No. 18-20026

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE OF THE RESIDENTIAL ASSET SECURITIZATION TRUST 2007-A8, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-H UNDER THE POOLING AND SERVICING AGREEMENT DATED JUNE 1, 2007,

Plaintiff-Appellant,

v.

JOANNA BURKE AND JOHN BURKE,

Defendants-Appellees.

On Appeal from the United States District Court
For the Southern District of Texas, Houston Division;
Civil Action No. 4:11-CV-01658

BRIEF OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

This is an appeal from a trial court order on remand that respectfully departed from this Court's mandate. After analyzing controlling Texas and Fifth Circuit law, the trial court determined that the mandate was predicated on clear legal error and, if followed, would result in manifest injustice—circumstances that support a narrow, but well-established, exception to the law-of-the-case doctrine and mandate rule. Given this unusual posture, and the significance of this appeal to homeowners across the state of Texas, Defendants-Appellees respectfully submit that oral argument would be helpful and is appropriate.

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I. INTRODUCTION

Appellees Joanna and John Burke respectfully submit that this Court should affirm judgment in their favor against Appellant Deutsche Bank. The issue before this Court is whether Deutsche Bank has the legal right to foreclose on the Burkes' homestead. The clear answer is no.

That was the judgment of the Honorable Stephen Wm. Smith, Magistrate Judge ("Trial Court"), in 2015 after a bench trial. Deutsche Bank appealed. In an unpublished opinion, this Court vacated the judgment of the Trial Court and remanded. Owing perhaps to the manner in which the issues were briefed, *pro se* in the case of the Burkes, the prior panel focused largely on an undisputed question—whether the Mortgage Electronic Registration Systems, Inc. ("MERS"), a mortgage book entry system, has authority to assign its beneficial interest in deeds of trust. The actual basis for the Trial Court's decision—that MERS did not in fact assign its beneficial interest under the specific assignment language at issue—was addressed only briefly in a footnote.

On remand, the Trial Court issued a lengthy decision where it again held that Deutsche Bank lacked standing to foreclose on the Burkes' homestead. The Trial Court acknowledged that its decision was contrary to the law of the case, but the court invoked a well-established exception to the doctrine. That exception permits a

trial court—and subsequent panel on appeal—to depart from prior appellate rulings that are clearly erroneous and would work a manifest injustice if followed.

The Burkes recognize the importance of the law of the case doctrine to the orderly administration of the courts. But this Court also has "emphasiz[ed] that 'justice is better than consistency, [and] has recognized that it must be free to determine whether the first decision was in error, and if so, whether a different result should be reached. . . . Where, as here, a party to the action raises serious objections to the soundness of the first decision, the Court, in all but special circumstances, . . . should reexamine the first decision as a prerequisite to its implementation as the law of the case."[1]

In this case, as the Trial Court correctly held on remand, the prior panel's decision was clearly erroneous because it was inconsistent with bedrock principles of Texas law—namely, (1) that an assignment is void when made on behalf of a defunct principal with no known successors; and (2) that an agent does not convey its own rights when making an assignment solely as a "nominee" for a disclosed principal.

[1] *Wm. G. Roe v. Armour & Co.*, 414 F.2d 862, 867-68 (5th Cir. 1969) (internal citations and footnote omitted).

Moreover, to uphold that clearly erroneous decision would work a manifest injustice. At stake is whether Deutsche Bank is authorized to turn a family from its home. "For over 175 years, Texas has carefully protected the family homestead from foreclosure."[2] Among the protections afforded homeowners, nothing is more fundamental than the requirement that a foreclosing entity affirmatively demonstrate its standing to foreclose. Relieving Deutsche Bank from that showing would not only be fundamentally unjust to the Burkes, it would set a dangerous precedent for homeowners across the state of Texas.

II. STATEMENT OF JURISDICTION

This is an appeal of a final judgment from a district court exercising jurisdiction pursuant to 28 U.S.C. § 1332. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

III. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Trial Court correctly concluded that this Court's decision in the prior appeal was clearly erroneous to the extent it upheld an assignment by an entity purporting to act solely as a "nominee" for a dissolved principal with unknown successors.

[2] *LaSalle Bank Nat. Ass'n v. White*, 246 S.W.3d 616, 618 (Tex. 2007).

2. Whether the Trial Court correctly applied the well-established exception to the law-of-the-case doctrine for appellate decisions that commit clear error and, if followed, would work a manifest injustice.

IV. STATEMENT OF THE CASE

When John and Joanna Burke applied for a home equity loan in 2007, IndyMac Bank, F.S.B. ("IndyMac") denied the application because the Burkes, as retirees, had no income. ROA.1124. Sometime later, a representative of IndyMac unexpectedly called the Burkes to report that the loan would be approved after all and, on May 21, 2007, Joanna Burke executed a home equity note (the "Note") promising to pay IndyMac $615,000 in monthly installments. *Id.* The Note was secured by Deed of Trust (the "Deed") placing a lien on the Burkes' home. *Id.*

The Deed conveys to IndyMac, as the Lender, certain rights including the right to enforce the lien through foreclosure proceedings. ROA.41. The Deed states further that MERS is the "beneficiary under this Security Instrument," ROA.29, and, "if necessary to comply with law or custom," may exercise IndyMac's rights and "take any action required of Lender." ROA.31.

Within days of closing, the Burkes received the loan documents, which included an unsigned loan application stating that the Burkes enjoyed $125,000 in annual employment income. ROA.1125. The Burkes, however, had truthfully

declared no employment income in the loan application process. *Id*. The Burkes promptly notified IndyMac of this irregularity but received no satisfactory response. *Id*.

After that, the Burkes' mortgage traveled a circuitous and ultimately indeterminate path. In July 2008, the original lender IndyMac was closed by the Office of Thrift Supervision and nearly all of its assets were transferred to IndyMac Federal Bank, FSB ("IndyMac Federal"). ROA.1125. Less than a year later, in March 2009, IndyMac Federal was placed in receivership by the FDIC and its deposits were transferred to OneWest Bank, F.S.B. ("OneWest"). ROA.1126. The fate of IndyMac Federal's other assets, however, ***including the Burkes' mortgage***, is a matter of pure speculation on this record. As the trial court found, IndyMac's ultimate successor as to the Burkes' mortgage is simply "unknown." ROA.1128.

As IndyMac collapsed, the Burkes' mortgage was less than carefully managed. In 2008, the Burkes complained that their monthly payments were placed in suspense and not applied to the mortgage. ROA.1125-26. When the Burkes subsequently sought a loan modification, they were told to withhold three months of rent before making the request; they did so, only to be whipsawed and told that the arrearage needed to be paid before a modification would be considered. ROA.1126. After the Burkes made those payments, no modification was approved. *Id*. The

Burkes' January 2010 loan payment was returned and the Burkes made no further payment attempts. ROA.1126.

