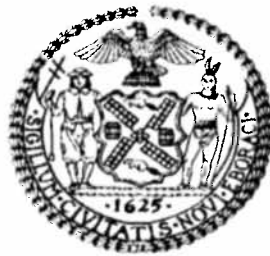


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## THE COUNCIL



### BRIEFING PAPER OF THE INFRASTRUCTURE DIVISION

Robert Newman, Legislative Director  
Baaba Halm, Deputy Director  
Jeffrey Baker, Assistant Deputy Director

### COMMITTEE ON COMMUNITY DEVELOPMENT

**Hon. Albert Vann, Chair**

January 31, 2012

**PROPOSED RES. NO. 871-A:**

By Council Members Vann, Arroyo, Brewer, James, Rose, Seabrook, Williams, Wills, Comrie, Levin, Barron, Dromm, Chin, Palma, Jackson, Foster, Dickens, Reyna, Mealy, Mark-Viverito, Ferreras, Gentile, Sanders, Jr. and Halloran

**TITLE:**

Resolution calling upon the New York State Legislature to codify subdivision (f) of section 202.12-a of the Uniform

Rules for the New York State Trial Courts, addressing the accuracy of filings in residential mortgage foreclosure actions.

**PROPOSED RES. NO. 872-A:**

By Council Members Vann, Comrie, Arroyo, Eugene, Gentile, Koppell, Lander, Mendez, Rose, Williams, Nelson, Wills, Levin, Barron, Dromm, Chin, Palma, Jackson, Foster, Dickens, Reyna, Mealy, Gonzalez, Mark-Viverito, Ferreras, Sanders, Jr. and Halloran

**TITLE:**

Resolution calling upon the New York State Legislature and the Governor to support the continuation of New York's Foreclosure Prevention Services Program in the 2012–2013 Executive Budget.

**PROPOSED RES. NO. 988-A:**

By Council Members Vann, Brewer, Fidler, James, Lander, Mendez, Williams, Mark-Viverito, Rose, Wills, Comrie, Levin, Barron, Dromm, Chin, Palma, Jackson, Foster, Dickens, Reyna, Mealy, Gonzalez, Ferreras, Gentile, Sanders, Jr. and Halloran

**TITLE:**

Resolution calling on the New York State Legislature and the Governor to enact legislation that would require the foreclosing party in a mortgage foreclosure action to produce the pooling and service agreement at the commencement of a mortgage foreclosure action.

**PROPOSED RES. NO. 989-A:**

By Council Members Vann, Brewer, James, Lander, Mendez, Williams, Rose, Wills, Garodnick, Comrie, Levin, Barron, Dromm, Palma, Jackson, Foster, Dickens, Reyna, Mark-Viverito, Ferreras, Gentile, Sanders, Jr. and Halloran

**TITLE:**

Resolution calling on the New York State Legislature and the Governor to enact legislation that would prohibit lenders from concealing mortgage assignments through the use of the Mortgage Electronic Registration System, Inc., known as MERS.

## **I. INTRODUCTION**

On January 31, 2012, the Committee on Community Development, chaired by Council Member Albert Vann, will meet to vote on proposed resolutions 871-A, 872-A, 988-A and 989-A. The Committee previously held a hearing on these resolutions on Monday, January 30, 2012.

## **II. BACKGROUND**

Almost every person in America who purchases a home does so with a loan, or promissory note, that is evidenced by a mortgage containing a security interest in the home itself, as collateral for the loan.<sup>1</sup> If a homeowner fails to repay the mortgaged loan as agreed, the lender, usually a bank or another entity the lender has transferred the right of collection to, enforces the security interest provisions of the mortgage by having the home sold to satisfy the loan's outstanding balance. This enforcement process is known as foreclosure.<sup>2</sup>

During the past four years, millions of American homeowners in every region of the nation suffered the loss of homes to mortgage foreclosure.<sup>3</sup> From 2005 through 2009, the foreclosure and default rates for the country reached their highest level in three decades.<sup>4</sup> Currently, there are approximately two million residential mortgage foreclosure cases pending across the country and approximately two million additional cases, in pre-foreclosure circumstances, waiting to be foreclosed.<sup>5</sup> Based on the number of residential mortgage foreclosures, the geographic expanse of foreclosure activity and the impact of foreclosures across

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<sup>1</sup> See Black's Law Dictionary, mortgage.

