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No. 73336-2-I

(King County Superior Court No. 14-2-12762-6 SEA)

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

BYRON BARTON and JEAN BARTON,

Appellants/Plaintiffs,

v.

JP MORGAN CHASE BANK, N.A., et al.,

Respondents/Defendants.

RESPONDENT JPMORGAN CHASE BANK, N.A.'S ANSWERING BRIEF

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I. INTRODUCTION

Petitioners Byron and Jean Barton appeal dismissal of their third lawsuit alleging near identical claims. In each lawsuit, the court found no merit to their allegations. In January 2013, Judge Coughenour described Plaintiffs' complaint as "fatally lacking in both clarity and plausibility." CP 409. Neither of the subsequent complaints improved that situation.

Res judicata bars Plaintiffs' Complaint because ***for the third time*** Plaintiffs sued the same defendants regarding the same subject matter—Chase's standing to initiate foreclosure on their 2007 WaMu loans—and relying on the same evidence—Plaintiffs' loan documents, including their Note indorsed in blank and the provisions in both their Note and Deeds of Trust allowing for transfer of their loan. Plaintiffs argue below and on appeal that "the new set of facts included in this complaint are [sic]: Chase is an unlawful 'beneficiary,' and QLS is not a properly appointed Trustee." OB at 21. But these are not facts, let alone ***new*** facts. In 2013, Judge Lasnik held Chase was beneficiary of Plaintiffs' Deed of Trust and that "[n]o additional approval, assignment, or consent was necessary to affect the transfer" of Plaintiffs' Note to Chase. And because Chase recorded Quality's appointment as successor trustee on June 28, 2012 (before Plaintiffs filed their first or second lawsuits), Plaintiffs already had ***two*** opportunities to litigate whether Quality was properly appointed as trustee.

But even if Plaintiffs' claims were not barred by res judicata, Plaintiffs waived any claims (except for their fraud, misrepresentation, and

CPA claims, which fail for other reasons) by failing to obtain a pre-sale injunction. "Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's Sale." RCW 61.24.040(1)(f)(IX). Plaintiffs do not deny receiving notice of their right to enjoin the sale in the Notice of Trustee's Sale (nor can they as they filed two previous lawsuits to enjoin foreclosure), and Plaintiffs' Property was sold at trustee's sale on April 11, 2014. Thus, the Deed of Trust Act's waiver provision bars many of Plaintiffs' claims.

On the merits, and more fundamentally, Plaintiffs' Complaint also fails because it does not allege the elements necessary to state a claim under the CPA, or for misrepresentation or fraud. This Court should conclude the trial court properly dismissed Plaintiffs' Complaint, and should affirm the trial court in all respects.

II. STATEMENT OF THE CASE

A. Factual Background

Plaintiff Enters Into Two Loans With WaMu in 2007. In August 2007, Mrs. Barton borrowed $456,500 from Washington Mutual Bank ("WaMu") to refinance Plaintiffs' existing loan and obtain cash-out, as evidenced by an adjustable rate Note. *See* CP 216-221 (Refinance Loan Note). The Refinance Loan Note expressly provided that WaMu, as lender, could "transfer this Note," and that "anyone who takes this note by transfer and is entitled to receive payments under this Note is called the 'Note holder.'" CP 216 ¶ 1. WaMu subsequently indorsed the Note in blank. CP 221. The Refinance Loan Note was secured by a Deed of Trust

executed by both Plaintiffs, and provided that upon default of the loan obligations, the lender could foreclose nonjudicially and sell the property. CP 223-243 (Refinance Loan Deed of Trust). The Deed of Trust was recorded in the King County Recorder's Office on August 14, 2007. CP 223. Like the Note, the Deed of Trust expressly provided that the Note could be sold one or more times, without notice to Plaintiffs. CP 234 ¶ 20. The same day as the Refinance Loan transaction, Mrs. Barton obtained from WaMu a $207,500 Home Equity Line of Credit ("HELOC"), evidenced by the WaMu Equity Plus Agreement and Disclosure. CP 276-284. That HELOC was also secured by a Deed of Trust (the "HELOC Deed of Trust") executed by both Plaintiffs, and recorded the same day and immediately after the Deed of Trust on the Refinance Loan. *See, e.g.,* CP 249 (April 13, 2013 Compl.) ¶ 6 ("In August 2007, Plaintiffs signed a closed-end Deed of Trust securing the HELOC"); CP 223; CP 276. As alleged in the April 13, 2013 Complaint, Plaintiffs' reason for obtaining the 2007 loans was to obtain relief from "an immediate financial crisis" allowing them to pay "property taxes" and complete "home improvements." *See* CP 249 ¶ 1.

Plaintiffs do not dispute (and in fact concede) they entered into the 2007 loan transactions. *See* CP 249 ¶ 6 (admitting "sign[ing] a closed-end Deed of Trust"), *id.* 250 ¶ 8 (signing "the pre-completed loan documents under the direction of a home notary from WAMU"). Indeed,

Plaintiffs concede they "sign[ed] two ... loans" with WaMu, but complain WaMu should have known they could not afford the loans. *Id.* ¶ 10.

WaMu Fails and Chase Acquires Mrs. Barton's Loans from the FDIC. On September 25, 2008, the FDIC placed WaMu in receivership and sold certain of WaMu's assets to Chase. *See* CP 295-338 (Purchase and Assumption Agreement Among FDIC and JP Morgan Chase Bank, N.A. (Sept. 25, 1998), http://www.fdic.gov/about/freedom/washington_mutual_p_and_a.pdf (the "Purchase and Assumption Agreement")). Chase thus became Note holder and beneficiary under the Deeds of Trust in September 2008.

