obviously does not concern an interest in land.

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The Court can dismiss this lawsuit in its entirety because it rests on dual premises inconsistent with Texas law. Dismissal is also required because the Counties have suffered no injury -- - and thus lack standing -- - from nonpayment of recording fees for documents that were never recorded. Since the Counties can only charge for the service of recording, they have nothing to complain about the fact they have not been paid any fees.

In addition, Defendants have separately addressed each of Plaintiffs' causes of action, demonstrating that each fails to state a cognizable claim for relief for multiple reasons. Dismissal is warranted for all of these reasons as well.

The purpose of this lawsuit, stated by one of the Counties' lawyers after the case was filed, is to generate revenue for the Counties in difficult economic times.[4] It is difficult to see how this purpose can be achieved, as the Counties cannot hope to get fee income through this case without actually doing the associated work. This curious state of affairs notwithstanding, the Counties' legal theories have no basis in law -- and, in fact, are inconsistent with Texas statutes -- so dismissal is required.

BACKGROUND

I. THE COMPLAINT

On September 20, 2011, Dallas County, Texas filed a Petition in the County Court at Law for Dallas County, Texas. It filed an Amended Petition and Second Amended Petition on September 30 and October 10, 2011. After removal, Dallas County filed a Class Action Complaint and the operative First Amended Class Action Complaint ("FAC"), which added Harris and Brazoria Counties as Plaintiffs (ECF No. 27).

For the most part, the Complaint alleges pages from law review articles and other commentary related to mortgage lending and securitization of loans, (*e.g.,* FAC ¶¶ 33-80) alongside inflammatory rhetoric unrelated to the causes of action asserted.[5] All told, the Complaint in its entirety, rests on the contention that Defendants "perpetrate a fraud" by identifying MERS as the mortgagee or beneficiary on a mortgage or deed of trust, and thereby "evade" some duty to record "transfers, assignments, transfers, and other activities related to" MERS Mortgages in the public land records. FAC ¶¶ 93, 112. Based solely on these allegations, Plaintiffs attempt to state statutory claims for violations of Tex. Civ. Prac. & Rem. Code § 12.002, Tex. Loc. Gov't Code § 192.007, as well as common law claims for unjust enrichment, negligent, grossly negligent, and fraudulent misrepresentation, negligent and grossly negligent undertaking, negligence per se and gross negligence per se, and conspiracy. The Counties also request declaratory relief, injunctive relief, and exemplary damages. *Id.* ¶¶ 157-58, 159-60, 161.

The Counties seek to hold each Defendant liable for its role in the conduct complained of, and to also hold BANA and Stewart Title Guaranty Company liable as shareholders of MERSCORP, Inc. *Id.* ¶¶ 15, 117, 127. The Counties filed suit on their own behalf and also on behalf of a putative class of other Texas counties. *Id.* ¶ 16.

II. HOW MERS WORKS.

When a mortgage lender loans money to a home buyer, two separate but related documents are obtained from the borrower: a promissory note and a mortgage or deed of trust. FAC ¶ 27. The promissory note is a negotiable instrument under Article 3 of the Uniform Commercial Code that effectuates and sets forth the terms of the borrower's promise to repay the loan. *See id.; In re MERSCORP, Inc. RESPA Litig.,* 2008 U.S. Dist. LEXIS 40473, at *13 (S.D. Tex. May 16, 2008) (attached as Exhibit F-3, App. 118). As a negotiable instrument, the promissory note (and, thus, the beneficial ownership interest in it) is frequently bought and sold. *Id.* The mortgage or deed of trust, as distinguished from the note, is a contract to establish a lien on the property that secures repayment of the loan. FAC ¶ 27; *Cooper v. Cochran,* 288 S.W.3d 522, 537-38 (Tex. App. -- Dallas 2009, no pet.) (mortgage is a contract); *Defranceschi v. Wells Fargo Bank, N.A.,* 2011 WL 3875338, at *4 (N.D. Tex. Aug. 31, 2011) ("Under Texas law, a deed of trust is a mortgage with a power to sell on default. A mortgage created by a deed of trust is an interest created by a written instrument providing security for payment.").

Two aspects of the loan are then usually bought and sold -- the servicing rights and the beneficial rights. FAC ¶ 31; *In re MERSCORP, Inc. RESPA Litig.,* 2008 U.S. Dist. LEXIS 40473, at *14. The servicing rights include the right to collect monthly escrow, principal, and interest payments from the borrower. *Id.* The beneficial rights include the right to receive the repayment of the loan itself. *Id.* For its part, MERS serves as the mortgagee of record on a mortgage or as a beneficiary on a deed of trust, on behalf of, or as the nominee for, the lender and any of the lender's successors and assigns. FAC ¶ 101; *In re MERSCORP, Inc. RESPA Litig.,* 2008 U.S. Dist. LEXIS 40473, at *17 (App. 119) (MERS is the "mortgagee").

At the origination of a loan, the lender takes possession of the note (and becomes the holder of the note), and the borrower and lender designate MERS (as the lender's nominee) to serve as the mortgagee or beneficiary, such that the lender's secured interest in the property is held by MERS. FAC ¶ 102. The borrower contractually agrees in the mortgage or deed of trust, that it is MERS, as the nominee of the lender, who will serve as mortgagee or beneficiary, [6] and as such, in the event of a default on the repayment of the loan, MERS is authorized to foreclose on the property. *See, e.g., Santarose v. Aurora Bank FSB,* 2010 WL 2232819, at *5 (S.D. Tex. June 2, 2010) ("By the plain language of the Deed of Trust, MERS had the right to foreclose the property."). After the borrower signs the mortgage or deed of trust, it is recorded in the public, local land records with MERS as the named mortgagee or beneficiary, as the nominee for the lender and the lender's successors and assigns. FAC ¶ 102.

When the note is sold, the various sales of the note are tracked on the MERS® System. *In re MERSCORP, Inc. RESPA Litig.,* 2008 U.S. Dist. LEXIS 40473, at *17 (App. 119). As long as the sale of the note involves MERS members, MERS remains the named mortgagee or beneficiary, and continues to act as the mortgagee, as the nominee for the new beneficial owner of the note (and MERS member). *Id.* at 18. The seller of the note does not and need not assign the mortgage or deed or trust, because MERS remains the mortgagee or beneficiary, as the nominee for the purchaser of the note, who is then the lender's successor and assign. *Id.* This relationship is memorialized in the security instrument to which the borrower signs and is a party, as well as by the MERS membership agreements that are entered into between MERS and its members (who are mortgage lenders and servicers). [7] If, however, a MERS Member is no longer involved with the note after it is sold, an assignment from MERS to the non-MERS member is provided by MERS, that assignment is recorded in the county where the real estate is located, and the loan is deactivated from the MERS® System. *See id.*

III. DISMISSAL OF OTHER RECORDING FEE LAWSUITS.

With local budgets experiencing serious financial difficulties, numerous lawsuits have been filed seeking to recover recording fees by alleging a failure to record documents when promissory notes secured by MERS Mortgages are bought and sold. Already, four have been dismissed. *Bates v. Mortg. Elec. Registration Sys., Inc.,* 2011 WL 1304486 at * 3 (D. Nev. Mar. 30, 2011) (claim that recording of assignments is required "legally frivolous"), *dismissed,* 2011 WL 1582945 (D. Nev. Apr. 25, 2011); *Christian Cnty. Clerk v. Mortg. Elec. Registration Sys., Inc.,* 2012 WL 566807 (W.D. Ky. Feb. 21, 2012) (no right of action for county clerks to seek recording fees); *Bates v. Mortg. Elec. Registration Sys., Inc.,* 2011 WL 892646 (E.D. Cal. Mar. 11, 2011) (public disclosures about MERS bar false claim act case); Order, *Bates v. MERS.,* No. 10-1-0160-01 (Haw. Cir. Feb. 22, 2012) (attached as Exhibit F-1, App. 103-07) (same).

ARGUMENT

I. THE COURT SHOULD DISMISS THIS LAWSUIT, BECAUSE TEXAS LAW REJECTS THE LEGAL THEORIES ON WHICH IT IS BASED.

Plaintiffs' lawsuit is grounded on two legal theories, under which Defendants purportedly: (1) "perpetrate a fraud" by identifying MERS as the mortgagee or beneficiary on MERS Mortgages, and (2) "evade" a duty to record "transfers, assignments, transfers, and other activities related to" MERS Mortgages in the public land records. FAC ¶¶ 93, 112. The law of the state of Texas rejects both theories, however, and Plaintiffs also lack standing to sue based thereon. The Court should accordingly dismiss the Complaint in its entirety.

A. ***By Statute, Texas Permits MERS To Serve As Record Beneficiary.***

Plaintiffs' suggestion that the deeds of trust designating MERS as beneficiary or mortgagee are false because MERS has no beneficial interest in the promissory note secured by the deed of trust or mortgage is meritless. Texas statutes and case law foreclose this claim.

1. Under Texas Law, MERS Is The Statutory Mortgagee.

The Court should reject the Plaintiffs' argument that MERS deeds are false because the Texas Legislature has expressly approved use of loan registry systems such as MERS.

Chapter 51 of the Texas Property Code governs real property. It defines a "mortgagee" to include a "book entry system," Tex. Prop. Code § 51.0001(4), which is in turn means ...

> a national book entry system for registering a beneficial interest in a security instrument that acts as a nominee for the grantee, beneficiary, owner, or holder of the security instrument and its successors and assigns.

Id. § 51.0001(1). Plaintiffs' Complaint shows that MERS fits the statutory definition perfectly: it alleges that MERS is a national system in which a creditor registers its beneficial interest in a security instrument while naming MERS to act as nominee for the grantee and its successors and assigns. FAC ¶¶ 86-89.