<sup>2</sup> Id., foreclosure.

<sup>3</sup> New York Times, "Foreclosures", January 24, 2012 (updated).

<sup>4</sup> United States Government Accountability Office, "Troubled Asset Relief Program, Further Actions Needed to Fully and Equitably Implement Foreclosure Mitigation Programs", June 2010, page 4.

<sup>5</sup> New York Times, "Foreclosures", January 24, 2012 (updated).

economic and demographic groups, many describe the current activity of foreclosure cases a crisis and further describe it as ‘depression-like’ in its severity.<sup>6</sup>

It is generally noted that the impact of the foreclosure crisis on New York City is less severe than other metropolitan areas of the nation. Notwithstanding, the foreclosure crisis has affected New York City generally, and has had a significant impact in particular communities in the City.<sup>7</sup> Since 2007, more than 53,000 foreclosure notices have been filed in the City.<sup>8</sup> City neighborhoods most affected by foreclosures are non-white neighborhoods where foreclosures are “due to factors such as subprime lending, unemployment, and declining home values. Neighborhoods in Southeast Queens, Central Brooklyn and the Bronx, with large numbers of African American and Latino residents, are hardest hit.<sup>9</sup> These neighborhoods, are “at risk neighborhoods”, as defined by the United States Department of Housing and Urban Development.<sup>10</sup>

Although homeowners typically earn higher incomes and are more educated than non-homeowners,<sup>11</sup> it has become urgently clear to court officials and social and economic justice advocates that homeowners of all income levels, and particularly low-income homeowners, require significant assistance in defending and exercising legal rights when the complex

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<sup>6</sup> US REO Properties online blog, “Present Foreclosure Crisis Causes Seniors To Recall Memories of the Great Depression”, <http://www.usreoproperties.com/blog/present-foreclosure-crisis-causes-seniors-to-recall-memories-of-the-great-depression>, accessed January 26, 2012.

<sup>7</sup> New York State Comptroller, report 13-2011, “Foreclosures in New York City”, March 2011

<sup>8</sup> Brazill, Caitlyn, Prepared testimony before the New York State Assembly, Committees on Housing, Judiciary and Banks, “Mortgage Foreclosures in New York: An Evolving Crisis”, November 7, 2011.

<sup>9</sup> See generally, NY Communities for Change, “Foreclosure Crisis: Disproportionate Impact on African-American and Latino Households and Neighborhoods”, January 2011; Brazill, Caitlyn, Prepared testimony before the New York State Assembly; New York State Comptroller, report 13-2011, “Foreclosures in New York City”, March 2011; Committees on Housing, Judiciary and Banks, “Mortgage Foreclosures in New York: An Evolving Crisis”, November 7, 2011.

<sup>10</sup> Michael Jacobs, New York City Independent Budget Office before the New York City Council Committee on Community Development, October 28, 2010.

<sup>11</sup> The Park Place Economist, “The Determinants of Home Ownership”, by Hood, Jaclyn K, vol. VII, 1998.

processes of foreclosure procedures begin.<sup>12</sup> New York State is one of twenty-two states that require banks and lenders to exercise their contractual right to foreclosure under the laws and procedures of the civil court system.<sup>13</sup>

Often, homeowners defending against foreclosure suits are not only without attorney representation but, due to the complexity of laws and court rules, they are generally incapable of adequately representing their legal interest in the case. In contrast, the foreclosing party is almost always represented by an attorney. Legal and consumer advocates have demonstrated numerous instances where homeowners were frustrated or outright denied either the opportunity or ability to enforce their rights when defending against mortgage foreclosure law suits.

### **III. ANALYSIS OF RESOLUTIONS**

#### **Proposed Res. No. 871-A**

During the recent residential mortgage foreclosure crisis affecting the nation, some lawyers representing financial institutions and investors filed documents with the courts that contained legally significant statements of purported fact that were often inaccurate and potentially fraudulent. These documents frequently went unnoticed by homeowners without legal representation and by overburdened judges and court staff until it was too late for legal remedies to address the problem.

