73016-9

73016-9

No. 73016-9-I

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

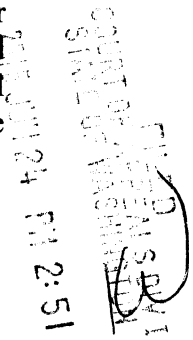
Lorina Delfierro,

Appellant,

v.

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

Respondents.



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

The Honorable Carol A. Schapira

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

The specific decisions for which review is sought are as follows:

1. Did the trial court incorrectly find that the Promissory Note that Ms. Delfierro had executed in 2007 was successfully conveyed to Mariners 4 in 2009?
2. Did the trial court err in finding that Mariners 5 then conveyed the Note to Pensco Trust Company Custodian IRA FBO Jeffrey D Hermann Account #20005343 in 2011?
3. Did the trial court err in accepting the Lost Note analysis presented by Defendants?
4. Was the trial court's final order, dated December 18, 2014 dismissing all of Ms. Delfierro's claims incorrect?
5. Did the trial court improperly find in Finding of Fact No. 7 that Mariners 4 purchased the beneficial interest in Ms. Delfierro's Note?
6. Did the trial court improperly find in Finding of Fact No. 8 that Mariners 4 actually purchased the beneficial interest in Ms. Delfierro's Note and that there was no evidence of impropriety? See Appendix, No. 8.

7. Did the trial court improperly find in Finding of Fact No. 9 that Mariners 4 purchased the beneficial interest in Ms. Delfierro's Note? See Appendix, No. 9.
8. Did the trial court improperly find in Finding of Fact No. 14 that Mariners 4 transferred the beneficial interest in Delfierro's Note to Mariners 5? See Appendix No. 14.
9. Did the trial court improperly find in Finding of Fact No. 16 that Mariners 4 transferred the original Delfierro' Note to Mariners 5? See Appendix, No. 16.
10. Did the trial court improperly find in Finding of Fact No. 18 that Mariners transferred the original Delfierro' Note to Robinson Tait, P.S. in 2011? See Appendix, No. 18.
11. Did the trial court improperly find in Finding of Fact No. 19 that Robinson Tait, P.S. received and maintained the original Delfierro' Note. See Appendix, No. 19.
12. Did the trial court improperly find in Findings of Fact Nos. 25-30 that Mariners and/or Robinson Tate P.S.ever had possession of the original note, when the testimony conceded that even the color copies of the Note were defective? See Appendix, Nos. 25-30.

13. Did the trial court improperly find in Finding of Fact No. 21 that "No Mariners employee has ever met or spoken with Mr. Hermann." See Appendix, No. 21.
14. Did the trial court improperly find in Finding of Fact No. 23 that transfer to PENSCO was an arms-length good faith transaction? See Appendix, No. 23.
15. Did the trial court improperly find in Conclusion of Law No. 3 that the causes of action brought against defendants were without factual support and were not meritorious. See Appendix, No. 3.
16. Did the trial court improperly find in Conclusion of Law No. 4 that Pensco was the beneficial owner of the subject Note? See Appendix, No. 4.
17. Did the trial court improperly find in Conclusion of Law No. 5 that Pensco had met the requirements of 62A.3-310 and that it proved that it is entitled to enforce the Note. See Appendix, No. 5.
18. Did the trial court improperly dismiss would be servicer Del Toro?

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court incorrectly admit into evidence two key Purchase and Sale documents[1] because insufficient foundation was laid at trial and because these documents were intrinsically defective? AOE 1,2.[2]
2. Did the trial court incorrectly admit into evidence these two key Purchase and Sale documents because these documents were never disclosed during the discovery process (though requested)? AOE 1, 2.
3. Did the trial court incorrectly admit into evidence-after testimony was complete and the parties had rested-two key Purchase and Sale documents? AOE 1, 2.
4. Did the trial court incorrectly conclude that an allonge relied on by Mariners 4 was effective in conveying Ms. Delfierro's note to Mariners 4? AOE 1.
5. Did the trial court incorrectly conclude that Mr. Hermann was a good faith buyer of the Delfierro Note for Pensco and therefore became a holder of the Note? AOE 1, 2.

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[1]The "Residential Mortgage Loan Sale Agreement" and the "Master Asset Sale and Interim Servicing Agreement."
[2] Assignment of Error.

6. Did the trial court mistakenly dismiss servicer, Del Toro Loan Servicing Inc., on summary judgment? AOE 18.
7. Did the trial court incorrectly apply the Lost Note analysis described in RCW 62A.3-309? AOE 3, 10, 11, 12, 17.
8. Did the trial court improperly analyze and present the Findings of Fact/Conclusions of Law?

III. STATEMENT OF CASE

A. Procedural Facts[3]

A number of parties associated with Delfierro's loan appear to have played a role in attempting to take her home from her. CP 1-102.

Second Mariners Investment Fund II, REO, LLC ("Mariners 4") [4] – argued that it became the holder of Ms. Delfierro's note in 2009 and therefore that it had rights in the Note. It wasn't until 2011, as she

[3] The facts and issues presented herein are outlined in the parties' testimony (RP 1-7), a number of the individual findings of fact and conclusions of law issued by the court (CP 750-760) and the first and second amended complaint (CP 1-102, 291-357.)

[4] The various Mariners organizations-all of which are operated by Mr. Steve Olson-are identified in the complaints in this matter as follows:
Mariners 1- Second Mariners Fund II, REO, LLC (It turned out that Mariners 1 was not an actual entity.)
Mariners 2- Mariners Investment Fund II, LLC
Mariners 3- Second Mariners Residential II, REO
Mariners 4- Second Mariners Investment Fund II, REO, LLC
Mariners 5- Mariners Investment Fund, LLC
Mariners 6- Mariners Strategic Fund, LLC

became more educated that she learned that Mariners 4 had no such rights. 2RP 134-137[5]. Ms. Delfierro filed the first comprehensive complaint in this matter in mid-2012.

The first amended complaint included claims against Equifirst, the original lender/broker, Mortgage Electronic Registration System, Inc. ("MERS"), trustees, servicers, notaries, sureties, the various "Mariners" organizations[6], Pensco Trust Company Custodian IRA Account Number 20005343 FBO Jeffery D. Hermann (hereinafter "Pensco,") ("the self directed IRA") and Jeffrey D. Hermann, (because he was "the Beneficiary" of the above-referenced IRA.) CP 1-102. 3RP 127,134,143. 4RP 31. Ex 41.

The principal defendants were Mr. Olson, Mr. Hermann and his IRA. In particular, there was Mariners 4 and Mariners 5. Last

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[5] Referenced transcripts are indexed as follows:
1RP- September 19, 2014, Summary Judgment Hearing
2RP- October 28, 2014, Trial day 1
3RP- October 29, 2014, Trial day 2
4RP- October 30, 2014, Trial day 3
5RP- November 3, 2014, Trial day 4
6RP- November 4, 2014, Trial day 5
7RP- December 8, 2014

[6] Mariners 1 alleged that it had purchased the Delfierro Note and Deed of Trust in April 2009 – shortly before the May 15, 2009 foreclosure. Ms. Delfierro did not know about any such efforts to purchase the note until she reviewed Mariners' proof of claim more than one year later – in June, 2010.

Hermann's self-directed IRA which is currently said to own the Note. 3RP 127, 134, 143. 4RP 31. Ex 3, 41, 116, 301.

Shortly after the first amended complaint was filed, motions were brought and a number of claims being dismissed. After discovery had taken place, a second amended complaint was filed. CP 291-351. Settlement occurred in August, 2014 with some parties. 1RP 2-3. Many claims remained and trial began on October 28, 2014.

Delfierro was principally pursuing Quiet Title and Consumer Protection Act claims against various defendants. Her principle argument: neither Mariners nor Pensco ever had any rights in her Note and Mariners and Hermann intentionally engaged in a concerted series of deceptions to ultimately take her home. CP 291-351.

The trial court accepted Mariners 4's and Hermann's arguments regarding conveyance of the Note.

The court issued Findings of Fact and Conclusions of Law which Ms. Delfierro argues are faulty. CP 750-760. 6RP 74-85. 7RP 7-30.

Ms. Delfierro is also appealing the court's dismissing a loan servicer by the name of Del Toro Loan Servicing on Summary Judgment that has retained funds that belong to Ms. Delfierro.

Thus far, Ms. Delfierro has retained her home. 1RP 15-17.

