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68516-3

No. 68516-3-I

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

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MICAH SCHNALL,

Appellant,

vs.

DEUTSCHE BANK NATIONAL TRUST COMPANY, MORTGAGE  
ELECTRONIC REGISTRATION SYSTEMS, REGIONAL TRUSTEE  
SERVICES, and JOHN DOES inclusive 1 through 20,

Respondents.

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BRIEF OF RESPONDENTS DEUTSCHE BANK NATIONAL  
TRUST COMPANY AND MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS

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Appeal from King County Superior Court  
Case No: 11-2-19807-3SEA  
The Honorable Judge Barnett

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## I. INTRODUCTION

Appellant Micah Schnall seeks to undo the foreclosure of his real property even though he acknowledges that he owed a mortgage loan secured by the property on which he failed to make any payments after August 2009. The trial court dismissed Mr. Schnall's case, concluding that respondent Deutsche Bank National Trust Company, as Trustee of the IndyMac INDX Mortgage Loan Trust 2006-AR39, Mortgage Pass-Through Certificates, Series 2006-AR39 under the Pooling and Servicing Agreement dated December 1, 2006 ("Deutsche Bank") was the current holder of Mr. Schnall's original promissory note and, therefore, was entitled to enforce the terms of the loan. The trial court also denied Mr. Schnall's motions for a preliminary injunction to stop the foreclosure sale and his motion to amend his Complaint.

Mr. Schnall appeals each of these rulings arguing, primarily, that the trial court's decisions are contrary to the Supreme Court's recent decision in *Bain v. Metropolitan Mortgage Group, Inc. et al.*, 175 Wn.2d 83 (2012). Mr. Schnall's appeal should be dismissed because he has failed to present an adequate record for this Court to review the decisions below. Further, even if the Court were to consider the merits of Mr. Schnall's arguments, the trial court should be affirmed because (1) its decisions do not run afoul of *Bain*, (2) Mr. Schnall failed to preserve certain of his

arguments raised on appeal, and (3) Mr. Schnall has failed to establish that the trial court erred in denying his requests for equitable relief.

## II. STATEMENT OF THE CASE

Mr. Schnall purchased the real property at issue in November 2006. CP<sup>1</sup> 1 (Compl.) at ¶¶ 1.1, 2.3. The property is located at 11521 167th Pl. NE, Redmond, Washington, 98052 (“the Property”). To fund the purchase, Mr. Schnall took out two loans from Quicken Loans, CP 1 at ¶¶ 2.2-2.5, and he pledged the Property as security for both loans under two Deeds of Trust that were recorded in the King County land records. CP 1 at ¶ 2.3. Thereafter, Quicken Loans sold the two loans—the first loan to IndyMac Bank, F.S.B. (“IndyMac”) and the second loan to Countrywide Home Loans, Inc. CP 1 at 2.6-2.7. The first loan was subsequently transferred to Deutsche Bank. CP 37 (Request for Judicial Notice) at Ex. A. Only the first loan is at issue here, and Deutsche Bank is the lender seeking to enforce the loan contract on the first loan.

In April 2009, Mr. Schnall contacted his servicer on the first loan about getting a loan modification, CP 1 at ¶ 2.9, and in August of that year he stopped making his loan payments, CP 37 at Ex. B. The following month, Mr. Schnall was given a three-month trial modification. CP 1 at ¶ 2.12. Mr. Schnall performed the trial modification, and in early March

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<sup>1</sup> “CP” refers to the Clerk’s Papers submitted on appeal.

2010, the loan servicer sent him a permanent loan modification agreement with a March 27, 2010 deadline to accept. CP 1 at ¶ 2.19. Mr. Schnall failed to execute the permanent modification agreement by the required deadline because he was on an extended trip to California from early March through early June, and the permanent modification failed. CP 1 at ¶¶ 2.18-2.19. Mr. Schnall did not review the modification documents until he returned from his trip in June. CP 1 at ¶ 2.20.

In August 2010, a Notice of Default was posted on Mr. Schnall's door informing him that he was over \$40,000 in arrears and that he needed to cure his loan default in order to avoid foreclosure. CP 1 at ¶ 2.24; CP 37 at Ex. B. The first paragraph of the Notice of Default identified and provided contact information for both the current owner of the promissory note (Deutsche Bank) and the current loan servicer (OneWest Bank). CP 37 at Ex. B.

Despite this notice, Mr. Schnall did not cure his default, and on November 9, 2010, he received a Notice of Trustee's Sale informing him the foreclosure sale was scheduled for February 11, 2011. CP 1 at ¶ 2.27. The Notice of Trustee's Sale was recorded in the King County land records on November 10, 2010. CP 37 at Ex. C. To avoid the sale, Mr. Schnall filed for Chapter 13 bankruptcy on February 2, 2011. CP 1 at ¶ 2.28. Because he failed to provide adequately for his mortgage debt or

show that he could feasibly pay his mortgage debt, the bankruptcy case was dismissed three months later.<sup>2</sup>

Thereafter, the foreclosure sale was rescheduled for June 10, 2011. CP 37 at Ex. D. Again to avoid foreclosure, Mr. Schnall filed this lawsuit and a motion for a temporary restraining order in the King County Superior Court on June 3. CP 1, 5. A temporary restraining order was granted *ex parte* that same day. CP 4. Mr. Schnall also filed a motion for a preliminary injunction, which was heard on July 27, 2011. CP 15, 20, 30. At that hearing, counsel for Deutsche Bank presented the original promissory note with Mr. Schnall's signature to both the trial court and to Mr. Schnall's counsel. CP 39, Ex. A at 8. After hearing argument from both parties, the trial court denied Mr. Schnall's motion, concluding that Deutsche Bank was the holder of the note and that the "holder of the note gets to enforce the note." CP 39, Ex. A at 10.

The foreclosure sale was rescheduled for December 2011. Continuing to try and stall the proceedings, in early November Mr. Schnall filed a second motion for preliminary injunction. CP 35B. Again, after hearing argument from both parties, the trial court denied Mr. Schnall's motion and made specific findings and conclusions, including that "Deutsche Bank National Trust Company (DBT) is the current holder

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<sup>2</sup> See *In re Schnall*, Case No. 11-11420-MLB (Bankr. W.D. Wash.).

of the promissory note, endorsed in blank by the original lender, Quicken Loans.” CP 44 at 1. The trial court further concluded that whereas Mr. Schnall “acknowledges the [loan] obligation and has not contested the default,” the equities did not favor granting him injunctive relief restraining foreclosure. CP 44 at 3.

Around the same time, respondents moved to dismiss Mr. Schnall’s lawsuit, CP 41, and Mr. Schnall, acting as his own *pro se* co-counsel while still having legal counsel, moved to amend his Complaint, CP 54. The trial court heard argument on both of these motions on December 16, 2011 and granted the motion to dismiss and denied the motion to amend. CP 91. This appeal followed.

