

71952-1

71952-1

NO. 71952-1-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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GARY AND DIANE ALEXANDER,

Appellants,

v.

CAPITAL ONE, N.A.; MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC., AKA MERS,

Respondents.

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BRIEF OF RESPONDENTS

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STATE OF WASHINGTON  
COURT OF APPEALS, DIVISION I

*BJ*

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I. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Issues Pertaining to the Alexanders' Appeal from the Summary Judgment Order Dismissing Their 2013 Lawsuit.

1. Did the trial court properly strike the report of mortgage examiner Michael Wood when (a) only two of its 29 pages were in the form of a declaration but it was not properly signed; (b) the declaration did not establish Mr. Wood's qualifications as an expert; and (c) Mr. Wood's opinions lacked foundation and were conclusory?

2. Did the trial court properly strike the March 15, 2014 declaration of James Kelley Ph.D. when (a) the declaration was not properly signed; (b) there was no showing that Dr. Kelley's novel method of document examination was generally accepted among forensic document examiners as required under *Frye*;<sup>1</sup> (c) Dr. Kelley's method was developed for his own lawsuit and has never been subject to peer review; (d) Dr. Kelley has never testified in court; and (e) the two courts that have evaluated Dr. Kelley's method have found it unreliable?

3. Is a trial court required to conduct a *Frye* hearing with live testimony before it may exclude a purported expert's opinion because it fails to meet the *Frye* general acceptance standard?

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<sup>1</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

4. Did the trial court properly conclude that the Alexanders failed to come forward with specific evidence creating an issue of fact concerning Capital One's ownership of the Promissory Note the Alexanders admit signing when receiving a \$3 million loan from Capital One's predecessor, Chevy Chase Bank?

B. Issues Pertaining to the Alexanders' Appeal From the Award of Sanctions Under CR 11.

1. Did the trial court abuse its discretion in awarding CR 11 sanctions against the Alexanders and their counsel?

2. Are Capital One and MERS entitled to fees and costs on appeal pursuant to the prevailing party provision of the Deed of Trust?

II. COUNTERSTATEMENT OF THE CASE<sup>2</sup>

During 2007, Appellant Gary Alexander, a licensed mortgage broker, earned \$72,106 per month through his mortgage brokerage business, Alexander Lending, Inc., and real estate investments. CP 123-27, 129. On March 30, 2007, Gary and Diane Alexander signed an Adjustable Rate Note ("Note") acknowledging a \$3 million loan from Chevy Chase Bank, F.S.B. ("Chevy Chase") and promising to pay that amount plus interest to Chevy Chase (the "Loan"). CP 213-17. The Note

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<sup>2</sup> Contrary to RAP 10.3(a)(5), Appellants' Opening Brief lacks references to the record for each factual statement. This allows the Alexanders to imply certain evidence was before the trial court on summary judgment, when the record is to the contrary. *See Appellants' Opening Brief ("App. Brief") at 2* (summarizing evidence before the court on "summary judgment *and* sanctions") (emphasis added).

was secured by a Deed of Trust (“DOT”) on the Alexanders’ property located at 2222 W. Lake Sammamish Parkway, Redmond, Washington (“Property”). CP 91-106.

During the first quarter of 2009, Chevy Chase merged into Capital One, N.A. (“Capital One”).<sup>3</sup> CP 209, 224-26. The Alexanders were advised of the merger in July 2009 through a Notice of Transfer of Servicing Rights for their Loan. CP 84-85, 131-32, 134. The Note evidencing the Loan was owned by Chevy Chase when it was merged into Capital One, so Capital One acquired all right, title and interest in the Note. CP 209.

The Alexanders ceased making payments on the Note on or about October 1, 2009. CP 151. On March 23, 2012, the DOT securing the Note was assigned to Capital One by Monica Hadley, an employee of Capital One authorized to sign such documents on behalf of Mortgage Electronic Registration Systems, Inc. (“MERS”). CP 85, 137-39, 142-43. Capital One then appointed Bishop, White, Marshall & Weibel, P.S. (“Bishop White”) as the successor trustee under the DOT. CP 145-46. On May 9, 2012, Bishop White sent a Notice of Default to the Alexanders,

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<sup>3</sup> The Alexanders mistakenly refer throughout their opening appellate brief to Capital One Bank, N.A. as the Respondent. Capital One Bank, N.A. is a separate legal and financial entity that had no involvement with the Alexanders’ Loan. CP 132.

who had failed to make their Loan payments for 32 consecutive months. CP 150-53.

The Alexanders did not cure the default, so Bishop White gave notice to the Alexanders that the Property would be sold at public auction on November 30, 2012 unless they cured the default at least eleven days before the Trustee's Sale or obtained a court order restraining the sale. The Alexanders' default under the Note exceeded \$561,000. CP 159-65.

Rather than cure the default, the Alexanders filed a *pro se* wrongful foreclosure lawsuit on November 21, 2012 (the "2012 Lawsuit"). They did not seek to enjoin the Trustee's Sale. CP 86, 361. The Alexanders admitted in their Verified Complaint that Chevy Chase was their mortgage lender and attached a copy of the Note to the Complaint. CP 371-73, 395-99. In an Affidavit of Truth attached to the Complaint, Mr. Alexander admitted that he and his wife signed the Note and DOT prepared by Chevy Chase and repeatedly referred to the Note as "my promissory note." CP 380-81, 385.

The Trustee's Sale went forward on November 30, 2012. Capital One successfully bid \$2,491,148.85 and Bishop White thereafter conveyed the Property to Capital One by Trustee's Deed. CP 167-70.

Capital One filed a summary judgment motion on January 11, 2013, seeking dismissal of the 2012 Lawsuit. In that motion, Capital One

argued that it acquired the Loan through a merger with Chevy Chase, that the Loan was never securitized, that the Loan was in default, and that Capital One was entitled to pursue foreclosure of the DOT. CP 175-85. The Alexanders did not file their opposition until February 8, 2013, the day the summary judgment motion was to be heard, so the court continued the hearing to February 28. At the court's request, the hearing was continued again to April 11 and then to April 22, 2013.

