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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

Deutsche Bank National Trust Co.,  
as trustee for Long Beach Mortgage  
Loan Trust 2006-4, et al.

Respondents,

vs.

John E. Erickson and Shelley A.  
Erickson, et al.

Appellants.

NO. 73833-0-I

(Trial Ct # 14-2-00426-5 KNT  
King County Superior Court)

APPELLANT'S OPENING BRIEF

*Corrected*

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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE

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## I. INTRODUCTION

Plaintiff below, respondent on appeal, is Deutsche Bank National Trust Co., as Trustee for Long Beach Mortgage Loan Trust 2006-4 (“DBNTC” in this brief).

Defendants below, appellants on appeal, are John E. Erickson and Shelley A. Erickson (“Ericksons” in this brief).

On July 17, 2015, the trial court entered an order granting summary judgment of foreclosure (CP 539 – 541) in favor of Deutsche Bank National Trust Co., as Trustee for Long Beach Mortgage Loan Trust 2006-4 (“DBNTC” in this brief), against appellants John E. Erickson and Shelley A. Erickson (“Ericksons” in this brief) and denied Ericksons motion for reconsideration. (CP 542 – 546; CP 547 – 549) The trial court then entered a final judgment and decree of foreclosure on August 27, 2015. (CP 680 – 685)

A fundamental flaw in the trial court’s decisions is that DBNTC submitted no competent evidence in support of the relief it requested and was granted. DBNTC submitted no declaration or affidavit of any person with personal knowledge of the assertions made by its attorney, Will J. Eidson, Stoel Rives, LLP, in support of DBNTC’s case. Attorney Eidson is the sole source of the factual assertions submitted to the trial court by DBNTC. Mr. Eidson’s assertions consist of unsworn oral statements at the two summary judgment hearings (VRP 7/2/2015) and VRP 7/13/2015)

and three declarations over his signature. (CP 235 – 255; CP 470 – 503; and CP 660 – 666) No officer, agent, records custodian, employee, or person other than DBNTC's lawyer J. Will Eidson submitted a declaration or testimony in support of DBNTC's claims.

DBNTC asserts solely through attorney J. Will Eidson's unsubstantiated hearsay assertions that at the time of trial it was the holder of the Ericksons' promissory Note and entitled to enforce the Note and foreclose the Ericksons' Deed of trust. It claims holder status based solely on Mr. Eidson's oral statements at the hearings and his declarations under penalty of perjury. DBNTC's complaint filed January 3, 2014, has attached to it a copy of a copy of a promissory note with no indorsements and no allonges. DBNTC's complaint does not allege that the attached note is an original or even a copy of the original note. Nor does the complaint allege the DBNTC is in possession of the original note or deed of trust.

Ericksons challenge DBNTC's standing to bring this judicial foreclosure action. The record is void of any competent evidence showing that DBNTC was in possession of, was the holder of, or was entitled to enforce the Erickson Note when it filed the foreclosure complaint on January 3, 2014. DBNTC does not assert in its motion for summary judgment, through Mr. Eidson's declarations, or at either of the two summary judgment hearings, or otherwise, that it possessed the Ericksons'



original note when it filed the judicial foreclosure action on January 3, 2014.

Nearly 1 1/2 years after the complaint was filed in January 2014, attorney Eidson's May 19, 2015 declaration (CP 235 – 255) for the first time provides a note copy that purports to have an undated blank indorsement on the back of the last page. No explanation is provided regarding the undated indorsement stamped on the blank sheet attached to this new version of the note (CP 239 – 242). That note copy is substantially different in appearance from the Note copy attached to the January 3, 2014 complaint. (CP 48 – 50)

The lack of competent evidence in support of summary judgment runs through DBNTC's entire case. For example, the trial court's judgment and decree of foreclosure (CP 680 – 685) enters a money judgment in favor of DBNTC against Ericksons in the principal amount of \$465,047.67 plus interest totaling \$253,354.11 for a total of amount of \$718, 401.78. No evidence whatsoever was presented to the court in support of the amount of principal or interest awarded. No records, no ledger, not even a statement of account! The money judgment is based solely on the unsupported hearsay representations of DBNTC's lawyer J. Will Eidson with no supporting evidence or documentation. Mr. Eidson does not claim to be a custodian of any underlying business records.

Ericksons raise additional challenges to DBNTC's claims. These are set forth below in the body of this brief.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in granting defendant DBNTC's motion for summary judgment. (CP 539 – 541)
2. The trial court erred in granting defendant DBNTC a judgment and decree of foreclosure. (CP 680 - 685)
3. The trial court erred in entering a money judgment as part of the judgment and decree of foreclosure in the absence of any evidence in support of a money judgment. (CP 680 - 685)
4. The trial court erred in dismissing Ericksons' affirmative defenses and counterclaims on the basis of collateral estoppel.
5. The trial court erred in awarding DBNTC any relief where DBNTC submitted no competent evidence or declarations or affidavits in support of the relief requested.
6. The trial court erred in awarding any relief to DBNTC due to DBNTC's lack of standing.

## **III. ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. Did DBNTC establish that it had possession of the Ericksons' original promissory note and thus had standing to enforce the note when it filed the original complaint for judicial foreclosure on January 3, 2014?
2. Did DBNTC establish that it had possession of the Ericksons' original promissory note on and after May 19, 2015?
3. Did DBNTC lack standing to proceed with a lawsuit to enforce the Ericksons' promissory note and foreclose their deed of trust where DBNTC failed to show that it was the holder and in possession of the original promissory note and entitled to

enforce the note on the date the judicial foreclosure complaint was filed?

4. Where the moving plaintiff DBNTC's motion for summary judgment was supported solely by the unsworn oral and written statements of its lawyer that are not based on personal knowledge and are clearly incompetent hearsay, was it error for the trial court to grant the moving party's motion for summary judgment and enter a judgment and decree of foreclosure against the nonmoving party Ericksons' homestead and enter a personal money judgment against the nonmoving party Ericksons?
5. Is an assignment of the deed of trust required to be issued and duly acknowledged by the Washington Statute of Frauds before a holder may enforce a promissory note by foreclosure of the deed of trust?
6. Was there an identity of parties and issues between the Ericksons' 2010 U.S. District Court case and this case such that dismissal of all Ericksons' affirmative defenses and counterclaims in this case was warranted under the doctrine of collateral estoppel?
7. Is Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 006-4, the same corporate entity as Deutsche Bank National Trust Company, N.A., or are they separate and distinct corporate entities?

8. Does DBNTC's confusion as to its own corporate identity preclude summary judgment and entry of judgment and where, as here, DBNTC's counsel admitted on the record that the corporate entity named as plaintiff was in fact not the corporate entity that counsel was actually representing in this case?