B. Substantive Facts

1. Events of 2006-2008

In 2006, Appellant Lorina Delfierro purchased the subject real property. Delfierro refinanced the property in 2007. 2RP 39-50.

The refinancing lender was Equifirst Financial Corporation ("Equifirst.") MERS was the "nominee beneficiary" and, of course, Ms. Delfierro was the borrower or grantor. 2RP 74-76. Ex 103 .

In 2008, Ms. Delfierro's ability to pay the $5,000.00 plus per month mortgage payment was compromised. 2RP 77-79.

Delfierro approached her servicer, HomEq[7] about a payment arrangement. That resulted in an increase of payment. 2RP 77-80.

HomEq transferred Ms. Delfierro's account to Specialized Loan Servicing ("SLS.") SLS was unwilling to work with the loan modifier. In the fall of 2008, Delfierro had to cease payments.[8] 2RP 80-83.

Although unknown to Delfierro then – it is now known that in August, 2007, Equifirst sold the loan to Sutton Funding, LLC. We also know that later in 2008 Equifirst and Sutton sold a package of loans,

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[7] HomEq was Ms. Delfierro's first loan servicer. (2RP 76-77.)

[8] Ms. Delfierro argues that she was current until the September, 2008 at which time she exercised an option – offered by HomEq – to miss her September payment. Things deteriorated after she missed the September, 2008 payment. (2RP 79.)

including the Delfierro loan – to a third party: FCDB FF1, LLC. 3RP 49-59.

2. Events of 2009

In contravention of the Washington Deeds of Trust Act (RCW 61.24) in 2009, MERS recorded an Appointment of Successor Trustee (AST #1) where it purported to make Fidelity National Title Insurance Company ("Fidelity") the new trustee.[9] 2RP 84-85. Ex 105.

Fidelity then recorded a Notice of Trustee's Sale ("NOTS #1") notifying Ms. Delfierro that foreclosure was set for May 15, 2009. 2RP 85-86. Ex 106 . MERS was identified as the foreclosing beneficiary.

On the day prior to the sale, Delfierro spoke with Fidelity, who assured her that her foreclosure would not be going forward. 2RP 87-88.

Despite the assurances offered by the trustee, the foreclosure actually occurred on May 15, 2009. 2RP 88. Ex 107.

A Trustee's Deed was issued in favor of MERS (given that it held the indebtedness secured by the Deed of Trust) and Mariners 1

[9] This appointment violated RCW 61.24.005(2) (and the recent holding in the Bain decision) which mandates that only the holder of the note – not MERS – is authorized to appoint a successor trustee. *Bain v. Metropolitan Mortgage Group, Inc. et. al.*, 175 Wn.2d 83 (2012.)

("Second Mariners Fund II REO, LLC.") as the new "owner" of the subject property.[10] Ex 107,120. 2RP 92-93. 5RP 14-17.

Mariners 1 filed an unlawful detainer action. 2RP 88-89. Ex 122.

Judge McDermott heard the case and found for Ms. Delfierro. The Judge ordered the foreclosure unwound and that the lien be restored to its' original lien position. 2RP 88-89, Ex 108, 109. 2RP 94-101.

3. Events of 2010

In early 2010 – the Mariners again tried to take Ms. Delfierro's home. 2RP 123-124. 3RP 12-13.

Ms. Delfierro filed for Bankruptcy during April, 2010 and was now seeing new names in the foreclosure papers – Mariners 3 and an entirely new party – American Default Management. ("ADM") 2RP 123-124, 5RP 20, Ex 5, 13.

A previously unknown organization – Mariners 4 – was now asserting that it had been assigned the Note and it filed a "proof of claim" with the Bankruptcy Court in June, 2010. Mariners 4 stated that it had purchased the Delfierro loan over a year earlier -in April, 2009. CP 479-216. 615-642, Interrogatory No. 11. Ex. 116. 5RP 18, 28, 33-35.

[10] Mr. Olson later testified that this Trustee's Deed along with some other documents prepared by Mariners contained mistakes. 5RP 13.

Mariners 4's Proof of Claim implied that Mariners 4 had indeed acquired the beneficial interest in the Delfierro Note from Equifirst in April 2009. CP 615-42, 44, Interrogatory No. 11, Ex 115, 116.

As noted, all of the actions taken by the Mariners organizations in 2009 were taken in the name of Mariners 1. Ex 107, 108, 109, 122.

Ms. Delfierro learned that the entity known as Mariners 1 had never existed in California, Washington or anywhere else.[11] CP 615-642, Interrogatory No. 6. CP 615-642, Interrogatory No. 9B. 5RP 13,16-18,20-25, 33, 55-56, 88.

4. Mariners 4 and Beneficial Interest in Delfierro Note

What did Mariners 4 gave up to obtain Delfierro's Note?

Ms. Delfierro does not know.

No information was provided by Mariners in their pleadings, discovery responses and/or their testimony. CP 615-44 Interrogatory No. 11. 1RP 85. 5RP 30-31, 85-89.[12]

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[11] Mariners argue that they inadvertently left out the word "Investment" out of Mariners 1's name and thus were mistakenly using the Mariners 1 tag rather than Mariners 4 tag throughout 2009: Mariners 1 - Second Mariners Fund II, REO, LLC. Mariners 4 – Second Mariners Investment Fund II, REO, LLC.

[12] No e-mail communications relating to negotiations to buy/sell the Note, no copies of checks or wiring instructions or anything that was financial in nature, no descriptions of negotiations; nothing except an allonge and a hopelessly incomplete sale agreement which was not disclosed until 2014 (to be discussed herein.) 1RP 85. CP 455, 491, 775. Ex 35.

5. Proof of Claim

In April of 2010, Ms. Delfierro still had no idea that Mariners 4 claimed to have purchased the note in 2009.[13] 2RP 104-108, 3RP 12-13

In 2010, Ms. Delfierro did not doubt what she had seen in her bankruptcy file – that Mariners 4 was asserting that it now owned the beneficial interest in her Note. Given the Mariners' proof of claim-filed on June 6, 2010, Ms. Delfierro – accepted that Mariners 4 had acquired rights in her Promissory Note[14]. 2RP 104-108. CP 479-516. Ex 116.

Specifically, Mariners 4's proof of claim consisted of the following documents:

- Mariners 4 Proof of Claim, bankruptcy claim form B-10;
- Altered copies of the Delfierro Promissory Note and Deed of Trust in favor of Equifirst (altered because certain information had been removed from the documents by the Mariners[15]);
- An allonge or "Note Endorsement" originally purported to have been executed by an Equifirst employee, Russ Ward. Previous to indicating as much in the Proof of Claim filing, the existence of this allonge had never been disclosed to Ms. Delfierro.[16]

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[13] In their discovery responses, the Mariners 4 stated that it had purchased the Note in mid-April, 2009 from Equifirst. CP 491, Interrogatory No. 16.

[14] Why? Because Mariners 4 had indicated as much in its proof of claim. In 2010, Ms. Delfierro did not yet understand many of the technical aspects of the process; as a result, at that time she accepted what Mariners said at face value.

[15] As was noted above, the loan documents had been altered by Mariners 4-apparently undeterred by the Federal Court mandate that filing a false claim could cost up to $500,000.00 and/or can lead to 5 years imprisonment.

[16] A review of the proof of claim documents reveals that this allonge was not physically attached or affixed to the note in a permanent way (as is expressly required

- Assignment of Deed of Trust (purporting to transfer the holder's interest in the Promissory Note and Deed of Trust to Mariners 4;)
- Declaration of Mr. Olson (filed with Mariners motion for relief from stay at the time of filing of the Proof of Claim.) Ex. 116.

The Master Asset Sale and Interim Servicing Agreement – was not included with Mariners 4's 2010 bankruptcy proof of claim filing. CP 407-411, 413-459, 479-516. Ex 3, 116.

The documents filed with Mariners 4's Proof of Claim did not prove that Mariners 4 owned the Note. CP 482-491. Ex 116.

Also filed at approximately the same time, Mr. Olson asserted in a declaration as follows:

"Movant is, the holder of, and has possession of the original endorsed note." CP 482-491. Ex 116.

6. Bankruptcy Events

Also in 2011, a number of bankruptcy related events occurred that should be considered here:

i. Cramdown

On April, 2010, Delfierro filed an adversarial action to determine the extent of the Mariners' lien. 2RP 104-108. 3RP 11-12.

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under the Washington version of the Uniform Commercial Code.) Another problem: the allonge is undated and doesn't make any reference to Ms. Delfierro's loan.

