IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

COUNTY OF CLACKAMAS, *et al,* Plaintiffs, vs. MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation, *et al,* Defendants.	)	Case No. 16CV36390

PLAINTIFFS' RESPONSE AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

D'AMORE LAW GROUP
4230 Galewood St., Ste. 200
Lake Oswego, OR 97035
(503) 222-6333

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Lake Oswego, OR 97035
(503) 222-6333

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Lake Oswego, OR 97035
(503) 222-6333

COME NOW, Plaintiffs and file this Opposition to Defendants' Motion to Dismiss the Amended Complaint.

I. INTRODUCTION AND BACKGROUND

As a general rule, the law of the state in which property is located will determine whether a "mortgage" or a "deed of trust" is used to pledge real property as security. In lien theory states such as Oregon, a "deed of trust" creates a lien on the property. [1] Further, while the deed of trust and note are ordinarily separate documents,

> [t]he note and mortgage are inseparable; the former as essential, the latter is an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.[2]

Through their actions, however, Defendants have collapsed this long-standing Oregon rule, [3] rendering the public record of interests in real estate opaque and unreliable. This result is impermissible in Oregon. The filing of false and inaccurate documents undermines the reliability of the public records system on which so many rely, including land owners, purchasers, local governments, title companies, insurers, and relators.

The instant action, filed by Plaintiffs, the Counties of Clackamas, Coos, Crook, Jackson, Klamath, Lane, Linn, Marion, Washington, and Yamhill ("Counties"), is intended to halt the filing of fraudulent documents by the MERS Defendants which have damaged the Counties and their respective record keeping systems.

In the most common residential lending scenario, there are two parties to a real property mortgage: a lender (the mortgagee) and a borrower (the mortgagor). When a mortgage lender

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1 *James v. ReconTrust Co.*, 845 F. Supp. 2d 1145, 1152 (D. Or. 2012).
2 *Carpenter v. Longan*, 83 U.S. 271, 274, 21 L. Ed. 313 (1872).
3 *U.S. Nat. Bank of Portland v. Holton*, 99 Or. 419, 427-29 (1921).

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loans money to a home buyer, it obtains two documents: (1) a promissory note in the form of a negotiable instrument from the borrower and (2) a mortgage or trust deed granting the mortgage lender a security interest in the property as collateral to repay the note. The mortgage or trust deed, as distinguished from the note, establishes the lien on the property securing repayment of the loan. In Oregon, the note cannot be separated from the mortgage or trust deed. (Amended Complaint ["AC"] ¶ 44.)[4]

Recording an interest in real property in Oregon is permissive, not mandatory.[5] However, if a party wants or needs to have a "first lien" security interest (a "perfected" interest), that party must record "as provided by law." By statute,

> Every conveyance, deed, land sale contract, assignment of all or any portion of a seller's or purchaser's interest in a land sale contract or other agreement or memorandum thereof affecting the title of real property within this state which is not **recorded as provided by law** is void as against any subsequent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance, deed, land sale contract, assignment of all or any portion of a seller's or purchaser's interest in a land sale contract or other agreement or memorandum thereof is first filed for record, and as against the heirs and assigns of such subsequent purchaser.

ORS 93.640 (emphasis added). In exchange for meeting the statutory recording requirements provided by Oregon law, lienholders are granted priority over subsequent purchasers or lienholders.

The relevant statute makes it clear that recording in the County Clerk's office is the one and only method for obtaining a perfected interest:

> To give constructive notice of an interest in real property, a person must have documentation of the interest recorded in the indices maintained under ORS 205. 130 in the county

[4] Plaintiffs adopt and incorporate their Amended Complaint as though fully set forth herein.
[5] *See Brandrup v. ReconTrust Co., N.A.*, 353 Or. 668, 698-99 (2013).

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> where the property is located. **Such recordation, and no other record**, constitutes constructive notice to any person of the existence of the interest.

ORS 93.643(1) (emphasis added).

A party that is entitled to the legal benefits and protections of ORS 93.640 (perfected lienholders status) cannot obtain these benefits and protections unless and until that party properly records the security instrument with the proper County and pays the County the required filing fee. Once a deed of trust is recorded and the security instrument is "perfected", Oregon law requires that the deed of trust be re-filed with the proper County Clerk's office each time the mortgage is transferred in the event the new lienholder wants or needs to have "first lien" perfected status. A perfected security interest cannot be assigned or transferred by operation of law and remain perfected as to the transferee. This ensures that the County deed records remain current and correctly identify any party asserting a lien. (AC ¶¶ 45, 46)

ORS 93.610 requires that:

> Separate books shall be provided by the county clerk in each county for the recording of deeds and mortgages. In one book all deeds left with the clerk shall be recorded at full length, or as provided in ORS 93.780 to 93.800, with the certificates of acknowledgment or proof of their execution, and in the other all mortgages left with the county clerk shall in like manner be recorded.

(AC ¶¶ 41, 42).

However, this traditional process for recording security interests changed in the late 1990s as the buying and selling of mortgage loans increased in the private sector. As the issuance of mortgage-backed securities grew, the traditional process for recording security interests was deemed by the mortgage industry to be too inconvenient and cumbersome.[6] (AC

[6] *See Cervantes v. Countrywide Home Loans, Inc.,* 656 F.3d 1034, 1039 (9th Cir. 2011).

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¶¶ 113-14). The industry's response was to create the MERS System. (AC ¶115).[7] MERS is a subsidiary of MERSCORP, Inc. ("MERSCORP"). MERSCORP is owned by, and its members are, various mortgage banks, title companies, and title insurance companies, including Shareholder Defendants. (AC ¶¶ 31-34).[8] MERS was developed by the real estate industry to operate an electronic registration system for tracking interests in mortgage loans and to serve as the mortgagee of record for its members in deed records throughout the United States. MERS' members pay a fee to use the MERS System for tracking mortgages and to have MERS appear as the mortgagee of record.[9] MERS and its members, including all Defendants, agree amongst themselves that: 1) sales or transfers of mortgage loans amongst MERS members will not thereafter be recorded in the real property records; 2) MERS will remain as the "grantee" of the security interest created by the original deed of trust; and 3) subsequent sales or transfers amongst MERS members will be tracked electronically in the MERS System. AC ¶ 92; *see also* Exhibit 3, MERSCORP Membership Rules.[10] "Any loan registered on the MERS® System is inoculated against future assignments because MERS remains the mortgagee no matter how many times servicing is traded."[11]

Rule II.4 of the MERSCORP, Inc. Rules of Membership provides, in part, that "each Member, at its own expense, shall cause 'Mortgage Electronic Registration Systems, Inc.' to appear in the applicable public land records as the Mortgagee of Record as Nominee for the Note Owner and its successors and/or assigns with respect to each mortgage loan that the

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[7] Exhibit 1, MERS published document entitled "Quick Facts" describing the history of MERS.
[8] *See id.*
[9] Exhibit 2, Process Loans, Not Paperwork.
[10] How Defendants achieved these requirements in light of Oregon's Statute of Frauds is unclear. *See* ORS 41.580.
[11] According to MERS, "[a]ny loan registered on the MERS® System is inoculated against future assignments because MERS remains the mortgagee no matter how many times servicing is traded." Exhibit 4, "MERS - About Us", *available at* http://www.mersinc.org/about/index.aspx.

