73016-9

73016-9

No. 73016-9-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

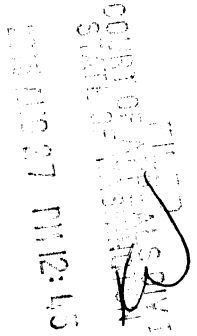
Lorina Delfierro,

Appellant,

v.

BSI Financial Services; Del Toro Loan Servicing, Inc.; Mariners Investment Fund, LLC; Mariners Investment Fund II REO, LLC; Mariners Second Fund II REO, LLC; Second Mariners Investment Fund II REO, LLC; Second Mariners RES Fund II REO, LLC; American Default Management; PENSCO Trust Company Custodian FBO Jeffery D. Hermann, IRA Account Number 20005343; April Smith in her individual and official capacity; Teresa Ceniceros in her individual and official capacity; Jeffery D. Hermann in his individual and official capacity; Jennifer Tait in her individual and official capacity; and Steve Olson in his individual and official capacity.

Respondents.



ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Carol A. Schapira

REPLY BRIEF

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A. Introduction

Not surprisingly, the Mariners' response brief in this matter is replete with a series of negative statements about Ms. Delfierro's brief such as the following: "her [Delfierro's] appeal is a rambling hodge-podge of the same baseless allegations that were soundly rejected." Or the following unhelpful oratory: "Like much of Appellants pleadings, her opening brief is a rambling, confusing, scattered collection of baseless allegations and half-truths."

To the contrary, it is the virtually unlimited number of mistakes, late decisions and non-truths presented by the Mariners organizations that have dominated the proceedings and that have completely obscured the truth virtually from the outset.

We hope to shed some light here and in doing so, the Court is asked to reverse the trial court's decision in this matter. Attorney's fees and costs are also requested.

B. Mariners Attempt to Obtain the Note

Perhaps the way to most quickly understand this situation is to consider the Mariners' four distinct attempts to acquire the subject Promissory Note – which attempts lie at the heart of this case:

1. 2009 Trustee Sale – this "so-called" 2009 sale resulted in Mariners bringing an unlawful detainer action where, at trial, Judge McDermott voided the sale and ultimately

dismissed Mariners' 1 complaint with prejudice.[1] Ex.103, 107, 108, 109. 2RP, 91-102. 3RP 29-37.

2. The second attempt occurred in mid-2010 where Mariners 4 filed a claim in bankruptcy court using an Assignment of Deed of Trust (#1) (now claimed by Mariners to be erroneous) and an unaffixed and undated allonge. The allonge was said to be issued by Equifirst (Mariners 4 collected monies from the bankruptcy Trustee on a bogus ownership claim. CP 352-382 . Ex. 5, 147, 301. 1RP, 31, 32, 70. 2RP, 125-128, 131-147. 3RP 9-14, 25-28, 97-99.
3. Third, after being sued by Ms. Delfierro Mariners came up with a third approach to obtain the Note based on late presented purchase and sale documents that are hopelessly late, incomplete and unverified. Ex. 3, 41, 211. 1RP 7-15, 33,56-69, 81-82. 2RP 14-16, 40-41, 45-49, 57-58, 65-69. 4RP 130. 5RP 12, 15-17, 28, 33, 44-48, 69, 85-87. 6RP 5-25, 52-62. 7RP 8, 12-13, 21.
4. Last, on September 19, 2014 after being pressed by the court to present the original Note, which had been transferred to the PENSCO IRA, said Note was determined to be missing. Even more strangely, the Note had been in the possession of the former holder Mariners even after it had been sold to the IRA. (In fact, no lost Note affidavit from the holder was presented, as is required under RCW 62A.3-309.) CP 455-459. Ex. 35, 116. 1RP 13-14, 68-70. 2RP 22-26. 3RP 22-29, 82-89, 94-95, 99-100, 109-114, 118-119. 5RP 40-41, 68, 78-83. 6RP 31-32, 57. 7RP 18-21, 25-26.

Frankly, none of these arguments got the job done. Said differently, though the trial court found otherwise, Mariners 4 has not established that it, or by extension, Pensco ever held the Note.