The court issued a cramdown order reducing Ms. Delfierro's secured debt from $572,281.63 to $325,000.00. 2RP 133-142.

Mariners later appealed this decision and lost.

ii. Stipulation and Ms. Delfierro's Self Education

On October 18, 2010, a stipulation was entered into by Ms. Delfierro and Mariners 4. Delfierro agreed to pay into the Bankruptcy Court because she still had no reason to doubt that Mariners 4 held her Note. 2RP 131-133. Ex. 147.

The parties agreed that Mariners 4 would receive $2,780.68 per month including $2,174.25 for principal and interest and $606.43 would be applied for property taxes and to keep insurance current on the home. 2RP 131-133. Ex 147.

Ms. Delfierro dutifully made these payments including a large back payment of approximately $16,000 to cover her pre-stipulation obligation. 2RP 131-133. Ex 147.

Unfortunately, Ms. Delfierro later learned that defendants had failed to pay some of the property taxes and all of the insurance. Ms. Delfierro was forced to pay a second time to keep insurance on her house. 2RP 133-142. Ex 147.

When she learned of this, Delfierro became extremely frustrated and studied all aspects of this case. She retain an expert to help her understand the case. CP 615-642 Interrogatory No. 6. 2RP 136-137.

By mid-2012, Ms. Delfierro concluded that Mariners 4 was not the legitimate holder of her Note and instead a series of mistruths had been perpetuated to her detriment. 2RP 135-142.

She chose to remove the case from Bankruptcy where she brought an action for damages, i.e. the current action. 2RP 138-139. Ex 164.[17]

7. Mariners Sell Note to Pensco

In 2011, Mariners still, purporting to have purchased the Note in 2009, attempted to sell the Note to Mr. Jeffrey Hermann's IRA. CP 750-760. There were a number of problems.

Mariners 4 said that it transferred the Note to Mariners 5. 2RP 66-67, 5RP 77-78, 7RP 14-17. The Findings of Fact and Conclusions of Law incorrectly state as follows re: the transfer to Mr. Hermann's IRA:

> **On May 23, 2011, Mariners Investment Fund, LLC, the beneficiary of Ms. Delfierro's loan at the time and the holder and owner of the original Note, which was endorsed in blank, sold the beneficial interest in Ms. Delfierro's loan to Pensco Trust Company**

[17] This was done at the cost of the "cramdown" advantage that she had obtained.

Custodian FBO Jeffery D. Hermann, IRA Account Number 20005343 ("PENSCO") for value in an arms-length transaction via a neutral third-party broker and facilitator, LoanMarket.net.

This sale from Mariners Investment Fund, LLC to PENSCO was the only transaction between any Mariners Entity and Jeff Hermann or PENSCO acting as his IRA custodian. No Mariners employee has ever met or spoken with Mr. Hermann.

The system that LoanMarket.net has established for the sale of mortgage loans is specifically designed to prevent sellers and buyers from identifying each other to insure LoanMarket.net makes a commission on the sales. The buyer and seller only learn the identity of the other party when a purchase and sale agreement is distributed for signature.

The sale from Mariners Investment Fund, LLC to PENSCO was a good faith, arms-length transaction in which PENSCO paid value for the beneficial interest in the Note and Deed of Trust. There was no evidence presented of any impropriety or collusion in any aspect of this sale. There is no factual or legal basis to question the bona fides, much less unwind this transaction. Mariners Investment Fund, LLC was not unjustly enriched in this transaction. This transaction was not an illusory sale.

CP 750-760.

8. Lost Note/Findings of Fact Conclusions of Law Issues

Just before trial, Defendants learned that the subject Note was lost. Over Ms. Delfierro's objections, the court allowed testimony on the lost note issue.[18] CP 690-734, 750-760.

Mariners submitted affidavits which weren't admitted. Additionally, Mariners/Pensco offered a number of previously undisclosed witnesses to address the lost note issue. The following are some core facts relating to the lost note issue:

- Mariners/Hermann counsel allege that they obtained the original Note in 2011 for possible use at the cramdown hearing.
- Defendant assigned the Note to the Pensco IRA in 2011 while bankruptcy proceedings were ongoing.
- Counsel sent the note back to Mariners in 2012 (oddly, this was done even though Pensco IRA owned the Note at the time.)
- The Note was then lost while in possession of the Mariners.
- Counsel discovered in 2014 that the Note was lost-the Note that-at the time-belonged to Hermann's IRA.

[18] The Lost Note materials and the witnesses were introduced well after discovery cutoff and the cutoff mandated by the scheduling order in this case.

As is discussed herein, the IRA can't make use of RCW 62A.3-309 because – even though it may have owned the Note – it did not have the Note in its possession at the time it was lost.

Also as noted, this transaction wasn't conducted in good faith and Mariners did not hold the subject Note and had nothing to convey.

9. Del Toro Servicing Issues

Del Toro acted as servicer for Hermann and was sued on an Unjust Enrichment theory. 1R 15-17, 73-74, 90. 2R 31-38, 50-52, 33, 138-144. 3R 5-6, 38, 145-146. 4R 13-15, 64-65, 114-115.

Del Toro, although never listed as servicer, took money from BSI, the previous servicer and it took money from the court and kept some funds. This money should be returned to Ms. Delfierro.

A demand has been made, however, Del Toro refuses to return the funds. Del Toro was sued as part of this action and was dismissed on Summary Judgment. Ms. Delfierro is appealing this dismissal and asks the court to review the court's dismissal.

IV. ARGUMENT

Did Mariners 4 ever established that it had obtained rights in the Promissory Note? No. CP 479-516. Ex 116.

The allonge was defective and thus, Mariners 4's never became holder of the Note.

Thus, Pensco cannot own the Note and it was a mistake to conclude otherwise.

A. Issues Related to 2009

Recall that in 2009, it was Mariners 1 that took a series of actions to foreclose on the subject home.[19] Ex 106, 107,109,120, 122.

Close study of the events in 2009 warranted because these events establish Mariner's all too frequent errors and its' brazen attitude; Also its' constantly acting outside of the rules to get the property.[20]

Mariners were ultimately rebuffed by Judge McDermott. Ex 109.

Indeed, Mr. Olson later conceded that there was no Mariners 1. Ex 297, Answer to Interrogatory No. 6.

B. No Transfer via Allonge

In its' proof of claim, Mariners 4 asserted that it owned the Note, Deed of Trust via the allonge. Ex 116, 301. 1RP 69-70.

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[19] Mariners 1 was not a legally, cognizable entity and therefore this was not appropriate.

[20] During 2009, Mariners 1 actually filed a lawsuit, obtained and recorded a Trustee's Deed and submitted an excise tax affidavit to the Department of Revenue – admittedly all in the name of a non-existent entity known as Mariners 1. 5RP 13, 16-18, 20-25, 55-56, 88.

Indeed, Delfierro did not even know until June, 2010 – when she reviewed the bankruptcy file – that Mariners 4 was relying on an allonge which had been used to support the original transfer from Equifirst to Sutton.[21]) CP 491. 1RP 69-70. 2RP 41-43, 107, 125. 3RP 12-13, 25.

Mr. Steve Olson laid virtually no foundation for this document.

The allonge is not permanently affixed to the Note and it is not dated. We question whether it is legitimate, what it is and what it does. CP 459, 491. Ex 35.

Unaffixed allonges have been dealt with previously.

In *Adams v. Madison Realty & Dev., Inc.,* 853 F.2d 163 (3rd Cir. 1988) the court held that the purchaser of a series of promissory notes containing endorsements on separate sheets of paper was not entitled to holder in due course status because the endorsements failed to meet the Uniform Commercial Code's fixation requirement. *Id.* at 164, 168-69. There the court relied on the wording of the UCC. The court relied on UCC section 3-202(2)[22] and held as follows:

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[21] There was no such witness present at trial that could rigorously establish foundation by explaining the purpose of the allonge and how it came to be.) CP 407-411,455-459, 479-516. Ex 301, Ex.116. 1RP 69-70, 5RP 40-41.

[22] The analgous Washington statute is RCW 62A.3-204 and it provides in part as follows: "For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument."