On Friday, April 19, 2013, attorney J.J. Sandlin advised Capital One's counsel that he had recently begun helping the Alexanders with their 2012 Lawsuit. After Capital One declined to continue the pending summary judgment motion, Mr. Sandlin's office sent Capital One's counsel notice that the Alexanders had filed a "*pro se*" Chapter 11 bankruptcy petition with a reminder that the "automatic stay provision is in effect." CP 1628. As a result, the hearing on Capital One's motion for summary judgment set for April 22, 2013 was cancelled. CP 1628. After obtaining relief from the bankruptcy stay, Capital One's summary judgment motion was re-noted for hearing on August 23, 2013. CP 1629.

On July 30, 2013, Mr. Sandlin filed a second Complaint for Wrongful Foreclosure in King County Superior Court on behalf of the Alexanders (the "2013 Lawsuit"). CP 1. Mr. Sandlin faxed a courtesy copy of the Complaint to Capital One's counsel, but Capital One was not

served with process until November 11, 2013. CP 1629. During a conversation on August 13, 2013, Mr. Sandlin told counsel for Capital One that he was going to dismiss the 2012 Lawsuit. Mr. Sandlin described the Complaint in that lawsuit in unflattering terms and said he laughed when he read Capital One's summary judgment motion describing the Complaint as "rambling, repetitive, and at times internally inconsistent." CP 1629. Counsel for Capital One told Mr. Sandlin that this was a straightforward case where Chevy Chase made the Loan, Capital One acquired the Loan by merger, and the Loan was never securitized. CP 1629.

On August 21, 2013, on a motion for voluntary dismissal filed by Mr. Sandlin, the Court dismissed the 2012 Lawsuit. The dismissal occurred two days before the long-delayed hearing on Capital One's summary judgment motion. CP 1629.

During the fall and winter of 2013, Capital One's counsel discussed the 2013 Lawsuit with Mr. Sandlin and told him that the Alexanders' claims were baseless because Capital One owned the Note and the Loan was never securitized. CP 1629-30. During one of these conversations, Mr. Sandlin said Capital One would need to depose the Alexanders' securitization expert. CP 1630. The Alexanders identified two "securitization audit experts," Lori Gileno and Michael Wood and

provided reports from both. When asked upon which of the experts the Alexanders intended to rely to oppose Capital One's planned summary judgment motion, Mr. Sandlin replied "definitely Gileno." CP 1630.

Capital One deposed Ms. Gileno on February 7, 2014. CP 87. In her report and testimony, Ms. Gileno implicated the Chevy Chase Funding LLC, Mortgage-Backed Certificates, Series 2007-2 Trust ("Chevy Chase Series 2007-2 Trust") as the trust through which the Loan was most likely securitized.<sup>4</sup> CP 199-200. Ms. Gileno testified to a firm and abiding belief that the Loan was securitized. She candidly admitted, however, that she had no evidence showing that the Loan was, in fact, securitized. CP 201.

On February 24, 2014, Capital One and MERS<sup>5</sup> filed a summary judgment motion seeking to dismiss the Alexanders' 2013 Lawsuit, based largely on the same arguments made in their summary judgment motion in the 2012 Lawsuit. CP 58-62, 175-85, 1630. In brief, these arguments were that Capital One acquired the Note through a merger with Chevy

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<sup>4</sup> The Chevy Chase Series 2007-2 Trust was named as a defendant in the 2013 Lawsuit (CP 1, 6), but the Alexanders apparently never served the Trust with process.

<sup>5</sup> Capital One and MERS both moved for and were granted summary judgment. CP 550-53. The Alexanders do not argue the trial court erred in granting summary judgment to MERS. *App. Brief at 1-13*. Appellants' appeal appears focused exclusively on Capital One. The Alexanders only mention MERS in the context of an assignment of the Deed of Trust, executed by an officer of MERS who was also an officer of Capital One, as successor to Chevy Chase Bank. *Id.* at 9-10. Consequently, in this Brief of Respondents, Capital One is referred to as if it was the sole moving party on the summary judgment motion.

Chase, that Capital One still owned the Note, that the Alexanders' Loan was never securitized, that the Loan was in default, and that the DOT was properly foreclosed. CP 67-69. The motion specifically addressed each of the Alexanders' seven causes of action, pointing out the elements lacking factual and legal support. CP 70-78. The motion was supported by a declaration from a Capital One manager establishing that Capital One owned the Note and that the Loan was never securitized. CP 208-09. Capital One also filed a declaration from the Trustee of the Chevy Chase Series 2007-2 Trust, the Trust implicated by Ms. Gileno, establishing that the Alexanders' Loan was not in the Trust. CP 256-57.

The Alexanders' summary judgment opposition did not contain a single reference to Ms. Gileno, who at this point had been demoted to a "consultant" by Mr. Sandlin. CP 299-312, 697-98. Instead, the Alexanders relied upon a "declaration" from their alternate securitization "expert," Michael Wood, and a declaration from an entirely new purported expert, James Madison Kelley, Ph.D. CP 305-06. Dr. Kelley had recently developed his novel document examination methodology to challenge the authenticity of his own signature in his bankruptcy proceeding where he sought to rescind his mortgage loan. CP 424, 452-53. The methodology apparently involves using the Color Sampler Tool in Adobe Photoshop®

to take color measurements of small areas of signatures on greatly enlarged scanned documents. CP 266-69, 367-68.

During the short period available to prepare a reply brief, Capital One's counsel located a federal court decision holding that Dr. Kelley was not qualified as a forensic document examiner and that his methodology was unreliable. CP 424-26, 432-41. Counsel also located an order by United States District Judge Robert S. Lasnik declining to qualify Dr. Kelley as an expert because his expertise in forensic document analysis was unclear and there was no showing that his "methodology comports with that generally utilized by forensic document analysts [and] is therefore reliable." CP 417-18.

The hearing on the summary judgment motion was continued from March 28 to April 18, 2014 to accommodate Mr. Sandlin. CP 1630. The day before the hearing, Mr. Sandlin filed motions for a CR 56(f) continuance and to compel production of the original DOT. CP 493-95. Mr. Sandlin also filed a supplemental declaration of Dr. Kelley dated and delivered to Mr. Alexander ten days earlier. CP 496-504, 1631. Capital One opposed the motion for a continuance on multiple grounds. CP 506-15. After hearing argument, the trial court denied the CR 56(f) motion

and the motion to compel and declined to consider the Supplemental Kelley Declaration. CP 551, 554-55.<sup>6</sup>

At the outset of the April 18, 2014 hearing, the Alexanders voluntarily dismissed their claims against Bishop White, rather than argue Bishop White's summary judgment motion. CP 693-96.

