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No. 72526-2-I

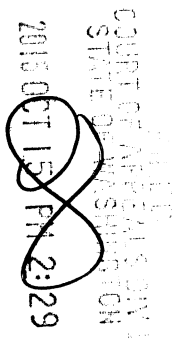
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

BLAIR LA MOTHE,

Appellant

U.S. BANK N.A., AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE THORNBURG MORTGAGE SECURITIES TRUST 2005-4 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-4, ITS SUCCESSORS IN INTEREST AND/OR ASSIGNS,

Respondent.



RESPONDENT'S APPELLATE BRIEF

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Respondent USB,[1] Plaintiff below, submits this response brief in opposition to Appellant's Opening Brief ("La Mothe's Brief"). La Mothe's appeal is without merit and should be denied.

I. RELEVANT FACTS

This is a deed of trust foreclosure action. In October 2005, La Mothe borrowed $1,500,000 from Liberty Financial Group, Inc., and executed a promissory note to evidence the debt and gave a deed of trust against certain real property located in Kirkland, Washington as collateral to secure payment.[2] Respondent USB is the current holder of the La Mothe note and deed of trust.[3]

La Mothe failed to make the monthly loan payment due on July 1, 2009, and has made no payments on the note and deed of trust since that date, or for more than almost five years.[4] Through May 6, 2014, there was due and owing a total amount of principal, interest and other charges of $1,980,479.19.[5]

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[1] "U.S. Bank N.A., as Trustee, on behalf of the Holders of the Thornburg Mortgage Securities Trust 2005-4 Mortgage Pass-Through Certificates, Series 2005-4."

[2] CP 103 (Sub 35) (Declaration of David Recksiek ("Recksiek Decl."), Exs. B, C.

[3] *Id.* (Recksiek Decl., ¶ 3).

[4] *Id.* (Recksiek Decl., ¶ 4). La Mothe asserts that he made one payment in or about November 2009, which, as provided by the terms of La Mothe's deed of trust, was placed in a suspense account. *Id.*

[5] *Id.*

II. PROCEDURAL BACKGROUND

The parties filed cross-motions for summary judgment below.[6] The trial court granted USB's motion and denied La Mothe's motion.[7] La Mothe appealed.

III. ARGUMENT

A. Introduction and Summary of the Argument

La Mothe's Brief does not dispute his extensive default in making payments. Instead, La Mothe disputes USB's right to proceed with foreclosure, disputes that USB holds La Mothe's original note on a variety of allegedly technical grounds, and challenges various assignments of his loan.

Those arguments are uniformly without merit. USB submitted La Mothe's original note and deed of trust at the summary judgment proceeding. Presentment of an original note makes a prima facie case for payment. Moreover, an original note is self-authenticating and non-hearsay, and La Mothe provided no contrary evidence to challenge the validity of the note. As a third-party borrower, La Mothe lacks standing to challenge assignments and transfers of his loan.

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[6] CP 95 (Sub 34) (Respondent U.S. Bank's Motion for Summary Judgment); CP 75 (Sub 31) (Petitioner La Mothe's Motion for Summary Judgment).

[7] CP 1865 (Sub 56) (Order Granting Plaintiff's Summary Judgment Motion, dated April 8, 2014).

La Mothe also asserts that (1) two versions of the note exist, (2) that USB failed to show a chain of title, (3) the note and deed of trust were not submitted timely to the trust for which USB is trustee,[8] and (4) La Mothe should have been allowed further discovery into the loan servicer's (Select Portfolio Services, Inc.) business records practices.[9] As explained herein, none of these arguments have merit either.

La Mothe has lived on the property since 2009 having made only one mortgage payment in six years. La Mothe agreed that in the event of default the lender had the right to foreclose its deed of trust against La Mothe's real property. USB is entitled to enforcement of the note and deed of trust. La Mothe's appeal should be denied.

B. The Original Note Was Submitted at the Summary Judgment Hearing

La Mothe was not "ambushed" at the summary judgment hearing with the original note. La Mothe's Brief at 19. USB's summary judgment motion, filed weeks before the hearing, clearly stated that its lawyers would bring the original note and deed of trust to the summary judgment hearing. *See* CP 95 (Sub 34) at 4 ("Here, Plaintiff is the present holder

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[8] Thornburg Mortgage Securities Trust 2005-4 Mortgage Pass-Through Certificates, Series 2005-4.

[9] Other arguments raised by La Mothe will be addressed in the course of the brief. For example, La Mothe argues that he was entitled to notice that he was in breach before the lawsuit was commenced. La Mothe's Brief at 25. La Mothe was sent a notice of default in August 2010. CP 103, Recksiek Dec. Ex. E.

and owner of La Mothe's note and deed of trust. The note is endorsed in blank, and Plaintiff's counsel will bring the original note and deed of trust to the summary judgment motion as proof that Plaintiff is the owner and holder of the note and deed of trust.") (emphasis added). Thus, if La Mothe had evidence challenging the validity of the note, he had plenty of notice and he should have submitted it at summary judgment. He did not do so.

By demonstrating that USB held the original note, and by submitting the original note endorsed in blank, USB established a prima facie case to enforce the note. "Mere production of a note establishes prima facie authenticity and is sufficient to make a promissory note admissible." *United States v. Varner*, 13 F.3d 1503, 1509 (11th Cir. 1994) (citing *United States v. Carriger,* 592 F.2d 312, 316-17 (6th Cir. 1979)). "[M]erely by producing a properly indorsed or issued instrument the plaintiff proves that he is entitled to enforce it as a holder." 2 James J. White & Robert S. Summers, *Uniform Commercial Code* § 16.4.b (5th ed. 2008).