#### **IV. STANDARD OF REVIEW**

This court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court, *Beaupre v. Pierce County*, 161 Wn.2d 568, 571, 166 P.3d 712 (2007), and reviews the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Fulton v. State, Dep't of Soc. & Health Servs.*, 169 Wn.App. 137, 147, 279 P.3d 500 (2012). Summary judgment is proper if there are no genuine issues of material fact. CR 56(c); *Lowman v. Wilbur*, 178 Wn.2d 165, 168-69, 309 P.3d 387 (2013). A material fact is one that affects the outcome of the litigation. *Janaszak v. State*, 173 Wn.App. 703, 711, 297 P.3d 723 (2013).

A [party] moving for summary judgment “has the initial burden to show the absence of an issue of material fact, or that the [other party] lacks competent evidence to support an essential element of [his] case.” *Seybold v. Neu*, 105 Wn.App. 666, 676, 19 P.3d 1068 (2001). If the [moving party] meets this initial showing, then the inquiry shifts to the [nonmoving party] to set forth evidence to support his case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989). The

evidence set forth must be specific and detailed. *Sanders v. Woods*, 121 Wn.App. 593, 600, 89 P.3d 312 (2004). The responding [party] may not rely on conclusory statements, mere allegations, or argumentative assertions. CR 56(e); *Vacova Co. v. Farrell*, 62 Wn.App. 386, 395, 814 P.2d 255 (1991). If the [nonmoving party] fails to establish the existence of an essential element that he bears the burden of proving at trial, then summary judgment is warranted. *Young*, id. at 112 Wn.2d at 225.

## V. STATEMENT OF THE CASE

### **Order Granting Plaintiff's Motion for Summary Judgment (CP 539 – 541):**

Pursuant to RAP 9.12, the Order Granting Plaintiff's Motion for Summary Judgment (CP 539 – 541) designates the following documents and evidence called to the attention of the trial court before the order of summary judgment was entered:

1. Plaintiff's Motion for Summary Judgment. (CP 215 – 234)
2. Declaration of J. Will Eidson in Support of Motion for Summary Judgment. (CP 235 – 255)
3. Defendant Ericksons' Response in Opposition to Plaintiff's Motion for Summary Judgment. (CP 259 – 280)
4. Declaration of Duncan Robertson in support of defendants' opposition to the MSJ. (CP 281 – 454)
5. Plaintiff's Supp. Declaration of J. Will Eidson. (CP 470 - 503)
6. Plaintiff's Reply in Support of Their Motion for Summary Judgment. (CP 455 – 462)
7. Defendant's Supplemental Memorandum. (CP 504 – 516)

The trial court also considered the arguments made at the two hearings held on this matter on July 2, 2015 and on July 13, 2015, and the

authorities cited by the parties, and reviewed additional case law, including *Corales v. Flagstar Bank, FSB*, 822 F.Supp.2d 1102, 1107-08 (W.D. ash 2011).

**The Note:**

On March 3, 2006, Ericksons as “Borrowers” made and delivered to Long Beach Mortgage Company as “Lender” a Fixed/Adjustable Rate Note in the amount of \$476,000 (the “Note”) (CP 3 ¶ 7; CP 26 ¶ 7; CP 29 ¶ 46). A copy of a copy of the Note is attached to the complaint as Exhibit “A”. (CP 7 – 10). An unauthenticated copy of a copy of the Note is attached to Ericksons’ answer as Exhibit 1. (CP 47 - 50)

The Note attached to the complaint (CP 8 – 10) is a copy of a copy of the Note. It has a printed loan number, a bar code, and a rubber-stamped certification (“THIS IS A CERTIFIED COPY OF THE ORIGINAL DOCUMENT”) with an illegible signature in the upper right area of the first page. This Note copy is not itself certified as a true copy. It has no indorsements or allonges. The complaint neither alleges that it is a copy of the original Note nor that DBNTC has possession of the original Note.

**The Deed of Trust:**

On March 3, 2006, Ericksons executed a Deed of Trust with Long Beach Mortgage Company (“LBMC”) as the original Beneficiary, Ericksons as the Grantors, and Older Republic Title, Ltd, as the Trustee. (CP 3 ¶ 8; CP 29 ¶ 48) A copy of a copy of the Deed of Trust recorded on

March 9, 2006 is attached to the complaint as Exhibit "B" (CP 12 – 23) and to Ericksons' answer as Exhibit 2 (CP 52 – 59) The complaint does not allege that DBNTC has possession of the original Deed of Trust.

**Assignment of Ericksons' Deed of Trust March 14, 2006:**

A copy of an Assignment of Deed of Trust dated March 14, 2006, with no indicia of recording, is attached to DBNTC'S complaint at CP 21.

The named assignor is Long Beach Mortgage Company.

No assignee is named.

This assignment recites

KNOW ALL MEN BY THESE PRESENTS that in consideration of the sum of TEN and no /100th DOLLARS and other good and valuable consideration, paid to the above named Assignor, the receipt and sufficiency of which is hereby acknowledged, the said Assignor hereby assigns unto the above-named Assignee, the said Deed of Trust together with the Note or other evidence of indebtedness (the "Note"), said Note having an original principal sum of \$476,000.00 with interest, secured thereby, together with all moneys now owing or that may hereafter become due or owing in respect thereof, and the full benefit of all the powers and of all the covenants and provisions herein contained, and the said Assignor hereby grants and conveys unto the said Assignee, the Assignor's beneficial interest under the Deed of Trust.

TO HAVE AND TO HOLD the said Deed of Trust and Note, and also the said property unto the said Assignee forever, subject to the terms contained in said Deed of Trust and Note.

It is signed as follows

On 3/14/2006

Long Beach Mortgage Company.

By: \_\_\_\_\_ [illegibly scribbled signature]  
Kimberly Smith  
Asst Vice President

**Assignment of Deed of Trust January 31, 2013:**

An Assignment of Deed of Trust dated January 31, 2013, which shows no indicia of recording, is attached to the complaint below at CP 22 - 23.

The assignee is

Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2006-4

This assignment recites

For Value Received, the undersigned as Beneficiary, hereby grants, conveys, assigns and transfers to Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2006-4, whose address is 800 Brooksedge Blvd, Westerville, OH 43081, all beneficial interest under that certain deed of trust, dated 03/03/06, executed by John E. Erickson and Shelley A. Erickson, Husband and Wife, Grantors., to Old Republic Title, Ltd., Trustee, and recorded on 03/09/06, under Auditor's file No. 20060309000958, Records of King County, Washington described as follows: Exhibit A Attached

It is signed as follows

J.P. Morgan Chase bank, National Association, successor in interest by purchase from the FDIC as receiver of Washington Mutual Bank Successor in interest to Long Beach Mortgage Company.

By: \_\_\_\_\_ Rebecca Dietrich  
Title: \_\_\_\_\_ Vice President  
Rebecca Dietrich

[Acknowledgment]



A copy of this assignment is attached to Ericksons' answer as Exhibit 4. This copy of the 2013 assignment bears indicia of recording dated February 2, 2013. (CP 65 – 67).

This 2013 Assignment of Deed of Trust by which JPMorgan Chase Bank, N.A., purports to transfer the Ericksons' Deed of Trust to Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2006-4, is dated and recorded seven years after the trust's closing date of May 9, 2006. (CP 85 & 94; CP 341).