That is not surprising -- because the Texas Legislature passed section 51.001 *precisely* to codify MERS's role as nominee. The statute was passed in 2003, shortly after MERS began operations. One commentator noted at the time that the Legislature's reference to "book entry system" "would be better understood as the 'Mortgage Electronic Registration System, Inc.,' or 'MERS' " and that "the new definition section in Tex. Prop. Code § 51.0001(1) now recognizes MERS." [8] Another explained that MERS is the *only* entity that meets the definition of a "book entry system" in the Texas Code. [9]

For that reason, Texas courts have held -- unanimously -- that MERS is a "book entry system" under section 51.0001(1) and thus is a "mortgagee" under section 51.0001(4). As Magistrate Judge Mazzant of the Eastern District recently stated:

> MERS is a mortgagee under the Texas Property Code. *See* Tex. Prop. Code Ann. § 51.0001(4). Since the Deed of Trust identifies MERS as the beneficiary and the nominee for the original lender and its successors and assigns, this makes MERS a mortgagee under the Texas Property Code regardless of whether MERS was the true owner of the Note.

Report and Recommendation, *Malikyar v. BAC Home Loans Servicing, LP,* 2011 WL 5837262, at *4 (E.D. Tex. Oct. 28, 2011), *adopted* 2011 WL 5920888 (E.D. Tex. Nov. 21, 2011). Multiple other Texas decisions have reached the same conclusion. *Robeson v. Mortg. Elec. Registration Sys., Inc.,* 2012 WL 42965, at *5 n.5 (Tex. App. -- Fort Worth Jan. 5, 2012, no pet.) ("MERS is defined in Texas Property Code § 51.0001(1) as a 'book entry system' ") (quoting *Richardson v. CitiMortgage, Inc.,* 2010 WL 4818556, at *5 (E.D. Tex. Nov. 22, 2010)); *Powell v. BAC Home Loans Servicing, LP,* 2011 WL 5837250, at *6 (E.D. Tex. Nov. 21, 2011) ("MERS is a mortgagee under the Texas Property Code"); Report and Recommendation, *Spositi v. Fed. Nat'l Mortg. Ass'n,* 2011 WL 5977319, at *4 (E.D. Tex. Nov. 3, 2011) (same), *adopted* 2011 WL 5975824 (E.D. Tex. Nov. 29, 2011); *Cannon v. JPMorgan Chase Bank, N.A.,* 2011 WL 6838615, at *7 (E.D. Tex. Nov. 16, 2011) ("MERS is a mortgagee under the Texas Property Code"); *Hornbuckle v. Countrywide Home Loans, Inc.,* 2011 WL 1901975, at *4 (Tex. App. -- Fort Worth May 19, 2011, no pet.) ("A book entry system such as MERS is included within the definition of 'mortgagee' under Texas law"); *McAllister v. BAC Home Loans Servicing, LP,* 2011 WL 2200672, at *5 (E.D. Tex. Apr. 28, 2011) (quoting *Richardson*).

The "beneficiary, owner or holder of a security instrument" is also a mortgagee. Tex. Prop. Code § 51.0001(4). For this reason too, where MERS is identified as the beneficiary, it is the statutory mortgagee. *McCarthy v. Bank of America, N.A.,* 2011 WL 6754064, at *4 (N.D. Tex. Dec. 22, 2011) ("Under the Property Code, MERS was a mortgagee based on either the definition of a 'book entry system,'... or alternatively, the definition of a 'holder of a security instrument[.]' "); *Valdez v. Fed. Home*

Loan Mortg. Corp., 2011 WL 7068386, at *2 (N.D. Tex. Nov. 28, 2011) ("MERS may properly act as the beneficial holder of a deed of trust").

The Texas Legislature has expressly granted book entry systems such as MERS authority to serve as a mortgagee and beneficiary under Texas security instruments, and nowhere does the Property Code require that the mortgagee also have an ownership interest in the loan. This Court must apply the law as written. As a matter of public policy, it may not change the Code to add the additional requirements sought by Plaintiffs here, [10] especially where the Texas Legislature has spoken precisely to the issue presented. [11]

2. MERS May Serve As Beneficiary Or Mortgagee Under The Security Instruments Signed By Borrowers.

Separate and apart from the statutory definition of MERS as a mortgagee, Plaintiffs' claim that MERS acts fraudulently as a beneficiary or mortgagee also fails because courts have consistently held that MERS is authorized to serve in those roles as a matter of contract law.

MERS Mortgages are contracts, and parties are free to contract as they please. *Fairfield Ins. Co. v. Stephens Martin Paving, LP,* 246 S.W.3d 653, 664 (Tex. 2008). In MERS Mortgages, borrowers and their lenders agree to name MERS as the mortgagee or beneficiary, as the lenders' nominee. FAC ¶ 102. The terms of MERS Mortgages that make up the alleged fraud, therefore, disclose MERS's role and prevent any claim of fraud. *Waltner v. Aurora Loan Services, LLC,* No. A-11-CA-502-SS, slip op. at 12 (W.D. Tex. Jan. 17, 2012) (attached as Exhibit F-7, App. 179) ("[Plaintiffs] claim that MERS was not the mortgagee under their deed of trust. Unfortunately, this attempt at evasion forces them to confront the problem that the deed of trust explicitly names MERS as the beneficiary.").

Lenders and borrowers agree in deeds of trust and mortgages that MERS can serve as beneficiary and mortgagee. Dallas County District Attorney Watkins agreed in the deed of trust he executed (which is a uniform instrument) that "MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument." FAC ¶ 101. He also agreed (as other borrowers do) that MERS can take actions on behalf of the lender and subsequent lenders:

> 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 Lender including, but not limited to, releasing and canceling this Security Instrument.

Exhibit B, App. 10; FAC ¶ 102.

Texas courts have repeatedly enforced these provisions, holding that MERS may serve as mortgagee or beneficiary, with the powers conferred by the security instrument. *Athey v. Mortg. Elec. Registration Sys., Inc.,* 314 S.W.3d 161, 166 (Tex. App. -- Eastland 2010, pet. denied) (MERS may foreclose because "deed of trust designated MERS as the mortgagee and as [the Lender]'s nominee," even though MERS did not own promissory note secured by the deed of trust); *Salmeron v. CitiMortgage, Inc.,* No. 3:11-CV-1398-M-BK, slip op. at 3-5 (N.D. Tex. Feb. 3, 2012) (attached as Exhibit F-5, App. 154-56) (claims based on role of MERS all fail); *Swim v. Bank of America, N.A.,* 2012 WL 170758, at *3 (N.D. Tex. Jan. 20, 2012) ("Under the express language of the New Deed of Trust, MERS is a beneficiary and nominee for both the originating lender and its successors and assigns."); *Helms v. Mortg. Elec. Registration Sys., Inc.,* 2012 WL 43368, at *2 (S.D. Tex. Jan. 9, 2012) ("MERS expressly held all rights of the Lender on the deed of trust"); *Wigginton v. Bank of New York Mellon,* 2011 WL 2669071, at *2 (N.D. Tex. July 7, 2011) ("[T]he deed of trust, on its face, grants MERS a right to foreclose"); *Malikyar,* 2011 WL 5837262, at*3 (dismissing claims "based upon the erroneous theory that MERS could not be the beneficiary on the Deed of Trust"); *Smith v. Fed. Nat'l Mortg. Assoc.,* No. 3:11-cv-02032-F, slip op. at *3 (N.D. Tex. Sept. 30, 2011) (attached as Exhibit F-6, App. 161) (similar); *Richardson,* 2010 WL 4818556, at *5 ("Under Texas law, where a deed of trust, as here, expressly provides for MERS to have the power of sale, then MERS has the power of sale.").

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Plaintiffs contend that MERS "can[not] be the 'mortgagee' in a mortgage or 'beneficiary' of a deed of trust" because, "[i]n MERS's own words: MERS has no interest at all in the promissory note evidencing the mortgage loan." FAC ¶¶ 89-91. They are wrong. Courts have long held that a mortgagee or deed of trust beneficiary may be a person other than the obligee of the debt secured thereby, and Texas courts have unanimously recognized that it is entirely proper for a lender, who holds the beneficial interest in a loan, to designate its nominee, MERS, to hold legal title to the security instrument and serve as the mortgagee or beneficiary of record. *See, e.g., Swim v. Bank of America, N.A.,* 2012 WL 170758, at *3 (N.D. Tex. Jan. 20, 2012) ("Under the express language of the New Deed of Trust, MERS is a beneficiary and nominee for both the originating lender and its successors and assigns."); *Valdez,* 2011 WL 706836 at *2 (MERS is mortgagee or beneficiary "regardless of whether MERS was the true owner of the Note."); *Defranceschi,* 2011 WL 3875338, at *4 ("MERS was the nominal beneficiary under the deed of trust as agent for [the lender] and its successors and assigns"). [12]

And critically, the courts have universally concluded that the identification of MERS as the mortgagee or beneficiary on a MERS Mortgage, as the lender's nominee, is *not* a misrepresentation or fraud. *See, e.g., Malikyar,* 2011 WL 5837262, at *4 (dismissing with prejudice negligent misrepresentation and fraud claims alleging "MERS is not a mortgagee," holding, "These attacks have been repeatedly rejected by this Court as well as others. MERS was the beneficiary under the Deed of Trust as agent for [the lender] and its successors and assigns") (citations omitted); *Salmeron,* slip op. at 3-5 (Exhibit F-5, App. 154-56) (claims based on role of MERS all fail). [13] In sum, the Texas Code and the tide of cases issued by Texas courts reject Plaintiffs' notion that Defendants "perpetrate a fraud" by identifying MERS as the mortgagee or beneficiary on MERS Mortgages.

The Texas Property Code, the tide of cases issued by Texas courts, and basic contract law principles reject Plaintiffs' notion that Defendants committed fraud by filing security instruments listing MERS as beneficiary or mortgagee. The primary theory of liability in the FAC is entirely meritless [14]

B. Texas Law Imposes No Duty To Record Assignments, Or Any Other Loan-*Related Documents.*

The other basis of this lawsuit is that certain Defendants "evade" an "ongoing obligation to maintain the accuracy of deeds of trust and other documents filed in the deed records," by allegedly failing to record "transfers, assignments, transfers, and other activities related to" MERS Mortgages in the public land records. FAC ¶¶ 93, 112-15. The Complaint suggests that every time a promissory note secured by a MERS Mortgage is transferred or assigned, the Defendants are under some "duty to file a notice of the assignment" and fail to do so. *Id.* ¶ 88. [15] But there is no duty under Texas law to record such documents in the public land records.