> **"An endorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become apart thereof." Id at 165. Since the endorsement page, indicating that the defendant was the holder of the Note, was not attached to the Note, the court found that the note had not been properly negotiated. *Id.* at 166-67. Thus, ownership of the Note was never transferred to the defendant. Applying that principle to the facts here, GMAC did not become a holder of the Note due to the improperly affixed special endorsement.**

That court also held as follows:

> **"the Code's requirement that an endorsement be "firmly affixed" to its instrument is a settled feature of commercial law, adopted verbatim by every American state. . . .Id. at 167.**

For the endorsement to be considered to be part of the Note, the rule is, the allonge must be a "paper affixed to the instrument." A.R.S. § 47-3204; see also *In re Nash,* 49 B.R. 254 (Bankr.D.Ariz. 1985).

Here, the evidence clearly demonstrates that the endorsement was not firmly affixed to the Note. See the Note and Allonge where it is evident that there are no clip marks, folds or glue marks which are necessary to meet the "firmly affixed" requirement. The endorsement is on a separate sheet of paper. CP 455-459, 482- 491. Ex 35.

The most recent articulation on the issue of endorsements is found in *In re Barry Weisband*, 427 B.R. 13 (Bkrtcy.D.Ariz. 2010)

where the creditor GMAC was attempting to establish that it had standing to pursue debtor Weisband. That court found as follows:

> **Under Arizona law a holder is defined as "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." A.R.S. § 47-1201(B)(21)(a).**
>
> Id. at 18.

Consider the following holding in that case:

> **GMAC has failed to demonstrate that it is the holder of the Note because, while it was in possession of the Note at the evidentiary hearing, it failed to demonstrate that the Note is properly payable to GMAC. A special endorsement to GMAC was admitted into evidence with the Note. However, for the endorsement to constitute part of the Note, it must be on "a paper affixed to the instrument." A.R.S. § 47-3204; *see also In Re* Nash, 49 B.R. 254, 261 (Bankr.D.Ariz. 1985). Here, the evidence did not demonstrate that the endorsement was affixed to the Note. The endorsement is on a separate sheet of paper; there was no evidence that it was stapled or other attached to the rest of the Note.**

Weisband quotes Nash as follows:

> **There is simply no indication that the allonge was appropriately affixed to the Note, in contradiction with the mandates of A.R.S. § 47-3204. Thus, there is no basis in this case to depart from the general rule that an endorsement on an allonge must be affixed to the instrument to be valid.**
> Emphasis added.

The Nash court held that GMAC could not overcome the problems with the unaffixed endorsement by its physical possession of the Note because the Note was not endorsed in blank and, even if it was, the problem of the unaffixed endorsement would remain. GMAC had to show that endorsement was proper to be a holder.

There is nothing here that demonstrates this so-called allonge was firmly affixed to the subject Note. CP 455-459, 482-491. Ex 35.

The Mariners was not a holder as defined in the UCC.

The witness presented by Mariners to testify on this issue was Olson, who simply put did not – or could not – provide any foundation regarding the allonge. CP 482-491, 455-459. Ex 35. 5RP 40-41.

C. Document Deficiencies Mean that There was No Transfer

Mariners 4's problems disclosing documents were unremitting. In fact, they never provided the original Note.

Here, rights in the Note were not transferred to Mariners because the Lost Note Analysis was incorrect. 2RP 47-49.

Delfierro sued Mariners 4 and Hermann because she concluded that neither party had acquired the Note. 2RP 39-45.

Frankly, defendants have never proven otherwise. [23]

To establish that it held the Note, Mariners 4 had to establish that it had, acquired the Note and that it later properly endorsed or conveyed the Note to the IRA .

Consideration of the Mariners 4's motion for summary judgment is highly instructive here.1RP 86-93.

Shortly before trial, Mariners 4, seeking to get all of Delfierro's claims dismissed, moved for Summary Judgment. CP 352-384, 389-463. 1RP 36-45, 71-73.

Mariners 4 filed a document previously referred to as "Master Asset Sale and Interim Servicing Agreement." CP 413-459. Also Mariners submitted a document entitled "Residential Mortgage Loan Sale Agreement" with Hermann's declaration. Mariners was trying to show it legitimately conveyed the Delfierro Note to Hermann's IRA. Ex 41.

Neither the "Sale" agreement nor the "Interim Servicing" agreement should have been admitted. [24] Ex 3, 41.

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[23] For the reasons articulated above, at trial in this matter, Mariners 4 did not establish that it was a holder of the Delfierro Note and therefore that it was not capable of later conveying the subject Note to Mr. Hermann. To establish that it was the holder of the Delfierro Note, Mariners 4 had to produce the Note with a properly affixed allonge, instead it relied on late disclosed, and legally insufficient, documents not to mention the unaffixed allonge.

At the summary judgment hearing, Ms. Delfierro objected to late submission of these documents. 1RP 56. 2RP 13-26. 3RP 42-47. 4RP 34-52. 5RP 67-68 .

Mariners and Hermann had violated both the Civil Rules and King County Local Rules as to timely discovery responses. (Late disclosure clearly violated the case scheduling order issued by the court in January of 2014.[25]) CP 612-613.

The Court was clearly troubled by the late introduction of these documents and even worse, the documents were not fully signed or complete. Even at this late date, not only were the documents not fully executed, they were replete with blanks and didn't include cited attachments. CP 479-516, 615-644. 1RP 9-15, 2RP 68-69.

Additionally, Judge Schapira believed that it was "weird" that these documents – and introduction of new parties : "Fortress" and "FF1" was occurring now after two years of litigation.

Though the Court did not issue a formal ruling at the Summary Judgment hearing, it was clear that the court was not going to admit or consider these documents. 1RP 9-15.

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[24] Making matters worse, these documents surely should not have been admitted after the parties had rested.

[25] The subject documents were also defective in a number of other respects-to be discussed shortly.

Consider the following September 19th exchange:

THE COURT: **Can I dig below this? Because –**

MR. SOLSENG: **Sure. If the Court's not concerned about that, then we'll accept that.**

THE COURT: **I'm not concerned about it, but I had never heard of Fortress, either. I'm not going to say everything is stored up here in a brilliant order. I had never heard of Fortress. As you know, I've walked through the bankruptcy. I didn't look for anything in particular other than what has been pointed out to me. Why are we hearing of — are they the FDNC? I thought that was —**

THE COURT: **-- it's weird to have a new name pop up. People are now calling them -- you're not the only one. Mr. Herman, I think, also talks about the Fortress entities.**

MR. SOLSENG: **Right.**

THE COURT: **What? Where did these new people — we didn't need any more parties, so I'm not hurt that we didn't have another party here, but it is a little weird for a transaction that we have talked about for two or three years and looked at with a pretty high-intensity microscope that there is a new name thrown out here,**

MR. SOLSENG: **Well, they were never named by**

the Plaintiff. They were never brought in to the case. They –

THE COURT: **But Sutton, we've talked about. We've, you know, had lots of summary judgments.**

MR. SOLSENG: **Right.**

THE COURT: **Everybody was looking very closely at one another, weren't they –**

MR. SOLSENG: **Right, yes.**

THE COURT: **-- right, and describing it? This is the first pleading that I can remember where somebody said, "Well we bought it from Fortress," or "Fortress was," — (Emphasis added.)**

MR. SOLSENG: **But that was — there's only a brief period of time, approximately three months. I misunderstood. There was a miscommunication between me and Mariners as to from whom they purchased the deed of trust.**

. . . . . .

THE COURT: **They don't have to be enjoined, but it is weird, again, after so many motions to dismiss and so many summary judgments from so many people who were servicing this loan. I mean, I don't expect to know the notaries in California to know everything about somebody else's transaction, but it's a little weird that I didn't know it. So I can't say that I disagree with the**

Plaintiff's position.

(Emphasis added.)

MR. GREENBERG: **A third notion – I objected to this one document being admitted because it had not been provided to us. And it's the master assets sale and interim servicing agreement between a number of entities and Mariners IV. It hadn't been given to us. You know, we had a discovery cut-off. To my way of thinking, after cajoling Mr. Solseng, I would get more information. But this is a document that had never been given to us.**

1RP 9-12.

The Mariners and Hermann correctly believed that they needed to establish a "chain" of conveyances – something they could not do without the heretofore undisclosed documents.[26]

Not only was the court's scheduling order violated re: discovery cutoff, Mr. Solseng conceded at trial that he had only received signed copies of the "Residential Mortgage Loan Sale Agreement" on October 29, 2014, the second day of trial. (The next time the issues came

[26] Because – as Plaintiff argues – the allonge was defective, Ms. Delfierro argues that they can't establish a chain even with the undisclosed documents.

up, with the court's permission, Mr. Solseng replaced the pages containing "blank" signatures –with signatures.[27]

The court expressed its concern. 4RP 43-45, 47-48, 51-52.