This 2013 assignment does not mention or purport to transfer the Ericksons' Note to DBNTC. It is well established law in Washington that an assignment of the Mortgage or Deed of Trust does not carry with it the Note or underlying obligation.

**Complaint for Judicial Foreclosure filed in  
King County Superior Court, case no.  
14-2-00428-5 KNT on January 3, 2014:**

The present action for judicial foreclosure of the Ericksons' Note and Deed of Trust was filed on January 3, 2014, in King County Superior Court under case no. 14-2-00428-5 KNT. (CP 1 – 23) The complaint alleges, inter alia, that

**I. PARTIES**

1. Plaintiff Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2006-4 is a Delaware corporation with its principle place of business in New York, New York. Deutsche Bank has paid all fees due to the State of Washington and is duly qualified to bring this action. (CP 2)

**Ericksons' Answer:** Contains legal conclusions. Denied for lack of sufficient information to admit or deny. **Plaintiff lacks authority to bring this action. Plaintiff lacks standing.** (CP 25)

### **III. FACTUAL BACKGROUND**

7. **Note.** On or about March 3, 2006, for a valuable consideration, John and Shelley made and delivered to Long Beach Mortgage Company ("Long Beach") a note in the original principal sum of \$476,000 (the "Note"). A true and correct copy of the Note is attached hereto as Exhibit A. (CP 3)

**Ericksons' Answer.** Admit paragraph 7. (CP 26)

8. **Security Instruments.** On or about March 3, 2006, John and Shelley made and delivered to Long Beach a Deed of Trust encumbering certain real property located in King County, Washington to secure payment of the Note (the "Deed of Trust"). The Deed of Trust was recorded in the office of the Auditor of King County, Washington, on March 9, 2006, under Auditor's No. 20060309000958. A true and correct copy of the Deed of Trust is attached hereto as Exhibit B. (CP 3)

**Ericksons' Answer:** Deny paragraph 8. (CP 26)

9. **Holder of the Note and Deed of Trust.** Subsequently, the Note and Deed and Trust were transferred or otherwise assigned to Deutsche Bank. Deutsche Bank is now the holder and owner of the Note and Deed of Trust. (CP 3)

**Ericksons' Answer:** Deny paragraph 9. (CP 26)

10. **Default.** John and Shelley are now in default under the terms of the Note and Deed of Trust for, among other things, failure to make monthly principal and interest payments since July 2009. (CP 3)

**Ericksons' Answer:** Deny paragraph 10. (CP 26)

**11. Amount of Principal and Interest Owning.** The unpaid principal balance owing on the Note is \$465,047.67 and unpaid interest has accrued thereon in the amount of \$186,836.08 as of November 18, 2013, late charges at the rate of six percent (6%) on all overdue interest accrued after July 1, 2009, in the amount of \$186,836.08 as of November 18, 2013. Default interest and other charges, fees, costs and expenses as provided by the Note and Deed of Trust continue to accrue under the terms of the Note and Deed of Trust. (CP 3)

**Ericksons' Answer:** Deny paragraph 11. (CP 26)

**12. Advances.** Before the entry of judgment herein Deutsche Bank may be required to advance sums for payment of taxes, assessments, water bill, fire insurance, and additional sums for the protection, preservation, and/or care of said real property together with other charges constituting prior liens on said property. In the event that any such advances are so made, the advances are secured by the Deed of Trust and Deutsche Bank is entitled under the terms thereof and will seek to add them to the amount of the judgment to be entered herein. (CP 3 – 4)

**Ericksons' Answer:** Deny paragraph 12. Challenge Plaintiff's authority to seek additional judgment as **Plaintiff lacks standing** and this judicial foreclosure is wrongful. (CP 26)

**13. No Other Action.** No other action is now pending to recover on the Note, nor to foreclose on the Deed of Trust. (CP 4)

**Ericksons' Answer:** Insufficient information to admit or deny and therefore deny paragraph 13. (CP 26)

#### **IV. CLAIM FOR RELIEF**

14. **Claims of Defendants.** The Defendants claim some right, title, interest, lien, or estate in and to said real property, but such claims and any right, title interest, lien or estate, if any they have, are subsequent, inferior and junior to the claim of Deutsche Bank under the Deed of Trust. (CP 4)

**Ericksons' Answer:** Deny paragraph 14. (CP 26)

15. **Possession During Redemption.** To the extent the property at issue is not the homestead of either John or Shelley, neither John nor Shelley is entitled to possession of the premises during the period of redemption following the Sheriff's sale pursuant to the Decree of Foreclosure herein and the purchaser at such Sheriff's sale is, or will be, entitled to the sole and exclusive possession thereof. (CP 5)

**Ericksons' Answer:** Deny paragraph 15. (CP 26)

**Ericksons' Answer, Affirmative Defenses, and Counterclaims:**

Ericksons' Answer, Affirmative Defenses, and Counterclaims filed May 19, 2014, sets forth the following:

**Nineteen affirmative defenses, including:**

- 23. Plaintiff **lacks authority** to judicially foreclose under CH 16.12 RCW (CP 27 l. 6)
- 27 Plaintiff **lacks standing** to enforce the note behalf of the trust (CP 27 l. 13)
- 37 Violations of the Consumer Protection Act (CP 27 l.

**Five Counterclaims:**

- 1. Breach of Contract. (Deed of Trust and Note) (CP 32 – 36)
- 2. Breach of Implied Duty of Good Faith Under Deed of Trust and Note. (CP 36 – 37)

3. Violation of Washington's Consumer Protection Act, RCW 19.86. (CP 37 – 41)
4. Equitable Relief. (CP 41 -42)
5. Negligence. (CP 43 – 44)

**Ericksons' lawyers withdrew effective April 30, 2015:**

An ORDER GRANTING MOTION TO WITHDRAW AS COUNSEL FOR DEFENDANTS JOHN E. ERICKSON AND SHELLEY A. ERICKSON was entered on April 30, 2015. (CP 210 – 212) The withdrawal of Ericksons' lawyers was promptly followed by DBNTC's filing of a motion for summary judgment on May 19, 2015. (CP 213 – 234)

**Proceedings on DBNTC's Motion for Summary Judgment filed May 19, 2015:**

DBNTC filed a motion for summary judgment on May 19, 2015 (CP 213 - 234) together with the May 19, 2015 DECLARATION OF J. WILL EIDSON IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT with two attached exhibits. (CP 235 – 255)

Ericksons filed their response in opposition to summary judgment on June 29, 2015. (CP 259 – 280) together with the June 26, 2015, DECLARATION OF DUNCAN K. ROBERTSON IN SUPPORT OF OPPOSITION TO MOTION FOR SUMMARY JUDGMENT with seventeen attached exhibits. (CP 281 – 454)

DBNTC filed PLAINTIFF'S REPLY IN SUPPORT OF SUMMARY JUDGMENT on June 30, 2015, (CP 455 – 462).