If La Mothe wished to challenge the authenticity of the note by challenging the authenticity of his signature, he was required to do so in his answer. Under RCW 62A.3-308(a): "In an action with respect to an instrument, the authenticity of, and authority to make, each signature on

the instrument is admitted unless specifically denied in the pleadings." A general denial is not sufficient to raise the defense.[10]

La Mothe did not deny the authenticity or authority of the signature on the original note in his answer. Instead, La Mothe answered by stating that "the documents speak for themselves" and that he "denies each and every interpretation of said documents made by Plaintiff and leaves Plaintiff to its proof at trial." CP 70 (Sub 11) (Defendant Blair La Mothe's Answer to Plaintiff's Complaint for Deed of Trust Foreclosure filed March 11, 2012, at paragraph 3).

And even if La Mothe had denied the note's validity in his pleadings, La Mothe cannot rest on his pleadings. La Mothe's signature is presumed "authentic and authorized," and La Mothe must submit contrary evidence to overcome the presumption:

> If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature.

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[10] *See, e.g., Wesla Fed. Credit Union v. Henderson,* 655 So. 2d 691, 693 (La. Ct. App. 1995) (determining general denial of paragraphs insufficient to constitute a specific denial of the authenticity of the signature); *Dryden v. Dryden*, 621 N.E.2d 1216, 1219 (Ohio Ct. App. 1993) (defining specific denial as "statement that denies a particular fact and then states what actually occurred" and ruling general denial without more insufficient); *Bank of New England, N.A. v. Greer,* No. 9124, 1991 WL 285755, at *2 (Mass. Dist. Ct. Dec. 23, 1991) (holding general denials in defendants' answer were insufficient to put the genuineness of signatures on the note into controversy).

RCW 62A.3-308(a). As the official comment to U.C.C. § 3-308 explains, unless La Mothe submitted a showing of the grounds for the denial – which La Mothe failed to do – USB was not required to submit any additional evidence:

> The question of the burden of establishing the signature arises only when it has been put in issue by specific denial. "Burden of establishing" is defined in Section 1-201. The burden is on the party claiming under the signature, but the signature is presumed to be authentic and authorized except as stated in the second sentence of subsection (a). "Presumed" is defined in Section 1-201 and means that until some evidence is introduced which would support a finding that the signature is forged or unauthorized, the plaintiff is not required to prove that it is valid. The presumption rests upon the fact that in ordinary experience forged or unauthorized signatures are very uncommon, and normally any evidence is within the control of, or more accessible to, the defendant. The defendant is therefore required to make some sufficient showing of the grounds for the denial before the plaintiff is required to introduce evidence. The defendant's evidence need not be sufficient to require a directed verdict, but it must be enough to support the denial by permitting a finding in the defendant's favor. Until introduction of such evidence the presumption requires a finding for the plaintiff.

(Emphases added.) In other words, "'[t]he defendant is therefore required to make some sufficient showing of the grounds for the denial before the plaintiff is required to introduce evidence.'" *In re Bass*, 738 S.E.2d 173, 177 (N.C. 2013) (citations omitted). La Mothe did not do so. Accordingly, USB had no obligation or need to submit additional evidence

beyond the original note and "the presumption requires a finding for the plaintiff."

C. The Original Note Is Self-Authenticating and Non-Hearsay; Payment Is an Affirmative Defense

La Mothe argues over the quality and effect of David Recksiek's declaration, and the copy of the note attached thereto, and asserts that USB's counsel improperly acted as witnesses.[11] But these lines of argument are red herrings. La Mothe did not challenge the original note with any evidence, and submission of the original note into evidence does not require an authenticating witness. The original note and the recorded deed of trust (1) are not hearsay; (2) are self-authenticating documents; and (3) as explained *infra,* establish a presumption of nonpayment for the amount USB claims is due and owning.

1. Notes and Deeds of Trust Are "Verbal Acts" and as Such Are Not Hearsay

The La Mothe note and deed of trust are what the law designates as "verbal acts," which are non-hearsay. *See Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 540 (5th Cir. 1994) ("'Signed instruments such as wills, contracts, and promissory notes are writings that have independent legal significance, and are non-hearsay.'" (quoting

[11] La Mothe's Brief at 13-14, 36-44. As explained in the following sections, La Mothe's argument about business records and hearsay, as applied to the note and deed of trust, is superfluous and irrelevant.

Thomas A. Mauet, *Fundamentals of Trial Techniques* 180 (1988))). "A contract, for example, is a form of verbal act to which the law attaches duties and liabilities and therefore is not hearsay. *See* 2 *McCormick on Evidence* § 249, at 101." *Mueller v. Abdnor*, 972 F.2d 931, 937 (8th Cir. 1992).[12]

2. The Note and Deed of Trust Are Self-Authenticating Documents

The original La Mothe note and deed of trust are self-authenticating documents. ER 902. Two sections of ER 902 cover the La Mothe note and deed of trust.[13]

> ER 902(i): "Commercial Paper and Related Documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law."[14]
>
> ER 902(h): "Acknowledged Documents. Documents accompanied by a certificate of acknowledgment executed

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[12] "Verbal acts, however, are not hearsay because they are not assertions and not adduced to prove the truth of the matter. *See* 2 John W. Strong et al., *McCormick on Evidence* § 249, at 101 (4th ed. 1992); 6 John H. Wigmore, *Evidence* § 1770, at 259 (James H. Chadbourn rev. ed. 1976). The Federal Rules of Evidence 'exclude from hearsay the entire category of "verbal acts" and "verbal parts of an act," in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.' Fed. R. Evid. 801(c) advisory committee's note." *Mueller*, 972 F.2d at 937.

[13] Both sections apply to the deed of trust. ER 902(i) applies to the note.