Recently, Chief Judge Jonathan Lippman, Chief Judge of the State of New York, has required that every attorney practicing law in New York State file an affidavit or affirmation affirming the “scope of inquiry” and the “accuracy of papers” when filing court documents in residential mortgage foreclosure cases.

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<sup>12</sup> See State of New York Unified Court System, 2011 Report of the Chief Administrator of the Courts, Pfau, Ann, Chief Administrative Judge; New York State Comptroller, Report 13-2011, “Foreclosures in New York City”; Brazill, Caitlyn, prepared testimony before the New York State Assembly, Committees on Housing, Judiciary and Banks.

<sup>13</sup> Mortgage Bankers Association, [www.mbaa.org/files/ResourceCenter/ForeclosureProcess/JudicialVersusNon-JudicialForeclosure.pdf](http://www.mbaa.org/files/ResourceCenter/ForeclosureProcess/JudicialVersusNon-JudicialForeclosure.pdf)

As the Chief Judge of the State of New York, Chief Judge Lippman has the authority to require this rule with the advice and consent of the Administrative Board of the Courts. However, the rule may be reversed by a future Chief Judge.

Proposed Resolution 871-A calls upon the State Legislature to make this rule permanent by enacting legislation to codify it.

**Proposed Res. No. 872-A**

New York homeowners that are subject to foreclosure are often unable to afford legal representation, have little idea how to defend themselves in court, and frequently face experienced, well-paid attorneys who represent the interests of financial institutions.

Proposed Resolution 872-A calls on the New York State Legislature and the Governor to support the continuation of Subprime Foreclosure Prevention Services Program in the 2012-2013 Executive Budget. The Subprime Foreclosure Prevention Services Program supports foreclosure prevention by providing direct service grants and foreclosure prevention training to local non-profit organizations across the State. The Subprime Foreclosure Prevention Services Program also provides funding to legal service providers for the representation of needy homeowners facing foreclosure.

In the December 2011 tax reform agreement, \$1 million in State funds were allocated to allow the Subprime Foreclosure Prevention Services Program to continue to operate until the end of the State's fiscal year.

The Governor's 2012-2013 Executive Budget released this week did not include funds for the program, and while the Governor has proposed the creation of a new Foreclosure Relief Unit, there are no funds allocated in the budget for legal services for homeowners.

**Proposed Res. No. 988-A**

In order to proceed with a foreclosure suit, a foreclosing party must own or represent the owner of the mortgage on the property against which they are filing. If a homeowner can demonstrate that there is insufficient evidence that the foreclosing party owns or represents the owner of the mortgage, they can file an Answer with the court asserting a defense to the suit based on the lack of standing of the foreclosing party.

Unfortunately, because individual mortgages are often pooled with hundreds of other mortgages and packaged as investments, it has become extraordinarily difficult for homeowners and attorneys to discover whether the foreclosing party owns or represents the owner of the mortgage on the property or not. These bundled mortgages can be transferred from one investor to another dozens of times, without reliable record keeping to document the owners of particular mortgages. Once a mortgage foreclosure case has been filed in court, a homeowner typically has between 20 and 40 days to determine if the plaintiff has standing. If they cannot do so within that time, they may lose their right to assert this defense.

Pooling and Servicing Agreements (PSAs) are contracts between a mortgage loan originator, a loan servicer, who collects payments and sends them to investors, and a legal trust, the entity having legal ownership of the pool of mortgages. These PSA contracts have specific rules that allow the owner of an individual mortgage on a property to be properly tracked.

Proposed Resolution 988-A calls on the Legislature and Governor to enact legislation that would require a foreclosing party to produce the pooling and service agreement when the law suit is initially filed.

**Proposed Res. No. 989-A**

The Mortgage Electronic Registration System (MERS) is an electronic registry system that was created by financial institutions to record mortgages. It was intended to streamline the mortgage process and track mortgage loans for the benefit of the financial institutions holding the loans. The MERS works by becoming the owner of record for the mortgages of its member financial institutions. When a member financial institution sells its ownership interest in a particular mortgage to another member, the transaction is recorded with MERS. No mortgage recording fees are required by the State because the owner of record does not change.

The MERS system makes it difficult to discover who actually owns the mortgage on a property being foreclosed. This information is important because a homeowner should have the ability to require proof of a claim before their property is foreclosed upon. Under the MERS system, the actual owner of the mortgage is often too difficult to locate within the time limits of a law suit.

