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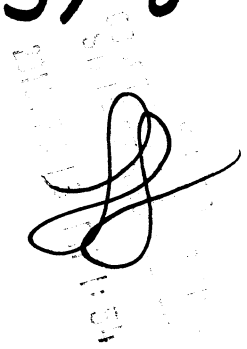

No. 73834-8-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

4518 S. 256th LLC,

Appellant,

v.

KAREN L. GIBBON, P.S., Trustee; RECONTRUST, N.A, Trustee; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ("MERS") acting as nominee for COUNTRYWIDE HOME LOANS, INC., a Beneficiary; THE BANK OF NEW YORK MELLON f/k/a THE BANK OF NEW YORK, as Trustee for the certificateholders of the CWABS, Inc. Asset-backed Certificates, Series 2006-7,

Respondents.

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Carol Murphy)

RESPONDENTS MERS AND BONY'S ANSWERING BRIEF

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I. INTRODUCTION

While non-judicial foreclosure is the setting of this dispute, this is not a typical "wrongful-foreclosure" case. Appellant 4518 S. 256th LLC ("Appellant") is not the borrower on the subject loan – it is a real estate investor who bought the subject property from the borrowers ***after*** non-judicial foreclosure proceedings had started against the property in 2015. Appellant's purpose in purchasing the property was to assert the argument that failed in the trial court – that the previous, 2008 foreclosure of the property triggered the statute of limitations governing the deed of trust and enforcement of the deed of trust is now time-barred.

Appellant's argument fails for several reasons. First, this appeal is barred by waiver. After Respondents BONY and MERS won below, Appellant failed to move to enjoin the foreclosure sale and the property was sold to Eastside Funding, LLC, a non-party. Thus, even if the Court agrees with Appellant's arguments, the Court cannot afford the requested relief and quiet title in Appellant's name because the title owner of the property is not before the jurisdiction of the Court.

Second, and more fundamentally, Appellant's argument that the 2008 foreclosure triggered the statute of limitations is premised on the mistaken legal conclusion that any foreclosure of a loan is also an acceleration of that same loan. Appellant's "foreclosure equals

acceleration" theory is without merit – foreclosure and acceleration are separate remedies that a lender may exercise in the case of a borrower's default. Foreclosure of a loan does not imply acceleration – under Washington law "acceleration must be made in a clear and unequivocal manner which effectively apprises the maker that the holder has exercised his right to accelerate the payment date." *Glassmaker v. Ricard*, 23 Wn. App. 35, 38, 593 P.2d 179 (1979).

The evidence before the trial court demonstrated that the loan was never accelerated – the loan servicer demanded that the borrowers cure their past due balance, but never demanded the entire loan balance due. Since there was no acceleration, there was no triggering of the statute of limitations. Accordingly, the deed of trust remained a valid and enforceable lien and the trial court's summary judgment dismissal of Appellant's lawsuit should be affirmed.

II. COUNTERSTATEMENT OF ISSUES

A. Whether Appellant waived its right to appeal the dismissal of its quiet title action by failing to enjoin the trustee's sale before the subject property was foreclosed and sold to a third party.

B. Whether Appellant failed to show that the loan was accelerated when the lender/servicer of the loan never demanded the entire balance due and payable.

C. Assuming, for the sake of argument, that the loan was accelerated, whether the multiple foreclosures of the loan have tolled the statute of limitations so that it has not yet expired.

III. COUNTERSTATEMENT OF THE CASE

A. Background Details Regarding the Loan and the Property

This lawsuit concerns the real property located at 4518 S. 256th Place, Kent, WA 98032 ("Property").[1]

As of May 31, 2006, non-parties Teodoro A. Puebla and Elizabeth A. Villalovos ("Borrowers") were the owners of the Property.[2] On that date, Borrowers took out a $256,000.00 loan ("Loan") secured by a deed of trust ("Deed of Trust") against the Property.[3] The Loan was originated by Defendant Countrywide Home Loans, Inc. ("Countrywide"), and called for 30 years of installment payments.[4]

By July 19, 2008, Borrowers were $13,427.12 in default on their monthly mortgage payments.[5]

On July 21, 2008, Defendant ReconTrust Company ("ReconTrust") was appointed successor trustee of the Deed of Trust.[6]

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[1] Compl. ¶ 1.1, CP 230.
[2] *Id.* at ¶¶ 3.3-3.4, CP 223.
[3] Deed of Trust, CP 107-108.
[4] *Id.* at ¶ F.
[5] Notice of Default ¶ D, CP 141.
[6] 2008 Appointment, CP 119-120.

