71402-3

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No. 71402-3-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

VALMARI RENATA,

Appellant/Plaintiff,

v.

FLAGSTAR BANK, F.S.B., et al.,

Respondents/Defendants.

RESPONDENTS FLAGSTAR BANK, F.S.B. AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.'S ANSWERING BRIEF

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I. INTRODUCTION

Appellant Valmari Renata does not dispute borrowing $200,800, in a loan funded by Respondent Flagstar Bank FSB ("Flagstar") to finance the purchase of a home, nor does she dispute that she stopped paying her mortgage in December 2009—***more than four and a half years ago***. Ms. Renata does not allege she ever cured her default, that she could cure her default, that there were any improprieties or irregularities in the servicing of her loan, or that she was confused as to whom to pay. Rather, after receiving a Notice of Default and a Notice of Trustee's Sale, Ms. Renata remarkably filed this lawsuit to stave off foreclosure and asked the trial court to strip the lien on her property so as to effectively give her a free house. The trial court refused to do so. She now asks this Court to reverse the trial court's Order granting summary judgment to Respondents Flagstar and Mortgage Electronic Registration Systems, Inc. ("MERS").

Ms. Renata's claims hinge on her unsupported theory that Flagstar did not have the right to enforce the promissory note secured by her Deed of Trust when it instructed Northwest Trustee Services, Inc. ("NWTS") to begin nonjudicial foreclosure. Notwithstanding Ms. Renata's protestations, Flagstar currently possesses the original, indorsed promissory note, and has possessed it since August 2006 (after Capital Mortgage Corporation delivered it to Flagstar), and it is therefore the "beneficiary" authorized to initiate a nonjudicial foreclosure under the Deed of Trust Act, RCVW 61.24 et seq. As a result, this Court should affirm the trial court's granting of summary judgment.

II. STATEMENT OF THE CASE

A. Factual Background.

Capital Mortgage Brokers Plaintiff's Loan from Flagstar. In July 2006, Ms. Valmari Renata retained Capital Mortgage Corporation ("Capital Mortgage") to act as a mortgage broker to find her a loan to buy a home. Clerk's Papers ("CP") 477. Capital Mortgage entered into a Wholesale Lending Broker Agreement ("Broker Agreement") with Flagstar, under which Flagstar funded loans Capital Mortgage brought to Flagstar—so long as the loan documentation met Flagstar's underwriting standards—and Capital Mortgage agreed to immediately indorse and deliver the promissory Note to Flagstar. CP 463-475. Capital Mortgage thus obtained a "table funded" loan from Flagstar for Plaintiff, whereby Capital Mortgage closed the loan in its own name, but was acting as an intermediary for the true lender, Flagstar, which assumed the financial risk of the transaction. On August 4, 2006, Capital Mortgage submitted the loan to Flagstar for underwriting review, and submitted a "Table Funding Request" to Flagstar. CP 458, 479. The Closing Instructions explained Flagstar would fund the loan, but required Capital Mortgage to indorse the promissory note (the "Note") as follows: "Pay to the Order of Flagstar Bank, FSB, Without Recourse, Capital Mortgage Corporation, By: _____, Its _____." CP 485-88.

Plaintiff's Note. On August 7, 2006, Plaintiff borrowed $200,800, in a loan funded by Flagstar but in the name of Capital Mortgage. CP 485-492. Indeed, the HUD-1 Settlement Statement Plaintiff executed at

closing lists Flagstar as lender. CP 490-492. Consistent with the Closing Instructions, the promissory note (the "Note") bears an endorsement to Flagstar (and then a Flagstar endorsement in blank on the back side of page two). *Id.*

Capital's Indorsement and Delivery of the Loan to Flagstar. Consistent with its Broker Agreement with Flagstar, Capital delivered and Flagstar received the original, indorsed Note on August 11, 2006, and Flagstar has held it ever since (until it delivered the original to undersigned counsel). CP 459, 494. The record shows Flagstar paid Capital Mortgage (out of the loan proceeds) for its broker services, as required by the Broker Agreement.[1] Flagstar immediately made an "imaged" copy of the Note for its records on August 11, 2006, and that imaged copy reflects the Capital Mortgage endorsement to Flagstar, showing the Note was indorsed to Flagstar upon receipt. CP 494.

The Note defined Capital Mortgage as the initial "Lender" (despite it acting as an intermediary for Flagstar) but required Plaintiff to acknowledge that she "understood that the Lender may transfer this Note," and that the "Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note

[1] *See, e.g.*, CP 182-84 (HUD-1 signed by Plaintiff, listing Flagstar as lender, and listing fees paid to Capital Mortgage at lines 801 & 811); CP 264 (itemization of amount financed, showing Capital Mortgage paid origination and processing fees); CP 481 (Table Funding Request form, listing Flagstar as funder, listing fees to Capital Mortgage for Broker and origination services); CP 486-88 (listing broker fees to Capital Mortgage on closing instructions with wiring instructions from Flagstar).

Holder.'" CP 496-498. The Note explained that the parties entered into a Deed of Trust the same day, and that the Note holder would have certain rights upon Plaintiff's default: "In addition to the protections given to the Note holder under this Note, ... a 'Deed of Trust' ... dated the same date as this Note, protects the Note Holder from possible losses that might result if I do not keep the promises that I make under this Note." *Id.*

Plaintiff's Deed of Trust. To secure repayment of the Note, Plaintiff executed a deed of trust (the "Deed of Trust") encumbering real property located at 2416 Cleveland Avenue, Everett, Washington 98201 (the "Property").

Like the Note, the Deed of Trust explained that Plaintiff's initial "Lender" was Capital Mortgage, but that Capital Mortgage or any subsequent holder of the Note could sell the Note without providing notice to her. This meant that Capital Mortgage (as Note holder) was beneficiary of the Deed of Trust as a matter of law, until it transferred the Note to a new party. *See* RCW 61.24.005(2). Plaintiff and Capital Mortgage also agreed, however, to label Mortgage Electronic Registration Systems, Inc. ("MERS") as "beneficiary" under the Deed of Trust, but ***solely*** as a nominee (agent) for Capital Mortgage and any successor or assign of Capital Mortgage. CP 415 ¶ (E). Thus, in the Deed of Trust, MERS was listed as an agent for a disclosed principal (Capital Mortgage), and the parties agreed that MERS would continue to act as an agent for any

successor Note holder until that Note holder were to terminate MERS's agency interest.[2]

Flagstar Sells the Right to Payments on (but not Enforcement of) the Loan. As noted above, the Note was transferred to Flagstar by Capital Mortgage (indeed Flagstar, funded the loan) immediately after origination in August 2006. CP 459, ¶ 9. In September 2006, Flagstar sold to Freddie Mac an ownership interest in payments due under the Note, but Flagstar at all times held the indorsed Note. *Id.*, ¶ 12. Thus, under a separate agreement with Freddie Mac, Flagstar was obligated to pass on the payments it received to Freddie Mac, but as Note holder,

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[2] The term "beneficiary" under the Deed of Trust is a contractual label (not a legal conclusion), useful for designating MERS as an agent for the Note holder (i.e., the beneficiary as a matter of law), to ensure MERS will get notice of any competing claims recorded against the property; this allows MERS (as agent) to relay that information to its principal (the Note holder), whomever that may eventually be. The Washington Supreme Court in *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 86 (2012), recognized that MERS's role is "plainly laid out in the deeds of trust," that there is "no reason to doubt that lenders and their assigns control MERS," and that MERS "certainly" provides "significant benefits," by creating "efficiency," and overcoming "a drawback of the traditional mortgage financing model: lack of liquidity." *Id.*at 105, 107, 109 (citation omitted). Thus, MERS's beneficiary designation is a matter of routine agency and contractual convenience, not an attempt to contract around Washington law. Indeed, the Deed of Trust discloses Capital Mortgage as Note holder (and thus beneficiary as a matter of Washington law), and the Deed of Trust explains that to the extent any term in the Deed of Trust conflicts with applicable law, that law controls. CP 39, ¶ (C), 49 ¶ 16. Nothing in the Deed of Trust suggests MERS is claiming that it is Note holder (i.e., beneficiary as a matter of Washington law). *See Bain*, 175 Wn.2d at 106 (recognizing DTA "approves the use of agents" and it is "likely true" that "lenders and their assigns are entitled to name MERS as its agent"). It also worth noting that on remand, on a complete record, MERS obtained summary judgment because the Deed of Trust was not split, MERS did have a principal for whom it acted, and MERS caused no injury. *See, e.g., Bain v. Metro. Mortg. Grp. Inc.*, 2013 WL 6193887, *5 (Wash. Super. 2013). *See also Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 248-49 (2008) (court may consider trial court orders).

Flagstar at all times had possession of the indorsed Note (and thus the right to enforce the Note, as well as the Deed of Trust securing the Note).

Plaintiff Defaulted on Her Loan in December 2009. Plaintiff defaulted under the Note and Deed of Trust by failing to make payments starting in December 2009—over four and a half years ago. CP 459, ¶ 13. As a result, Flagstar delivered (through its agent) a Notice of Default on July 23, 2010, listing total arrears at that point of $15,230.26. CP 460, 501 ¶ D. The Notice of Default also explained that failure to cure the default within 30 days would result in recordation of a Notice of Trustee's Sale and a sale of the property within 120 days. *Id.*, ¶ G. Finally, the Notice of Default explained that Flagstar was beneficiary of the Deed of Trust (as Note holder), it was Plaintiff's creditor, and it was also the loan servicer. CP 502, ¶¶ K, L(2).

