Supreme Court No. 94093-2

Court of Appeals No. 74264-7-I

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

ROBERT AND DORIS CUMMINGS, husband and wife,

Petitioners,

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

Respondents.

APPELLANTS CUMMINGS' REPLY TO ANSWER

JAMES A. WEXLER
Attorney for Petitioners/Appellants
2700 NW Pine Cone Dr., Suite 314
Issaquah, WA 98027
(206) 849-9455

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I ARGUMENT

Respondent Deutsche Bank ("Deutsche") makes the following claim in its Answer to the Petition for Review ("Answer"):

> In any event, the Cummings' argument that the security for a note only follows a transfer of ownership of the note is contrary to over 100 years of precedent.

Answer, at 2.

In a footnote attendant to the above quote, Deutsche acknowledges UCC § 9-203(g) is the codification of the common-law *security follows the note* doctrine,[1] but claims UCC §§ 9-203(a) and (b) are not part of the rule:

> The 'security follows the note' rule was codified in UCC section 9-203(g). There is no hint or suggestion that in doing so it materially changed or limited the rule to transfers of ownership. There is no hint or suggestion that as part of the codification process UCC sections 9-203(a) and (b) were incorporated into the rule as part of the codification. The Cummings identify no cases or authorities that adopt this position or support their theory. (cite omitted).

Answer, at 3.

Both the above claims are false and evidence a profound lack of knowledge of the precedent surrounding the security follows the debt

[1] The doctrine's name is a misnomer. Historically, the doctrine is *the security follows the **debt***. *Green v. Hart,* 1 Johns. 580 (1806). The Lender's acceptance of the note at the close of the mortgage loan transaction means payment of the note per its covenants and agreements to the person entitled to enforce the note simultaneously satisfies the homeowner's ***two*** obligations: (1) the homeowner's stand-alone, contractual obligation to pay the note to the ***person entitled to enforce the note*** (the PETE); and (2) the borrower's separate and independent obligation to repay the underlying mortgage *debt* to the ***Lender***. Because the parties agree that the note is the preferred method of repaying the debt, and the note payment obligation is the only out-of-pocket payment obligation so long as the note is honored, the security follows ***the note*** became acceptable shorthand for the security follows ***the debt***. After decades of using that shorthand, the distinction between the obligation to pay the note and the obligation to repay the underlying mortgage debt by paying the note has been lost on the legal profession. The failure to recognize this distinction is the most significant source of the widespread confusion that exists in the legal profession, including in the *Brown* decision, concerning who has the right to foreclose.

doctrine, and an equally concerning lack of understanding of the meaning of UCC § 9-203.

Dating from the beginning of this nation, until very recently, the *security follows the note* doctrine has always meant the security follows a transfer of *ownership* of the *debt*. More than 240 years of precedent – going all the way back to the beginning of the republic and beyond -- affirm that the security follows the note doctrine means the security follows the *transfer of ownership of the* ***debt*** that the note evidences. *Carpenter v. Longan,* 83 U.S. 271, 271 (1872) ("It is to be remarked that the [security follows the debt] doctrine is: ***that the mortgage follows the debt; not the bond, note, or other evidence of debt, but the debt.***")

In *Carpenter*, B. Platte Carpenter ("Carpenter 1") *purchased* the note in question for a *valuable consideration*[2] from Jacob B. Carpenter ("Carpenter 2"). *Id.,* at 272. Carpenter 2 then *assigned* the note to Carpenter 1. *Id.* The assignment transferred *all* Carpenter 2's interest in the note to Carpenter 1.

Carpenter, the U.S. Supreme Court's seminal *security follows the debt* case, supports Appellants' view of the doctrine. Here is what the *Carpenter* Court stated in the opening paragraphs of the opinion:

> The assignment of a ***debt*** carries with it the mortgage. ***This is the universal rule***.

[22] Purchase of a note is, and always has been, the conventional way of purchasing an intangible debt.