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Member registers on the MERS® System."[12] Accordingly, at the origination of an Oregon mortgage loan by a MERS member, the lender directs preparation of a deed of trust identifying the lender as "the lender" and MERS as "the beneficiary." (AC ¶ 88).

When a deed of trust in which MERS is denominated as "the beneficiary" is recorded, the county clerks index MERS as a "grantee" in the statutory deed records. By way of example, Exhibit 1 to Defendant's Motion to Dismiss shows that MERS is not simply identified as the lender's nominee or agent. Instead, MERS is also identified without qualification as "the beneficiary under this Security Instrument."[13] Because MERS was denominated as "the beneficiary," both Guild Mortgage Company (as "lender") and MERS (as "beneficiary") would be indexed as a "grantee" in the Statutory Grantor/Grantee Index. The reason why the lenders denominate MERS as "the beneficiary," and not just as the lenders' nominee, is because the County would not index MERS as a "grantee" if it were merely serving in the capacity as the nominee or agent of the lender, its successors and assigns. (AC ¶ 139). It is only by denominating MERS itself as "the beneficiary" that MERS will be indexed as a grantee and therefore as one in whose favor a security interest has been granted. An agreement with the borrower to denominate MERS as a beneficiary does not, however, make MERS a beneficiary of that deed of trust. When the lender sells or assigns the note to another MERS member, the change is tracked only in the MERS database, and is not recorded in County records, because MERS continues to appear in the county records as the "grantee" of the deed of trust. If a note is assigned to a non-MERS member, MERS records an assignment and/or release of its supposed interest in favor of the new owner of the note with the County. (AC ¶ 94).

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[12] Exhibit 3 at p. 9, *Merscorp Rules of Membership* at II.4. This same condition is contained in the *Terms and Conditions of MERS' Residential Membership Application.*

[13] *See, e.g.*, Exhibit 1 to Defendants' Motion to Dismiss the Amended Complaint, Ludlow Deed of Trust showing MERS as Beneficiary and Grantee, attached hereto as Exhibit 5.

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As highlighted above, the MERS System is plagued by a serious conundrum: if MERS is acting only as a "nominee" or "agent" of the lender, MERS itself has no security interest in the real property that is the subject of the deed of trust and, therefore, MERS has no rights which qualify it to assert that it is a beneficiary of the deed of trust. But, unless MERS identifies itself as a "beneficiary," MERS will not be denominated as a "grantee" in the deed records. (AC ¶89). And, unless MERS is identified as a "grantee" in the deeds records, the MERS System does not work because the protections of the recording statutes are not extended to MERS. The solution for Defendants was thus to simply ignore the law and to identify MERS as the "beneficiary" of an instrument in which MERS holds no beneficial interest. (AC ¶ 90).

The deeds of trust in issue here generally state that "MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns."[14] Of course, a lender is free to appoint an agent. As noted above, however, if this was MERS' only status as denominated in the deeds of trust, it would ordinarily not be indexed as a "grantee" in its own right. Thus, Wall Street fixed this problem by adding an untruth to each such deed of trust—namely, that "MERS is the beneficiary under this Security Instrument." In that way, county clerks, including the clerks of the Counties at issue here, would identify MERS as a "grantee" in their deed records, and MERS, and other members of the mortgage banking industry could take advantage of the recording system.

According to MERS, it is the "mortgagee" or "beneficiary" of record in more than 50 million mortgages filed in the deed records of counties throughout the United States.[15] MERS, however, does not actually have a security interest in the real property that is the subject of

[14] *See, e.g.,* Exhibit 5.
[15] Exhibit 6, *MERSCORP Response to FHFA Report*

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such mortgages or deeds of trust. (AC ¶99). In MERS' own words:

> MERS has no interest at all in the promissory note evidencing the mortgage loan. MERS has no financial or other interest in whether or not a mortgage loan is repaid
> . . .
> MERS is not the owner of the promissory note secured by the mortgage and has no rights to the payments made by the debtor on such promissory note
> . . .
> MERS is not the owner of the servicing rights relating to the mortgage loan and MERS does not service loans. The beneficial interest in the mortgage (or the person or entity whose interest is secured by the mortgage) runs to the owner and holder of the promissory note. In essence, MERS immobilizes the mortgage lien while transfers of the promissory notes and servicing rights continue to occur.[16]

The MERS system as designed and implemented requires MERS itself to not only hold, but to repeatedly transfer the legal benefits and protections of ORS 93.640 (perfected lienholder status) as many times as necessary, and to as many different MERS members as necessary to achieve securitization without Defendants ever re-filing the security instrument with the County.[17] Assuming that such transfers were legally possible, MERS lacks the legal authority/ability to make them. MERS cannot be a "beneficiary" in its own right, MERS cannot serve as a "beneficiary" in the role as agent or nominee of the lender or obligee, and MERS cannot hold and transfer legal title to the trust deeds that secure them. *See Brandrup v. ReconTrust Co., N.A.*, 353 Or 668, 674-75 (2013).[18]

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[16] Exhibit 7, *Mortg. Elec. Registration Sys., Inc. v. Nebraska Dep't of Banking & Fin.,* 270 Neb. 529, 704 N.W.2d 784 (Neb. 2005), *Brief of Appellant* at 11-12 (citations omitted) (emphasis added). MERS does not explain how it can be a "mortgage lien" holder or how it can "inoculate" loans "against future assignments" while simultaneously insisting the "MERS is not the owner of the promissory note secured by the mortgage and has no rights to the payments made by the debtor on such promissory note secured by the mortgage and has no rights to the payments made by the debtor on such promissory note" and "is not the owner of the servicing rights relating to the mortgage loan."

[17] At least two loan transfers are necessary to create a residential mortgage backed security. (AC ¶ 110).

[18] Defendants' suggestion that MERS could theoretically have been acting as the Lender's "agent" is legally and factually unsupportable.