The Texas land recording statutes are permissive in nature. The Property Code *allows* parties to record interests in land, but does not *require* recording of a mortgage, deed of trust, or an assignment of a mortgage or deed of trust. *See* Tex. Prop. Code § 12.001 ("An instrument concerning real or personal property *may be recorded*"); *id.* § 12.003 ("written evidence of title to land ... *may be recorded*"); *id.* § 12.004 (foreign deed "*may be recorded*"); *id.* § 12.009 ("A master form of a mortgage or deed of trust *may be recorded.*") (emphasis added). Texas courts have thus repeatedly recognized the permissive nature of the land recording system. [16] And there is no requirement that interests in a promissory note (which only evidences a debt, and not an interest in land) be recorded.

The permissive nature of Texas's recording statutes is consistent with the purpose of the statutes: protecting intending purchasers and encumbrancers by providing notice of an instrument affecting title to land. *See, e.g., Ojeda De Toca v. Wise,* 748 S.W.2d 449, 450-51 (Tex. 1988) ("[T]he purpose of recording statutes is to protect intending purchasers and encumbrancers"); *Corpus v. Arriaga,* 294 S.W.3d 629, 635 (Tex. App. -- Houston [1st Dist.] 2009, no pet.) ("The purpose of recording statutes in Texas is to give notice to all persons of the existence of the instrument."). To that end, an unrecorded instrument "affecting the title to land" is not "effectual against subsequent purchasers, for a valuable consideration, without notice." *Henderson v. Pilgrim,* 22 Tex. 464, 476 (1858). A document "affecting the title to land" therefore "*ought* to be recorded, *to make it effectual against subsequent purchasers,* for a valuable consideration, without notice." *Id.* (emphasis added). But there is *no requirement* or *duty,*

under Texas law, to record even a mortgage or deed of trust, let alone is there a *requirement* or *duty,* as alleged, to record any "transfers, assignments, transfers, and other activities related to" a mortgage or deed of trust. FAC ¶ 93.

Plaintiffs acknowledge that there is no duty under Texas law to record a mortgage or deed of trust. *See* FAC ¶ 29 ("recording of a security instrument in real property is not mandatory"), ¶ 133 ("filing, generally, is not mandatory"). There is also no duty, under Texas law, to record an assignment of a mortgage or deed of trust. *See, e.g., Bittinger v. Wells Fargo Bank, N.A.,* 744 F. Supp. 2d 619, 625 (S.D. Tex. 2010) ("Under Texas law, there is no requirement that the deed of trust assignment be recorded."). [17] An unrecorded assignment of a mortgage or deed of trust is valid and enforceable. *See, e.g., Traders' Nat'l Bank v. Price,* 228 S.W. 160, 162 (Tex. Comm'n App. 1921) ("The fact that the transfer of [a] lien was not of record would be without effect upon the rights of the respective parties.").

Nothing in Texas law remotely suggests a requirement or duty to create or record some sort of "notice," whenever a promissory note secured by a mortgage or deed of trust is transferred or assigned, regardless of whether MERS is the mortgagee. FAC ¶ 88. Neither a promissory note, nor a transfer or assignment thereof, "affects the legal title to land" such that it "ought" to be recorded, much less that it is required to be recorded by law. *See In re MERSCORP, Inc. RESPA Litig.,* 2008 U.S. Dist. LEXIS 40473, at *18 (App. 119-20) ("MERS members ... are free to transfer the servicing and beneficial rights to the loan as many times as they wish without having to record these transfers in the public land records.").

Texas is not unique in this regard. Indeed, Judge Jones of the District of Nevada described as "legally frivolous" the notion that assignments must be recorded under Nevada law, and noted the permissive land recording systems across the United States. *Bates v. MERS,* 2011 WL 1304486, at *3 (D. Nev. Mar. 30, 2011). The court explained:

> Recordation of an interest in land simply serves to perfect one's interest in real property by putting the world at large on constructive notice of the claimed interest; but *recordation is not required to validate one's interest... If Defendants do not wish to record assignments of loans or deeds of trust, they need not do so.* A party may choose to avoid the filing fee and hassle of recording an assignment if it would rather bear the risk that its interest in the property will not be protected from a potential subsequent bona fide purchaser under the applicable recording statute.

Id. (emphasis added). Judge Jones later dismissed the lawsuit. *Nevada ex rel. Bates v. Mortg. Elec. Registration Sys., Inc.,* 2011 WL 1582945, at *6 (D. Nev. Apr. 25, 2011).

So too here, Plaintiffs' theory that Defendants "evade" some duty to record "assignments, transfers and other activities" founders under the plain language of the Texas land recording statutes, which do not mandate that a creditor record *any* documents. All of the Plaintiffs' claims accordingly fail and should be dismissed for this reason as well.

C. *Plaintiffs Lack Standing To Assert Their Claims.*

The Court should also dismiss this lawsuit because the Counties do not, and cannot as a matter of law, plausibly show that they suffered an injury in fact caused by the conduct complained of, and therefore lack standing to make the claims asserted in the Complaint. *Reyes v. North Tex. Tollway Auth.,* 2011 WL 5557418, at *4 (N.D. Tex. Nov. 14, 2011). The Counties' rights and obligations are wholly unaffected by either the identification of MERS as a mortgagee or beneficiary, or the alleged failure to record documents in the public land records.

As to all of their claims, the Counties attempt to establish an injury by alleging that Defendants' "conduct caused a reduction in the revenue that Plaintiffs and the Class Members would have collected had Defendants complied with Texas law and recorded all subsequent transfers, assignments, transfers, and other activities related to the original deed of trust identifying MERS as the 'beneficiary' of the deed of trust." FAC ¶ 93. In other words, the Counties claim to have suffered injury as a result of the Defendants' alleged failure to record documents and pay an associated recording fee. The claim is inconsistent with Texas law.

It is a basic proposition of Texas law, enshrined in its Constitution, that governmental entities are not entitled to compensation for services never rendered. Tex. Const. § 3 ("no man, or set of men, is entitled to exclusive separate public emoluments, or

privileges, but in consideration of public services"). This stricture is also part of the Texas Local Government Code: a county, in connection with recording of documents concerning real property, may only collect fees "for services rendered" in connection with recordings. Tex. Loc. Gov't Code § 118.011(a). [18] Where, as alleged here, a document was not recorded and no service rendered, the Counties are forbidden by Texas law from recovering a recording fee. *See, e.g., Earnest v. Couch,* 81 S.W.2d 761, 761-62 (Tex. Civ. App. -- San Antonio 1935) (affirming dismissal of county tax assessor claims "for the obvious reason ... that plaintiff did not perform the specific service" at issue; "certainly, not having performed that duty, or actually earned that fee, [plaintiff] was not entitled to payment therefor. This is elemental").

Under Texas law, the Counties are forbidden from receiving fees for services not rendered, and thus cannot plausibly allege that they suffered a cognizable injury in fact as a result of Defendants' failure to pay recording fees. The Court should dismiss the Complaint in its entirety for this reason as well. *See id.; Maverick Conty. Water Control & Improvement District No. 1 v. State,* 456 S.W.2d 204, 207 (Tex. Civ. App. -- San Antonio 1970, writ ref'd) (county agency could not assess a fee for services "neither received nor requested"); *Carpenter v. Arroyo-Colorado Nav. Dist. of Cameron & Willacy Contys.* 111 S.W.2d 822, 823 (Tex. Civ. App. -- San Antonio 1937) (affirming dismissal of county commissioner's claim because he could not recover compensation for service he did not perform).

Indeed, there is no fashion in which the Counties could show financial harm from Defendants' conduct. If Defendants had a duty to record, the Counties could not ask to reap the fees without actually doing the recording. Instead, since Counties can only get fees for services rendered, any fees would be awarded only if the Counties actually handled the recordings. Unless the Counties take the position that they intend to profit from rendering this public service, a judgment will not generate any net money for the Counties. They have not shown, and never could show, injury in these circumstances. Dismissal is required for this reason as well.

II. THE COURT SHOULD ALSO DISMISS THE COMPLAINT BECAUSE IT OTHERWISE FAILS TO STATE COGNIZABLE CLAIMS FOR RELIEF.

The Court should dismiss the Complaint because it rests on legal theories directly contrary to Texas law and the Counties lack standing to sue. The Court can independently dismiss the Complaint because it fails to allege facts stating cognizable claims for relief.

A. *The Complaint Fails to State a Claim for Violation of the False Lien Statute.*

Based on the groundless allegation that MERS Mortgages "falsely represent MERS' interest in the real property that is the subject of [MERS Mortgages]," the Complaint purports to plead a violation of the fraudulent lien statute, Tex. Civ. Prac. & Rem. Code § 12.002. FAC ¶¶ 129-31. A claim lies under this statute only when a defendant "(1) made, presented, or used a document with knowledge that it was a fraudulent lien; (2) intended the document be given legal effect; and (3) intended to cause [Plaintiffs] financial injury." *Walker & Assocs. Surveying v. Roberts,* 306 S.W.3d 839, 848 (Tex. App. -- Texarkana 2010, no pet.) (citing Tex. Civ. Prac. & Rem. Code § 12.002(a)). This cause of action fails to state a claim for several reasons.