> In *Martin v. Mowlin,* 2 Burr. 978 Lord Mansfield[3] says: a mortgage is a charge upon the land, and whatever will give the money, will carry the estate in the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it.
> In *Martin v. Mowlin*, 2 Burr. 978, Lord Mans' J., says: "The mortgage interest, as distinct from the ***debt***, is not a fit subject for assignment. It has no determinate value. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor who holds the bonds. *Accessorium non ducit, sed sequitur suum principalem [That which is the accessory or incident does not lead, but follows, its principal.]*
> It is to be remarked that the [security follows the debt] doctrine is: ***that the mortgage follows the debt; not the bond, note, or other evidence of debt, but the debt.***

Carpenter, at 271. (bracketed material added, and underlying, bolding, and italics added).

Please notice, per the above quote from *Carpenter,* the doctrine is the security follows a *sale of the debt*. Equally important, the italicized, bolded, and underlined phrase in the last sentence of the above quote establishes that the note and the debt are two different things. The *mortgage follows the debt*. *All* the early cases, in the United States and England, are to the same effect. *Martin v. Mowlin,* 2 Burr. 978; *Jackson v. Blodget,* 5 Cow. 202, 206 (1825) (transfer of the mortgage followed assignment for *value* of *all the assignor's interest* in the bond); *Green v.*

[3] William Murray, 1st Earl of Mansfield. Lord Mansfield was the Chief Justice of the King's Bench from November 8, 1756 to June 4, 1788. For 20 of those 32 years, America was under English rule. English legal precedent was very important in America during that entire period.

Lord Mansfield was the most powerful British jurist of the 18th Century. He advanced commercial law in ways that helped establish England as the world leader in industry, finance, and trade. He is recognized as the founder of English commercial law because of the highly-sophisticated analyses he authored in *Carter v. Boehm* and *Pillans v. Mierop*. Justice Swayne, who wrote the *Carpenter* opinion, cited Lord Mansfield as authority for the court's ruling in *Carpenter* because Lord Mansfield was the leading commercial law authority in the world at the time.

Hart, 1 Johns. 580 (1806) (a mortgagor indebted to a mortgagee gave the mortgagee a note in payment of the *debt*. To secure the payment of the *debt*, a trustee of the mortgagor executed a mortgage of two lots of land. The mortgagee endorsed the note to a third party and delivered it to him with the mortgage. When the mortgagor defaulted on the note, the third party filed suit and alleged that he had *paid a valuable consideration for the note and mortgage*.[4] Judgment for the third party based on the security follows the *debt* doctrine); *Jackson v. Willard*, 4 Johns. 41 (1809). *Dutton v. Ives,* 5 Mich. 515, 519 (1854); *Cornnell v. Hichens,* 11 Wis. 353 (1860); *Walker v. Dement,* 42 Ill. 273 (1866).

And before someone makes the ludicrous claim that the original doctrine has evolved into the present-day variation, there is irrefutable proof the doctrine has not devolved into the present-day aberration. UCC § 9-203(g), current law in Washington, is the codification of the common-law doctrine as espoused in *Carpenter. See Official Comment 9 to UCC § 9-203* and *Official Comment (b) to Restatement of Property (3d), Mortgages, § 5.4*. Official Comment 9 cites Restatement of Property (3d),

[4] Remember, the note is *evidence of the debt*. Debt is intangible. In America and England, the conventional way of transferring debt is, and always has been, sale of the note that evidences the debt. Per *Carpenter*, transfer of the debt (as evidenced by the note) for value transfers the security for the debt.

In *Brown*, Freddie Mac did not transfer the note to M & T for *value*. Freddie Mac temporarily delivered the blank-endorsed note to M & T – thereby allegedly making M & T the holder of the note -- under the mistaken belief that doing so would authorize M & T to foreclose. Under these circumstances, delivery of the note did not vest M & T with an iota of interest in Ms. Brown's underlying mortgage debt. Ownership of the note and of the underlying mortgage debt that the note evidenced remained the property of Freddie Mac. Since the DOT secures *to the Lender* repayment of the underlying debt via the covenants and agreements of the note, M & T never acquired the right to foreclose.