MERS Terminates its Nominee Role. On August 16, 2010, MERS—acting as nominee for Flagstar (*i.e.*, the successor and assign of Plaintiff's loan)—assigned its nominee interest in the Deed of Trust back to its principal, Flagstar, thereby terminating MERS's agency interest. CP 428-29. MERS has no employees and operates through MERS signing officers appointed by MERS as assistant secretaries and vice presidents of MERS and who are also officers of the MERS® System members who own and service loans associated with MERS deeds of trust. In this case, the assignment was executed by Sharon Morgan, who was a MERS signing officer and was also a Flagstar officer. CP 460, ¶¶ 16-19.

Flagstar Appoints a New Trustee and Initiates Foreclosure. Flagstar, as Note holder (and thus beneficiary as a matter of law), recorded its appointment of Northwest Trustee Services, Inc. ("NWTS") as successor trustee. CP 431-32. As required by the Deed of Trust Act, RCW 61.24.030(7), Flagstar executed and delivered to NWTS a declaration (the "Beneficiary Declaration"), stating Flagstar was "the actual holder of the promissory note or other obligation evidencing the above-referenced loan or has requisite authority under RCW 62A.3-301 to enforce said obligation." CP 460, 507.

NWTS Schedules a Trustee's Sale. Because Plaintiff did not cure her default, on September 7, 2010, NWTS recorded a Notice of Trustee's Sale ("Notice of Sale") with a sale date of December 10, 2010. CP 434-39. The Notice of Sale listed arrears of $18,574.82. CP 435 § III.

Plaintiff Files for Bankruptcy. The day before the trustee's sale Plaintiff filed a bankruptcy petition in the United States Bankruptcy Court for the Western District of Washington, staying the trustee's sale. CP 1125. Notably, in her bankruptcy petition, Plaintiff acknowledged under penalty of perjury that Flagstar was a secured creditor with a valid lien on the Property (*i.e.*, Flagstar held her note and could enforce the Deed of Trust). CP 445. Plaintiff's bankruptcy was dismissed on April 26, 2011. CP 1125. With the bankruptcy case over, NWTS recorded an Amended Notice of Trustee's Sale on May 3, 2011, setting a new sale date of June 10, 2011. CP 448-52. The foreclosure sale did not occur, and the property

has not been sold. (And under RCW 61.24.040(6) any foreclosure sale must start over, since the maximum 120-day-extension period has elapsed from the original sale date of December 10, 2010.)

B. Procedural Background.

Plaintiff's Complaint. Plaintiff filed her Complaint in June 2011 alleging various claims against Flagstar, MERS, and NWTS. *See* CP 1121-1168. Plaintiff's Complaint, however, does not dispute her default, does not dispute that Flagstar was disclosed to her in the Notice of Default, does not claim any other entity has ever tried to foreclose on her, and does not claim she can reinstate her loan but is afraid of paying the wrong entity. The gravamen of Plaintiff's Complaint is ***not*** that she does not know ***who*** to pay, but that she wants to find some way to ***avoid*** the consequences of defaulting on her loan.

Flagstar and MERS's Motion for Summary Judgment. On November 15, 2013, Flagstar and MERS sought summary judgment. CP 511-54. The motion was supported by the declaration of Sharon Morgan, who was a Flagstar employee and MERS signing officer, who based her testimony on personal review of Flagstar's business records. CP 457-61. Attached to the Morgan Declaration were copies of loan documents from Flagstar's loan file, reflecting Flagstar's contracts with Capital Mortgage, the transfer of the loan to Flagstar, the indorsed Note, the HUD-1 Settlement Statement, the Notice of Default, the Beneficiary Declaration, the Corporate Resolution between MERS and Flagstar, and the

Assignment of the Deed of Trust. CP 462-510. At the conclusion of the Morgan Declaration, Ms. Morgan identified herself as an Assistant Vice President of Flagstar as well as a MERS signing officer. CP 460, ¶¶ 16, 19. On November 15, 2013, NWTS joined the motion of Flagstar and MERS. CP 407-08.

On December 2, 2013, Plaintiff filed an untimely opposition to the motion. CP 383-406. Plaintiff did not provide any evidence disputing the authenticity of any of the documents attached in support of the motion (or disputing her default)—nor did her briefing address those issues. *Id.*

In reply, Flagstar and MERS pointed out that Plaintiff did not dispute the debt, her default, or that if Flagstar is entitled to enforce the Note, its foreclosure efforts were proper. CP 72-104. Flagstar further noted that Plaintiff did not dispute that Flagstar purchased and possesses her original Note, making it Note holder—or at a minimum, because Capital Mortgage delivered the Note to Flagstar for the purpose of allowing Flagstar the right to enforce it, that Flagstar has all the rights of a Note holder. *Id.*

The Trial Court Granted Summary Judgment. Finding no controverting evidence had been presented, the trial court awarded summary judgment to Defendants on December 13, 2013. CP 8-11. On January 2, 2014, Plaintiff filed a Notice of Appeal. CP 1-7.

III. ARGUMENT

A. Standard of Review.

This Court reviews *de novo* an order granting summary judgment, engaging in the same inquiry as the trial court. *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 63–64 (2000). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends. *Graham v. Concord Constr., Inc.*, 100 Wn. App. 851, 854 (2000) (citing *Doe v. Dep't of Transp.*, 85 Wn. App. 143, 147 (1997)). In determining whether a genuine issue of material fact exists, this Court construes the facts and reasonable inferences from them in the light most favorable to the nonmoving party. *Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 963 (1997). The moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 (1989). If the moving party meets this initial showing and is a defendant, the burden shifts to the plaintiff. *Young*, 112 Wn.2d at 225. "Where different competing inferences may be drawn from the evidence, the issue must be resolved by the trier of fact." *Johnson v. Spokane to Sandpoint, LLC*, 176 Wn. App. 453, 457–58 (2013) (citing *Kuyper v. Dep't of Wildlife*, 79 Wn. App. 732, 739 (1995)).

B. The Trial Court Properly Granted Summary Judgment Notwithstanding Plaintiff's Contention that Ms. Anderson was an Improper Trustee.

On appeal, Plaintiff reiterates her contention that there are "deficiencies in the deed of trust," by observing that the Deed of Trust appointed Joan Anderson, a Flagstar officer, as Trustee of the Deed of Trust. Appellant's Br. at 12.

It is not clear for what claim Plaintiff raises the issue, but it does not matter. To the extent Plaintiff suggests foreclosure was wrongful because the Deed of Trust lists Ms. Anderson as Trustee, that claim fails because she was replaced as Trustee by NWTS before any foreclosure began. CP 431, 434-39. Plaintiff does not suggest that NWTS is somehow an invalid trustee. Plaintiff thus cannot show injury caused by Ms. Anderson's designation, since she never took any action as Trustee. As a result, any claim based on her designation fails as a matter of law.

And regardless, Plaintiff's theory is also wrong substantively. Although the DTA once prohibited an employee, agent, or subsidiary of a beneficiary from serving as the trustee for the beneficiary under the same deed of trust, this prohibition changed almost forty years ago: "The Legislature specifically amended the statute in 1975 to allow an employee, agent or subsidiary of a beneficiary to also be a trustee." *Cox v. Helenius*, 103 Wn.2d 383, 390 (1985) (citing Laws of 1975, 1st Ex.Sess., ch. 129, § 2).[3] And the Legislature did this for good reason: "The amendment

[3] In 1975, the Legislature deleted that portion of 61.24.020 which read, "nor may the trustee be an employee, agent, or subsidiary of a beneficiary of the same deed of trust." Laws 1975, 1st Ex.Sess., ch. 129, § 2.

furthers the general intent of the act that nonjudicial foreclosure be efficient and inexpensive, and in the ordinary case would present no problem." *Id.* Every court to consider the issue has rejected Plaintiff's argument here. *Cascade Manor Assoc. v. Witherspoon, Kelley, Davenport & Toole, P.S.*, 69 Wn. App. 923, 934-35 (1993) (holding the DTA "does not does not prohibit a trustee from also acting as the attorney for the beneficiary"); *Meyers Way v. Univ. Savings*, 80 Wn. App. 655, 666 (1996) (noting DTA does not "prevent a trustee from serving simultaneously as the creditor's attorney, agent, employee or subsidiary. The trustee serving in such a dual role must transfer one role to another party if serving in this capacity causes an actual conflict of interest with the debtor.").[4]

Notably, Plaintiff's entire argument about the propriety of Ms. Anderson acting as Trustee—*i.e.*, it was improper to have a Flagstar officer as a Trustee because Flagstar became beneficiary after Capital Mortgage transferred the loan to Flagstar—defeats the remainder of her

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[4] *See also Salmon v. Bank of Am. Corp.*, 2011 WL 2174554, *6 (E.D. Wash. 2011) ("a subsidiary or a person or entity otherwise acting as agent for the beneficiary may serve as trustee under the Deed of Trust Act. ... Therefore, the Court finds that with regard to this argument the Plaintiffs do not state a plausible claim for relief."); *see also US Bank N.A. v. Woods*, 2012 U.S. Dist. LEXIS 78676, 15-17 (W.D. Wash. 2012) ("Washington case law allows 'an employee, agent or subsidiary of a beneficiary to also be a trustee'"). And every major treatise on the DTA agrees. Wash. Real Prop. Deskbook Series: Real Estate Essentials § 21.7(1) (2012) ("Although RCW 61.24.020 prohibits the same person or entity ... to act as trustee and beneficiary under one deed of trust, an employee, agent, or subsidiary of a beneficiary may act as the trustee.") Wm. B Stoebuck & John W. Weaver, 18 Wash. Prac., Real Estate § 20.8 (2d ed. 2012) ("This amendment, according to the Washington Supreme Court in *Cox v. Helenius*, had the effect of permitting the beneficiary's officers and attorneys to act as trustee").

claims, because she is conceding Flagstar is the beneficiary (and thus had the right to foreclose). Plaintiff's concession that Flagstar is beneficiary means Flagstar had the right to foreclose and supports summary judgment.