1. MERS Mortgages Are Not Fraudulent Liens.

Plaintiffs' claim should be dismissed as an initial matter because a MERS deed of trust is not a "fraudulent lien or claim against real or personal property." Tex. Civ. Prac. & Rem. Code § 12.002(a)(1). Although not defined in the statute, "fraudulent" generally refers to "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." *Walker,* 306 S.W.3d at 849. As explained in Part IA above, there is nothing false or fraudulent about designating MERS as the mortgagee or beneficiary. Under Texas law, and under all the Texas case law cited above, MERS is a valid mortgagee or beneficiary, and MERS Mortgages are valid. And a valid mortgage cannot, under the plain terms of the statute, form the basis of a fraudulent lien claim. *See* Tex. Civ. Prac. & Rem. Code § 12.002(a)(2); *Casstevens v. Smith,* 269 S.W.3d 222, 233 (Tex. App. -- Texarkana 2008, pet. denied) (rejecting Section 12.002 claim where defendant had a valid claim against real property). Indeed, a claim virtually identical to Plaintiffs', in which a debtor alleged that a MERS Mortgage violated

Section 12.002, was rejected, on the grounds that "the Deed of Trust on the subject property," which identified MERS as the beneficiary, was "valid." *Kiggundu v. Mortg. Elec. Registration Sys.,* 2011 WL 2606359, at *7 (S.D. Tex. June 30, 2011). [19]

2. The Counties Are Not "Injured Person[s]" Because They Suffer No Harm From Non-Recorded Documents.

The Court should also dismiss the false lien claim because the Counties are not "injured person[s]" as required under Section 12.002(b). The Complaint alleges that Defendants "intended by [their] conduct to financially injure Plaintiff[s]," the Counties, "by avoiding the costs and filing fees associated with filing, registering, or recording subsequent releases, transfers, assignments, or other action relating to" MERS Mortgages. FAC ¶ 130. But Section 12.002 has nothing to do with costs and fees associated with filing, registering or recording documents. *See Centurion Planning Corp. v. Seabrook Venture II,* 176 S.W.3d 498, 505 (Tex. App. -- Houston [1st Dist.] 2004, no pet.); *Medina v. Vanderbilt Mortg. & Fin., Inc.,* 2010 WL 3359541, at *4 (S.D. Tex. Aug. 25, 2010). A plaintiff "must suffer and prove some cognizable, compensable injury in fact, of which the violation is a legal and proximate cause," and damages "must be based on something more than an abstract violation of a statute." *Austin Police Dept. v. Brown,* 96 S.W.3d 588, 601 (Tex. Ct. App. 2002). And Dallas County's rights and obligations with respect to costs and filing fees are wholly unaffected by a violation of Section 12.002. As shown in Part IC above, the Texas Constitution and the Texas Code forbid counties from receiving fees for services which they did not perform. Thus, the failure to record assignments could not have injured the Counties, because they never performed any services as to non-recorded assignments for which they could be compensated. Numerous Texas courts have dismissed lawsuits by government bodies in these circumstances (*see* cases cited in Part IC), and the same result is required here. [20]

3. The Complaint Fails to Allege Intent to Cause Financial Injury.

The Court should also dismiss the false lien claim because the Complaint does not allege any intent to cause financial injury. Intent to cause financial injury is not "self-evident"; in the absence of such allegations, a false lien claim must be dismissed. *Preston Gate, LP v. Bukaty,* 248 S.W.3d 892, 897 (Tex. App. -- Dallas 2008, no pet.). Here, the Complaint alleges only that Defendants intended to injure the Counties "by avoiding the costs and filing fees" of recording documents. FAC ¶ 130. That conclusory allegation merely states the effect of registering a loan with the MERS system, however. It does not allege an intent by Defendants to cause harm to the Counties. *Avalon Residential Care Homes, Inc. v. City of Dallas,* 2011 WL 4359940, at *4 (N.D. Tex. Sept. 19, 2011). Dismissal is therefore required. No such intent to cause harm could be plausibly alleged in any event. As explained above, no duty exists to record assignments of loans under Texas law, and so Defendants cannot have acted with intent to injure Plaintiffs by doing something that Texas law expressly allowed them to do.

4. ***The Statute Provides No Right of Action To The Counties.***

The Counties also fail to state a claim for violation of Section 12.002 because they have no right of action under the statute. "[T]he plain and common meaning of the words of Chapter 12 reveals that the Legislature intended to provide a civil action for injunctive relief and monetary damages to all persons *owning an interest in real or personal property* against which a fraudulent lien is filed." *Centurion Planning Corp.,* 176 S.W.3d at 505 (emphasis added); *see also Medina,* 2010 WL 3359541, at *4 ("In enacting Section 12.002, the Legislature intended to provide a civil action for injunctive relief and monetary damages to all persons owning an interest in real or personal property against which a fraudulent lien is filed."). Thus, "in the case of a fraudulent lien or claim against real or personal property or an interest in real or personal property," the Legislature expressly provides for a cause of action to be brought under Section 12.002, only by "the obligor or debtor, or a person who owns an interest in the real or personal property" against which a fraudulent lien is filed. Tex. Civ. Prac. & Rem. Code § 12.003(a)(8). Plaintiffs' claim fails because they do not allege they are "obligor[s] or debtor[s], or person[s] who own[] an interest in the real or personal property" against which fraudulent liens were filed.

B. ***The Section 192.007 Claim Fails To State A Claim For Multiple Reasons.***

Plaintiffs also assert (in an afterthought not even included in their original Petition) that Defendants violated Section 192.007 of the Local Government Code "by failing to record all releases, transfers, assignments, and other actions relating to deeds of trust [that identify] MERS as the 'beneficiary.' " FAC ¶ 135. This claim also should be dismissed for multiple reasons.

1. No Right of Action Exists Under Section 192.007.

The Court should first dismiss the section 192.007 claim because no private right of action exists for alleged violations of its provisions.

A private right of action may be created expressly by the Legislature or implied by a court in appropriate circumstances. *Davis v. Hendrick Autoguard, Inc.,* 294 S.W.3d 835, 838 (Tex. App. -- Dallas 2009, no pet.). Here, no express cause of action exists, as the text of Section 192.007 does not provide that any person can sue for an alleged violation, nor does it provide any remedies in the event that its provisions are not complied with.

Nor would it be appropriate to create any private cause of action. A court may not "imply a private right of action" unless it is clear that the "drafters intended to create such a private remedy" to effectuate the purpose of a statute. *Id.* Courts look to the "plain and common meaning of the statute's words," reading the statutory provision "as a whole" and "giving meaning to the language consistent other provisions in the statute." *Tex. Dep't of Transp. v. City of Sunset Valley,* 146 S.W.3d 637, 642 (Tex. 2004). Here, nothing in the plain language of Section 192.007 indicates that the Legislature intended to create a private right of action allowing an allegedly aggrieved person to seek damages or otherwise enforce the statute. Nor is any other basis apparent for implying a private right of action. Section 192.007 is part of a subtitle containing four chapters that instruct local officials on how to maintain, store, and organize county records efficiently. Tex. Loc. Gov't Code §§ 191.001-009, 192.001-007, 193.001-013, 195.001-009. Indeed, a completely separate title of the Local Government Code allows counties to collect fees for recording interests in real property (*see* Tex. Loc. Gov't Code §§ 118.001 *et seq.*), and no provision of the Local Government Code (or Property Code) authorizes an action by a county to attempt to collect fees allegedly due for *unrecorded instruments; fees may only be collected for recorded instruments. Finally, the general purpose of Texas's recording statutes is to give prospective creditors and purchasers information about title to property.*[21] *Because no indication exists that the Texas Legislature enacted Section 192.007 to give a cause of action to the Counties to recover damages for assignments that were never presented for recording and which it never recorded, the Court should dismiss this claim.* Texas Dep't of Transp., *146 S.W.3d at 644 (affirming dismissal of claim; statute created no private right of action);* Davis, *294 S.W.3d at 840 (same);* Rubinstein v. Collins, *20 F.3d 160, 172 (5th Cir. 1994) ("we will not expand state law beyond its presently existing boundaries.").*

Christian County Clerk v. Mortgage Electric Registration Systems, Inc. 2012 WL 566807 (W.D. Ky. Feb. 21, 2012) is instructive. There, the court dismissed with prejudice a putative class action like this one filed by county clerks to recover unpaid recording fees because the statute sued on did not provide a right of action:

> There is nothing in the plain language of the statute that indicates that the statute was designed to be enforced by the county clerk ... The General Assembly did not provide a statutory mechanism for the recovery of fees for unfiled assignments by the county clerks. Had the General Assembly wanted to allow county clerks to file lawsuits regarding recording fees, it certainly knew how to do so.

Id. at *2, 5. The court also held that "the lack of intent to protect County Clerks is further demonstrated by the fact that the recording fees Plaintiffs seek to recover are not mentioned in the recording statutes, but rather are contained in an entirely different chapter." *Id.* at *4. Likewise, here, there is no mention of recording fees in Section 192.007, and the collection of fees for recording interests in real property is governed by an unrelated title of the Local Government Code (Tex. Loc. Gov't Code § 118.001 *et seq.*). The Counties' claim for violation of section 192.007 should be dismissed because the statute does not provide a right of action. *Tex. Dep't of Transp.,* 146 S.W.3d at 644 (affirming dismissal of claim for violation of statute that created no private right of action); *Davis,* 294 S.W.3d at 840 (same).

2. Section 192.007 Does Not Require Assignments To Be Recorded.

The Court should also dismiss the Section 192.007 claim because the Counties incorrectly assert that the statute creates a duty to record assignments.

Section 192.007 provides:

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(a) To release, transfer, assign, or take another action relating to an instrument that is filed, registered, or recorded in the office of the county clerk, a person must file, register, or record another instrument relating to the action in the same manner as the original instrument was required to be filed, registered, or recorded.

(b) An entry, including a marginal entry, may not be made on a previously made record or index to indicate the new action.

By "its plain meaning and context" (*Omaha Healthcare Ctr., LLC v. Johnson,* 344 S.W.3d 392 (Tex. 2011)), section 192.007 does not require recorded assignments of MERS-registered loans, or any other loans for that matter. The plain purpose of the statute is to direct the "manner" in which assignments and other documents relating to an instrument that is filed are to be recorded. By its terms, this provision does not require that anyone "release, transfer, assign, or take another action relating to an instrument." Rather, the statute states that, *if* the "original instrument" was "required to be ... recorded" in a certain manner, a subsequent instrument should be recorded "in the same manner" as the original. Because no requirement to record initial security instruments exists, this statute does not mandate recording of assignments. To clarify, section 192.007(b) provides, "An entry, including a marginal entry, may not be made on a previously made record or index to indicate the new action."