[14] The Advisory Committee Note and the Report of the House Committee on the Judiciary indicate that "general commercial law" refers to the U.C.C. 28 U.S.C.A., Federal Rules of Evidence, at 734-35 (1976); *see* 11 J. Moore, *Federal Practice* § 920.01(b), at IX 31 (2d ed. 1976).

> in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments."

USB's submission of the original note and the deed of trust was all that was required for USB's prima facie case. By submitting the original note to the court, USB's attorneys did not act as witnesses. No authenticating witness is necessary:

> Appellants mistake the legal standard governing the admission of a self-authenticating document into evidence. Deutsche Bank was not required to present a witness to authenticate the note. *See* Fed. R. Evid. 1003. Rather, the note was admissible as a self-authenticating document without the need for further evidence in support of its authenticity. Under the Federal Rules of Evidence, signed commercial paper is "self-authenticating," meaning that it "require[s] no extrinsic evidence of authenticity in order to be admitted." Fed. R. Evid. 902(9). A signed promissory note falls into this category of evidence. *See In re Cook*, 457 F.3d 561, 566 (6th Cir. 2006) ("the promissory note is self-authenticating evidence pursuant to Rule 902"); *United States v. Varner*, 13 F.3d 1503, 1508-09 (11th Cir. 1994).

Miller v. Deutsche Bank Nat'l Tr. Co., No. 12-cv-03279-PAB, 2013 U.S. Dist. LEXIS 126888, at *27-28 (D. Colo. Sept. 4, 2013) (first brackets in original; emphases added). In short, the original note stands on its own as evidence, and La Mothe failed to plead or offer contrary evidence.

3. La Mothe's Attacks on David Recksiek's Declaration Are a Red Herring

La Mothe mounts a number of attacks on Recksiek's declaration, alleging that it contained inadmissible hearsay, that it failed to establish a "business record" exception to hearsay, and that there were two versions

of the note because a copy was attached to Recksiek's declaration. La Mothe's Brief at 35-43. As the foregoing sections of this brief demonstrate, because the original note standing alone established USB's prima facie case to recover on the original note and enforce the deed of trust for nonpayment, Recksiek's declaration was not necessary for USB's case, and any flaws there, real or imagined, fail to create a genuine issue of material fact.

As USB explained to the trial court, La Mothe's various attacks on Recksiek's declaration were without basis. CP 1824 (Sub 49). But arguing against Recksiek's declaration, when the original note was submitted to the court, misses the point. La Mothe must demonstrate a genuine issue of material fact requiring a trial. CR 56. Because it is the original note that establishes USB's rights, La Mothe could only create a material issue of fact by attacking the original note. Yet, La Mothe failed to offer any evidence challenging the validity of the original note.

La Mothe's arguments directed at Recksiek's declaration are beside the point. Disputes over nonmaterial facts or subjects do not defeat summary judgment. Such arguments do not create a genuine issue of material fact. CR 56.

4. La Mothe Had the Burden of Pleading and Proving Payment As an Affirmative Defense

La Mothe waived the affirmative defense of payment by failing to plead or prove it. Payment is an affirmative defense that must be pled and proven by the defendant. CR 8(c); *Frick v. Wash. Water Power Co.*, 76 Wash. 12, 14, 135 P. 470 (1913) ("The defense of payment in such cases is an affirmative defense, and must be proved as such."); *U.S. Bank Nat'l Ass'n v. Whitney*, 119 Wn. App. 339, 347, 81 P.3d 135 (2003); *W. Coast Credit Corp. v. Pedersen*, 64 Wn.2d 33, 35-36, 390 P.2d 551 (1964).[15] La Mothe's answer set forth 19 affirmative defenses, but did not plead payment as an affirmative defense:[16]

> Under our common law, when a holder of a promissory note is in possession of the promissory note, possession of the promissory note "raises a rebuttable presumption that a note was not paid." *In re Estate of Rutter*, 633 N.W.2d 740, 747 (Iowa 2001). Once the holder of the promissory note introduces the promissory note into evidence, the borrower may then claim he or she made more payments on the promissory note. In an action on a promissory note, we recognize this claim by the borrower as the defense of

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[15] "The general rule, therefore, which we find to be in accord with reason and justice, is that failure to pay must be alleged if it is an essential element of the claim for relief, as in this case, where the breach of the contract consists of nonpayment; but the burden rests upon the defendant to prove payment." *W. Coast Credit Corp. v. Pedersen*, 64 Wn.2d 33, 34-36, 390 P.2d 551 (1964) (emphasis added); *see also Perma-Fix Nw. Richland, Inc. v. Ecology Servs. Inc.*, No. CV-06-5013-FVS, 2008 U.S. Dist. LEXIS 89651 (E.D. Wash. Aug. 28, 2008) (same).

[16] La Mothe's other affirmative defenses were dismissed at summary judgment. CP 1865.

> payment. The defense of payment in an action is an affirmative defense. *Glenn v. Keedy*, 248 Iowa 216, 221, 80 N.W.2d 509, 512 (1957). The burden is on the borrower to prove his or her defense of payment. *Id.* In an action on a promissory note, where the holder of the promissory note claims less than the total amount is due and owing on the promissory note, the rebuttable presumption of nonpayment only applies to the amount the holder claims is still due and owing. *See Burch Mfg. Co. v. McKee*, 231 Iowa 730, 731-33, 2 N.W.2d 98, 99 (1942).

Iowa Mortg. Ctr., L.L.C. v. Baccam, 841 N.W.2d 107, 112 (Iowa 2013) (emphases added); *Gulf Coast Bank & Tr. Co. v. Donnaud's Inc.*, 759 So. 2d 268, 272 (La. Ct. App. 2000).