Finally, even if Ms. Anderson were an improper beneficiary, that does not make the Deed of Trust void, it would just make the Deed of Trust unenforceable until a proper Trustee is appointed. Plaintiff's counsel made this same argument with regard to MERS at the Washington Supreme Court in *Bain v. Metro. Mortg. Grp,. Inc.*, 175 Wn.2d 83 (2012)—*i.e.*, arguing that designating MERS as beneficiary voided the Deed of Trust. *See Bain*, 175 Wn.2d at 112-13. The Supreme Court rejected that argument, as "without authority." *Id.* The only effect of having an improper trustee (and there was not one) is that there could be no nonjudicial foreclosure until after appointment of a new Trustee—exactly what happened here. Thus, because there was and is a current valid trustee under the Deed of Trust, it is not void.

C. The Trial Court Properly Granted Summary Judgment Notwithstanding Plaintiff's Argument that the Indorsement on the Note was Forged or Unauthorized.

Plaintiff argues on appeal that there remains a question as to whether Flagstar "holds" the Note because Christina Butler—also a client of Plaintiff's counsel—claims that the Capital Mortgage indorsement under her name is not her signature. Appellant's Br. at 14. (Notably, Ms. Butler's declaration does not state that she did not authorize the indorsement, that she did not direct someone else to make the indorsement, that she was unaware of the indorsement, that the marking is

not hers, or that she did not know of or approve the indorsement. She merely states that the marking on the note is not her "signature."). In sum, Plaintiff argues that Flagstar is not the Note holder and, thus, lacked the authority to initiate foreclosure proceedings against Plaintiff. This argument fails for several reasons.

1. Plaintiff Has Not Rebutted the Presumption of Authenticity.

Contrary to Plaintiff's protestations, Ms. Butler's claim that the indorsement appearing on the Note is not her "signature" does not mean that the Capital Mortgage indorsement is invalid, forged, or unauthorized. Under Washington's Uniform Commercial Code (UCC), RCW 62A.3-401(b), a signature may be made by any "word, mark, or symbol executed or adopted by a person with present intention to authenticate a writing." Indeed the Official Comments to this UCC provision explain that the "signature may be made ... by an ***agent*** authorized to act for the obligor," and that "signature may be handwritten, typed, printed ***or made in any other manner.*** ... It may be made by mark, or even by thumb-print." RCW 62A.3-401 Official Comments 1 & 2 (emphasis added).

Moreover, Washington law expressly allows agents to execute documents in the name of principals. Thus, even if an employee or agent of Capital Mortgage indorsed the Note for Capital Mortgage by signing Christina Butler's name on the Note and transferring it to Flagstar, the indorsement is still valid and effective:

> If a person acting, or purporting to act, as a representative signs an instrument by signing ... the name of the

> represented person ... the represented person is bound by the signature to the same extent the represented person would be bound if the signature were on a simple contract. If the represented person is bound, the signature of the representative is the "authorized signature of the represented person" and the represented person is liable on the instrument, whether or not identified in the instrument.

RCW 62A.3-402(a).

Indeed, under RCW 62A.3-308 and ER 902, any signature on a promissory note is legally ***presumed*** authentic unless disputed in a ***pleading***. RCW 62A.3-308(a) ("signature is presumed to be authentic"); ER 902(i) (signatures on commercial paper presumed authentic). Plaintiff's Complaint nowhere pleads the indorsement is unauthorized and nothing in Ms. Butler's declaration states the indorsement is unauthorized (nor could she, as the Capital Mortgage Broker Agreement ***required*** her to indorse and deliver the Note to Flagstar).

In fact, there is not a shred of evidence in the record that Ms. Butler did not authorize indorsement of the Note on behalf of Capital Mortgage—a statement she does not, and cannot, make because by signing the Broker Agreement, Capital Mortgage was required to deliver an indorsed Note to Flagstar. CP 463-75. Indeed, RCW 62A.3-402 expressly allows a principal to have an agent sign in the principal's name. Nothing in Ms. Butler's declaration or elsewhere in the record suggests that Capital Mortgage failed to indorse the Note through appropriate markings as permitted by the UCC.

Flagstar is Note holder because Plaintiff produced no evidence refuting the UCC's presumption of the authenticity for the indorsement.

2. Capital Mortgage Ratified Any Indorsement.

Even if Ms. Butler's indorsement were somehow unauthorized—and there is no evidence of that—Capital Mortgage's conduct ratified any indorsement on the Note. This is consistent with Washington law, which provides that "[a]n unauthorized signature may be ratified for all purposes of this article." RCW 62A.3-403. Any unauthorized signature, including one which is allegedly forged, may be ratified. "For a principal to be charged with the unauthorized act of his agent by ratification, ***it must ... accept the benefits of the acts*** or intentionally assume the obligation imposed without inquiry." *Swiss Paco Logging v. Halliewicz,* 18 Wn. App. 21, 32, (1977) (emphasis added).

Here, because Capital Mortgage was contractually required to indorse and deliver the Note to Flagstar as a precondition to payment by Flagstar, and it ***did*** deliver an indorsed Note and accept payment by Flagstar, that delivery and retention of payment is sufficient to ratify any indorsement. *See* CP 463-75; *see also Stroud v. Beck*, 49 Wn. App. 279, 286 (1987) (acceptance of payment ratified unauthorized indorsement of Note by agent). Capital's "receipt of the proceeds of [Flagstar's] check" means it is barred from "den[ying] the endorsement's authenticity and assertion of the forgery." *Bank of the W. v. Wes-Con Dev. C., Inc.*, 15 Wn. App. 238, 242 (1976). Once Capital Mortgage accepted the benefits of payment from Flagstar for delivery of an indorsed Note, it ratified the indorsement, making Flagstar a Note holder.

3. Flagstar is a Transferee and Thus a "Person Entitled to Enforce the Instrument" With the Right to Foreclose.

Plaintiff mistakenly assumes that a Note indorsement is the only way one may obtain the right to enforce the Note. Appellant's Br. at 16. She is wrong. Where a party delivers an unindorsed Note to a third party for the purpose of giving that third party the right to enforce the Note, the transferee obtains all the rights of a holder and has the right to enforce the Note (and by extension, the Deed of Trust). *See* RCW 62A.3-203(a)-(b) (sale and delivery of Note gives transferee rights of a holder); RCW 62A.3-301(ii) (possession of Note with rights acquired via transfer allows transferee to enforce Note). Thus, whether or not the Note contains a valid indorsement, Flagstar is a "person entitled to enforce" ("PETE") and, thus, has the right to foreclose.

Indeed, in *Bain v. Metro. Mortg. Grp,. Inc.*, 175 Wn.2d 83 (2012), Plaintiff's counsel here convinced the Supreme Court to follow the UCC and to hold that to have the right to initiate foreclosure, a party must ***either*** be Note holder ***or*** otherwise be entitled to enforce the Note. *Id.* at 103-04 (citing RCW 62A.3-301). This is what the Supreme Court meant when it held that to foreclose one must ***either*** be the Note holder ***or*** "document[] the chain of transactions" giving the lender the right to enforce the Note. *Bain*, 175 Wn.2d at 111. Thus, to be a PETE, a lender can either be "the holder of the instrument," or "a nonholder in possession of the instrument who has the rights of a holder." RCW 62A.3-301.[5]

[5] In either situation, the creditor must physically possess the original Note, which means Plaintiff's argument that Capital Mortgage might still be the Note

Accordingly, even if Flagstar did not have an indorsed Note (and it does), it has the right to foreclose if it possesses the Note and has the rights of a holder. *Id.* Flagstar possesses the original Note and meets this alternate category of a PETE because it has the rights of a holder. To obtain the rights of a holder, Flagstar need only show it meets RCW 62A.3-203, which governs Note transfers (rather than Note negotiations via indorsement). If the holder of the Note delivers the Note to a third party "for the purpose of giving to the person receiving delivery the right to enforce [the Note]," that delivery is a "transfer" under the UCC. *Id.* A Note transfer, "whether or not the transfer is a negotiation"—*i.e.*, regardless of indorsement—"***vests in the transferee any right of the transferor to enforce the instrument***, including any right as a holder in due course ...." *Id.* (emphasis added). Here, the Note was payable to Capital Mortgage (making Capital Mortgage the original note holder), but the Note was delivered to Flagstar under the Broker Agreement so that Flagstar could enforce the Note. CP 458-59, 463-75, 490-94. These business records show how and when Flagstar became entitled to enforce the Note and foreclose. The Broker Agreement between Flagstar and Capital Mortgage expressly provides that: "[i]f Mortgage Loan closes in [Capital Mortgage's] own name, [Capital Mortgage] agrees to ... endorse the original Note without recourse to Flagstar Bank, FSB." CP 467, ¶ 3.1(e). Therefore, even if Flagstar were not a note holder in its own

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holder simply cannot be true, since it is undisputed that Flagstar possesses the original Note. *See* RCW 62A.3-301.

right—and it is—it remains a PETE because it would still be a non-holder in possession with the rights of a holder. RCW 62A.3-301.