On January 20, 2011, MERS executed a purported assignment of the Burkes' Deed to Deutsche Bank (the "Assignment"). ROA.51. The signature block of the Assignment leaves no ambiguity as to MERS' role in this transaction:

> MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., ***AS NOMINEE FOR INDYMAC BANK, F.S.B., ITS SUCCESSORS AND ASSIGNS***
> By: _____
> Brian Burnett Assistant Secretary

Id. (emphasis added). The body of the Assignment and its corporate acknowledgement further reinforce that MERS executed the assignment ***solely*** "as nominee for lender, its successor and assigns." *Id*. Nowhere in the Assignment is there any indication that MERS intended to assign any of its own interests, as beneficiary or otherwise, in the Deed.

The Assignment was backdated to April 9, 2010, but even as of that date, IndyMac—the Assignment's disclosed principal—had been defunct for nearly two years. IndyMac's immediate successor, IndyMac Federal, was also in receivership as of that date and its assets disbursed to other entities unknown on the current record. In short, while MERS purported to assign some entity's interests in the Deed,

the identity of that entity is an utter mystery, as is MERS' actual authority to act on that entity's behalf.

Undeterred, Deutsche Bank initiated these foreclosure proceedings in 2011. Under Texas law, a party has standing to foreclose if it is a holder of either the note or deed of trust.[3] Deutsche Bank presented no evidence that it holds the Burkes' Note. ROA.1128. Instead, Deutsche Bank claimed to be the bona fide holder of the Deed, placing the validity of the Assignment squarely at issue.

After a bench trial in February 2015, the Trial Court entered judgment in favor of the Burkes. The judgment was supported by findings of fact and conclusions of law determining, among other things, that the Assignment was void because it was made "as nominee" for a defunct principal with unknown successors. ROA.1123. Because it did not legally acquire the Deed, the Trial Court ruled, Deutsche Bank could not foreclose upon the lien it created.

Deutsche Bank appealed. The briefing on the initial appeal, *pro se* in the case of the Burkes, never engaged the Trial Court's analysis of the Assignment language. Instead, Deutsche Bank framed the issue as whether MERS could assign its *own*

[3] *L'Amoreaux v. Wells Fargo Bank, N.A.*, 755 F.3d 748, 750 & n.1 (5th Cir. 2014). In determining whether a party is entitled to foreclose, a federal court applies the substantive law of the forum state, in this case Texas. *See Resolution Trust Corp. v. Starkey*, 41 F.3d 1018, 1023 (5th Cir. 1995).

interests, as beneficiary, notwithstanding IndyMac's dissolution. ROA.1107-1108. This Court followed suit, describing the dispositive issue as whether MERS "as beneficiary did not have authority to assign the deed of trust."[4]

As to that question, this Court correctly held:

> Texas law and our precedent make clear that MERS, *acting on its own behalf as a book entry system and the beneficiary of the Burkes' deed of trust*, can transfer *its* right to bring a foreclosure action to a new mortgagee by a valid assignment of the deed of trust.[5]

But the Burkes have never contested MERS' ability, acting as beneficiary, to assign its interest in a deed of trust. The contention is that MERS did not operate in that capacity here because, under the plain terms of the Assignment, MERS purported to act solely as a "nominee." As to this issue, this Court held in a footnote that the Assignment language was not controlling because the Court had "not found a single case from any Texas state court" distinguishing between MERS' roles as a beneficiary and nominee.[6] The Court accordingly vacated judgment and remanded for a determination on "the remaining requirements to foreclose under Texas law."[7]

On remand, the Trial Court sought the parties' assistance in reconciling this

[4] *Deutsche Bank Nat'l Tr. Co. v. Burke*, 655 F. App'x 251, 254 (5th Cir. 2016).

[5] *Id*. (emphasis added).

[6] *Id*. at 254 n.1.

[7] *Id*. at 254.

Court's footnoted analysis with basic contract and agency principles distinguishing between the roles of principal and agent. ROA.1281-1287. When Deutsche Bank's counsel was pressed to identify the "capacity" in which MERS assigned the Deed here, counsel explicitly acknowledged that "[t]he assignment says nominee." ROA.1283. But this was not fatal to the Assignment, counsel surmised, because this Court "didn't want to get into the issue of MERS acting as a nominee versus a beneficiary . . . and told us to move on." ROA.1284.

Dissatisfied with this explanation, the Trial Court identified what this Court had struggled to locate—Texas authority applying ordinary agency principles to MERS.[8] After counsel was appointed for the Burkes, the Trial Court ordered multiple rounds of briefing and, on December 21, 2017, again entered judgment for the Burkes. In doing so, the Trial Court relied on centuries of unbroken Texas common law establishing that where an agent or nominee (here MERS) enters a contract (here the Assignment) on behalf of a disclosed principal (here IndyMac and its successors), the agent or nominee does not convey its own rights. ROA.1110-1121.[9]

[8] *See EverBank, N.A. v. Seedergy Ventures, Inc.*, 499 S.W.3d 534, 540-41 (Tex. App. 2016).

[9] The Trial Court also held that the Burkes had not established that the lien on their homestead was invalid under Article XVI Section 50 of the Texas Constitution. ROA.1102. Without conceding this determination, the Burkes do not challenge it by cross-appeal.

The Trial Court made every attempt to reconcile this controlling precept with the prior panel decision. But, unable to do so, the Trial Court did the only thing that could be done—it departed from the mandate under the well-established exception for appellate decisions that are "clearly erroneous." The Trial Court reached this conclusion with great reluctance, observing:

> This opinion unavoidably assumes a posture of defiance that is profoundly uncomfortable for its author. After nearly forty years of working within this circuit at the bar or on the bench, every natural instinct is to salute and obey. Nevertheless, in view of the long common law tradition and precedents just described, it is difficult to imagine that jurists of reason could debate whether MERS was a party to the 2011 assignment.

ROA.1121. This appeal ensued.

V. SUMMARY OF ARGUMENT

Agency relationships do not survive the demise of the principal and assignments made on behalf of a defunct entity are, accordingly, void. MERS thus plainly could not assign the Deed as nominee for IndyMac. To be sure, the Deed also makes MERS a nominee for IndyMac's "successors and assigns." But Deutsche Bank's reliance on this clause is misplaced because IndyMac's successors and assigns as to the Burkes' mortgage, if any, are unknown. As a matter of Texas law, and common sense, MERS cannot act on behalf of a principal that cannot even be named.