A United States Bankruptcy Judge in the United States District Court for the Eastern District of New York issued an opinion in February 2011 questioning the rules and procedures MERS uses to transfer mortgages and handle foreclosures for the largest United States banks.

This resolution calls for the Legislature and Governor to enact legislation that would increase transparency of the MERS system, thereby protecting homeowners from foreclosure by parties without the legal right to enforce a mortgage.

**IV. “THE FIRST HEARING”**

The Committee previously held a hearing on January 30, 2012 on these resolutions. At this hearing, the Committee received testimony in support of these resolutions from Legal Services NYC, Brennan Center for Justice at the New York University School of Law, Urban



Justice Center, New York University's Furman Center for Real Estate and Urban Policy, The Legal Aid Society, the New York Legal Assistance Group, the New York Mortgage Coalition, the Center for New York City Neighborhoods and the Neighborhood Economic Development Advocacy Project.



Proposed Res. No. 871-A

Resolution calling upon the New York State Legislature to codify subdivision (f) of section 202.12-a of the Uniform Rules for the New York State Trial Courts, addressing the accuracy of filings in residential mortgage foreclosure actions.

By Council Members Vann, Arroyo, Brewer, James, Rose, Seabrook, Williams, Wills, Comrie, Levin, Barron, Dromm, Chin, Palma, Jackson, Foster, Dickens, Reyna, Mealy, Mark-Viverito, Ferreras, Gentile, Sanders Jr. and Halloran

Whereas, During the past three years, millions of American homeowners have suffered the loss of their homes to mortgage foreclosure; and

Whereas, According to the United States Government Accountability Office, from 2005 through 2009, the foreclosure and default rates for the country reached their highest level in three decades; and

Whereas, While it has been broadly reported that New York City has not suffered the depth and severity of the mortgage foreclosure crisis to the extent that other areas of the county have and since 2005, foreclosure filings in the City have more than doubled; and

Whereas, A New York Times article from January 10, 2011, reported that some foreclosure filings have been based on incorrect information, and New York State Supreme Court judges have attempted to combat false filings by attorneys for the financial institutions seeking to foreclose on mortgages; and

Whereas, For example, the article mentioned how an upstate New York law firm was ordered to pay nearly \$20,000 in fines and penalties because an attorney for the firm filed numerous documents that contained “falsities;” and

Whereas, For example, with regards to the upstate New York firm, judges have called the due diligence of the firm “slipshod work,” which has resulted in some cases in the dismissal of the foreclosure action; and

Whereas, In light of this problem the Chief Administrative Judge of the Courts of New York promulgated a new section of the Uniform Rules for the New York State Trial Courts which requires counsel to attest to the accuracy of court filings by filing an affidavit or affirmation; and

Whereas, Since the Chief Administrative Judge has promulgated a rule subject only to the advice and consent of the Administrative Board of the Courts and a future Chief Administrative judge who may seek to amend or repeal the rule, and because the validity of the rule is now subject to legal challenge before the appellate courts of the State of New York, it would be beneficial for the New York State Legislature to codify the rule, now, therefore, be it

Resolved, That the Council of the City of New York calls upon the New York State Legislature to codify subdivision (f) of section 202.12-a of the Uniform Rules for the New York State Trial Courts, addressing the accuracy of filings in residential mortgage foreclosure actions.

BJG/  
LS # 1822  
2/14/2011

TBD  
1/13/12 Res 871  
1/30/12 Prop. Res. 871A

Proposed Resolution No. 872-A

Resolution calling upon the New York State Legislature and the Governor to support the continuation of New York's Foreclosure Prevention Services Program in the 2012-2013 Executive Budget.