The first hearing on summary judgment was held on July 2, 2015.  
The hearing was continued to July 13, 2015. (VRP July 2, 2015)

DBNTC filed a SUPPLEMENTAL DECLARATION OF J. WILL EIDSON IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT with three attached exhibits on July 6, 2015. (CP 470 – 503)

Ericksons filed their SUPPLEMENTAL MEMORANDUM, IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT on July 8, 2015. (CP 504 – 516)

The second hearing on summary judgment was held on July 13, 2015. (VRP July 13, 2015)

**Order Granting Plaintiff's Motion for Summary Judgment:**

The court entered an order granting plaintiff's motion for summary judgment on July 17, 2015. (CP 539 – 541)

**Ericksons' Motion for Reconsideration:**

Ericksons moved for reconsideration on July 27, 2105. (CP 542 – 546) The court entered an order denying reconsideration on August 4, 2015. (CP 640 – 648)

**DBNTC's Motion for Entry of Final Judgment and Decree of Foreclosure:**

DBNTC filed a MOTION FOR ENTRY OF FINAL JUDGMENT AND DECREE OF FORECLOSURE ON August 19, 2015 (CP 651 – 659) together with a DECLARATION OF J. WILL EIDSON IN

SUPPORT OF MOTION FOR ENTRY OF SUMMARY JUDGMENT  
AND DECREE OF FORECLOSURE. (CP 660 – 666)

**Ericksons' Response to Plaintiff's Motion for  
Entry of Final Judgment and decree of Foreclosure:**

Ericksons' filed their RESPONSE TO PLAINTIFF'S MOTION  
FOR ENTRY OF FINAL JUDGMENT AND DECREE OF  
FORECLOSURE on August 25, 2015. (CP 667 – 672)

**DBNTC's Reply to Ericksons' Response:**

DBNTC filed a REPLY IN SUPPORT OF ITS MOTION FOR  
ENTRY OF FINAL JUDGMENT AND DECREE OF FORECLOSURE  
on August 26, 2015. (CP 673 – 679)

**Judgment and Decree of Foreclosure:**

The court's JUDGMENT AND DECREE OF FORECLOSURE  
was entered on August 27, 2015. (CP 680 – 685)

**Ericksons' Notice of Appeal:**

Ericksons filed their NOTICE OF APPEAL on Monday, August  
17, 2015, from the July 17, 2015 ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT and the August 4, 2015  
ORDER DENYING DEFENDANTS' MOTION FOR  
RECONSIDERATION. (CP 640 – 648)

**Ericksons' Amended Notice of Appeal:**

Ericksons filed their AMENDED NOTICE OF APPEAL on August 31, 2015. The amended notice added the August 27, 2015 JUDGMENT AND DECREE OF FORECLOSURE to the trial court decisions from which review is sought. (CP 686 – 700)

**VI. ARGUMENT AND AUTHORITIES**

(Argument applicable to  
all assignments of error)

**DBNTC lacked standing to bring this case for judicial  
foreclosure of the Ericksons' Note and Deed of Trust:**

“Standing is a threshold issue”. *In re Estate of Becker*, 177 Wn.2d 242, 246, 298 P.3d 720 (2013)(citing *Knight v. City of Yelm*, 173 Wash.2d 325, 336, 267 P.3d 973 (2011)); *See also Alexander v. Sanford*, No. 69637-8-1, Slip Op. ¶ 28 (Wn.App. Div. 1 05-12-2014) (Review granted, 339 P.3d 634 (2014). Standing of a plaintiff to bring suit must be determined as of the commencement of the suit. Dispositive to this argument here is: “The absence of a valid right of action at the inception of a suit [lack of standing] cannot be cured by filing a supplemental complaint alleging subsequent acquisition of such right of action.” *Amende v. Town of Morton*, 40 Wn.2d 104, 106, 241 P.2d 445 (1952).

New York’s highest court recently ruled that state’s requirement for a plaintiff to prove standing:

“[Because] defendants raised the issue of standing in their answer, plaintiff was [ ] obligated to demonstrate



that it was a holder or assignee of the note and subject mortgage at the time the action was commenced. *JPMorgan Chase Bank, N.A. v. Hill*, No. 519429 (NY App. 09-10-2015) (citing *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d at 1376; *Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307, 1307 [2012])).

In Washington, standing as to a particular claim is jurisdictional and may be raised at any time. *Firefighters*, 146 Wn.2d at 206, *supra* (“Standing... may be raised for the first time on appeal.”). Ericksons’ raised the standing issue in their answer to DBNTC’s complaint (CP 25; CP 26) and have consistently asserted DBNTC’s lack of standing.

A party seeking foreclosure must be the “actual holder” to foreclose. "Only the holder of a note can authorize the foreclosure of the collateral that is security for the note." *Brown, Slip Op.* at 15 n.5 (quoting *SA Anderson On The Uniform Commercial Code* §§ 3-201:5, at 448; *concurring*: Richard Cosway, *Negotiable Instruments-A Comparison of Washington Law and Uniform Commercial Code Article 3*, in *Collected Essays On The Uniform Commercial Code In Washington* 261,268 (1967)).

The term “Holder” is a legally defined term:

Washington's UCC defines a "holder" to be 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." RCW 62A.1-201(2)(A); accord *Black's Law Dictionary* 848 (10th ed. 2014) (defining "holder" to be a person "who has legal possession of a negotiable instrument and is entitled to receive payment on it").

*Brown v. Dept. of Comm.*, at \*12-13.

Although DBNTC's complaint filed January 3, 2014, alleges that it "*is now the holder and owner of the Note and Deed of Trust*" (CP 3), that statement is a mere allegation and legal conclusion which is denied by paragraph 9 of Ericksons' answer. (CP 26)

To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and the mortgage note, ownership of the mortgage, and the defendants' default in payment. As shown above in the Statement of the Case, the declarations submitted by DBNTC in support of its motion for summary judgment all fail to establish that DBNTC had possession and was the holder of the Note when the complaint for judicial foreclosure was filed on January 3, 2014. The note copy attached to the complaint is merely a copy of a copy of the note which shows no indorsements either special or in blank.

As observed by the court in *Bavand v. One West Bank, F.S.B.*, 176 Wn.App. 475, 309 P.3d 636 (Wash.App. Div. I 2013):

"Possession of 'a true and correct *copy* of the original' note does not, of course, establish possession of the original note itself."

Ericksons disputed and dispute that DBNTC had possession of the original promissory note at the time of the summary judgment motion and hearings in May to July 2015. DBNTC submitted no competent evidence on this point.

Ericksons disputed and dispute that DBNTC had possession of the original promissory note at the time plaintiff filed the complaint for judicial foreclosure on January 3, 2014. DBNTC submitted no competent evidence on this point.

VRP July 2, 2015:

**THE COURT:** Mr. Kah?

**MR. KAH:** Well, first of all, there's nothing whether or not plaintiff has possession of the original note.

**THE COURT:** Uh-huh.

**MR. KAH:** We don't concede that. We don't know that that's the case.

**THE COURT:** Well, is it -- I mean, I could take a look at it. Normally when you see something that purports to be original -- an original, it's not difficult to discern whether it's a photocopy or, in fact, an original.