[1] Mariners 1 refers to Second Mariners Fund II, REO, LLC
Mariners 3 refers to Second Mariners Residential Fund II, REO
Mariners 4 refers to Second Mariners Investment Fund II REO, LLC

C. Missed Payments

Yes, Mariners may wax poetic about all the missed payments and how Ms. Delfierro is still living in the subject home. That misses the point. Mariner entities collected payments through servicer BSI Financial and later Pensco collected through servicer Del Toro Loan Servicing. (While Ms. Delfierro was in bankruptcy, a stipulation had been entered into and was specific as to the portions of each payment that would be applied to the loan interest, insurance and taxes. Both servicers accepted and, in large part, retained the money. Ex. 147. 2RP 134-137, 131-14.

Under the circumstances, is it any wonder that Ms. Delfierro stopped making payments?

In fact, both of the above-referenced servicers allowed the insurance to lapse until Ms. Delfierro later obtained and paid for insurance on her own. 2RP 43-45, 135-138.

Property taxes that had been paid by Ms. Delfierro weren't paid into King County and the property is due to be foreclosed by the taxing authorities. Monies were retained by the servicers. The court is asked "Why would anyone continue to make payments to a loan servicer who holds all the funds in a separate account, applying none of the funds as agreed to in the stipulation that was entered into?"

D. Mariners Mistakes

In subsection B of this brief we consider in some detail some – but not nearly all – of the many mistakes and other missteps committed by Mariners in this matter – mistakes which have greatly undermined the ability of the court and the parties to fully understand and comprehensively analyze this case.

This cascading flow of mistakes and inconsistencies coupled with the egregious failure of Mariners to adhere to the rules of evidence and the court rules made it impossible for a reasonably intelligent person to understand and ultimately bring this case to an appropriate conclusion.

But one thing appears clear: many of the decisions were made by the trial court based on a number of misunderstandings-likely because of the numerous Mariners' missteps which will be described herein.

E. Issues with the Trustee's Deed

As noted above, on May 26, 2009 foreclosure of the Delfierro property took place. A Trustee's Deed was recorded and issued to Mariners 1. It is worth noting that MERS was incorrectly identified in all of the related documents as the exclusive beneficiary and the holder of indebtedness. An excise tax return was recorded and Mariners 1 paid $10.00 in excise tax. On the tax affidavit, Fidelity signed as the seller for MERS and Les Popitt, a Trustee, signed on behalf of Mariners 1. Mr.

Olson testified at trial that he did not know who Mr. Popitt was or why he was signing for Mariners. At trial, Mr. Olson expressly claimed that this Trustee's Deed contained a mistake – it was Mariners 4 that purchased the property not Mariners 1. Ex, 107, 120, 103. 5RP, 16.

As Mariners note, it is true that Judge Schapira ultimately ruled in favor of Defendants. This is precisely why this appeal was filed. For reasons that are explained herein, the Judge's decision was incorrect. CP 750-760 .

F. Mariners' Mistakes Undermined the Entire Process

Speaking of Mariners' 1 "rambling hodge-podge of baseless allegations" comment, consider the unremitting, unrelenting flow of mistakes and other missteps committed by Mariners – both before and during the litigation process. What follows is a comprehensive layout of the mistakes and other missteps:

1. Events of 2009

First, consider the documents that were issued in 2009:

1. Appointment of Successor Trustee, Exhibit 105 – this document is improper because it identifies MERS not as nominee beneficiary but as beneficiary. MERS then improperly appointed Fidelity National Title Insurance Company ("Fidelity") as Trustee (in contravention of RCW 61.24.005(2) and 61.24.010 which mandate that only the beneficiary/ holder of the Note is authorized to appoint the successor trustee;)

2. Notice of Trustee's Sale by MERS alone. Again, MERS was improperly identified as beneficiary; Exhibit 106.
3. Trustee's Deed – the Deed improperly identifies MERS as beneficiary and Second Mariners Fund II, REO, LLC as new owner – of the subject property. Ex. 107. This is an entity that Mariners Olson admitted did not exist; Ex. 297.
4. Unlawful Detainer Summons and Complaint – again in the name of a company that was admitted by Mariners 4 to not exist; Ex. 297.
5. Order Issued by Judge McDermott against Second Mariners Fund II, REO, LLC-an entity that does not exist-ordering that MERS be reinstated as beneficiary.
6. Mariners' complaint was ultimately dismissed with prejudice. Ex. 109.