### III. ARGUMENT

#### A. **This appeal should be dismissed because Mr. Schnall failed to present an adequate record for appellate review.**

The appellant has an obligation to ensure that those parts of the trial court record necessary to consider the arguments raised on appeal are presented to the appellate court. *Rhinevault v. Rhinevault*, 91 Wn. App. 688, 692 (Div. 1 1998). Specifically as relates to transcripts of court proceedings, the appellant must “arrange for the transcript of all those portions of the verbatim report of proceedings necessary to present the issues raised on review.” RAP 9.2(b). If the appellant fails to provide an

adequate record to allow the appellate court to consider the argument raised, “[t]he court may decline to reach the merits of an issue.”

*Rhinevault*, 91 Wn. App. at 692.

Here, Mr. Schnall challenges the trial court’s ruling on the motion to dismiss and motion to amend, arguing, among other things, that the trial court failed to make adequate findings to support dismissal of his Consumer Protection Act claim, Op. Br. at 18, made improper findings at the motion to dismiss stage on his breach of contract claim,<sup>3</sup> *id.*, and failed to make adequate findings to support denying his request to amend, *id.* at 17. As part of the Clerk’s Papers transmitted to this Court, Mr. Schnall designated the parties’ relevant written pleadings and the trial court’s written order on these motions. He did not, however, include the transcript from the December 16, 2011 hearing on these motions where the trial court stated its findings and conclusions. *See* 5/23/12 Statement of Arrangements.<sup>4</sup> Nor did he otherwise provide any summary of these proceedings. *See* RAP 9.3 (“The party seeking review may prepare a narrative report of proceedings.”). Well before the Opening Brief was filed, the undersigned counsel contacted Mr. Schnall and pointed out this

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<sup>3</sup> It is unclear precisely what Mr. Schnall is referring to on this issue because he did not assert a breach of contract claim below. *See* CP 1 (asserting claims for violations of the Consumer Protection Act, Truth in Lending Act, Deed of Trust Act, and Real Estate Settlement Procedures Act).

<sup>4</sup> Included as **Attachment 1** to the Appendix hereto.

omission, and Mr. Schnall responded that he purposefully chose not to include the December 16 hearing transcript.

The trial court's written order resolving these two motions expressly states that the ruling was based on the hearing on the motions. CP 91. By failing to include the transcript or other summary of the relevant hearing where the trial court made the findings at issue, Mr. Schnall deprived this Court of an adequate record to consider his arguments and, therefore, his appeal as relates to these issues should be dismissed. RAP 9.2(b); *In re Welfare of M.R.H.*, 145 Wn. App. 10, 27 (Div. 3 2008) (holding issue not properly before court where appellant failed to present sufficient record for review). Any other outcome would lead to injustice by allowing litigants to manipulate the record and intentionally omit those parts viewed as detrimental to their position while at the same time raising errors based on the proceedings or decisions memorialized in the omitted parts. Such manipulation is inconsistent with fundamental principles of the adversary system, fairness, and appellate review.

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**B. *Bain* does not undermine the trial court's rulings.**

1. MERS acted only as an agent of the beneficiary and not as a beneficiary in its own right, which is permitted under *Bain*.

If the Court decides to consider the merits of Mr. Schnall's arguments despite his failure to present an adequate record, they should be rejected. Citing *Bain v. Metropolitan Mortgage Group, Inc. et al.*, Mr. Schnall argues that the trial court's finding that MERS properly assigned his trust deed to Deutsche Bank was in error because only the beneficiary has authority to execute assignments and MERS is not a "beneficiary." Op. Br. at 13-14, 16. While the Supreme Court did hold in *Bain* that MERS *itself* is not a proper beneficiary under the Washington Deed of Trust Act, it also expressly recognized that MERS can serve as an agent of the trust deed beneficiary. *Bain*, 175 Wn.2d at 106. On this point, the Supreme Court stated: "[N]othing in this opinion should be construed to suggest an agent cannot represent the holder of a note. Washington law, and the deed of trust act itself, approves of the use of agents." *Id.*

Principles of agency did not control in *Bain*, but not because MERS cannot serve as an agent of the trust deed beneficiary. Rather, the Court was unwilling to apply agency principles under the facts of *Bain* (and its companion case *Selkowitz*) because MERS was not acting as agent for the original beneficiary who designated it as a nominee, but instead

was purportedly acting on its own behalf or on behalf of its own—that is, MERS’ own—successors and assigns.<sup>5</sup> *See id.* at 107. The Court expressed concern that under the facts presented there, the identity of MERS’ principal was unknown, and it reasoned that designation of MERS as nominee by the original beneficiary does not inherently give rise to an agency relationship between MERS and successor lenders. *Id.*

Here, there is no such hidden principal or degree of separation. Quicken Loans was the original lender and beneficiary under Mr. Schnall’s deed of trust. CP 36 (Decl. Re Exhibits 1-5 to Plf’s 2d Mot. for Prelim. Inj./TRO), Ex. 4l; *see also Bain*, 175 Wn.2d at 99 (note holder is the beneficiary). And the assignment at issue, executed by MERS “AS NOMINEE FOR QUICKEN LOANS,” transferred the beneficial interest in Mr. Schnall’s trust deed originally held by Quicken Loans to Deutsche Bank. CP 37 (Defs.’ Request for Judicial Notice), Ex. A) (capitalization in original). MERS did not purport to act on behalf of anyone other than

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<sup>5</sup> In *Bain*, the Assignment of Deed of Trust at issue was executed by MERS “AS NOMINEE FOR ITS SUCCESSORS AND ASSIGNS.” *Bain v. Metropolitan Mortg. Grp.*, No. CV-09-149-JCC (W.D. Wash.) (Declaration of Greg Allen in Support of LPS’s Mot/ for Summ. J. Ex. A) (Doc. # 43). In *Selkowitz*, the document at issue was an Appointment of Successor Trustee, which was executed by MERS in its purported capacity as “Beneficiary,” rather than as nominee of the beneficiary. *See Selkowitz v. First Am. Title Ins. Co., et al.*, No. 3:10-cv-05523-JCC (W.D. Wash.) (8/12/10 Mot. to Dismiss, Ex. B) (Doc. #8-1). For the convenience of the Court, these documents of public record are included as **Attachments 2-3**, respectively, to the Appendix hereto. MERS recognizes that the documents at issue in *Bain* and *Selkowitz* may have been inartfully drafted, but regardless, in those cases (as in this one), MERS was acting on behalf of the note holder and not on its own behalf.

the party that expressly designated it as nominee. MERS also did not purport to act as a beneficiary in its own right or to assign a beneficial interest held by it directly. Rather, under the language of the assignment, MERS acted solely as agent of the proper original beneficiary—Quicken Loans—and made a public record of the transfer of Quicken Loans' interest in the deed of trust to the proper current beneficiary—Deutsche Bank. Under these facts, the assignment at issue does not run afoul of *Bain*, and the trial court's decision should be upheld.

2. Deutsche Bank established in the proceedings below that it was the current holder of Mr. Schnall's loan contract, which also satisfies *Bain*.

The second part of the *Bain* decision addresses the effect of MERS acting as a purported beneficiary and how to remedy this problem. On this issue, the Supreme Court gave the following instruction: "If the original lender had sold the loan, that purchaser would need to establish ownership of that loan, either by demonstrating that it actually held the promissory note *or* by documenting the chain of transactions." *Bain*, 175 Wn.2d at 111 (emphasis added). The Supreme Court further indicated that naming MERS as beneficiary does not automatically invalidate an otherwise valid deed of trust, as demonstrated by the Court's failure to invalidate the trust deeds in *Bain* or *Selkowitz*. *See id.* at 114.