**MR. KAH:** Well, it may or may not be, Your Honor. It's - - you know, with today's photocopy machines, it -- a color copy made with a high-quality machine can look exactly like an original.

The only “evidence” plaintiff submitted on its motion for summary judgment are the two declarations of plaintiff’s lawyer J. Will Eidson dated May 19, 2015 (CP 235 – 255) and July 6, 2015 (CP 470 – 503).

Paragraph 2 of Eidson’s May 19, 2015 declaration states:

“Attached hereto as Exhibit A is a true and correct copy of Defendants John E. Erickson and Shelley A. Erickson’s note in the principal sum of \$476,000 (the “Note”).”

Even if, for the sake of argument, DBNTC had been able to show (which it failed to do) that it was the holder of Ericksons’ promissory note on May 19, 2015, such a showing is not evidence that DBNTC was in

possession or was the holder or a person entitled to enforce the note on January 3, 2014, when the complaint for judicial foreclosure was filed.

Significantly, nowhere does DBNTC provide any competent evidentiary support for the conclusion that it was in possession of and the holder of the Ericksons' original Note on January 3, 2014. The allegation at paragraph 9 of the unverified complaint, which Ericksons' denied, is not evidence. Nor does DBNTC's trial court counsel or anyone else state in any declaration or sworn statement that DBNTC was the holder of the Erickson note on January 3, 2014.

**The declarations of DBNTC's lawyer J. Will Eidson are not competent evidence of any fact asserted by him:**

Although Mr. Eidson's declarations recite pro forma that "*I make this declaration based upon personal knowledge*", the declarations do not disclose any basis for Mr. Eidson's claim of personal knowledge of the "facts" stated in his declarations.

Eidson cannot authenticate any document he submitted. He has no personal knowledge of any alleged transaction in this matter. All factual assertions of Eidson are hearsay, are not based on firsthand or personal knowledge, are obviously based of what he was told by others, are based on review of someone else's documents, are legal conclusions, or are mere supposition.

Eidson's declarations violate ER 802 (Hearsay Rule), ER 602 (Lack of Personal Knowledge), and ER 603 (Oath of Affirmation), which provide as follows:

ER 802 Hearsay Rule:

Hearsay is not admissible except as provided by these rules, by other court rules, or by statute

ER 801(c) Definition of Hearsay

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 602 Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

ER 603 OATH OR AFFIRMATION

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

DBNTC's counsel J. Will Eidson acted as both advocate and as the sole witness in support of DBNTC's case and its motion for summary judgment, in violation of the aptly-named advocate-witness rule. RPC 3.7(a).

The advocate-witness rule generally prohibits attorneys from testifying in cases they are litigating. RPC 3.7(a); *United States v. Edwards*, 154 F.3d 915, 921 (9th Cir. 1998).

Ericksons objected to the unsworn hearsay statements of lawyer J. Will Eidson as follows:

VRP July 13, 2015:

MR. KAH: I want to point out that it's important to keep in mind that a substantial portion of the plaintiff's argument is based on the statements made by Mr. Eidson and declarations signed by Mr. Eidson.

Counsel doesn't have personal knowledge of anything, and just as the Court pointed out that in the absence of a declaration or report from Mr. Bishop, the document examiner, the Court's not going to hear what I have to say about that.

THE COURT: Right.

MR. KAH: And, frankly, I think the Court also must ignore any factual assertions made by Mr. Eidson, because he is not a witness, he has not shown that he has personal knowledge of any fact in this case.

THE COURT: Well, I will take a look at everything with that in mind. I don't know that that occurred. It - - my recollection is - - but I'll go back and double check. My recollection is that Mr. Eidson's declarations simply identified various documents and indicated, here they are. Here are true and correct copies of them, which counsel routinely do in almost any case that involves exhibits at the summary judgment level. But I will - - I will go back and take another look at that. \* \* \* . "

(VRP July13, 2015 p. 62 l. 19 to p. 63 l. 16)

As shown, Ericksons' counsel made it clear that Ericksons do not concede that the Note which DBNTC's lawyer J. Will Eidson represented to be the original Note is indeed an original. There is no evidence in this

case other than Mr. Eidson's hearsay and unsworn assertions that it is the original Note. (VRP July 2, 2015 p. 12 l. 22 to p. 13 l. 11) The trial court merely accepted Mr. Eidson's unsupported assertion that it is the original.

**Transfer of Erickson's Loan by Long Beach Mortgage Company to an MBS Trust in 2006:**

Attached as Exhibit "B" to the SUPPLEMENTAL DECLARATION OF J. WILL EIDSON IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (CP 470 – 503) is a copy of the unpublished ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT entered on March 2, 2011, in the U.S. District Court case of Erickson vs. Long Beach Mortgage Company, et al. (CP 494 -500) DBNTC submitted this federal court decision as an attachment to Mr. Eidson's declaration filed July 15, 2015, as support for DBNTC's argument that Ericksons' affirmative defenses and counterclaims are barred by collateral estoppel. (Motion for Summary Judgment at CP 218 – 220)

The U.S. District Court decision briefly discusses that the Erickson loan was transferred to an MBS trust shortly after the loan was made:

\* \* \* Plaintiffs first obtained the loan from Defendant Long Beach Mortgage Co. ("LBMC") on March 3, 2006, and entered into a fixed/adjustable rate note secured by a deed of trust. (Reardon Decl. At 4.) The loan was then sold into a pool of loans held in trust by Defendant Deutsche Bank National Trust ("DB"). (Id. At 6.) Defendant Washington Mutual Bank ("WaMu") took over

the loan in 2006, when it merged with LMBC, taking over all its rights and obligations. (Id. At 9.)

(CP 470)

The U.S. District Court’s statement that “*The loan was sold into a pool of loans in trust by Defendant Deutsche National Bank Trust (“DB”)*” is inconsistent with the immediately following statement that “*Defendant Washington Mutual Bank (“WaMu”) took over the loan in 2006, when it merged with LBMC, taking over all its rights and ++obligations.*”

The December 22, 2010 Declaration of Thomas Reardon, attached as Exhibit 16 to the June 29, 2015 Declaration of Duncan Robertson (CP 446 – 452), states that:

“6. Plaintiff’s [Ericksons’] loan was subsequently sold into a securitized pool of loans known as the Long Beach Mortgage Loan Trust 2006-4 (“Trust”), with Defendant Deutsche Bank National Trust Company (“DB”) acting as Trustee.”

(CP 446)

The Reardon declaration was filed in the U.S. District Court, Western District of Washington, Seattle Division, on 12/23/2010 by the law firm of Davis Wright Tremaine LLP. It states that Mr. Reardon is the "Assistant Vice President with JPMorgan Chase Bank, N.A. ("Chase").

The last sentence of the 4<sup>th</sup> paragraph of the Reardon declaration (CP 446) states that

4. “ \* \* \* The original Note has been stored with Deutsche Bank National Trust Company (“Deutsche



Bank”), and Chase delivered the Note to counsel for Chase in this action in November 2010.”