Indeed, in a case directly on point, this Court rejected a similar challenge to the one Plaintiff makes here. *Metro. Mortg. & Sec. Co., Inc. v. Becker*, 64 Wn. App. 626, 630 (1992). In *Metropolitan Mortgage*, a debtor argued that the creditor could not enforce the Note because it never obtained a proper indorsement. *Id.* The Court rejected that argument:

> ***The Beckers first contend Metropolitan cannot enforce the note as a transferee absent negotiation by delivery with an endorsement. They are mistaken.*** The rights of the transferor are vested in the transferee by transfer of the instrument. In a dispute between two claimants, the original payee and assignee, "endorsement of the promissory note was not required to effectively transfer it." ... [The UCC] require[s] a transferee who takes without an endorsement to offer proof of acquisition, which creates a presumption the transferee is entitled to recover on the instrument. ***Metropolitan has offered unrefuted proof of the Slaters' assignment to it. Metropolitan can enforce the note without negotiation.***

Id. (citations omitted) (emphasis added). So too, here. The record on appeal provides unrefuted evidence showing how Flagstar acquired the Note and that Flagstar possesses the Note. This evidence makes it (at the very least) a transferee ***with the rights of a holder***, meaning it is entitled to enforce the Note and foreclose nonjudicially. As a result, even if the Note's indorsement were somehow invalid, Flagstar had the authority to initiate foreclosure.

4. The UCC Bars Plaintiff Asserting Another's Ownership Interests as a Basis to Avoid Enforcement of the Note.

Notwithstanding the undisputed evidence in the record that Flagstar is entitled to enforce the Note, the UCC expressly bars Plaintiff

from arguing that other entities (*i.e.*, Freddie Mac or Capital Mortgage) might claim an interest in the Note. Indeed, Plaintiff lacks standing to assert the *jus tertii* claims or rights of another as a defense: "[T]he obligor may not assert against the person entitled to enforce the instrument a … claim to the instrument of another person." RCW 62A.3-305(c) (internal citation omitted). The UCC provides that whoever holds the Note has the right to enforce the Note, even if in wrongful possession of the Note. *See* RCW 62A.3-301. These provisions mean that even if some other entity had an interest in the Note, the UCC bars Plaintiff from raising that interest as a defense to enforcement of the Note by Flagstar. (The idea being that any other entity with an interest can bring an action against the entity in possession of the Note, which does not affect the borrower.)

5. Even if the Note Were Unindorsed, Flagstar May Now Indorse It.

Even if the Capital Mortgage indorsement were somehow unauthorized—and again, the evidence in the record shows it was authorized or ratified—Flagstar would not lack the authority to foreclose. To avoid just this type of scenario, Flagstar's Broker Agreement with Capital Mortgage also grants Flagstar a power of attorney to indorse any and all promissory notes on any loan sold to Flagstar: "[Capital Mortgage] hereby irrevocably appoints Flagstar … its attorney-in-fact, with full power of substitution in the name of [Capital Mortgage] or otherwise … to demand, sue for, receive, collect, sign, ***endorse***, assign or compromise ***any and all promissory notes***, checks, money orders or monies due on any

Mortgage Loans sold to Flagstar." CP 473-74, ¶ 7.11 (emphasis added). Thus, whether or not Christina Butler or a representative of Capital Mortgage actually indorsed the Note, Capital Mortgage contractually gave Flagstar the right to enforce the Note (and by extension the Deed of Trust) as well as the power of attorney to indorse the Note. Should the Court have any concern over the current indorsement, Flagstar can re-indorse the Note tomorrow and resume foreclosure. This means Plaintiff cannot show prejudice from a lack of proper indorsement, which means she has no claim under the Deed of Trust Act or otherwise.[6]

D. The Trial Court Properly Granted Summary Judgment Notwithstanding Plaintiff's Contention that MERS Lacked Authority to Assign the Deed of Trust.

Ignoring the evidence in the record as well as the case law cited in Defendants' Motion for Summary Judgment, Plaintiff argues on appeal that the trial court erred in granting summary judgment because (i) the MERS Assignment of the Deed of Trust is void under *Bain* as a matter of law, and (ii) there is no evidence in the record of any agency relationship between MERS and Flagstar. Appellant's Br. at 18-20. Plaintiff's attack

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[6] *See Udall v. T.D. Escrow Serv., Inc.*, 159 Wn.2d 903, 915-16 (2007); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 112 (1988); *Albice v. Premier Mortg. Serv. of Wash.*, 157 Wn. App. 912, 933 (2010), *aff'd* 174 Wn.2d 560 (2012); *Amresco Ind. Funding v. SPS Properties, LLC*, 129 Wn. App. 532, 537 (2005); *Queen City Sav. & Loan Ass'n v. Mannhalt*, 111 Wn.2d 503, 510 n.17 (1988); *Steward v. Good*, 51 Wn. App. 509, 514 (1988). *See also* Marjorie Dick Rombauer, 27 Wash. Prac., Creditors' Remedies—Debtors' Relief § 3.41 (1998) ("[E]ven though the [Deed of Trust Act] has not been complied with strictly in the foreclosure process, the foreclosure may still be deemed to be effective and complete if a complaining party is not able to demonstrate prejudice from technical violations of the Act.").

on the MERS assignment is not supported by the facts or the law, and the Court should reject it out of hand for several reasons.

1. Flagstar's Right to Foreclose Has Nothing to do with MERS's Assignment of the Deed of Trust.

Plaintiff's brief reflects a fascination with MERS, even though MERS played no role in her foreclosure. Relying almost entirely on *Bain*, she argues that if MERS is involved, there must be something wrong with the foreclosure. Plaintiff is mistaken.

Contrary to Plaintiff's assertions to the contrary, *Bain* held it was "likely true" MERS could act as agent for a Note holder, nothing "should be construed to suggest an agent cannot represent the holder of a note," and that "Washington law, and the deed of trust act itself, approves of the use of agents." *Bain*, 175 Wn.2d at 106. In *Bain*, plaintiff's counsel here remarkably tried to argue that a deed of trust is void under Washington law because it designates MERS as the "beneficiary." The Supreme Court rejected that argument (as has every other court to address the issue), noting that plaintiff's counsel has "no authority ...for the suggestion that listing an ineligible beneficiary on a deed of trust would render the deed void and entitle the borrower to quiet title." *Id.* at 112. Thus, Plaintiff's argument here (raised by the same counsel in *Bain*) was expressly rejected by the Washington Supreme Court. *Cf. Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1044 (9th Cir. 2011) (MERS's role irrelevant where MERS did not foreclose).

But unlike *Bain*—where the lender's right to foreclose was purportedly based solely on a MERS assignment—Flagstar here did not and does not rely on any MERS assignment for the right to foreclose. Assignments are not required to foreclose (indeed, the word assignment does not appear in any requirement of the Deed of Trust Act). And factually, MERS had no role in the foreclosure. MERS had no contact with Plaintiff, MERS did not appoint the Trustee, MERS did not issue the Notice of Default, MERS did not record the Notice of Trustee's Sale, and Plaintiff does not allege she did anything in reliance on MERS. MERS did literally nothing relevant to the foreclosure process, and its role ended before foreclosure had even begun.

Indeed, it is ironic that Plaintiff simultaneously complains that MERS cannot be designated on the Deed of Trust and also complains that MERS tried to remove itself from the Deed of Trust by assigning its nominal interest to Flagstar (at Flagstar's direction). MERS is a convenient scape goat, but MERS did nothing wrong here because Flagstar did not rely on MERS's assignment as a basis to foreclose, such that MERS's one action (assigning its agency interest) had no bearing on Flagstar's right to foreclose.

Indeed, myriad courts have rejected Plaintiff's identical arguments. *See, e.g., Myers v. MERS, Inc.*, 2012 WL 678148, *3 (W.D. Wash. 2012) ("Even if MERS had improperly assigned the Deed, Flagstar is empowered as the beneficiary to appoint the trustee because it holds Mr.

Myers's Note, not because of the [MERS] assignment."); *aff'd* 540 Fed. Appx. 572 (9th Cir. 2013); *Cameron v. Acceptance Capital Mortg. Corp.*, 2013 WL 4664706, *3 (W.D. Wash. 2013) ("Flagstar derived its authority from holding the Note itself," not any MERS assignment); *Lynott v MERS, Inc.*, 2012 WL 5995053, at *2 (W.D. Wash. 2012) ("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 .... [P]ossession of the note makes U.S. Bank the beneficiary; the assignment merely publicly records that fact."). In affirming the trial court's motion to dismiss—not even summary judgment—the Ninth Circuit in *Myers* went out of its way to explain that the same cases Plaintiff cites here did not change the result: "We further note that recent Washington case law does not change the result." *Myers*, 540 Fed. Appx. 572 (citing *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771 (2013), and *Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294 (2013)).

