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

NO. 74264-7-I

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ROBERT CUMMINGS and DORIS CUMMINGS, husband and wife,

Appellants,/Plaintiffs

vs.

NORTHWEST TRUSTEE SERVICES OF WASHINGTON; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AND DEUTSCHE BANK NATIONAL TRUST CO., AS TRUSTEE IN TRUST FOR THE REGISTERED CERTIFICATE HOLDERS OF FIRST FRANKLIN MORTGAGE LOAN TRUST, ASSET-BACKED SECURITIES SERIES 2006-FF8

Defendants/Respondents.



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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SNOHOMISH

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# APPELLANTS CUMMINGS' RESPONSE BRIEF

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## STATE STATUTES

### RCW CHAPTER 61.24



### RCW CHAPTER 62A.9A



### FEDERAL STATUTE



### CASE LAW

# I ARGUMENT

## A. Northwest Trustee Services, Inc.'s Foreclosure Actions have been Unfair and Deceptive.

Neither *intent* to deceive nor *actual* deception is required to prove an act or practice is deceptive. *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 115, 285 P.3d 34 (2012). The question always is, "Does the conduct have the *capacity to deceive* a substantial segment of the public?", not whether it has actually deceived someone. *Panag v. Farmers Insurance Co. of Washington,* 166 Wn.2d 27, 47, 204 P.3d 885 (2009).

The illegal "appointment" of Northwest Trustee Services, Inc. ("NWTS") as successor trustee in hundreds, perhaps thousands, of foreclosure cases throughout the State of Washington over the past 8 years, under circumstances precisely like those presented by this case, has actually deceived thousands of Washingtonians. Those Washingtonians no longer reside in their homes even though NWTS was not lawfully appointed the successor trustee and therefore had no right to foreclose.

NWTS seeks to escape responsibility for conducting the illegal foreclosure by claiming it played no part in the creation of the illegal MERS assignment.[1] Notice, NWTS does not claim the MERS assignment was legal; it merely asserts the illegality cannot be attributed to it. That

[1] MERS attempted to assign the DOT, but not the note. Wholly apart from the fact MERS could not assign the DOT because MERS never obtained any interest in the underlying debt the DOT secures, MERS could not assign the DOT separately because assignment of the DOT in the absence of a transfer of the debt the DOT secures is a nullity. *RCW 62A.9A-203(a), (b), and (g)* (the security follows the debt).

argument might have merit if Plaintiffs-Appellants were attempting to hold NWTS responsible for creation of the MERS assignment.

Plaintiffs-Appellants are not now nor have they ever been attempting to hold NWTS responsible for the creation of the MERS assignment. Plaintiffs-Appellants have only ever sought to hold NWTS responsible for acting as the successor trustee when it knew or should have known the appointing entity, Deutsche Bank ("Trust"), received its *interest* in deed of trust through the MERS assignment.[2]

NWTS acted as the successor trustee. If its appointment as successor trustee was not lawful, its actions as the successor trustee also were not lawful. NWTS can be held responsible for its own unlawful actions.

**1. Unfair and Deceptive Acts or Practices.**

**a. Appointment of NWTS, and Every Action Taken by NWTS in Foreclosure Proceeding, Deceptive and Unfair.**

RCW 61.24.010(2) requires the *beneficiary* to appoint the successor trustee. *Bavand v. OneWest Bank, FSB*, 176 Wn. App. 475, 486, 309 P.3d 636 (2013) ("only a proper beneficiary has the power to appoint a successor to the original trustee named in the deed of trust"). Moreover, only a lawfully-appointed trustee is authorized to conduct a non-judicial

[2] Again, the Trust received nothing for two reasons: (1) MERS had nothing to transfer; and (2) even if MERS had had something to transfer, the DOT cannot be transferred separately from the note it secures.

foreclosure. *Id.; Keller v. Provident Funding Assocs.*, 2014 Wash. App. LEXIS 2313 (Wash. Ct. App., Sept. 8, 2014) *9.

RCW 61.24.005(2) defines the *beneficiary* as, "the *holder of the instrument* evidencing the *obligations* secured by the deed of trust, excluding persons holding the same as security for a different obligation." (Emphasis added).

On or about September 23, 2014, Select Portfolio Servicing, LLP ("SPS"), claiming to be the attorney-in-fact (agent) for the Trust, attempted to appoint NWTS the successor trustee. NWTS never received any proof SPS was in fact the Trust's authorized agent. Indeed, NWTS never even asked SPS to provide proof of agency. And despite Plaintiffs-Appellants' objection, the trial court never required SPS or NWTS to provide proof of SPS's agency relationship with the Trust.