Here, as just explained, the assignment executed by MERS was valid because MERS acted *solely* as an agent in executing the assignment and, therefore, “the chain of transactions” has been properly documented. But even if this Court were to disagree, the trial court’s rulings should be upheld because Deutsche Bank established that it is the current holder of Mr. Schnall’s original note and trust deed. At the hearing on Mr. Schnall’s first motion for a preliminary injunction, counsel for Deutsche Bank presented the original promissory note signed by Mr. Schnall to the court and to Mr. Schnall’s counsel. CP 39, Ex A at 8.

Mr. Schnall’s original promissory was indorsed in blank by Quicken Loans. CP 25, Ex. 10 at 5; CP 44 at 1. After inspecting the original loan documents, the Superior Court held: “The holder of the note gets to enforce the note.” CP 39, Ex. A at 10. This conclusion is consistent with long-established Washington law. RCW 62A.1-201(20) (“Holder” with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer.”); 62A.3-309 (“‘Person entitled to enforce’ an instrument means (i) the holder of the instrument . . . .”) It is also consistent with *Bain*. 175 Wn.2d at 111. Indeed, at the hearing on the first motion for preliminary injunction, Mr. Schnall’s counsel expressly stated that if Deutsche Bank could establish possession of the original promissory note, it would be entitled to enforce the loan

through foreclosure. CP 39, Ex. A at 4. Deutsche Bank did just that at that same hearing.

3. Respondents satisfied the Deed of Trust Act's requirement concerning proof of Deutsche Bank's ownership of the promissory note.

Citing RCW 61.24.030, Mr. Schnall seemingly suggests that respondents failed to comply with the Deed of Trust Act's requirement that the trustee have proof that the beneficiary owns the note secured by the deed of trust being foreclosed before issuing a notice of sale. Op. Br. at 16-17 (asserting beneficiary must prove it "was the owner (not merely possessor) of the promissory note)" (emphasis in original)). The relevant statutory provision expressly states that proof of ownership is satisfied where the trustee has a declaration from the beneficiary "stating that the beneficiary is the actual holder of the promissory note." RCW 61.24.030(7)(a). As established in the trial court, the trustee here did have the necessary declaration from Deutsche Bank in the proper form before the notice of trustee's sale was issued. CP 24 (Decl. of Melissa Hjorten In Opp. to Mot. for Prelim. Inj./TRO) at ¶¶ 3-4, Ex 3. Thus, this argument fails as well.

For all of these reasons, Mr. Schnall's arguments related to the *Bain* decision should be rejected and his request for a remand for further proceedings should be denied as unnecessary. There is no question that

Deutsche Bank was the party entitled to enforce Mr. Schnall's loan contract, both because the deed of trust was properly assigned to Deutsche Bank and because Deutsche Bank was in physical possession of the original promissory note. Despite holding that MERS is not a "beneficiary" for purposes of the Deed of Trust Act, the Supreme Court rejected the argument that alleged errors related to this issue result in the homeowner-debtor retaining the property while shedding the encumbrance of the bargained-for deed of trust. *See Bain*, 175 Wn.2d at 112 (noting lack of authority for "suggestion that listing an ineligible beneficiary on a deed of trust would render the deed void and entitle the borrower to quiet title").

Mr. Schnall has already retained possession of the Property for over three years without making any payments on his loan obligation. And in that time period there has been no suggestion or scintilla of evidence that anyone other than Deutsche Bank has sought to enforce Mr. Schnall's loan. Mr. Schnall has also made no representation that he is able or willing to cure his default. Thus, as a matter of both law and equity, the trial court's rulings should be affirmed and this protracted litigation should come to an end. *See Beadles v. ReconTrust Co., N.A.*, 2012 WL 4904461 (E.D. Wash. Oct. 15, 2012) (slip op.) (quoting *Bain* and holding that

quieting title in favor of borrower simply because MERS was named as beneficiary is inconsistent with the purposes of the Deed of Trust Act).<sup>6</sup>

4. The trial court did not make improper findings on the motion to dismiss.

Finally, Mr. Schnall contends that the trial court erred in making findings of disputed fact on a motion to dismiss. *See* Op. Br. at 3, 18. The findings that he contends were erroneous, however, were made as part of the trial court's ruling on his motion for injunctive relief, not the motion to dismiss. *See id.* at 1-3, 18-19 (referring to the November 15, 2011 ruling on motion for preliminary injunction). Courts are required to make findings in support of their rulings on motions for preliminary injunction. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 153 (2007) (en banc). Thus, Mr. Schnall's argument on this point is not well taken.

**C. Mr. Schnall failed to preserve his arguments concerning RCW 61.24.040.**

Mr. Schnall broadly contends that Deutsche Bank "failed to comply with RCW 61.24.040 and/or other relevant portions of the Deed of Trust Act." Op. Br. at 14. He fails to identify with any specificity, however, what provisions or requirements of Section 61.24.040 he believes were violated. Instead, he simply asserts that Section 61.24.040 "requires the Notice of Trustee's sale to specify that the beneficiary

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<sup>6</sup> As required by GR 14.1, a copy of this decision is included as **Attachment 4** to the Appendix hereto.

interest under the Deed of Trust was assigned, and that said assignment was duly recorded.” Op. Br. at 14.

It is well-established that a party is not entitled to appellate review of issues that were not first presented to the trial court for decision. RAP 2.5(a); *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 853 (2002); *Stedman v. Cooper*, 170 Wn. App. 61, 73-74 (Div. 1 2012). The purposes of this rule are both to ensure fairness and efficiency in the judicial process by avoiding sandbagging and other gamesmanship and by giving the opposing party notice of all of the issues for consideration and an opportunity to respond appropriately in the trial court with any relevant argument or evidence. *See State v. Bertrand*, 165 Wn. App. 393, 406-07 (Div. 2 2011) (Quinn-Brintnall, J., concurring) (quoting Frank M. Coffin, *On Appeal: Courts, Lawyering, and Judging* 84-85 (1994)).

Here, despite multiple motions for injunctive relief, an opposition to the respondents’ motion to dismiss, and a motion for reconsideration, Mr. Schnall never raised any arguments related to Section 61.24.040 below. For this reason alone, his arguments on this issue should be rejected. Additionally, he failed to properly present this issue for review because he has not referenced any part of the record or otherwise explained the violation or what he contends should have been done to satisfy RCW 61.24.040, which is necessary for respondents to reasonably

address this issue. *See* RAP 10.3(6); *Elber v. Larson*, 142 Wn. App. 243, 250 (Div. 3 2007) (refusing to consider arguments that were “not well developed . . . on appeal”). For these reasons, Mr. Schnall’s arguments related to RCW 61.24.040 should also be dismissed.