In sum, USB established a prima facie case by submitting the original note; La Mothe submitted no evidence to challenge the note, and waived the defense of payment. USB is entitled to recover the amount claimed, because the "presumption of nonpayment only applies to the amount the holder claims is still due and owing." *Baccam*, 841 N.W.2d at 112.

5. The Existence of Copies of the Original Note Does Not Create a Genuine Issue of Material Fact

La Mothe argues that because a copy of the note attached to Recksiek's declaration contains barcodes, or the words "note, signed certified copy," this somehow creates a material fact issue requiring a trial. Not so. Because the trial court had before it the original La Mothe note, the existence of copies of the original note, with or without additional

marks or irrelevant verbiage or marginalia, does not create a genuine issue of material fact.

La Mothe failed to submit any evidence showing that the original note was not before the court at the summary judgment hearing, or that it was not his original signature on that note. That copies of the note have additional inconsequential marginalia is not disputed, but those facts do not create a genuine issue of material fact requiring a trial. These additional marks or notations may have been placed on copies of the note for record-keeping or file-keeping purposes, but La Mothe has offered no explanation of how they are material to enforcement when the original note was before the trial court. To defeat summary judgment, La Mothe must identify a genuine issue of material fact that requires a trial to resolve. CR 56. La Mothe failed to do so.

6. The Note Was Endorsed in Blank

La Mothe argues that USB failed to establish a "chain of endorsements" for the note. La Mothe's Brief at 20-21. La Mothe's argument is legally meritless.[17] Because the note was endorsed in blank, no chain of endorsements is required. An instrument endorsed in blank is

[17] "A holder of the Note is entitled to enforce it. If the Creditor can prove that it is in possession of the Note endorsed in blank, then as a holder it is entitled to enforce the Note. The Creditor is not required to prove the details of each transfer in the chain of title." *Mesina v. Citibank, NA*, No: 10-2304 RTL, 2012 Bankr. LEXIS 2958, at *7 (Bankr. D. N.J. June 27, 2012).

negotiated by physical transfer and does not require a written "chain of endorsements" for the holder of the note to enforce the note:

> Under Washington law an instrument endorsed in blank becomes payable to the bearer and may be negotiated. RCW 62A.3-205(b). The holder of a negotiable instrument is the person in possession and is entitled to enforce it. RCW 62A.3-301; 62A.1-201(20).
>
> Here, Plaintiff does not contest that Chase is in physical possession of the note and that it is endorsed in blank. Therefore, Chase is the holder of the note as a matter of law.

Zalac v. CTX Mortg. Corp., No. C12-01474 MJP, 2013 U.S. Dist. LEXIS 20269, at *8-9 (W.D. Wash. Feb. 14, 2013).

7. The Deed of Trust Follows Transfer of the Note by Operation of Law

USB also holds the deed of trust. When the original note was transferred to USB, the deed of trust was also transferred by operation of law. It is black letter law that the security – the deed of trust – follows the transfer of the debt and that a formal assignment of the deed of trust is not required:

> The statute merely codifies the longstanding common law rule that the deed follows the debt: "Transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter." *In re Jacobson*, 402 B.R. 359, 367 (noting that "this principle is neither new nor unique to Washington") (*quoting Carpenter v. Longan*, 83 U.S. 271, 275, 21 L. Ed. 313 (1872)); *see also Fidelity & Deposit Co. of Maryland v. Ticor Title Ins. Co.,* 88 Wn. App. 64, 68-69, 943 P.2d 710 (1997) (noting "the

> maxim that the mortgage follows the debt"). *Flagstar*, as the Note-holder and beneficiary, properly appointed MTC.

Myers v. Mortg. Elec. Registration Sys., Inc., No. 11-cv-05582, 2012 U.S. Dist. LEXIS 30891, at *11 (W.D. Wash. Feb. 24, 2012) (emphasis added).

La Mothe raises several arguments based upon recorded assignment documents. La Mothe's Brief at 22-24. Because the deed of trust followed the note by operation of law, any recorded assignment of the deed of trust simply gave public notice of the transfer. As a result, USB is the beneficiary of the deed of trust because it holds the note, not because of any recorded assignment of the deed of trust by any party:

> Here, Plaintiff's claims arise from a fundamental misunderstanding of the law. U.S. Bank is the beneficiary of the deed because it holds Plaintiff's note, not because MERS assigned it the deed. Under Washington law, a beneficiary is by definition the party holding the note: "'Beneficiary' means the holder of the instrument or document evidencing the obligations secured by the deed of trust." Wash. Rev. Code § 61.24.005(2). This rule, however, is merely the codification of the longstanding principle that "the deed follows the debt." *See* Restatement (Third) of Property (Mortgages) § 5.4(a) ("A transfer in full of the obligation automatically transfers the mortgage as well . . . ."); *see also Carpenter v. Longan*, 83 U.S. 271, 21 L. Ed. 313 (1872) ("The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter."). The Washington Supreme Court reiterated this principle in *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wash. 2d 83, 104, 285 P.3d 34 (2012), stating "Washington's deed of trust act contemplates that the security instrument will follow the note, not the other way around." In sum, possession of the note makes U.S. Bank the beneficiary; the assignment

> merely publicly records that fact. Because U.S. Bank is the proper beneficiary, it is empowered to initiate foreclosure following Plaintiff's default.

Lynott v. Mortg. Elec. Registration Sys., Inc., No. 12-cv-5572-RBL, 2012 U.S. Dist. LEXIS 170607, at *5-6 (W.D. Wash. Nov. 30, 2012) (emphases added and omitted).

