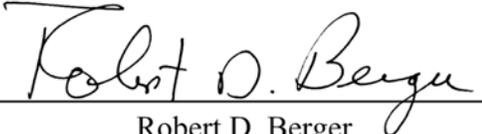




The relief described hereinbelow is SO ORDERED.

SIGNED this 6th day of July, 2015.


Robert D. Berger
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

**Bobby Joe Spencer and
Diane Wiggins Spencer,
Debtors.**

**Case No. 12-20854
Chapter 13**

**ORDER DENYING MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC.'s
MOTION TO QUASH SUBPOENA**

Mortgage Electronic Registration Systems, Inc. (MERS), moves this Court to quash Debtors' subpoena pursuant to Fed. R. Civ. P. 45(d)(3).¹ The Court, having reviewed the pleadings, counsel's arguments, and exhibits, denies MERS's motion. MERS argues that the subpoena must be quashed because it is unduly burdensome and requires compliance beyond the

¹ Doc. 234. Debtors, Bobby Joe Spencer and Diane Wiggins Spencer, appear by their attorney, Constance L. Shidler, Overland Park, KS; Mortgage Electronic Registration Systems, Inc., appears by its attorney, Michael Wambolt, St. Louis, MO.

100-mile limit of Fed. R. Civ. P. 45(c)(2). The Court is unpersuaded by these arguments because: (a) MERS failed to timely serve an objection in compliance with Fed. R. Civ. P. 45(d)(2)(B); (b) MERS regularly transacts business within 100 miles of the place for compliance; and (c) MERS does not provide a sufficient factual foundation to establish that the subpoena is unduly burdensome.

This Court has jurisdiction under 28 U.S.C. §§ 157 and 1334 to decide the matter in controversy.² This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A). The parties do not contest the core nature of this proceeding. Venue is proper pursuant to 28 U.S.C. §§ 1408.

I. FINDING OF FACTS

On March 10, 2015, Debtors issued a subpoena to MERS at its registered agent, CT Corporation, located at 1200 South Pine Island Road, Plantation, Florida 33324.

MERS's principal place of business is located at 1818 Library Street, Reston, Virginia 20190.

Debtors assert the subpoena is necessary to investigate whether CitiMortgage³ had the right to foreclose on Debtors' principal residence located at 14846 150th Street, Bonner Springs, Kansas 66012.

Debtors' subpoena directs MERS to produce:

² The District Court for the District of Kansas refers all cases and proceedings in, under, or related to Title 11 to the District's bankruptcy judges pursuant to the Amended Standing Order of Reference, effective June 24, 2013, referenced in D. Kan. Rule 83.8.5.

³ Schedule D of Debtors' Chapter 13 Petition lists CitiMortgage as having a first mortgage on Debtors' principal residence. Doc. 1. Whether CitiMortgage fraudulently filed a proof of claim and the secured or unsecured nature of CitiMortgage's claim are issues in this case.

Documents that show the historical and current securitization on the above identified mortgage; and

Documents that show all mortgagees and any other parties with any interest historically in the mortgage or mortgage note such as servicers and/or investors under MIN #: 1000115-0704475396-9 from April 5, 2002, to the current date.⁴

The place for compliance set forth in the subpoena is Debtors' attorney's office located at 750 Commerce Plaza II, 7400 W. 110th St., Overland Park, Kansas 66210-2362 (Commerce Plaza).⁵ MERS's response was requested by March 27, 2015.⁶

On March 30, 2015, three days after the production deadline had passed, MERS filed a motion to quash the subpoena.⁷ MERS filed an amended motion to quash the subpoena on March 31, 2015.⁸ MERS asserts that Debtors' subpoena subjects MERS to an undue burden and that the subpoena violates Fed. R. Civ. P. 45(c)(2)(A).⁹

On April 17, 2015, Debtors filed a memorandum in opposition to MERS's motion to quash. Debtors argued the subpoena did not subject MERS to an undue burden and that MERS regularly transacts business within 100 miles of the place for compliance.¹⁰

On May 12, 2015, the parties agreed that the matter could be submitted on the briefs and

⁴ Doc. 218, at 4.

⁵ *Id.* at 1.

⁶ *Id.*

⁷ Doc. 230.