Indeed, Federal District Court Judge Coughenour distinguished *Bain*—which he certified to the Washington Supreme Court—on this basis in *Florez v. OneWest Bank, F.S.B.*, 2012 WL 1118179 (W.D. Wash. 2012):

> Plaintiff bases its claims on the notion that MERS is not a viable entity holding legitimate beneficial interest, and that therefore any assignment made by MERS is invalid. There are ... key defects in Plaintiffs' logic. ... [T]he situation at issue here is unlike the situation in *Bain v. Metro. Mortg. Group Inc.* In *Bain, **the alleged authority to foreclose was based solely on MERS's assignment of the deed of trust, rather than on possession of the Note. Here, however, the***

undisputed facts establish that OneWest had authority to foreclose, independent of MERS, since OneWest held Plaintiffs' Note at the time of foreclosure.

Id., at *1 (dismissing with prejudice) (citations omitted) (emphasis added).

And just a few weeks ago a Federal District Court Judge granted summary judgment for Defendants, rejecting a similar argument that a note holder's request that MERS assign back its nominee interest to the Note holder was somehow improper:

> Plaintiffs object that MERS unlawfully assigned the deed of trust to SunTrust. The Court can discern no reason why MERS would be prohibited from conveying its interest in the deed of trust back to SunTrust upon the latter's request. In fact, the Washington State Supreme Court recently concluded that "only the actual holder of the promissory note [i.e., not MERS] ... may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property," although the court declined to decide the legal effect of MERS acting as a beneficiary without legal authority. *Bain*, 175 Wash.2d at 89, 114, 285 P.3d 34. SunTrust apparently avoided this issue by reacquiring its full status as a beneficiary before appointing a successor trustee.

Smith v. Nw. Tr. Serv., Inc., 2014 WL2439791, *4 (W.D. Wash. May 30, 2014). Plaintiff's myopic focus on MERS is a red herring designed to distract from her admitted default and Flagstar's possession of her indorsed Note.

2. Plaintiff Lacks Standing to Challenge any MERS Assignment.

Plaintiff's brief challenges the validity and authority of the MERS assignment but it remarkably does not address any of the evidence in the record showing that MERS, acting as nominee for Flagstar, terminated its role when it assigned its nominee interest in the Deed of Trust back to its

principal, Flagstar. Indeed, the undisputed evidence shows: (a) Flagstar is the successor and transferee of the Capital Mortgage loan; (b) MERS, as agent of the Note holder, had the authority to assign its agency interest to Flagstar, (c) Sharon Morgan was a MERS signing officer (and Flagstar officer), and was authorized to execute the MERS assignment; (d) MERS was acting at Flagstar's direction; and (e) Plaintiff was not a party to (or ever given) the MERS assignment. *See* CP 457-510. Thus, MERS, as agent to Flagstar, had the authority to execute the assignment, and had the right to assign MERS's agency interest to Flagstar. Thus, any claims tied to a MERS assignment fail.

In any event, Plaintiff cannot challenge the validity of the MERS assignment because, as a stranger to the document, she lacks standing to challenge an assignment she did not sign, which was not executed for her benefit, and which has no bearing on who or how much she has to pay: "[A] stranger to a contract may not challenge the contract's validity." *Newport Yacht Basin Ass'n v. Supreme N.W. Inc.*, 168 Wn. App. 56, 80–81 (2012); *McGill v. Baker*, 147 Wash. 394 (1928) (only party to an assignment can challenge its validity); RCW 65.08.120 (assignment does not affect borrower).

Numerous courts interpreting Washington law have rejected the notion that a borrower has standing to challenge a foreclosure based on an assignment to which she is not a party. *See Salmon v. Bank of Am. Corp.*, 2011 WL 2174554, *8 (E.D. Wash. 2011) (plaintiff's rights unaffected by

assignment); *Brodie v. Nw. Tr. Serv., Inc.*, 2012 WL 6192723, *2–3 (E.D. Wash. 2012) (borrower lacks standing to attack assignment because the borrower is not a party to it and thus cannot be injured by it), *aff'd* – Fed. Appx --, 2014 WL 2750123, *1 (9th Cir. 2014) ("further amendment would be futile because U.S. Bank could legally foreclose on her defaulted loan, and ***Brodie lacks standing to challenge the assignment and transfer of the note and deed of trust.***") (emphasis added); *Ukpoma v. U.S. Bank, N.A.*, 2013 WL 1934172, *4 (E.D. Wash. 2013) ("Plaintiff, as a third party, lacks standing to challenge" assignment) (citing cases); *McPherson v. Homeward Residential*, 2014 WL 442378, *6 (W.D. Wash. 2014) (rejecting assignments claim; "recording of an assignment of a deed of trust does not affect a borrower's rights"); *see also Old Nat'l Bank of Wash. v. Arneson*, 54 Wn. App. 717, 723 (1989) (contract rights are freely assignable); *Oriental Realty Co. v. Taylor*, 69 Wash. 115, 122 (1912) (agency interest "clearly" assignable).

Indeed, even if there were something wrong with the MERS assignment, there could be no liability because neither MERS nor Flagstar owe a duty to Plaintiff with respect to recorded documents to which she is a non-party. *Centurion Props., III, LLC v. Chicago Title Ins. Co.*, 2013 WL 3350836, *4 (E.D. Wash. 2013). "[T]here is ample authority that borrowers, as third parties to the assignment of their mortgage … cannot mount a challenge to the chain of assignments unless a borrower has a genuine claim that they are at risk of paying the same debt twice if the

assignment stands." *Borowski v BNC Mortg. Inc.*, 2013 WL 4522253, *5 (W.D. Wash. 2013). And in Washington, absent delivery of the assignment to the borrower—which Plaintiff does not and cannot allege—a borrower is never at risk of paying twice based on an assignment because the "recording of an assignment of a mortgage is not in itself notice to the mortgagor, his or her heirs, assigns or personal representatives, to invalidate a payment made by any of them to a prior holder of the mortgage." RCW 65.08.120; *see also Stansbery v. Medo-Land Dairy*, 5 Wn.2d 328, 337 (1940) (payment to prior creditor satisfies obligation absent actual notice to debtor of assignment).

Put simply, Flagstar's right to foreclose is tied to its possession of the Note, not anything MERS did. As the Ninth Circuit recently recognized (interpreting Washington law), Plaintiff "lacks standing to challenge the assignment and transfer of the note and deed of trust." *Brodie*, --- Fed. Appx. ---, 2014 WL 2750123, *1. Because Flagstar had the right to foreclose based on its status as Note holder, and the MERS assignment does not affect Plaintiff in any way, the Court should affirm the trial court's order granting summary judgment.

E. The Trial Court Properly Granted Summary Judgment Notwithstanding Plaintiff's Contention that the "Holder" of the Note Must Also Be the "Owner."

Plaintiff argues on appeal that the trial court erred in granting summary judgment where there existed genuine issues as to material fact concerning the status of Flagstar as "owner," "holder," or "beneficiary" of the Note, and whether Flagstar had authority to initiate nonjudicial

foreclosure of Plaintiff's property under RCW 61.24.030. Appellant's Br. at 21-38. The essence of Plaintiff's argument is that the "holder" of the Note must ***also*** be the "owner" of the obligation in order to conduct a nonjudicial foreclosure, and that the owner and holder of Plaintiff's obligation is either Capital Mortgage or Freddie Mac, not Flagstar. Appellant's Br. at 23, 26. Plaintiff, however, is mistaken; the holder of the Note need not also own the rights to loan payments to have the right to enforce the Note.

The Deed of Trust Act (DTA), specifically RCW 61.24.030, states certain requirements for a trustee's sale for a nonjudicial foreclosure of a deed of trust. The version of the statute that was in effect at the time of commencement of the nonjudicial foreclosure proceeding involving Plaintiff's real property in 2010 stated, in relevant part:

> It shall be requisite to a trustee's sale:
>
> . . .
>
> (7)(a) That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, ***the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust.*** A declaration by the beneficiary made under the penalty of perjury stating that the ***beneficiary is the actual holder*** of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.[7]

[7] Former RCW 61.24.030 (Laws of 2009, ch. 292 § 8, eff. July 26, 2009) (emphasis added)

Plaintiff argues that, under the first sentence of this statute, a trustee must not initiate foreclosure absent evidence "that the beneficiary is the owner of any promissory note," and contends that either Capital Mortgage or Freddie Mac owns his loan. Appellant's Br. at 23, 26. But Plaintiff ignores the next sentence of the statute, which explains that as used in the DTA, for negotiable instruments at least, "owner" means note holder: "A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection." RCW 61.24.030(7)(a).