**D. Denial of Mr. Schnall’s Motion to Amend should be affirmed.**

The trial court’s decision on a motion to amend can only be overturned for “manifest abuse of discretion.” *Wilson v. Horsley*, 137 Wn.2d 500, 505 (1999) (en banc). Mr. Schnall argues that it was error for the trial court to deny his request to amend while at the same time dismissing his case without prejudice. (Op. Br. at 3.) It is Mr. Schnall’s burden, as the appellant, to demonstrate the complained-of abuse of discretion. As previously discussed, Mr. Schnall failed to provide the transcript from the hearing on this motion so there is no way for this Court to assess whether the trial court exercised its discretion “on untenable grounds, or for untenable reasons.” *Wilson*, 137 Wn.2d at 505. And even if the Court were to consider the merits of his argument, he fails to cite *any* legal authority to support his contention that it is improper to deny a request to amend while entering a dismissal without prejudice. *See* Op. Br. at 17-18. Under these procedural rulings, Mr. Schnall was not denied the ability to assert any new claims or theories that he may have had, he just needed to present them as a new action rather than as an amendment,

which he acknowledges in his Opening Brief. Op. Br. at 17-18. That he opted not to do so and to instead pursue an appeal does not mean that the trial court abused its discretion.

**E. Denial of Mr. Schnall's Motion for Injunctive Relief should be affirmed.**

Injunctive relief can only issue where the moving party establishes “(1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of either have or will result in actual and substantial injury.” *San Juan County*, 160 Wn.2d at 153. Here, the trial court concluded that Mr. Schnall failed to establish the first element because Deutsche Bank held his original promissory note and was entitled to enforce the terms of the loan. CP 44 at 2-3. The trial court also concluded that the “balance of equities” did not favor Mr. Schnall where he “acknowledges the [loan] obligation and has not contested the default.” CP 44 at 3. That is, not only did the trial court find that Mr. Schnall had no “clear legal or equitable right” to prevent foreclosure, it also necessarily found that he would not suffer any injury if the foreclosure sale was allowed to proceed. CP 44 at 2-3.

Mr. Schnall's only argument related to this ruling concerns *Bain* and challenges to Deutsche Bank's authority to enforce his loan contract, which was addressed above. *See* Op. Br. at 1. He does not challenge the

trial court's conclusion concerning the balance of the equities or the lack of harm in allowing the foreclosure to proceed in light of his long-standing default. The procedural history and the record in this case make clear that Mr. Schnall's strategy is simply to delay the loss of the Property. He cannot dispute that he defaulted on his loan or that the deed of trust provided for foreclosure upon default. Therefore, the trial court was correct in concluding that Mr. Schnall was not entitled to protection through exercise of the court's equitable authority, and the denial of his request for a preliminary injunction barring foreclosure should be affirmed.

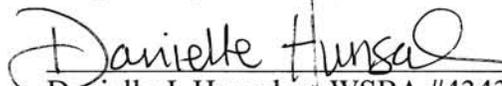
#### IV. CONCLUSION

For the foregoing reasons, Mr. Schnall's appeal should be dismissed because he failed to present an adequate record to allow this Court to consider the trial court's rulings challenged on appeal. Alternatively, even if the Court decides to consider the merits of his arguments, the trial court's rulings should be affirmed because the foreclosure in this case was in conformity with the Supreme Court's *Bain* decision. Mr. Schnall was unquestionably in default for failing to make payments on this mortgage loan, he made no representation that he could

have cured his default, and the record establishes Deutsche Bank's right to enforce the loan contract through foreclosure.

November 8, 2012.

Respectfully submitted,

  
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Attorney for Respondents Deutsche Bank  
National Trust Company and Mortgage  
Electronic Registration Systems

## V. APPENDIX

**Attachment 1** - 5/23/12 Statement of Arrangements

**Attachment 2** - *Bain v. Metropolitan Mortg. Grp.*, No. CV-09-149-JCC (W.D. Wash.) (Declaration of Greg Allen in Support of LPS's Mot/ for Summ. J. Ex. A) (Doc. # 43).

**Attachment 3** - *Selkowitz v. First Am. Title Ins. Co., et al.*, No. 3:10-cv-05523-JCC (W.D. Wash.) (8/12/10 Mot. to Dismiss, Ex. B) (Doc. #8-1).

**Attachment 4** - *Beadles v. ReconTrust Co., N.A.*, 2012 WL 4904461 (E.D. Wash. Oct. 15, 2012).

## **APPENDIX**

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

Micah Schnall,	)	
Plaintiff,	)	
v.	)	Case No. 11-2-19807-3SEA
DEUTSCHE BANK NATIONAL TRUST	)	Appeal No. 68516-3-I
COMPANY, MORTGAGE ELECTRONIC	)	STATEMENT OF ARRANGEMENT:
REGISTRATION SYSTEMS, REGIONAL	)	[Rule 9.2(a)]
TRUSTEE SERVICES, and JOHN DOEs 1	)	
through 20,	)	
Defendants.	)	

COMES NOW, Plaintiff Micah Schnall and states that on or around May 5, 2012, I arranged with the official court reporter a transcription of the original and one copy of the verbatim report of proceedings from the court reporter(s) named below and arranged to pay the costs of the transcriptions as follows:

<u>Hearing Date</u>	<u>Judge</u>	<u>Court Reporter/Transcriptionist</u>
11/15/2011	Suzanne Barnett	Dolores Rawlins
12/2/2011	Suzanne Barnett	Dolores Rawlins

<i>Statement of Arrangements</i>	Micah Schnall 11521 167 <sup>th</sup> Pl NE Redmond, Washington 98052 425-445-4779
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A complete verbatim report of proceedings has been ordered.

A partial report has been ordered. In compliance with RAP 9.2, the following issues will be presented.

Respectfully submitted by,

/s/Micah Schnall                      5/23/2012  
Micah Schnall, Plaintiff              Date

*Statement of Arrangements*

Micah Schnall  
11521 167<sup>th</sup> Pl NE  
Redmond, Washington 98052  
425-445-4779

HON. JOHN C. COUGHENOUR

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

KRISTIN BAIN, a single person,  
Plaintiff,  
v.  
METROPOLITAN MORTGAGE GROUP,  
et al.  
Defendant.

NO. CV-09-00149-JCC

**DECLARATION OF GREG ALLEN IN  
SUPPORT OF LPS'S MOTION FOR  
SUMMARY JUDGMENT DISMISSAL**

**NOTED FOR CONSIDERATION:  
January 1, 2010**

I, Greg Allen, declare:

1. I am Assistant Vice President, Customer Support, for Lender Processing Services (LPS). I have personal knowledge of the facts set forth below.

2. LPS is the nation's leading provider of mortgage processing services, settlement services, mortgage performance analytics and default solutions. Specifically, LPS acts as an agent to process the necessary paperwork to pursue non-judicial foreclosure on behalf of its servicer and lender clients. LPS's services help lenders and mortgagees lower their costs and reduce processing time associated with non-judicial foreclosures.

3. LPS has a contract with IndyMac Bank and has contractually granted signing authority from the Mortgage Electronic Registration Systems, Inc. (MERS).

DECLARATION OF GREG ALLEN - 1  
[Case No. CV-09-00149-JCC]

SIRIANNI YOUTZ  
MEIER & SPOONEMORE  
719 SECOND AVENUE, SUITE 1100  
SEATTLE, WASHINGTON 98104  
TEL. (206) 223-0303 FAX (206) 223-0246

1           4.     Bethany Hood is a LPS employee. She has also been designated as  
2 an authorized signing agent for MERS. As part of her duties as a signing agent for  
3 MERS, Ms. Hood signed an "Assignment of Deed of Trust" dated September 3, 2008.  
4 Attached as *Exhibit A* is a true and correct copy of the Assignment of Deed of Trust  
5 signed by Ms. Hood in this matter. Attached as *Exhibit B* is a true and correct copy of  
6 the authorization by MERS for Ms. Hood to execute documents on its behalf.