This case had been proceeding pursuant to the amended case scheduling order that had gone into effect on January 30, 2014.

This cutoff was not discretionary, it was an order. CP 612-614.

The repartee regarding the above-referenced documents came up each day of trial and defendants' offer was rejected at every turn – until after the parties rested. Ex 3, Ex 41. 1RP 56. 2RP 13-26, 68-69. 3RP 42-72. 4RP 34-52. 5RP 67-68. 6RP 5, 23.

D. Mariner's Discovery Defects

So as to adhere to the scheduling order issued by the court, Ms. Delfierro had propounded discovery to the Mariners organizations and Hermann, and Pensco (as well as many of the other defendants) always well in advance of the discovery cutoff – August 18, 2013.[28]

[27] Mariners had since 2009 to present the executed document-assuming that it had been legitimately executed, of course.

[28] All of the many other defendants in this matter adhered to the scheduling order – they either propounded or responded to discovery well in advance of the discovery cutoff.

i. Mariners Entities

On or about November 8, 2013, Mariners provided late responses to the Delfierro Interrogatories and Delfierro's Requests for Production of Documents. CP 615-642, 644. Ex 297.

The responses were grossly inadequate. A copy of Mariners 1 responses is referenced. Ex 297.

For example, Ms. Delfierro's Interrogatory No. 3 asked Mariners to identify *anyone* with knowledge regarding the issues covered in the Delfierro lawsuit. Mariners responded by simply regurgitating the list of party defendants identified in the caption that was in place at the time of the lawsuit. The responses made no mention of Fortress or FCDB SNPWL TRUST or FCDB FF1 LLC.

Similarly, in Interrogatory No. 10, Mariners were asked to identify all communications with any other person or entities identified in the Mariners' responses as having knowledge. No mention was made of communication with Fortress, FCDB SNPWL TRUST or FCDB FF1 LLC, simply put, the parties weren't identified until just before trial when the Mariners attempted to admit documents.

Indeed, throughout the course of the discovery process, no mention whatsoever was ever made regarding the "Master and Servicing

Asset Agreement" or the "Residential Mortgage Loan Sale Agreement." The same was true for the lost Note. Ex 3, 35, 41. The same was true for Fortress and FCDB FF1 LLC.

In response to Interrogatory No. 10, no mention was made by Mariners as to any party it had communicated with in association with these agreements. The same was true regarding witnesses associated with "Fortress." Ex 3, 41. 2RP 68-69. 3RP 42-47. 4RP 34-40.

Regarding the production of documents propounded to them, Mariners stated that with a few exceptions – not relevant here – it had provided copies of all of its business records (120 pages had been provided, the vast majority of which were related to the closing documents on Ms. Delfierro's 2007 original refinance and also provided were multiple copies of the original Note and Deed of Trust.) Ex 297.

Essentially, Ms. Delfierro had asked the very kinds of questions which clearly should have elicited the information contained in both of the above-referenced agreements.

Yet during discovery Ms. Delfierro received nothing relating to these newly disclosed parties and documents.

Because of the marked inadequacies in Mariners' original responses, Ms. Delfierro's counsel was forced to issue a lengthy letter to

Mariners in April 2014 demanding complete supplementation – so as to provide other information that Mariners might have.[29] CP 645-652.

In response, counsel received a brief email and a six page attachment (additional documents) –documents which had nothing to do with Fortress or the other two key documents discussed above. The six pages of attachments were Mariners 4's only attempt to supplement its responses. CP 653-660. 1RP 33, 84-86. 2RP 14-22.

ii. Hermann

What was said about Mariners is also true of Mr. Hermann, who –like the Mariners –originally produced a paltry and inadequate set of discovery responses. Ex 208.

Fortunately, Ms. Delfierro had independently propounded a subpoena to Pensco itself, the actual holder of Hermann's IRA account. Fortunately Pensco provided a full production of documents and responses. Ex 208. 4RP 15-30.

This was even though these kinds of documents were well within the purview of the discovery requests that had been propounded.

[29] Mariners' lack of responsiveness caused Appellant to conclude that a good deal of discoverable information was being withheld.

Despite all of these infirmities, the purchase documents were admitted at the end of trial. Ex 3, 41. 6RP 5-23.

Frankly, this was a grievous breach of the discovery rules.

iii. Documents Were Not Admissible Because of Foundation Issues

First, at the time of the summary judgment motion, the Master Asset Sale and Interim Servicing Agreement was unsigned. During trial, Mariners obtained signatures. (They had five years to obtain signatures, yet no signatures were provided until after trial had begun.)

Note Exhibit 2 – Mortgage Loan Documents. Again, note the "blanks." And no attachments. This calls for provision of the original Notes, Assignments of Mortgage, Guarantees or in this case Deeds of Trust and intervening assignments. None of these materials were provided.

iv. Legal Analysis of Discovery

The rules of discovery are instruments intended to "make a trial less a game of blind man's bluff and more a fair contest" with the basic issues and facts disclosed to the fullest practicable extent. *U.S. v. Proctor & Gamble Co.,* 356 U.S. 677 (1958).

CR 26(b)(1) states in part as follows:

> **Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of the party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.**

Regarding the meaning of discovery obligations, CR 37(g) provides as follows:

> **Failure of Party To Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Production or Inspection. If a party fails; (2) to serve answers or objections to interrogatories submitted under rule 33; or (3) to serve a written response to a request for production of documents or inspection submitted under rule 34, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under sections (A), (B), and (C) of subsection (b)(2) of this rule.**

Frankly, Mariners (and Olson) and Pensco (and Hermann) made a mockery of the discovery rules.

Pursuant to CR 37 the court "may make such orders in regard to the failure as are just..."

In this case, given the various failures, these documents should not have been admitted. Additionally, there should have been no testimony allowed as to Fortress, FF1 and SNPWL.

Consider *Idahosa v. King County* 113 Wn.App 930 (2002), where Idahosa argued that it was improper for the court to dismiss her claims because of her discovery violation and/or her failure to comply with the case schedule.

Instructive to this case, the court there held as follows:

> **The trial court has considerable latitude in managing its court schedule to ensure the orderly and expeditious disposition of cases. Woodhead v. Disc. Waterbeds, Inc., 78 Wn. App. 125, 129, 896 P.2d 66 (1995); Wagner v. McDonald, 10 Wn. App. 213, 217, 516 P.2d 1051 (1973). Here, given the trial court's observations of Idahosa's dilatory pattern, the lateness and size of the response, and a pending trial date less than two months away, we cannot say that it was an abuse of discretion to refuse to accept the untimely response or to strike it as untimely. See King County Fire Prot. Dist. No. 16 v. Hous. Auth. of King County, 123 Wn.2d 819, 826, 872 P.2d 516 (1994) (trial court's ruling on motion to strike is reviewed for abuse of discretion); Analytical Methods, Inc. v. Dep't of Revenue, 84 Wn. App. 236, 244, 928 P.2d 1123 (1996) (same).**

Also consider *Washington State Physician's Insurance Exchange v. Fisons Corporation,* 122 Wn.2d 299 (1993) where the court held in dicta as follows:

> **The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." Hickman v. Taylor, 329 U.S. 495 (1947). Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake.**
>
> . . .
>
> **. . . Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. . . .. . .**
>
> **There, as here, there was concern about important documents not being disclosed.**

v. Prejudice to Ms. Delfierro

Throughout the pre-trial discovery process, Ms. Delfierro consistently believed – that Mariners persistent failure to produce any documentation to support its' so-called purchase would lead to its demise.

In discovery, Mariners (and later Hermann) showed nothing: no agreement, no checks or money transfers, no e-mail exchanges between the buyer and seller addressing the negotiation process. Perhaps, most importantly, during the entire pre-trial process no contract or purchase or sale agreement was ever presented.

Without it they only have a defective allonge.

Ignoring the marked lack of foundation as to both of these documents, admission was vital to Mariners' case.[30]

During that September 19th summary judgment hearing, the Court repeatedly characterized defendant's newly disclosed information as "weird" (because in the almost two years prior to this hearing, Fortress nor any of the other entities referenced in the Mariners'' agreement had previously been identified or even referred to.)

If the "support documents" were not admitted, the outcome was clear: Mariners could not establish a necessary link in the chain; it could not establish with any reasonable foundation that it held the Note.

(This is ignoring the amazing fact that Mariners – never supplied the agreement to the bankruptcy as part of its' proof of claim.