Plaintiffs Default on their Refinance Loan. Plaintiffs allege that as early as December 2008 they began inquiring as to possible loan modification options due to difficulties in making payments. *See* CP 250 ¶ 13. Plaintiffs concede that between March 2009 and August 2009 Chase considered, but ultimately denied, their modification requests in August 2009. CP 250-251, ¶¶ 15-17. Plaintiffs further acknowledge that Chase again considered them for modification but sent another letter again denying their modification request on June 16, 2010. CP 258 ¶ 6. Plaintiffs defaulted on their loan as of July 2011, and the Trustee of the Deed of Trust recorded a Notice of Trustee's Sale scheduling a sale for December 21, 2012. *See* CP 340-343 hereto (Notice of Trustee's Sale).

B. Procedural Background

Plaintiffs' First Lawsuit. Facing foreclosure, Plaintiffs filed their first lawsuit in King County Superior Court on August 31, 2012, asserting

claims for alleged: (a) breach of contract; (b) fraud; (c) RESPA violations; (d) state RICO violations; (e) quiet title; and (f) a list of various state and federal statutes and regulations with no allegations tied to those provisions. CP 349-362 (August 31, 2012 Compl.); (*Barton v. JP Morgan, et al.*, 12-2-29180-2 SEA (King County Superior Court Aug. 31, 2012) (*Barton I*). After Chase removed and moved to dismiss Plaintiffs' Complaint, the District Court dismissed Plaintiffs' claims without prejudice. CP 408-410 (order dismissing complaint); *Barton v. JP Morgan, et al.*, 2:12-cv-01772-JCC (W.D. Wash. Jan. 28, 2013), Dkt. 12-13.

Plaintiffs' Second Lawsuit. Undeterred, Plaintiffs filed a virtually ***identical*** complaint in King County Superior Court on April 23, 2013, without attempting to fix the first Complaint's deficiencies (the only alteration being the inclusion of a request for appointment of counsel). CP 245-259 (April 13, 2013 Compl.); (*Barton v. JP Morgan, et al.*, 13-2-17762-5 SEA (King County Superior Court April 23, 2013) (*Barton II*). Defendants again removed, and the court again dismissed Plaintiffs' claims, this time ***with*** prejudice. CP 417-421 (order dismissing complaint); *Barton v. JP Morgan, et al.*, 2:13-cv-00808-RSL (W.D. Wash. Oct. 9, 2013), Dkt. 12. The Court found "[t]he Chase Entities acquired plaintiffs' loans through a purchase and assumption agreement with the FDIC. No additional approval, assignment, or consent was necessary to affect the transfer." 12 U.S.C. § 1821(d)(2)(G)(i)(II)." CP 418.

April 11, 2014 Trustee's Sale. After successfully defending against two lawsuits, Chase again initiated foreclosure. In December 2013, Quality Loan Service Corp. of Washington ("Quality") recorded a Notice of Trustee's sale setting a sale date for April 11, 2014. CP 461-464. By this time, Plaintiffs were over $82,000 in arrears. *Id.* at III. On April 11, 2014, the Property was sold at the trustee's sale to the highest bidder, Triangle Property Development. CP 467 ¶ 10. A Trustee's Deed Upon Sale was recorded in favor of the purchaser. CP 466-468.

Plaintiffs' Third Lawsuit. On or about May 5, 2014, Plaintiffs filed their third lawsuit against Chase. CP 1-17. As with the previous lawsuits, Plaintiffs again allege Chase does not have standing to foreclose because it allegedly failed to acquire Plaintiffs' loan from Washington Mutual, CP 3-10, and refuses to show "the wet in note." CP 7. Plaintiffs assert claims for (1) violations of the Deed of Trust Act ("DTA"); (2) violations of the Consumer Protection Act ("CPA"); violations of the Uniform Commercial Code ("UCC"), and for fraud and misrepresentation. CP 8-11, 16. Plaintiffs seek damages and to quiet title. CP 15-16.

Chase moved for dismissal arguing res judicata precluded Plaintiffs' claims regarding Chase's alleged lack of standing to foreclose, Plaintiffs waived their claims by failing to enjoin the trustee's sale, and that regardless, Plaintiffs failed to state a claim. CP 188-204. Chase also requested judicial notice ("RJN") of a number of documents in support of dismissal. CP 209-468. On January 16, 2015, the trial court granted

Chase's motion relying on the RJN and dismissed Plaintiffs' claims without prejudice.[1] CP 597-598. Plaintiffs moved to amend their Complaint, CP 677-679, but after evaluating Plaintiffs' motion and proposed first amended complaint, the trial court denied amendment and dismissed all claims against Chase with prejudice. CP 726-727.

Plaintiffs Appeal Dismissal. On April 1, 2015, Plaintiffs appealed the trial court's dismissal. On October 7, 2015, Commissioner Masako Kanazawa of the Court ruled that Plaintiffs' appeal would be "dismissed as abandoned without further notice of this Court, unless appellants file their opening brief or otherwise respond to this ruling in writing by October 19, 2015." Commissioner Kanazawa noted that he had previously sanctioned Plaintiffs for failing to respond to prior rulings and to appear at scheduled hearings. *Id.* On November 30, 2015, Plaintiffs moved for an extension of time to file their opening brief on December 17, 2015. On December 23, 2015, Plaintiffs filed their Opening Brief. On December 21, 2015, Chase moved for a 30 day extension to file its Answering Brief.

Plaintiffs Lose Their Collateral Attack on the Trustee's Sale.

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[1] Courts may take judicial notice of matters of public record without converting a CR 12(b)(6) motion into one for summary judgment. A court may do so if the information is "not subject to reasonable dispute in that it is ... capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 726 (2008) (quoting ER 201(b)). Plaintiffs do not argue on appeal that the trial improperly considered the RJN and have thereby waived any challenge to its consideration. *Ang v. Martin*, 154 Wn.2d 477, 486-87 (2005); RAP 10.3(a).