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Under Oregon law, MERS' system is legally defective and incapable of accomplishing its stated purpose – allowing MERS members to receive and transfer the benefit of a continuous and uninterrupted **perfected** mortgage without re-filing the security interest with the Counties and paying the required fee. If the MERS system did not exist, MERS members would have to re-file their deeds of trust with the County each time the security instruments are transferred in order to remain perfected. Likewise, outside the world of MERS, non-MERS members currently have to re-file their deeds of trust with the County and pay its legally required filing fee each time the security instruments are transferred in order to remain perfected. Under Oregon law, transfers within the private MERS system are insufficient to perfect the security instrument for the transferee. Absent a recording of a deed of trust with the County, the security instrument is unperfected in the hands of the transferee. In short, Defendants knowingly failed to record the transfer of deeds of trust necessary for securitization, yet Defendants continue to maintain that they had the benefit of perfected security instruments, a benefit that could only be obtained by recording.[19]

Despite Defendants' attempts to argue to the contrary, this Motion to Dismiss is substantively identical to the Motion raised in the action brought by Multnomah County in December 20, 2012. Nevertheless, Defendants argue that this Court should overlook this fact on the grounds that "Defendants make many arguments here that Judge Litzenberger did not consider or rule on." (Def.'s Mot. at 3). Yet, to the extent that Defendants articulate arguments in this Motion that were not previously addressed by Judge Litzenberger, the arguments themselves are far from novel. For example, much of Defendants' Motion relies on the idea

[19] For purposes of issuing mortgage-backed securities, Defendants claim that mortgages in the Mortgage Pools are secured by "first liens" (AC ¶ 125).

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that Plaintiffs' claims are precluded under common law contract principles. However, this argument has already been squarely rejected by the Oregon Supreme Court in *Brandrup v. ReconTrust Co.*, 353 Or. 668 (2013).

II. STANDARD OF REVIEW

On review of a motion under ORCP Rule 21, the Court assumes the truth of the facts alleged and gives the non-moving party the benefit of all inferences that can be reasonably drawn from the facts. *Hornbuckle v. Harris*, 69 Or. App. 272 (1984).

III. ARGUMENT

A. THE COUNTIES ARE THE PROPER PLAINTIFFS TO BRING THE CLAIMS ASSERTED IN THIS ACTION.

In their Motion to Dismiss, Defendants argue that the Counties are precluded from suit on the grounds that the Counties are "strangers to the trust deed contracts" and thus cannot challenge those contract terms. In support of their argument, Defendants cite to a decision from the Western District of Arkansas.[20] Curiously, although Defendants cite to a decision from an entirely different jurisdiction with no bearing on the decisions of this Court in support of their argument, they opt to entirely disregard the Oregon Supreme Court's holding in *Brandrup v. ReconTrust Co.*, 353 Or. 668 (2013).

In *Brandrup*, like here, Defendants argued that the "bedrock" principles of "freedom of contract" should dictate the interpretation of the applicable law. *Id.* at 686-87 ("Defendants also point to the 'bedrock' principle that 'contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts,' unless contrary to some 'overpowering rule of public policy.'"). However, the Supreme Court of Oregon has flatly rejected this

[20] *See Brown v. Mortg. Elec. Registration Sys., Inc.*, 903 F. Supp. 2d 723, 727 (W.D. Ark. 2012), *aff'd*, 738 F.3d 926 (8th Cir. 2013).

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argument, noting: "We disagree. The resolution of this question does not hinge on the parties' intent; rather, it depends on legislative intent." *Id.* at 687. In short, Oregon law does not allow principles of "freedom of contract" to shield a party from responsibility for a violation of Oregon statute. Nor do such principles trump the State of Oregon's legislative intent, particularly with respect to questions of public policy.

Despite Defendants' arguments to the contrary, the Counties are the appropriate plaintiffs in this action. As a preliminary matter, under the Oregon Constitution, the Counties are constitutional home rule counties who have power to exercise "authority over matters of county concern." Oregon Constitution, Article VI § 10; see also, *Multnomah Kennel Club v. Dep't. of Revenue*, 295 Or. 279 (1983). Further, the County is charged by the Oregon legislature with the capacity to sue. Counties have existed in corporate form with the power to sue and be sued since before statehood. Oregon Statute Section 203.010, originally enacted in 1854, General Laws of Oregon, chapter IX, § 1, specifically gives the power to sue and be sued, stating:

> Each county is a body politic and corporate for the following purposes:
>
> (1) To sue and be sued;
> (2) To purchase and hold for the use of the county lands lying within its own limits and any personal estate;
> (3) To make all necessary contracts; and
> (4) To do all other necessary acts in relation to the property and concerns of the county.

Under these statutes, counties possess interests that may be asserted against the state. *Tillamook County v. State*, 302 Or 404, 415-16 (1986). Finally, the County is responsible for the fees collected and their use as well as being responsible for setting and charging fees under Oregon law. ORS 205.320 and ORS 205.323.

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Indeed, as Judge Litzenberger explained in denying Defendants' Motion to Dismiss in the prior suit filed by Multnomah County:

> The Court rejects Defendants' assertion that Plaintiff does not have standing to assert this claim. Multnomah County is the appropriate plaintiff in this case; it has the power to sue granted by Article VI, sec. 10 of the Oregon Constitution and ORS 203.010(1), *Multnomah Kennel Club v. Dept. of Rev.*, 295 Or. 279 (1983); *Tillamook County v. State*, 302 Or 404, 415-16 (1986).[21]

B. PLAINTIFFS HAVE ALLEGED ACTIONABLE DAMAGES UNDER OREGON LAW.

Pursuant to Oregon statute, the Counties are statutorily charged with maintaining land records, as well as the collection of, charging of, and use of fees for such service. Defendants' fraudulent conduct, however, undermined the Counties' public records, caused the Counties to lose revenue due to Defendants' failure to properly file for properly perfected security interests, and has forced the Counties to bear the cost of remediating records to accurately reflect the parties with interest in the property. Despite all of this, Defendants argue that the Counties have not alleged actionable damages. Specifically, Defendants argue that Plaintiffs' claims are not actionable because there is no duty to record assignments under Oregon law and, especially perplexingly, because the Counties' do not have a property interests in their records.

1. Perfected Security Interests Must Be Recorded "As Provided By Law."

Defendants argue that because the recordation of assignments is permissible, they do not need to record the transfers of perfected security interests. However, as described above, Defendant ignores the clear language of ORS 93.640 which states, in relevant part,

> Every conveyance, deed, land sale contract, assignment of all or any portion of a seller's or purchaser's interest in a land sale contract or other agreement or memorandum thereof affecting the title of real property within this state which is not **recorded as provided by law**

[21] *See* Exhibit 8, September 19, 2014 Letter Order on Defendants' Motions to Dismiss.