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[30] In the months leading up to the summary judgment hearing, a number of Ms. Delfierro's claims had been dismissed via motions to dismiss and summary judgment. But Ms. Delfierro's claims highlighting Mariners 4's lack of proof of transfer of the Note was completely intact.

E. Lost Note Issues

The trial court erred in accepting the Mariners/Pensco claim of lost Note presented by defendants. [31]

Ignoring for the moment that the Lost Note Affidavits – like the Purchase and Sale documents discussed previously – violated the discovery cutoff, note that the lost note materials were presented two court days before trial. They were untimely and should be stricken.

Besides the fact that they were not timely, the "Affidavit of Lost Note" documents/testimony presented make it clear that defendants failed to comply with RCW 62A.3-309.

Subparagraph a of RCW 62A.3-309 provides in pertinent part as follows:

> (a) **A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred,.**

[31] The Findings of Fact/Conclusions of Law are replete with mistakes as they relate to the "Lost Note" issue (and other issues.) Hence, Ms. Delfierro asks the Court of Appeals to strike the findings and order that they be redone in a maner consistent with the testimony that was presented. A lost note affidavit is a non-judicially created or approved document and where it is done properly, the affidavit physically replaces the missing note in cases where employment of this statute is appropriate. For reasons articulated above, use of this statute is not appropriate in this case. See RCW 62A.3-309.

The person required to make a lost note affidavit is identified in section RCW 62A.3-309(b) as follows:

> **(b) "A person seeking enforcement of an instrument under subsection (a)....**

Given this language only the current holder of the instrument can make a claim in regards to enforcing a lost Note.

According to their own testimony the Note was in the possession of the Mariners when it was lost. Also according to their testimony the holder of the note at the time was the IRA.

Pensco – the party that is alleged to have purchased the Note from Mariners 5 in 2010 – does not meet the requirements of RCW 62A.3-309(a) because – by Mariners' own admission – Pensco never had possession of the Note. 3RP 111.

As a result, this court should strike the portions of the decision and findings of Fact/Conclusions of Law where it accepted the Lost Note analysis as well as other portions of the Findings that are clearly incorrect.

In this action, the actual entity that alleges to have met the requirements of section (b) of the Lost Note statute is the Pensco Trust Company as Custodian.

The very purchase and sale agreement that the Mariners have so far been successful in getting admitted identifies the party obtaining the Note as Pensco. Ex 41.

Consequently, as of May 2011, Pensco was the alleged holder/owner of the Note. (Pensco is the approved IRA custodian.) Even a quick review of the caption established that Pensco itself is not a party to this suit and, contrary to claims made by defense counsel, Pensco was not represented by counsel in this litigation because it wasn't Pensco that was sued. It was the IRA that was sued. See caption on Page 1 of this brief.

Robinson and Tait, did not forward the note to Pensco as required by the new owner. 3RP 111. Instead, it held the note for 14 months and then for reasons never fully explained, it allegedly sent it to the Mariners Companies (where it was later claimed to have been lost.) 3RP 114.

Importantly, note that counsel for Mariners represented Hermann in his individual capacity but he did not represent Pensco the company (and custodian) of the IRA account, the real player in this litigation. See Caption on page 1.

F. Closing Arguments on November 4, 2014

On November 4, 2014, after all of the testimony in this matter had been taken – and the parties had rested – closing argument ensued. The trial court, after being badgered ceaselessly each day of trial by defendant's counsel, finally granted defendant's request to admit the two key, but hopelessly defective documents: Master Asset Agreement and the PENSCO Purchase and Sale Agreement. 6RP 5-23.

This time, Mariners' counsel stated – rather than suggesting as he had done previously – that he had actually sent these key document to Ms. Delfierro's counsel in conformance with the discovery rules.

The truth is Mariners/ Hermann did not disclose or send the two above-referenced documents until counsel received the Mariners' motion for summary judgment – after the discovery cut off. 1RP 109-112.

As an officer of the court, Delfierro's counsel – on each occasion where the issue came up – strenuously objected. 1RP 9-12. 6RP 5-23.

Before, without admission of these late disclosed documents, there was no credible way for Mariners to make any such argument.[32]

[32] There are numerous other fatal defects which are discussed herein. Excusing the defects listed above, Mariners never obtained an interest in the Note because the original Note was made by Ms. Delfierro for the benefit of Equifirst. The Allonge said

Out of the blue – the two primary defendants came up with these two contracts (which at the time contained no signatures.) Subsequently, during trial they apparently got signatures – who knows when or how such signatures were obtained or if defendants are lying. To suggest that this was not prejudicial – as defendants do – is nonsensical.

Ms. Delfierro argues that it was inappropriate and reversible error for the Judge to decline to admit this document on each occasion when it was presented and then – after testimony was complete – to then allow it to be admitted. As noted above, to do so was highly prejudicial.

These documents should not have been considered or allowed.

G. Defects in Subject Document

Unrefuted testimony of former Equifirst employee Ms. Stacy tells us as follows: in August, 2007 Equifirst sold the Delfierro loan to Sutton. In September, 2008 Sutton sold the loan to FCDB FF1, LLC., 3 RP 49-59. At trial, Mariners 4 originally produced the unsigned document which it says proves that it purchased the Delfierro Note in

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to transfer said Note was defective. Originally, Equifirst lent money to Appellant and as such it was the original beneficiary. It is noted, that the beneficial interest was transferred to Sutton and later the Note went to FCDB FF1, LLC.

April of 2009. The first page of this exhibit identifies a series of sellers, none of which are FCDB FF1, LLC, the prior holder of the Note.[33]

Mariners try to obscure the situation by continually invoking the name "Fortress." Ultimately, there is absolutely no traceability.

Consider also that Mariners untimely produced the very agreement which makes no reference whatsoever to the Delfierro Note and it speaks to its having purchased the Note from entities other than FCDB FF1, LLC, the last known owner of the Note.

Of critical importance, Mariners adopted the term "Fortress" to represent these transactions. The name Fortress had never come up before the summary judgment motion.

This is why the Judge was so troubled at the Summary Judgment Hearing and later, at trial. (She only relented after the parties had rested and before closing arguments.)

There is no accountability for any of the transactions that were said to have taken place.

Regarding Mariner 4's so-called actual purchase of the note, it offered only Mr. Olson's declaration and testimony which provide no

[33] The entities identified on the first page of the Purchase and Sale Agreement are each legal entities – either Trusts or LLC's. Where does it say "Fortress"?

proof that the transaction ever took place (even ignoring the fact that the wrong parties were identified.)

On page ii of the Master Sale agreement is shown 5 exhibits including, Exhibit 1 Form of Assignment and Exhibit 2 Mortgage Loan Documents. All of the exhibit pages were entirely blank, even the signature pages. In keeping with this blatant incompleteness, there are no groups of attachments. Ex 3.

Mr. Olson testified, but he was off the stand before the document was admitted. There was no way to test his knowledge because the parties had rested. Not only was this document hopelessly incomplete, no fundamental foundation was laid for this by Mr. Olson. Mr. Olson was examined by Mr.Solseng and he did not seem to be familiar with the Note and he did not know if the Note was endorsed in blank. 5R 69.

As the court knows, under ER 901 documents are admissible to prove the existence of a disputed fact, that the evidence is relevant, is not otherwise inadmissible and is property authenticated, i.e. the item is what the proponent claims it is.

Authentication thus promotes accuracy or fact – finding by excluding documents that might be false or otherwise unreliable. *United States v. Perlmutter,* 693 F.2d 1290, 1292-1293 (9th Cir 1982).

This late disclosed documents were unsigned – although the court allowed a later supplied signature page to be substituted – makes no reference whatsoever to the Delfierro Note.

Third, the document – is not considered in a vacuum. See Exhibit 2 which calls for production of all appropriate documents. Not one of these documents was supplied.

There was no proof of Mariners' interest in the Delfierro's Note.

V. CONCLUSION

The Court of Appeals is asked to reverse the decision of the trial court in this matter and remand with appropriate instructions.

As noted at the outset, when everything is stripped away, the case becomes straightforward. Defendants are trying to argue that the Delfierro note was endorsed in blank and therefore it was conveyed to Mariners who then conveyed the Note to the Pensco IRA.

The problem is that the allonge was not firmly affixed in a way that passes muster with precedent. To do so, it must be stapled or glued. There is ample guidance provided in In re Weisband and Adams v. Madison Realty. A review of Exhibit 115 reveals that the allonge was simply placed in a notebook. Under the rulings described above, this is not adequate.