Mortgages § 5.4 as strong authority for the proposition that 9-203(g) is the codification of the common-law security follows the debt doctrine. In turn, Official Comment (b) to § 5.4 cites *Carpenter v. Longan,* 83 U.S. 271 (1872) as being on all fours with Comment (b)'s assertion that transfer of an obligation also transfers the security for the obligation. In other words, 9-203(g) codifies the ruling in *Carpenter* that the security follows debt, not the note.

Respondent claims there is no "hint or suggestion" that the codification of the security follows the note rule "materially changed or limited the rule to transfers of ownership." *Answer,* at 2. Further, Respondent claims, "There is no hint or suggestion that as part of the codification process UCC sections 9-203(a) and (b) were incorporated into the rule as part of the codification." *Id.,* at 3. While it is true the codification of the doctrine did not materially change the common-law rule, the remainder of Respondent's claims evidence a profound ignorance concerning the proper way to apply UCC section 9-203. A competent analysis of UCC § 9-203 proves the point.

Uniform Commercial Code § 9A-203(a) states a <u>*security*</u> interest (<u>*ownership*</u> interest (*See* UCC §1-201[b][35]) attaches to collateral (a mortgage note (UCC § 9-102[a][12][B]) when the *ownership* interest in the mortgage note becomes ***<u>enforceable</u>*** against the debtor (the *seller* of the mortgage note (UCC § 9-102[a][28][B]).

UCC § 9-203(b) states that a *security* interest (*ownership* interest (*See* UCC § 1-201[b][35]) in collateral (a mortgage note (UCC § 9-102[a][12][B]) becomes ***enforceable*** against the seller and the rest of the world the instant three conditions have been met: (1) *value* has been given for the note (UCC § 9-203[b][1]); (2) the *seller* has rights in the note or the power to transfer rights in the note to a purchaser (UCC § 9-203[b][2]); and (3) either (a) the *debtor* (the *seller* of the note (UCC § 9-102[a][28][B]) has signed a *security agreement* (a *security agreement* is an agreement that creates or provides for a *security interest* (UCC § 9-102[a][74]) that provides a description of the note (UCC § 9-203[b][3][A]), or (b) pursuant to the terms of the *debtor's* security agreement, is *possessed* by someone other than the *secured party* (the *purchaser* of the note [UCC § 9-102(a)(73)(D)]) under UCC § 9-313 solely for the *purchaser's* benefit (UCC § 9-203[b][3][B]). *See UCC § 9-203(b)(3)(A) and (B) and UCC § 9-313.*

UCC § 9-203(g) is the codification of the common-law *security follows the note* doctrine.[5] *See Official Comment 9 to UCC §9-203.*[6] Under

[5] I know you interpret the UCC as codifying a security follows the note doctrine that is different from the common law doctrine. But the UCC, and the Restatement of Property (3d), correctly disagrees with your interpretation.

[6] "9. **Collateral Follows Right to Payment or Performance.** Subsection (g) ***codifies the common law rule*** that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien." UCC § 9-203(g) is the codification of the common-law *security follows the note* doctrine. Restatement (3d), Property (Mortgages) section 5.4(a) (1997) is to the same effect: § 5.4 Transfer of Mortgages and Obligations Secured by Mortgages. (a) A transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise. . . . (c) A mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures.

UCC § 9-203(g), the DOT is automatically transferred if, *and only if*, the Note is transferred pursuant to § 9-203(a) and (b). That is, the DOT follows a transfer of *ownership* of the Note. Under § 9-203(a), (b), and (g), a transfer of holder status alone does not carry the right to enforce the DOT.

The *Brown* decision doesn't even acknowledge the existence of the underlying mortgage debt. The entire case is premised on the erroneous notion that the homeowner's sole obligation is the obligation to pay the note. There is zero recognition of the dual nature of the homeowner's obligation: (1) to pay the note per its covenants and agreements; and (2) to repay the underlying mortgage debt by paying the note per its covenants and agreements. An analysis than fails to even address the central issue in a foreclosure case – who has the right to enforce the underlying mortgage debt, not who has the right to enforce the note – is bound to yield fatally flawed results and nonsensical, real life consequences.