Following the trustee's sale of their Property to Triangle Property Development, Plaintiffs failed to vacate the Property, and Triangle Property filed an unlawful detainer action. *See Triangle Prop. Dev., LLC v. Barton*, 190 Wn. App. 1017, 2015 WL 5682838, *1 (2015) (unpublished). The trial court granted the writ of restitution. *Id.* Plaintiffs appealed, contending the trial court should have allowed them to collaterally attack the trustee's sale in the unlawful detainer action. *Id.* However, the Court of Appeals, Division I held that only limited procedural defects divest a trustee of its authority to conduct the foreclosure sale and Plaintiffs did not establish defects to set aside a foreclosure sale. *Id.* Although Plaintiffs specifically argued that the lender failed to provide them "with a Notice of Default, an opportunity to mediate under the Foreclosure Fairness Act, and a Notice of Pre–Foreclosure Options," the Court of Appeals held that these defects could not be raised for the first time in a post-sale unlawful detainer action. *Id.* at *1-*2.

III. COUNTERSTATEMENT OF ISSUES

1. Did the trial court properly find res judicata bars Plaintiffs' claims against Chase?

2. Did the trial court properly find Plaintiffs waived their post-foreclosure claims?

3. Did the trial court properly find Plaintiffs' claims fail to state a claim upon which relief could be granted?

IV. ARGUMENT

The only claims before this Court on review are either barred by res judicata, waived, or were not properly pleaded. Plaintiffs' Complaint alleged several additional theories of liability that they do not pursue on appeal; Plaintiffs have thereby waived any challenge to the dismissal of those claims. *Ang v. Martin*, 154 Wn.2d 477, 486-87 (2005); RAP 10.3(a). Specifically, Plaintiffs' opening brief does not challenge dismissal of their allegations that Chase failed to respond to a qualified written request (a claim also dismissed on the merits in 2013), that Chase violated "the disability act (HUD)," that the Note and Deed of Trust were separated, or that Chase was obligated to produce the "wet ink note."

A. Standard and Scope of Review.

This Court reviews a motion to dismiss de novo. *Reid v. Pierce Cnty.*, 136 Wn.2d 195, 201 (1998). A court properly grants a motion to dismiss under 12(b)(6) when "no facts exist that would justify recovery." *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755 (1994). The purpose of CR 12(b)(6) is to "weed[] out complaints where, even if what the plaintiff alleges is true, the law does not provide a remedy." *McCurry v. Chevy Chase Bank, FSB,* 169 Wn.2d 96, 102 (2010). While all well-pleaded facts "are presumed true ... the court is not required to accept the complaint's legal conclusions." *Rodriquez*, 144 Wn. App. at 717-18. "[W]here it is clear from the complaint that the allegations set forth do not support a claim, dismissal is proper." *Id.* at 759. To withstand dismissal, "the complaint must contain either direct allegations on every material

point necessary to sustain a recovery on any legal theory, ... or ***contain allegations*** from which an inference ***fairly may be drawn*** that evidence on these material points will be introduced at trial." *Berge v. Gorton*, 88 Wn.2d 756, 763 (1977) (emphasis added).

B. The Trial Court Properly Found Res Judicata Bars Plaintiffs' Claims Against Chase.

The doctrine of res judicata, also known as claim preclusion, "ensures the finality of decisions." *Pederson v. Potter*, 103 Wn. App. 62, 67 (2000). Res judicata "applies where a final judgment previously entered and a present action are so similar that the current claim should have been litigated in the former action." *Storti v. Univ. of Washington*, 181 Wn.2d 28, 40 (2014); *Pederson*, 102 Wn. App. at 67 (res judicata "prohibits the relitigation of claims and issues that were litigated, or ***could*** have been litigated, in a prior action") (emphasis added, citation omitted). "Merely asserting a new legal basis for a claim that has already been decided does not bar the application of res judicata." *Irondale Cmty. Action Neighbors v. W. Washington Growth Mgmt. Hearings Bd.*, 163 Wn. App. 513, 529 (2011) (citing *DeYoung v. Cenex, Ltd.*, 100 Wn. App. 885, 892 (2000)).

"Application of the doctrine requires identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of persons for or against whom the claim is made." *Pederson*, 103 Wn. App. at 67. "Res judicata also requires a final judgment on the merits." *Id.* For purposes of res

judicata, Chase compares Plaintiffs' 2014 Complaint on appeal with their 2013 complaint from their second lawsuit that was dismissed with prejudice on the merits. *Compare* CP 1-17 *with* CP 245-259 *and* CP 417-421 (order dismissing complaint); *Barton v. JP Morgan, et al.*, 2:13-cv-00808-RSL (W.D. Wash. Oct. 9, 2013), Dkt. 12.

Plaintiffs argue below and on appeal that "the new set of facts included in this complaint are [sic]: Chase is an unlawful 'beneficiary,' and QLS is not a properly appointed Trustee." OB at 21. But in 2013, Judge Lasnik held Chase was a valid beneficiary for Plaintiffs' loan and that "[n]o additional approval, assignment, or consent was necessary to affect the transfer" of Plaintiffs' Note to Chase. CP 418. And Plaintiffs already had ***two*** opportunities to litigate whether Quality was properly appointed as trustee: Chase recorded Quality's appointment as successor trustee was recorded on June 28, 2012, before Plaintiffs filed their first or second lawsuits. CP 345-347.