This means that – under the authority cited herein – the conveyance never took place. According to Adams, no holder in due course status would be afforded to the defendants.

In addition, the very documents that defendants rely on were not provided timely, i.e. they did not comply with the court's scheduling order and they were provided after the discovery cutoff in this case.

The documents appear to be a sham. At the time of trial the documents weren't even fully signed, they contain various blanks and they are hopelessly incomplete. They are supposed to include a complete mortgage package. None of these materials were provided.

Given this, even if the materials were not untimely, they don't bear the measure of reliability that would be required before documents are admitted.

The documents that Mariners testified that it purchased the Note based on is not consistent with the testimony provided by Ms. Stacy.

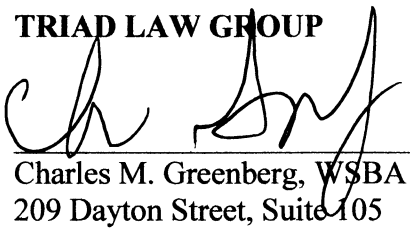
Last, it was inappropriate to admit the two referenced documents until after testimony was complete and the parties had rested.

Given all of the issues raised above, the Court of Appeals should reverse the inartful decision issued by the lower court and remand with appropriate instructions. In addition, Plaintiff is asking for an award of

attorney's fees and costs given that the Note/Deed of Trust call for the award of fees.

Respectfully submitted this 23rd day of June, 2015.

TRIAD LAW GROUP



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CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that on the June 23, 2015, I caused the attached APPELLANT'S OPENING BRIEF to be emailed and personally delivered to the following address:

Joe Solseng
ROBINSON TAIT, P.S.
710 Second Avenue, Suite 710
Seattle, Washington 98104
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Vita Tsinkevich, Legal Assistant

APPENDIX

The Honorable Carol A. Schapira
Trial Date: 10/28/2014

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

LORINA DELFIERRO,

Plaintiff,

v.

MARINERS INVESTMENT FUND II REO, LLC; MARINERS SECOND FUND II REO, LLC; SECOND MARINERS INVESTMENT FUND II REO, LLC; MARINERS INVESTMENT FUND, LLC, a Limited Liability Company; PENSO TRUST COMPANY CUSTODIAN FBO JEFFREY D. HERMANN, IRA ACCOUNT NUMBER 20005343, an entity, form unknown; MERCHANTS BONDING INSURANCE COMPANY; Steve Olson, in his individual capacity and in his official capacity as manager of the MARINERS defendants; April Smith in her individual and official capacity; Jeffrey D. Hermann in his individual capacity; and DOES 1-30,

Defendants.

NO. 12-2-25326-9 KNT

[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER BENCH TRIAL

This case, having come on for trial starting on October 28, 2014, and continuing on October 29 and 30, 2014, and on November 3 and 4, 2014, before the Honorable Carol A. Schapira sitting

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without a jury, and the Plaintiff being represented by Charles Greenberg and the remaining Defendants MARINERS INVESTMENT FUND II REO, LLC; MARINERS SECOND FUND II REO, LLC; SECOND MARINERS INVESTMENT FUND II REO, LLC; MARINERS INVESTMENT FUND, LLC ("Mariners Entities"); PENSCO TRUST COMPANY CUSTODIAN FBO JEFFERY D. HERMANN, IRA ACCOUNT NUMBER 20005343 ("PENSCO"); MERCHANTS BONDING INSURANCE COMPANY; Steve Olson; April Smith; and Jeffery D. Hermann (referred to collectively as the "Remaining Defendants") being represented by Joe Solseng of Robinson Tait, P.S. and this court having heard and considered all of the testimony, evidence, and arguments of the parties and their respective counsel, hereby enters the following

FINDINGS OF FACT

1. Plaintiff Lorina Del Fierro freely and knowingly executed an Adjustable Rate Note in the original principal amount of $572,850.00 dated July 16, 2007 ("Note"). EquiFirst Corporation was the lender.
2. This Note was secured by a Deed of Trust executed by Ms. Del Fierro at the same time ("Deed of Trust"). The Note and Deed of Trust were secured by the property legally described as: LOT 83, TWIN LAKES NO. 4, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 91 OF PLATS, PAGES 44 THROUGH 46, RECORDS OF KING COUNTY, WASHINGTON and commonly known as 4009 Southwest 323rd Street, Federal Way, Washington 98023 (hereinafter "Property"). Ms. Del Fierro previously operated the Property as an adult care nursing facility, but since March, 2014, she no longer cares for patients at the Property and the Property is now her primary residence.

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3. Plaintiff defaulted on the terms of the Note and Deed of Trust by failing to make the monthly payment commencing in the Fall of 2008. Plaintiff was working intermittently on a loan modification at this time.

4. Although through a subsequent stipulation entered into while in Bankruptcy Court on October 18, 2010 Ms. Del Fierro made further partial payments, she has been ~~in continuous payment default on~~ behind in her payments on the Note and is due for her May, 2009, payment.

5. In various lawsuits brought by Plaintiff regarding her payment default on the Note and in her bankruptcy case, Plaintiff has been ably represented by counsel and other consultants and in general has obtained very favorable results from such litigation.

6. The beneficial interest of the Note and Deed of Trust was transferred several times prior to April, 2009. The original lender and beneficiary was Equifirst Corporation. Equifirst sold its interest to Sutton Funding, LLC. Sutton Funding LLC sold its interest to FCDB FF1, LLC, one of several entities commonly referred to as "Fortress."

7. On April 14, 2009, Second Mariners Investment Fund II REO, LLC purchased for value the beneficial interest in Ms. Del Fierro's Note and Deed of Trust from FCDB SNPWL TRUST, commonly referred to as "Fortress" in court. The Master Asset Sale and Interim Servicing Agreement for this sale was admitted as Exhibit 3 in the trial over Plaintiff's objection.

8. The sale from FCDB SNPWL TRUST to Second Mariners Investment Fund II REO, LLC was a good faith, arms-length transaction in which Second Mariners Investment Fund II REO, LLC paid value for the beneficial interest in Ms. Del Fierro's loan. There was no evidence presented of any impropriety in any aspect of this sale. There is no legal or factual basis to question the bona fides, much less unwind, this transaction.

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9. As a part of this transaction, FCDB SNPWL TRUST provided Second Mariners Investment Fund II REO, LLC with the original Note endorsed in blank, thus making Second Mariners Investment Fund II REO, LLC the holder and beneficiary of the Note with authority to enforce it.

10. On April 5, 2010, Ms. Del Fierro filed for Bankruptcy. Second Mariners Investment Fund II REO, LLC filed a Proof of Claim for the debt and lien on the Property evidenced by the Note and Deed of Trust ("Proof of Claim"). The various bankruptcy pleadings admitted into evidence consistently refer to Second Mariners Investment Fund II REO, LLC as the beneficiary of the Note and Deed of Trust at the time.

11. In July, 2010, Ms. Del Fierro filed an Adversary Proceeding in Bankruptcy Court in an attempt to "cram down" the value of the Property from the full principal and interest amount to the current value of the Property. Although the "cram down" was contested, the parties stipulated that the then-current value of the property was $325,000.00. Plaintiff prevailed in that adversary proceeding and in the subsequent appeal of that result to the Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals.

12. The pleadings filed by Ms. Del Fierro in the Bankruptcy Adversary Proceeding consistently refer to Second Mariners Investment Fund II REO, LLC as the current beneficiary of the Note and Deed of Trust. During the adversary proceeding and throughout the bankruptcy case, Ms. Del Fierro never alleged any confusion or conflicting information as to the fact that Second Mariners Investment Fund II REO, LLC was the true and valid beneficiary of her loan at the time. Plaintiff never objected to the Proof of Claim filed by Second Mariners Investment Fund II REO, LLC on any grounds other than

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to claim only $325,000.00 of the claim should be considered secured for purposes of confirming her plan in the bankruptcy case.

13. Plaintiff testified that she understood that when she dismissed her bankruptcy case, the Note and Deed of Trust were enforceable as originally executed and the "cram down" was no longer in effect.

14. On December 8, 2010, Second Mariners Investment Fund II REO, LLC transferred the beneficial interest in the Note to Mariners Investment Fund, LLC and executed an Assignment of Deed of Trust from Second Mariners Investment Fund II REO, LLC to Mariners Investment Fund, LLC. The Residential Mortgage Loan Sale Agreement between Mariners Investment Fund, LLC and PENSCO was admitted as Exhibit 41 in the trial.