Deutsche Bank is thus left to argue that the Assignment transferred MERS' own beneficial interest in the Deed. The problem is that the Assignment unambiguously states otherwise—providing repeatedly that MERS acted as a "nominee" for IndyMac and its successors. Under controlling Texas law, this language of assignment must be honored. It makes no difference that MERS, as the Deed's beneficiary, *could have* transferred its interests to Deutsche Bank. No one disputes MERS' authority to assign its own interests in a deed of trust. But that did not occur, and could not have occurred, under the Assignment language at issue.

There also is nothing unique to MERS that commands a different outcome. Texas Courts have applied standard agency principles to MERS, recognizing that MERS can act solely as principal, or solely as nominee. The distinction is not theoretical. Although MERS assigned the Burkes' Deed as a "nominee" for the lender and its successors, in other instances MERS uses assignment language by which it expressly assigns its own "beneficial interest" in deeds of trust. The Assignment here—prepared by Deutsche Bank's own sophisticated counsel—should not be rewritten so that MERS can switch roles after the fact.

The Burkes are fully aware that this Court upheld the Assignment in the prior appeal. But briefing in that appeal did not meaningfully address the language of the Assignment, much less the body of Texas law giving such language legal effect.

With these issues now fully briefed, and with the benefit of the Trial Court's careful decision on remand, the prior panel's error is plain. The "clearly erroneous" exception to the law-of-the-case doctrine exists precisely so that such errors can be corrected. Respectfully, the exception was properly invoked here.

VI. ARGUMENT

A. Law-of-the-case doctrine is not inviolate and trial courts can in narrow but applicable circumstances deviate from a mandate.

Under longstanding Fifth Circuit law, issues decided by the appellate court should be followed in subsequent trial court or appellate proceedings ***unless*** "[1] the evidence on a subsequent trial was substantially different, [2] controlling authority has since made a contrary decision of the law applicable to such issues, or [3] the decision was clearly erroneous and would work a manifest injustice."[10] As respectfully set forth in this submission, and in the Trial Court's decision on remand, the third exception to the law of the case doctrine applies. The prior panel decision was clearly erroneous and would result in manifest injustice if upheld.

When determining if an exception to the law of the case doctrine applies, the Supreme Court has explained that the doctrine is an exercise of judicial discretion,

[10] *White v. Murtha*, 377 F.2d 428, 432 (5th Cir. 1967); *see Dickinson v. Auto Ctr. Mfg. Co.*, 733 F.2d 1092, 1096 (5th Cir. 1983) (confirming that this rule and the exceptions apply to subsequent proceedings in the trial court and on later appeals to the appellate court).

not a limit on judicial power.[11] This Court similarly has "emphasiz[ed] that 'justice is better than consistency, [and] has recognized that it must be free to determine whether the first decision was in error, and if so, whether a different result should be reached. . . . Where, as here, a party to the action raises serious objections to the soundness of the first decision, the Court, in all but special circumstances, . . . should reexamine the first decision as a prerequisite to its implementation as the law of the case."[12]

The Fifth Circuit has not hesitated to invoke the third exception to the law of the case doctrine to overrule an earlier opinion that was wrongly decided and would work a manifest injustice if upheld.[13] Other circuit courts have similar exceptions to the law of the case doctrine and have applied them when justice requires.[14]

In its opening brief, Deutsche Bank correctly states that the Trial Court on remand went beyond the mandate of the Fifth Circuit. But it wrongly implies that this is an issue separate from the law of the case doctrine. In fact, the mandate rule

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[11] *Messenger v. Anderson*, 225 U.S. 436, 444 (1912).

[12] *Wm. G. Roe*, 414 F.2d at 867-68 (internal citations and footnote omitted).

[13] *See, e.g., United States v. Hollis*, 506 F.3d 415, 421-22 (5th Cir. 2007).

[14] *See, e.g., Negron-Almeda v. Santiago*, 579 F.3d 45, 50-52 (1st Cir. 2009) (invoking exception because to uphold incorrectly decided prior decision would bar the plaintiffs from the equitable relief to which they were entitled); *Sulik v. Taney County*, 393 F.3d 765, 766-67 (8th Cir. 2005) (first panel's ruling that a three year limitations statute governed some of plaintiff's claims "was clear error of law, and letting it stand would work a manifest injustice").

is merely "'a special application of the 'law of the case' doctrine.'"[15] The same exceptions apply, including the "clearly erroneous" exception at issue here.[16]

B. Deutsche Bank has not established any right to foreclose on the Burkes' home.

Having failed to establish any interest in the Burkes' Note, Deutsche Bank's standing to foreclose hinges entirely on the validity of the Assignment by which it has purported to obtain the Deed. As shown below, that Assignment is void.

1. An assignment cannot be made on behalf of a dissolved principal with no assets to convey.

An agency relationship generally "terminates" when the principal "ceases to exist or commences a process that will lead to cessation of its existence."[17] Even if agency could survive a principal's demise in some theoretical capacity, an "existing right is a precondition for a valid assignment."[18] In short, an agent cannot assign something its principal does not possess.

Here, IndyMac was not only closed when the Assignment was executed, it had been divested of substantially all of its assets. ROA.1126. Deutsche Bank thus has not shown, and cannot show, that at the time of the Assignment IndyMac had

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[15] *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1370 (5th Cir. 1992) (quoting *Piambino v. Bailey*, 757 F.2d 1112, 1120 (11th Cir. 1985)).

[16] *Id.*

[17] Restatement (Third) of Agency § 3.07(4).

[18] *Pain Control Inst., Inc. v. GEICO Gen. Ins. Co.*, 447 S.W.3d 893, 899 (Tex. App. 2014).

"existing rights" in the Burkes' mortgage that MERS could convey as IndyMac's nominee.[19]

Failing to engage this inescapable fact, Deutsche Bank flatly asserts that "the subsequent bankruptcy or dissolution of a lender does not negate MERS' ability to assign a deed of trust on behalf of the bankrupt entity."[20] Deutsche Bank cites nothing to support this remarkable proposition. Instead, Deutsche Bank cites a string of Texas district court decisions affirming MERS' capacity to assign "***its*** interest" in a deed of trust after the lender's demise.[21]

These cases are irrelevant. The Burkes do not contend, and the Trial Court did not hold, that IndyMac's dissolution prevented MERS from assigning ***its*** beneficial

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[19] *Id.; see also Pool v. Sneed*, 173 S.W.2d 768, 775 (Tex. App. 1943) ("The idea of an assignment is essentially that of transfer by one existing party to another existing party" (internal quotation marks omitted)).