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is void as against any subsequent purchaser. . .

(emphasis added). Thus, Oregon law requires that in order for a security interest in a property to be perfected, the interest must be recorded. ORS 93.640.

Given that Defendants sold interests in properties located in the respective Counties, the Counties have a right to seek a determination as to whether the interests in the mortgages and deeds of trust were later transferred as perfected interest or not. This matter is of direct concern to the Counties, and Defendants' failure to properly record and pay for this protection has caused the Counties compensable damage.

2. The Counties Clearly Have An Ownership Interest In Their Own Public Land Records, As Well As The Right To Protect Them.

Defendants also attempt to argue that the Counties lack an ownership interest in their land records system because this system is itself governed by statute. Not only does this argument misconstrue the applicable law, but also, it has already been previously rejected.[22] Defendants are correct in their assertion that Oregon law vests the counties with a duty to control and protect these public records. However, rather than demonstrate the Counties' lack of an ownership interest in their records, this duty only further underscores the fact that the public land records and indexes are the Counties' property.

Pursuant to Oregon statute, the County Clerk must "[h]ave the custody of, and safely keep and preserve all files and records of deeds and mortgages of real property, and a record of all maps, plats, contracts, powers of attorney and other interests affecting the title to real property required or permitted by law to be recorded." ORS 205.130. Thus, as custodians over these records, the Counties have the right to exercise control over them. ORS 192.410.

[22] *See* Exhibit 8.

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Moreover, the Counties may also "adopt reasonable rules necessary for the protection of the records and to prevent interference with the regular discharge of duties of the custodian." ORS 192.430. Notably, the Counties maintain their own public land records and indexes and employ clerks that create such records. The Counties also digitize or place on microfiche all land records at their own expense. In short, it is precisely because the Counties are charged with maintaining these records that the Counties have suffered actionable injuries as a result of Defendants' actions and are thus the proper parties to bring suit.

Prior to the widespread use of the MERS system, the Counties' public land records accurately reflected priority by reflecting the current lien holder. Now, however, these records reflect MERS as the perpetual lien holder, even if the original Lender – long after the first note transfer – could still be identified. Meanwhile, MERS, a party that cannot hold or transfer anything, is named as the entity holding priority interest.

Because Defendants' actions have harmed the records that the Counties are charged to maintain – records that the Counties own and for which they are responsible – Plaintiffs have properly alleged actionable damages.

C. OREGON LAW SUPPORTS THE LEGAL THEORIES UNDERLYING PLAINTIFFS' CLAIMS.

For the reasons outlined in this Response, MERS cannot be a beneficiary in deeds of trust as it has no such interest. *See Brandrup,* 353 Or. at 679. Moreover, Oregon requires the recording of transfers for a perfected security interest to be in place under ORS 93.640. That is, under Oregon law, obtaining or maintaining a perfected, priority-first lien security interest requires the recordation of subsequent transfers, assignments, and conveyances in the offices of the county clerks of the Counties. Here, the false filings made by Defendants in stating that MERS is a "beneficiary" does not create a perfected security interest for subsequent entities

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who are purchasers of the security instrument as demonstrated above. As such, there is a basis for Plaintiffs' claims under Oregon law.

1. MERS Cannot Be A Beneficiary In Deeds Of Trust.

Defendants improperly attempt to construe Plaintiffs' Amended Complaint as basing "all its claims on the false legal notion that *all* trust deeds designating MERS as beneficiary, as nominee (or agent) for the lender and the lender's successors and assigns, are 'false' because MERS cannot be a valid beneficiary or valid agent of the beneficiary." (Def.'s Mot. at 14). Defendants then proceed to cite to a string of cases in which courts have declined to find that a lien is *de facto* invalid in the context of a judicial foreclosure. (Def.'s Mot. at 16-18). However, in citing to these cases, Defendants are merely attempting to confuse the issues at hand in this case.

Here, the issue is whether Defendants fraudulently asserted MERS' interest in properties so that MERS would be indexed and once indexed, Defendants then used MERS' indexing to obtain and profit from a benefit Defendants did not rightfully obtain. Specifically, Plaintiffs allege that Defendants received a first-lien benefit for each deed of trust that Defendants properly recorded under Oregon law. Defendants did so by reselling the benefit of perfected lienholder status to its members thereby allowing them to claim that they were transferring perfected first-lien mortgages without ever re-filing — a legal impossibility in Oregon.

When asked whether an entity such as MERS can be a "beneficiary" under the OTDA, the Oregon Supreme Court answered "no":

> [T]he "beneficiary" is the lender to whom the obligation that the trust deed secures is owed or the lender's successor in interest. Thus, an entity like MERS, which is not a lender, may not be a trust deed's

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"beneficiary," unless it is a lender's successor in interest.

Brandrup v. ReconTrust Co., N.A. 353 Or. 668, 689 (2013); see also *Niday v. GMAC Mortgage*, 353 Or 648, 666 (2013) ("MERS is not, and never has been, the beneficiary of the trust deed for the purposes of OTDA."). Likewise, when asked whether MERS is eligible to serve as "beneficiary" of a trust deed in a role as the obligee's agent, or nominee, the Oregon Supreme Court again said "no".

> Is MERS eligible to serve as beneficiary under the Oregon Trust Deed Act where the trust deed 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 those interests"?
>
> **Answer: "No."** A "beneficiary" for purposes of the OTDA is the person to whom the obligation that the trust deed secures is owed. At the time of origination, that person is the lender. The trust deeds in these cases designate the lender as the beneficiary, when they provide: "This Security Instrument secures to Lender: (i) the repayment of the loan, and all renewals, extensions and modifications of the note; and (ii) the performance of borrower's covenants and agreements under this security instrument and the note." Because the provision 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 * * * has the right to exercise any or all of those interests," does not convey to MERS the beneficial right to repayment, the inclusion of that provision does not alter the trust deed's designation of the lender as the "beneficiary" **or make MERS eligible to serve in that capacity.**

Brandrup, 353 Or. at 693 (emphasis added). Faced with a clear rejection of their "beneficiary" arguments, Defendants now attempt to obfuscate this legal holding by claiming that the ruling in *Brandrup* concerning the Oregon Trust Deed Act has no application to the Oregon trust deeds at issue in this case. This assertion is meritless.