After hearing argument on Capital One's summary judgment motion, the trial court struck the declaration of Mr. Wood, finding that the declaration was not properly signed and contained speculation, and that Mr. Wood was not qualified to render the legal opinions he was espousing. CP 551-52, 737. The trial court also struck the declaration of Dr. Kelley, finding that he was not a qualified forensic document examiner and that his methodology was novel and did not meet the *Frye* general acceptance standard. CP 551-52, 713-14, 737-39. Thereafter, the trial court granted summary judgment in favor of Capital One.

The Alexanders filed a motion for reconsideration focused on Dr. Kelley's qualifications to render opinions as a forensic document examiner. CP 557-58. Their supporting memorandum stated that Dr. Kelley had been "accepted as an expert in 80% of the cases" which he had

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<sup>6</sup> The Alexanders' Notice of Appeal includes notice that they are appealing from the Order Denying Plaintiffs' Motions for Continuance and Production of Deed of Trust for Forensic Examination. CP 554-55, 624. However, the Alexanders have not assigned error to those orders in their opening appellate brief or made any argument that those rulings were an abuse of discretion. The Alexanders have therefore waived these issues. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808-09, 828 P.2d 549 (1992).

worked on. CP 561-62. The Alexanders, however, failed to come forward with evidence establishing that a single court had qualified Dr. Kelley as an expert in forensic document examination based upon his software-based, ink-color methodology. The trial court denied the motion for reconsideration without requesting a response from Capital One.<sup>7</sup> CP 621.

On May 19, 2014, Capital One and MERS filed their Motion for Attorneys' Fees and Sanctions.<sup>8</sup> CP 1605-18. By agreement of the parties, the Motion was re-noted for hearing on June 9, 2014, without oral argument. CP 1710-12.

Capital One and MERS sought attorneys' fees and/or sanctions on three grounds. First, they sought an award of contractual attorneys' fees under the DOT which contained a prevailing party attorneys' fees provision. Second, they sought attorneys' fees under RCW 4.84.185, the frivolous action statute. Third, they sought an award of sanctions against the Alexanders and Mr. Sandlin under CR 11. CP 1606. The Alexanders

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<sup>7</sup> The Alexanders' Notice of Appeal includes notice that they are appealing the Order Denying Plaintiffs' Motion for Reconsideration, CP 621, 624, but they have not assigned error to that order in their opening appellate brief or made any argument that entry of that order was an abuse of discretion. The Alexanders have therefore waived this issue. *Cowiche Canyon Conservancy*, 118 Wn.2d at 808-09.

<sup>8</sup> On May 9, 2014, the trial court granted an extension to June 9, 2014, for Capital One and MERS to file a motion seeking an award of contractual attorney's fees and/or sanctions under CR 11 or RCW 4.84.185. The motion seeking this relief was unopposed. CP 1603-04.

did not oppose an award of attorneys' fees on the first two grounds. CP 638-41.

After striking certain materials the Alexanders submitted in opposition to the Motion for Attorneys' Fees and Sanctions, the trial court granted the motion awarding fees on all three grounds.<sup>9</sup> CP 1561-71. The trial court entered detailed findings of fact supporting its award of fees and sanctions. CP 1565-68. The Alexanders have not assigned error to any of the findings of fact, so the findings of fact are verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). Nor have the Alexanders assigned error to any of the trial court's detailed conclusions of law.

The Alexanders filed a motion for reconsideration of the award of sanctions under CR 11, but not the award of fees under the other two grounds. CP 1580-85. The trial court denied the motion for reconsideration without requesting a response. CP 1593. Capital One and MERS thereafter moved the trial court for entry of Judgment on the court's Order granting their motion for attorneys' fees and sanctions. CP

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<sup>9</sup> The Alexanders did not appeal the granting of the motion to strike. Although they did appeal the Order Denying Plaintiffs' Motion for Reconsideration Re Order Granting Sanctions, CP 1593, they have not assigned error to that order in their opening appellate brief or made any argument that entry of that order was improper. Thus, they have waived any appeal of the order on the motion to strike and the order denying reconsideration of the award of sanctions. *Cowiche Canyon Conservancy*, 118 Wn.2d at 808-09. Although the Alexanders did not directly appeal the Order Granting Defendants' Motion for Attorneys' Fees and Sanctions, CP 1594, it is reviewable under RAP 2.4(g).

1574-75. Neither the Alexanders nor Mr. Sandlin opposed the motion. CP 1587-88. The trial court entered Judgment against the Alexanders and Mr. Sandlin, jointly and severally, in the amount of \$79,865.26 with interest at 12% per annum. CP 1590-91.

### III. ARGUMENT

#### A. Standard of Review.

Orders granting summary judgment are reviewed *de novo*. *Kelley v. Centennial Contractors Enters., Inc.*, 169 Wn.2d 381, 386, 236 P.3d 197 (2010). An appellate court may affirm a trial court ruling on any grounds supported by the record, whether or not the trial court based its ruling on that ground. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

Review of a trial court's decision to admit or exclude novel scientific evidence under the general acceptance standard set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), is also *de novo*. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 919, 296 P.3d 860 (2013). A reviewing court is "not limited to the evidence that was before the trial court with respect to the *Frye* admissibility issues, and may undertake a searching review of scientific literature as well secondary legal authority before rendering a decision." *State v. Sipin*, 130 Wn. App. 403, 414, 123

P.3d 862 (2005) (citing *State v. Copeland*, 130 Wn.2d 244, 256, 922 P.2d 1304 (1996)).