[20] Appellant Brief ("Aplt. Br.") at 21-22.

[21] *See Newton v. New Century Mortg. Corp.*, No. A-14-CA-990-SS, 2014 WL 7016133, at *4 (W.D. Tex. Dec. 11, 2014) ("MERS obtained *its* rights under the Deed of Trust in August 2006, and New Century's subsequent bankruptcy did not affect its authority to assign *its* interest to another entity." (emphasis added)); *Applin v. Deutsche Bank Nat. Tr.*, No. H-13-2831, 2014 WL 1024006, at *5 (S.D. Tex. Mar. 17, 2014) (MERS "had the authority irrespective of New Century's legal status, to assign *its* interests in the mortgage to Deutsche Bank." (emphasis added and internal quotation marks omitted)); *Khan v. Wells Fargo Bank*, No. H-12-1116, 2014 WL 200492, at *8 (S.D. Tex. Jan. 17, 2014) ("As the holder of legal title—and thus the mortgagee of record—MERS had the authority, irrespective of New Century's legal status, to assign *its* interest in the mortgage to other entities." (emphasis added)); *Davis v. Countrywide Home Loans*, 1 F. Supp. 3d 638, 642 (S.D. Tex. 2014) (considering assignment by which MERS explicitly conveyed "all beneficial interest" in deed of trust (internal quotation marks omitted)); *see also Trang v. Taylor Bean & Whitaker Mortg. Corp.*, 600 F. App'x 191, 194 (5th Cir. 2015) ("MERS obtained *its* right to assign the Deed of Trust when the Deed of Trust was executed," and this was not "undone" by lender's "rejection of its executory contracts in bankruptcy." (emphasis added and internal bracket marks omitted)).

interests in the Deed. The question is whether MERS, as a matter of fact, exercised that right. On that dispositive issue, addressed further below, Deutsche Bank's cases are silent.

2. The Assignment here is not saved by its "successors and assigns" clause.

Tacitly conceding that any assignment on behalf of defunct principal is void, Deutsche Bank emphasizes that the Assignment here was made not only on behalf of IndyMac, but also IndyMac's "successor and assigns." ROA.51. The Deed similarly identifies MERS as nominee for "Lender and Lender's successors and assigns." ROA.29.

This language cannot salvage the Assignment, however, because Deutsche Bank has not identified (despite every opportunity) any successor or assign to IndyMac. The only known IndyMac successor is IndyMac Federal. ROA.1126. But by the date of the Assignment, IndyMac Federal was itself in federal receivership and its assets disbursed to entities unknown on this record. *Id.*

Deutsche Bank suggests that OneWest *may* be IndyMac's successor with respect to the Burkes' mortgage because it supposedly purchased "*substantially* all of IndyMac Federal Bank, FSB's residential mortgage portfolio."[22] But Deutsche

[22] Aplt. Br. at 6 n.4 (emphasis added).

Bank cites to nothing in the appellate record confirming the particulars of this transaction. In any case, the mere *possibility* that the Burkes' mortgage was among the assets OneWest acquired hardly shows that OneWest actually held the mortgage and did so at the time of the Assignment.[23]

This is a fatal gap in Deutsche Bank's proof. "Texas law does not presume agency, and the party who alleges it has the burden of proving it."[24] To carry this burden, a party claiming agency must demonstrate that the "principal consent[ed] to the agent acting on the principal's behalf" and "control[led] the acts of the alleged agent."[25] MERS obviously cannot establish these foundational facts with respect to an entity it cannot even identify. This shortcoming is all the more startling given that MERS is a book entry system that "was created for the purpose of tracking ownership interests in residential mortgages."[26]

[23] *See Priesmeyer v. Pacific Southwest Bank, F.S.B.*, 917 S.W.2d 937, 938, 940 (Tex. App. 1996) (refusing to presume, without specific documentary showing, that a particular note was transferred from failed bank to entity that acquired "substantially all" of its assets).

[24] *IRA Res., Inc. v. Griego*, 221 S.W.3d 592, 597 (Tex. 2007).

[25] *Davis-Lynch, Inc. v. Asgard Techs., LLC*, 472 S.W.3d 50, 60 (Tex. App. 2015) (collecting Texas cases).

[26] *Bexar Cnty., Texas v. MERSCORP, Inc.*, No. SA-12-CA-586-FB, 2013 WL 12291471, at *2 (W.D. Tex. Feb. 25, 2013); *see also Harris Cnty. Texas v. MERSCORP Inc.*, 791 F.3d 545, 549 (5th Cir. 2015).

This precise issue was addressed in *Bain v. Metropolitan Mortgage Group, Inc*.[27] There, MERS argued that where a deed of trust makes MERS the nominee for a lender and its "successor and assigns," MERS retains free-ranging authority to act as agent for whomever happens to hold the note, even if that principal is unknown. The *Bain* Court had little difficulty rejecting this claim:

> We have repeatedly held that a prerequisite of an agency is control of the agent by the principal. While we have no reason to doubt that the lenders and their assigns control MERS, ***agency requires a specific principal that is accountable for the acts of its agent***. If MERS is an agent, its principals in the two cases before us remain unidentified. MERS attempts to sidestep this portion of traditional agency law by pointing to the language in the deeds of trust that describe MERS as 'acting solely as a nominee for Lender and Lender's successors and assigns.' But MERS offers no authority for the implicit proposition that the lender's nomination of MERS as a nominee rises to an agency relationship with successor noteholders. ***MERS fails to identify the entities that control and are accountable for its actions. It has not established that it is an agent for a lawful principal***.[28]

The law could be no other way. By its own admission, MERS can be an "agent for its members only."[29] Nothing in this record forecloses the possibility that

[27] *Bain v. Metro. Mortg. Grp. Inc.*, 285 P.3d 34 (Wash. 2012).

[28] *Id*. at 45-46 (emphasis added and internal bracket marks, quotation marks, and citations omitted). Although *Bain* applied Washington law, the control element it relied upon is equally central to Texas agency law. *See Davis-Lynch*, 472 S.W.3d at 60.

[29] *In re Mitchell*, No. BK-S-07-16226-LBR, 2009 WL 1044368, at *4 (Bankr. D. Nev. Mar. 31, 2009) (noting that MERS' counsel acknowledged this limitation at oral argument), *aff'd on other grounds*, 423 B.R. 914 (D. Nev. 2009).

the Burkes' Note has been transferred outside the MERS system. ROA.903. Requiring Deutsche Bank to identify MERS' principal thus ensures that MERS does not assume agency where none could exist.