By Council Members Vann, Comrie, Arroyo, Eugene, Gentile, Koppell, Lander, Mendez, Rose, Williams, Nelson, Wills, Levin, Barron, Dromm, Chin, Palma, Jackson, Foster, Dickens, Reyna, Mealy, Gonzalez, Mark-Viverito, Ferreras, Sanders Jr. and Halloran

Whereas, Over the past several years, the United States housing market has experienced a crisis due to historic foreclosure rates; and

Whereas, According to the Empire Justice Center, ten percent of mortgage loans in New York City are either delinquent by 90 days or more or in foreclosure; and

Whereas, According to the Federal Reserve Bank of New York (the Fed), in September of 2011, approximately seven percent of mortgage loans in Queens, approximately eight percent of mortgage loans in Brooklyn, approximately seven percent of mortgage loans in the Bronx, approximately five percent of loans in Staten Island and approximately one percent of the loans in Manhattan were in foreclosure; and

Whereas, According to the Fed, in September of 2011, approximately six percent of the mortgage loans in Queens, approximately five percent of the mortgage loans in Brooklyn, approximately six percent of the mortgage loans in the Bronx, approximately five percent of the mortgage loans in Staten Island and approximately one percent of the mortgage loans in Manhattan were sixty or more days delinquent on their mortgage payments and were in danger of being foreclosed; and

Whereas, A report entitled "Do Foreclosures Cause Crime?" by the Furman Center for Real Estate and Urban Policy at New York University found that violent crime increases about two percent on blocks where a home becomes foreclosed and by approximately six percent if a

second home is foreclosed on the same block; and

Whereas, According to the report entitled “Neighborhood Effects of Concentrated Mortgage Foreclosures,” a single foreclosure can reduce the price of nearby homes by one to two percent and three foreclosures can reduce the price of nearby homes by about three percent; and

Whereas, According to a report by the Task Force to Expand Access to Civil Legal Services, forty-four percent of New York homeowners are unrepresented in foreclosure cases throughout New York State; and

Whereas, According to the New York Times, there have been instances where certain financial institutions used improper methods in hastening foreclosures, negatively impacting the homeowners’ chances of keeping their property; and

Whereas, Many families who encounter foreclosure cannot afford legal representation, resulting in homeowners having little idea how to defend themselves, and it is important that individuals who cannot afford legal representation in foreclosure proceedings receive assistance; and

Whereas, The Foreclosure Prevention Services Program provides a continuum of foreclosure prevention services such as outreach and education, counseling, legal representation and court-based services through direct service grants to not-for-profit providers and legal service providers; and

Whereas, A recent change to the Uniform Rules for the New York State Trial Courts which requires counsel to attest to the accuracy of paperwork by filing an affidavit or affirmation attesting to the accuracy of foreclosure documents they submit, coupled with the growing number of foreclosure filings, may have slowed the foreclosure resolution process and created a backlog in the court system, thereby creating a need for foreclosure mitigation services, which

may be needed for several years to come, now; therefore, be it

Resolved, That the Council of the City of New York calls upon the New York State Legislature and the Governor to support the continuation and increased funding of New York's Foreclosure Prevention Services Program in the 2012-2013 Executive Budget.

WJH/BJG  
LS # 2149 & 3046  
1/12/2012

TBD  
1/31/12 Prop. Res. 872A

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Proposed Res. No. 988-A

Resolution calling on the New York State Legislature and the Governor to enact legislation that would require the foreclosing party in a mortgage foreclosure action to produce the pooling and service agreement at the commencement of a mortgage foreclosure action.

By Council Members Vann, Brewer, Fidler, James, Lander, Mendez, Williams, Mark-Viverito, Rose, Wills, Comrie, Levin, Barron, Dromm, Chin, Palma, Jackson, Foster, Dickens, Reyna, Mealy, Gonzalez, Ferreras, Gentile, Sanders Jr. and Halloran

Whereas, According to the Center for Responsible Lending, after a dramatic rise in foreclosures from 2008, foreclosure activity is expected to increase again as lenders and servicers gradually process the backlog of thousands of foreclosures that have been delayed due to improperly processed paperwork; and

Whereas, Mortgages are often bundled and sold as mortgage backed securities involving the transfer of the mortgages between several parties, which allow mortgage lenders to disperse exposure to credit risk, and the proliferation of these securities have made it difficult for judges and lawyers to determine who actually owns the underlying properties in a typical securitized mortgage pool; and

Whereas, The Pooling and Servicing Agreement (PSA) is the primary contractual document between all parties involving the transfer of mortgages from the originator to the servicer and ultimately to a trust, which then becomes the legal owner of a pool of mortgages; and