This measure to standardize recording practices fits with the Legislature's stated reasons for enacting the statute: to "replace a patchwork of local records laws with uniform and equitable provisions clearly setting out the records management responsibilities of all local governments." House Report, at p. 71 (attached as Exhibit E, App. 99); *see also* 1989 Tex. ALS 1248 (H.B. 1285) § 200.002(1) ("The efficient management of local government records is necessary to the effective and economic operation of local and state government"). The express intent of the statute is to standardize recording practices across Texas by requiring that each recorded action appear on a separately filed document -- not to impose a substantive requirement that a lender create and record a document in the first instance. Indeed, that result would make no sense, because Chapter 12 of the Property Code and Texas cases establish that the Texas land recording system is permissive, not mandatory. It is therefore not surprising that Texas courts have held that "[u]nder Texas law, there is no requirement that the deed of trust assignment be recorded." *Bittinger,* 744 F. Supp. 2d at 625. [22] The section 192.007 claim should be dismissed.

3. No Violation Occurred Even Under Plaintiffs' Theory.

Even if a private right of action existed, and even if Section 192.007 imposed a duty to record assignments, dismissal would be required because assignments of deeds of trust are not created for MERS-registered loans.

The Counties contend that the transfer of promissory notes secured by deeds of trust naming MERS as beneficiary triggers a duty to record assignments and that those assignments were not recorded. FAC ¶¶ 88, 132-36. But a transfer of an interest in a promissory note does not effect or impact an interest in realty that may be recorded. The Supreme Court of Minnesota explained the distinction in *Jackson v. Mortgage Electronic Registration Systems, Inc.,* 770 N.W.2d 487, 489-90 (Minn. 2009). There, borrowers sought to enjoin non-judicial foreclosure sales on the ground that MERS, as mortgagee, failed to comply with a statutory requirement that all assignments of a mortgage must be recorded and notice must be given of each assignee to the mortgagee. The Court held that no violation occurred, because "when MERS members transfer their interest in a debt, an assignment of the promissory note is executed but an assignment of the security instrument is not executed." *Id.* at 495.

Indeed, that is the whole point of MERS: "If the lender sells or assigns the beneficial interest in the loan to another MERS member, the change is recorded only in the MERS database, not in county records, because MERS continues to hold the deed on the new lender's behalf." *Cervantes v. Countrywide Home Loans, Inc.,* 656 F.3d 1034, 1039 (9th Cir. 2011). Because MERS remains the nominee beneficiary, the transfer of a promissory note does not constitute an assignment of a deed of trust. *Jackson,* 770 N.W.2d at 501.

Finally, Plaintiffs' position ignores the basic principle that statutes passed by a legislature must at all times be construed to harmonize various provisions, and not to render any statute nugatory. [23] Here, the Texas Legislature expressly authorized book entry systems such as MERS to serve as beneficiaries under deeds of trust and mortgages. Tex. Prop. Code § 51.0001. Plaintiffs'

contrary position would undermine the entire MERS business model and write Property Code § 51.0001 out of the Texas statutes. That position would violate fundamental principles of statutory construction and should be rejected.

C. ***The Unjust Enrichment Claims Should Be Dismissed.***

The Counties allege that Defendants have been unjustly enriched by avoiding recording fees that they would have paid had they recorded assignments of transfers of promissory note interests. FAC ¶¶ 137-40. Some courts have held that unjust enrichment is not a cause of action in Texas; [24] if this Court agrees, it can dismiss the unjust enrichment claim for this reason alone. [25]

Even if unjust enrichment is a viable cause of action, no claim is stated for several reasons. First, a plaintiff is entitled to recover under a theory of unjust enrichment only where "one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage." *Heldenfels Bros., Inc. v. City of Corpus Christi,* 832 S.W.2d 39, 41 (Tex. 1992); *Zapata Corp. v. Zapata Gulf Marine Corp.,* 986 S.W.2d 785, 788 (Tex. App. -- Houston [1st Dist. 1999, no pet.). Here, there is no allegation that Defendants "obtained a benefit from" Plaintiffs. *Heldenfels Bros., Inc.,* 832 S.W.2d at 41. To the contrary, Plaintiffs allege that Defendants did *not* record documents and did not pay fees for those documents they did *not* record. FAC ¶ 138. Defendants therefore obtained no benefit from Plaintiffs, and no claim is stated. [26] Indeed, by seeking as damages recording fees for documents they never recorded, Plaintiffs are the parties seeking an unjust windfall, not Defendants.

The unjust enrichment claim also should be dismissed because the Complaint does not allege Defendants were unjustly enriched as a result of "fraud, duress, or the taking of an undue advantage." As shown previously, the Texas law expressly allow MERS to serve as beneficiary and do not require recording of assignments of MERS loans. No fraud occurred, and the unjust enrichment claim must be dismissed. *TSBA, Inc. v. Perkins Ins. Agencies, LLP,* 2011 WL 1196035, at *3-4 (Tex. App. -- Eastland Mar. 31, 2011, pet. denied) (granting summary judgment; no showing of "fraud, duress, or taking an undue advantage by the defendants").

D. ***The Complaint Fails To Allege Cognizable Misrepresentation Claims.***

Plaintiffs allege claims for negligent, grossly negligent, and fraudulent misrepresentation based on the assertion that Defendants misrepresented "the true beneficial owner of notes and related mortgages filed by them in the deed records of Plaintiffs and other Class Members for the purpose of avoiding the recordation of subsequent transfers and payment of attendant filing fees." FAC ¶¶ 141-42, 144-46, 155-56. Dismissed is required for several reasons.

First, it is an essential prerequisite for misrepresentation claims that the defendant has misstated a fact. *Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.,* 51 S.W.3d 573, 577 (Tex. 2001); *Fed. Land Bank Assoc. of Tyler v. Sloane,* 825 S.W.2d 439, 442 (Tex. 1992). That key element is missing here. As explained above, MERS Mortgage expressly state that MERS is acting as a nominee of the lender, the Texas Legislature allows book entry systems like MERS to serve as mortgagee, and courts have repeatedly held that MERS may serve this role. The filing of MERS security instruments therefore misstated no facts, and so the Court should dismiss these claims. *Robinson v. BAC Home Loan Servicing, LP,* 2011 WL 2490601, at *6-7 (S. D. Tex. June 21, 2011) (dismissing misrepresentation claims; no false statements of fact alleged); *Biggers v. BAC Home Loans Servicing, LP,* 767 F. Supp. 2d 725, 734 (N.D. Tex. 2011) (no misrepresentation as to whether defendant "owned or serviced their loan and had the legal capacity to threaten to enforce or enforce the deed of trust lien.").

The misrepresentation claims also must be dismissed because they require justifiable reliance by Plaintiffs on a material misrepresentation, *Ernst & Young,* 51 S.W.3d at 577; *Sloane,* 825 S.W.2d at 442; *Industrias Trele, S.A. de C.V. v. Reyes,* 1997 WL 563228, at *2 (Tex. App. -- San Antonio Sept. 10, 1997, no pet.), but the Complaint alleges none. Justifiable reliance requires that (1) Plaintiffs must in fact rely on the information and (2) the reliance must be reasonable. *Collins v. Morgan Stanley Dean Witter,* 224 F.3d 496, 501-02 (5th Cir. 2000). Here, Plaintiffs do not allege the first element of justifiable reliance: that Plaintiffs took any action or refrained from taking any action based on any purported misrepresentation about the true beneficial owner of a note or mortgage, let alone the second element. Nor could they, because Plaintiffs, through their clerks, merely record the documents which are presented to them by a party wishing to record. Tex. Loc. Gov't Code § 191.001(c). And it is therefore immaterial who a deed of trust states the note holder or the mortgagee is; a county recorder records the entity's name in the land records but it does not rely on the entity's identity in doing so. The misrepresentation claims fail for this reason

as well. *Burnett v. Sharp,* 328 S.W.3d 594, 603 (Tex. App. -- Houston [14th Dist.] 2010, no pet.) ("Burnett has not alleged that Sharp made any material misrepresentation or that Sharp intended that Burnett act on any such misrepresentation or that Burnett acted in reliance on such a misrepresentation.").[27]

E. *The Negligent Undertaking Claims Fail To State Cognizable Claims.*

Plaintiffs allege claims for negligent and grossly negligent undertaking on the grounds that Defendants filed "false and deceptive records in the deed records of Plaintiffs and other Class Members" and failed "to properly record all releases, transfers, [and] assignments." FAC ¶¶ 147, 149. Every negligence claim requires the existence of a duty flowing from the defendant to the plaintiff, however,[28] and Defendants had no duty under Texas law to record transfers of interests in MERS-registered loans. The negligence claims fails to meet this basic requirement.

Dismissal is required for several additional reasons. First, liability for negligent undertaking only "arises when the actor undertakes a particular course of action *for the benefit of another party.*" *Tex. Farm Bureau Ins. Cos. v. Sears,* 54 S.W.3d 361, 368 (Tex. App. -- Waco 2001), *rev'd on other grounds,* 84 S.W.3d 604 (Tex. 2002) (emphasis in the original).[29] The Complaint does not allege that Defendants undertook any actions for the benefit of the Counties. Nor could it, because when Defendants recorded deeds of trust listing MERS as beneficiary, they did so for their *own* benefit -- - to perfect their security interests in property securing loans. This defect requires dismissal. *Staples v. Merck & Co.,* 270 F. Supp. 2d 833, 841 (N.D. Tex. 2003) (conclusory assertion of duty insufficient); *Bain v. Honeywell Int'l, Inc.,* 167 F. Supp. 2d 932, 939 (E.D. Tex. 2001) (dismissing negligent undertaking claim; defendant had no "affirmative duty to investigate and report the fractured screws").

The negligent undertaking claims also fail because Plaintiffs cannot allege that Defendants "failed to exercise reasonable care" in not recording assignments of MERS-28 registered loans. *Torrington,* 46 S.W.3d at 839. As noted above, Texas law does not require that assignments be recorded, requiring dismissal of these claims. *Midwest Employers Cas. Co. v. Harpole,* 293 S.W.3d 770, 779 (Tex. App. -- San Antonio 2009, no pet.) (no negligent undertaking claim; plaintiff failed to show "necessary element of a negligent undertaking claim--Harpole's failure to exercise reasonable care in providing his services").