Based on Borrowers' default, on August 15, 2008, ReconTrust scheduled the non-judicial foreclosure of the Property for November 14, 2008, via a recorded Notice of Trustee's Sale.[7]

On March 13, 2009, the 2008 Notice of Trustee's Sale expired as a matter of law.[8]

On August 9, 2011, an assignment was recorded giving notice that BONY was the new beneficiary of the Deed of Trust as successor to Countrywide.[9] Under Washington law, the effect of this assignment was to give notice to the public of BONY's successorship.

On November 28, 2011, ReconTrust formally discontinued the trustee's sale.[10]

On January 1, 2015, Defendant Karen L. Gibbon, P.S. ("Gibbon") was appointed trustee of the Deed of Trust as successor to ReconTrust.[11]

On February 2, 2015, Gibbon noticed and recorded a second non-judicial foreclosure of the Property for June 12, 2015.[12]

On February 17, 2015, Borrowers quitclaimed the Property to Appellant.[13] As the preceding undisputed sequence of events indicates,

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[7] 2008 Notice of Trustee's Sale, CP 12-16.
[8] RCW 61.24.040(6) (trustee may continue sale only up to 120 days after original sale date).
[9] Assignment, CP 122.
[10] Discontinuance, CP 124.
[11] 2015 Appointment, CP 126.
[12] 2015 Notice of Trustee's Sale, CP 20-23.
[13] Quitclaim Deed, CP 4-5.

Appellant did not acquire its interest in the Property until after the 2015 Notice of Sale was recorded.

On March 6, 2015, Appellant filed this lawsuit.[14] Appellant's Complaint sought three forms of relief: (1) that title to the Property be quieted in favor of Appellant; (2) a declaratory judgment that the Deed of Trust is barred by the statute of limitations; and (3) that the foreclosure of the property should be restrained.[15] Although Appellant's request for relief includes a line item for "money judgment against Defendants in an amount to be proven at trial," there is no other pleading, declaration, or briefing supporting such a claim.[16] Appellant's Opening Brief similarly contains no discussion of a damages award.

Simply put, Appellant does not have any claim for damages and has not preserved such a claim on appeal – Appellant's only claim on appeal is that the Court erred in failing to quiet title to the Property in Appellant's name. *See State v. Thomas*, 150 Wn. 2d 821, 874, 83 P.3d 970, 996 (2004) (issue waived on appeal when argument or authority not cited in opening brief).

Although Appellant attached a copy of Borrowers' Quitclaim Deed to its Complaint, this document does not contain a King County Auditor's

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[14] Complaint p. 1, CP 230.
[15] Complaint §§ IV-VI, CP 234-7.
[16] *See id.* at p. 10, ¶ 3, CP 237.

recording stamp.[17] A search of the King County Auditor's online recorded document database confirmed that the Quitclaim Deed was not recorded at the time of the summary judgment hearing below.[18] Additionally, the King County Assessor continued to list Borrowers as the record owners of the Property at the time of the summary judgment hearing.[19]

B. ReconTrust's Declaration, Including the 2008 Notice of Default, Showed that the Lender Never Demanded the Entire Loan Due.

ReconTrust is the former trustee of the Deed of Trust.[20] As trustee, ReconTrust conducted the 2008 foreclosure of the Deed of Trust. In its declaration, ReconTrust authenticated the notice of default ("Notice of Default") that it served on Borrowers in the course of the 2008 foreclosure.[21] This Notice of Default states that the Loan is in default and lists a total cure amount of $15,255.56.[22] The Notice of Default also states that, as of its issuance date, the principal balance on the Loan was $255,932.00.[23] Since the cure amount was less than the total amount owed, the Loan was not accelerated by definition. *See* Black's Law Dictionary (10th ed. 2014) (defining "acceleration" as, in part "The

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[17] Quitclaim Deed, CP 4-5.
[18] Lorber Decl. ¶ 9, CP 103.
[19] Auditor's Printout, CP 128.
[20] ReconTrust Decl. ¶ 3.
[21] Notice of Default, Ex. A to ReconTrust Decl.
[22] *Id.* at ¶ E.
[23] *Id.* at ¶ K.

advancing of a loan agreement's maturity date so that payment of the ***entire debt is due immediately***[.]") (emphasis added).