Arguably, a beneficiary's right to use the services of an agent is an exception to the *actual-holder* rule. It is possible, perhaps even likely, a beneficiary of a DOT, by mutual agreement, may be able to use the services of an agent to conduct a non-judicial foreclosure in Washington. *Bain*, 175 Wn.2d at 106. However, if the agreement specifies the alleged agent is acting as an independent contractor and not as an agent, or does not indicate someone is accountable for the acts of the alleged agent (*Id.*, 175 Wn.2d at 107), then the alleged agent is not actually an agent. *See Rucker v. NovaStar Mortgage, Inc.*, 177 Wn. App. 1 (2013) ("Language in a contract between an original lender and a successor lender [and current

holder of a promissory note evidencing an obligation secured by a deed of trust under chapter 61.24 RCW] describing the original lender as the loan servicer with all powers necessary to "effectuate foreclosure or other conversion of the ownership of the mortgaged property securing a related mortgage loan" *does not* establish an agency relationship between the successor lender and the original lender if the contract also specifies that the parties' relationship is "intended by the parties to be that of an independent contractor and not that of a joint venturer, partner or agent.")

A *non-agent* of a beneficiary definitely has no right under RCW 61.24.010(2) to appoint a successor trustee.

The record is devoid of evidence that there was a servicing or an agency agreement between SPS and the Trust on September 23, 2014. Moreover, if a servicing or an agency agreement existed and described SPS as the "loan servicer with all powers necessary to 'effectuate foreclosure or other conversion of the ownership of the mortgaged property securing a related mortgage loan[,]'" then an agency relationship did not exist between SPS and the Trust on September 23, 2014. *Rucker*, 177 Wn. App. at 16.

If there was no agency relationship between SPS and the Trust, SPS's attempt to appoint NWTS the successor trustee did not comply with RCW 61.24.010(2). NWTS has the responsibility to make sure its appointment as successor trustee is lawful, or to accept the responsibility for its actions if it acts as the successor trustee without lawful authority.

NWTS cannot escape responsibility for its unlawful actions by claiming it was unaware its actions were unlawful.

NWTS never obtained the powers of the successor trustee. Without those powers, every statutory notice issued or recorded by NWTS in the foreclosure proceeding that is the subject of this litigation was issued or recorded unlawfully. A lawful foreclosure proceeding cannot be based on unlawfully issued or recorded statutory notices.

**b. Trust's Appointment of NWTS was Unfair and Deceptive Act.**

SPS's appointment of NWTS as the successor trustee on the basis of the authority purportedly obtained by the Trust through the MERS assignments was an unlawful, unfair, and deceptive act. The Trust had never become the lawful beneficiary because the MERS assignment was legally ineffective (a fact NWTS knew or should have known). Since the Trust never lawfully obtained an interest in the DOT,[3] its *appointment* of NWTS (through non-agent SPS) did not comply with RCW 61.24.010 and therefore did not grant NWTS the powers of the successor trustee. Hence, NWTS's initiation of the non-judicial foreclosure proceeding was an unlawful, unfair, and deceptive act.

Over the years, in the normal course of their businesses, Defendants-Respondents have conducted non-judicial foreclosures under

[3] Please do not lose sight of the fact we are speaking in the alternative. The Trust did not own the Note or beneficial interest in the DOT when it appointed NWTS the successor trustee. Accordingly, on these separate, substantial, unrelated bases, NWTS was not entitled to foreclose.

circumstances very similar to or exactly the same as the circumstances presented by this case in thousands of foreclosure throughout the State of Washington. Their joint and several actions have had significant impact on residents of this state.

### c. NWTS's Commencement of Foreclosure Unlawful, Unfair and Deceptive.

NWTS is the biggest foreclosure mill in the State of Washington. It is a regional foreclosure mill, with foreclosure operations in 8 states. It is their business to know the foreclosure laws. Knowledge of how a foreclosure is lawfully conducted in each one of the states in which they operate is what they sell. Hence, just as Plaintiff, an individual with no formal legal training, has been able to discover the foreclosure proceeding that is the subject of this litigation is unlawful, NWTS certainly should have been able to figure that out.