D. La Mothe Lacks Standing To Challenge Transfers and Assignments Of His Loan

La Mothe suggests that the presence of MERS as a nominee for the deed of trust in some manner creates a claim for La Mothe. La Mothe's Brief at 22. La Mothe also argues that the note and deed of trust were improperly transferred to the Thornburg Mortgage Securities Trust 2005-4 Mortgage Pass-Through Certificates, Series 2005-4 (for which USB is trustee) separate and apart from the lender owning the La Mothe note. La Mothe's Brief at 22-24. These arguments have no merit.

1. MERS Was a Nominee, an Often-Used Status in Real Estate

La Mothe's conclusory suggestion that MERS owned the deed of trust, separately, is simply wrong and is directly contrary to the deed of trust itself. La Mothe's deed of trust does *not* state that MERS owns the deed of trust or that MERS was a beneficiary on its own behalf. Instead, the deed of trust states that:

> MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument.

Deed of Trust at 2 (emphasis added).

> The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS.

Deed of Trust at 3 (emphasis added); *cf. Estribor v. Mt. States Mortg.*, No. C13-5297 BHS, 2013 WL 6499535, at *3 (W.D. Wash. Dec. 11, 2013) ("The deed of trust clearly states MERS is a nominee for the lender and lender's successors and assigns. It is unclear how actions within that capacity are unfair or deceptive.").

Courts may not adopt a contract interpretation that renders a term absurd or meaningless. *Seattle-First Nat'l Bank v. Westlake Park Assocs.*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985).[18] And words in a contract are given their ordinary, usual, and popular meaning, absent indication of any contrary intent or use of technical terms. *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990).

La Mothe's argument violates both of these basic contract interpretation rules. La Mothe's argument seeks to convert MERS into

[18] *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980). La Mothe's proposed interpretation leads to absurd results. MERS, which has a limited role as a "nominee" ("one designated to act for another as a limited representative") (*Black's Law Dictionary* 1076 (8th ed. 2004)) becomes, contrary to the meaning of the words employed, the prime actor rather than an agent of the principal party. La Mothe's interpretation stands the parties' relationship on its head.

something it is not. "Nominees" or "agents" have been, and are frequently, used for a variety of purposes in real estate transactions, including to execute or hold security instruments. *See, e.g., Bain v. Metro. Mortg. Grp. Inc.*, No. C09-0149-JCC, 2010 WL 891585, at *6 (W.D. Wash. Mar. 11, 2010) ("There is simply nothing deceptive about using an agent to execute a document, and this practice is commonplace in deed of trust actions."). A "nominee" means "one designated to act for another as his representative in a rather limited sense." *Schuh Trading Co. v. Comm'r*, 95 F.2d 404, 411 (7th Cir. 1938). "Solely" means, in context, that MERS was acting only as a nominee, not in any independent capacity or as a principal. The status of nominee in real estate documents is well-established. "Washington law, and the deed of trust act itself, approves of the use of agents." *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 106, 285 P.3d 34 (2012); *see, e.g., Carr v. Cohn*, 44 Wash. 586, 588, 87 P. 926 (1906) (nominee to whom property has been deeded without consideration and merely as title-holder for grantors, to convey as they might direct, can bring quiet title action on deed); *Andrews v. Kelleher*, 124 Wash. 517, 534-36, 214 P. 1056 (1923) (bond holders' agent authorized to prosecute foreclosure); *Fid. Tr. Co. v. Wash.-Or. Corp.*, 217 F. 588, 596 (W.D. Wash. 1914) (same).[19]

[19] *Thayer v. Nehalem Mill Co.*, 51 P. 202, 203 (Or. 1897) (confirming that agent

In short, well-established rules of contract interpretation and real estate transactions dictate that MERS be treated "solely" as a "nominee," not as the owner. La Mothe cannot defeat foreclosure of his deed of trust – a consequence of his own undisputed failure to make payments – by offering an absurd interpretation of the deed of trust that ignores the actual words and statements contained in the contract.

Courts have rejected claims based upon the identification of MERS as a nomine in a deed of trust. "[T]he mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury." *Bain*, 175 Wn.2d at 120.

> *Bain* does not stand for the proposition that a deed of trust is unenforceable simply because it names MERS as a beneficiary.

Johnson v. CitiMortgage, Inc., No. 2:13-cv-00037 RSM, 2013 U.S. Dist. LEXIS 177065, at *9 (W.D. Wash. Dec. 17, 2013); *see Zhong v. Quality Loan Serv. Corp. of Wash.*, No. C13-0814 JLR, 2013 WL 5530583, at *3

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had authority to execute mortgage on behalf of principal); *In re Cushman Bakery*, 526 F.2d 23, 30 (1st Cir. 1975) (citing cases), *cert. denied*, 425 U.S. 937 (1976); *In re Childs Co.*, 163 F.2d 379, 382 (2d Cir. 1947); *Barkhausen v. Cont'l Ill. Nat'l Bank Tr. Co. of Chi.*, 120 N.E.2d 649, 655 (Ill.), *cert. denied*, 348 U.S. 897 (1954); *accord Callaghan v. Scandling*, 167 P.2d 119, 119 (Or. 1946) (quoting contract language: "'The owners agree to pay to the broker or his nominee or nominees one section of property . . . .'"). The Restatement (Third) of Property recognizes that agents may enforce a trust deed on behalf of a lender, even instructing courts to "be vigorous in seeking to find such [an agency] relationship, since the result is otherwise likely to be a windfall for the mortgagor and the frustration of [the lender's] expectation of security." Restatement (Third) of Property § 5.4 cmt. e (1997).