Once again, because MERS itself has no security interest in the real property that is the subject of the deed of trust, MERS has no rights which qualify it to assert that it is a mortgagee,

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beneficiary, or grantee of the deed of trust. Defendants admittedly knew that fact, but Defendants also knew that unless MERS itself was identified as a "beneficiary," MERS would not have been indexed as a "grantee" in the deed records. And unless MERS is identified as a "grantee" in the deed records, the MERS System does not work because the protections of the recording statutes are not extended to MERS. To now claim that MERS was always acting as a mere "nominee" or "agent," a status that would not have allowed MERS to be indexed as a "grantee," is to admit that Defendants' filings with Plaintiff claiming otherwise are false.

Finally, to the extent that Defendants are attempting to re-argue that MERS can somehow still qualify as a "beneficiary" under a "beneficiary as nominee of Lender" theory, the Oregon Supreme Court has already said "no" to that theory. *Brandrup*, 353 Or. at 691, 692. MERS cannot operate as the beneficiary and the lender's agent at the same time. A company cannot be both agent and principal with respect to the same right.

2. Defendants' Argument That A Note Transfer Need Not Be Recorded For A Lien To Be Perfected Is Unsupported By Oregon Law.

Defendants have also argued that Plaintiffs' legal theories fail because Defendants could not have caused damage through their failure to record the mortgage assignments since no Oregon law requires them to record. Even assuming that MERS has been designated an agent for the banks (which it has not), and assuming that Oregon law allows MERS to serve as agent for the thousands of banks at issue (which it does not), Oregon law nevertheless requires that transfers of mortgages or trust deeds be recorded to perfect and prioritize the principals' security interests.

As explained above, the securitizations that Defendants assembled, held, and profited from, required properly recorded, adequately conveyed, perfected and prioritized security interests. Instead, Defendants created a financial instrument that depended upon the recording

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system, represented that mortgages were perfected and properly conveyed, and were priced accordingly. Defendants cannot now complain that the obligations that they undertook and promised, in order to claim tax and bankruptcy benefits under federal law, were not required by Oregon statute.

Thus, as is set forth in greater detail below, the legal theory underlying Plaintiffs' claims is supported by Oregon law and the Counties' Amended Complaint in this action has adequately alleged substantive claims for fraud, unjust enrichment, negligence, and gross negligence.

D. PLAINTIFFS STATE A COGNIZABLE CLAIM FOR FRAUD.

In Oregon, the elements of fraud are: "(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury." *Conzelmann v. N. W.P. & D. Prod. Co.*, 190 Or 332, 350 (1950).

In *Peterson v. Auvel*, 275 Or. 633, 639 (1976), the Oregon Supreme Court made it clear that "When representations by the defendant may be fact or opinion, according to the circumstances, a pleading may not be held insufficient on the ground that the representations are not factual. (citing *Eyers v. Bitrbank*, 97 Wash. 220, 166 P 656, 659 (1917)*; Van Slochem v. Villard*, 207 NY 587, 101 NE 467, 468 (1913)). The *Peterson* Court also held that, "[i] n such a case, the question of whether the representation was one of fact or of opinion is for the trier of fact to decide upon proof at trial." *Id.* (citing *Hansen v. Holmberg,* 176 Or. 173, 180-

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82 (1945)*; Olston v. Oregon Water Power & Ry. Co.*, 52 Or. 343, 356-57 (1908)*; Tacoma v. Tacoma Light & Water Co.*, 17 Wash. 458, 50 P. 55, 59-60 (1897)).

1. Plaintiffs' Allegations Are Sufficient To Reasonably Infer That Defendants Made False Statements.

Plaintiffs' Amended Complaint alleges that Defendants knowingly filed, or caused to be filed, security instruments in the Counties' property records which falsely represent that MERS has an interest in certain pieces of real property as a grantee, beneficiary, or mortgagee, i.e., "MERS is the beneficiary under this security instrument." (AC ¶ 138).

MERS has no property or financial interest in the property which is the subject of these deeds of trust and therefore by law cannot be the "Grantee" or the "Beneficiary" of these deeds of trust. In *Niday v. GMAC Mortg., LLC*, 251 Or. App. 278, 292-99 (2012), the Oregon Court of Appeals held that MERS could not be a beneficiary of a trust deed. Therefore, deeds of trust identifying MERS as the beneficiary are false.

2. Plaintiffs' Allegations Are Sufficient To Reasonably Infer That Defendants' Misrepresentations Were Statements Of Fact And Not Legal Opinion.

Plaintiffs have specifically plead that Defendants intentionally and knowingly misrepresented MERS' status in official documents with the knowledge and intent that these factual misrepresentations would have a particular legal effect. (AC ¶¶ 130, 131, 134 & 138.) Defendants argue that Plaintiffs fraudulent misrepresentations claims must be dismissed because Defendant's false statements concerning MERS' legal status were "legal opinion" and not misrepresentations of material fact. (Def.'s Mot. to Dismiss at 26). This identical argument was recently asserted by MERS and was summarily rejected in another court:

> Next, **Defendants argue that Plaintiffs fraudulent misrepresentation claim must be dismissed because Defendants' allegedly false statements concerning MERS legal status were**

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> **legal opinions, not misrepresentations of material facts. <u>The Court disagrees with this distinction</u>.**
>
> . . .
>
> Plaintiff alleges that Defendants represented in official documents filed with the County that MERS was a grantee, grantor, beneficiary, lender, and holder or owner of notes and liens. (FAC 23, 25, 27, 29, and 42.) **These statements were not qualified legal opinions, but they were statements of fact made with the knowledge and intent they would have a particular legal effect**. . . . The alleged misrepresentations caused the County to index the deeds of trust in a particular way and resulted in MERS being publicly identified through the County records as having a security interest in the properties. Accordingly, viewing the allegations of the FAC in the light most favorable to Plaintiff, the Court concludes that one could plausibly infer that Defendants made material misrepresentations of fact to Plaintiff in the deeds of trust presented to the County for filing.

Nueces County v. MERSCORP Holdings, Inc., No. 2:12-CV-00131, 2013 US Dist LEXIS 93424, 37-39 (S.D. Tex. July 3, 2013) (emphasis added).