### d. Assignment Occurred After Trust Closing Date, and was therefore Unlawful, Unfair, and Deceptive.

Defendants-Respondents argue Plaintiffs-Appellants are not a party to the assignment of the DOT, are not third-party beneficiary of the assignment, and consequently do not have *standing* to assert a violation of the Pooling and Servicing Agreement or of the relevant federal statute (26 USC §860[A]-[G]). If Plaintiffs were arguing the assignment is *voidable*, Defendants-Respondents' arguments might be valid. Plaintiffs, however, are not arguing the assignment is *voidable*. Plaintiffs are arguing the assignment is *void*. Therefore, the facts that Plaintiffs are not parties to the

assignment agreement, are not third-party beneficiaries of the assignment, and are postulating violations of the Real Estate Mortgage Conduit Act ("REMIC") (26 U.S.C. §860[A]-[G]) do not prevent Plaintiffs from asserting the illegality of the assignment. *See Glaski v. Wells Fargo Bank, N.A.*, 218 Cal. App. 4th 1079, 1096-1098 (160 Cal. Rptr. 3rd 449) (2013).

Plaintiffs recognize some cases accept the third-party beneficiary and lack-of-privity arguments. As demonstrated below however those cases paint with too broad a brush.

**2. Assignment Violated Pooling and Servicing Agreement.**

The Trust Pooling & Servicing Agreement ("*PSA*"), the governing document for the Trust, supports the claim that the Trust does not have the power of sale. The PSA requires all loans to be placed in the Trust no more than 30 days after the Trust's Closing Date. *First Franklin Mortgage Loan Trust, Asset-Backed Securities Series 2006-FF8*, at II-1. The Trust closed on June 29, 2006. *See id.*, at 33. Accordingly, to be assigned to the Trust lawfully, Plaintiff's loan had to be assigned to the Trust no later than June 29, 2006. The loan, if it has ever been placed in the Trust, was not assigned to the Trust until, at the earliest, October 6, 2011, more than five years after the Trust's Closing Date. The assignment was therefore legally ineffective, unlawful, unfair (because it gave the world the impression the Trust was the lawful owner of Plaintiffs' Note and DOT), and deceptive (because it was intended to give the world the impression the Trust was the owner of Plaintiffs' Note and DOT).

### 3. Plaintiffs-Appellants Prejudiced by Assignment.

The Trust appointed NWTS to commence this foreclosure. It did so because the DOT was allegedly assigned to it by MERS—even though the assignment occurred years after the last date upon which both the *PSA* and the REMIC statute authorized lawful loan assignments into the Trust. Consequently, the harm identified by Plaintiffs—the attempt to foreclosure with all of its attendant costs for Plaintiffs—can be traced directly to the Trust's exercise of the authority purportedly granted to it by the assignment. Moreover, and this, if possible, is even more important; Plaintiffs are obligated to pay the Note issued in payment of the mortgage debt, or suffer loss of the security (i.e., their home), *only to a person that has actually been lawfully assigned the debt*. *Yvanova v. New Century Mortgage Corp.*, 62 Cal. 4th 919, 2016 WL 639526 at *11.

Plaintiffs-Appellants have made the *Yvanova* argument, repeatedly, from the start of this litigation. Plaintiffs-Appellants owe a debt to a specific person, not to everyone in the world! This is precisely what the DOT states. *See DOT, TRANSFER OF RIGHTS IN THE PROPERTY Section.*

Prior to the California Supreme Court's very recent decision in *Yvanova*, the majority rule in California had been that homeowners could not challenge late assignments of DOT's into securitized trusts because they were neither parties to the assignments nor third-party beneficiaries

of the assignments. The same *reasoning* is currently the majority rule in Washington.

From the beginning of this litigation, Plaintiffs-Appellants have argued the majority rule is ill-conceived. Now, the California Supreme Court, the leading state court in the country, has joined Plaintiffs-Appellants. It is only a matter of time until state court's throughout the country follow the California Supreme Court's example. Washington courts, considered throughout the country to be among the leaders in developing trends, should be on the cutting edge of this trend. The California Supreme Court's analysis is right.

Plaintiffs do not owe money to the world at large, but to a particular person. More than a few courts fail to keep this fact firmly in mind when evaluating cases of this type. Only the person to whom the debt is owed may enforce the debt by foreclosing on the security for the debt (i.e., the home). *See* DOT, *TRANSFER OF RIGHTS IN THE PROPERTY Section*; and RCW 62A.9-203(a), (b), and (g) (codification of the "security follows the debt" legal axiom). Taking the contrary position (that there is no prejudice from a void assignment because the homeowner owes the debt to *someone*) leads to an absurdity: anyone, even a stranger to a debt, can declare a default and order a trustee's sale because, after all, the homeowner owes the debt to someone, *though not to the foreclosing entity*.

In a post-foreclosure-sale context, the California Supreme Court has already condemned *reasoning* of this kind. *Yvanova,* 62 Cal. 4th 919, 2016 Cal. LEXIS, at *12.[4] It is only a matter of time until state courts across the country become enlightened enough to join the California Supreme Court.