(W.D. Wash. Oct. 7, 2013) (determining that "*Bain* also held that a deed of trust naming MERS as a beneficiary is not automatically unenforceable"); *see also Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 323, 308 P.3d 716 (2013) (rejecting the argument that designation of an ineligible beneficiary "standing alone, renders [a deed of trust] void"); *Zalac*, 2013 U.S. Dist. LEXIS 20269, at *8 (citing *Bain*, 175 Wn.2d at 120 ("the mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury")); *Bhatti v. Guild Mortg. Co.*, No. C11-0480-JLR, 2011 WL 6300229 (W.D. Wash. Dec. 16, 2011) (no declaratory relief based on MERS' capacity as nominee in deed of trust), *aff'd*, 550 F. App'x 514 (9th Cir. 2013).

2. La Mothe Lacks Standing to Challenge Assignments or Transfers of The Note and Deed of Trust

The courts have almost uniformly concluded that borrowers lack standing to challenge assignments of their loans:

> "Third-party borrowers lack standing to assert problems in the assignment of the loan" because the borrowers have not suffered an injury in fact. *Flores v. GMAC Mortg., LLC*, 2013 U.S. Dist. LEXIS 68606, 2013 WL 2049388, at *3 (N.D. Cal. May 14, 2013); *see also Jenkins v. JP Morgan Bank, N.A.*, 216 Cal. App. 4th 497, 513-14, 156 Cal. Rptr. 3d 912 (2013); *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 129 Cal. Rptr. 3d 467 (2011). Assignment defects do not injure borrowers because "even if there were some defect in the [subsequent] assignment of the deed of trust, that assignment would not have changed

> plaintiff's payment obligations." *Simmons v. Aurora Bank, FSB*, 2013 U.S. Dist. LEXIS 142917, 2013 WL 5508136, at *2 (N.D. Cal. Sept. 30, 2013); *see Siliga v. Mortg. Elec. Registration Sys., Inc.*, 219 Cal. App. 4th 75, 85, 161 Cal. Rptr. 3d 500 (2013) ("The assignment of the deed of trust and the note did not change [Plaintiffs'] obligations under the note, and there is no reason to believe that . . . the original lender would have refrained from foreclosure in these circumstances."); *Apostol v. CitiMortgage, Inc.*, 2013 U.S. Dist. LEXIS 167308, 2013 WL 6328256, at *7-8 (N.D. Cal. Nov. 21, 2013).

Moran v. GMAC Mortg., LLC, No. 5:13-CV-04981-LHK, 2014 U.S. Dist. LEXIS 84411, at *11-12 (N.D. Cal. June 18, 2014) (brackets and ellipsis in original); *see Bateman v. Countrywide Home Loans*, No. 12-00033 SOM/BMK, 2012 WL 5593228, at *4 (D. Haw. Nov. 14, 2012) ("borrowers generally lack standing to challenge the assignments of their loans").

3. La Mothe Lacks Standing to Raise Claims Related to the Pooling and Servicing Agreement for the Trust

La Mothe makes several arguments that the note and deed of trust are not enforceable based upon the terms of the pooling and servicing agreement ("PSA") that establishes the trust, or upon claims that the note and deed of trust were not submitted to the trust at the time of its creation. La Mothe's Brief at 22-24.

Numerous courts have held that borrowers are strangers to the PSA and cannot raise challenges to those contracts or their performance.

Therefore, La Mothe, a stranger to the PSA or any agreements between the trust and its beneficiaries, lacks standing to raise challenges to these contracts or their performance. *In re Sandford*, No. 11-10-14424 TS, 2012 Bankr. LEXIS 5609, at *9-10 (Bankr. D. N.M. Dec. 3, 2012) ("case law is both uniform and abundant (*Walker*'s "judicial consensus") that a borrower lacks standing to challenge the validity of a loan assignment based on alleged noncompliance with a PSA, because the borrower is neither a party to the PSA nor a third party beneficiary" (footnote omitted)).[20]

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[20] *Metcalf v. Deutsche Bank Nat'l Tr. Co.*, No. 3:11-CV-3014, 2012 WL 2399369, at *4 (N.D. Tex. June 26, 2012); *Lindsay v. America's Wholesale Lender*, No. SACV 11-1303-DOC, 2012 WL 83475, at *3 (C.D. Cal. Jan. 10, 2012); *Bascos v. Fed. Home Loan Mortg. Corp.*, No. CV 11-3968-JFW, 2011 WL 3157063, at *6 (C.D. Cal. July 22, 2011); *Wittenberg v. First Indep. Mortg. Co.*, No. 3:10-CV-58, 2011 WL 1357483, at *21 (N.D. W. Va. Apr. 11, 2011); *Velasco v. Sec. Nat'l Mortg. Co.*, 823 F. Supp. 2d 1061, 1071 (D. Haw. 2011); *Wolf v. Fed. Nat'l Mortg. Ass'n*, 830 F. Supp. 2d 153, 161 (W.D. Va. 2011); *Livonia Prop. Holdings, L.L.C. v. 12840-12976 Farmington Road Holdings, L.L.C.*, 717 F. Supp. 2d 724, 735 (E.D. Mich.), *aff'd*, 399 F. App'x 97 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 1696 (2011); *Bittinger v. Wells Fargo Bank NA*, 744 F. Supp. 2d 619, 625-26 (S.D. Tex. 2010); [*In re*] *Correia*, 452 B.R. [319,] 324 [(B.A.P. 1st Cir. 2011)] (affirming bankruptcy court's determination that the "debtors lacked standing to challenge the mortgage's chain of title under the PSA."); *Washington v. Saxon Mortg. Servs. (In re Washington)*, 469 B.R. 587, 590 (Bankr. W.D. Pa. 2012); *In re Wright*, No. 10-03893, 2012 WL 27500, at *3 (Bankr. D. Haw. Jan. 5, 2012); *Kain v. Bank of N.Y. Mellon (In re Kain)*, No. 08-08404-HB, 2012 WL 1098465, at *8 (Bankr. D.S.C. Mar. 30, 2012); *Edwards v. Deutsche Bank Nat'l Tr. Co. (In re Edwards)*, No. 11-23195, 2011 WL 6754073, at *3 (Bankr. E.D. Wis. Dec. 23, 2011); *In re Smoak*, 461 B.R. 510, 519 (Bankr. S.D. Ohio 2011); *Washington v. Deutsche Bank Nat'l Tr. Co. (In re Washington)*, 468 B.R. 846, 853 (Bankr. W.D. Mo. 2011), *aff'd*, No. 11-01278-CV-FJG, 2012 WL 4483798 (W.D. Mo. Sept. 28, 2012); *In re Almeida*, 417 B.R. 140, 149 n.4 (Bankr. D. Mass. 2009)." *Sandford*, 2012 Bankr. LEXIS 5609, at *10-11.