The Defendants' Motion to Dismiss a claim for fraudulent misrepresentation brought by the County of Dallas, Texas was denied on similar grounds.[23]

"Determining that a statement couched as an opinion is such a representation of fact requires considering such factors as 'to whom, with what knowledge and in what context a defendant makes a statement,' and whether the 'object and design' of the statement is to induce reliance on it." *Jeska v. Midhall,* 71 Or. App. 819, 822 (1985); *see also Campbell v. Southland Corp*., 127 Or App 93, 100 (1994). As Plaintiffs have alleged, it was the object and design of the MERS scheme to intentionally misrepresent MERS' status as "the beneficiary" in order to

---

[23] *See* Exhibit 9, Transcript of hearing in the case "*Dallas County, TX v. MERSCORP, INC.*, Case No. 3:11- cv-3722, N.D. TX, Dallas Div., before the Hon. Reed C. O'Conner, May 23, 2012 (announcing Order on Motion to Dismiss and allowing Plaintiffs claims of declaratory relief for statutory violations of TX Govt. Code 192.007, fraudulent misrepresentation, unjust enrichment, conspiracy, piercing corporate veil, injunctive relief and declaratory judgment to go forward).

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induce the Counties to index MERS as the "grantee." Defendants knew that MERS was not the beneficiary and that Plaintiffs were relying upon the truthfulness of Defendants' misrepresentations as Defendants had superior knowledge. Likewise, the Defendants' misrepresentations did not concern the legal effects of an instrument but were statements of fact Defendants made in order to get MERS indexed. Furthermore, "whether a statement was only an opinion or was an actionable assertion of fact is normally a question of fact for the jury." *Buckner v. Home Depot, U.S.A., Inc.*, 188 Or. App. 307, 312 (2003).

3. Defendants Made False Representations To Plaintiffs In The Deeds of Trust Filed With Plaintiffs.

As specifically alleged in Plaintiff's Amended Complaint, representations were made to the Plaintiffs *via* written instruments created by Defendants which were presented to Plaintiffs by Defendants for the purpose of inducing Plaintiffs to index MERS as grantee, mortgagee, or beneficiary among the public land records of Multnomah County. (AC ¶¶ 82, 90, 131, 134, 139, 142, 143, & 147).

4. Plaintiff Has Specifically Alleged That Defendants Knew Their Statements Were False.

Defendants knew they were making false statements to Plaintiff and did so in order to cause Plaintiff to index MERS as a "grantee," "beneficiary," or "mortgagee." Making false statements in order to be indexed in the record was the backbone of the MERS Scheme. (AC ¶ 131, 134, 138 & 139). Plaintiff specifically alleges that Defendants "knew" they were making false statements to Plaintiff and that they "intended" to make false statements to Plaintiff. (AC ¶¶ 131, 134, 138& 139).

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5. Plaintiffs Have Specifically Alleged That Defendants' Misrepresentations Were Material And That Plaintiffs Relied On Them.

The false statements at issue are material because Plaintiffs are required to maintain accurate public records and in so doing Plaintiffs rely on the truthfulness and accuracy of the documents presented for recording. (AC ¶¶ 39.) A critical element of the MERS Scheme was that the County would accept these material statements ("MERS is the beneficiary") as true and would index MERS in the deed records. But for Defendants' misrepresentations, Plaintiffs would not have done so. Thus, to argue that Defendants' false statements were not material is without merit.

6. Plaintiffs Lacked Full Knowledge Of Defendants' Fraudulent Recording Activities Or Their Unlawful Taking of Benefits.

When Defendants recorded at the various County offices, Plaintiffs took Defendants' representations at face value and trusted that the documents that Defendants presented for recording were true and accurate. It is absurd for Defendants to suggest that Plaintiffs are somehow precluded from their claims because the Counties' Clerks and Deputies "continued to record MERS trust deeds even after *Brandrup*." *See* Def.'s Mot. to Dismiss at 29.

For these reasons, dismissal of Plaintiffs' Fraud Claim is therefore inappropriate because Plaintiffs have properly pled this claim.

E. PLAINTIFFS STATE A COGNIZABLE CLAIM FOR UNJUST ENRICHMENT.

Contrary to Defendants' assertions, Plaintiffs' unjust enrichment claims are viable claims for restitution in Oregon.

A claim for unjust enrichment is based on what another has unjustly received and retained for his own benefit. "A benefit received and retained can consist of any form of advantage and exists, for example, where one party adds to the property of another or saves

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(503) 222-6333

another from expense or loss." *Hitchcock v Delaney,* 192 Or. App 453, 459 (2004). Unjust enrichment is well-established in Oregon law:

> An action for money had and received, although an action at law, is governed by equitable principles. The action is liberal in form, and greatly favored by the courts. The generally accepted test which determines whether a recovery may be had is whether the defendant, in equity and good conscience, is entitled to retain the money to which the plaintiff asserts claim. The right to the refund is based upon a promise to return which the law implies, irrespective of any actual promise, and even against the refusal of the wrongful party to make it.

Comcast of Oregon II, Inc. v City of Eugene, 346 Or 238, 253 (2009) (quoting *Smith v. Rubel,*140 Or. 422, 426-27 (1932)).

Under the theory of unjust enrichment, the measure of plaintiff's recovery is "the reasonable value of the property received" by the defendants. *Burklund v Clayton,* 275 Or. 115, 119 (1976) (citing *Hughes v. Bembry,* 256 Or. 172 (1970)). *See also Elle v. Babbitt,* 259 Or. 590, 609 (1971) (the measure of restitution for a benefit conferred on another is the value of the benefit to the recipient, not the expense to the party who confers it).

Recovery under a claim of unjust enrichment is not dependent upon the existence of a particularized wrong; "equity may impress a constructive trust on property 'obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, *or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest." Tupper v. Roan,* 349 Or. 211, 220 (2010) (quoting John Norton Pomeroy, 4 *A Treatise on Equity Jurisprudence §* 1053, 119 (5th ed. 941)) (emphasis in original).

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1. The County Conferred A "Benefit" Cognizable Under Oregon Law.

Defendants' assertion that the Oregon Legislature and not the Counties confers the "benefit" of a perfected security instrument ignores Oregon law. Specifically, Defendants claim that because the right of a lienholder to obtain the benefit of a perfected security interest is codified in a statute enacted by the Oregon Legislature, the Oregon Legislature, therefore, is the one and only party that actually bestows the benefit upon a lienholder. According to Defendants' logic, because the Oregon Legislature enacts all statutes, the Oregon Legislature confers all statutory benefits and is the one and only party entitled to receive any compensation associated with the conferring of said benefit. What the actual statute says or what other statutes enacted by the same Legislature regarding the same subject matter have to say are apparently of no consequence. This logic is flawed.