1. Plaintiffs' Complaints Involve the Same Identity and Quality of Parties.

Plaintiffs 2014 Complaint sued JPMorgan Chase Bank, First American Title, and Quality; Plaintiffs 2013 Complaint sued JP Morgan Chase Bank, American Title, and Quality, among others. Thus, identity of parties exists.

"The quality of persons or parties is relevant in situations where the parties to two lawsuits are the same, but one or the other acts in a different capacity in the two proceedings." *Berschauer Phillips Const. Co.*

v. Mut. of Enumclaw Ins. Co., 175 Wn. App. 222, 231 & n.21 (2013). The parties in both suits operated in identical capacities. Plaintiffs initiated suit, Chase defended as the beneficiary initiating foreclosure, Quality as the trustee conducting foreclosure, and First American Title as the previous trustee. *Compare* CP 1-17 *with* CP 245-259.

2. Plaintiffs' Complaints Involve the Same Claims and Subject Matter.

Washington courts consider four factors in determining whether two causes of action are identical for purposes of res judicata:

> (1) [w]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Berschauer, 175 Wn. App. at 230 & n.18 (citing *Kuhlman*, 78 Wn. App. at 122). It is not necessary that all four factors be present to bar the claim. *Id.* In *Berschauer*, the court found an identity of subject matter and cause of action where "the evidence necessary to each lawsuit" was the same and both lawsuits depended on the "same nucleus of facts" and "rights at issue" regarding one party's duty to indemnify. *Id.*

Plaintiffs' reliance on *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94 (2013) is misplaced. In *Schroeder*, the court held that res judicata did not apply because the plaintiff's two

lawsuits were based on entirely separate deeds of trust representing two different contractual relationships. 177 Wn.2d at 108. Here, the underlying facts and subject matter are identical in both complaints. Plaintiffs' claims in both complaints concern the same loans Plaintiffs obtained from WaMu in 2007, secured by the same Deeds of Trust on the Property. Plaintiffs defaulted on these loans in 2011, and Chase instituted foreclosure. Both complaints attack validity of the foreclosure, based primarily on their allegations that Chase is not the beneficiary for their loan because it has not produced the "wet ink note" and it did not assume liability from the FDIC for Plaintiffs' damages claims against WaMu.

The evidence necessary to each lawsuit is also the same. Both lawsuits required demonstrating Chase was the beneficiary with the ability to appoint a trustee and initiate foreclosure. Such a determination requires analyzing Plaintiffs' loan documents, including Plaintiffs' Note indorsement and the provisions in both their Note and Deeds of Trust allowing for transfer of their loan. Finally, both complaints assert the same claimed infringement of rights: the foreclosure on Plaintiffs' property.

In their 2013 Complaint, Plaintiffs attempted to obstruct the foreclosure process claiming there was no chain of title or "proof of ownership," and alleging that Chase was "not a real party of interest and has no standing to foreclose." CP 251-253, 256-258,

& 259. Plaintiffs also claimed that Chase failed to respond to a written request, committed fraud and misrepresentation, separated the note and deed of trust, failed to present the original note pursuant to UCC, and failed to substitute the OTS as the real party in interest. *Id.* Plaintiffs also demanded the "wet ink signature promissory note." CP 256. Plaintiffs' Complaint was made specifically to "stop the sale" of their Property "according to RCW 61.24.130." CP 246. Plaintiffs' Complaint refers to the August 2012 Notice of Trustee's Sale, which states ""[a]nyone having any objections to this sale on any grounds whatsoever will be afforded an opportunity to be heard as to these objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130." CP 341. The 2012 Notice of Trustee's Sale also specifically referred to the "Notice of Default" sent to Plaintiffs by "both first class and certified mail on 7/6/2012, proof of which is in the possession of the Trustee." *Id.*

The same claims are present in Plaintiffs' 2014 Complaint on appeal. Plaintiffs attack the trustee's sale by alleging Chase: (a) is not the beneficiary with standing to foreclose (and thus could not validly appoint a successor trustee); (b) committed fraud and misrepresentation; (c) failed to provide proof of ownership or of the "wet ink note" as required under the UCC; (d) failed to substitute the "real party in interest"; (e) separated the deed of trust and note; (f) failed to respond to a written request; and (g)

was required to mediate before foreclosure. *See* CP 4-7, 9, 11, 14-16. Plaintiffs made no allegations regarding failing to receive a Notice of Pre-Foreclosure Options, a Notice of Default, or that the Trustee's Deed did not state all statutorily mandated facts.

3. Plaintiffs' 2013 Complaint was Dismissed Through Final Judgment on the Merits.

Plaintiffs 2013 Complaint was dismissed with prejudice on the merits. CP 417-421 (order dismissing complaint); *Barton v. JP Morgan, et al.*, 2:13-cv-00808-RSL (W.D. Wash. Oct. 9, 2013), Dkt. 12. Plaintiffs' identical 2012 complaint (with the exception of their 2013 request for counsel) was dismissed without prejudice in January 2013. CP 408-410 (order dismissing complaint); *Barton v. JP Morgan, et al.*, 2:12-cv-01772-JCC (W.D. Wash. Jan. 28, 2013), Dkt. 12-13. Judge Lasnik's 2013 order adjudicated on the merits the allegations Plaintiffs now make in their 2014 Complaint:

- Plaintiffs 2014 Complaint alleges "[t]he Plaintiff moves the court to void the sale because of the Defendant's fail we to substitute the United State Office of Thrift Supervision (OTS) and/or the Federal Deposit Insurance Corporation: (FDIC) and/or J.P. Morgan/Chase as the real party in interest ..." CP 8.
- Judge Coughenour ruled in January 2013 that "It is difficult for the Court to understand the Bartons' argument or what relief they are seeking. As evidenced by the above discussion, the Chase Entities (including JPMorgan Chase) have appeared as the defendants in this action. Because the Bartons' motion appears to seek the substitution of defendants that are already parties to this action, the Court STRIKES their motion." CP 409-410.
  Plaintiffs 2014 Complaint alleges: "[t]he Defendant Chase Bank is not the real party of interest and has no standing to pursue this action." CP 9. And that Chase committed an "intentional misrepresentation, in foreclosures across the United States, that Chase is the 'successor in interest' to Washington Mutual Bank when in fact Chase itself has

affirmatively represented, in multiple Federal court filings in different states, that it is NOT the successor in interest to WAMU, and only purchased certain defined assets and liabilities from the FDIC as Receiver for WAMU." CP 11. Plaintiffs 2014 Complaint also alleged that Chase "didn't answer the Written Request point by point is considered a non-response." CP 15-16.

- Judge Lasnik ruled in October 2013 that "[t]he Chase Entities acquired plaintiffs' loans through a purchase and assumption agreement with the FDIC. No additional approval, assignment, or consent was necessary to affect the transfer. 12 U.S.C. § 1821(d)(2)(G)(i)(II). Any liabilities arising from the way the loans were negotiated and/or structured remained with the FDIC: the named defendants cannot be held responsible for claims related to the origination of the loan under any of the theories mentioned in plaintiffs' complaint." CP 418.
- Judge Lasnik further ruled that "[n]or have plaintiffs plausibly alleged that the Chase Entities had a duty to modify their loan, that defendants failed to respond to a qualified written request under RESPA and/or that such failure damaged plaintiffs, that defendants engaged in fraud, misrepresentation, or criminal profiteering, that plaintiffs are entitled to quiet title, that the promissory note or deed of trust was breached, or that any of the other statutes mentioned in the complaint are applicable in the circumstances presented here." CP 418.
- Plaintiffs 2014 Complaint alleges: "Chase wants the unearned profit of Washington Mutual without showing the wet ink note." CP 7.
- Judge Lasnik ruled in October 2013: "the fact that the Chase entities refused to produce the original note for inspection does not raise an inference that they do not possess the original. Original promissory notes are bearer paper: the holder of the note has the right to collect payments thereunder according to its terms. It is hardly surprising that original notes are not bandied about or otherwise put at risk of loss or destruction[,]" CP 418, "Plaintiffs' stubborn insistence that they are entitled to production of the original note on demand does not state a plausible claim for relief under any of the theories mentioned in their complaint." CP 419.

All of operative facts underlying Plaintiffs' 2014 Complaint regarding Chase's beneficiary status, the status of their Note and Deed of Trust, the "real party in interest," and Chase's response to their alleged qualified written request were available to them in 2013. Plaintiffs' new allegations (not found in their 2014 Complaint) that they did not receive

notice of pre-foreclosure options or a notice of default are also contradicted by their 2013 Complaint.[2] *See* OB at 17-18, 21. RCW 61.24.031 requires certain disclosures (or "pre-foreclosure options") be made to borrowers before a Notice of Default can issue. Plaintiffs' 2013 Complaint was brought for the purposes of objecting to the August 2012 Notice of Trustee's Sale that specifically referenced Plaintiffs' receipt of the Notice of Default. CP 341. Thus, Plaintiffs' 2013 Complaint could have (and was required to have) alleged Plaintiffs failed to receive a Notice of Default or notice of pre-foreclosure options but failed to do so (likely because these notices were in fact served on Plaintiffs pursuant to RCW 61.24.031 and as provided in the August 2012 Notice of Trustee's Sale). Because Plaintiffs have already had the opportunity to assert their claims against Chase and these claims were adjudicated on the merits, res judicata now bars all claims. *Pederson*, 103 Wn. App. at 67 (res judicata "prohibits the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action").[3]

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[2] "A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along." *Woodley v. USAA Cas. Ins. Co.*, 175 Wn. App. 1038 (2013) (citing *Kirby v. City of Tacoma*, 124 Wn. App. 454, 472 (2004) ("A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment.") (internal marks omitted).

[3] When the res judicata analysis involves a federal action, Washington courts will apply the state law test where the result would remain the same. *Kuhlman. v. Thomas*, 78 Wn. App. 115, 120 n.3 (1995) (citing *Blonder–Tongue Lab. v. University of Ill. Found.*, 402 U.S. 313, 323–24 (1971) (federal test for res judicata requires (1) an identity of claims; (2) a

C. The Trial Court Properly Found Plaintiffs' Waived Their Post-Foreclosure Claims.

Even if Plaintiffs' claims were not barred by res judicata, Plaintiffs waived their claims (except for their fraud, misrepresentation, and CPA claims, which fail for other reasons) when they failed to obtain a pre-sale injunction. The Deed of Trust Act (DTA) sets forth the procedure to obtain a pre-sale injunctive relief to halt a nonjudicial foreclosure sale. RCW 61.24.130. "This statutory procedure is the 'only means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure.'" *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 163 (2008) (quoting *Cox v. Helenius*, 103 Wn.2d 383, 388 (1985)).

As stated in the Notice of Sale prescribed by the DTA: "Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's Sale." RCW 61.24.040(1)(f)(IX). The Washington Supreme Court reaffirmed the waiver doctrine in *Frizzell v. Murray*, 179 Wn.2d 301 (2013). The Supreme Court explained that "waiver of a postsale contest occurs when 'a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a

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final judgment on the merits; and (3) identity or privity between the parties); *Thompson v. King Cnty.*, 163 Wn. App. 184 (2011). Here, because the action on appeal involved identical parties and allegations, as described above, the result under either federal or state law would be the same. *Compare* CP 1-17 *with* CP 245-259 *and* CP 417-421 (order dismissing complaint); *Barton v. JP Morgan, et al.*, 2:13-cv-00808-RSL (W.D. Wash. Oct. 9, 2013), Dkt. 12.

defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale.'" *Frizzell*, 179 Wn.2d at 306–07 (quoting *Plein v. Lackey*, 149 Wn.2d 214, 227 (2003)).