15. Although this particular Assignment of Deed of Trust (supra, paragraph 14) has not yet been recorded, it remains valid as between the signatories, the Mariners entities.

16. Also on December 8, 2010, Second Mariners Investment Fund II REO, LLC transferred possession of the original Note to Mariners Investment Fund, LLC, making Mariners Investment Fund, LLC the holder of the Note and beneficiary with the right to enforce the Note.

17. During the course of trial, Plaintiff raised the issue of whether Second Mariners Investment Fund II REO, LLC was a registered LLC in California at the time it purchased Plaintiff's loan and at the time it transferred the loan to Mariners Investment Fund, LLC. Uncontroverted evidence at trial was presented that Second Mariners Investment Fund II REO, LLC registered with the State of California on April 3, 2009 and cancelled its registration on January 19, 2011. The Court finds that Second Mariners Investment Fund

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II REO, LLC was a properly registered Limited Liability Company at the time it purchased Plaintiff's loan, at the time it transferred its interest in the loan to Mariners Investment Fund, LLC, and at all times relevant to this action.

18. In March, 2011, the Mariners entities delivered the original Note to Robinson Tait, P.S., the law firm it had retained to represent its interests in Ms. Del Fierro's bankruptcy case. The Mariners entities remained in possession of the Note through their agent, Robinson Tait. P.S.

19. Robinson Tait, P.S. received the original note on March 25, 2011 and maintained the original Note in its original document vault and tracked the location of the original Note in its Original Document Log. Robinson Tait, P.S. executed a Bailee Letter acknowledging receipt of the original Note and sent a copy of the Bailee Letter to the Mariners entities.

20. On May 23, 2011, Mariners Investment Fund, LLC, the beneficiary of Ms. Del Fierro's loan at the time and the holder and owner of the original Note, which was endorsed in blank, sold the beneficial interest in Ms. Del Fierro's loan to Pensco Trust Company Custodian FBO Jeffery D. Hermann, IRA Account Number 20005343 ("PENSCO") for value in an arms-length transaction via a neutral third-party broker and facilitator, LoanMarket.net.

21. This sale from Mariners Investment Fund, LLC to PENSCO was the only transaction between any Mariners Entity and Jeff Hermann or PENSCO acting as his IRA custodian. No Mariners employee has ever met or spoken with Mr. Hermann.

22. The system that LoanMarket.net has established for the sale of mortgage loans is specifically designed to prevent sellers and buyers from identifying each other to insure

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LoanMarket.net makes a commission on the sales. The buyer and seller only learn the identity of the other party when a purchase and sale agreement is distributed for signature.

23. The sale from Mariners Investment Fund, LLC to PENSCO was a good faith, arms-length transaction in which PENSCO paid value for the beneficial interest in the Note and Deed of Trust. There was no evidence presented of any impropriety or collusion in any aspect of this sale. There is no factual or legal basis to question the bona fides, much less unwind this transaction. Mariners Investment Fund, LLC was not unjustly enriched in this transaction. This transaction was not an illusory sale.

24. During the course of trial, Plaintiff also raised the issue of whether Mariners Investment Fund, LLC was a registered LLC in California at the time it became the beneficiary of Plaintiff's loan and at the time it sold the loan to PENSCO. Uncontroverted evidence at trial was presented that Mariners Investment Fund, LLC registered with the State of California on November 13, 2007 and cancelled its registration on May 10, 2012. The Court finds that Mariners Investment Fund, LLC was a properly registered Limited Liability Company at the time it became the beneficiary of Plaintiff's loan, at the time it sold its interest in the loan to PENSCO, and at all times relevant to this action.

25. PENSCO retained Robinson Tait, P.S. as its attorney in Ms. Del Fierro's bankruptcy. On May 31, 2011, Robinson Tait, P.S. confirmed via email to Mr. Hermann that Robinson Tait, P.S. was still in possession of the original Note, endorsed in blank. Robinson Tait, P.S. emailed a color copy of the original Note and the Bailee Letter to Mr. Hermann. The color copy of the Bailee Letter shows that it was executed in blue ink. Only Ms. Del Fierro's initials on page three and her signature on page four on the color copy of the original Note appear as having been signed with blue ink. The remaining initials and

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signatures appear in black ink. Uncontroverted testimony was that the original initials and signature were all in blue ink, but that most of them appeared black in the color copy, apparently due to the quality of the copy machine being used.

26. Robinson Tait, P.S. was in possession of the original Note on behalf of its client, PENSCO.

27. Nearly a year later, on April 3, 2012, Robinson Tait, P.S. sent the original note back to Mariners via FedEx. The original Note was sent to Mariners instead of PENSCO because Robinson Tait, P.S. did not have a Bailee Letter with PENSCO. It was the intent of the parties that Mariners would forward the original Note to PENSCO.

28. The original Note was received by Mariners on April 5, 2012 and signed for by Kirsten Gray.

29. The original Note was never forwarded to PENSCO.

30. Despite a diligent search, Mariners cannot locate the original Note and its whereabouts cannot be determined.

31. There were no unfair or deceptive acts or practices in the sale from FCDB SNPWL TRUST to Second Mariners Investment Fund II REO, LLC nor in the sale from Mariners Investment Fund, LLC to PENSCO. The Mariners entities' business is buying and selling notes and real estate investments.

32. Neither sale had an impact on the public interest; this was a private transaction.

33. The Court finds Plaintiff has not proven there is any other claimant other than PENSCO to the beneficial interest in her Note and Deed of Trust.

34. The Court finds the Plaintiff failed to prove the following by a preponderance of the evidence:

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Plaintiff's allegations that alleged irregularities in the transfers of the Note and Deed of Trust should cause the Court to determine that neither Second Mariners Investment Fund II REO, LLC nor Mariners Investment Fund, LLC nor PENSCO has, or has ever had, any ownership or beneficial interest in the Note and the Deed of Trust with the result that PENSCO has no authority or ability to enforce the Note or the Deed of Trust and that, in asserting ownership of and beneficial interest in the Note and Deed of Trust, the Remaining Defendants other than PENSCO and Jeffery Hermann have violated the applicable Consumer Protection Act (RCW 19.86).

Based on these findings of facts, the Court hereby enters the following

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this lawsuit.
2. King County is the proper venue for this lawsuit.
3. All of the causes of action against all Remaining Defendants, including MARINERS INVESTMENT FUND II REO, LLC; MARINERS SECOND FUND II REO, LLC; SECOND MARINERS INVESTMENT FUND II REO, LLC; MARINERS INVESTMENT FUND, LLC; PENSCO TRUST COMPANY CUSTODIAN FBO JEFFERY D. HERMANN, IRA ACCOUNT NUMBER 20005343; MERCHANTS BONDING INSURANCE COMPANY; Steve Olson; April Smith; and Jeffery D. Hermann are found by this Court to be without factual support and without legal merit. Judgment should therefore be entered against Plaintiff and in favor of the Remaining Defendants on all causes of action and Plaintiff is to take nothing from such Remaining Defendants.

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4. On the cause of action to Quiet Title, this Court determines that title to the Property is vested in Plaintiff but subject to the lien of the Deed of Trust securing Plaintiff's obligations under the Note, and that PENSCO is the beneficial owner of the Note and Deed of Trust with power and authority to enforce the same.

5. Further, this Court finds that PENSCO has satisfied the requirements of RCW 62A.3-310 and proved that it is entitled to enforce the Note and Deed of Trust. Specifically, PENSCO has proved that it was in possession of the original Note, endorsed in blank, when loss of the Note occurred; that the loss of possession was not the result of a transfer by PENSCO or a lawful seizure; and that PENSCO cannot reasonably obtain possession of the original Note because the whereabouts of the Note cannot be determined.

6. The Mariners entities, Steve Olson, April Smith, the PENSCO Trust, and Jeffery Hermann were the prevailing parties in this action and are entitled to attorney's fees and costs per the terms of the Note and Deed of Trust. A separate judgment shall be entered against the Plaintiff detailing these fees and costs.

7. Judgment is to be entered accordingly.

Dated this 16th day of December, 2014, at Seattle, Washington.

Carol A. Schapira, Judge

Presented by:

Joe Solseng, WSBA #16855
Robinson Tait, P.S.
Attorneys for Defendants

* The court incorporates its oral rulings, findings and conclusions as part of this document

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