Digging a deeper hole, Deutsche Bank asserts that, under *L'Amoreaux*, "when a deed of trust contemplates MERS' continuing to act as the nominee for the lender's 'successors and assigns,' the lender's existence (or non-existence) at the time of MERS' assignment is irrelevant."[30] *L'Amoreaux* in fact held the opposite.

In *L'Amoreaux*, as here, MERS assigned a deed of trust as "nominee" for a dissolved lender and its "successors and assigns."[31] The difference is that, in *L'Amoreaux*, the successor—Wells Fargo—was known, identified, and undisputed.[32] Because it was "undisputed that [the lender] endorsed the Note to Wells Fargo," there was no question that "MERS became a nominee for Wells Fargo" with authority to assign the deed on Wells Fargo's behalf.[33] In this regard, *L'Amoreaux* merely restates the common law requirement that an agent purporting to act on a principal's behalf must, at an absolute minimum, be capable of identifying the principal. Deutsche Bank has not met that requirement.

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[30] Aplt Br. at 20.

[31] *See L'Amoreaux*, 755 F.3d at 750.

[32] *See id*.

[33] *Id.*

3. MERS did not assign its own beneficial interest in the Deed when acting solely as a nominee for a disclosed principal.

Given that MERS could not validly assign the Deed on behalf of IndyMac or its successors and assigns, the Assignment can be upheld only if MERS assigned its own interests in the Deed. As the Trial Court found, this possibility is squarely foreclosed by the Assignment's plain terms and longstanding Texas law, applied in multiple Fifth Circuit decisions, requiring adherence to the contracting parties' chosen language of assignment.

In three places on the Assignment—the body of the document, the signature block, and the corporate acknowledgement—MERS makes clear the limited capacity in which it as the assignor was purporting to act: "Mortgage Electronic Registration Systems, Inc., ***as nominee for***, IndyMac Bank, F.S.B., its successors and assigns." ROA.51 (emphasis added). There is absolutely nothing in the Assignment stating that MERS was acting, or intended to act, as a principal to assign its own beneficial interests. *Id.* Indeed, as the Trial Court explained, Deutsche Bank implicitly conceded at trial that MERS was acting solely as an agent (nominee) when executing the Assignment. ROA.1106. Deutsche Bank never argued that the Assignment—which its own sophisticated lawyers drafted—was ambiguous on this point. And Deutsche Bank never offered any extrinsic evidence suggesting that MERS intended to assign its own beneficial interests. ROA.1106-1107.

On these facts, governing Texas law compels a finding that MERS acted solely as an agent (nominee) without conveying its own interests. A "nominee" is a type of agent.[34] Deutsche Bank does not dispute this fundamental point or that under the Deed, MERS was the "nominee," or agent, for its principal, IndyMac Bank. That concession is not surprising; this Court has used "nominee" and "agent" interchangeably in construing comparable MERS agreements.[35]

In accordance with centuries of common law,[36] Texas courts exercise a presumption that if an agent signs a contract for a disclosed principal, it does not make itself a party to the contract. Unless an ambiguity is created by contrary language in the body of the instrument itself—and Deutsche Bank does not argue that the contract language is ambiguous here—the agent does not become party to the contract. Moreover, contrary parol evidence—which was not even offered here—is inadmissible to override unambiguous contractual language.[37]

The leading Texas case on this issue is *Cavaness v. General Corp.* Mr. Cavaness was the owner of certain patent rights, and entered an agreement to

[34] *See* Black's Law Dictionary 1211 (10th ed. 2014) ("A person designated to act in place of another, usu; In a very limited way").

[35] *See Harris Cnty. Texas*, 791 F.3d at 558-59 (using the terms "nominee" and "agent" interchangeably when describing MERS' authority under typical deed of trust language).

[36] The Trial Court discussed the common law roots of this doctrine at length. ROA.1110-1112. Because Texas law controls, that discussion will not be repeated here.

[37] *See Cavaness v. General Corp.*, 283 S.W.2d 33 (Tex. 1955) (discussing these principles).

license those rights in exchange for royalty payments. Instead of executing the agreement in his own name, however, Cavaness made the agreement in the name of a non-existent company called D–A–M Company, and signed the contract as "President" of that company. When the royalty payments were not forthcoming, Cavaness brought suit individually on his own behalf, claiming to be the real contracting party notwithstanding the contrary language in the contract. Writing for a unanimous court, Justice Garwood rejected that claim.[38]

Certain elements of the *Cavaness* decision are particularly instructive here. For one, it made no difference to the result that Mr. Cavaness himself, as owner of the patent rights in question, held a personal interest in the subject matter of the contract. According to the Court, if the terms of the contract are clear, the parol evidence rule controls, whether or not the agent holds a personal stake in the matter: "We see no reason why the Rule should not apply in the one case as in the others. . . ."[39] Nor did it make any difference that the nominal principal—"D–A–M Company"—never existed, either before or after the contract was executed. The court endorsed the view of the Restatement of Agency that, when the contract

[38] *See id.* at 38.

[39] *Id.*

language is unambiguous, parol evidence is not admissible "although the effect of the evidence is to show that the purported principal is nonexistent."[40]

The *Cavaness* decision remains good law today[41] and its teachings are regularly invoked by Texas courts.[42] The Fifth Circuit also has consistently applied *Cavaness* in a manner relevant to this case.[43] For example, in *Nishimatsu v. Houston National Bank,* Judge Wisdom explained that "[c]onstruction of this contract must begin with the presumption that if an agent signs a contract for a disclosed principal, he does not intend to make himself a party to the instrument[,]" and that "[u]nless an ambiguity is created by some contrary manifestation in the body of the instrument itself, parol evidence is not admissible to show that the agent is or the principal is not a party to the instrument, except where the plaintiff seeks to reform the

[40] *Id.* at 37 (quoting Comment b., Sec. 326).

[41] 3 Tex. Jur. 3d Agency § 310 (June 2017 Update) ("Where an unambiguous contract is executed and signed by an agent in the principal's name, extrinsic evidence is generally not admissible to show that the agent, in executing the agreement, intended to bind him- or herself only, instead of the principal." (citing *Cavaness*)).