All three elements for waiver exist here. First, Plaintiffs do not deny receiving notice of their right to enjoin the sale in the Notice of Trustee's Sale. *See* CP 3 (explaining that Quality set sale dates for 12/21/2012, 8/9/2013, and 4/11/2014); *see also* CP 461-464 (Notice of Trustee's Sale explaining "[a]nyone having objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to these objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale."). Moreover, Plaintiffs' previous Complaints also sought to enjoin the sale of their Property in 2012 and 2013, further demonstrating Plaintiffs knew of their right to seek to enjoin the sale. *See Frizzell*, 179 Wn.2d at 307 ("[S]he fails to explain why she sought an injunction barring enforcement of the deed of trust ... if she did not have knowledge [of it]."); CP 246 (Plaintiffs' 2013 Complaint alleged their action was "according to RCW 61.24.l30 [to] stop the sale the home[.]").

Second, Plaintiffs' claims are based upon their allegations that Chase is not the beneficiary with the power to appoint Quality as successor trustee, as recorded on or about June 28, 2012. CP 345-347 (Appointment of Successor Trustee); OB 16-17 ("Since [Chase] is not the

beneficiary of the deed of trust, it is not empowered to appoint a successor trustee, so its appointment, if any, of QLS as the successor trustee is invalid and unenforceable."). "A person is deemed to have constructive knowledge of a fact if a person exercising reasonable care could have known of that fact." *Brown*, 146 Wn. App. at 164-65. Plaintiffs were aware of these facts prior to foreclosure as it named Quality as a defendant and made allegations regarding Chase's beneficiary status in all three Complaints. *See id.*

Finally, Plaintiffs did not bring an action to enjoin the trustee's sale. OB at 19 ("Plaintiffs did not file a lawsuit to restrain the sale."). As a result, waiver applies.

In 2009, the Legislature amended the DTA to exempt a limited number of claims from waiver. Now, a borrower does not waive certain enumerated claims, including: fraud and misrepresentation, RCW Title 19 violations (which include the Consumer Protection Act), or the "[f]ailure of the ***trustee*** to materially comply" with the DTA. RCW 61.24.127(1)(a)-(c) (emphasis added); *McCrorey v. Fed. Nat. Mortg. Ass'n*, 2013 WL 681208, at *3 (W.D. Wash. 2013) ("The only type of DTA claim that may be asserted post-foreclosure is a claim against the trustee for failing to materially comply with the provisions of the DTA. (citing RCW 61.24.127(1)(c))). Thus, any claims tied to Deed of Trust Act requirements (i.e., regarding allegedly failing to receive a notice of default, notice of pre-foreclosure options, and that the Trustee's Deed did

not recite all statutorily mandated facts) are limited to claims against the trustee, not Chase.[4]

Plaintiffs rely upon *Albice v. Premier Mortgage Services*, 174 Wn.2d 560 (2012) in arguing they did not waive their post-foreclosure claims. OB 13-16. *Albice* is inapposite. There, the homeowners defaulted on their mortgage loan and received a notice of trustee's sale. The trustee's sale occurred 161 days after the original date set forth in the notice of trustee's sale. "Procedural irregularities, such as those divesting a trustee of its statutory authority to sell the property, can invalidate the sale." *Id.* at 567; *see also Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 914–15 (2007) (insufficiency of price is not a procedural irregularity that voids a nonjudicial foreclosure sale). The *Albice* court concluded that the trustee's failure to conduct the sale within the 120–day statutorily prescribed time period divested the trustee of any statutory authority to conduct the sale. "Without statutory authority, any action taken is invalid." *Albice*, 174 Wn.2d at 568. Therefore, the court held the sale was invalid. *Id.* But here, the trustee conducted the sale within 120 days of the original sale date (in fact, on the sale date). *Compare* CP 461-464 (December 6,

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[4] Again, Plaintiffs failed to plead these allegations and their 2013 Complaint contradicts their new assertions regarding receipt of a notice of default and pre-foreclosure options. *Kirby*, 124 Wn. App. at 472 ("A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment."). Plaintiffs also fail to identify what "statutorily mandated facts" the Trustee's Deed allegedly fails to contain or even what statute mandates content for a Trustee's Deed Upon Sale.

2013 Notice of Trustee's Sale setting sale date for April 11, 2014) with CP 466-468 (Trustee's Deed Upon Sale noting an April 11, 2014 sale date).

Plaintiffs' Property was sold on April 11, 2014, and they received notice of the right to enjoin this sale. CP 461-464. It is undisputed Plaintiffs failed to enjoin the sale and Plaintiffs do not allege they lacked knowledge of their alleged defenses before foreclosure. *See* CP 1-17; OB at 19. Thus, the Court should uphold the trial court in finding Plaintiffs' waived their post-foreclosure claims.

D. The Trial Court Properly Found Plaintiffs' Allegations Fail to State a Claim.

1. Plaintiffs' Fraud Claims Fail Because Plaintiffs Cannot Establish Falsity or Reliance.

To establish a fraud or intentional misrepresentation claim, Plaintiff must allege with particularity and prove by clear and convincing evidence the nine following elements: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) speaker's knowledge of its falsity; (5) intent of the speaker that it be acted upon by plaintiffs; (6) plaintiffs' ignorance of falsity; (7) plaintiffs' reliance on the truth of the representation; (8) plaintiffs' right to rely on it; and (9) actual damages. *Stiley v. Block*, 130 Wn.2d 486, 505 (1996).