Although the Washington Supreme Court stated in *Lakey*, 176 Wn.2d at 919, that review of a trial court's decision concerning the admissibility of expert testimony under ER 702 is reviewed for an abuse of discretion, and that "[a] trial court abuses its discretion by issuing manifestly unreasonable rulings or rulings based on untenable grounds, such as a ruling contrary to law," the Court has held in other cases that review of evidentiary rulings made in connection with motions for summary judgment are subject to *de novo* review. *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 249, 327 P.3d 614 (2014); *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

Orders denying motions for reconsideration of orders granting summary judgment are reviewed for abuse of discretion. *Morinaga v. Vue*, 85 Wn. App. 822, 831, 935 P.2d 637, *rev. denied*, 133 Wn.2d 1012 (1997). "A trial court abuses its discretion by issuing manifestly unreasonable rulings or rulings based on untenable grounds, such as a ruling contrary to law." *Lakey*, 176 Wn.2d at 919. New evidence may be considered on a motion for reconsideration of a summary judgment order, CR 59(a)(4), but only if the evidence was not available in time to submit it

in response to the original summary judgment motion. *Morinaga*, 85 Wn. App. at 831.

Orders granting or denying sanctions under CR 11 are reviewed for abuse of discretion. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993).

B. The Trial Court Properly Granted Summary Judgment for Capital One.

The trial court properly struck the declarations of purported experts Michael Wood and Dr. Kelley. Michael Wood's declaration was not properly signed and contained conclusory and speculative legal opinions that he was not qualified to provide. The Alexanders did not show that Dr. Kelley's novel methodologies met the *Frye* general acceptance test or that the opinions were relevant and helpful to the trier of fact. Capital One submitted evidence that it owned the Note as the successor by merger to originating lender Chevy Chase. The Alexanders argued their Loan was securitized but they failed to produce any evidence of securitization. The trial court did not err in ruling that Capital One owned the Note and was entitled to foreclose.

1. Because Capital One Owned the Note and the Alexanders Were in Default, Capital One Was Entitled to Pursue Foreclosure.

In *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 89, 285 P.3d 34 (2012), the Washington Supreme Court held that "only the

actual holder of the promissory note or other instrument evidencing the obligation may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property.” The holder of a promissory note includes a person in possession of the note, if the note is endorsed in blank, and a person in possession of the note, if the note is payable to that person. *Id.* at 103-04.

It is undisputed that the Alexanders signed a \$3 million note payable to Chevy Chase and that the Alexanders stopped making payments on the Note in October 2009. CP 20, 30, 151, 285. In their Verified Complaint in the 2012 Lawsuit, the Alexanders admitted signing the Note and they attached a copy of the Note to their Complaint. CP 371-78, 395-99, 407. Capital One’s summary judgment motion was supported by a declaration stating that Chevy Chase owned the Note when it merged with Capital One and that Capital One currently holds the Note. CP 209. The declaration also stated that the Alexanders’ Loan was never securitized. *Id.* Appellants dispute this but, as discussed *infra* at 21 and 32, there is no evidence or reasonable inference that the Loan was securitized.

The Alexanders make a confusing argument about the “‘global assignment’ of deeds of trust” from Chevy Chase to Capital One not allowing Capital One “to assert preemption of the Washington Deeds of

Trust Act.” *App. Brief at 7-8*. Capital One did not argue or rely upon preemption, either under the Home Owners’ Loan Act, 12 U.S.C. § 1464, or the National Bank Act, 12 C.F.R. § 34.4(a). Thus, the preemption cases the Alexanders cite are irrelevant.

Nor did Capital One rely upon any global assignment of deeds of trust. Capital One relies on basic merger law and corporate law to assert ownership of the Note and DOT. The undisputed evidence establishes that Chevy Chase was merged into Capital One in 2009. CP 209, 224, 372.

[A] merger means the absorption of one corporation that ceases to exist into another that retains its own name and identity and acquires the assets and liabilities of the former where the latter also retains its name and corporate identity with the added capital, franchises and powers of the merged corporation. ... Hence, a merger essentially consists of a combination whereby one of the constituent corporations remains in being, absorbing or merging in itself all the other constituent corporations.

... A formal assignment of claims or contracts is not necessary to pass title, in case of merger, to the corporation in which the corporation owning such a claim is merged, for they pass without further act or deed.

15 Fletcher Cyc. Corp. §§ 7041, 7088. *See also Payne v. Saberhagen Holdings, Inc.*, 147 Wn. App. 17, 25-26, 190 P.3d 102 (2008). As a matter of corporate law, Capital One acquired all rights in the Note when Chevy Chase was merged into Capital One, without a “general assignment” or any required corporate action.

The Alexanders also argue that the assignment of the DOT to Capital One is invalid because it was executed by an employee of Capital One, “years after Chevy Chase Bank was defunct.” *App. Brief at 9*. The Alexanders lack standing to challenge the assignment. *See Ukpoma v. U.S. Bank Nat’l Ass’n*, No. 12-CV-0184-TOR, 2013 U.S. Dist. LEXIS 66576, at \*13 (E.D. Wash. May 9, 2013); *Borowski v. BNC Mortgage, Inc.*, No. C12-5867-RJB, 2013 U.S. Dist. LEXIS 122104, at \*13-14 (W.D. Wash. Aug. 27, 2013). Moreover, the DOT was properly assigned to Capital One by an Assignment of Deed of Trust signed by Monica Hadley, an Assistant Secretary of MERS. Ms. Hadley, an officer of Capital One, was authorized by MERS Corporate Resolution to use the Assistant Secretary title and to “assign the lien of any mortgage loan naming MERS as the mortgagee” when Capital One is the note-holder. CP 91-92, 137-39, 142-43. The Alexanders presented no evidence creating an issue of fact as to Ms. Hadley’s authority to execute the Assignment of Deed of Trust. Moreover, Washington courts have upheld the validity of documents signed by MERS authorized signers. *See Bain v. Metro. Mortgage Group, Inc.*, No. C09-0149-JCC, 2010 U.S. Dist. LEXIS 22690, at \*1, \*4 and \*18 (W.D. Wash. Mar. 11, 2010) (after noting that employees of LPS were authorized to sign DOT assignments for MERS, the court stated “[t]here is simply nothing deceptive about using an agent

to execute a document, and this practice is commonplace in deed of trust actions.”).