C. SLS's Declaration, Including the June 2015 Mortgage Statement, Showed that the Lender Never Demanded the Entire Loan Due.

Non-party Specialized Loan Servicing, LLC was the loan servicer of the Loan starting December 22, 2011.[24] As loan servicer, SLS was the party responsible for collecting payment, generating loan statements and notices, interfacing with the borrower regarding loan issues, conducting loss mitigation, and foreclosing on loans in default.[25] SLS performed these services on behalf of BONY, the loan's investor.[26] BONY acquired its interest in the Loan on or around June 28, 2006.[27]

SLS's records indicate that the Loan was not accelerated.[28] SLS submitted the June 2015 mortgage statement for the Loan, which showed that the total amount due on the Loan was $181,734.02, dating back to January 1, 2008.[29] The unpaid principal balance on the Loan was $255,932.00.[30] Because the total amount due was less than the principal balance, by definition the Loan was not accelerated as of June 2015.[31] Not

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[24] SLS Decl. ¶ 5, CP 145.
[25] *Id.* at ¶ 2, CP 144-5.
[26] *Id.* at ¶ 4, CP 145
[27] *Id.*
[28] *See id.* at ¶ 5.
[29] *Id.* at ¶ 5, Mortgage Statement, Ex. A to *id.*, CP 149.
[30] *Id.*
[31] *See* Black's Law Dictionary, *supra.*

only was the Loan not accelerated at that time, SLS had no record that the Loan was ever accelerated.[32]

D. Following Entry of Summary Judgment the Loan was Foreclosed and Sold to a Third Party Not Before the Jurisdiction of the Court.

Appellant filed this lawsuit on March 6, 2015.[33] On June 5, 2015, the parties stipulated to an agreed order restraining the trustee's sale until the trial court could rule on the substantive claims in this dispute.[34]

On July 31, 2015, the trial court heard oral argument on cross-motions for summary judgment filed by Appellant and Respondents.[35] The trial court granted Respondents' motion, denied Appellant's motion, and ruled that the previously entered preliminary injunction would remain in force until August 31, 2015.[36] The purpose of this extension of the preliminary injunction was to give Appellant time to seek a stay of the pending foreclosure in this Court.[37]

Following the trial court's granting of the summary judgment motion, Respondents moved for a fee award against Appellant.[38] The trial court granted the attorney fees motion and awarded BONY $12,400.00.[39]

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[32] *See* SLS Decl. ¶ 6, CP 145.
[33] Complaint p. 1, CP 230.
[34] Agreed Order, CP 250-2.
[35] *See* Order, CP 225-226.
[36] *Id.*
[37] RP pp. 25-27.
[38] *See* Fee Order, CP 228.
[39] *Id.*

While Appellant appeals the award of fees because it believes it should have prevailed, the Opening Brief does not dispute that the fee award was authorized by contract, nor does it assert that the amount of fees awarded was improper.[40]

Following the trial court's ruling on the cross-motions for summary judgment, Appellant never sought to stay or otherwise restrain the resumed foreclosure.[41] Accordingly, the Property was sold at a foreclosure sale on September 4, 2015.[42] Non-party Eastside Funding, LLC purchased the Property for $251,921.00.[43] The King County Auditor's records for the Property do not show that the Quitclaim Deed to Appellant was ever recorded with the County.[44] The records also show that there was no notice of lis pendens recorded against the subject by Appellant or Borrowers.[45]

IV. STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment *de novo*, engaging in the same inquiry as the trial court. *Citizens All. for Prop. Rights Legal Fund v. San Juan Cty.*, 184 Wn.2d 428, 435, 359 P.3d 753,

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[40] Op. Br. pp. 20-21.
[41] Respondents respectfully direct to the Court both to its own docket, and the docket below, neither of which contain any entry for a post-MSJ motion for stay/injunction.
[42] Trustee's Deed ¶ 10, Ex. A to Affidavit of Karen Booth, filed with accompanying Respondents MERS AND BONY's Motion to Permit Additional Evidence on Review.
[43] *Id.*
[44] Booth Affidavit ¶ 3.
[45] *Id.*

757 (Wn. 2015) (affirming trial court's grant of defendant's summary judgment motion).