Under RCW 61.24.005(2) and 61.24.010, all of these above-referenced documents were improper in that they were incorrect, violated the Deed of Trust Act, and improperly informed the public that MERS was the beneficiary. Amazingly, Mariners spent virtually all of 2009 actively making use of the Washington courts under the guise of a company that they later admitted does not exist. Ex. 297. 3RP 117-118.

During the early stages of this litigation, the "position" consistently articulated by Mariners was that it had purchased the subject Note from Equifirst. See Ex. 297, the answer to Interrogatory No. 11 where Mariners expressly state that they purchased the Note from Equifirst.[2] Also, see Proof of Claim submitted to the Bankruptcy claim. Ex. 115.

[2] The Mariners weren't aware until later that Equifirst had sold to Sutton who had, in turn sold to FCDB FF1 LLC because these two transactions were never recorded. 1RP 34, 64-65. 3RP, 53-54.

Despite their contention that they purchased Ms. Delfierro's Note, Mariners never produced any Purchase and Sale documents during discovery and, perhaps more of a mystery, they never submitted any such Purchase and Sale documents as part of the bankruptcy proof of claim they submitted in June of 2010. Ex. 301, 297. 1RP 7-9, 66.

(Amazingly, the only "assignment" document issued by Mariners in 2009 – produced by Mariners in discovery – relates to a completely different piece of property that has nothing to do with Ms. Delfierro. Ex. 262. This document was later said by Mr. Olson to have been inadvertently included in Mariners' responses to discovery. 5RP 35-36.

Other than this document nothing was produced establishing Mariners' so-called purchase.

Said differently, until September 19, 2014, Mariners produced no proof of sale or other proof that they had made any purchase whatsoever. Mariners simply said that they bought the Note from Equifirst – with virtually no supporting evidence. Ex. 297.

Four years later, Mariners conveniently produced a series of purchase and sale documents littered with blanks and with none of the cited exhibits – which were supposed to be attached to the letter. Ex. 3.

This clearly does not pass the "smell test."

2. Events of 2010

The Mariner debacle did not end in 2009. The mistakes and other transgressions continued unabated in 2010:

1. After the 2009 foreclosure debacle where the foreclosure was unwound by Judge McDermott, the process started anew in 2010. Mr. Olson incorrectly executed Appointment of Successor Trustee #2 on behalf of Mariners 3 which in turn appointed ADM as trustee. By Mr. Olson's own admission, Mariners 3 was not the beneficiary and under RCW 61.24.005, the beneficiary must be the holder of the Note. (Given this definition, Mariners 3 was never the beneficiary and because by Mariners 3's own admission, it never held the Note. It also follows that it could not appoint ADM as trustee as it did in 2010.[3]) Ex.105. 5RP 20.
2. Also, consider the Assignment of Deed of Trust ("ADOT #1) dated 3/11/2010 that Mariners is relying on. Somehow, ADOT #1 was executed on a particular day and it was not notarized until some four days later. As was the case in 2009, ADOT #1 was improperly executed by MERS (as if it were the beneficiary when it was only the nominee beneficiary.) As noted above, this is in contravention of the Deed of Trust Act. Ex. 5.
3. In Notice of Trustee's Sale #2 and Notice of Default #2, a company by the name of CT was identified as beneficiary – even though no supporting documents have ever been produced. This is another mistake admitted to by the Mariners. Ex. 113. 5RP 22-23.
4. In mid-2010, Mariners filed their Bankruptcy proof of claim where they indicated under oath that they had

[3] Mr. Olson later testified that this was mistaken. It was Mariners 4 that was the beneficiary. Additionally, on April 5, 2010, ADM, the appointed substitute Trustee (unlicensed in Washington) executed and recorded a NOTS#2 notifying the public that it is securing an obligation in favor of MERS as the beneficiary. The beneficial interest was assigned by MERS to CT Residential Note REO Pool, LLC as the beneficiary and holder of the indebtedness. Under RCW 61.24.030(7)(a) trustee must identify the lender. RCW 61.24.030(l) requires the Trustee to provide name and address of the identified owner in the Notice of Trustee Sale. Mr. Olson testified in court that this was an error, it was Mariners 4, not CT or Mariners 1 that was the actual beneficiary.

purchased the Note from Equifirst in 2009. Ex 297, 301.