Even assuming the Assignment of Deed of Trust was invalid, Capital One, as the Note holder, would be entitled as a matter of law to enforce the DOT. As the United States Supreme Court held in *Carpenter v. Longan*, 83 U.S. 271, 274-75 (1872), the “Deed of Trust follows the Promissory Note. Where the Promissory Note goes, the Deed of Trust must follow.” *See also Bain*, 175 Wn.2d at 104 (“Washington’s deed of trust act contemplates that the security instrument will follow the note, not the other way around.”); *Ukpoma*, 2013 U.S. Dist. LEXIS 66576, at \*10 (“[T]he transfer of [a] note carries with it the security, without any formal assignment or delivery, or even mention of the latter.”). Capital One benefits from the security of the DOT, even without a formal assignment from MERS.

Finally, citing RCW 62A.3-104, the Alexanders argue the Note is not a negotiable instrument because it is “replete with conditions” and cannot be an “unconditional promise” to pay a debt. *App. Brief at 11*. The Note contains an unconditional promise to pay, stating as follows:

In return for a loan that I have received, I promise to pay Three Million and 00/100 Dollars ... plus interest, to the order of the Lender. The Lender is Chevy Chase Bank, F.S.B.

CP 213. The Alexanders fail to identify a single express condition to this promise to pay, much less one that would make the promise conditional under RCW 62A.3-106(a), which they fail to cite or discuss. The Note was a negotiable instrument.

Capital One owned the Note and the Alexanders were in default of their payment obligation under the Note. Capital One was entitled to pursue foreclosure under the DOT.

2. The Trial Court Properly Struck the “Declaration” of Securitization “Expert” Michael Wood.

The declaration of Michael Wood was apparently created by counsel copying Mr. Wood’s Mortgage Document Examination Report onto pleading paper. CP 313-41, 363. Only two pages, pages 23 and 24, come close to complying with RCW 9A.72.085, but those pages are signed “/s/ Michael Wood” which is improper. *See* CP 334-35; GR 30(d)(2).

Under ER 702, a witness may qualify as an expert based on his “knowledge, skill, experience, training, or education.” Mr. Wood’s declaration contains almost no information concerning his qualifications as a document examiner, stating simply that he is “a mortgage document examiner with over three years experience.” CP 334. Mr. Wood does not provide any information concerning relevant knowledge, skill, training or

education. Nor does he describe what he has done as a mortgage document examiner or how this qualifies him to offer expert testimony. Mr. Wood does not disclose whether any court has found him qualified to provide expert testimony. Appellants failed to demonstrate that Mr. Wood qualified as an expert.<sup>10</sup>

Mr. Wood offers speculative conclusions and legal opinions that he is not qualified to render. He speculates that the Loan was “likely a securitized loan” through the Chevy Chase Series 2007-2 Trust, but does not state a single fact showing the Loan was securitized. Instead, he “recommends” that a Mortgage Loan Schedule for the Trust be requested to determine if the Trust contains plaintiffs’ Loan. CP 334.<sup>11</sup> As another example, he opines that the “Assignment of Mortgage” is “invalid” and then speculates that actions based on it are “arguably of no legal standing.” *Id.* But on the next page of the declaration, he disclaims legal expertise, stating “[t]he recommendations and opinions entered herein by me are not intended as legal advice or counseling.” CP 335.

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<sup>10</sup> At least two local federal courts reviewing similar “expert reports” have cautioned that the Federal Trade Commission has issued a warning about fraudulent forensic loan reports. *Hanson v. Wells Fargo Bank, N.A.*, No. C10-1948Z, 2011 U.S. Dist. LEXIS 57599, at \*10-11 n.6 (W.D. Wash. May 26, 2011); *Wells Fargo Bank, N.A. v. Genung*, No. C11-1698JLR, Docket No. 23, at 7 n.2 (W.D. Wash. July 23, 2012).

<sup>11</sup> Capital One’s summary judgment motion was supported by a declaration of the servicer of the Chevy Chase Series 2007-2 Trust establishing that the Alexanders’ Loan was *not* in the Trust. CP 256-58.

The trial court did not abuse its discretion or otherwise err in striking Mr. Wood's declaration. The declaration was not properly signed, Mr. Wood did not demonstrate the requisite expertise, and his opinions were speculative, conclusory and lacked the necessary factual basis.

3. The Trial Court Properly Struck the Kelley Declaration Under *Frye* and Properly Declined to Consider the Untimely Supplemental Kelley Declaration.

Declarations on summary judgment motions must be made on personal knowledge, show affirmatively that the declarant is competent to testify to the matter stated and set forth admissible evidence. CR 56(e). *See, e.g., Germain v. Pullman Baptist Church*, 96 Wn. App. 826, 830-31, 838, 980 P.2d 809 (1999), *rev. denied*, 139 Wn.2d 1026 (2000). If an expert's declaration is submitted on summary judgment, the declaration must explain the expert's specific qualifications to give an opinion on the subject matter about which he plans to testify. *See Doherty v. Municipality of Metropolitan Seattle*, 83 Wn. App. 464, 468-69, 921 P.2d 1098 (1996). Where novel scientific evidence is involved, the party offering the expert opinion must satisfy the *Frye* general acceptance standard. *Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wn. App. 168, 313 P.3d 408 (2013), *rev. denied*, 179 Wn.2d 1019 (2014).

Trial courts generally have wide discretion in ruling on the admissibility of expert testimony. The appellate court will not disturb the trial court's ruling "[i]f the reasons for admitting or excluding the opinion evidence are both fairly debatable." *Moore v. Hagge*, 158 Wn. App. 137, 155, 241 P.3d 787 (2010) (citations omitted), *rev. denied*, 171 Wn.2d 1004 (2011).

The Alexanders suggest that several declarations of James Kelley, Ph.D. were before the trial court on summary judgment. *App. Brief at 2*. This is incorrect. Although the Kelley declaration dated March 15, 2014 was properly before the trial court on summary judgment, CP 260-83, as explained more fully below, the trial court properly struck the Supplemental Kelley Declaration dated April 7 but not filed until April 17, 2014, CP 496-505, 551, 588-89, 614.

Dr. Kelley's March 15, 2014 declaration does not explain his novel methodology. His methodology appears to involve using computer programs to measure color components of ink on scanned documents and then drawing conclusions based on the similarity or dissimilarity of the color components as to whether the signatures were made with the same pen or whether the notary seal was made with the same ink pad. CP 266, 279-80, 366-68. Dr. Kelley apparently uses the Color Sampler Tool in Adobe Photoshop® to measure colors in the "Lab Color space." Dr.