For example, the Brown decision authorizes a thief to foreclose in the event the secured note he has stolen falls into default. A thief can be a holder. For example, the deed of trust, in clear, unambiguous language limits its protection to the Lender, the Successor Lender, or the Assignee

A standard DOT, by its literal, unambiguous terms, secures ***to the Lender*** (or the ***Successor Lender***, or the ***Assignee Lender***), and ***no one else in the world***, repayment of the underlying mortgage debt per the note's covenants and agreements. Thus, pursuant to UCC § 9-203(g) and Restatement (3d) of Property: Mortgages § 5.4, the only person entitled to utilize the DOT to foreclose is the ***Lender***, the ***Successor Lender***, or the ***Assignee Lender***.

Lender. There is no definition of the word "Lender" to be found in any dictionary, in any language, anywhere in the world that includes a person or entity who has not loaned anything. In *Brown*, M & T Bank had not loaned anything to Darlene Brown.

For example, RCW 61.24.030(3), one of the requisites to a lawful trustee's sale, requires the trustee[7] to have proof that has occurred in the obligation secured which by the terms of the deed of trust makes operative the power to sell the property. Under the terms of the deed of trust, the only default that makes operative the power to sell the property is a default declared by the Lender. *See DOT,* at ¶ 22. It is disingenuous to pull the power of sale provision out of a portion of ¶ 22 of the DOT and then ignore the remainder of that same paragraph that restricts to the Lender the right to make operative the power to sell the property. The DOT is a contract between the homeowner and the Lender. How then is someone who is neither the homeowner nor the Lender entitled to assert rights in the DOT contract?

For example, in Brown this court acknowledged Freddie Mac was entitled to *foreclosure proceeds* in the event of a sale. But foreclosure proceeds is the benefit the trust established by the DOT is created to distribute to the beneficiary of the DOT in the event of a default in the

[7] Appellant has decided to dismiss the case against Northwest Trustee Services, Inc. Their actions are culpable, but there are legitimate issues concerning Appellants' filing of the notice of appeal concerning NWTS. Appellant does not want the court to waste anytime focusing on those side issues when the main issue in this case is of paramount importance to Appellants and thousands of other Washington homeowners.

obligation to repay the underlying mortgage debt. The person who is entitled to the benefit the DOT is created to convey in the event of a default in the obligation to repay the mortgage is, by definition, the beneficiary of the DOT. Yet, Brown concludes Freddie Mac, the entity that *is entitled* to foreclosure proceeds *is not* the beneficiary of the DOT, and M & T, the entity that *is not entitled* to foreclosure proceeds *is* the beneficiary of the DOT. This is a formulation of the concept of a beneficiary that stands 1000 years of trust history on its head.

There are many more examples that will be brought to light if the court accepts review.

We have established that 9-203(g) stands for the proposition that the sale of the mortgage note – thereby simultaneously selling the underlying mortgage debt – transfers the mortgage. This is the vital connection between RCW 62A.9A-203(a) and (b) and RCW 62A.9A203(g) that the court missed in Brown. It failed to recognize the connection, as all the courts that follow the bogus *security-follows-the-transfer-of-the-right-to-enforce-the-note* doctrine fail to do, because it failed to understand that the homeowner has two obligations, not one: (1) the obligation to pay the note per its covenants and agreements; and (2) the separate and distinct obligation to repay the underlying mortgage debt per the covenants and agreements of the note.

One payment satisfies both obligations. But the fact that one payment simultaneously satisfies both obligations does not turn the two obligations into a single obligation. As *Carpenter* – and all the early American and English cases -- proves, the deed of trust secures the second obligation.