The Oregon Legislature specifically provided in ORS 93.640 that the benefit of perfected lienholder status will not be conferred upon any party unless and until that party records "as provided by law." That same Oregon Legislature specifically sets out in companion statutes (that it also enacted into law) the actual method a party wishing to become a perfected lienholder must use in order to obtain the actual benefit from the County. *See* ORS 93.643; ORS 205.130. A review of the statutes themselves confirms the Oregon Legislature did not reserve for itself or for the State any role or responsibility whatsoever in the conferring of the benefit upon a lienholder. To the contrary, the Oregon Legislature specifically delegated to the County all duties and responsibilities for conferring the benefit and provided that County (not the Legislature or State) is entitled to any payments/revenues derived from conferring the benefit. This is consistent with the historic fact that the County — not the Legislature or the State — has always had responsibility for recording and maintaining land and deed records and that County land records

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pre-date the existence of the State itself. It is axiomatic that the party that confers the benefit is the party from who the benefit is obtained. It is undisputed that the benefit of perfected lienholder status can only be obtained from the County and that by statutory design, neither the Legislature nor the State play any role in the actual conference of the benefit.

2. Defendants Unjustly Retained The Benefit Conferred By The Counties.

By design, the very purpose of the MERS System is to allow MERS' members to take the benefits of the public recording system without having to pay for them.[24]

Without the MERS System, Defendants could not have taken the benefits of the public recording system, and, without taking the benefits of the public recording system, Defendants could not have achieved their ultimate goal of securitization and the issuance of Residential Mortgage Backed Securities. Moreover, MERS purports to maintain a national electronic database that tracks the changes in ownership of home mortgages, as well as changes in loan servicers.[25] The MERS System, however, is inherently unreliable. This fact is most apparent in the abuse of the MERS System by MERS, lenders, and loan servicers in pursuing foreclosures.

In April 2011 MERS and MERSCORP executed a *Stipulation and Consent to the Issuance of a Consent Order* with the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the Federal Housing Finance Agency (the "Federal Regulators"), in which the entities agreed to the terms of a comprehensive *Consent Cease and Desist Order*

[24] According to MERS, "[a]ny loan registered on the MERS® System is inoculated against future assignments because MERS remains the mortgagee no matter how many times servicing is traded." *See* Exhibit 4, MERS–About Us.

[25] *See, e.g.,* Exhibits 1, 4, and 6.

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("Consent Order").[26] The Consent Order grew out of an inter-agency review of major residential mortgage servicers and mortgage service providers and included an examination of MERS and MERSCORP, "both of which provide various services to financial institutions related to tracking and registering residential mortgage ownership and servicing, acting as mortgagee of record in the capacity of nominee for lenders, and initiating foreclosure actions."[27]

The Consent Order included findings that MERS and MERSCORP "(a) have failed to exercise appropriate oversight, management supervision and corporate governance, and have failed to devote adequate financial, staffing, training, and legal resources to ensure proper administration and delivery of services to Examined Members; and (b) have failed to establish and maintain adequate internal controls, policies, and procedures, compliance risk management, and internal audit and reporting requirements with respect to the administration and delivery of services to Examined Members."[28]

In sum, Defendants cite no Oregon authority that the County conferred no "benefit" on Defendants that is cognizable under Oregon law. Moreover, the other cases from other jurisdictions cited by Defendants either do not address the issues directly or do not provide any actual legal analysis. *See, e.g., Fuller v. MERS,* 888 F.Supp. 2d 1275 (2012) (providing no legal analysis or explanation of Florida law). Accordingly, Plaintiffs have stated cognizable claims for unjust enrichment and Defendants' Motion should be denied.

F. PLAINTIFFS STATE A COGNIZABLE CLAIM FOR NEGLIGENCE.

Under Oregon law, foreseeability is the determinative factor in Oregon negligence law:

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[26] Exhibit 10, *In the Matters of MERSCORP, INC., and the Mortgage Electronic Registration Systems, Inc*., FHFA No. EAP-11-01 (Federal Housing Finance Agency, April 13, 2011).
[27] *Id.* at 2.
[28] *Id.* at 5.

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> [T]he issue of liability for harm actually resulting from defendant's conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff. The role of the court is what it ordinarily is in cases involving the evaluation of particular situations under broad and imprecise standards: to determine whether upon the facts alleged or the evidence presented no reasonable fact finder could decide one or more elements of liability for one or the other party.

Fazzolari v. Portland School Dist. No. 1J, 303 Or. 1, 17 (1986).

Plaintiffs' Complaint states that the Defendants developed a scheme which first allowed MERS to be falsely indexed as a beneficiary in deeds of trust. Next, once inside the Counties' record keeping system, the scheme allowed MERS members to transfer the legal benefits and protections of ORS 93.640 (perfected lienholder status) amongst and between MERS members without re-filing the security interest with the Counties and paying the required fee. (AC ¶¶ 116-143.) The Complaint then sets out specific claims for negligence and the grossly negligent conduct of the Defendants, which "caused foreseeable harm to County's public record." (AC ¶ 169-181).

The facts as alleged make clear that the harm suffered was not only foreseeable, but was the intended purpose of Defendants' actions. The harm was an acknowledged byproduct of the MERS scheme in which all Defendants participated. (AC ¶ 147). Finally, the fact that the Counties were not Parties to the Deeds of Trust has no bearing on the issue of whether the Defendants' actions caused harm to the Counties.

1. The Economic Loss Doctrine Does Not Bar Plaintiffs' Negligence Claim.

The economic loss doctrine does not apply when there has been injury to person or property and therefore does not apply with respect to damaged public records for which the County is responsible. As Oregon courts have explained:

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(503) 222-6333

> The only case in which the Supreme Court provided an explicit definition for the term "economic loss" is *Onita*, in which the court stated that "economic losses" refers to "financial losses such as indebtedness incurred and return of monies paid, as distinguished from damages for injury to person or property." 315 Or. at 159 n. 6. In subsequent cases, we have followed that lead and defined "economic losses" to refer to financial losses to intangibles.

Harris v. Suniga, 209 Or App 410, 418 (2006). The harm done to County is to its property – the records it is charged to maintain. The Amended Complaint sets out the harm caused to County and its property. (AC ¶ 147). Further, Plaintiffs have alleged that the subject records are "public" records which constitute the property of the County, and County is charged with the responsibility of maintaining the same. (AC ¶¶ 36-43). In short, public records are the property of the County, are maintained by the County, and the County is charged with the upkeep of same.

Finally, Defendants' assertion that a "special relationship" is required is unsupported by law and contravenes the statutory provisions that expressly allow Plaintiffs to bring this suit. *See supra* Section III.A.

2. Counties Concedes That Criminal Statutes Are Precluded From Claims of Negligence Per Se.

Plaintiffs concede that Oregon criminal statutes concerning making false statements and interfering with public records require that actions in violation of the statutes be made "knowingly" and that current negligence case law holds that such *mens rea* condition precludes a claim of mere negligence. The fact that knowing violation of Oregon criminal law was part of the elaborate business plan of MERSCORP shows that the MERS scheme was conceived and operated "knowingly" and illegally. Although Oregon negligence law seems to preclude a remedy for knowingly violating a criminal statute in the pursuit of a tortious act, Defendants should not be allowed to escape responsibility for their conduct.