Summary judgment is appropriate if the pleadings, depositions, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). Once the moving party establishes no dispute exists as to a material fact, the burden shifts to the nonmoving party to show the existence of such fact. *Kahn v. Salerno,* 90 Wn. App. 110, 117, 951 P.2d 321 (1998). "The nonmoving party must set forth specific facts that demonstrate a genuine issue of material fact and cannot rest on mere allegations." *Lipscomb v. Farmers Ins. Co. of Wn.,* 142 Wn. App. 20, 27, 174 P.3d 1182 (2007).

V. ARGUMENT

A. This Appeal is Barred by Waiver.

Absent extraordinary circumstances, failure to enjoin a trustee's sale constitutes waiver of the right to unwind the sale after it has occurred. *Frizzell v. Murray*, 179 Wn. 2d 301, 307, 313 P.3d 1171 (2013); RCW 61.24.127(2). Wavier occurs where "a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to

obtain a court order enjoining the sale." *Id.* at 306 (citing *Plein v. Lackey*, 149 Wn. 2d 214, 227, 67 P.3d 1061 (2003).

All elements of waiver are met here. Appellant had notice of its right to enjoin the sale – the Notice of Sale explaining that right is attached as an exhibit to Appellant's Complaint.[46] Appellant knew of its defenses prior to the sale – indeed, it filed this lawsuit to stop the sale and quiet title to the Property.[47] Finally, Appellant failed to move to restrain the sale in this Court even though the trial court explicitly gave it an opportunity to do so.[48]

As discussed above, Appellant's only claim on appeal is that the trial court erred by failing to quiet title to the Property in Appellant's name. By failing to restrain the trustee's sale, the quiet title claim is waived as a matter of law. *See* RCW 61.24.127(2)(e) (a post-sale "claim may not operate in any way to encumber or cloud the title to the property that was subject to the foreclosure sale[.]"). The result of such waiver is that the trial court's ruling below should be affirmed.

B. <u>This Appeal is Barred Because it is Moot</u>.

"A case is moot if a court can no longer provide effective relief." *Harbor Lands LP v. City of Blaine*, 146 Wn. App. 589, 592-593, 191 P.3d

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[46] 2015 Notice of Trustee's Sale ¶ IX, CP 22.
[47] *See generally* Complaint, CP 230-8.
[48] *See* RP pp. 25-27.

1282 (2008) (quoting *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984)). The issue of mootness "is directed at the jurisdiction of the court" and may thus be raised at any time. *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 350, 662 P.2d 845 (1983).

Given that Appellant's only claims for relief are declaratory and injunctive, this appeal must be rejected on the basis of mootness. Appellant specifically requested that the trial court give it time to obtain a stay pending appeal and Appellant failed to seek such a stay.[49] In the interim, the Property was sold to a non-party who is not before the jurisdiction of this Court or the trial court.[50] Further, under Washington's "first-in-time, first-in-line" recording system, Appellant's failure to record its Quit Claim Deed or a lis pendens means that the foreclosure sale purchaser's fee interest in the Property is superior to any purported interest held by Appellant. *See Summerhill Vill. Homeowners Ass'n v. Roughley*, 289 P.3d 645, 647 (Wn. Ct. App. 2012) (discussing "first-in-time" rule).

Because it does not have personal jurisdiction over the fee owner of the Property, this Court is not able to afford the relief Appellant seeks. Accordingly, the appeal is moot and affirmance is appropriate.

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[49] *See* RP pp. 25-27.
[50] *See* Trustees' Deed, Ex. A to Booth Affidavit.

C. Borrowers' Loan was Never Accelerated and so the Statute of Limitations Never Began Running.

Appellant seeks to quiet title to the Property in favor of itself.[51] It acknowledges the existence of the Deed of Trust as a lien against the Property, but contends that the Deed of Trust is unenforceable because the debt underlying it has expired under the statute of limitations.[52] Appellant contends that the six-year statute of limitations began running when Borrowers' debt was supposedly accelerated in the 2008 Notice of Trustee's sale.[53] However, there was no such acceleration.