**4. Prejudice exists in Pre-Foreclosure-Sale Context.**

Prejudice in the post-foreclosure-sale context is more easily recognized than in the pre-foreclosure-sale context. In the post-foreclosure-sale situation, plaintiff has already suffered the perceptible injury of the loss of the property. Because the sale in *Yvanova* had been completed, it is possible to conclude the *Yvanova* prejudice analysis applies only in the context of a completed foreclosure sale. However, such a conclusion would be erroneous.

The prejudice analysis in *Yvanova* does not depend on the existence of a completed foreclosure sale. *Lundy v. Selene Finance, LP,* 2016 U.S. Dist. LEXIS 35547 at *31. The *Yvanova* Court's prejudice analysis focuses, as it should, on the unfairness of requiring a plaintiff to be subjected to foreclosure proceedings by an entity that has no right to initiate those proceedings. *Id.* For this reason, in *Lundy* the U.S. District

[4] The California Supreme Court has granted review in two cases that address the prejudice issue in the ***pre-foreclosure-sale*** context: *Keshtgar v. U.S. Bank,* 178 Cal. Rptr. 3d 320, 334 P.3d 686 (Cal. 2014) (granting petition for review), and *Mendoza v. JP Morgan Chase Bank,* 228 Cal. App. 4th 1020 (July 2014). Both cases were stayed pending the Supreme Court's decision in *Yvanova.* Anticipating the California Supreme Court's decisions in *Keshtgar* and *Mendoza,* in *Lundy,* the United States District Court for the Northern District of California analyzes and decides the prejudice issue in a ***pre-foreclosure-sale*** context.

Court for the Northern District of California concluded that *Yvanova's prejudice* ruling applies just as strongly to pre-foreclosure-sale plaintiffs as it does to post-foreclosure-sale plaintiffs. *Lundy*, 2016 U.S. Dist. LEXIS 35547, at *31. ("A plaintiff who has already lost her home has undoubtedly suffered prejudice; but so has a plaintiff who is at imminent risk of doing so."). Defendants-Respondents' assertion that Plaintiffs-Appellants have suffered no prejudice is ludicrous.

At the commencement of this litigation, Plaintiffs herein were at imminent risk of losing their home. If this case ends with Plaintiffs-Appellants' defeat, the imminence of losing their home will immediately return. As such, there is no lack of prejudice, and there never has been a lack of prejudice.

**B. These acts are capable of repetition and have a substantial impact on the public interest.**

For years Defendants-Respondents have allowed MERS to assign Notes and DOTs into securitized trusts years after the trusts have closed. Defendants are fully aware that in most instances the courts are simply turning a blind eye to Defendants' actions in non-judicial foreclosure proceedings because, after all, the homeowner owes a debt to *somebody*. Does it really matter to whom the debt is paid, as long as the homeowner is not required to pay it more than once? If any member of this court is thinking in such venal terms, the answer is "Yes, it does matter, if the law matters."

Because courts pay little attention to what these very corrupt foreclosure mills are doing, illegal actions go undetected and uncorrected in almost every illegally-conducted non-judicial foreclosure proceeding. Moreover, even in those few instances in which borrowers challenge non-judicial foreclosure efforts in court, some judges do not possess sufficient understanding of the statutory requirements, or do not desire to look sufficiently closely at the trustee's actions, to know the foreclosure proceeding should be arrested.

Because these actions are so often repeated, the practices described herein above have a widespread impact on some of Washington's most vulnerable and exposed citizens, Plaintiffs among them. If the court permits this sale to occur despite the illegality of Defendants' actions, Plaintiffs will lose the Property—a grave injury indeed if, as Plaintiffs claim, the foreclosure proceeding is unlawful.

**C. Causation**

Finally, the loss of the Property will have been due entirely to Defendants' unlawful conduct. The fact Plaintiffs-Appellants owe a debt to someone means only that someone has a right to foreclose. If anyone else forecloses, as happened here, they have foreclosed illegally. Any injury caused by an illegal foreclosure is due strictly to that illegal foreclosure.

## V CONCLUSION

For the reasons listed herein above, the court should reverse the trial court's dismissal of Plaintiff's lawsuit and remand the case to the trial court for trial on the regular court calendar.

Respectfully submitted,

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Plaintiffs/Appellants

## DECLARATION OF SERVICE

**THE UNDERSIGNED** declares under penalty of perjury under the laws of the State of Washington that he caused Appellant/Plaintiff's Response Brief to Respondent/Defendant Northwest Trustee Services, Inc.'s Reply Brief to be served on the following representative for Defendants at the below stated address by E-Mail as previously agreed between the parties to this litigation:

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