(CP 446)

The foregoing scenario regarding transfers of the Erickson loan is irreconcilably inconsistent on its face. If the Erickson loan was sold by LBMC into a pool of loans held in trust by Defendant Deutsche Bank National Trust *before* LBMC merged with WaMu, then WaMu did not acquire the Erickson loan when LBMC merged into WaMu because LBMC had previously sold the Erickson loan to a different entity.

The Long Beach Mortgage Loan Trust 2006-4 ("Trust"), closed in 2006. It did not accept loan transfers after its closing. Relevant pages from the trust's prospectus are attached as Exhibit 8 to Ericksons' answer. (CP 78 - 94) and also as Exhibit 7 to the Declaration of Duncan Robertson. (CP 281 - 454). These documents show the trust's closing date to be May 9, 2006. (CP 85 & 94) (CP 341)

Regardless whether JPMorgan Chase Bank’s purported assignment of the Ericksons’ Deed of Trust to the Long Beach Mortgage Loan Trust 2006-4 on January 31, 2013 (CP 22 – 23), seven years after the trust closing date of May 9, 2006, is void or merely voidable, this 2013 assignment shows the confusion under which the Ericksons’ Note and Deed of Trust have been handled by Long Beach Mortgage Company, by DBNTC, and by JPMorgan Chase Bank, N.A., from the loan’s inception in March 2006. If the loan was sold to the trust shortly after the loan date

of March 3, 2006, and before Long Beach Mortgage Company's merger into Washington Mutual Bank, the loan documents would necessarily have been transferred to the trust as dictated by the Pooling and Servicing Agreement. Then the Note and Deed of Trust would not have been acquired by JPMorgan Chase Bank from the FDIC. Then JPMorgan Chase Bank, N.A., would have had nothing to assign to DBNTC on January 31, 2013. DBNTC's submissions on its motion for summary judgment have failed to dispel any of the confusion.

The Reardon declaration states that during the 2010 lawsuit the Erickson Note was in the possession of JPMorgan Chase Bank, N.A.,'s lawyers, not in the possession of DBNTC, and not in the possession of DBNTC's lawyers, and that DBNTC was merely a depository for storage of the Note. Whether, how, why, when, and where the Note came into possession of DBNTC from JPMorgan Chase Bank, N.A.,'s lawyers is not explained by respondent DBNTC anywhere in the record of the present case.

DBNTC's lawyers in the present case were not counsel of record for any party in the U.S. District Court lawsuit. The U.S. District Court's decision identifies only Fred B. Burnside, Joshua A. Rataczyk, and Davis Wright Tremaine, Seattle, WA, as attorneys for defendants in that case. (CP 494) Nowhere is attorney J. Will Eidson, Stoel Rives LLP, or any member of that firm identified as counsel involved in the U.S. District Court proceeding. That the Note was in the possession of attorneys with

Davis Wright Tremaine in 2010 does not address the issues of whether, how, why, when, where, and from whom DBNTC's current lawyers obtained possession of Ericksons' Note as alleged.

**JPMorgan Chase Bank, N.A.,'s acquisition of the assets of Washington Mutual Bank in September 2008:**

The U.S. District Court decision states that after Washington Mutual's failure in 2008 and its entry into FDIC receivership, JPMorgan Chase Bank, N.A., purchased Washington Mutual's assets from the FDIC through a Purchase and Assumption Agreement:

After WaMu failed and entered FDIC receivership on September 25, 2008, Chase purchased WaMu assets-including Plaintiffs' loan-under a Purchase and Assumption Agreement ("P & A Agreement"). *Purchase and Assumption Agreement Among Federal Deposit Insurance Corporation and JP Morgan Chase Bank, National Association*, (Sept. 25, 2008) , available at [http://fdic.gov/about/freedom/Washington\\_mutual\\_p\\_and\\_a.pdf](http://fdic.gov/about/freedom/Washington_mutual_p_and_a.pdf). Defendants request the Court follow other district courts in taking judicial notice of the P & A Agreement. (Dkt. No. 51 at 4 n.2.) The Court takes judicial notice of the P & A Agreement "because it is a public record and not the subject of reasonable dispute." *Danilyuk v. JP Morgan Chase Bank, N. A.*, No. C10-0712JLR, 2010 WL 2679843, at \*4 (W.D. Wash., July 2, 2010) (collecting cases).  
(CP 494)

A more detailed exposition of how Long Beach Mortgage Company was morphed into Washington Mutual Bank is found in the published decision of the Michigan Supreme Court in the case of *Kim v. JPMorgan Chase Bank, N.A.*, 493 Mich. 98, 825 N.W.2d 329 (2012). At issue in the *Kim* case was "the manner in which defendant JPMorgan

Chase Bank, N.A., (Chase) the successor in interest to Washington Mutual Bank (WaMu), acquired plaintiff Kim's mortgage loan." The court in *Kim*, id., explains:

When WaMu collapsed on September 25, 2008, the federal Office of Thrift Management closed the bank and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver for its holdings. That same day, the FDIC, acting as WaMu's receiver, transferred virtually all of WaMu's assets to defendant under authority set forth in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.<sup>3</sup> Under 12 USC 1821, the FDIC is empowered to transfer the assets of a failed bank "without any approval, assignment, or consent . . . ." <sup>4</sup> However, in this case, it did not avail itself of that authority. Instead, the FDIC sold WaMu's assets to defendant pursuant to a purchase and assumption (P&A) agreement.

Although JPMorgan Chase Bank, N.A., acquired Washington Mutual Bank's asset from the FDIC in 2008, there is no finding in the federal case, and there is no finding or evidence in the present case, that the Ericksons' loan was among the assets transferred to JPMorgan Chase Bank, N.A., by the FDIC. Indeed, how could the Erickson loan have been transferred by the FDIC to JPMorgan Chase Bank, N.A. if Long Beach Mortgage Company had previously sold the Ericksons' loan into the mortgage backed securities Trust in 2006? If that transfer occurred, as claimed, then the Erickson loan would not have been among Washington Mutual's assets when it failed in 2008 and was taken into FDIC receivership.

**Statute of Frauds:**

Ericksons take issue with the proposition that mere possession of the note is sufficient to authorize the possessor to foreclose the Deed of Trust or Mortgage securing the note. That proposition circumvents the State of Frauds. It is tantamount to a conveyance of an interest in real property without the protections afforded by the Statute of Frauds. It allows a mere possessor of a piece of paper, the Note, to in effect, acquire an interest in real property without the protection of the formalities required by the Statute of Frauds. It is one thing to hold that mere possession of a negotiable instrument, here a promissory note, authorizes the possessor to collect the note from the maker. It is an entirely different thing to hold that the mere transfer of possession of the note constitutes a conveyance of a real property interest, i.e. a power of sale under a Deed of Trust or Mortgage under which an entity other than the current possessor is named as the Beneficiary. See Ericksons' Response in Opposition to Motion for Summary Judgment at CP 276 – 278, and Supplemental Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at CP 508 – 516.