[42] *See, e.g., Fleming & Assocs., L.L.P. v. Barton*, 425 S.W.3d 560, 573 (Tex. App. 2014); *Hull v. S. Coast Catamarans, L.P.,* 365 S.W.3d 35, 45 (Tex. App. 2011); *Barker v. Brown*, 772 S.W.2d 507, 510 (Tex. App. 1989); *Fed. Deposit Ins. Corp. v. K–D Leasing Co.*, 743 S.W.2d 774, 775–76 (Tex. App. 1988); *Priest v. First Morta. Co. of Texas, Inc.*, 659 S.W.2d 869, 872 (Tex. App. 1983); *Jordan v. Rule*, 520 S.W.2d 463, 465 (Tex. Civ. App. 1975) ("A written contract may itself afford the highest evidence of the identity of the contracting parties and the terms of the agreement," citing *Detroit Fidelity & Surety Co. v. First Nat'l Bank,* 66 S.W.2d 406, 407 (Tex. App. 1933)).

[43] *See, e.g., Martin v. Xarin Real Estate, Inc.*, 703 F.2d 883 (5th Cir. 1983); *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200 (5th Cir. 1975); *Northern Propane Gas Co. v. Cole*, 395 F.2d 1 (5th Cir. 1968).

contract."[44] On this basis, *Nishimatsu* held that an individual who signed an agreement solely as agent for a corporation could not be made individually liable under the contract.[45]

Here, the Assignment states unambiguously that MERS was acting as a "nominee" in purporting to assign the interests of a disclosed principle (IndyMac and its successors) to Deutsche Bank. Nowhere "in the body of the instrument"[46] is it suggested that MERS was acting as a principal on its own behalf. Indeed, Deutsche Bank does not argue to the contrary. Moreover, as in *Cavaness* and *Nishimatsu*, the fact that MERS ***could have*** executed the Assignment as a principal does not compel a contrary result. Courts cannot rewrite agreements simply because the parties could have structured them differently.

In the prior panel opinion, this Court did not give effect to the Assignment's plain terms, holding: "Here, MERS assigned its right to foreclose under the deed of trust to Deutsche Bank. That the assignment did not state that MERS was acting in its capacity as beneficiary does not change our analysis."[47] Respectfully, that holding

[44] *Nishimatsu*, 515 F.2d at 1207.

[45] *Id.*

[46] *Id.*

[47] *Deutsche Bank*, 655 Fed App'x at 254.

is clearly erroneous under the foregoing Texas law and the Fifth Circuit cases construing it.

The Burkes respectfully submit that this Court did not intend to discard decades of Texas law (which it cannot do) and override prior Fifth Circuit opinions (which it also cannot do[48]) in a footnote of an unpublished decision. Several explanations for this incongruous outcome are possible. One possibility is that the prior panel proceeded on the assumption that common law principles of agency do not apply to MERS, a creature of recent vintage, such that even where MERS purports to act as a "nominee," it may be assumed that MERS also acts as a principal. Possibly to this end, the prior panel observed that it had located no Texas authority distinguishing between MERS as "nominee" and MERS as "beneficiary."[49] That authority exists, however, as the Trial Court respectfully noted on remand. Specifically, in *EverBank* the Texas Court of Appeals distinguished a prior case on the ground that, there, "MERS was acting merely as a nominee or agent of a lender" and not, as in *EverBank*, in its capacity as "as a beneficiary."[50]

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[48] In the Fifth Circuit, the rule of orderliness generally forbids one panel from overruling a prior panel. *Teague v. City of Flower Mound,* 179 F.3d 377, 383 (5th Cir. 1999). This rule extends to conflicting language in the subsequent case. *Arnold v. U.S. Dept. of Interior,* 213 F.3d 193, 196 n.4 (5th Cir. 2000) ("under the rule of orderliness, to the extent that a more recent case contradicts an older case, the newer language has no effect").

[49] *Id*. at 254 n.1.

[50] *EverBank,* 499 S.W.3d at 540.

Were that not enough, MERS itself distinguishes between its roles as "nominee" and "beneficiary" when assigning interests in deeds of trust. Consider the assignment addressed in *Morlock, L.L.C. v. Bank of America, N.A.*[51] There, MERS executed a "Corporate Assignment of Deed of Trust/Mortgage" providing in pertinent part:

> For value received, the undersigned grants, assigns, and transfer to BAC Home Loans Servicing, JP, FKA Countrywide Home Loans Servicing, JP ***all beneficial interest under that certain Deed of Trust dated 1/30/2007***, executed by Eduardo Ramirez and Erica Ramirez.[52]

This language of assignment is in fact common in MERS' assignments. It was used by MERS in *Davis*,[53] a case cited by Deutsche Bank, and it is referenced in case law across the country.[54] In short, MERS knows how to assign its beneficial interests and executes assignments with specific language to accomplish that

[51] *Morlock, L.L.C. v. Bank of Am., N.A.*, No. H-14-1678, 2014 WL 7506888, at *2 (S.D. Tex. Oct. 29, 2014).

[52] *Id*. (emphasis added).

[53] *Davis*, 1 F. Supp. 3d at 642 (discussing assignment by MERS of "all beneficial interest" in deed).

[54] *See, e.g.*, *Rust v. Bank of Am., N.A.*, 573 F. App'x 343, 344 (5th Cir. 2014) (discussing MERS assignment of "all beneficial interest under [the] Deed of Trust" (internal quotation marks omitted)); *In re Rinehart*, No. 11-41210-JDP, 2012 WL 3018291, at *3 (Bankr. D. Idaho July 24, 2012) (discussing assignment of "all MERS' beneficial interest in the DOT to First Horizon" (internal bracket and quotation marks omitted)); *Hall v. Bank of Am., N.A.*, No. 12-CV-3068-RWS, 2013 WL 1747916, at *3 (N.D. Ga. Apr. 22, 2013) (addressing MERS assignment of "all beneficial interest" under a deed of trust (internal quotation marks omitted)); *Knecht v. Fidelity Nat'l Title Ins. Co.*, No. C12-1575RAJ, 2015 WL 3618358, at *6 (W.D. Wash. June 9, 2015) (discussing MERS assignment of "all beneficial interest under certain Deed of Trust" (internal quotation marks omitted)).

objective. Deutsche Bank's lawyers did not use that language in the Assignment here, which does not even acknowledge, much less purport to assign, MERS' beneficial interest in the Deed. Instead, Deutsche Bank drafted an assignment with MERS acting solely as "nominee." That election is binding.