Finally, the Court should dismiss the negligent undertaking claims because the Complaint does not allege that Plaintiffs relied on Defendants' actions or that Defendants' actions increased Plaintiffs' "risk of harm." *Torrington,* 46 S.W.3d at 839. Again, no such allegations could be made (consistent with Rule 11): the purpose of recording is to provide notice of liens to third parties and creditors, and counties merely maintain the records and do not rely on the filing of land records for their own legal obligations. This claim also fails because the risk giving rise to a claim must involve *physical* harm, and Plaintiffs assert financial harm. *Torrington,* 46 S.W.3d at 838; *Pugh v. General Terrazzo Supplies, Inc.,* 243 S.W.3d 84, 95 (Tex. App. -- Houston [1st Dist.] 2007, pet. denied).

F. *Plaintiffs' Negligence Per Se Claims Fail.*

The Complaint alleges claims for negligence per se and gross negligence per se, premised on the purported violations of Sections 12.002 and 192.007. FAC ¶¶ 151-54. Because the claims under those statutory sections fail to state cognizable claims for relief, the negligence per se claims must likewise be dismissed. *Verrando v. ACS State & Local Solutions, Inc.,* 2009 WL 2958370, at *5 (N.D. Tex. Sept. 15, 2009).[30] These claims also fail because no physical injury or property damage is alleged. *Express One Int'l v. Steinbeck,* 53 S.W.3d 895, 899 (Tex. App. -- Dallas 2001, no pet.) ("To be entitled to damages for negligence, a party must plead and prove either a personal injury or property damage as contrasted to mere economic harm."); *Binder v. Bank of Am. Corp.,* 2010 WL 5017314, at *2 (N.D. Tex. Nov. 22, 2010) ("economic loss rule bars negligence per se claims") (citing cases).

G. Injunctive Relief, Declaratory Judgment, and Exemplary Damages Are Not *Cognizable Causes Of Action.*

Finally, Plaintiffs purport to assert claims for a declaratory judgment, injunctive relief, and exemplary damages. FAC ¶¶ 157-61. These "claims" should be dismissed, as they are remedies, not causes of action.[31] These claims also fail because they are derivative of Plaintiffs' other causes of action, none of which state cognizable claims for relief.

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H. ***No Conspiracy Claim Is Stated.***

The Complaint includes a brief paragraph containing cursory allegations of a conspiracy by Defendants. *See* FAC ¶ 162. Plaintiffs have simply parroted the elements of a civil conspiracy, however, which is insufficient to state a claim. *VendEver LLC v. Intermatic Mfg.,* 2011 WL 4346324, at *8 (N.D. Tex. Sept. 16, 2011) (dismissing conclusory conspiracy claim); *Berry v. Indianapolis Life Ins. Co.,* 600 F. Supp. 2d 805, 815 (N.D. Tex. 2009) (dismissing conspiracy claim; plaintiffs failed to allege facts showing agreement among defendants). Moreover, because liability for conspiracy is "derivative" of the underlying tort claims in the Complaint, *Tilton v. Marshall,* 925 S.W.2d 672, 681 (Tex. 1996), and because the Complaint states no viable tort claims, the conspiracy allegations are likewise defective. *Woodward v. Liberty Mut. Ins. Co.,* 2009 WL 1904840, at *5 (N.D. Tex. July 2, 2009) (dismissing claim; "civil conspiracy in Texas is a derivative tort which requires the plaintiff to show that the defendant is liable for some underlying tort," which plaintiffs failed to do).

III. PLAINTIFFS CANNOT PIERCE THE CORPORATE VEIL OF MERS AND MERSCORP TO REACH BANA OR STEWART.

In addition to direct claims, the Counties also seek to hold BANA and Stewart Title Guaranty Company ("Stewart") liable based on their status as shareholders of MERSCORP. FAC ¶¶ 15, 120, 127. The Court need not reach this issue because none of Plaintiffs' causes of action states a viable claim. But the notion is meritless in any event.

American jurisprudence strongly favors the separate existence of corporations and shareholders. [32] Accordingly, piercing the corporate veil "is an exception reserved for extreme situations," *Trs. of the Nat'l Elevator Indus. Pension Health Benefit & Educ. Funds v. Lutyk,* 332 F.3d 188, 197 (3d Cir. 2003) (applying Delaware law), and the requirements for piercing the corporate veil "are demanding ones." *Am. Bell, Inc. v. Fed'n of Telephone Workers,* 736 F.2d 879, 886 (3d Cir. 1984). The Complaint does not remotely come close to meeting this burden and fails to allege the necessary facts required to justify piercing the corporate veil (in fact, to justify piercing the corporate veils of both MERSCORP and MERS). [33] The Court should dismiss the claims against BANA and Stewart to the extent they are predicated on BANA's and Stewart's status as shareholders of MERSCORP, just as similar allegations have been dismissed by a federal district judge in the District of Delaware, and also recently by the judge presiding over a multi-district proceeding involving MERS litigation. *Trevino v. MERSCORP, Inc.,* 583 F. Supp. 2d 521, 528-31 (D. Del. 2008); *In re Mortg. Elec. Registration Sys., Inc. (MERS) Litig.,* slip op. at 13 (Exhibit F-4, App. 140). [34]

A. Veil-Piercing Of The Type Alleged Already Has Been Rejected Under *Delaware Law*.

This is not the first time a plaintiff has sought to impose liability on MERSCORP shareholders for alleged misconduct involving MERS. In *Trevino,* the plaintiffs' alter ego allegations were very similar to those alleged here, but a federal court applying Delaware law refused to pierce MERSCORP's corporate veil to impose liability on its shareholders.

The *Trevino* court recognized that "in order to state a claim for piercing the corporate veil under an alter ego theory, [the plaintiffs] must show (1) that the corporation and its shareholders operated as a single economic entity, and (2) that an overall element of injustice or unfairness is present." *Id.* at 528. Whether a "single economic entity exists is determined by considering several factors: "(1) undercapitalization; (2) failure to observe corporate formalities; (3) nonpayment of dividends; (4) the insolvency of the debtor corporation at the time; (5) siphoning of the corporation's funds by the dominant stockholder; (6) absence of corporate records; and (7) the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders." *Id.* at 528-29 (citation omitted). As *Trevino* noted, " '[w]hile no single factor justifies a decision to disregard the corporate entity,' some combination of the above is required, and 'an overall element of injustice or unfairness must always be present, as well.' " *Id.* at 529.

The *Trevino* court held that the plaintiffs had "not adequately pled facts sufficient to support an inference that the Shareholder Defendants are using 'an independent corporation' to 'defeat the ends of justice, to perpetuate a fraud, to accomplish a crime, or otherwise evade the law.' " *Id.* at 529. In addition, although the plaintiffs there had alleged that MERS was undercapitalized, the court dismissed the action because plaintiffs failed to allege any other of the seven factors which were indicia of veil piercing

under Delaware law. *Id.* at 530. The court further held that the mere fact that the plaintiffs alleged overcharges by MERS for a large number of foreclosure proceedings was insufficient to pierce the corporate veil because it did not relate to "abuse or injustice in the use of the corporate form." *Id.* at 531.

Similarly, Judge James Teilborg of the District of Arizona recently dismissed a consolidated complaint in a multidistrict proceeding involving certain claims concerning formation or operation of the MERS system. *In re Mortg. Elec. Registration Sys., Inc. (MERS) Litig.,* slip op. at 13 (App. 140). The plaintiffs there alleged that the shareholders were liable for aiding and abetting wrongful foreclosure under a veil piercing theory of recovery. *Id.* The plaintiffs did not "allege facts to show that this case is one of the specific, unusual circumstances where the courts will curtail limited liability" and instead only relied on insufficient "bare allegations that the shareholders 'participated' in the creation of MERS." *Id.* Accordingly, Judge Teilborg rejected the veil-piercing theory, dismissing the aiding and abetting claim with prejudice. *Id.*

B. The Complaint Fails To Allege Facts To Meet The Heavy Burden Of *Justifying Piercing The Corporate Veil.*

Plaintiffs' attempt to pierce the corporate veil is likewise defective here as well. The Complaint fails to allege that piercing the veil of *both* MERSCORP and MERS is appropriate under *any* of the factors considered by the Delaware courts: *i.e.,* use of corporation to perpetrate a fraud; failure to observe corporate formalities; non-payment of dividends; insolvency; siphoning of corporate funds; undercapitalization; absence of corporate records; operation of the corporation as a façade. *Trevino,* 583 F. Supp. 2d at 528-29. The only allegations as to veil piercing are that "MERSCORP established MERS without sufficient capitalization," and that "MERSCORP failed to retain an appropriate number of employees." FAC ¶ 113. These conclusory allegations do not come close to stating all the required elements needed to make a claim for veil-piercing under Delaware law. *Cf. Trevino,* 583 F. Supp. 2d at 530 (a "shortage of capital, as with all the factors of the alter ego doctrine, is not a per se reason to pierce the corporate veil."). When coupled with the fact that MERS was created to help foster the growth of a secondary market for the purchase and sale of mortgages, the *Trevino* court held that similar allegations were inadequate to support veil-piercing. Given that Plaintiffs similarly acknowledge the permissible purpose behind MERS (FAC ¶ 82), this Court should reach the same conclusion as *Trevino* and hold that Plaintiffs have not sufficiently pleaded an alter ego claim.

Nor is there a sufficient allegation of injustice or unfairness, as required to pierce the corporate veil under Delaware law. As in *Trevino,* the only injustice alleged by Plaintiffs is that MERS might not satisfy a potential judgment. However, "Delaware courts have held that the possibility that a plaintiff may have difficulty enforcing a judgment is not an injustice warranting piercing the corporate veil." *Trevino,* 583 F. Supp. 2d at 530. The Complaint fails to meet the "demanding factual standard" to show that veil-piercing is justified here, and so the veil piercing claims against BANA and Stewart should be dismissed. *In re MERS Litig.,* slip op. at 13.