7           5.     Christina Allen is a LPS employee. She has also been designated  
8 as an authorized signing agent for IndyMac Bank. As part of her duties as a signing  
9 agent for IndyMac Bank, Ms. Allen signed an "Appointment of Successor Trustee"  
10 dated August 26, 2008, effective as of September 3, 2008. Attached as *Exhibit C* is a  
11 true and correct copy of the "Appointment of Successor Trustee" signed by Ms. Allen  
12 in this matter. Attached as *Exhibit D* is a true and correct excerpt of the Agreement  
13 between IndyMac Bank and LPS that authorized Ms. Allen to execute documents on  
14 behalf of IndyMac.

15           6.     After the "Assignment of Deed of Trust" and the "Appointment of  
16 Successor Trustee" documents were executed, LPS sent the documents to Regional  
17 Trustee to be recorded.

18           7.     The above describes LPS's complete involvement in "Assignment  
19 of Deed of Trust" and the "Appointment of Successor Trustee" documents with respect  
20 to Ms. Bain's foreclosure. LPS was not involved in the process by which Ms. Bain's  
21 deed of trust was established.

22           8.     MERS acts as a nominee in county land records for lenders and  
23 servicers. Thus, no matter how many times a loan's servicing is traded, MERS remains  
24 the nominal mortgagee. When a loan goes into default, MERS will reassign the deed of  
25 trust to the current servicer of the loan, so that foreclosure proceedings may be  
26

DECLARATION OF GREG ALLEN - 2  
[Case No. CV-09-00149-JCC]

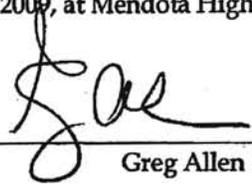
SIRIANNI YOUTZ  
MEIER & SPOONEMORE  
719 SECOND AVENUE, SUITE 1100  
SEATTLE, WASHINGTON 98104  
TEL. (206) 223-0303 FAX (206) 223-0246

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instituted. Attached as *Exhibit E* is a true and correct copy of a description of MERS from its corporate website.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and accurate to the best of my knowledge.

DATED this 8<sup>th</sup> day of December, 2009, at Mendota Hights, Minnesota.



Greg Allen

DECLARATION OF GREG ALLEN - 3  
[Case No. CV-09-00149-JCC]

SIRIANNI YOUTZ  
MEIER & SPOONEMORE  
719 SECOND AVENUE, SUITE 1100  
SEATTLE, WASHINGTON 98104  
TEL. (206) 223-0303 FAX (206) 223-0246

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

- **William Louis Cameron**  
wlc@leesmart.com,wlcameron@att.net
- **Nicolas A Daluiso**  
ndaluiso@robinsontait.com,ndaluiso@hotmail.com
- **Douglas L Davies**  
dougdavies@hotmail.com
- **Melissa A Huelsman**  
mhuelsman@predatorylendinglaw.com,mlefebvre@predatorylendinglaw.com
- **Laura Marquez-Garrett**  
marql@foster.com,taral@foster.com
- **Richard E Spoonemore**  
rspoonemore@sylaw.com,matt@sylaw.com,rspoonemore@hotmail.com,theresa@sylaw.com
- **Jennifer L Tait**  
jtait@robinsontait.com,serobinson@robinsontait.com,kfraser@robinsontait.com
- **Joel E. Wright**  
jw@leesmart.com,sm@leesmart.com

and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants:

- (No manual recipients)

DATED: December 9, 2009, at Seattle, Washington.

/s/ Richard E. Spoonemore

DECLARATION OF GREG ALLEN - 4  
[Case No. CV-09-00149-JCC]

SIRIANNI YOUTZ  
MEIER & SPOONEMORE  
719 SECOND AVENUE, SUITE 1100  
SEATTLE, WASHINGTON 98104  
TEL. (206) 223-0303 FAX (206) 223-0246

## **Exhibit A**

20080909001149.00

When recorded, mail to:

INDY MAC BANK  
Attn: Foreclosure Department  
7700 W Parmer LANE  
AUSTIN, TEXAS 78729



20080909001149  
FIDELITY NATIONAL TITLE 15.00  
PROPERTY OF  
08/19/2008 13:51  
KING COUNTY, WA

Trustee's Sale No: 01-FMB-62059

\*FMB620590112000000\*

FIDELITY NATIONAL TITLE  
U806008 2/16

ASSIGNMENT OF DEED OF TRUST

FOR VALUE RECEIVED, the undersigned, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR ITS SUCCESSORS AND ASSIGNS, by these presents, grants, bargains, sells, assigns, transfers and sets over unto INDYMAC FEDERAL BANK, FSB, all beneficial interest under that certain Deed of Trust dated 3/9/2007, and executed by KRISTIN BAIN A SINGLE PERSON, as Grantor, to STEWART TITLE GUARANTY CO., as Trustee, and recorded on 3/19/2007, under Auditor's File No. 20070319001732, of KING County, State of WASHINGTON, and covering property more fully described on said Deed of Trust referred to herein.

Together with the Note or Notes therein-described or referred to, the money due and to become due therein with interest, and all rights accrued or to accrue under said Deed of Trust.

Dated: 09.03.08

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR ITS SUCCESSORS AND ASSIGNS

BY: [Signature]  
Bethany Hood Title VP  
Name Title

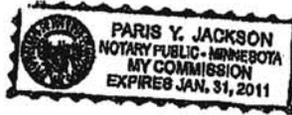
20080909001149.001

STATE OF MIN  
COUNTY OF Dakota } ss.

On Sept. 3 before me, [Signature]  
personally appeared Bethany Hood, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies) and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted executed the instrument.

WITNESS my hand and official seal.

[Signature]  
NOTARY PUBLIC in and for the State of  
MIN, residing at: Ramsey  
My commission expires: 1/31/11



**Electronically Recorded**

**20100520000866**

SIMPLIFILE  
Page 001 of 002  
05/20/2010 02:36  
King County, WA

AST 15.00

When recorded return to:

Quality Loan Service Corp. of Washington  
2141 5th Avenue  
San Diego, CA 92101

Space above this line for recorders use only

TS # WA-10-357584-SH  
APN: 413980045004  
MERS MIN No.:  
5512

Order # 100254607-WA-GSI

Investor No. [REDACTED]

### Appointment of Successor Trustee

**NOTICE IS HEREBY GIVEN** that **QUALITY LOAN SERVICE CORPORATION OF WASHINGTON**, a corporation formed under RCW 61.24, whose address is 2141 5th Avenue San Diego, CA 92101 is hereby appointed Successor Trustee under that certain Deed of Trust dated **10/30/2006**, executed by **KEVIN J. SELKOWITZ , AN UNMARRIED MAN** as Grantor, in which **FIRST AMERICAN TITLE INSURANCE COMPANY** was named as Trustee, **MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR NEW CENTURY MORTGAGE CORPORATION, A CALIFORNIA CORPORATION A CORPORATION** as Beneficiary, and recorded on **11/1/2006**, under Auditor's File No. **20061101000910** as book **xxx** and page **xxx** , Official Records. Said real property is situated in **KING** County, Washington and is more particularly described in said Deed Of Trust.