To accelerate a promissory note, an "affirmative action is required, some action by which the holder of the note makes known to the payors that he intends to declare the whole debt due." *Glassmaker*, 23 Wn. App. at 37 (quoting *Weinberg v. Naher*, 51 Wn. 591, 594, 99 P. 736 (1909)). "[A]cceleration must be made in a clear and unequivocal manner which effectively apprises the maker that the holder has exercised his right to accelerate the payment date." *Glassmaker*, 23 Wn. App. at 38. According to Black's Law Dictionary, the plain meaning of, "acceleration" is "[t]he advancing of a loan agreement's maturity date so that payment of the ***entire debt is due immediately***[.]" *See* Black's Law Dictionary (10th ed. 2014) (emphasis added).

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[51] Compl. § IV.
[52] *See* Op. Br. p. 2, Issue to Assignment of Error.
[53] *See* Op. Br. p. 5 (stating obligation was accelerated August 9, 2008.

Respondents agree that the acceleration of a debt triggers a six-year limitations period – governed by RCW 62A.3-118(a) – to enforce that debt. However, Respondents disagree with Appellant's "foreclosure equals acceleration" theory. As shown below, each of Appellant's theories of acceleration is deeply flawed.

1. Acceleration and Foreclosure are Separate and Distinct Remedies in the Deed of Trust.

Appellant's first argument in its "foreclosure equals acceleration" theory relies on ¶ 22 of Borrowers' Deed of Trust.[54] That paragraph sets forth the procedural steps that the lender must take ***if*** it wants to accelerate the Loan.[55] Indeed, the language of ¶ 22 is purely permissive regarding whether acceleration occurs: "**Lender at its option, may** require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale."[56] Nowhere in this paragraph does the Deed of Trust require acceleration before invoking the power of sale.

Paragraph 22 of the Deed of Trust is itself split into three sub-paragraphs.[57] The first sub-paragraph deals with acceleration – the notices that are and are not required before calling the whole debt due.[58]

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[54] *See* Op. Br. 8-11.
[55] Deed of Trust, CP 116.
[56] *Id.* (citing Deed of Trust ¶ 22) (emphasis in original).
[57] Deed of Trust ¶ 22, CP 116.

The second sub-paragraph concerns invoking the power of sale, i.e., foreclosing.[59] It requires lender to give notice to the trustee and give notice to the borrower as required by law.[60] The sub-paragraph permits the trustee to then sell the property without further notice, to postpone the sale as allowed by law, and, finally, permits the lender to bid at the sale.[61] This sub-paragraph in no way predicates foreclosure upon acceleration of the loan.[62]

Finally, the third sub-paragraph concerns the procedure and effect of the trustee's deed conveyed by the sale.[63] It too does not relate to acceleration.[64]

Borrowers were served with a notice of default in 2008. [65] This document was not a pre-acceleration notice under ¶ 22. The 2008 Notice of Default does not threaten acceleration and does not state that the entire debt may be declared due.[66] The "effect of failure to cure" listed in the Notice of Default is that the Property may be sold at foreclosure – not that

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[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] 2008 Notice of Default, CP 140-143.

the Loan will be accelerated.[67] Thus, it does not meet the requisites of the Deed of Trust ¶ 22 pre-acceleration notice.

Nothing in the Deed of Trust (or any other document for that matter) requires that the Loan be accelerated before a non-judicial foreclosure is commenced. The record is devoid of any pre-acceleration notice, any actual acceleration notice, or any other evidence that the entire debt was called due. As such, the Loan was not accelerated and the statute of limitations was not triggered.

2. Nothing in the Deed of Trust Act Supports the "Foreclosure Equals Acceleration" Theory.

Appellant argues that RCW 61.24.090 also supports the "foreclosure equals acceleration" theory.[68] However, the statute actually states that the borrower can pay the amount due on the obligation "other than such portion of the principal as would not then be due had no default occurred." RCW 61.24.090(1)(a). That is, it allows the borrower to pay less than the entire principal due. Thus, like the rest of the Deed of Trust Act, this specific statute envisions some situations in which acceleration has occurred and some situations where it has not. If acceleration has occurred, the Deed of Trust Act nevertheless allows the borrower to pay only the past due amount up to 11 days before the sale.

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[67] *Id.* at CP 142.
[68] Op. Br. pp. 11-13.

Further, evidence submitted with the declarations of ReconTrust and SLS reinforces the legal conclusion that there has been no acceleration. Most telling is the June 2015 mortgage statement, which shows an amount owed as approximately $70,000 less than the outstanding principal.[69] Since the creditor stated in that document that less than the entire debt is due, the Loan was not accelerated as a matter of law.