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1230 Galewood St., Ste. 200
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(503) 222-6333

3. The Counties Have Properly Pled Gross Negligence.

In *Garrison v Pacific Northwest Bell*, 45 Or. App. 523, 532 (1980), the Oregon Court of Appeals defined gross negligence as follows:

> Gross negligence is characterized by conscious indifference to or reckless disregard of the rights of others. In the context of a guest passenger case it has been stated that "[fin order to show gross negligence it is incumbent upon the plaintiff to prove that defendant's conduct, when measured objectively, reveals `a state of mind indicative of an indifference to the probable consequences of one's acts.' This state of mind has been described as an 'I don't care what happens' attitude.' Ordinarily, the issue of gross negligence is a question of fact to be decided by the jury. The court will withdraw the issue from the jury only when it can say as a matter of law that the actor's conduct falls short of gross negligence.

Based on Defendants' actions and the ensuing results, Plaintiff's factual allegations as set forth in Plaintiff's Amended Complaint satisfy this criteria. (AC ¶¶ 173- 182). It is evident by Defendants' conduct that they were well aware of what would occur to County's records and income, but chose to act anyway. The system Defendants set up and used was designed to alter and avoid both, despite legal requirements otherwise. Defendants' argument regarding gross negligence fails.

IV. CONCLUSION

Plaintiffs have undertaken good-faith efforts to plead cognizable claims for relief and believe that they have done so. The central facts in this matter are not in dispute: the MERS System caused a wholesale collapse of the public recording system in Oregon by having Defendants denominate MERS in trust deeds as something it is not – a "beneficiary" to be indexed as "an indirect party" or in some cases "a direct party" in the County's property records. The purpose of these false statements was to place MERS into the recording system so that subsequent transfers/assignments could be performed without having to pay the County

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(503) 222-6333

recording fees while representing that the subsequent transfers had perfected lien status. The problem with this scheme is that when transfers occur, the one and only way to obtain perfected lien status is to record with the County and to pay a fee. The effect of Defendants' conduct has been to render the property records of the Counties unreliable and to allow Defendants to keep moneys for themselves – moneys to which the Counties were otherwise entitled. Based upon the foregoing, Plaintiffs respectfully request that Defendants' Motion to Dismiss be denied. Finally, as described herein, issues raised by Defendant in its Motion were responded to and ruled upon by this Court in *County of Multnomah v. Mortgage Electronic Registration Systems, et. al.*, Case No. 1212-16328. To the extent ruled upon in the Multnomah case, the previous rulings should be determinative.

Should this Honorable Court determine that any of Plaintiffs' claims are not properly plead, or insufficiently specific, Plaintiffs respectfully ask the Court to exercise its broad discretion to grant Plaintiffs leave to amend their complaint in order to correct any deficiencies the Court may determine.

Dated this 20th day of June, 2017.

D'AMORE LAW GROUP, P.C.

By: s/ Thomas D'Amore
Thomas D'Amore, OSB #922735
S. Michael Rose, OSB #983388

Attorney for Plaintiffs

Trial Attorney:
Thomas D'Amore, OSB #922735
D'Amore Law Group, P.C.
4230 Galewood Street, Suite 200
Lake Oswego, OR 97035

Nicholas Kahl, OSB #101145
209 SW Oak Street, #400

Portland, OR 97204

Linda Singer (*pro hac vice)*
Motley Rice, LLC
3333 K St. NW, #450
Washington, DC 20007

John E. Herrick (*pro hac vice)*
Motley Rice, LLC
28 Bridgeside Blvd.
Mount Pleasant, SC 29464

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing **DECLARATION OF THOMAS D'AMORE IN SUPPORT OF PLAINTIFFS' RESPONSE AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT** by email to the attorney(s) at the address(es) listed herein:

Erich M. Paetsch
Saalfeld Griggs
P.O. Box 470
Salem, OR 97308
epaetsch@sglaw.com
Attorneys for Defs. Citizens Bancorp (dba Citizens Bank) and Willamette Community Bank

Gregory Chaimov
Davis Wright Tremaine LLP
1300 SW Fifth Ave., #2400
Portland, OR 97201
gregorychaimov@dwt.com
Attorneys for Defs Mortgage Electronic Registration Systems, Inc; MERSCORP Holdings, Inc.; and JPMorgan Chase Bank, N.A.

Valerie I. Holder
Keesal, Young & Logan
1301 Fifth Avenue, Suite 3100
Seattle, WA 98101
valerie.holder@kyl.com
Attorneys for Defs CitiMortgage, Inc.

B. John Casey
Stoel Rives LLP
760 SW 9th Ave., #3000
Portland, OR 97205
John.casey@stoel.com
Attorneys for Def. SunTrust Mortgage, Inc.

William L. Larkins, Jr.
Cody Hoesly Larkins Vacura LLP
121 SW Morrison St., #700
Portland, OR 97204
wlarkins@lvklaw.com
choesly@lvklaw.com
Attorneys for Def. Umpqua Bank

Bruce Cahn
Ball Janik
101 SW Main #1100
Portland, OR 97204
bcahn@balljanik.com
Attorneys for Bank of Oswego, Bank of the Cascades, Willamette Valley Bank, a subsidiary of Oregon Bancorp, Inc.

Joseph F. Yenouskas
Thomas M. Hefferon
Goodwin Procter LLP
901 New York Avenue, NW
Washington, DC 20001
jyenouskas@goodwinprocter.com
thefferon@goodwinprocter.com
Attorneys for Defs Bank of America, N.A.; EverBank; and Wells Fargo Bank, National Association

James P. Laurick
Graham Sweitzer
Kilmer Voorhees & Laurick
732 NW 19th Ave.
Portland, OR 97209
jlaurick@kilmerlaw.com
gsweitzer@kilmerlaw.com
Attorneys for Defs Bank of America, N.A.; EverBank; and Wells Fargo Bank, National Association

D'AMORE LAW GROUP
1230 Galewood St., Ste. 200
Lake Oswego, OR 97035
(503) 222-6333

DATED: June 20, 2017.

D'AMORE LAW GROUP, P.C.

By: s/ Thomas D'Amore
Thomas D'Amore, OSB #922735
Of Attorneys for Plaintiff

D'AMORE LAW GROUP
4230 Galewood St., Ste. 200
Lake Oswego, OR 97035
(503) 222-6333