Kelley does not describe the Lab Color space or the Color Sampler Tool. CP 266 n.9. Nor does he explain the Lab Color measurements that are reflected in terms of “L,” “a” and “b.” Despite relying on small differences in these values, Dr. Kelley offers no explanation of standard ranges of measurement error or variation in color, no analysis of statistical significance of differences, and no foundation for certain assumptions such as that all of the ink on an ink pad will have exactly the same color components or that all ink in a ballpoint pen will be exactly the same. CP 266-69, 354, 367-68. Dr. Kelley also makes assumptions concerning the pens Gary Alexander and his wife used to sign dozens of Loan documents in 2007.<sup>12</sup>

Dr. Kelley has a Ph.D. in Electrical and Computer Engineering and has worked professionally designing airborne military radar and electronic countermeasure systems. CP 262. His Curriculum Vitae distinguishes his techniques from those used by “[t]raditionally trained Forensic Document Examiners.” CP 270. Dr. Kelley lists about a dozen “court cases,” suggesting he has testified in court in those cases. CP 272. Any such impression is misleading. Dr. Kelley has not testified in court in *any* of

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<sup>12</sup> Dr. Kelley assumes without any stated basis that the Alexanders used blue ink ballpoint pens from an unspecified “factory” where the ink was premixed and “should not contain [any] black” ink. CP 267, 268. Mr. Alexanders’ declaration does not state that he used a ballpoint pen to sign all the Loan documents. CP 285. Moreover, at the court hearing, Mr. Alexander informed the trial court that he used a Rollerball pen. CP 604.

the listed cases. CP 1632-33, 1646. Dr. Kelley includes a case in his list of court cases if he prepares a declaration in the case, whether or not the declaration is filed. CP 1632, 1645-47.

Two other courts have examined Dr. Kelley's qualifications to testify as a forensic document examiner and both excluded his testimony and declined to qualify him as an expert.<sup>13</sup> Locally, United States District Judge Robert Lasnik recently denied a motion to qualify Dr. Kelley as an expert witness in advance of trial:

[T]he basis for Dr. Kelley's expertise in the area of forensic document analysis is unclear: he has no training or education in the area, his experience is extremely limited, and the sources of his knowledge are mostly unidentified. In addition, plaintiff has yet to establish that Dr. Kelley's methodology comports with that generally utilized by forensic document analysts [and] is therefore reliable. Absent a proper foundation for the admission of his testimony, the Court declines to pre-qualify Dr. Kelley as an expert in forensic document analysis.

CP 417-418.

Another federal court ruled that Dr. Kelley was not qualified to testify as an expert on the authenticity of a promissory note and a borrower's signature. *See* CP 420-430, 432-441 (*Malin v. JP Morgan Chase Bank, N.A.*, No. 3:11-CV-544 (E.D. Tenn. May 7, 2013 and July 8, 2013)). As the *Malin* Court found, Dr. Kelley possesses no education or training in either forensic document examination or handwriting analysis.

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<sup>13</sup> Motions to strike Dr. Kelley's expert report or declaration were filed and/or granted on various grounds in several other cases that he lists in his CV. CP 1632-33.

CP 424. Although Dr. Kelley claims to be an expert in the computer programs upon which he relies when examining documents, he has never taken a single course in any of these programs. CP 446. Dr. Kelley claims to have developed expertise by reading “hundreds” of research reports and “dozens” of articles but he was unable at his deposition in *Malin* to identify a single article or name even a single publication in which the articles appeared. CP 444-445.<sup>14</sup> With respect to teaching, “[Dr. Kelley] has never given lectures, taught any courses, or authored any articles or books on the subjects of handwriting analysis or document examination...In addition, he is not a member of any organization for computer forensic documentation.” CP 424. Although he claims to be an expert in comparing the differences between things, Dr. Kelley admits he is not an expert in comparing signatures. CP 452. Nor does he testify regarding whether a signature is a forgery. CP 451.

Dr. Kelley’s interest in document examination began recently in connection with his own bankruptcy proceeding, when he challenged the authenticity of his own promissory note in seeking to rescind his mortgage loan. *See* CP 424; *Kelley v. JP Morgan Chase Bank, N.A.*, No. 10-05245 (Bankr. N.D. Cal.). Dr. Kelley admits he is entirely self-taught based on

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<sup>14</sup> *Cf. U.S. v. Prime*, 220 F. Supp. 2d 1203, 1212 (W.D. Wash. 2002) (detailing forensic document examiner’s Master of Forensic Science Degree, 3-year apprenticeship and training with the Secret Service).

internet articles he has read and experiments he has performed. CP 444-446. Dr. Kelley has never submitted any of his work for peer review, claiming he is too busy. CP 453-454. At the time of his deposition in *Malin*, Dr. Kelley had performed document examinations of only four sets of documents and had only reviewed 15 sets of documents to any extent. CP 448-49.

Courts consider four sources of information when performing a *Frye* analysis:

To determine whether a consensus of scientific opinion has been achieved, the reviewing court examines expert testimony, scientific writings that have been subject to peer review and publication, secondary legal sources, and legal authority from other jurisdictions. However, “the relevant inquiry is general acceptance by the scientists, not the courts.”

*Lake Chelan Shores Homeowners Ass’n*, 176 Wn. App. at 176 (quoting *Eakins v. Huber*, 154 Wn. App. 592, 599-600, 225 P.3d 1041 (2010)).

Appellants offered no information supporting the general acceptance of Dr. Kelley’s methodology. Rather than espousing general acceptance of his underlying principles and methods, Dr. Kelley suggests traditionally trained forensic document examiners are not using his computerized methods despite “an urgent need for this specialization.” CP 270. Dr. Kelley claims to have located several other people using similar methods, but he declined to identify them. CP 456. Dr. Kelley

admits his methods have not been peer reviewed. CP 453-56. To Capital One's knowledge, the only two other courts that have examined Dr. Kelley's methods have not found them reliable.

The trial court did not abuse its discretion in striking Dr. Kelley's March 15, 2014 declaration.