Under Washington law, acceleration occurs where there is a "clear and unequivocal" statement that the whole debt is due. *Glassmaker*, 23 Wn. App. at 38. Appellant presented no evidence of a "clear and unequivocal" statement that the whole debt is due. As such, there has been no acceleration as a matter of law. *Id.* Since there was no acceleration as a matter of law, the statute of limitations has not run and Borrowers' debt remains enforceable. Thus, this lawsuit should be dismissed with prejudice.

3. Appellant's Case Law References are Misplaced.

Appellant cites Washington and foreign law in support of its "foreclosure equals acceleration" theory.[70] These cases are wholly insufficient to support reversal.

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[69] CP 149.
[70] See Op. Br. 13-15.

Appellant erroneously relies on *Meyers Way Dev. Ltd. P'ship v. Univ. Sav. Bank*, 80 Wn.App. 655, 669-70, 910 P.2d 1308 (1996).[71] Appellant argues that the case stands for the proposition that "presumes acceleration has occurred in conjunction with Lender/Beneficiary invoking the power of sale." However, *Meyers Way* actually cuts against Appellant's position.

In Meyers Way, the plaintiff/borrower claimed that RCW 61.24.090 prevented a lender from accelerating a loan before the sale. 80 Wn.App. at 669-70. In rejecting this theory, the court explained that:

> Nothing in this provision prohibits the acceleration of a loan in order to charge default interest on the amount owing. RCW 61.24.090(1)(a) simply precludes the creditor from enforcing the election prior to the eleventh day before the date of the trustee's sale, and allows the debtor to reinstate the loan prior to that time by paying the amount which would have been due under the terms of the deed of trust if no default had occurred.

Id.

Thus, in *Meyers Way*, the plaintiff was not claiming that foreclosure required acceleration, it was claiming that foreclosure precluded acceleration (at least until the 11th day before the sale). In rejecting the plaintiff's position, the court's holding reinforced the

[71] *Id.* at p. 13.

optional nature of acceleration as just one of the potential remedies available to a foreclosing lender.

Appellant's reliance on the commentaries and related non-Washington law referenced in its Opening Brief is also misplaced. The non-Washington authorities in its brief are off-point and are countered by persuasive authority that supports Respondents' position that loan acceleration and loan foreclosure are separate remedies that a lender may exercise in the case of a borrower's default.

Appellant relies on non-Washington cases cited in C.J.S. MORTGAGES § 680 for the proposition that if the terms of the deed of trust require notice prior to acceleration, as is the case here, then "the lender must provide clear and unequivocal notice to the borrowers that it is exercising its right to accelerate."[72] The C.J.S. article cites, *inter alia*, *Wedderien v. Collins*, 937 A.2d 140, 2007 WL 3262148 (Del., Nov. 6, 2007) (unpublished)[73], to illustrate what constitutes an unequivocal notice of acceleration. In *Wedderien*, after a mortgagee fell behind on payments, the mortgagor sent him a letter titled "Notice of Default and Acceleration" which expressly informed him that the mortgagor was accelerating the mortgage under the relevant provisions of the note. *Wedderien*, 2007 WL

[72] *See* Op. Br. p. 14.
[73] In accordance with GR 14.1(b), unpublished Delaware Supreme Court decisions may be cited in Delaware courts, thus *Wedderien* may be cited in Washington.

3262148 at *2. The court found this to have provided proper notice of acceleration, but because the notice included an incorrect time to cure, the mortgagor's foreclosure suit was dismissed. The C.J.S. article also cites *Jackson v. Wells Fargo Bank, N.A.*, 90 So.3d 168 (Ala. 2012), in which the notice at issue was titled: "NOTICE OF ACCELERATION OF PROMISSORY NOTE AND MORTGAGE" and it in fact stated: ". . . hereby accelerates to maturity the remaining unpaid balance of the debt . . .". *Jackson*, 90 So.3d at 170 (capitals in original). The key language in both of these cases is the express notice that the loan is being accelerated – language absent in the present case.