More fundamentally, even if there were a sound basis for MERS to be carved out from basic agency principles, Texas courts, respectfully, must do the carving. Exercising diversity jurisdiction, the federal courts' task is to "predict state law, not to create or modify it."[55]

The prior panel decision may also have been prompted by a misreading of *Casterline v. OneWest Bank, F.S.B,*[56] on which Deutsche Bank also relies.[57] To be sure, *Casterline* and this case bear certain factual similarities—a deed that was assigned by MERS "as nominee" for IndyMac, the same defunct principal.[58] But the plaintiff's argument in *Casterline* was that the assignment there was void because the foreclosing entity did not hold both the note and the deed—the so-called "split-

[55] *See Herrmann Holdings Ltd. v. Lucent Techs. Inc.*, 302 F.3d 552, 558 (5th Cir. 2002). As the Trial Court observed, to the extent this Court has doubts about MERS' status under Texas law, an appropriate course would be to certify the issue to the Texas Supreme Court. *See* Tex. R. App. P. 58.1.

[56] *See Deutsche Bank*, 655 F. App'x at 254 n.1 (citing *Casterline v. OneWest Bank, F.S.B.*, 537 F. App'x 314 (5th Cir. 2013)).

[57] *See* Aplt. Br. at 18-19.

[58] *Casterline*, 537 Fed App'x at 315-16.

the-note" theory.[59] That argument goes nowhere under Texas law and it was not the basis for the Trial Court's decision.[60] The *Casterline* plaintiff never contested, as the Burkes do here, MERS's authority to assign its deed "as nominee" only, and that issue was neither discussed nor decided in the opinion.[61] *Casterline* thus has nothing to say about the proper understanding of the Assignment language in this case.[62]

This discussion of *Casterline* also highlights an important aspect of the proceedings in the prior appeal, which may indeed explain the outcome. The briefing in that appeal, in which the Burkes proceeded *pro se,* could have easily led this Court to believe that the dispositive issue was whether MERS had ***authority*** to assign—*i.e.*, whether it could have in theory assigned—its rights in the Deed. This oft-litigated[63] question was a focus of both Deutsche Bank's presentation on appeal, ROA.1107-1108, and the prior panel's decision.[64] But as the Trial Court reiterated

[59] *Id*. at 316 (internal quotation marks omitted).

[60] *Id*. (citing *Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 253 (5th Cir.2013)).

[61] *Id*. at 317 ("Casterline has not challenged the assignment of the Security Instrument to OneWest.").

[62] *Legal Servs. Corp. v. Velazquez,* 531 U.S. 533, 557 (2001) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed."); *Thomas v. Texas Dep't of Criminal Justice*, 297 F.3d 361, 370 (5th Cir. 2002) (quoting *Nat'l Cable Television Ass'n, Inc. v. Am. Cinema Editors*, 937 F.2d 1572, 1581 (Fed. Cir. 1991) ("When an issue is not argued or is ignored in a decision, such decision is not precedent to be followed in a subsequent case in which the issue arises.").

[63] *See e.g., Burton v. Nationstar Mortg., L.L.C.*, 642 F. App'x 422, 425 (5th Cir. 2016).

[64] *See Deutsche Bank*, 655 F. App'x at 254 (emphasizing that "Texas law and our precedent make clear that MERS, acting on its own behalf as a book entry system and the beneficiary of the Burkes' deed of trust, can transfer its right to bring a foreclosure action to a new mortgage.").

on remand, MERS' *authority* to assign its rights in the Burkes' Deed has never been called into question. The issue to be resolved is whether MERS *exercised* that right—a possibility that the unambiguous Assignment language precludes.[65]

C. Permitting Deutsche Bank to foreclose would work a manifest injustice.

This case cannot be reduced to "some technical defect" in assignment documents, as Deutsche Bank contends.[66] At stake is whether Deutsche Bank is authorized to turn a family from its home. "For over 175 years, Texas has carefully protected the family homestead from foreclosure."[67] To execute this most drastic remedy, foreclosing parties are held to exacting standards under Texas law and, in this regard, nothing is more fundamental than the requirement that a foreclosing party demonstrate that it possesses a security interest on which it can foreclose.[68]

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[65] Deutsche Bank misconstrues the real issue again in its briefing on this appeal. For example, Deutsche Bank writes in the first paragraph of its substantive discussion of the Trial Court's decision, "*Martins* clearly sets out the ***ability*** of MERS to[] exercise its rights as any other mortgage[e]." Aplt. Br. at 18 (emphasis added). Deutsche Bank writes on the next page, "The genesis of the Trial Court's confusion is the Trial Court's erroneous belief that MERS improperly act as both principal and agent in the same transaction. This Court, however, has made clear that MERS' ***ability*** to 'assign' a Deed of Trust is not limited by its capacity as a 'nominee' of a lender." Aplt. Br. at 19 (emphasis added).

[66] Aplt. Br. at 10.

[67] *LaSalle Bank Nat'l Ass'n v. White*, 246 S.W.3d at 618.

[68] *See* Tex. R. Civ. P. 736.1(d)(3)(B); Texas Property Code § 51.0001(4); *Leavings v. Mills*, 175 S.W.3d 301, 308-10 (Tex. App. 2004).

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Exempting Deutsche Bank from this basic showing would be manifestly unjust in any circumstance, but particularly given the fraudulent origins of this loan. In falsifying the Burkes' loan application—specifically to include $125,000 annual employment income (ROA.1125)—IndyMac extended funds that it knew the retired Burkes could not repay. If there is a case in which Texas law should be relaxed in favor of foreclosure, this is not that case.

It also bears emphasis that the Burkes are not asking this Court to absolve them of all responsibility under the loan documents they executed. The issue on appeal is whether Deutsche Bank has shown that ***it*** can foreclose. Permitting Deutsche Bank to do so in circumstances where it has not established itself to be anything but a stranger to the Burkes' loan would not only be manifestly unjust to the Burkes and similarly situated homeowners—it would grant Deutsche Bank a windfall.

Finally, affirming the Trial Court will not lead to widespread disruption of the mortgage industry. It would merely preclude financial institutions from foreclosing on properties when (1) they have not established any interest in the note and (2) purport to have obtained a deed of trust from MERS in circumstances where MERS was acting solely as nominee for a defunct principal with unknown successors. To the extent this scenario is commonplace, fault does not lie with homeowners.