**Collateral Estoppel Does Not Apply:**

The record fails to show that the elements of collateral estoppel exist.

DBNTC failed to file the required Corporate Disclosure in the Erickson’s federal case, thus failing to establish their identity as a party to that action. Fed. R. Civ. P. Rule 7.1; Robertson Decl. Exhibit 12 (federal case docket) (CP 432 – 437). While Washington Superior Courts do not enforce a parallel rule requiring formal disclosure, as shown *supra*, DNBTC is claiming to be an entity that does not exist. Thus DBNTC has failed to meet the required “a party to or in privity with a party to the prior adjudication”, barring collateral estoppel. *Hadley v. Maxwell*, 144 Wn.2d 306, 311 (2001) (en banc) (internal quotes omitted).

The Summary Judgment Order dismissing the Erickson’s claims in federal court identified the claims it dismissed as:

- 1) rescission under the Truth In Lending Act (“TILA”),
- (2) declaratory or injunctive relief preventing foreclosure, and
- (3) damages under TILA or various tort theories.”

The Deutsche Bank entity in that action identifying itself as “Deutsche Bank National Trust” brought no counterclaims.

The U.S. District Court made no ruling as to the validity of the defendant’s claim to be the holder of the Note and Deed of Trust, ruling instead that:

“Plaintiffs’ argument rests on the contention that Defendants lack standing to foreclose because they are not the original creditors, and cannot produce the original note. Courts “have routinely held that [this] so-called ‘show me the note’ argument lacks merit.” [citing an unpublished federal court case quoting the Arizona Supreme Court – where, indeed, “show me the note” is

not required].” (Dist. Ct. Order at p. 3, left column, 3<sup>rd</sup> paragraph from top). (CP 496)

No Washington authority was cited in support, because there is none.

The Washington Supreme Court established the “show me the note” rule for this state long ago:

[T]he fact of possession or non-possession of the note is not wholly determinative. It may be evidence of the authority, or lack of authority, to collect it, but not conclusive proof. *Delaney v. Nelson*, 132 Wash. 472, 232 Pac. 292; *Pfeiffer v. Heyes*, 166 Wash. 125, 6 P.2d 612. **In *Koppler v. Bugge*, 168 Wash. 182, 11 P.2d 236, decided since the entry of judgment herein, we took a more definitive and a somewhat more stringent position; and by adopting certain conclusions of the trial court therein, announced the rule that, when one advances money to an alleged agent of the holder to satisfy a mortgage and the notes which it secures, it is his duty, at his \*peril\*, to see that the person to whom he pays as agent is either (a) in possession of the instrument, or (b) has special authority to receive payment, or (c) has been represented by the owner and holder of the security to have such authority. We further stated in the opinion in that case that the burden of proving such agency must be borne by the party who asserts it.**

*Ross v. Johnson*, 171 Wash. 658, 19 P.2d 101 (1933). Does unpublished federal-district-judge-written law trump the announced rule of the Washington Supreme Court?

DBNTC’s claim of collateral estoppel grossly overstates the ruling of the district court, which was not that DBNTC had proven its assertions; but that the Ericksons had failed to *disprove* them. “Collateral estoppel [ ] bar[s] relitigation of a particular issue or determinate fact.” *State v. Dupard*, 93 Wn. 2d 268, 609 P.2d 961 (1980). If the disputed facts are not

permitted to be challenged it does not render as true unsupported claims.

The MFSJ cites to the Ericksons' Complaint to assert what is barred -

because the issues for which it seeks preclusion were not in fact adjudged.

Collateral estoppel requires that the issue decided in the prior adjudication is identical with the one at hand. *Luisi Truck Lines, Inc. v. State Utils. & Transp. Comm'n*, 72 Wn.2d 887, 894, 435 P.2d 654 (1967). Where an issue arises in two entirely different contexts, this requirement is not met. *Luisi*, at 895. In addition, collateral estoppel precludes only those issues that have actually been litigated and determined; it "does not operate as a bar to matters which could have . . . been raised [in prior litigation] but were not." *Davis v. Nielson*, 9 Wn. App. 864, 874, 515 P.2d 995 (1973); *Accord, Fluke Capital & Management Servs. Co. v. Richmond*, 106 Wn.2d 614, 620, 724 P.2d 356 (1986).

*McDaniels v. Carlson*, 108 Wn.2d 299, 738 P.2d 254 (1987).

The Ericksons are the DEFENDANTS in this case. DBNTC is attempting to apply collateral estoppel as an *offensive* tool. The U.S. Supreme Court has warned that this is a very dangerous practice and to be discouraged. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979).

**No Identity of Parties:**

The Deutsche Bank entity that was a defendant in the U.S. District Court case was "Deutsche Bank National Trust Company", not "Deutsche Bank National Trust Company, a Trustee for Long Beach Mortgage Loan trust 2006-4". These are two separate and distinct corporate entities. Both DBNTC and the court below conflate these names as though they are a single corporate entity.



Courts have distinguished DBNTC as a being distinct from “DBNTC as trustee.” In a criminal action against DBNTC, *City of Cleveland v. Deutsche Bank Natl. Trust Co.*, 2014-Ohio-1948 (Ohio App. 2014) the court accepted DBNTC’s own pleading that their existence as a bank was distinct from the entity that was named in the action:

“On September 13, 2012, DBNTC filed a motion to dismiss the complaint because the named defendant, "Deutsche Bank," did not exist because the proper name was Deutsche Bank National Trust Company[, not Deutsche Bank National Trust Company as Trustee for Long Beach Mortgage Loan Trust 2003-1]. DBNTC also argued that it was not the owner of the property because the title listed the owner as "Deutsche Bank National Trust Company as Trustee for Long Beach Mortgage Loan Trust 2003-1." (Emphasis sic.) DBNTC claimed that the property was an asset of the Long Beach Mortgage Loan Trust 2003-1 for which DBNTC serves as the trustee.”

2014-Ohio-1948 at ¶6. The court ruled,

We find that the court [below] improperly found DBNTC liable in its individual capacity. The title of the property lists the owner as: "Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2003-1." In fact, given that the trial court accepted the stipulation to amend the complaint to change the defendant from DBNTC to "Deutsche Bank National Trust Company as Trustee for Long Beach Mortgage Loan Trust 2003-1," we do not understand why the court would conclude that DBNTC, which was no longer a party in its individual capacity, was guilty.

Id. at ¶12.

Other courts have dismissed actions against DBNTC individually when the claims related to loans or properties titled to DBNTC as trustee of a specific trust. In *Cincinnati v. Deutsche Bank Natl. Trust Co.*, 897 F.Supp.2d 633 (S.D. Ohio 2012), Cincinnati attempted to hold DBNTC liable individually and as a trustee for problems with the condition of trust properties. The court dismissed the claims against DBNTC individually because DBNTC owned the properties in its capacity as trustee of specific trusts.