IN WITNESS WHEREOF, the Beneficiary, **MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.**, has hereunto set his hand; if the undersigned is a corporation, it has caused its corporate name to be signed and affixed hereunto by its duly authorized officers.

EXHIBIT NO. B  
1 OF 2



Westlaw

Page 1

Slip Copy, 2012 WL 4904461 (E.D.Wash.)  
(Cite as: 2012 WL 4904461 (E.D.Wash.))

Only the Westlaw citation is currently available.

United States District Court,  
E.D. Washington.  
Gregory A. BEADLES, Plaintiff,

v.  
RECONTRUST COMPANY, N.A., et al., Defend-  
ants.

No. CV-12-00378-JLQ.  
Oct. 15, 2012.

John A. Long, Law Office of John A. Long, Is-  
squah, WA, for Plaintiff.

John S. Devlin, III, Lane Powell PC, Seattle, WA,  
for Defendants.

ORDER RE: MOTION TO DISMISS  
JUSTIN L. QUACKENBUSH, Senior District Judge.

\*1 BEFORE THE COURT is the Motion to Dismiss pursuant to Fed. R.Civ.P. 12(b)(6) for failure to state a claim (ECF No. 16) filed on behalf of Defendants Federal National Mortgage Association ("Fannie Mae"), ReconTrust Company ("ReconTrust"), Mortgage Electronic Registration Systems ("MERS"), and Bank of America, N.A., the successor by merger to Countrywide Bank, FSB, and BAC Home Loans Servicing LP (herein "BofA") and collectively "Defendants". Response (ECF No. 18) and Reply (ECF No. 19) briefs have been filed.

### I. Introduction

This action was originally filed in state court on January 3, 2012, and removed to this court on June 4, 2012. The Complaint alleges that Plaintiff Gregory Beadles owns real property at 406 E Gettysburg Ct, Spokane, Washington (the "Property") that he refinanced in August 2006. Plaintiff obtained a second loan on the Property in September 2007. In 2010 and 2011, Plaintiff was

experiencing financial hardship and was allegedly in communication with BofA regarding a possible loan modification. (Complaint, ¶ 3.4). Plaintiff then received a Notice of Trustee sale, setting a sale date of July 1, 2011.

Plaintiff contends that he was told that as long as the loan modification process was underway, the sale would not occur. However, the sale did occur on July 1, 2011. Plaintiff contends the Property was sold by ReconTrust at a public auction at which Fannie Mae purchased the property for \$163,864. Plaintiff alleges numerous wrongful and deceptive acts on behalf of Defendants and asserts the following claims: 1) wrongful foreclosure, 2) breach of duty of good faith, 3) negligent or intentional misrepresentation, 4) negligent or intentional misrepresentation against BofA, 5) violation of the Washington State Consumer Protection Act, 6) wrongful foreclosure, 7) quiet title, and 8) slander of title. Defendant seeks title to the property and monetary damages including attorney's fees and costs.

### II. Discussion

Defendants argue that Plaintiff has admitted he was in default on the loan, and admits that he received notice that the foreclosure sale would occur on July 1, 2011. Defendants claim that under the Washington Deed of Trust Act ("WDTA"), RCW § 61.24.005 et seq., by failing to seek relief prior to the foreclosure sale, "Plaintiff is not entitled to the requested relief because all claims to invalidate the sale and certain claims for damages were waived at the time of foreclosure." (ECF No. 17, p. 1). There are four Defendants, and eight claims. Not all claims are asserted against all four Defendants. Defendants argue that certain claims are waived or fail as a matter of law as to individual Defendants. The court will address the claims seriatim for the sake of clarity.

1. **Wrongful Foreclosure** —This claim is asserted against all four of the Defendants. Defendants assert it is waived due to Plaintiff's failure to

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 (Cite as: 2012 WL 4904461 (E.D.Wash.))

seek relief prior to the foreclosure sale. The court agrees, and this claim will be dismissed. In *Plein v. Lackey*, 149 Wash.2d 214, 67 P.3d 1061 (2003), the Washington Supreme Court stated: “The failure to take advantage of the presale remedies under the deed of trust act [RCW 61.24.005 et seq.] may result in the waiver of the right to object to the sale.” *Id.* at 227, 67 P.3d 1061. Waiver will be found where a party: 1) received notice of the right to enjoin the sale, 2) had actual or constructive knowledge of a defense to foreclosure, and 3) failed to bring an action to obtain a court order enjoining the sale. *Id.* at 227, 67 P.3d 1061.

\*2 Plaintiff has pled that he received the Notice of Trustee sale prior to the foreclosure sale. (Complaint, ¶ 3.4). Plaintiff did not seek to enjoin the sale prior to the sale occurring on July 1, 2011, and in fact did not file his Complaint in state court until January 3, 2012. Thus, the only remaining element to establish waiver, is whether Plaintiff had actual or constructive knowledge of a defense to foreclosure. “[I]n applying the waiver doctrine, a person is not required to have knowledge of the legal basis for his claim, but merely knowledge of the facts sufficient to establish the elements of a claim that could serve as a defense to foreclosure.” *Brown v. Household Realty Corp.*, 146 Wash.App. 157, 164, 189 P.3d 233 (Wash.App. Div. 1, 2008). Defendants argue that because Plaintiff’s alleged defense to the foreclosure sale is based on documents and information he had prior to the sale this element is met. (ECF No. 17, p. 6).

Plaintiff’s Response (ECF No. 18) does not directly address whether the three waiver elements have been met. Instead, Plaintiff argues that because Defendants made continual assurances that the sale would not take place, he was deterred from filing suit to enjoin the sale. (ECF No. 18, p. 4). The court finds that Plaintiff’s alleged detrimental reliance on Defendant’s statements does not prevent the operation of the waiver doctrine. In *Plein*, the homeowner filed suit nearly two months before the trustee’s sale, but did not move for a temporary re-

straining order or preliminary injunction. The Washington Supreme Court stated that “any objection to the trustee’s sale is waived where presale remedies are not pursued.” 149 Wash.2d at 229, 67 P.3d 1061.

Additionally, Plaintiff’s claims concerning the alleged misrepresentations are asserted in Counts III and IV against all Defendants and those counts are not subject to the waiver doctrine. RCW 61.24.127(1)(a) provides that a failure to seek to enjoin a foreclosure sale does not waive a claim for damages based on fraud or misrepresentation. Although a misrepresentation claim is not waived, a plaintiff may only seek monetary damages. Under RCW 61.24.127(2), a claim may not affect the validity or finality of the foreclosure sale and “may not seek any remedy at law or in equity other than monetary damages.” Plaintiff’s claim for wrongful foreclosure seeks to have the sale set aside and the property returned to him. (Complaint, ¶ 4.3). This claim has been waived. The Motion is GRANTED as to Count 1 and that claim will be dismissed.