Late in the afternoon on April 17, the day before the summary judgment hearing, the Alexanders filed a Supplemental Kelley Declaration that was provided to Mr. Alexander on April 7, 2014. CP 1630-31. The Declaration was signed "/s/ James Madison Kelley" and was missing all but one of the nine exhibits. CP 496-505. The declaration focused on the DOT and whether the Alexanders used the same pens to sign the various Loan documents. The trial court did not abuse its discretion in not considering the Supplemental Kelley Declaration given the lack of general acceptance of his methods, the unexplained delay in providing the declaration to defense counsel, the lack of a valid signature and the untimely filing of the declaration.

4. The Trial Court Did Not Err or Violate the Alexanders' Constitutional Rights by Excluding Dr. Kelley's Declarations Without Hearing Live Testimony at an ER 104 Hearing.

The Alexanders complain that the trial court did not hold a *Frye* hearing concerning the admissibility of Dr. Kelley's declarations.<sup>15</sup> The Alexanders even suggest that the failure to hold a *Frye* hearing violated their rights under the state constitution. *App. Brief at 12-13.*<sup>16</sup>

The Alexanders have not cited any authority holding that there is a right to a *Frye* hearing with live testimony. In the criminal context, the court has discretion in resolving a preliminary matter under ER 104 to hear the matter entirely on affidavits or also to consider oral testimony. *See State v. Simms*, 10 Wn. App. 75, 77, 516 P.2d 1088 (1973). Similarly, federal district courts are not required to hold *Daubert* evidentiary hearings in determining whether an expert is qualified. *See Millenkamp v. Davisco Foods Int'l, Inc.*, 562 F.3d 971, 979 (9th Cir. 2009); *Clay v. Ford Motor Co.*, 215 F.3d 663, 667 (6th Cir. 2000).

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<sup>15</sup> The Alexanders' Memorandum Opposing Summary Judgment did not address *Frye* or request an ER 104 hearing with live testimony. CP 299-312.

<sup>16</sup> The Alexanders contend, in a single sentence, that the "same argument" applies for the "testimony" of Lori Gileno, Michael Wood and Mr. Alexander. *App. Brief at 13.* The Alexanders are mistaken. First, none of those declarants relied on novel scientific evidence, so *Frye* does not apply. Second, the Alexanders did not rely on Ms. Gileno in opposing Capital One's summary judgment motion. CP 299-312, 696-98. And, third, Mr. Wood's declaration was properly struck for grounds unrelated to *Frye*. *Supra* at 20-21.

The Alexanders must have known that Dr. Kelley's methods would be challenged by Capital One under *Frye*, but the Alexanders did nothing in their summary judgment opposition or at oral argument to meet their burden of showing general acceptance. They made no proffer at oral argument as to what testimony they would present if live testimony was permitted. The trial court did not abuse its discretion in excluding Dr. Kelley's opinions without permitting live testimony in a separate *Frye* hearing.

The Alexanders suggest their due process rights under the Washington State Constitution were violated by the trial court's decision to exclude Dr. Kelley's testimony without hearing live testimony. The Alexanders fail to address the factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 62, 720 P.2d 808 (1986), so the court should decline to address this constitutional question. Moreover, the Alexanders do not engage in any constitutional analysis. They simply quote footnote 11 from *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 790, 295 P.3d 1179 (2013). But that footnote deals with the constitutionality of nonjudicial foreclosures under the Deeds of Trust Act under the state constitution, an entirely different issue.

5. There Were No Genuine Issues of Material Fact as to Capital One's Ownership of the Note.

The Alexanders' 2012 and 2013 Lawsuits and this appeal largely turn on a single issue: Whether Capital One, as successor to Chevy Chase, owns the Note upon which the foreclosure was based. The Alexanders do not deny signing the Note.<sup>17</sup> On the contrary, the Alexanders repeatedly admit receiving a \$3 million loan from Chevy Chase and signing a note in this amount payable to Chevy Chase. *See* CP 285, 361-66, 371, 372, 376, 385, 403, 407; *see also* RCW 62A.3-308(a) (authenticity of signature on instrument is admitted unless specifically denied).

The terms of the Note are not disputed. The Alexanders attached a copy of the Note to their Verified Complaint in the 2012 Lawsuit. CP 395-99. The terms of that Note are identical to the terms of the Note submitted by Capital One, CP 213-17, and the copy of the Note contained in the escrow agent's file, CP 469-73. The escrow agent even obtained

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<sup>17</sup> Dr. Kelley's March 15, 2014 declaration was properly stricken (*supra* at 23-28) but, even if considered, the declaration would not have created an issue of fact as to whether the Alexanders signed the Note. Dr. Kelly opined as to the Alexanders' signatures on the Construction/Permanent Loan Addendum but he did not opine about their signatures on the Adjustable Rate Note (Note). CP 217, 221-22, 266, 278-81. Moreover, Dr. Kelley's opinion that the Alexanders' signatures "have a wide variation in blue ink colors that is atypical of ink from a ballpoint pen" lacks foundation and is based on an assumption that the Alexanders each used the same ballpoint pen to sign all of the Loan documents. CP 268. This assumption conflicts with Mr. Alexander's statement in court that he used a Rollerball pen to sign documents. CP 729. For these same reasons, Dr. Kelley's testimony would not have been helpful to the trier of fact as required under ER 702.

copies of the Alexanders' driver's licenses to verify their identity. CP 460-61.

Capital One submitted evidence that the Note was in Chevy Chase's possession when it merged into Capital One. CP 209. The Alexanders admit that Capital One acquired Chevy Chase. CP 372. However, relying on their purported experts, the Alexanders attempt to create an issue of fact by arguing that the Loan was securitized and Capital One does not have the original Note.