3. Events of 2011

Unfortunately, things did not improve in 2011. At that time, Mariners' standing was based on a purchase from Equifirst using an inappropriate ADOT and an unaffixed allonge. CP 352-382.

The Court, counsel and Ms. Delfierro were each convinced that Mariners 4 had purchased the Note from Equifirst through ADOT#1 and the copy of unaffixed allonge (both submitted to the Bankruptcy Court as part of Mariners' proof of claim.) Ex. 301.

Mariners' counsel later claimed that ADOT#1 was an erroneous document. (However, this led to thousands of dollars in legal expenses for Ms. Delfierro with their now unsupported "Equifirst" claim.) CP 352-382. 1RP 31-32.

On May 25, 2011, Mariners 5 (alleged assignee of the Note from Mariners 4) said that it sold the loan to Pensco (Hermann's IRA.) The testimony was that this was an arms' length transaction.

However, Defendant Mr. Hermann, the beneficiary of the subject IRA and a practicing bankruptcy attorney, testified that he obtained information from the attorney representing the seller of the Note in bankruptcy court where the information was of sufficient quality to cause

him to raise his offer to the asking price on the loan. Indeed, invoices provided by Pensco show that the Mariners' attorney billed the IRA for a pre-sale conversation that was had with Mr. Hermann.

Seemingly, use of this insider info suggests that this was not an arm's length transaction. Ex. 41, 114, 211. 3RP 103, 104, 128-147. 5RP 160.

In June, 2011, Mariners 4 whose registration had been cancelled since January 2011 filed the transfer of proof of claim to Pensco in bankruptcy court. At trial, Mr. Olson claimed he did not know that Mariners 4 transferred the proof of claim and it was an error or mistake of his attorney. Ex. 290, 301. 3RP 86-87,101-103.

As if all of this wasn't enough, here's one more oddity that occurred in 2011/2012: on page 4 of their brief, Mariners indicate that the subject Note – was purchased by Pensco during May of 2011. Ex. 41, 114, 211. Even though the Note – by Mariners' express admission – had been purchased by Hermann's Pensco IRA account, the Note – was FedEx'd by Robinson Tait back to Mariners on April 3, 2012. In fact, the testimony revealed that the Note was never physically conveyed to Hermann or to Pensco. To make matters worse, the Note was ultimately lost while in Mariners' possession. (The Note was lost by Mariners sometime after

April 2012, almost 2 1/2 years after the Note had been allegedly purchased by the Pensco IRA.) 5RP 39-41.

Why would the Note be shipped to and held by Mariners rather than Pensco only to be lost about one year later?

Frankly, part of the reason Ms. Delfierro was never able to demonstrate – that Mariners never purchased anything was because of this continuing and highly pervasive stream of mistakes, inappropriate documents, mistruths and other transgressions/oddities

The last mistake/transgression was perhaps the biggest transgression of all: two court days before trial, Mariners reported for the first time that the Note was lost. This means that the Note was never produced before, during or after trial. CP 455-459. Ex. 35, 301. 1RP 13-14. 2RP 22-24.

Like the Purchase and Sale agreements, Mariners apparently never even looked for the Note until they were told by the Judge at the September 19th pre-trial Summary Judgment hearing to provide the Note to the court. Mariners failed to do this or they would have reported the loss much earlier. This supports Ms. Delfierro's contentions that Defendants never had the Note. Instead, Mariners were forced to introduce – but not get admitted – a series of affidavits a few days before trial along coupled with live testimony which was presented at trial. Why? Because Mariners

again ignored the discovery rules and apparently did not even know about the lost Note until the last moment. 2RP 23. 3RP 82-83, 94-95, 109, 110-112, 118-119. 5RP 40-41, 68-69. 6RP 31-32. 7RP 20.