The note is secured only to the extent that it is the mutually-agreed-upon, preferred method of repaying the underlying mortgage debt. It is necessary to secure the note to this extent so that the failure to pay the note as agreed is a default event under the terms of the DOT. Because of UCC § 3-310, the obligation to repay the underlying mortgage debt is suspended so long as the note is paid per its covenants and agreements. UCC § 3-310(b)(2). If failure to pay the note was not a default event under the DOT, the Lender could not declare a default when the homeowner failed to pay the note. And if the Lender could not declare a default, the property could never be foreclosed because suspension of the obligation to pay the underlying mortgage could never be lifted.

UCC § 3-310 establishes, beyond dispute, that the obligation to pay the note per its covenants and agreements and the obligation to pay the underlying mortgage debt per the note's covenants and agreements are separate and distinct obligations. Courts all over the United States – and many legal commentators -- routinely conflate these distinct obligations into a single obligation – the obligation to pay the note per its covenants and agreements. This conflation is one of the most obvious and significant

contributors to the easily-recognized confusion that exists in many U.S. court decisions and legal commentaries concerning the right to foreclose.

In the TRANSFER OF RIGHTS IN THE PROPERTY Section of a standard DOT the parties agree that payment of the note per its covenants and agreements satisfies, to the extent of the payment, the homeowner's obligation *owed to the Lender* to repay the underlying mortgage debt. Moreover, under UCC § 3-310(b), as a matter of law, if a note is taken for an obligation, "the ***obligation is suspended*** to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken[.]" (emphasis added). And under UCC § 3-310(b)(2), *suspension* of the obligation *continues until* dishonor of the note or until the note is paid. Payment of the note results in discharge of the underlying debt obligation to the extent of the payment. *Id.*

It should go without saying (but, given most courts' lack of familiarity with the meaning of most UCC provisions, it needs to be said) that payment of the note per its covenants and agreements satisfies the obligation to pay the note per its covenants and agreements. Thus, a single payment simultaneously satisfies both the obligation to pay the note per its covenants and agreements, ***and*** the obligation to pay the underlying mortgage debt per the note's covenants and agreements, to the extent of the payment.

To completely understand what is happening in a mortgage loan transaction, it is critical to understand the meaning of the preceding paragraph; so, I will say it again. Because of the agreement between the Lender and Homeowner, a timely payment made on the note (which satisfies the obligation to pay the note to the extent of the payment) ***simultaneously satisfies the obligation to repay the underlying mortgage debt to the extent of the payment***. One payment satisfies two obligations, not one. However, the fact that one payment satisfies two obligations does not conflate the two obligations into a single obligation.

If the note is consistently paid per its covenants and agreements, the only obligation the homeowner has appears to be the obligation to pay the note. Under those circumstances, it is easy to forget (if one ever knew) that the single payment on the note satisfies two obligations, not one. There is no need to consider how many obligations payment of the note satisfies when the note is consistently honored.

But when the note is dishonored, and the PETE is not the owner of the note, it is critical to remember (understand) that payment of the note per its covenants and agreements satisfies two obligations, not one. Why? Because, per UCC § 3-301, the obligation to pay the note per its covenants and agreements is owed to the PETE, regardless of whether the PETE owns the note. On the other hand, per the TRANSFER OF RIGHTS IN THE PROPERTY Section of the DOT, UCC § 3-310(b)(3), and UCC § 9-203(a), (b), and (g), the obligation to repay the mortgage debt per the

note's covenants and agreements is owed to the Lender (or the Successor Lender, or the Assignee Lender), ***and no one else in the world***!

Neither the DOT nor UCC § 3-310 requires the borrower to make note payments directly to the Lender. Thus, if note payments are made to a PETE that does not own the note (satisfying the homeowner's obligation to pay the note per its covenants and agreements [the homeowner's first obligation]), the homeowner's second obligation – the obligation to repay the mortgage debt per the note's covenants and agreements – is still met. In other words, if the Lender transfers PETE status to a third party while retaining ownership of the note and ownership of the underlying mortgage debt, the homeowner's obligation to pay the note per its covenants and agreements is now owed to a different PETE; but the homeowner's obligation to repay the underlying mortgage debt per the note's covenants and agreements *continues to be owed to the Lender*.