**2. Breach of Duty of Good Faith** —This claim is asserted against only ReconTrust. Plaintiff asserts that ReconTrust had a duty to act in good faith towards Plaintiff and that by going forward with the sale, despite Plaintiff informing ReconTrust of his belief that the sale should not go forward due to loan modification discussions, ReconTrust breached this duty. (ECF No. 18, p. 5). Defendant counters that ReconTrust had no duty to cancel or continue the sale, and cite to RCW § 61.24.040(6), which provides that the “trustee has no obligation to, but may, for any cause the trustee deems advantageous, continue the sale ...”. A trustee does have a duty to the borrower under the WDTA. Specifically RCW 61.24.010(4) provides that the trustee “has a duty of good faith to the borrower, beneficiary, and grantor.” Further, the Washington Supreme Court has stated: “Trustees have obligations to all of the parties to the deed, including the homeowner.” *Bain v. Metropolitan Mortg. Group*, 175 Wash.2d 83, 285 P.3d 34, 38 (2012). A claim that the trustee has

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(Cite as: 2012 WL 4904461 (E.D.Wash.))

failed to comply with obligations under the WDTA is not a claim that is waived by the failure to seek an injunction to prevent the foreclosure sale. RCW 61.24.127(1)(c). Accordingly, Plaintiff has stated a claim against ReconTrust, and the Motion to Dismiss is DENIED as to Count 2.

**\*3 3. Negligent and/or Intentional Misrepresentation**—This claim is asserted against MERS, BofA, and ReconTrust. Defendants argue that Plaintiff has not alleged a representation of existing fact or that the representations were directed at Plaintiff. Defendants also argue that Plaintiff has not alleged detrimental reliance.

Plaintiff argues that several false statements were made: 1) that while he was being considered for loan modification the foreclosure sale would not occur; 2) that the trustee sale would be postponed; 3) that the foreclosure sale had not occurred (when in fact it had); and 4) that if financial documentation was submitted that met underwriting guidelines for loan modification, a permanent modification would be granted. (ECF No. 18, p. 11). Plaintiff alleges he relied on these representations to his detriment by foregoing other possible options to retain his home. Plaintiff also argues that the Defendants falsely represented their authority to foreclose. Paragraph 6.8 of the Complaint appears to allege that MERS knew it was not properly a beneficiary under the deed of trust and misrepresented its authority to Plaintiff, and Plaintiff makes similar allegations that BofA and ReconTrust misrepresented their authority as note holder and successor trustee respectively. See Complaint, ¶¶ 6.4 & 6.5.

Under Washington law, a plaintiff alleging negligent misrepresentation must prove: 1) that the defendant supplied information for use in a business transaction that was false; 2) the defendant knew or should have known the information was supplied to guide the plaintiff in a business transaction; 3) the defendant was negligent in obtaining or communicating the false information; 4) the plaintiff relied on the false information; 5) the plaintiff's reliance was reasonable; and 6) the false

information proximately caused the plaintiff damages. *Austin v. Ettl*, 286 P.3d 85, 2012 WL 4510867 (Div.2, 2012) citing *Ross v. Kirner*, 162 Wash.2d 493, 499, 172 P.3d 701 (2007). Intentional misrepresentation is similar, but is sometimes described as consisting of nine elements: 1) representation of existing fact; 2) materiality; 3) falsity; 4) the speaker's knowledge of falsity; 5) intent of the speaker that the information be acted on by plaintiff; 6) plaintiff's ignorance of falsity; 7) plaintiff's reliance; 8) plaintiff's right to rely; and 9) damages. *West Coast, Inc. v. Snohomish County*, 112 Wash.App. 200, 206, 48 P.3d 997 (Div.1, 2002).

Plaintiff's allegations are sufficient to state a claim. He asserts that he was supplied information in the course of his dealings with Defendants, that the information was false, that he relied on this information to his detriment, and suffered damages. Plaintiff does not contest that he was in default, he failed to cure the default, and he received notice of the foreclosure sale. It may be difficult for Plaintiff to establish damages as he will have to establish that he had other viable options to avoid foreclosure. He alleges in Paragraph 6.15 of the Complaint that were it not for the misrepresentations he would have been able the actual holder of the note to resolve the default and otherwise make arrangements to avoid foreclosure." This raises questions of fact beyond the scope of the Motion to Dismiss, and the Motion is DENIED as to Count 3.

**\*4 4. Negligent and/or Intentional Misrepresentation**—This claim is asserted against only B of A. Plaintiff contends that misrepresentations were made concerning loan modification in that he was told his home would not be sold at the July 1, 2011 Trustee sale. (Complaint, ¶¶ 7.4–7.6). These allegations survive the motion to dismiss. The allegations, if proven, could support an award of damages. Plaintiff argues that but-for the misrepresentations he could have pursued other avenues to avoid the foreclosure sale. The Motion to Dismiss as to Count 4 is DENIED.

#### 5. Washington Consumer Protection Act

Slip Copy, 2012 WL 4904461 (E.D.Wash.)  
(Cite as: 2012 WL 4904461 (E.D.Wash.))

**Claim** —This claim is asserted against B of A, ReconTrust, and Fannie Mae.<sup>FN1</sup> Plaintiff alleges that the Defendants have engaged in a course of conduct in executing, recording and relying upon documents it should have known to be false. Plaintiff claims the Defendants are engaged in deceptive acts. Defendants argue this claim fails as a matter of law because Plaintiff has not alleged a public interest impact, and that his allegations are specific to Plaintiff's own experience and do not evidence a generalized pattern of actions.

FN1. According to the heading for Count 5 the claim is asserted against BofA, ReconTrust, and Fannie Mae, however para. 8.2 of the Complaint asserts that MERS, BofA, and Fannie Mae (but not ReconTrust) violated the CPA.

In his Response brief, Plaintiff relies on the Washington Supreme Court's recent opinion in *Bain v. Metro. Mortg. Group*, 175 Wash.2d 83, 285 P.3d 34, 2012 WL 3517326 (August 16, 2012). Plaintiff claims that Bain stands for the proposition that MERS claiming to be the beneficiary when it does not hold the note is *per se* deceptive or unfair.

To prevail on a claim under the Washington Consumer Protection Act, a plaintiff must show: 1) an unfair or deceptive act or practice; 2) occurring in trade or commerce; 3) public interest impact; 4) injury to plaintiff in his business or property; and 5) causation. *Bain*, 175 Wash.2d 83, 285 P.3d 34, 49 (2012). Contrary to Plaintiff's argument, the Washington Supreme Court did *not* hold that MERS claiming to be the beneficiary was *per se* deceptive. The court stated: "While we are unwilling to say it is *per se* deceptive, we agree that characterizing MERS as the beneficiary has the capacity to deceive," and thus the court found the first element was presumptively met. *Id.* at 51. As to the third element, which Defendants challenge here, the court stated, "MERS is involved with an enormous number of mortgages in the country (and our state), perhaps as many as half nationwide." *Id.* at 51. Thus, the court found the third element was also

presumptively met.