Appellant's reliance on *Heist v. Dunlap & Co.*, 193 Ga. 462, 18 S.E.2d 837 (Ga. 1942), is also misplaced.[74] The question before the court in *Heist* was whether the acceleration clause in the subject real estate security deed required the grantee to *first* give notice of its *intent* to accelerate the debt and make a demand for past due payment *prior to* exercising its right to sell or accelerate. The court held that no such notice was required and dismissed the debtor's suit. *Id.* at 466. Contrary to Appellant's assertions, the *Heist* court did not hold that a notice of foreclosure is the same as acceleration. Any conclusion to that effect

[74] *See* Op. Br. p. 14.

would be a weak implication from a single sentence of dicta. Accordingly, *Heist* does not support Appellant's theory.

Similarly, reliance on *Redwine v. Frizzell*, 184 Ga. 230, 190 S.E. 789 (Ga. 1937) is misplaced because the section that Appellant quotes is out of context.[75] The court in *Redwine* was not asked to decide whether the published notice of sale served to accelerate the loan, but whether the language in the notice of sale satisfied the requirements in the terms of the security deed. *Redwine*, 190 S.E. at 792-93. The *Redwine* court found that it had satisfied the essential requirements as a notice of sale, and that it was irrelevant whether the notice stated whether or not the loan had been accelerated. *Id.* at 793.

Further, the two Texas cases relied upon for the proposition that a "Notice of Trustee's Sale is itself a notice of acceleration" do *not* hold that a notice of sale is the same as acceleration – rather they are clear that the notice of sale is the second in a two-step process where the first step was the issuance of a notice of intent to accelerate that unambiguously signals that the loan will be accelerated if a default is not cured.[76] *Meadowbrook Gardens, Ltd. v. WMFMT Real Estate Ltd. P'ship*, 980 S.W.2d 916, 919 (Tex. App. 1998) ("we also conclude that Multi–Family's July 1 notice of intent to accelerate coupled with its July 15 notice of foreclosure

[75] *Id.*
[76] *See* Op. Br. p. 15.

amounted to notice of acceleration"); *McLemore v. Pac. Sw. Sav. Bank, FSB*, 872 S.W.2d 286, 291 (Tex. App. 1994) ("We conclude that these last acts [providing a notice and then selling the property] constituted "notice of acceleration" as required by statute in this situation"). As discussed above, the 2008 Notice of Default in this case did not list possible acceleration as one of the consequences of default.

Nothing in the Texas cases support Appellant's contention that a notice of sale is the same as the act of acceleration. Rather, similar to Washington law, the Texas Supreme Court requires that lender must be "clear and unequivocal" that it intends to accelerate the terms of a loan. *Holy Cross Church of God in Christ v Wolf*, 44 S.W.3d 562, 570 (Tex. 2001).

Respondents contend that acceleration of the terms of a loan and a foreclosure sale are separate remedies available to the lender. Washington law and law from other jurisdictions fully support this conclusion. *See County of Greene v. Chalifoux*, 6 N.Y.S.3d 763, 765, 127 A.D.3d 1316 (N.Y. Sup. Ct. 2015) ("When a listed event of default occurs, the loan agreement provides certain remedies that plaintiff may elect, including accelerating the entire balance of the loan or commencing a collection action."). In contrast, Appellant's position that acceleration and notice of foreclosure are one and the same is not supported by the law.

Respondents thus prevail on this question and the trial court correctly concluded the same.

D. Even if the Loan Was Accelerated at the Time of the 2008 Foreclosure the Statute of Limitations Has Still Not Expired.

Appellant argues that a lender must enforce a loan within six years of accelerating the loan or else enforcement is barred by the statute of limitations.[77] Respondents agree with this general statement of the law although they vigorously dispute that acceleration has taken place. However, even if the commencement of the 2008 foreclosure sale did constitute acceleration (it did not), the statute of limitations still has not run on BONY's right to enforce the Loan.

Even if the Loan was accelerated by the 2008 Notice of Trustee's Sale, it is well settled Washington law that "the commencement of a nonjudicial foreclosure tolls the statute of limitations." *Bingham v. Lechner*, 111 Wn. App. 118, 127, 45 P.3d 562, 566 (2002). Thus, if the statute of limitations did begin running on August 9, 2008, it was immediately tolled by the pending foreclosure.

RCW 61.24.040(6) allows a trustee to continue a foreclosure sale up to 120 days beyond the original sale date, but no longer. Thus, where a foreclosure is noticed but does not occur, the statute of limitations remains

[77] Op. Br. pp. 15-16.

tolled until either: (1) the trustee files a notice of discontinuance; or (2) 120 days from the initial sale date lapse. *Bingham*, 111 Wn. App. at 127.