This makes sense, because the Deed of Trust Act is not limited to Deeds of Trust secured by negotiable instruments, so a term broader than "holder" in the UCC sense is necessary. For example, in *Cox*, the Deed of Trust at issue secured an installment contract, not a promissory note. *Cox*, 103 Wn.2d at 385. One cannot be a "holder"—in the UCC sense of the term—of an installment contract because RCW 62A.301 et seq. (UCC Article III) does not apply to installment contracts. *See also Rodgers v. Seattle First Nat'l Bank*, 40 Wn. App. 127, 129 & n.1 (1985) (addressing enforcement of Deed of Trust securing non-negotiable instruments). The Deed of Trust Act underscores this distinction by defining beneficiary as one that holds the enforcement rights both of an "instrument"—(*i.e.*, a negotiable instrument like a promissory note—"***or document evidencing the obligations secured by the deed of trust.***" RCW 61.24.005(2)

(emphasis added). This means that a Deed of Trust subject to the Deed of Trust Act may secure obligations that are ***not*** negotiable instruments, and thus "beneficiaries" are not limited solely to "holders" as defined by the UCC. To accommodate that business reality, the legislature used the term "owner" in RCW 61.24.030(7)(a), so as to allow one to demonstrate the right to foreclose on a Deed of Trust by showing that a beneficiary holds the rights to enforce a document secured by a Deed of Trust. *See* RCW 61.24.030(7)(a). But nothing in the Deed of Trust Act suggests that a beneficiary must always be ***both*** the "owner" of all rights in the loan and also the "holder" of a promissory Note. Indeed, the Washington Supreme Court in *Bain* rejected that very notion by quoting with approval RCW 62A.3-301, which provides that "[a] person may be entitled to enforce the instrument ***even though that person is not the owner of the instrument.***" 175 Wn.2d at 104 (emphasis added).

Indeed, to the extent there was ever any ambiguity, this Court resolved it in *Trujillo v. Nw. Tr. Serv., Inc.*, --- Wn. App. ---, 2014 WL 2453092 (Div. I, June 2, 2014). In *Trujillo*, this Court closely examined the terms "beneficiary," "owner," and "holder" to determine the Legislature's intent in enacting the statute. *Trujillo*, 2014 WL 2453092, *4 ¶ 30. In examining the DTA's definition of the term "beneficiary," this Court determined, consistent with the Supreme Court's analysis in *Bain*, that a beneficiary is "the ***holder*** of the instrument or document evidencing the obligations secured by the deed of trust[.]" *Id.* at *5 ¶ 33 (quoting

Bain, 175 Wn.2d at 98-99) (emphasis in original). Thus, in *Trujillo* (as in the case here), because an officer of Wells Fargo declared in its Beneficiary Declaration under penalty of perjury that it was "the actual holder of the promissory note ... or has requisite authority under RCW 62A.3-301 to enforce said obligation," the Court determined that Wells Fargo "provided proof that it is the 'beneficiary' of the [Trujillo's] deed of trust." *Id.*, at *5 ¶¶ 31-35.

The *Trujillo* Court thereafter examined the DTA's definition of the term "owner," and observed that the term is not defined in either the DTA or RCW 62A.3-103 (UCC, Article 3, Negotiable Instruments). *Id.*, at *5 ¶¶ 36-37. The Court, however, noted that the UCC clarified that a "person entitled to enforce" is not is not synonymous with the "owner" of the note. *See id.* ("***The right to enforce an instrument and ownership of the instrument are two different concepts. ... Moreover, a person who has an ownership right in an instrument might not be a person entitled to enforce the instrument.***") (quoting UCC Comment 1 to RCW 62A.3-203) (emphasis in original); *see also* RCW 62A.3-301 ("A person may be a person entitled to enforce the instrument ***even though the person is not the owner of the instrument.***") (emphasis added). The Court, thus, determined that the Legislature did not intend that the terms "owner" and "holder" to require a holder of enforcement rights to also always be the ultimate owner of the payment rights. *Id.*, at *6-*7 ¶¶ 39, 48. This is consistent with more than forty years of Washington law. *See John Davis*

& Co. v. Cedar Glen No. Four, Inc., 75 Wn.2d 214, 222-23 (1969) ("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.***") (citation omitted and emphasis added). As the result, the Court in *Trujillo* concluded that for negotiable instruments, "the beneficiary must be the holder of the note. It need not show that it is the owner of the note." *Trujillo* ,2014 WL 2453092*Id.* at *8, ¶ 49.[8]

The *Trujillo* Court addressed the meaning of the term "holder" by following the analysis and conclusion set forth by the Supreme Court in

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[8] Before *Trujillo*, every court to consider the issue had agreed that one need not be both holder and owner of the Note to be a beneficiary under Washington law; this makes sense because a disclosure requirement to the Trustee under RCW 61.24.030(7) cannot change the definition of beneficiary in RCW 61.24.005(2). *See Mulcahy v. Freddie Mac*, 2014 WL 1320144, *3 (W.D. Wash. 2014) (rejecting argument that Freddie Mac's role as investor means that Wells Fargo could not foreclose as beneficiary) (citing *Bain*); *In re Brown*, 2013 WL 6511979, fn.23 (9th Cir. BAP Dec. 2013) ("Washington law makes clear that the distinction between an owner of the note and a beneficiary who is a holder of the relevant note is not significant." ... "Indeed, at least for purposes of RCW 61.24.030, Bank of America [the note holder] was the owner," despite the fact that Fannie Mae was investor); *Massey v. BAC Home Loans Serv.*, 2013 WL 6825309, *5 (W.D. Wash. 2013) (rejecting argument that Freddie Mac's role as note owner affected Bank of America's right to foreclose as holder); *Rouse v. Wells Fargo Bank, NA*, 2013 WL 5488817, *5 (W.D. Wash. 2013) (rejecting same challenge based on 61.24.030(7)(a) and holding Freddie Mac's ownership interest irrelevant because Wells Fargo held the Note); *Coble v. Suntrust Mortg.*, 2014 WL 631206 , *4 (W.D. Wash. 2014) (rejecting argument that holder must also be owner); *Corales v. Flagstar Bank, FSB*, 822 F. Supp. 2d 1102, 1108 (W.D. Wash. 2011) ("even if a lender sells a loan to Fannie Mae, the lender's possession of the Note endorsed in blank means that it may foreclose in its own name"); *In re Butler*, 2012 WL 8134951, at *2 (rejecting the argument of the same Plaintiff's counsel that the holder of a note must also prove that it is the owner of the obligation).

Bain. In *Bain*, the Supreme Court concluded that any interpretation of the DTA should be guided by relevant portions of the UCC. In particular, the Supreme Court observed that RCW 62A.1-201(21) defined the term "holder" with respect to a note, to mean: "The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is in possession." *Trujillo*, 2014 WL 2453092, *8 ¶ 52 (quoting *Bain*, 175 Wn.2d at 103-4 and RCW 62A.1-201(21)). As a result, the Court determined that Wells Fargo's Beneficiary Declaration was sufficient proof that it was the "holder" of Trujillo's note, which entitled it as the "beneficiary" to "enforce a note secured by the deed of trust. Ownership of the note is irrelevant." *Id.*, at *10 ¶ 69.

In this case, Plaintiff does not dispute that Flagstar provided the relevant Beneficiary Declaration necessary for the DTA's requirements. *See* Appellant's Br. at 23-24 ("the Beneficiary Declaration that Flagstar Bank provided to NWTS which states that Flagstar Bank was the 'actual holder' of the Note"). Thus, as affirmed by *Trujillo*, because an officer of Flagstar declared in its Beneficiary Declaration under penalty of perjury that it was "the actual holder of the promissory note," the trial court properly determined that Flagstar provided sufficient proof to NWTS that it is the "beneficiary" of Plaintiff's Deed of Trust.

F. The Trial Court Properly Granted Summary Judgment on Plaintiff's CPA Claim.

The elements of a CPA claim are: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) that impacts the public

interest; (4) causes injury to the plaintiff's business or property; and (5) that injury is causally linked to the unfair or deceptive act. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986). The trial court found that Plaintiff failed to produce evidence on each element required to prove a CPA claim. As a result, the trial court properly granted Defendants summary judgment.

1. Plaintiff Failed to 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). Plaintiff can meet the first CPA element by 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 an unfair trade practice. *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 344 (1989) (quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778 (1986)). Plaintiff must therefore allege facts showing that Defendants' acts have the capacity to deceive a substantial portion of the public or show an unfair trade practice.

Defendants did not commit any *per se* unfair trade practice. Only the Washington Legislature has the authority to declare a trade practice as being *per se* "unfair." *Hangman Ridge*, 105 Wn.2d at 787. Plaintiff cites no statutory violation that is a legislatively declared *per se* CPA violation, and thus there is no basis for a CPA claim tied to a *per se* "unfair" act or

practice. In a similar case, the Washington Supreme Court declined to hold that MERS's alleged actions were *per se* deceptive. *Bain*, 175 Wn.2d at 117. Plaintiff cannot show that Defendants committed a *per se* CPA violation, and thus she cannot establish a *per se* unfair act as a basis for a CPA claim.

Further, to show Defendants acted "unfairly" under the CPA—outside the context of a *per se* unfair trade practice—Plaintiff must show Defendants took some action violating the public interest, which typically requires a showing that Defendant's practice "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves or outweighed by countervailing benefits." *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 787 (2013) (citing FTC standard). Plaintiff failed to allege Defendants acted unfairly at all, let alone in a manner "likely to cause substantial injury to consumers."

Likewise there is no evidence in the record establishing any deceptive practice by Defendants. To be "deceptive," 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). Plaintiff does not allege Defendants misled her about any material fact and thus cannot show deception. Her Deed of Trust discloses MERS as an agent for a disclosed principal (Capital Mortgage). There's nothing deceptive about that (particularly where the loan documents she signed disclosed both Capital Mortgage's role as broker and Flagstar's role as

funder and acquirer of her loan). Likewise, the MERS assignment was never even given to Plaintiff, and is accurate because it shows MERS is assigning its nominee (agency) interest back to Flagstar (i.e., terminating its agency interest). And Flagstar's representations were only that it was the Note holder seeking to foreclose. That was and remains true.