The court also found that the fourth and fifth elements, injury and causation, would depend on the evidence presented. The court stated: "if there have been misrepresentations, fraud, or irregularities in the proceedings, and if the homeowner borrower cannot locate the party accountable and with authority to correct the irregularity, there certainly could be injury under the CPA." *Id.* at 51. Here, Plaintiff has alleged misrepresentations and has also alleged that he was damaged "by being unable to contact the actual holder of the note to resolve the default and otherwise make arrangements to avoid foreclosure." (Complaint ¶ 6.15). Plaintiff has successfully pled a cause of action under the CPA, at least against Defendant MERS. As to the remaining Defendants, the claim is not sufficiently pled. Plaintiff will be granted leave to amend his Complaint to clarify against which Defendants this claim is asserted, and to more specifically plead facts supporting the claim. Defendants' Motion to Dismiss Count 5 is DENIED as to MERS and GRANTED as to the remaining Defendants. Plaintiff is granted leave to amend.

**\*5 6. Wrongful Foreclosure** —This second count of wrongful foreclosure, is asserted against ReconTrust and BofA. This claim fails for the same reasons stated in the discussion *supra* of Count 1 and will be dismissed.

**7. Quiet Title** —This claim is asserted against all Defendants. This count asks that the sale be vacated and the property returned to Plaintiff. Claims brought after the foreclosure sale "may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property." RCW 61.24.127(2)(c). Plaintiff has waived the right to seek return of the property by failing to timely seek to enjoin the sale. *Plein v. Lackey*, 149 Wash.2d 214, 227, 67 P.3d 1061 (2003) "The failure to take advantage of the presale remedies under the deed of trust act [RCW 61.24.005 et seq.] may result in the waiver of the right to object to the sale." In *Bain v. Metropolitan Mortg. Group*, 175 Wash.2d 83, 285

Slip Copy, 2012 WL 4904461 (E.D.Wash.)  
 (Cite as: 2012 WL 4904461 (E.D.Wash.))

P.3d 34 (2012), the Washington Supreme Court declined to conclusively decide the legal effect of MERS unlawfully acting as beneficiary under the terms of the WDTA. The court did, however, discuss the issue and said it had been presented with “no authority ... for the suggestion that listing an ineligible beneficiary on a deed of trust would render the deed void and entitle the borrower to quiet title.” *Id.* at 48. While declining to answer the question, the court stated that it “tend[s] to agree” with MERS argument that “any violation of the deed of trust act should not result in a void deed of trust, both legally and from a public policy standpoint.” *Id.* at 49. The court finds this claim waived. Plaintiff did not seek to enjoin the foreclosure despite having notice and did not file this lawsuit until 6 months after the sale. One of the primary purposes of the WDTA is to promote stability of land titles. *Plein*, 149 Wash.2d 214, 225, 67 P.3d 1061 (2003). That purpose would not be served by allowing a quiet title claim under these circumstances. Count 7 will be dismissed.

**8. Slander of Title** —This claim is asserted against BofA, ReconTrust, and Fannie Mae. A claim of slander of title consists of five elements: 1) false words; 2) maliciously published; 3) with reference to some pending sale or purchase of property; 4) which go to defeat plaintiff's title; and 5) result in plaintiff's pecuniary loss. *Majerus Const. v. Clifton*, 155 Wash.App. 1041 (Div.3, 2010) *citing Rorvig v. Douglas*, 123 Wash.2d 854, 859, 873 P.2d 492 (1994). The Washington Court of Appeals has stated that “the initiation of foreclosure proceedings cannot be deemed malicious in the context of a bona fide dispute over mortgage payments.” *Krienke v. Chase Home Finance*, 140 Wash.App. 1032 (2007). Here it is admitted that Plaintiff was in default. It is also alleged that Fannie Mae was the purchaser of the Property, and it is unclear what false words Fannie Mae allegedly maliciously published to defeat Plaintiff's title. Further, Paragraph 11.6 seeks return of the Property. Plaintiff's claim to return of the Property is waived, as discussed *supra*. Claims brought after the foreclosure sale

“may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property.” RCW 61.24.127(2)(c). Count 8 will be dismissed, with leave to amend if Plaintiff wishes to attempt to assert a claim for monetary damages only.

**\*6 IT IS HEREBY ORDERED:**

1. Defendants' Motion to Dismiss (ECF No. 15) is **GRANTED IN PART** and **DENIED IN PART** as stated herein. Counts 1, 6, & 7 are hereby dismissed. The Motion is denied as to Counts 2, 3, & 4. As to Counts 5 & 8, the Motion is granted in part, with leave to amend.

2. Plaintiff shall have **14 days** from the date of this Order to file an Amended Complaint. The Amended Complaint shall not include claims which the court has ruled are waived. The Amended Complaint should also not include American Mortgage Network, as that Defendant was dismissed by stipulation. The Amended Complaint shall address the lack of clarity and specificity concerning Count 5 for violation of the Washington CPA. The Amended Complaint may also attempt to re-plead Count 8.

**IT IS SO ORDERED.** The Clerk is hereby directed to enter this Order and furnish copies to counsel.

E.D.Wash., 2012.  
 Beadles v. ReconTrust Co., N.A.  
 Slip Copy, 2012 WL 4904461 (E.D.Wash.)

END OF DOCUMENT

## CERTIFICATE OF SERVICE

I am over the age of 18 and am not a party to the within action. I am employed in Multnomah County, State of Oregon, and my business address is 621 SW Morrison St., Suite 1450, Portland, Oregon 97205.

On November 8, 2012, I served the following document(s):

**BRIEF OF RESPONDENTS DEUTSCHE BANK NATIONAL TRUST  
COMPANY AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS**

on the party or parties listed on the following page(s) in the following manner(s):

**BY HAND DELIVERY:** For each party, I caused a copy of the document(s) to be placed in a sealed envelope and caused such envelope to be delivered by messenger to the street address(es) indicated on the attached service list.

**BY FEDERAL EXPRESS:** For each party, I caused a copy of the document(s) to be placed in a sealed envelope and caused such envelope to be delivered by Federal Express to the street address(es) indicated on the attached service list.

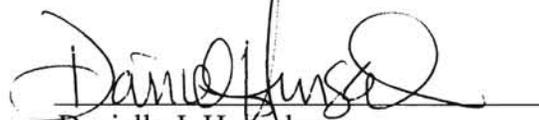
**BY FIRST-CLASS MAIL:** For each party, I caused a copy of the document(s) to be placed in a sealed envelope and caused such envelope to be deposited in the United States mail at Portland, Oregon, with first-class postage thereon fully prepaid and addressed to the street address(es) indicated on the attached service list.

**BY FACSIMILE:** For each party, I caused a copy of the document(s) to be sent by facsimile to the facsimile number(s) indicated on the attached service list. If this action is pending in Oregon state court, then printed confirmation of receipt of the facsimile generated by the transmitting machine is attached hereto.

**BY E-MAIL:** For each party, I caused a copy of the document(s) to be sent by electronic mail to the e-mail address(es) indicated on the attached service list. If this action is pending in Oregon state court, then I received confirmation that the e-mail was received.

**BY ECF:** For each party, I caused a copy of the document(s) to be sent by electronic mail via ECF to the e-mail address(es) indicated on the attached service list.

I declare under penalty of perjury under the laws of the State of Oregon that the foregoing is true and correct.

  
Danielle J. Hunsaker

Micah Schnall  
11521 167th PL NE  
Redmond, WA 98052  
Appellant *Pro Se*

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