Here, the initial foreclosure sale was never held and the discontinuance of foreclosure was not filed until November 28, 2011.[78] However, as a matter of law, the 2008 Notice of Sale expired on March 13, 2009.[79] Therefore, under *Bingham*, the statute of limitations remained tolled from the commencement of foreclosure until that March 13, 2009 expiration. The statute would not have expired then until March 13, 2015, which was after trustee Gibbon recorded a new notice of sale.

Indeed, on February 2, 2015, trustee Gibbon noticed a new foreclosure of the Property.[80] Under *Bingham*, this new notice of sale once again tolled the statute of limitations. 111 Wn. App. at 127.

Most importantly, the 2015 Notice of Sale was recorded ***less than six years*** after the 2008 Notice of Sale expired as a matter of law. Thus, even if the 2008 Notice of Sale did constitute acceleration as Appellant claims, BONY re-commenced the foreclosure of the Property within the limitations period. As such, BONY's right to enforce the Loan was not time-barred and Appellant's claims were properly dismissed.

The following chart illustrates the statute of limitations analysis:

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[78] Discontinuance, CP 124.
[79] RCW 61.24.040(6) (trustee may continue sale only up to 120 days after original sale date).
[80] 2015 Appointment, CP 126.

August 9, 2008: Notice of Trustee's Sale executed – this is the date Plaintiff contends the Loan was accelerated. However, the pending foreclosure tolls the statute of limitations. *Bingham*, 111 Wn. App. at 127.

March 14, 2009: First day statute of limitations begins running again because the 2008 Notice of Sale has expired as a matter of law. RCW 61.24.040(6).

February 2, 2015: 2015 Notice of Trustee's sale executed – statute of limitations tolled again. This is less than six years from March 14, 2009.

E. MERS Was Properly Dismissed Because it Claimed No Right, Title, or Interest in the Property.

At summary judgment, Respondents argued that, at a minimum, MERS should be dismissed from the lawsuit because it had no right, title, or interest in the Property; it disclaimed its interest on August 9, 2011, by executing the Assignment.[81] Appellant does not assign error to the dismissal of MERS on this ground and such dismissal should be affirmed.

F. BONY and MERS are Entitled to An Award of Attorney Fees on Appeal.

In its Opening Brief, Appellant agrees that attorney fees are available to the prevailing party in this dispute (but disagrees that Respondents should have prevailed).[82] If the Court affirms, Respondents

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[81] Assignment, CP 122.
[82] Op. Br. pp. 20-21 (citing attorney fee provision in parties' contract).

request that the Court award them the attorney fees and costs incurred in defending the appeal. *See* RAP 18.1(a).

VI. CONCLUSION

This case is about a real estate investor trying to use a perceived legal loophole to get a free house. Appellant's perception of that loophole, however, is seriously skewed. The mere fact that the loan was foreclosed in 2008 did not constitute acceleration and thus did not trigger the statute of limitations. More importantly, by allowing the foreclosure of the property to go through, Appellant has waived its right to continue this appeal.

Appellant's Opening Brief closes with a policy argument: Appellant contends that it is somehow inequitable to allow a lender 30 years to foreclose on a deed of trust. However, Appellant must acknowledge that the loan at issue is in fact a 30-year loan. When parties agree to a decades-long contractual relationship, it only makes sense that a party may need to enforce the agreement over the course of several decades.

In the end, the incongruous result Appellant seeks is not supported by the law or evidence. With respect, this Court should affirm.

RESPECTFULLY SUBMITTED this 18th day of February, 2016.

LANE POWELL PC

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of February, 2016, I caused to be served a copy of the foregoing **RESPONDENTS MERS AND BONY'S ANSWERING BRIEF** on the following person(s) in the manner indicated below at the following address(es):

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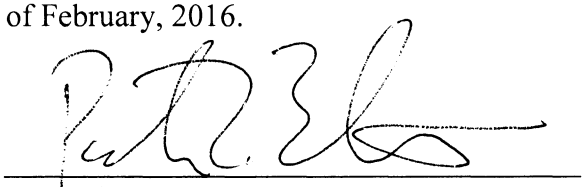

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