Plaintiff's opening brief argues that the Washington Supreme Court decision in *Bain* suggests identifying MERS as beneficiary on his Deed of Trust presumptively satisfies this prong of the CPA. *See Bain*, 175 Wn.2d at 117. But what the Washington Supreme Court found potentially deceptive in *Bain* was MERS taking action purportedly on behalf of itself and ***its own*** successors and assigns, without disclosing that it was acting on behalf of a principal. *See id.* at 116-117.[9] The Supreme

[9] Unfortunately, in certifying *Bain* to the Washington Supreme Court, United States District Court Judge John Coughenour's Order transmitted an incomplete and limited record (addressing exclusively legal, not factual, issues), and in the process omitted evidence in the record showing MERS was acting on behalf of known Note holder (*i.e.*, principal). *See* CP 648-51 (*Bain v. Metro. Mortg. Group. Inc.*, No. 2:09-cv-149-JCC, Dkt. 159, Order Certifying Question to the Washington Supreme Court, at 4 (W.D. Wash. June 27, 2011) (listing docket entries for transmittal in *Bain* and *Selkowitz* cases)); *compare* Dkt. 150 & 150-1 (Declaration of Ronaldo Reyes identifying Deutsche Bank as Note holder and listing specific trust owning and holding the Note and the date of acquisition). Because this information was outside the appellate record, counsel for MERS was barred from referring to this evidence to the Washington Supreme Court. *State v. McFarland*, 127 Wn.2d 332, 335 (1995). The incomplete record resulted in the mistaken impression at the Washington Supreme Court that MERS had no principal controlling MERS's actions and was acting as beneficiary not as an agent, but for itself. *See Bain*, 175 Wn.2d at 90 & n.2, 97 & n.12. The complete record clarifies that even in *Bain*, MERS did have a principal for whom it was acting. The assignment in *Bain* was poorly drafted, omitting the name of the lender before the "its successor and assigns" language, so that it appeared MERS was acting for itself, rather than a principal. *Id.* at 116-17.

Court recognized that if MERS were an agent, there is nothing improper about MERS's role: "MERS argues that lenders and their assigns are entitled to name it as their agent. ***This is likely true and nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note. Washington law, and the deed of trust act itself, approves of the use of agents.***" *Bain*, 175 Wn.2d at 106 (citations omitted) (emphasis added). Nothing in *Bain* suggests it is improper to designate MERS as beneficiary in a Deed of Trust as an agent for the disclosed principal. Indeed, the Court in *Bain* agreed that "MERS's role [is] plainly laid out in the deeds of trust." *Id.* at 105 (quoting *Cervantes*). ***Bain does not hold*** that the presence of MERS in a mortgage creates a presumptive CPA claim." *Mickelson v. Chase Home Fin., LLC*, 2012 WL 5377905, *2 (W.D. Wash. 2012) (emphasis added), *affd* --- Fed. Appx. ---, 2014 WL 2750133 (9th Cir. June 18, 2014).

Moreover, the Washington Supreme Court's primary concern in *Bain* was the difficulty borrowers may encounter when trying to identify the current holder of their loan. *Bain*, 175 Wn.2d at 97. The *Bain* court noted that "the nub" of the concerns about MERS arose from "possible errors in foreclosures, misrepresentation, and fraud ... [along] with questions of authority and accountability." *Id.* All of the evidence in the record establish that those concerns are not present in this case. Specifically, the Assignment, and Notice of Sale all identify Flagstar as the beneficiary of the loan, and the Notice of Default identifies Flagstar as

the beneficiary and the servicer of the loan. *See* CP 428-29, 434-39, 500-505. This comports with RCW 61.24.050(2), which provides that the "beneficiary" is the "holder of the instrument" (which Flagstar was and still is). These documents show that Flagstar informed Plaintiff about the changes in her loan servicing status. Because Plaintiff knew at all times whom to contact to address problems arising from her loan and loan servicing, the potential concerns raised by the Washington Supreme Court in *Bain* are not present.

Finally, Plaintiff's claim that it was deceptive merely to identify MERS as the beneficiary and nominee of the lender on the Deed of Trust, is barred by the CPA's four-year limitations period. RCW 19.86.120 ("Any action to enforce a claim for damages under RCW 19.86.090 shall be forever barred unless commenced within four years after the cause of action accrues."). MERS was listed on the Deed of Trust dated August 7, 2006, and Plaintiff signed that Deed of Trust over six years ago. *See* CP 1132-42. Accordingly, Plaintiff's claim premised on the fact that MERS is listed on the Deed of Trust is time-barred.

2. There is No Public Interest Impact.

A plaintiff asserting a CPA claim must also allege facts demonstrating that the act complained of impacts the public interest. The factors to be considered when evaluating this element depend upon the context in which the alleged act was committed. *Hangman Ridge*, 105

Wn.2d at 780. Because Plaintiff complains of a consumer transaction, the following factors are relevant:

> (1) Were the alleged acts committed in the course of defendant's business? (2) Are the acts part of a pattern or generalized course of conduct? (3) Were repeated acts committed prior to the act involving plaintiff? (4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?

McKenna v. Commonwealth United Mortg., 2008 WL 4379582, *5 (W.D. Wash. 2008) (quoting *Hangman Ridge*, 105 Wn.2d at 790). In *McKenna*, the court dismissed a CPA claim, finding the plaintiffs failed to: "identify any facts from which a reasonable jury could conclude that additional plaintiffs have been or will be injured in the same fashion; that the alleged conduct was part of a pattern or was repeated prior to the conduct alleged in this matter; that there is potential for similar conduct in the future; [or] that many consumers were affected, or will likely be affected, by the conduct." *Id.* In other words, "it is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest." *Hangman Ridge*, 105 Wn.2d at 790.

Because the concerns in *Bain* are not present and Plaintiff cannot identify any deceptive act committed by any Defendants, there is no public interest impact. *See Bain*, 175 Wn.2d at 118 ("***[i]f*** in fact the language is unfair or deceptive, it would have a broad impact") (emphasis added). A necessary prerequisite to an impacted public interest is a deceptive act.

Plaintiff's failure to allege a deceptive act likewise prevents her from satisfying the public interest prong of her CPA claim. Absent MERS taking ***actions*** as beneficiary in its own right (*e.g.*, appointing the trustee without direction from note holder), there is nothing about Defendants' conduct affecting the public interest. Indeed, the opposite: "There are certainly significant benefits to the MERS approach," *id.* at 109, and "MERS has helped overcome ... a drawback of the traditional mortgage financing model: lack of liquidity" by allowing "more money to come into the mortgage market," which reduces rate for borrowers. *Id.* at 96.

3. Plaintiff Does Not Allege Compensable Injury or Any Causal Link Between Defendants' Acts and Injury.

Plaintiff's CPA claim also failed because she failed to show any actionable injury. "Even if the deception element of the CPA were met, Plaintiffs cannot make a claim under the CPA because they cannot show injury." *Mickelson*, 2012 WL 5377905, at *3. The only injury Plaintiff claims is "the distraction and loss of time to pursue business and personal activities due to the necessity of addressing wrongful conduct." CP 1129. As a threshold matter, only injury to business or property is compensable under the CPA, so any alleged time lost for "personal activities" is not compensable. *See* RCW 19.86.090 (person must be "injured in his or her business or property"); *see also Demopolis v. Galvin*, 57 Wn. App. 47, 54, 786 P.2d 804 (1990) (holding Plaintiff's alleged injury resulting from having to bring suit to protect against lender's foreclosure action was

insufficient to satisfy injury element of a private CPA claim). Plaintiff alleges no facts showing injury to her business or property. As the Washington Supreme Court held in *Bain*, "the mere fact that MERS is listed on the deed of trust as a beneficiary is ***not itself an actionable injury***." *Bain*, 175 Wn.2d at 120 (emphasis added). Indeed, upon remand to the trial Court, Judge Shaffer granted MERS summary judgment in *Bain* because of a lack of injury or causation. CP 454-56. Likewise, because Flagstar is Note holder, it is Deed of Trust beneficiary as a matter of law with the right to foreclose. RCW 61.24.005(2). As such, Plaintiff has no injury tied to Flagstar. Judge Coughenour (who certified *Bain* to the Supreme Court) recently rejected an identical argument:

> Plaintiffs argue that '[d]efendants' wrongful conduct has caused injury to Plaintiffs including, but not limited to, loss of business and personal time, travel, meeting with accountants and attorneys, professional fees and having to file this action.' But, ***even assuming that Plaintiffs accrued those expenses in an attempt to 'dispel uncertainty' about the debt, Plaintiffs have not put forward any explanation for why they need to clarify the identity of the beneficiary. Plaintiffs, as noted above, have not alleged that they were unable to make payments on their mortgage, or described what disputes they have been unable to resolve or legal protections of which they have been unable to avail themselves. Nor do they describe any future actions that they are unable to take without knowledge of the identity of the beneficiary. They do not allege that they had to leave their business to 'respond to improper payment demands,' as they do not allege that the payment demands were improper***. *Panag*, 204 P.3d at 901. Nor do they state that defendants have sought to collect monies not actually owed, as occurred in Panag. *Id.* Accordingly, Plaintiffs have failed to allege a CPA claim, as they have failed to allege causation and damages

Bakhchinyan v. Countrywide Bank, N.A., 2014 WL 1273810, *6 (W.D. Wash. 2014) (emphasis added). So too, here.