Hopefully, these actions present a general picture of the absolute chaos caused by one party: Mariners.

G. Mariners Never Established Purchase of the Loan

On the last paragraph on page 4 of their responsive brief, Mariners argue as follows:

> **"Respondents were able to show a clear chain of title and possession of the Note."**

Frankly, nothing could be further from the truth.

First, Mariners asserted for years that they had purchased the Note directly from Equifirst. Ex. 297. It wasn't until just before trial in September, 2014 – that they testified to having purchased the Note and allonge from an entity known as "Fortress." 1RP 7-15, 56-69, 81-82.

Instead, Mariner's produce a Purchase and Sale Agreement littered with blanks and absolutely none of the documents that are cited in that document are attached-and they expect to persuade the court using this document? Ex. 3.

Presumably, Mr. Olson could have produced corroborating records – easily establishing that Mariners indeed had purchased the Note from "Fortress."

But he didn't.

Frankly, the only witness that testified to having any knowledge of the substantive facts relating to the so-called purchase was Mr. Olson, President of the Mariners organizations. What little testimony he gave in this matter made it clear that he knew next to nothing about the facts as they related to this case. 5RP 12, 16, 17, 28, 33, 44-48.

Mariners' simply ignore the fact that discovery was propounded to them in 2013. As the court knows as part of the discovery process, Mariners were obligated to produce and answer all of the questions that had been posed and provide all of the responsive documents and to answer all of the questions unless there were objections.

Many of Ms. Delfierro's Interrogatories were specifically designed to elicit – among other things – information about Mariners' "purchase" of the subject Note from Equifirst. (During the discovery process, Ms. Delfierro believed – based on what she had learned from Mariners – that if they indeed had the Note it had been purchased from Equifirst.)

After studying the issues Ms. Delfierro became apparent to that Mariners never legitimately acquire the note

Upon receipt of the forensic report, Ms. Delfierro had concluded that the Mariners were lying about having purchased the Note.

Mariners actions have bolstered Ms. Delfierro's opinions.

Mariners first set of discovery responses – months late as it was – expressly stated that the Note had been purchased from Equifirst. Ex. 297.

Regarding Mariners' production of the documents, including proof of purchase of the Note, Mariners' produced 122 pages of documents. Nothing was produced but a one-page copy of an unrelated document – a document that Mariners stated shouldn't have been included with Mariners' responses. Ex. 262.

In discovery, no purchase and sale documents were provided or even referred to. Mariners simply stated as follows: "Mariners Investment Fund II, LLC claimed an interest in the Note and Deed of Trust by way of its purchasing of the Note and Deed of Trust from Equifirst Corporation and its assignment of the Deed of Trust from MERS executed on April 16, 2009." Ex. 297.

Indeed, though everything that Mariners had was requested, nothing else was produced that would support the notion that Mariners had purchased the Note from Equifirst (or anybody else for that matter.) No checks, no copies of email negotiations, telephone memos, no verification of money transfers, log entries, etc.

Amazingly, regardless of who they say they bought the Note from, no paper trail was produced!

Against this backdrop, four years after 2010 – in 2014 – Mariners abruptly and without warning introduced the notion that they had purchased the Note from an entity known as "Fortress."

Since the outset, Ms. Delfierro has been incredulous, given the decided lack of any proof supporting any such "sale."

Under these mysterious circumstances, counsel later approached Mariners' counsel and specifically asked if there were any supplemental materials available – materials that might shed light on and prove that Mariners had indeed obtained the Note. In response, six pages of additional materials were supplied by Mariners, none of which related to the subject of Mariners' purchase of the Note.)

Mariners failed miserably when it came to adhering to the rules of discovery – or proving their case.

To be entirely fair we should examine this so-called Fortress "purchase" in more detail.