Plaintiffs' allegations of fraud and intentional misrepresentation appear to solely relate to Chase's status as beneficiary and its ability to appoint Quality as successor trustee:

> In the present case, JP Morgan Chase fraudulently claims itself to be the beneficiary even though it cannot show that

> it obtained Appellants' note and/or deed of trust from the FDIC or WAMU. Since it is not the beneficiary of the deed of trust, it is not empowered to appoint a successor trustee, so its appointment, if any, of QLS as the successor trustee is invalid and unenforceable.

OB at 17; CP at 11 (Chase committed an "intentional misrepresentation, in foreclosures across the United States, that Chase is the 'successor in interest' to Washington Mutual Bank when in fact Chase itself has affirmatively represented, in multiple Federal court filings in different states, that it is NOT the successor in interest to WAMU."). Plaintiffs cannot prevail on their claim because Chase is the beneficiary with the right to foreclose, authorized to appoint Quality as successor trustee.

The Refinance Loan Note expressly provided that WaMu, as lender, could "transfer this Note," and that "anyone who takes this note by transfer and is entitled to receive payments under this Note is called the 'Note holder.'" CP 216 ¶ 1. WaMu subsequently indorsed the Note in blank. CP 221. On September 25, 2008, the FDIC placed WaMu in receivership and sold certain of WaMu's assets to Chase. *See* CP 295-338 (Purchase and Assumption Agreement Among FDIC and JP Morgan Chase Bank, N.A. (Sept. 25, 1998)), http://www.fdic.gov/about/freedom/washington_mutual_p_and_a.pdf (the "Purchase and Assumption Agreement") § 3.1 (Chase acquired all loans and all loan commitments of WaMu). Chase thus became Note holder and beneficiary under the Deeds of Trust in September 2008. *See* RCW 61.24.005(2) (beneficiary means holder of instrument evidencing obligation secured by deed of trust); RCW 61.24.030(8) (beneficiary may

initiate foreclosure). WaMu did not need to execute an assignment of its interest in the loan to Chase because Chase already held the Note by virtue of the acquisition from the FDIC, and in Washington, the security (Deed of Trust) follows the debt (Note). *Fidelity & Deposit v. Ticor*, 88 Wn. App. 64, 69 (1997) (Deed follows Note). *See also* 12 U.S.C. § 1821(d)(2)(G)(i)(II) (FDIC authorized, as receiver, to "transfer any asset or liability" of WaMu "without any approval, assignment, or consent with respect to such transfer"); *Sherman v. JPMorgan Chase Bank, N.A.*, 2012 WL 3071246, *1-2 (W.D. Wash. 2012). Thus, the recorded documents ***correctly*** identified Chase and its role with respect to Plaintiffs' Loan.

In addition, Plaintiffs cannot show detrimental reliance because they are indifferent as to the mechanics behind how Chase came to hold their Note. Plaintiffs have not, and cannot, allege that multiple parties simultaneously demanded payment on their loan. Who owns the Note is irrelevant to a borrower; the only relevant question is who holds the Note. "The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument. It is not necessary for the holder to first establish that he has some beneficial interest in the proceeds." *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 222–23 (1969) (citation omitted). The Washington Supreme Court in *Brown v. Washington State Dep't of Commerce*, 184 Wn.2d 509 (2015), similarly recognized that where a servicer holds the note, a borrower who knows who to contact regarding the servicing of his

or her loan has no need to determine the owner or investor of his or her promissory note. *Id.* at 523, 527, 537-543 (borrower obtains all relevant information in the Notice of Default and has no need to investigate who the owner of the loan is because it is only holder status that is relevant); *see also Zalac v. CTX Mortg. Corp.*, --- Fed. Appx. ---, 2016 WL 146006 *1 (9th Cir. Jan. 7, 2016) (note ownership irrelevant to enforcement) (citing *Brown*); *In re Veal*, 450 B.R. 897, 912 (B.A.P. 9th Cir. 2011) ("Under established rules, the maker should be indifferent as to who owns or has an interest in the note so long as it does not affect the maker's ability to make payments on the note. Or, to put this statement in the context of this case, the Veals should not care who actually owns the Note—and it is thus irrelevant whether the Note has been fractionalized or securitized—so long as they do know who they should pay."). "The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument. It is not necessary for the holder to first establish that he has some beneficial interest in the proceeds." *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 222–23 (1969) (citation omitted).

In fact, the Washington Supreme Court has held because of the DTA's anti-deficiency provision—providing that after a nonjudicial foreclosure, a borrower is absolved of any further liability, even if the wrong entity forecloses—that where, as here, the borrower concedes default and cannot cure, the borrower is economically indifferent to any

defects in the foreclosure process and cannot suffer prejudice. *Udall v. T.D. Escrow Serv., Inc.*, 159 Wn.2d 903, 915 (2007). Thus, this Court should affirm the district court's dismissal of Plaintiffs' fraud and intentional misrepresentation claims.

2. Plaintiffs' Fail to Allege Any CPA Elements.

A private cause of action exists under the CPA only if (1) the conduct is unfair or deceptive, (2) occurs in trade or commerce, (3) affects the public interest, and (4) causes injury (5) to plaintiff's business or property. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986). The trial court properly dismissed Plaintiffs' CPA claim against Chase because Plaintiffs did not (and could not) allege ***even a single fact*** supporting any of the required elements. CP 11-12. On appeal, Plaintiffs argue they identified an unfair or deceptive practice and a public interest impact. OB 10-13.