4. Plaintiff Cannot Establish Causation.

Plaintiff cannot show injury caused by Defendants, which defeats her CPA claim. There has been no foreclosure sale and Plaintiff offers no evidence that "but for" any allegedly deceptive action by Defendants that she would not have suffered any injury. *See Indoor Billboard*, 162 Wn.2d at 82. The foreclosure at issue here stems from Plaintiff's default, not any action by Defendants, and, thus, her CPA claim fails.

G. The Trial Court Properly Denied Plaintiff's Request for Additional Discovery.

Two and a half years after filing her Complaint, and three weeks after being served with Defendants' Motion for Summary Judgment, Plaintiff used one paragraph in her opposition to Defendants' motion to ask the trial court to continue Defendants' motion for additional discovery on an issue of law, namely "the issues surrounding the forged endorsement." CP 405-06. The trial court should deny a CR 56(f) request when: (1) the moving party fails to state what evidence it would establish through additional discovery; (2) the evidence sought would not raise a genuine issue of fact rendering delay and further discovery futile; or (3) the moving party fails to offer good reason for their delay in obtaining the evidence desired. *Molsness v. City of Walla Walla*, 84 Wn. App. 393, 400 (1997). Failure to meet one of these requirements is fatal and the timing of a motion for summary judgment is irrelevant to whether a continuance should be denied. *See e.g.*, *Manteufel v. SAFECO Ins. Co.*, 117 Wn. App. 168, 175 (2003) (denying request to continue motion for summary

judgment one month after filing of the complaint). The trial court properly denied Plaintiff's request for the following reasons:

First, delay for additional discovery "is not justified if the party fails to support the request with an explanation of the evidence to be obtained through additional discovery." *Molsness*, 84 Wn. App. at 400-401. "Vague or wishful thinking is not enough." *Id.* (holding trial court did not abuse discretion by denying continuance). Plaintiff must identify, by affidavit, specific evidence she will obtain that is necessary to oppose summary judgment. *See* CR 56(f); *Molsness*, 84 Wn. App. at 401. Plaintiff failed to present any such affidavit to the trial court. This failure by itself bars her claims here. Regardless, Plaintiff also failed to identify any specific evidence that she might uncover by delaying the motion for additional discovery. While Plaintiff claimed to require additional discovery regarding "the issues surrounding the forged endorsement" (Appellant's Br. at 47; CP 405-06), such evidence would not be in the possession of any Defendant, but rather, it would be in possession of Christina Butler—a current client of Plaintiff's counsel.[10] Thus, Plaintiff had ample time and opportunity to obtain discovery regarding the alleged unauthorized indorsement from Ms. Butler.

Second, the trial court properly denied Plaintiff's request for delay because Plaintiff did not and could not demonstrate that additional

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[10] *See In re Butler*, 2012 WL 8134951, *2 (Bankr. W.D. Wash) (rejecting the argument of the same Plaintiff's counsel that the holder of a note must also prove that it is the owner of the obligation).

discovery could raise a genuine issue of fact. *Stranberg v. Lasz*, 115 Wn. App. 396, 406-407 (2003). The mere possibility that discoverable evidence exists that may be relevant is not sufficient. *Molsness*, 84 Wn. App. at 401. Plaintiff did not and could not submit any facts surrounding the indorsement that would bear on what is a question of law—whether Flagstar has the right to enforce the Note securing the Deed of Trust.

Third, the trial court properly denied Plaintiff's request for delay because Plaintiff failed to offer good reason for her delay in obtaining the evidence desired. CR 56(f) is not intended to endorse inaction and delay. *Bridges v. ITT Research Inst.*, 894 F. Supp. 335, 337 (N.D. Ill. 1995) ("Rule [56(f)] is not to be used as a delay tactic or scheduling aid for busy lawyers"). "The failure to conduct discovery diligently is grounds for denial of a Rule 56(f) motion." *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1005 (9th Cir. 2005).[11] Plaintiff did nothing in this case for over a year—she neither noted a deposition nor submitted a single request for admission, request for production, or interrogatory. Indeed, Plaintiff waited until the deadline for responding to Defendants' Motion for Summary Judgment before asking the trial court for a continuance. As a result, the trial court properly denied Plaintiff's request for delay to conduct additional discovery.

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[11] Washington state courts interpret CR 56(f) consistently with its federal counterpart. *Turner v. Kohler*, 54 Wn. App. 688, 693 (1989) (looking to Fed. R. Civ. P. 56(f))

H. The Trial Court Correctly Allowed into Evidence the Declaration of Sharon Morgan.

Plaintiff contends the trial court erred by allowing into evidence and considering the Declaration of Sharon Morgan and its supporting documents in violation of CR 56(e). Appellant's Br. at 10-12. Plaintiff argues that although Ms. Morgan claims to have personal knowledge of all the facts contained within her declaration as well as familiarity with Flagstar's record-keeping practices, Flagstar submitted no evidence indicating how the records she refers to were prepared, kept, or transferred to Flagstar. *Id.* Moreover, Plaintiff contends Flagstar failed to state or otherwise establish Ms. Morgan's qualifications, the steps that Flagstar took to obtain information concerning Plaintiff's Note, the basis of the accounting for her debt, or the maintenance of Flagstar's records. *Id.* at 11.

CR 56(e) requires competent declarants with personal knowledge:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Thus, under CR 56(e), affidavits have three substantive requirements: (i) they must be made on personal knowledge, (ii) be admissible in evidence, and (iii) show affirmatively that the declarant is competent to testify to the information contained in the declaration. CR 56(e). The requirement of personal knowledge might require someone who signed or witnessed the signing of a document to establish its authenticity. Nevertheless,

Washington courts consider "the requisite of personal knowledge to be satisfied if the proponent of the evidence satisfies the business records statute." *Wells Fargo Bank, N.A. v. Short*, 2014 WL 1266304, *4 (Wn. App. Div. 3, 2014) (citing *Discover Bank v. Bridges,* 154 Wn. App. 722 (2010).

Washington's business records statute, RCW 5.45.020, states:

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Courts broadly interpret the statutory terms "custodian" and "other qualified witness" under the business records statute. *State v. Smith,* 55 Wn.2d 482 (1960); *State v. Ben–Neth,* 34 Wn. App. 600, 603 (1983); *State v. Quincy,* 122 Wn. App. 395, 399 (2004). Under the statute, the person who created the record need not identify it. *Cantrill v. Am. Mail Line, Ltd.*, 42 Wn.2d 590 (1953); *Ben–Neth,* 34 Wn. App. at 603.

More importantly, testimony by a witness who has custody of the record as a regular part of her work suffices. *Cantrill*, 42 Wn.2d 590; *Quincy*, 122 Wn. App. at 399; *Ben–Neth,* 34 Wn. App. at 603. Admissibility hinges upon the opinion of the court that the sources of information, method and time of preparation were such as to justify its admission. *Quincy*, 122 Wn. App. at 401; *Ben–Neth*, 34 Wn. App. at 603.

Computerized records are treated the same as any other business records. *Quincy*, 122 Wn. App. at 399.

Ms. Morgan's declaration squarely meets these requirements and is indistinguishable from evidence this Court has approved previously. For instance, in *Discover Bank v. Bridges*, Discover Bank relied on three affidavits from employees of DFS, an affiliated entity that assisted Discover Bank in collecting delinquent debts. The three affiants stated in their respective affidavits that (1) they worked for DFS, (2) that two of the affiants had access to the Bridges' account records in the course of their employment, (3) the same two affiants testified based on personal knowledge and review of those records, and (4) the attached account records were true and correct copies made in the ordinary course of business. *Discover Bank*, 154 Wn. App. at 726. The Court of Appeals rejected the Bridges' contention that the trial court improperly admitted the affidavits into evidence. *Id.*

Similar to *Discover Bank*, Ms. Morgan stated in her declaration that she has personal knowledge of and access to Plaintiff's loan documents. Moreover, Ms. Morgan states that she personally reviewed those records. CP 457-58, ¶ 3. She has personal knowledge of how Flagstar's business records were "ma[d]e, collect[ed], and maintain[ed] ... and "how each document attached to [her] declaration was retrieved and compiled." *Id.* While Ms. Morgan does not expressly state she was a custodian of the records, neither did the affiants in *Discover Bank*. Thus,

the trial court correctly allowed into evidence the Morgan Declaration and its supporting documents.

IV. CONCLUSION

Respondents Flagstar and MERS respectfully ask this Court to affirm the trial court's granting of summary judgment in its entirety.

RESPECTFULLY SUBMITTED this 2nd day of July, 2014.

Davis Wright Tremaine LLP
Attorneys for Flagstar Bank, F.S.B. and Mortgage Electronic Registration Systems, Inc.

By _____
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PROOF OF SERVICE

I declare under penalty of perjury that on this day I caused a copy of the foregoing document to be served upon the following counsel of record:

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Dated at Seattle, Washington this 2nd day of ~~July,~~ 2014.

Fred B. Burnside