⁸ Doc. 234. MERS amended its motion to quash after the Clerk of the Court issued an order requesting that MERS correct the defective pleading (Doc. 230) by attaching the appropriate exhibits (originally omitted from Doc. 230).

⁹ *Id.* at 2.

¹⁰ Doc. 245.

the Court took the matter under advisement.¹¹

II. LAW

Federal Rule of Bankruptcy Procedure 9016 makes applicable Fed. R. Civ. P. 45 in cases under the Bankruptcy Code. Rule 45(d)(3) governs quashing or modifying a subpoena as follows:

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.¹²

Federal Rule of Civil Procedure 45(c)(2) provides:

For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person.”¹³

MERS, as the movant, bears the burden to show that compliance with the subpoena

¹¹ Doc. 254.

¹² FED. R. CIV. P. 45(d)(3).

¹³ FED. R. CIV. P. 45(c)(2)(A). MERS argued that the Rule 45(c)(2)(A) test requires an analysis relating to locations within 100 miles from its principal place of business. However, Rule 45(c)(2)(A) clearly states the applicable test requires an analysis relating to locations within 100 miles of where the person “regularly transacts business in person.”

presents an undue burden.¹⁴ “Typically, a movant asserting an undue burden objection ‘must present an affidavit or other evidentiary proof of the time or expense involved in responding to the discovery request.’”¹⁵

Rule 45(d)(2)(B) provides:

A person commanded to produce documents . . . may serve on the party or attorney designated in the subpoena a written objection The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served.¹⁶

III. ANALYSIS

A. **MERS waived its right to object to the subpoena because it failed to timely file an objection in compliance with Fed. R. Civ. P. 45(d)(2)(B).**

A party waives its right to object to a subpoena “[b]y failing to object within the time permitted by the Federal Rules.”¹⁷ Debtors’ subpoena was issued on March 10, 2015, requesting compliance by March 27, 2015. Rule 45(d)(2)(B)’s 14-day deadline gave MERS until March 24, 2015, to file an objection. The Federal Rules state that an objection must be served by the earlier of the two dates.¹⁸ Thus, MERS had until March 24, 2015, to object. However, MERS did not file its motion to quash until March 30, 2015, six days outside the time limit. Therefore, MERS waived its right to object to Debtors’ subpoena.

¹⁴ *Ficep Corp. v. Haas Metal Eng’g, Inc.*, 2015 WL 566988, at *3 (D. Kan. Feb. 11, 2015).

¹⁵ *Id.* (quoting *Booth v. Davis*, 2011 WL 2008284, at *8 (D. Kan. May 23, 2015)).

¹⁶ FED. R. CIV. P. 45(d)(2)(B).

¹⁷ *Creative Gifts, Inc. v. UFO*, 183 F.R.D. 568, 570 (D. N.M. 1998) (citing *Wang v. Hsu*, 919 F.2d 130 (10th Cir. 1990)); *see also* 2015 WL 566988, at *1.

¹⁸ FED. R. CIV. P. 45(d)(2)(B).

Some courts have considered objections after a party has failed to act in a timely manner “in unusual circumstances and for good cause.”¹⁹

Such unusual circumstances have been found in cases where (1) the subpoena is overbroad on its face and exceeded the bounds of fair discovery, (2) the subpoenaed witness is a nonparty acting in good faith, and (3) counsel for the witness and counsel for the subpoenaing party were in contact concerning the witness’ compliance prior to the time the witness challenged the legal basis for the subpoena.²⁰

The Court declines to find that unusual circumstances exist in the instant case. The subpoena is not overbroad on its face because its inquiry is limited to Debtors’ mortgage. Further, the Debtors provided the specific MERS “MIN” number for their mortgage. Also, courts consider late objections to subpoenas when the parties have had regular contact in an attempt to reach a compromise regarding the subpoenaed items.²¹ In this case, the parties have made no showing of regular contact to resolve the issue. Finally, while MERS is a nonparty to the litigation, which bears consideration, MERS makes no assertions that the subpoena was filed in bad faith without good cause. Debtors’ subpoena only requests information related to Debtors’ mortgage. Therefore, the Court finds the subpoena is a fair discovery request to a nonparty and cannot excuse MERS’s obligation to comply with the applicable rules. However, even if MERS complied with Rule 45(d)(2)(B)’s time limitation, the motion to quash still fails as set forth in sections B and C hereinafter.