Plaintiffs Did Not Identify An Unfair or Deceptive Act or Practice. "[W]hether the [alleged] conduct constitutes an unfair or deceptive act can be decided by this court as a question of law." *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash.*, 162 Wn.2d 59, 74 (2007). Plaintiffs could meet the first CPA element in only two ways: establishing either that an act or practice (i) "has a capacity to deceive a substantial portion of the public," or (ii) that "the alleged act constitutes a per se unfair trade practice." *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 344 (1989) (quoting Hangman Ridge, 105 Wn.2d at 785-86).

Additionally, to violate the CPA, the act or practice must be one that "misleads or misrepresents something of material importance." *Nguyen v. Doak Homes, Inc.*, 140 Wn. App. 726, 734 (2007).

Plaintiffs' Complaint did not allege any per se unfair trade practice. Nor did Plaintiffs allege facts showing Chase committed an unfair or deceptive act or practice more generally that had the capacity to deceive a substantial portion of the public. *Hangman Ridge*, 105 Wn.2d at 785. The only unfair or deceptive act or practice Plaintiffs identify on appeal is that "Respondents engaged in a pattern and practice of unfair and unlawful activity that ultimately resulted in unfair, deceptive, and unlawful foreclosure proceedings." OB 11-12. Chase can only assume Plaintiffs argument again is that Chase committed an "intentional misrepresentation" by representing itself to be a successor to WaMu. CP at 11. As described above, the FDIC placed WaMu in receivership and sold certain of WaMu's assets to Chase, *see* CP 295-338, and Chase held Plaintiffs' Note pre-sale, indorsed in blank. CP 221. Thus, Chase made no misrepresentations at all, let alone a material one. Because Chase did not make a material misrepresentation to Plaintiffs or the public, their CPA claim fails.

There is No Public Interest Impact. The Washington legislature amended the CPA in 2009 to create a new test for establishing the public interest element of the CPA, for actions occurring after that date. *See* RCW 19.86.093. Under the amended CPA standard applicable here,

Plaintiffs must offer evidence showing Chase's actions (a) injured other persons, (b) had the capacity to injure other persons, or (c) has the capacity to injure other persons. RCW 19.86.093(3)(a). *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins.Co.*, Wn.2d 778, 789–90 (1986). A dispute among the parties to a private contract does not affect the public interest. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins.Co.*, Wn.2d 778, 790 (1986).

Plaintiffs argue the public impact prong is met because "Chase routinely forecloses on properties that involved loans that originated with WAMU but Chase fraudulently claims that it owns those notes." OB at 13. But Plaintiffs cannot establish Chase's alleged conduct of enforcing valid contract rights by foreclosing on defaulted loans it holds injured any person, or has or had the capacity to do so such that it might affect the public interest. As a result, Plaintiffs failed to make allegations necessary to support the public interest element of their CPA claim.

There are no Facts Showing Injury Caused by Chase. Because Chase did not commit any unfair or deceptive act or practice, it cannot have injured Plaintiffs by reason of that practice, as required by the CPA. None of the purported technical defects they allege—even if they were not waived or barred, which they are—suggest Plaintiffs suffered any prejudice as a result. This is fatal to their claims. *See, e.g., Mickelson v. Chase Home Fin., LLC*, 579 Fed. Appx. 598, 602 (2014); *Bavand v. OneWest Bank, FSB*, 587 Fed. Appx. 392, 394-95 (2014) ("Washington

state courts have required the borrower to show prejudice before they will set aside a trustee's foreclosure sale in the face of allegations of technical errors.") (citation omitted); *see also id.* at 395 ("any technical, non-prejudicial issues should not bar foreclosure proceedings.").

3. Chase is Not Required to Mediate.

Plaintiffs incorrectly allege mediation is required before foreclosure. CP 6-7. But the DTA does not place any affirmative obligation on lenders or servicers to offer mediation. *See* RCW 61.24.160(3) ("A housing counselor or attorney assisting a borrower may refer the borrower to mediation ... if [counselor/attorney] determines that mediation is appropriate."); RCW 61.24.163(1) ("The foreclosure mediation program ... applies only to borrowers who have been referred to mediation by a housing counselor or attorney."); *see also Brown*, 184 Wn.2d at 516 ("After the notice of default has been issued, the FFA's foreclosure mediation program becomes available to qualified parties. RCW 61.24.163. To gain access, a government-certified housing counselor or an attorney must refer the borrower to the mediation program."). Plaintiffs do not allege they were referred to mediation or that Chase received (let alone refused) any request for mediation. Moreover, Plaintiffs fail to allege any facts showing a mediation to discuss modification would have resulted in an outcome other than foreclosure—indeed, Chase denied Plaintiffs' requests for loan modifications in 2009 and again in 2010. CP at 250-51, 258. As a result, even if there were

some obligation to mediate, Plaintiffs cannot recover here because they allege no prejudice stemming from the lack of mediation. *See, e.g., Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 581 n.4 (Stephens, J., concurring); *Steward v. Good*, 51 Wn. App. 509, 514-15 (1988) ("no showing of harm to debtor" where trustee did not comply with 90-day requirement for recording the notice of sale); *Koegel v. Prudential Mut. Sav. Bank,* 51 Wn. App. 108, 112 (1988); *Queen City Sav. & Loan Ass'n v. Mannhalt,* 111 Wn.2d 503, 510 n.17 (1988).

V. CONCLUSION

Respondent Chase respectfully asks this Court to affirm the trial court's dismissal of Plaintiffs' Complaint in its entirety.

RESPECTFULLY SUBMITTED this 18th day of February, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies and declares under penalty of perjury under the laws of the state of Washington that on this 18th day of February, 2016, she served a copy of the foregoing document upon the following counsel of record via first class mail:

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