Nothing about the Lender's transfer of PETE status to a third party affects the homeowner's obligation to the Lender in any way. *Before* the transfer of PETE status, by law, the homeowner has an obligation to pay the note per its covenants and agreements to the PETE. Because the Lender is the PETE before transferring PETE status to a third-party, the obligation to pay the note is initially owed to the Lender.[8] *After* the

[8] The obligation to pay the note per its covenants and agreements is a stand-alone obligation. The borrower offers the note to the Lender. (The note is presented to the borrower by the Lender on a take it or leave it basis. But by executing the note and handing it back to the Lender, the note becomes the borrower's offer.) By taking the note from the loan closing without changing the note in any way, the Lender accepts the

transfer of PETE status, as far as the homeowner is concerned, nothing of legal significance has changed!

The homeowner is still required to pay the note per its covenants and agreements to the PETE (satisfying the homeowner's first obligation), and the payment to the PETE still satisfies the homeowner's obligation to the Lender to repay the underlying mortgage debt per the note's covenants and agreements (the homeowner's second obligation). The Lender has changed the person to whom he wants the note payments made. But that change is between the Lender and the transferee PETE. That change has nothing to do with the homeowner or the homeowner's loan-related obligations.

PETE status could change 100 times, and the changes would not alter the homeowner's loan-related obligations one iota. Why? ***Before*** the transfer of PETE status, the homeowner has two obligations: (1) the obligation to pay the note per its covenants and agreements ***to the PETE*** (whoever the PETE might be); and (2) the obligation to repay the underlying mortgage debt per the note's covenants and agreements ***to the Lender***. ***After*** the transfer of PETE status, the homeowner continues to have the same two obligations: (1) the obligation to pay the note per its covenants and agreements ***to the PETE*** (whoever the PETE might be);

borrower's offer. And the loan provides ample consideration for the note. Offer, acceptance, consideration – contract! The borrower has a stand-alone obligation to pay the note, regardless of what the note payment is paying for.

and (2) the obligation to repay the underlying mortgage debt per the note's covenants and agreements ***to the Lender***. For the homeowner, nothing has changed!

The change of PETE status does not affect the homeowner's two obligations. But the PETE status transfer does affect the homeowner's and the Lender's foreclosure rights. The Lender can never foreclose because it can never declare the note dishonored[9] (so the underlying mortgage debt remains suspended); and the homeowner should be able to prevent the PETE from foreclosing because the PETE has no interest in the underlying mortgage debt and is not a party to the DOT contract.

II CONCLUSION

For the reasons *listed* herein above, the court should grant Petitioner's request for review.

DATED this 15th day of March, 2017.

Respectfully submitted,

/s/ James A. Wexler_____
James A. Wexler, WSBA # 7411
Attorney for Petitioners Cummings

[9] The right to payment of the underlying mortgage debt is represented by the note which is controlled by the transferee PETE, not the Lender.

DECLARATION OF SERVICE

THE UNDERSIGNED declares under penalty of perjury under Laws of the State of Washington that he caused Petitioners' Reply to Respondents' Answer to be served on the Clerk, Washington Supreme Court, on this date, 15 March 2017 by e-mail (supreme@courts.wa.gov) as instructed by the Clerk, and on the following representatives for the Respondents at the below stated e-mail addresses as mutually agreed by counsel.

Joshua S. Schaer
RCO Legal, P.S.
13555 S.E. 36th St., Suite 300
Bellevue WA 98006
jschaer@rcolegal.com

Vanessa Power
John E. Glowney
Stoel Rives, LLP
600 University Street
Suite 3600
Seattle, WA 98101
John.glowney@stoel.com
Vanessa.power@stoel.com

DONE this 15th day of March, 2017 at Issaquah, Washington

JAMES A. WEXLER

Attorney-at-Law

/s/ James A. Wexler
James A. Wexler, WSBA #7411
Attorney for Petitioners Cummings