¹⁹ 2015 WL 566988, at *1 (quoting *Premier Election Solutions, Inc. v. Systest Labs Inc.*, 2009 WL 3075597, at *4 (D. Colo. Sept. 22, 2009)).

²⁰ *Id.*

²¹ *See, e.g., id.*

B. MERS regularly conducts business in person within 100 miles of Debtors' requested place for compliance.

Debtors assert that the Court may take judicial notice that MERS regularly transacts business in person within 100 miles of Commerce Plaza. The Federal Rules of Evidence provide that a court may take judicial notice of a fact that “is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”²² Facts that are part of the public record fall inside the scope of this rule.²³ This Court may take judicial notice of facts at a party's request or *sua sponte* during any stage of the proceeding.²⁴

Here, the Court takes judicial notice that MERS regularly transacts business in person within 100 miles of Commerce Plaza. Since 2011, the United States Bankruptcy Court for the District of Kansas has issued five separate judicial orders regarding MERS's role in Kansas.²⁵ In those cases, MERS was the mortgagee to a mortgage on real property in Kansas. In each case, the courts found a mortgage naming MERS as mortgagee was valid and enforceable against

²² FED. R. EVID. 201(b)(2).

²³ *JP Morgan Trust Co. Nat. Ass'n v. Mid America Pipeline Co.*, 413 F. Supp. 2d 1244, 1258 (D. Kan. 2006) (citing *Van Woudenberg ex rel. Foor v. Gibson*, 211 F.3d 560, 568 (10th Cir. 2000), *abrogated on other grounds by McGregor v. Gibson*, 248 F.3d 946, 955 (10th Cir. 2001)).

²⁴ FED. R. EVID. 201(c)–(d).

²⁵ *Martinez v. MERS and Countrywide Home Loans, Inc. (In re Martinez)*, 455 B.R. 755 (Bankr. D. Kan. 2011); *Williams v. BAC Home Loans Servicing, L.P. (In re Williams)*, 2012 WL 695832 (Bankr. D. Kan. 2012); *Van Nostrand v. IBM Lender Business Process Svcs., Inc. (In re Van Nostrand)*, Case No. 09-24265, Adv. No. 10-06146 (Bankr. D. Kan. Apr. 30, 2012); *Huerter v. Chase Home Finance, LLC (In re Huerter)*, Case No. 10-23175, Adv. No. 10-06147 (Bankr. D. Kan. Apr. 30, 2012); *Wilkinson v. BAC Home Loan Servicing, L.P. (In re Wilkinson)*, Case No. 09-24357, Adv. No. 10-06251 (Bankr. D. Kan. Apr. 30 2012).

debtors in bankruptcy proceedings in the District of Kansas.²⁶ Four of the orders involved real property located in Lawrence, Kansas. Lawrence is 34.4 miles²⁷ from Commerce Plaza. The fifth order involved real property located in Topeka, Kansas. Topeka is 61.5 miles²⁸ from Commerce Plaza. Therefore, based on those cases, it is clear MERS transacts business in Kansas and within 100 miles of Commerce Plaza.

Furthermore, MERS holds itself out and makes it publicly known that it transacts business in Kansas. Following the conclusion of three of the aforementioned cases, MERS, in a May 3, 2012, press release, heralded the District of Kansas Bankruptcy Courts for affirming MERS's model as "valid and effective in Kansas."²⁹ MERS advertises itself as a member-based organization which includes members in the Overland Park, Kansas, area.³⁰ A quick search of MERS's member database³¹ reveals that Cornerstone Bank, Valley View State Bank, Bank of

²⁶ "MERS's business is to hold record legal title to mortgages and deeds of trust on behalf of the beneficial owners. MERS is structured to allow its members, which include originators, lenders, servicers and investors, to track transfers of servicing rights and beneficial ownership interests in notes secured by the mortgages and deeds of trust held by MERS." *Huerter v. Chase Home Finance, LLC (In re Huerter)*, Case No. 10-23175, Adv. No. 10-06147 slip op. at 3 (Bankr. D. Kan. Apr. 30, 2012).