*Id.* at ¶14. Here DBNTC *cannot* be acting in a “trustee capacity” because *there is no* Long Beach Mortgage Loan Trust 2003-4. Thus, DBNTC is attempting to take property for itself that it has acknowledged it has no right, implicitly before this Court and explicitly before the Ohio court, which position was upheld by that court. *Id.*

[Deutsche Bank National Trust Company] cite[s] well-established law that distinguishes conduct by an entity acting on its own behalf from that within its capacity as a trustee. *See Union Guardian Trust Co. v. Detroit Trust Co.*, 72 F.2d 120, 121 (6th Cir.1934), noting that a trust company acting in its capacity as trustee for certain bondholders acts in "an entirely different capacity" when it acts in its individual capacity as a bank trust company.

*City Of Cincinnati v. Deutsche Bank National Trust Company*, 897 F.Supp.2d 63, 638 (S.D.Ohio 2012).

**Ericksons question the authority of DBNTC’s current attorneys of record to act on DBNTC’s behalf:**

Ericksons are concerned that it appears DBNTC’s attorneys of record do not have authority to act on DBNTC’s behalf in this case. This concern arises from the lack of any submission whatsoever on the record from an officer, employee, records custodian, or agent of DBNTC other than the submissions of its counsel of record. RCW 2.44.030 allows the court, on motion of either party, to “produce or prove the authority under which he or she appears”:

RCW 2.44.030. Production of authority to act.

The court, or a judge, may, on motion of either party, and on showing reasonable grounds therefor, require the attorney for the adverse party, or for any one of several adverse parties, to produce or prove the authority under which he or she appears,

and until he or she does so, may stay all proceedings by him or her on behalf of the party for whom he or she assumes to appear.

[2011 c 336 § 59; Code 1881 § 3282; 1863 p 405 § 8; RRS § 132.]

Ericksons' former counsel requested proof of authority through their interrogatories and requests for production of documents in the trial court. DBNTC's attorneys of record refused to provide proof of authority. See Request for Production No. 19 and Response at CP 536. Granted, Ericksons' former counsel did not make a motion in the trial court requesting proof of authority. None-the-less, the concern remains.

## **VII. ATTORNEY FEES**

Ericksons request an award of their costs, disbursements, and reasonable attorney fees under the attorney fee provision of the promissory Note (CP 8 - 10) at paragraph 7(D) which provides “ \* \* \* Those expenses include, for example, reasonable attorneys' fees” and also under the attorney fee provision of the deed of trust (CP 12 – 20) at paragraph 21 which provides “ \* \* \* Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this paragraph 21, including, but not limited to, reasonable attorneys fees and costs of title evidence.” (CP 18) This request for an award of attorney fees is based upon RCW 4.84.330 which provides as follows:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall

be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

Attorneys' fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorneys' fees is void.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

### **VIII. CONCLUSION**

DBNTC failed to demonstrate its prima facie entitlement to judgment as a matter of law. DBNTC did not submit any, let alone sufficient, evidence to demonstrate that it had standing to commence this action. Because standing was put into issue by Ericksons, DBNTC was obliged to prove its standing at the time the action was commenced in order to be entitled to relief. Here, the evidence submitted by DBNTC in support of its motion did not demonstrate that the Note was physically delivered to it prior to the commencement of the case. The declaration and statements of DBNTC's attorneys of record did not give any factual details of a physical delivery of the Note and, thus, failed to establish that DBNTC had physical possession of the Note prior to commencing this action.

Nor does the alleged blank indorsement on the back of the Note that was submitted as a copy attached to the May 19, 2015 declaration of lawyer J. Will Eidson, or the alleged original Note Mr. Eidson brought to the July 2, 2015 summary judgment hearing, establish that DBNTC had

possession of the original Note on January 4, 2014 when the action was commenced. The alleged indorsement is undated. Significantly, the endorsement was not included in the copy of note attached to DBNTC's complaint filed January 3, 2014.

Although DBNTC asserts that the Deed of Trust was assigned to it by JPMorgan Chase Bank, N.A., in 2013, the record is ambiguous as to whether JPMorgan Chase Bank, N.A., had authority to assign the Deed of Trust to DBNTC. The record indicates that the Erickson loan was sold to a mortgage backed securities trust *before* Long Beach Mortgage Company was merged in the Washington Mutual and before Washington Mutual went into FDIC receivership. As a result, the Ericksons' loan could not have been included among the Washington Mutual assets that JPMorgan Chase Bank, N.A. purchased from the FDIC. Thus, JPMorgan Chase Bank, N.A., did not have had any authority to assign the Erickson Deed of Trust to DBNTC in 2013. Significantly, that 2013 assignment does not purport to transfer or assign an interest in the Erickson note. That assignment only refers to the Deed of Trust.

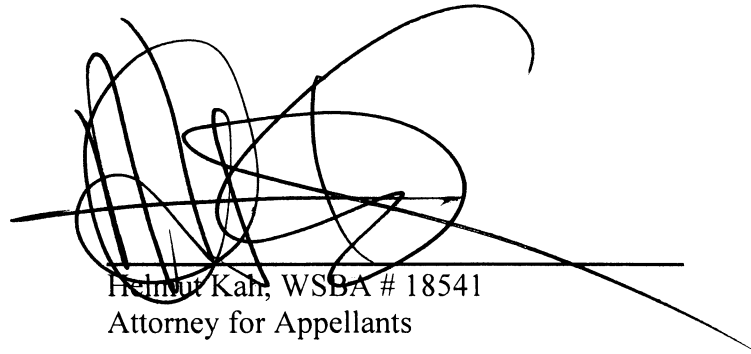
DBNTC failed to establish that there is no genuine issue of material fact regarding its standing to foreclose. Plaintiff was not entitled to judgment as a matter of law on the standing issue, or on any other issue in this case. DBNTC's motions for summary judgment and for entry of the final judgment and decree of foreclosure should be reversed.

DBNTC submitted no basis for the court to enter a JUDGMENT AND DECREE OF FORECLOSURE with any monetary judgment against Ericksons. DBNTC submitted no evidence in support of a monetary amount owed by Ericksons. The dollar amounts stated at page 2 and 3 of the JUDGMENT AND DECREE OF FORECLOSURE are without explanation and without reference to any basis in the record except, perhaps, plaintiff's complaint. But the Ericksons are not in default. Their answer to the complaint denies the alleged figures. The record is void of any basis for establishing the amount, if any, owed to DBNTC by Erickson. Thus it was clear error to enter a monetary judgment against the Ericksons.

Appellants Ericksons respectfully ask this Court to:

1. Reverse the Order Granting Plaintiff's Motion for Summary Judgment. (CP 539 – 541)
2. Reverse the Judgment and Decree of Foreclosure. (CP 680 – 685)
3. Declare that DBNTC lacked standing and dismiss DBNTC's complaint or lack of standing.
4. Award Ericksons' their costs, disbursements and reasonable attorney fees on this appeal.
5. Such other relief as is just and proper.

Respectfully submitted this 3<sup>rd</sup> day of June, 2016.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right. The signature is positioned above the printed name and title.

Helmut Kah, WSBA # 18541  
Attorney for Appellants