In addition, "Delaware law permits a court to pierce the corporate veil only 'where there is fraud or where [the corporation] is in fact a mere instrumentality or alter ego of its owner.' " *NetJets Aviation, Inc. v. LHC Comm'cns, LLC,* 537 F.3d 168, 176 (2d Cir. 2008) (citing *Geyer v. Ingersoll Pubs. Co.,* 621 A.2d 784, 793 (Del. Ch. 1992)). Dismissal is required because the Complaint does not allege these critical elements either. As discussed above, the Complaint fails to allege facts under an alter ego theory under Delaware law and instead merely recites some of the elements required to sufficiently allege an alter ego theory. *See* FAC ¶¶ 121, 128 ("Recognizing the corporate existence of MERSCORP and MERS separate from their shareholders, including [BANA and Stewart] would bring about an inequitable result or injustice ... The corporate fiction is being used ... as a mere tool or business conduit for others"). In fact, the Complaint contains only a few bare, conclusory allegations as to these factors considered as proof of an alter ego. FAC ¶ 113. This is insufficient to impose liability under an alter ego theory. *Trevino,* 583 F. Supp. 2d at 529-31. [35]

The Court also should decline to hold BANA and Stewart liable for the conduct of MERSCORP or MERS because Plaintiffs do not allege that MERSCORP or MERS was used to perpetrate a fraud. *NetJets Aviation, Inc.,* 537 F.3d at 177 (corporate form disregarded when corporation is being used to perpetrate a fraud or to promote injustice). While Plaintiffs try to allege that MERSCORP and MERS were used "to perpetrate a fraud in the form of wrongfully identifying MERS as the 'beneficiary,' 'mortgagee,' [or] 'grantee' ... in deeds of trust" (FAC ¶ 112), that assertion about how the MERS system functions on a daily basis fails to support a claim for veil piercing, because it does not show that *the corporate form* of MERS or MERSCORP

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was used specifically for the purpose of perpetuating fraud to cause injustice or unfairness to Plaintiffs. *Trevino,* 583 F. Supp. 2d at 529-31. And, as shown in Part I, Texas law explicitly permits MERS' role as mortgagee -- and the *Trevino* court and others have consistently held that the MERS corporations are not a fraud. 583 F. Supp. 2d at 529-31; *see also Cervantes v. Countrywide Home Loans, Inc.,* 2009 WL 3157160 (D. Ariz. Sept. 24, 2009), *aff'd,* 656 F.3d 1034 (9th Cir. 2011) (MERS not a "sham beneficiary" "); *In re Mortgage Elec. Registration Sys. (MERS) Litig.,* 744 F. Supp. 2d at 1029 ("The MERS system is not fraudulent, and MERS has not committed any fraud").

CONCLUSION

For these reasons, defendants Bank of America, N.A., MERSCORP, Inc. (n/k/a MERSCORP Holdings, Inc.), Mortgage Electronic Registration Systems, Inc., Stewart Title Guaranty Company, Stewart Title Company, and Aspire Financial, Inc. d/b/a Texaslending.com respectfully request that the Court grant their Motion and dismiss all claims against them in the Class Action Complaint with prejudice.

Respectfully submitted,

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Dated: March 9, 2012

Footnotes

1 Defendants are Bank of America, N.A., MERSCORP, Inc. (n/k/a MERSCORP Holdings, Inc.) ("MERSCORP"), Mortgage Electronic Registration Systems, Inc., Stewart Title Guaranty Company, Stewart Title Company, and Aspire Financial, Inc. d/b/a Texaslending.com.

2 *See* Tex. Prop. Code § 12.001("An instrument concerning real or personal property *may be recorded*"); Tex. Prop. Code § 12.003 ("written evidence of title to land ... *may be recorded*"); *id.* § 12.004 (foreign deed "*may be recorded*"); *id.* § 12.009 ("A master form of a mortgage or deed of trust *may be recorded.*") (emphasis added).

3 *See Thornton v. Rains,* 299 S.W.2d 287, 288 (Tex. 1957); *Denson v. First Bank & Trust of Cleveland,* 728 S.W.2d 876, 877 (Tex. App. -- Beaumont 1987, no writ); *McCracken v. Sullivan,* 221 S.W. 336, 338 (Tex. Civ. App. -- San Antonio 1920, no writ); *In re Harwood,* 404 B.R. 366, 400 (Bankr. E.D. Tex. 2009).

4 Bloomberg (Sept. 23, 2011) (attached as Exhibit A, App. 6) ("A county may charge $21 for the first page of a document and $9 for each succeeding page ... Dallas county has a budget shortfall of $36 million," Watkins said. "We're in the position that we can't even provide basic services," he said. Had MERS not existed, "we could have collected those fees").

5 *See, e.g., id.* ¶ 81 (MERS is a "shadow recording system created by Wall Street"), ¶ 88 ("The MERS Lie -- *[W]hat is a lie? 'Tis but the truth in masquerade.*") (alterations in original).

6 *See id.* (The standard form deed of trust provides: "MERS is the beneficiary under this security Instrument. The 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.").

One of Plaintiffs' attorneys, District Attorney Craig Watkins, executed deeds of trust containing this language explaining MERS' role as nominee for lender and subsequent lenders. Exhibits B & C, App. 8, 29. These deeds of trust are the standard MERS Deed of Trust and nearly identical to the "standard form deed of trust" referenced in the FAC (¶ 102). The Court can take judicial notice of them because they were filed in the Official Public Records of Dallas County, Texas. *Frank v. Stryker,* 631 F.3d 777, 783 (5th Cir. 2011).

7 The MERS membership agreement, and rules and procedures for MERS which contain the contractual agreements between MERS and the lenders or servicers, are available on the MERS website at *www.mersinc.org.*

8 G. Tommy Bastian, *One Year Later: The New Foreclosure Requirements,* Texas Land Title Institute (Dec. 3, 2004) at 13, 36 (attached as Exhibit D, App. 66, 89).

9 15 Tex. Prac., Texas Foreclosure Law & Prac. § 19.05 (2011) ("[S]tatutory drafting rules prevent private entities like MERS from being specifically identified by name in Texas statutes. However, the defined term 'book entry system' in Tex. Prop. Code § 51.0001(1) means MERS because it is the only 'national book entry system for registering a beneficial interest in a security instrument that acts as a nominee for the grantee, beneficiary, owner, or holder of the security instrument and its successors and assigns' ... That utility is MERS and MERS alone").

10 *Connecticut National Bank v. Germain,* 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says").

11 *AEP Texas North Co. v. SPA Pipe, Inc.,* 2008 WL 5210919, at *6 (Tex. App. -- Austin Dec. 12, 2008, pet. dism'd) ("We cannot construe [a statute] in a manner that would so directly undermine the legislature's intent as expressed in the clear language of [that statute].").

12 *See also Wigginton v. Bank of New York Mellon,* 2011 WL 2669071, at *2 (N.D. Tex. July 7, 2011); *Anderson v. CitiMortgage, Inc.,* 2011 WL 1113494, at *4 (E.D. Tex. Mar. 24, 2011); *Eskridge v. Fed. Home Loan Mortg. Corp.,* 2011 WL 2163989, at *5 (W.D. Tex. Feb. 24, 2011); *Williams v. Bank of New York Mellon,* 2010 WL 3929007, at *1 (N.D. Tex. Oct. 7, 2010); *Santarose v. Aurora Bank FSB,* 2010 WL 2232819, at *5 (S.D. Tex. June 2, 2010).

13 *See, e.g., Cervantes v. Countrywide Home Loans, Inc.,* 656 F.3d 1034, 1040-42 (9th Cir. 2011) (affirming dismissal of fraud claim based on status of MERS as beneficiary); *In re Mortg. Elec. Registration Sys. (MERS) Litig.,* 2011 WL 251453, at *8 (D. Ariz. Jan. 25, 2011) ("The MERS system is not fraudulent, and MERS has not committed any fraud."); *In re Mortg. Elec. Registration Sys. (MERS) Litig.,* 744 F. Supp. 2d 1018, 1029 (D. Ariz. 2010) (same); *Swanson v. EMC Mortg. Corp.,* 2009 WL 3627925, at *10 (E.D.Cal. Oct. 29, 2009) ("MERS demonstrates that it is a qualified [deed of trust] beneficiary to defeat a fraud claim to the effect it is not."); *McGinnis v. GMAC Mortg. Corp.,* 2010 WL 3418204, at * 3 (D. Utah August 27, 2010) (dismissing fraud claim based on identification of MERS as beneficiary).

14 Courts across the country are aligned with Texas. *See, e.g., Cervantes,* 656 F.3d at 1041-42; *In re Mortg. Elec. Registration Sys. Litig.,* No. 09-2119-JAT, slip op. at 6 (D. Ariz. Oct. 3, 2011) (attached as Exhibit F-4, App. 133) ("As specifically agreed to by the Plaintiffs in their Deeds of Trust, MERS holds legal title to the secured interests and is the beneficiary or lienholder of record, as the nominee or agent for Plaintiffs' lenders and the lenders' 'successors and assigns'"); *Fontenot v. Wells Fargo Bank, N.A.,* 198 Cal. App. 4th 256, 272-73 (2011) (MERS may serve as beneficiary under deed of trust as nominee for lender); *Trent v. Mortg. Elec. Registration Sys., Inc.,* 288 F. App'x 571, 572 (11th Cir. 2008) ("Under the contracts, [MERS] "is the mortgagee."); *Dancy v. Aurora Loan Servs.,* LLC, 2010 U.S. Dist. LEXIS 116513, at *9-10 (N.D. Cal. Nov. 1, 2010) (attached as Exhibit F-2, App. 109) ("[W]hether or not MERS owned the note or was entitled to any payments thereunder does not obviate the fact that the Deed of Trust designated MERS as a beneficiary."); *Maxa v. Countrywide Loans, Inc.,* 2010 WL 2836958, at *6 (D. Ariz. July 19, 2010) (finding no authority requiring "a beneficiary under the Deed of Trust to be the owner and holder of the Note or that holds MERS cannot be named as a nominal beneficiary under a deed of trust"); *Birkland v. Silver State Fin. Servs.,* 2010 WL 3419372, at *4 (D. Nev. Aug. 25, 2010) ("[B]y signing the deeds of trust designating MERS as nominee for the lender and beneficiary, Plaintiff designated MERS as nominee, beneficiary, and a proper party to administer the deed of trust."); *Fowler v. ReconTrust Co., N.A.,* 2011 WL 839863, at *2 (D. Utah Mar. 10, 2011) ("Under the terms of the Trust Deed at issue here, which Plaintiffs signed, MERS was appointed as the beneficiary and nominee for the Lender and its successors and assigns and granted the power to act in their stead."); *Nicholson v. OneWest Bank,* 2010 WL 2732325, at *4 (N.D. Ga. April 20, 2010) ("the nominee of the lender has the ability to foreclose on a debtor's property even if such nominee does not have a beneficial interest in the note secured by the mortgage.").