Whereas, The Pooling and Servicing Agreement prescribes how the trust must oversee the disbursement of the cash flows, monitors compliance with appropriate covenants by other parties to the agreement, and details the specific loan documents contained in each loan file that will be delivered to the Trustee or Document Custodian on behalf of the trust, establishing who holds the original note and where it may be found; and

Whereas, In New York State, in order for a homeowner in a mortgage foreclosure action to assert that the party initiating the foreclosure does not have a legal right to do so, he or she must include that claim in a written answer in the foreclosure proceeding and many homeowners do not file a written answer or do not have enough information to make that assertion; and

Whereas, The homeowner's time to serve and file an answer is only approximately 20 to 40 days after they receive the initial foreclosure papers, depending on the method of service; and

Whereas, After the time to answer has expired, a defendant may not later assert the standing defense unless he or she receives permission from the court to allow the filing of a late or amended answer, which generally requires that the defendant show 1) a reasonable excuse for the delay and 2) a meritorious defense to the foreclosure; and

Whereas, These motions are not easily made by pro se defendants, so the absence of legal representation for homeowners means that very few such motions are being made despite the difficulties in determining who owns the underlying property in a securitized mortgage pool; and

Whereas, The process of reversing a wrongful foreclosure is difficult once an auction has taken place and is almost impossible once the property is purchased by a third party; now, therefore, be it

Resolved, That the Council of the City of New York calls on the New York State Legislature and the Governor to enact legislation that would require the foreclosing party in a mortgage foreclosure action to produce the pooling and service agreement at the commencement of a mortgage foreclosure action.

LS 1823  
AS 7-15-11

AS  
1-30-12 Res. No. 988

Proposed Res. No. 989-A

Resolution calling on the New York State Legislature and the Governor to enact legislation that would prohibit lenders from concealing mortgage assignments through the use of the Mortgage Electronic Registration System, Inc., known as MERS.

By Council Member Vann, Brewer, James, Lander, Mendez, Williams, Rose, Wills, Garodnick, Comrie, Levin, Barron, Dromm, Palma, Jackson, Foster, Dickens, Reyna, Mark-Viverito, Ferreras, Gentile, Sanders Jr. and Halloran

Whereas, In the mid-1990s, Fannie Mae, Freddie Mac and several large banks in the United States created the Mortgage Electronic Registration System, Inc. (MERS), an electronic-lien registry system built by the housing finance industry, to streamline the mortgage process; and

Whereas, Each mortgage that is entered into the MERS system has a unique mortgage identification number (MIN) used to track a mortgage loan throughout its life, from its origination through securitization; and

Whereas, Critics claim the decision to create MERS was made mostly to avoid paying recording fees charged by government agencies, which required that all mortgage transfers and assignments be properly recorded and indexed in publicly available registries of deeds; and

Whereas, MERS works by registering as the owner of record in the public filings for all mortgages originated or acquired by its members and tracking the owner of the beneficial and legal interest in those mortgages with its own mortgage identification number; and

Whereas, MERS has become as a privately run, national registry of deeds under which they act as the depository of all mortgages entered into the system and the mortgage notes and loans themselves are freely bought and sold on a secondary market; and

Whereas, According to Legal Services NYC, ownership of mortgages have been obscured by lenders through the frequent use of the MERS to avoid the need to re-record

mortgages each time a loan is assigned; and

Whereas, United States Bankruptcy Judge Robert E. Grossman, serving in the Eastern District of New York, issued an opinion in February 2011 calling into question the rules and procedures that MERS uses to transfer mortgages and handle foreclosures on behalf of the largest United States banks; and

Whereas, Judge Grossman concluded that “MERS and its partners made the decision to create and operate under a business model that was designed in large part to avoid the requirements of the traditional mortgage recording process” thus rejecting any argument that because “MERS may be involved with fifty (50) percent of all residential mortgages in the county ... it should receive favorable treatment from the judiciary and turn a blind eye to the fact that this process does not comply with the law”; and now, therefore, be it

Resolved, That the Council of the City of New York calls on the New York State Legislature and the Governor to enact legislation that would prohibit lenders from concealing mortgage assignments through the use of the Mortgage Electronic Registration System, Inc., known as MERS.

LS 1824  
AS 6-29-11  
AS  
1-30-12 Res. No. 989