E. La Mothe's Deed of Trust Governed Suspense Account Amounts

La Mothe complains about the amounts held in a suspense account from one late payment he made. The placement of a payment in suspense is governed by the terms of the deed of trust. La Mothe did not make payments for a number of months (June through October 2009), thereby accruing default interest. It appears that when he then made one late payment in November 2009, the payment was applied first to the default interest. The remaining amount of the payment was insufficient to make a full payment, so it was put into suspense – as provided in the deed of trust. CP 103 Recksiek Decl. Ex. 3 (Deed of Trust, p. 4). La Mothe's contract arguments fail.

F. The Trial Court Properly Denied La Mothe's CR 56(f) Motion

La Mothe claimed to the trial court that he was unable to "complete discovery on the testimony of David Recksiek, and as such cannot present facts essential to justify Defendant's opposition of declaration of David Recksiek, specifically Defendant's equitable arguments and arguments related to Select Portfolio Servicing, Inc.'s practices related to the creation and maintenance of business records." CP 1869 (Sub 58) La Mothe's CR 56(f) Motion at 2 (emphasis added).

La Mothe sought discovery about SPS's (the loan servicer) practices for business records.[21] But with the original note and deed of trust before the trial court, SPS's business records practices were irrelevant and could not raise a material issue of fact.

CR 56(f) allows a trial court to order a continuance when "it appear[s] from the affidavits of a party opposing [a summary judgment] motion that for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition." The trial court's denial of a motion for a continuance under CR 56(f) is reviewed for abuse of discretion. *Manteufel v. Safeco Ins. Co. of Am.*, 117 Wn. App. 168, 175, 68 P.3d 1093 (2003). A trial court does not abuse its discretion if (1) the requesting party does not offer a good reason for the delay in obtaining the evidence; (2) the requesting party does not identify what evidence would be presented as the result of the additional discovery; or (3) the evidence sought will not raise a question of material fact. *Id.*

La Mothe's focus is on the day-long deposition of Recksiek, which La Mothe's attorneys conducted prior to the summary judgment motion.

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[21] In fact, La Mothe's counsel obtained responses from Recksiek to a number of questions about SPS's business records practices. *See* DR Dep. 41-52, 145-147 (review and audit of loan information from prior server), 158:10-17 (assimilation of records from prior server, extensive audits and recalculations of loan documents), 168:25-169:2 (witness intended to testify at trial based upon facts contained in business records), 162-166 (series of questions regarding how SPS proceeds to foreclosure). CP 404-614.

Throughout the deposition, La Mothe's counsel posed numerous improper questions, including many broad hypotheticals to a lay witness (Recksiek) calling for broad speculation. *See* Appendix A.

The questions, and La Mothe's purported expected answers, did not raise any fact questions relevant to the summary judgment before the trial court. *See* Appendix A. Moreover, a trial court may not consider inadmissible evidence when ruling on a summary judgment motion. *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986).

Speculative lay testimony is not admissible, and lay witnesses cannot give opinion testimony except in very limited circumstances. ER 701. "'The essential difference between [Rule 701 and 702 testimony] . . . is that a qualified expert may answer hypothetical questions.'"[22] If a hypothetical question is to be answered by a lay witness in a deposition, the question must be properly posed. A lay witness "cannot be asked to give an opinion [in response to a question posed during discovery depositions] unless it is based upon a complete statement of all relevant facts," and the "hypothetical questions must be based upon facts of record

[22] *Wilburn v. Maritrans GP Inc.*, 139 F.3d 350, 356 (3d Cir. 1998) (citation omitted; brackets and ellipsis in original).

[i.e., testimony of another deponent or a document related to the testimony]."[23]

La Mothe's deposition questions were improper, and such evidence is inadmissible and cannot be used in opposition to a summary judgment or at trial. *See, e.g.*, *Wash.v. Dep't of Transp.*, 8 F.3d 296, 300 n.10 (5th Cir. 1993) ("*See Kloepfer v. Honda Motor Co.*, 898 F.2d 1452, 1459 (10th Cir. 1990) (citing Fed. R. Evid. 701(a) for its conclusion that speculative lay testimony by the plaintiff – as to whether she would have obeyed a warning – was properly excluded because such testimony would not have been based on the witness's perception.); *see also* Fed. R. Evid. 701 Note ('If . . . attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by this rule.')" (emphasis added; ellipsis in original)); *Elyria-Lorain Broad. Co. v. Lorain Journal Co.*, 298 F.2d 356, 360 (6th Cir. 1961) ("[A] witness may not testify to what he would have done had the situation been different from what it actually was.").

La Mothe's counsel completely disregarded these rules and repeatedly posed broad and improper hypotheticals. La Mothe cannot support a CR 56(f) motion by claiming he had a right to answers to improper hypothetical questions posed to a lay witness. *E.g.*, *Howard v.*

[23] *Williams v. Thomas Jefferson Univ.*, 54 F.R.D. 615, 617 (E.D. Pa. 1972).