15 The Complaint does not allege that Stewart Title Guaranty Company or Stewart Title Company released, transferred, assigned or took another action relating to deeds of trust without filing an instrument. FAC ¶ 93. The portion of Plaintiffs' case relating to the alleged failures to properly record notices of actions taken *after* the filing of a deed is thus not alleged to apply to Stewart Title Guaranty Company or Stewart Title Company in the first place.

16 *See Thornton v. Rains,* 299 S.W.2d 287, 288 (Tex. 1957) ("Of course the recording of a deed is not essential to the conveyance of title"); *Denson,* 728 S.W.2d at 877 ("[N]either the acknowledgment nor recordation of a deed of trust is necessary to make it a valid and binding obligation between the immediate parties thereto"); *McCracken,* 221 S.W. at 338 ("neither the acknowledgment nor

record is necessary to make [a deed] a valid and binding obligation"); *In re Harwood,* 404 B.R. 366, 400 (Bankr. E.D. Tex. 2009) ("The fact that the deed of trust ... is unrecorded is irrelevant to the rights of [the parties to the agreement].").

17 *See also* *Salvagio v. Madison Realty Capital, L.P.,* 2011 WL 2559371, at *8 (S.D. Tex. June 27, 2011) ("Under Texas law, the ability to foreclose on a deed of trust is transferred when the note is transferred, not when an assignment of deed of trust is either prepared or recorded.").

18 *See also* Tex. Loc. Gov't Code § 118.002 ("A fee under this chapter is not payable to a person until a clerk or officer produces or is ready to produce a bill in writing containing the details of the fee to the person who owes the fee").

19 MERS Mortgages are also not fraudulent liens for two other reasons. First, claims of fraud relate to statements of fact, not legal disputes or matters of opinion. *GMAC Commercial Mortg. Corp. v. East Tex. Holdings,* 441 F. Supp. 2d 801, 806 (E.D. Tex. 2006). Here, however, the Counties seek liability based on their belief that MERS may not serve as a beneficiary under a deed of trust. That allegation concerns a legal dispute, not facts that allegedly were misstated. Second, a lien cannot be fraudulent if it is consented to by another party or is otherwise valid. *Casstevens,* 269 S.W.3d at 233; *Centurion Planning Corp. v. Seabrook Venture II,* 176 S.W.3d 498, 507 (Tex. App. Houston 1st Dist. 2004). Second, the security instruments that Plaintiffs complain of were consented to by borrowers when they signed deeds of trust in exchange for receiving loans that they used to acquire property or refinance existing loans.

20 Indeed, Plaintiffs seek *double recovery* in this case. They request injunctive relief requiring Defendants to record MERS assignments (FAC ¶¶ 159-60, 165), which would entitle them to fees paid to record the documents -- but also seek damages from Defendants for allegedly failing to record the documents (*id.* ¶¶ 131, 136, 164). That is impermissible under Texas law. *Contreras v. Bennett,* 2011 WL 6432807, at *5 (Tex. App. -- El Paso Dec. 22, 2011, no pet.) ("Texas law does not permit double recovery").

21 *Ojeda De Toca v. Wise,* 748 S.W.2d 449, 450-51 (Tex. 1988) ("[T]he purpose of recording statutes is to protect intending purchasers and encumbrancers against the evils of secret grants and secret liens and the subsequent frauds attendant upon them.") (ellipses omitted).

22 *Accord* *Salvagio,* 2011 WL 2559371, at *8.

23 *Acker v. Tex. Water Comm'n,* 790 S.W.2d 299, 301 (Tex. 1990) ("A statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it ... A [statute] should be harmonized whenever possible with its predecessor in such a manner as to give effect to both").

24 *E.g.,* *Walker v. Cotter Props., Inc.,* 181 S.W.3d 895, 900 (Tex. App. -- Dallas 2006, no pet.) ("Unjust enrichment is not an independent cause of action but rather characterizes the result of a failure to make restitution of benefits either wrongfully or passively received under circumstances which give rise to an implied or quasi-contractual obligation to repay.").

25 *See* *Redwood Resort Props., LLC v. Holmes Co.,* 2006 WL 3531422, at *9 (N.D. Tex. Nov. 27, 2006) (granting Rule 12 motion; unjust enrichment not an independent cause of action); *Wood v. Gateway, Inc.,* 2003 WL 23109832, at *12 (N.D. Tex. Dec. 12, 2003) (same); *Oxford v. Williams Cos.,* 137 F. Supp. 2d 756, 762 (E.D. Tex. 2001) (same).

26 *Zapata Corp.,* 986 S.W.2d at 788 ("The profit must be 'unjust' under principles of equity."); *Shin v. Sharif,* 2009 WL 1565028, at *7 (Tex. App. -- Fort Worth June 4, 2009, no pet.) (affirming summary judgment where there defendant did not receive alleged benefits unjustly).

27 *See also* *Marquez v. Fed. Nat'l Mortg. Ass'n,* 2011 WL 3714623, at *8 (N.D. Tex. Aug. 23, 2011) ("Plaintiffs fail to allege how Plaintiffs justifiably relied on these misrepresentations to his detriment."); *Biggers v. BAC Home Loans Servicing,* LP, 767 F. Supp. 2d 725, 734 (N.D. Tex. 2011) ("the Biggers have failed to plead sufficient facts to show that they relied on these representations to their detriment ... The amended complaint does not contain a plausible explanation of how their beliefs regarding the *identity* of the loan owner and servicer had any effect on their circumstances").

28 *Ibarra v. Hines Land Group, LTD,* 2010 WL 2869814, at *2 (Tex. App. July 21, 2010, no pet.) ("Negligent undertaking ... require[s] a showing of duty").

29 *See also* *Sears,* 54 S.W.3d at 367 (this "tort frequently arises in a 'good Samaritan' context"); *Torrington Co. v. Stutzman,* 46 S.W.3d 829, 837 (Tex. 2000) ("duty to use reasonable care may arise when a person undertakes to provide services to another, either gratuitously or for compensation").

30 "Negligence per se is not itself a cause of action, but actually a way to prove a party's negligence as a matter of law, through the violation of a penal statute." *De Pacheco v. Martinez,* 515 F. Supp. 2d 773, 779 n.7 (S.D. Tex. 2007).

31 *Lindsey v. Ocwen Loan Servicing, LLP,* 2011 WL 2550833, at *6 (N.D. Tex. June 27, 2011) (dismissing claim for declaratory judgment); *Cook v. Wells Fargo Bank, N.A.,* 2010 WL 2772445, at *4 (N.D. Tex. July 12, 2010) ("Under Texas law, a request for injunctive relief is not itself a cause of action but depends on an underlying cause of action"); *UMLIC VP LLC v. T & M Sales & Envtl Sys., Inc.,* 176 S.W.3d 595, 616 (Tex. App. -- Corpus Christi 2005, pet. denied) (exemplary damages unavailable where plaintiff-appellees "failed to sufficiently plead an underlying cause of action for fraud" or any "independent cause of action in tort.").

32 *See* *Dole Food Co. v. Patrickson,* 538 U.S. 468, 474 (2003) ("A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities."); D. Wolfe & M. Pittenger, *Corporate and Commercial Practice in the Delaware Court of*

Chancery § 2-3[b][iii] at 2-34-2-35 (2007) ("It is a fundamental tenet of corporate law ... that corporations are entities separate and distinct from their stockholders, and therefore that stockholders ordinarily are insulated from personal liability for the debts and obligations of the corporation.").

33 Plaintiffs allege that "the acts of misconduct alleged ... against MERS are alleged as well against MERSCORP as the owner and operator of MERS." FAC ¶ 111. To the extent they seek to hold BANA and Stewart liable for the conduct of MERS as well, Plaintiffs would need to allege facts making a two-step showing: (1) that the separate corporate existence between MERS and MERSCORP should be pierced, so that MERSCORP (the sole shareholder of MERS) is liable for MERS's alleged misconduct; *and also* (2) that the corporate veil of MERSCORP should be pierced, so that BANA and Stewart also should be liable for MERS's alleged misconduct.

34 Delaware law determines whether shareholders (such as BANA and Stewart) may be held liable for the debts of an entity incorporated under Delaware law (such as MERSCORP) as well as whether a corporate parent (such as MERSCORP) may be liable for debts of a subsidiary incorporated under Delaware law (such as MERS). Because this Court sits in diversity, it must follow Texas choice of law rules. *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 496 (1941). Texas law provides that the law of the entity's incorporation governs liability of the shareholders of the entity. Tex. Bus. Orgs. Code §§ 1.102 & 1.104. This law "express[ly] provide[s] that the question of shareholder liability for corporate obligations ... [is] governed solely by the law of its jurisdiction of incorporation." Tex. Bus. Corp. Act, art. 8.02(a), 1996 Comment. *See Alberto v. Diversified Group, Inc.,* 55 F.3d 201, 203-04 (5th Cir. 1995) (same).

35 Plaintiffs' inability to allege facts supporting the alter ego theory is not surprising. Veil piercing is typically used where a corporation is closely dominated by a single shareholder, who uses it for her personal benefit; the purpose of ignoring the corporate form is to ensure that the acts of a single, dominant shareholder are not shielded by empty corporate formalities. *E.g., Baldwin v. Matthew R. White Invs., Inc.,* 669 F. Supp. 1054, 1056 (D. Utah 1987). Here, however, Plaintiff admits MERSCORP is "owned by various mortgage banks, title companies, and title insurance companies, including Defendants [BANA] and Stewart." FAC ¶ 86. Most of the shareholders of MERSCORP are competitors. There is no suggestion in the Complaint that BANA or Stewart are dominating shareholders, much less that there has been any attempt by them--two shareholders of many ... to treat MERSCORP or MERS as tools for their sole benefit.

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