As noted above, discovery was propounded to Mariners so that Ms. Delfierro could obtain – among other things – everything that Mariners had relating to its so-called purchase. As part of discovery, Mariners were asked for all relevant documents and they were asked a series of questions.

Ex. 297. In response, Mariners simply said that they purchased the Note from Equifirst. (At the time, this seemed natural because the Note had originally been issued by Equifirst in 2007 (at the time there was no record of Equifirst's transfer of the Note to Sutton.))

In this context – Mariner provided this new Fortress information – in support of its summary judgment motion. This motion introduces entirely new previously undisclosed documents – all of which were either unsigned or which contained a series of blanks and which were missing critical attachments. Ex. 3. In the Olson declaration – submitted as part of Mariners' Summary Judgment Motion that references a Master and Sale and Interim Servicing Agreement. Similarly, in the Hermann Declaration there was referral to a Purchase and Sale document. Ex. 41, 211.

The court is asked to closely review these agreements.

First, we must dispense with the notion that Defendant provided these materials as part of its supplemental discovery responses.

Not true.

Consider the exhibits to the Purchase and Sale Agreement. Exhibit 1 to the Mariners – "Fortress" agreement is left blank and is not executed. Note that Exhibit 2 is entitled "Mortgage Loan Document" and speaks to the original Note and all intervening endorsements – none of which were provided. Nothing in Exhibit 4 speaks to a "form of commitment letter."

None of these documents are executed. Just a series of blanks and no endorsements.

As the court knows before a document is admitted foundation and authenticity must be established.

The problem is that the court mistakenly waited until the parties had rested before admitting these faulty documents. 6RP 5, 23.

Starting with the September 19th hearing on Mariners' Motion for Summary Judgment – counsel for Plaintiff would object and the court would opine without fail that she was troubled by the late disclosure and there are many.

Recall that counsel attempted to have the court consider these documents at the Summary Judgment hearing and the request was rejected.

During opening argument, the request was made once again.

Counsel concluded cross-examination on November 11, 2013.

At this time, the documents had not been admitted. There was nothing to be gained by delving into the subject any further.

Counsel did not question Mr. Olson because the Purchase and Sale materials had not been admitted.

After the parties had rested – it was then that the court admitted these documents without having tested for foundation and authenticity.

These materials should not have been admitted. Mariners attempted to get these materials admitted at every turn they got, Ms. Delfierro objected on each occasion.

Defendants should not be allowed to perpetuate this farce.

H. Lost Note

Mariners go through their rendition of the lost note scenario in their response brief. Unfortunately, they rely on the wrong statute. This was probably done because they recognize that they don't meet the requirements of the operative statute: RCW 62A. 3-309. CP 455-459. Ex. 35, 301.

The chronology presented at trial by Mariners is straightforward.

> Well after Pensco had become owner, the Note was sent to Mariners and was lost while in Mariners' possession.[4]

Regarding the "lost note" issue, RCW 62A.3-309 provides in part as follows:

> **(a) A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was**

[4] What sense does it make for counsel to send the Note to Mariners given that the Pensco IRA was now the owner of the Note.

> **destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.**
>
> **(b) A person seeking enforcement of an instrument under subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, RCW 62A.3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.**

Under RCW 62A.3-309(a), a party that has lost an instrument can enforce it if he was in possession of the instrument when it was lost. Said differently, Pensco the custodian for Hermann's IRA did not execute the lost Note affidavit (also, the witness and affidavit testimonies are inconsistent.) 3RP 82-83, 94-95, 110, 112, 118-119. 5RP 40-41, 68-69.

Mariners make reference to RCW 62A.3-310(b)(4) (and similar language is found in the findings.) The language in RCW 62A.3-310(b)(4) does not relieve a person wishing to enforce the Note from the requirements contained in RCW 62A.3-309.

Ms. Delfierro argues that the court erred in permitting Mariners' counsel to allow his witnesses to testify along the lines of their affidavit of lost Note. Mariners' counsel did not ask the court to admit the affidavit.

Attorneys Tait and Anderson-Swanes, Hermann and Olson testimonies and affidavits did not corroborate. This means it is highly unlikely that they had seen the original Note. 3RP 82-83, 94-95, 109-110, 112, 118-119. 5RP 40-41, 68-69.