Rustin, No. 06-00200, 2008 U.S. Dist. LEXIS 36101, at *12 (W.D. Pa. Apr. 30, 2008) ("Plaintiffs' motion to compel Dr. Dixon to respond to this hypothetical question is denied . . ."); *Ashley v. Hall*, 138 Wn.2d 151, 157-58, 978 P.2d 1055 (1999).

Not receiving responses to improper hypothetical questions, to questions about a nonparty, or to questions that were so broadly stated that the answer is meaningless in the context of identifying specific facts to defeat summary judgment, does not satisfy CR 56(f).

A review of La Mothe's list of questions, and La Mothe's suggested answers (CP 75-94; La Mothe's CR 56 Motion at 8-10 ("Offers of Proof")), shows no answer that La Mothe can suggest that has any bearing on this case or summary judgment motion. The specific questions La Mothe asserts that would provide evidence relevant to this motion are included on Appendix A (with some paraphrasing for brevity). As noted, none of these questions were relevant to USB's summary judgment motion.

None of these questions sought information that would raise a material fact issue for the summary judgment motion before the trial court. Therefore, the trial court correctly denied La Mothe's CR 56(f) motion.

IV. CONCLUSION

USB submitted La Mothe's original note and deed of trust, thereby establishing a prima facie case. La Mothe submitted no contrary evidence. La Mothe lacks standing to raise the various claims he makes about transfers or assignments of his loan, and identified no evidence he sought that would have raised any genuine issues of material fact. La Mothe simply has not made his mortgage payments for years, and the holder of his note and deed of trust is entitled to the remedy for default La Mothe agreed to. Respondent USB respectfully requests that the Court deny La Mothe's appeal.

Respectfully submitted this 15th day of October 2015.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that I caused **Respondent's Appellate Brief** to be filed with the Court of Appeals (original and one copy); and caused a true and correct copy of same to be served upon the party listed below by U.S. Mail:

Blair La Mothe, Pro Se
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DATED: October 15, 2015, at Seattle, Washington.

Teresa Bitseff, Litigation Practice Assistant
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APPENDIX A[24]

(1) How did Select Portfolio obtain servicing rights? (DR Dep. 21:2-6);[25]

(2) So when you talk about your business records, I can assume that what you're talking about would apply to every SPS person being serviced (DR Dep. 36:21-37:6);[26]

(3) How does Select Portfolio Servicing make money? What money does it make by doing servicing? (DR Dep. 65:24-66:2);[27]

(4) You [SPS] paid .77 percent, or less than a penny. Do you have any idea how much that would be on – for servicing rights, how much that would be on $2 million? (DR Dep. 70:19-23);[28]

(5) What's your understanding of the obligations SPS owes to the holders of certificates, if anything? (DR Dep. 87:5-7);[29]

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[24] The contents of this Appendix were taken directly from USB's opposition to La Mothe's motion to strike the motion for summary judgment, which is contained at CP 1721-1732.

[25] As Exhibit 1 to the deposition shows, SPS obtained the servicing rights by purchasing them out of the Thornburg bankruptcy case.

[26] How SPS may or may not proceed against other borrowers is irrelevant to La Mothe's default and his right to proceed in this case. However, Recksiek testified that SPS would service La Mothe's loan like it would service other loans. DR Dep. 36:21-23.

[27] How SPS is compensated is irrelevant to this case and this summary judgment motion. Nevertheless, La Mothe's counsel made it clear that the target of his questioning was SPS.

> MR. STAFNE: This foreclosure – I'm trying to understand what, if anything, SPS will receive out of it, whether or not – I want to know whether they're going to keep all the money in the foreclosure, whether they're going to pay any money to the trust, and I want to know if the certificate holders are going to get any of the money in Mr. La Mothe's foreclosure.

DR Dep. 66:8-14.

[28] The question has a mathematical answer but is irrelevant to this case.

[29] The question is irrelevant and provides no information regarding the loan records.

(6) Do you ever work with certificate holders? (DR Dep. 87:20-21);[30]

(7) You believe and you act upon, in performance of your job, the fact that the note, which is owned by the noteholder, and the deed of trust, which is owned by MERS, create a mortgage loan for purposes of federal regulations and the bankruptcy agreement which sells you mortgage loans? (DR Dep. 116:14-24);[31]

(8) So approximately how many [other times] have you testified? (DR Dep. 154:3-8);[32]

(9) So let's say the MERS deed of trust did not identify itself as a nominee and simply said it was the beneficiary. Would that cause you to have any concern, or would you just go to your lawyers and ask them the question? (DR Dep. 167:10-19);[33]

(10) So what would you do in a situation where the note is owned by one party and the deed of trust is owned by a totally separate party? (DR Dep. 167:21-23).[34]

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[30] The question is irrelevant and provides no information regarding the loan records. Recksiek testified that there was a SPS department that communicated with the trust. DR Dep. 119:2-5, 148:8-13.

[31] The deed of trust is not owned by MERS. *Elyria-Lorain Broad. Co. v. Lorain Journal Co.,* 298 F.2d 356, 360 (6th Cir. 1961) ("[A] witness may not testify to what he would have done had the situation been different from what it actually was."). La Mothe's counsel insisted upon repeatedly referring throughout the deposition to "MERS," "data," or "MERS documents," but the mere fact that MERS is identified as a "nominee" in a document does not permit such an argumentative and misleading characterization. DR Dep. 159-167.

[32] La Mothe's counsel misunderstood this question, and believed that the question was how many times had *other* SPS witnesses testified in other cases. Recksiek had already testified that he did not recall how many times he had testified in trial. DR Dep. 151:13-18.

[33] *Elyria-Lorain Broad. Co.*, 298 F.2d at 360.

[34] *Id.*