D. The Burkes have standing to contest the foreclosure.

As a last gasp, Deutsche Bank argues that the Burkes do not have standing to contest the bank's ability to foreclose on their home. Not so. The Burkes have standing to contest the foreclosure on the grounds that the assignment to Deutsche Bank was void. The Fifth Circuit has recently held that Texas courts follow the majority rule that an obligor may defend against an assignee's efforts to enforce an obligation on any ground that renders the assignment void or absolutely invalid.[69] That makes sense because, as the Fifth Circuit held in *Reinagel v. Deutsche Bank National Trust Co.*, "A contrary rule would lead to the odd result that Deutsche Bank could foreclose on the Reinagels' property though it is not a valid party to the deed of trust or promissory note, which, by Deutsche Bank's reasoning, should mean that it lacks 'standing' to foreclose."[70]

Deutsche Bank in this case does not address this rule head on. Instead, it cites to the narrow exception to this rule—not relevant to the case at hand—that an obligor

[69] *Reinagel v. Deutsche Bank Nat. Tr. Co.*, 735 F.3d 220, 225 & n.8 (5th Cir. 2013) (citing *Tri–Cities Const., Inc. v. Am. Nat. Ins. Co.*, 523 S.W.2d 426, 430 (Tex. Civ. App. 1975); *Glass v. Carpenter*, 330 S.W.2d 530, 537 (Tex. App. 1959)); *see also, e.g.*, 6A C.J.S. Assignments § 132 (2013) ("A debtor may, generally, assert against an assignee . . . any matters rendering the assignment absolutely invalid . . . such as[ ] the nonassignability of the right attempted to be assigned, or a prior revocation of the assignment."); *Murphy v. Aurora Loan Servs., LLC*, 699 F.3d 1027, 1033 (8th Cir. 2012) (recognizing that mortgagors can defend against foreclosure by establishing a fatal defect in the purported mortgagee's chain of title)).

[70] *Reinagel*, 735 F.3d at 225.

cannot defend against an assignee's enforcement of an obligation "on a ground that merely renders the assignment voidable at the election of the assignor."[71] The Fifth Circuit case cited by Deutsche Bank illustrates perfectly this narrow exception, and why it is inapplicable here. In *Golden v. Wells Fargo Bank, N.A.*,[72] this Court held that an obligor (homeowner) did not have standing to contest an assignment of the right to foreclose on the ground that an agent did not have the authority to act on behalf of a principal.[73] The decision does not suggest that the obligor (homeowner) alleged any defect or gap in the chain of title; rather, the contention was simply that the agent did not have authority to act on the principal's behalf.[74] *Golden* held that, at most, this would make the assignment voidable, because it was up to the "defrauded assignor"—principal—to contest its putative agent's authority, if the principal so wished.[75]

That is not the Burkes' argument here, and it was not the basis for the Trial Court's decision. The Burkes argue that the assignment by MERS to Deutsche Bank was void because—as explained *supra*, in the Argument's sections B.1 and B.2—

[71] *Id.*

[72] *Golden v. Wells Fargo Bank, N.A.*, 557 Fed App'x 323 (5th Cir. 2014).

[73] *Id.* at 325-26.

[74] *Id.*

[75] *Id.* at 326.

there is no evidence that MERS was acting on behalf of an enumerated principal that had the right to foreclose on the Burkes' property at the time of the Assignment. Deutsche Bank cannot identify—offering no evidence to the Trial Court—the proper entity (principal) upon whom MERS could and did act as an agent at the time of the assignment. That created a deficiency in the chain of title. The facts before this Court fit squarely into the rule announced in *Reinagel*, including the Eighth Circuit decision cited by *Reinagel*, *Murphy v. Aurora Loan Services, LLC*,[76] which "recognized that mortgagors can defend against foreclosure by establishing a fatal defect in the purported mortgagee's chain of title."[77]

E. Any remand proceedings should not be reassigned.

The Burkes agree with Deutsche Bank that the factual record, at least as it pertains to Deutsche Bank's standing to foreclose, is clear and that further remand proceedings on this issue "would serve no purpose."[78] This case was tried more than

[76] *Murphy*, 699 F.3d 1027.

[77] *See Reinagel*, 735 F.3d at 225 n.8 (citing holding of *Murphy*, 699 F.3d at 1033, with approval); *Sevilla v. Fed. Nat'l Mortg. Ass'n*, No. 15-CV-3594-B, 2017 WL 697783, at *4 (N.D. Tex. Feb. 22, 2017) (citing *Reinagel* and that explaining that, "If Plaintiffs are correct, then the assignment would be void because 'Texas courts routinely allow a homeowner to challenge the chain of assignments by which a party claims the right to foreclose.'"); *Miller v. Homecomings Fin., LLC*, 881 F. Supp. 2d 825, 832 (S.D. Tex. 2012) ("The court concludes that under Texas law homeowners have legal standing to challenge the validity or effectiveness of any assignment or chain of assignments under which a party claims the right to foreclose on their property.").

[78] Aplt. Br. at 23.

three years ago and Deutsche Bank has not appealed any of the Trial Court's evidentiary rulings.

But the Burkes do not agree with Deutsche Bank that, to the extent further remand proceedings are required, they should be reassigned to a different judge. Deutsche Bank has identified not even a whisper of the bias, impartiality, or judicial misconduct that might support this "extraordinary" and "rarely invoked" maneuver.[79] The most that can be said is that the Trial Court disagreed with Deutsche Bank's interpretation of Texas law. But judicial rulings, even those that depart from a mandate, are not grounds for reassignment.[80]

Attempting to gin up bias where none exists, Deutsche Bank claims that the Trial Court improperly delayed proceedings on remand. Putting aside that even "substantial" delays do not warrant reassignment,[81] the Trial Court acted diligently here, particularly because multiple rounds of remand briefing were conducted with new counsel. Deutsche Bank also is in no position to complain of delays given the Trial Court's finding that Deutsche Bank engaged in conduct unnecessarily "protecting these proceedings." ROA.1043, n.1.

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[79] *See United States v. Stanford*, 883 F.3d 500, 516 (5th Cir. 2018).

[80] *Johnson v. Maestri Murrell Prop. Mgmt.*, 555 F. App'x 309, 314 (5th Cir. 2014) (citing *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

[81] *Benchmark Elecs., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 731 (5th Cir. 2003).

Straying even further from the record, Deutsche Bank asserts without citation that the Burkes have "sufficient resources to retain their own counsel" and that the Trial Court's appointment of counsel therefore evinces bias.[82] Nothing in the record supports Deutsche Bank's assertions as to the Burkes' resources. In any case, counsel was appointed so that remand proceedings could be conducted in an orderly and efficient fashion. ROA.1043. This case-management effort, taken for the benefit of "all parties," *id.*, hardly suggests a breakdown in the Trial Court's impartiality.

VII. CONCLUSION

For the foregoing reasons, the Burkes respectfully request that the Trial Court judgment be affirmed.

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[82] Aplt. Br. at 25.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font, with the exception of footnotes, which are in proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 12-point font.

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s/ Steve W. Berman
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CERTIFICATE OF SERVICE

I hereby certify that, on June 15, 2018, a true and correct copy of the foregoing Brief of Appellees was served via the Court's EM/ECF system on the following counsel of record for Appellees:

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