Pensco custodian cannot verify the Note because he had never held or seen the Note, no one from Equfirst, Sutton Funding LLC, FCDB FF1 LLC, MERS, Fortress or FCDB SNWL Trust ever testified as to the authenticity of these documents. The Note and allonge was never seen by an impartial person. 2RP 48.

According to the testimony, the Note had been given to the IRA but Mariners had possession of the Note when it was lost. 5RP 39-40.

Here – by Mariners' own admission on page 4 of its brief – the "lineage" regarding the Note:

- Mariners 5 in possession of the Note;
- March 2011-Mariners sent the Note to Robinson Tait, P.S.;
- (On May 25, 2011 the Note was transferred and assigned to Pensco) 3RP 103-104. 4RP 5, 6, 9, 11, 21-22, 26-27, 32-33, 37;
- Robinson Tait, P.S. retained by Pensco – held note;
- Robinson Tait, P.S. FedEx'd the Note to Mariners on April 3, 2012;

- After receiving the original Note, it was lost by Mariners.

Mariners indicate that Pensco established beyond any doubt that it had the right to enforce the Note under RCW 62A.3-309.

Under the very words of RCW 62A.3-309:

> **"A person not in possession is permitted to enforce the instrument if it was in his possession when it was lost.**

That is not the case.

The party that was sued was Pensco Trust Company Custodian FBO Jeffrey D. Hermann, IRA Account Number 20005343.

Evidence and testimony during trial shows that Pensco never received the original Note (even though it was a requirement in the purchase and sale agreement between Pensco and Olson that the original Note be delivered to Pensco within 10 days of receipt of the money.

RCW 62A.3-309(b) requires that "the person seeking enforcement", ie, the holder in due course, (in this case Pensco, as custodian), must prove the terms of the Note and their right to enforcement. 5RP 12. 6RP 14-16, 24-28, 37-39, 72.

Mariners incorporated 310 which is not the appropriate statute. Mariners stretch the law to the absolute limit saying that they were an agent and that their actions were the IRA's action. This is nonsensical.

The language in RCW 62A.3-310(b)(4) does not relieve a person wishing to enforce the Note from the requirement RCW 62A.3-309 since the Mariners failed to prove they have ever owned the Note.

1. Findings of Fact/Conclusions of Law

Under the circumstances described above, it is no wonder that the judge was not able to fully understand the proceedings. The findings – to the extent that they accept the Mariners arguments regarding having possession of the Note – are incorrect. The Mariners' arguments were not established. They failed to establish that they were in possession of the note and they failed and it was reversible error to allow admission of the purchase and sale documents – particularly because there was no foundation and/or authenticity established. Making matters worse, late admission made it impossible to cross examine Mr. Olson. The court was also incorrect in accepting the lost – Note argument put forth by the Mariners. They put forth an argument that is inapplicable.

For these reasons the findings adopted by the court – over the objections of Plaintiff – were incorrect.

2. Delfierro's Consumer Protection Act Claims

Ms. Delfierro was clearly subject to a number of actions that were unfair/deceptive. By virtue of the evidence that was presented the public interest impact was met because Mr. Olson testified that he is in the

business of real estate purchasing/lending/borrowing. Ms. Delfierro was clearly injured as a result of the actions taken by Mariners. She experienced considerable damages. For these reasons, if the court accepts Ms. Delfierro's claims, she would be entitled to damages under the Consumer Protection Act.

I. Conclusions

This case is a disaster because of the mistakes and other inappropriate actions taken by the Mariners. Given the problems that they created, they should not be casting aspersions against Ms. Delfierro.

Given their failures as documented herein, the trial court's decision should be reversed. Additionally, Ms. Delfierro is entitled to attorney's fees and costs.

Respectfully submitted this 26th day of August, 2015.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that on the August 26, 2015, I caused the attached REPLY BRIEF to be emailed and personally delivered to the following address:

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jsolseng@robinsontait.com

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Vita Tsinkevich, Legal Assistant