²⁷ Distance was calculated using the shortest route of public travel. Generally, courts measure the 100-mile limit of Rule 45(c) along a straight line or "as the crow flies" rather than along the shortest route of public travel. *Premier Election Solutions, Inc. v. Systest Labs Inc.*, 2009 WL 3075597, at *4 (D. Colo. Sept. 22, 2009) (citing *Weerheim v. J.R. Simplot Co.*, 2007 WL 2121925, at *1 (D. Id. July 23, 2007)). However, since the distance along a straight line will always be shorter than or equal to the shortest route of public travel, the values calculated can be accepted when within 100 miles.

²⁸ *Id.*

²⁹ *U.S. Bankruptcy Court Judge Affirms MERS' Role As Mortgagee in Kansas*, 2012 press releases (May 3, 2012), <http://www.mersinc.org/media-room/press-releases/archives-2012/14-media-room/press-releases-archives/press-releases-2012/210-u-s-bankruptcy-court-judge-affirms-mers-role-as-mortgagee-in-kansas1>.

³⁰ MERS "is a member-based organization made up of thousands of lenders, servicers, sub-servicers, investors and government institutions." *Our Business*, <https://www.mersinc.org/about-us/our-business> (last visited June 16, 2015).

³¹ Member Search, <https://www.mersinc.org/about-us/member-search> (last visited June 16, 2015).

Blue Valley, and Ameri-National all possess Overland Park, Kansas, addresses. All of these banks are less than five miles from Commerce Plaza and two are less than two miles away.

Therefore, MERS is precluded from arguing that the subpoena violates Fed. R. Civ. P.

45(c)(2)(A).

C. MERS fails to prove why responding to the subpoena is unduly burdensome because it presented no factual foundation for holding otherwise.

To find undue burden the Court considers “such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed.”³² A court “will not excuse compliance with a subpoena for relevant information simply upon the cry of ‘unduly burdensome.’”³³ Inevitably, complying with a subpoena “involves some measure of burden to the producing party. Nevertheless, the court will not deny a party access to relevant discovery because compliance inconveniences a nonparty or subjects it to some expense.”³⁴

MERS fails to present information sufficient to form a factual foundation to find that the subpoena is unduly burdensome. MERS asserts that it would be an “unfair expense on a non-party” to obtain and ship the documents over 100 miles.³⁵ This argument is insufficient as MERS offers no information about the number of documents involved, how they are stored, and

³² *Goodyear Tire & Rubber Co. v. Kirk’s Tire & Auto Servicenter of Haverstraw, Inc.*, 211 F.R.D. 658, 662 (D. Kan. 2003) (quoting *Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 53 (S.D.N.Y. 1996)).

³³ *E.E.O.C. v. Citicorp Diners Club, Inc.*, 985 F.2d 1036,1040 (10th Cir. 1993) (citing *E.E.O.C. v. Maryland Cup Corp.*, 785 F.2d 471, 479 (4th Cir. 1986)).

³⁴ *Ficep Corp. v. Haas Metal Eng’g Inc.*, 2015 WL 566988, at *3 (D. Kan. Feb. 11, 2015) (citing *Booth v. Davis*, 2011 WL 2008284, at *7 (D. Kan. May 23, 2011)).

³⁵ Doc. 234, at 2.

what effort is necessary to produce the requested information. Further, Debtors requested only the specific documents related to Debtors' mortgage by providing their MERS "MIN" number. The inclusion of Debtors' specific MERS "MIN" number should take *MERS an electronic mortgage registration system* little time to locate the requested documents. The breadth of the document request is narrow, even though it calls for a 13-year inquiry, because it relates only to Debtors' single mortgage. Without information regarding the number of documents involved or the effort it would take MERS to produce them, the Court cannot find Debtors' subpoena unduly burdensome.

IV. CONCLUSION

IT IS ORDERED that MERS's motion to quash is DENIED.

IT IS FURTHER ORDERED that MERS shall produce the requested documents in compliance with Debtors' subpoena within 30 days of the entry of this order.

IT IS SO ORDERED.

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ROBERT D. BERGER
U.S. BANKRUPTCY JUDGE
DISTRICT OF KANSAS