Capital One submitted evidence that the Loan was never securitized. CP 209. The Alexanders rely on the declaration of Michael Wood and the testimony of Lori Gileno<sup>18</sup> to try to create an issue as to whether the Loan was securitized. Neither "expert" found any evidence that the Loan was securitized. CP 194-95, 201, 327. Their identification of the Chevy Chase Series 2007-2 Trust is based on speculation and the fact that the Trust closed about two months after the Loan closed. CP 199-200, 328, 769. Mr. Wood recommended that the Alexanders obtain a Mortgage Loan Schedule from the Chevy Chase Series 2007-2 Trust to determine whether the Loan was within the Trust. The Alexanders did not

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<sup>18</sup> Contrary to their implication, the Alexanders did not rely on Ms. Gileno's testimony to oppose summary judgment. CP 299-312, 696-98. Similarly, the Alexanders misstate the record when they say Ms. Gileno "disputed the originality of the signatures" on the Note (*App. Brief at 4*). Ms. Gileno testified that the signatures of Gary Alexander and Diane Alexander on the Note appeared to be real or original. CP 198.

do so. Capital One, however, obtained a declaration from the servicer of the Chevy Chase Series 2007-2 Trust stating that the Loan is not in the Trust. CP 257. The Alexanders failed to come forward with specific evidentiary facts creating an issue as to securitization of the Loan.

Relying on Dr. Kelley's opinion, the Alexanders argue that Capital One does not have the original Note. CP 268-69, 305-06. However, Dr. Kelley's declaration containing this opinion, which was based on examination of a scan rather than the original document, was properly stricken. *Supra* at 28. Moreover, Capital One does not have to prove that it holds the original Note before it can foreclose. *See* RCW 61.24.030(7); *Mikhay v. Bank of Am., N.A.*, No. 2:10-cv-01464-RAJ, 2011 U.S. Dist. LEXIS 7326, at \*7 (W.D. Wash. Jan. 12, 2011) (plaintiffs "do not cite any authority requiring [the lender] to affirmatively prove [its] ownership [of the note] to the Plaintiffs"). Capital One could enforce the Note even if the original Note was lost. *See In re Allen*, 472 B.R. 559, 565-66 (B.A.P. 9th Cir. 2012) (even if lender loses original note it may enforce the note under RCW 62A.3-309(a)).

The Alexanders want this Court to infer that some unknown securitization trust acquired the Note from Chevy Chase before its 2009 merger with Capital One, but that trust simply has not come forward yet to enforce the Note despite the Note being in default for more than five

years. There is simply no evidence from which it would be reasonable to infer the existence of such a phantom note holder.

Moreover, even if the Loan was securitized, that would not alter Capital One's right to foreclose because securitization does not discharge a promissory note or change the relationship of the parties and borrowers typically lack standing to challenge securitization. *See Bhatti v. Guild Mortgage Co.*, No. C11-0480-JLR, 2011 U.S. Dist. LEXIS 145181, at \*15-16 (W.D. Wash. Dec. 16, 2011) ("Securitization merely creates a separate contract, distinct from the Plaintiffs' debt obligations under the Note, and does not change the relationship of the parties in any way."); *Borowski*, 2013 U.S. Dist. LEXIS 122104, at \*13 ("[B]orrowers, as third parties to the assignment of their mortgage (and securitization process), cannot mount a challenge to the chain of assignments unless a borrower has a genuine claim that they are at risk of paying the same debt twice..."); *Ukpoma*, 2013 U.S. Dist. LEXIS 66576, at \*6-7 (rejecting plaintiffs' contention that securitization discharged the promissory note).

There were no genuine issues of material fact, so the trial court properly granted summary judgment to Capital One.

C. The Trial Court Did Not Abuse its Discretion in Awarding CR 11 Sanctions Against the Alexanders and Their Counsel.

Capital One and MERS were awarded attorney's fees against the Alexanders under the DOT and the frivolous action statute, RCW 4.84.185. CP 1570. The Alexanders did not oppose the award of attorney's fees on those grounds. CP 775-80. Nor do they assign error to or argue against the award of these fees. *App. Brief at 1, 13-18*. The Alexanders and Mr. Sandlin<sup>19</sup> challenge only the award of sanctions under CR 11. *Id.*

The trial court entered detailed findings of fact on Capital One and MERS's motion for attorney's fees and sanctions. The Alexanders have not assigned error to any of these findings. Thus, the following findings of fact are verities on this appeal. *Cowiche Canyon Conservancy*, 118 Wn.2d at 808.

5. In July of 2009, Chevy Chase Bank, F.S.B. ("Chevy Chase") merged into Capital One, and all property of Chevy Chase became the property of Capital One. Plaintiffs received notice of this merger between Chevy Chase and Capital One via a Notice of Transfer of Servicing Rights in July 2009.

6. Plaintiffs filed their first lawsuit against Capital One and MERS on November 21, 2012.

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<sup>19</sup> The Alexanders are subject to the same amount of attorney's fees or sanctions under the DOT, RCW 4.84.185 and CR 11. Mr. Sandlin is only subject to sanctions under CR 11. Thus, the primary party opposing the award of sanctions is Mr. Sandlin, rather than his clients. The Alexanders filed for bankruptcy protection in April 2013, so the collectability of the Judgment against them for attorney's fees and sanctions is uncertain.

7. Plaintiffs were made aware of the fact that Capital One owned the Note and that the Note had not been securitized when defendants filed an affidavit of a Capital One representative in support of their motion for summary judgment in January 2013 in the 2012 lawsuit.

8. On July 30, 2013, attorney J.J. Sandlin filed the second lawsuit against defendants on behalf of plaintiffs. The Complaint included a claim that the DOT was “void and of no further force and effect,” and plaintiffs sought title to the Property. *Mr. Sandlin and plaintiffs ignored the evidence presented in the first lawsuit and failed to make a reasonable inquiry into whether evidence existed to rebut the evidence presented by defendants before plaintiffs filed the second Complaint on July 30, 2013.*

9. Capital One and MERS were not served with the Complaint in the second lawsuit until November of 2013.

10. Throughout both lawsuits, *plaintiffs and Mr. Sandlin conducted no discovery or other meaningful post-filing investigation.*

11. On February 26, 2014, defendants filed their motion for summary judgment in the second lawsuit.

12. Plaintiffs’ opposition to defendants’ motion for summary judgment focused on the opinions of their alleged “experts” and on whether “global assignments” of deeds of trust are valid, even though Capital One obtained plaintiffs’ Loan through a merger and not an assignment. *Plaintiffs made no attempt in their opposition to establish a prima facie case for any of their seven causes of action, even though each of them was addressed in detail in defendants’ motion.*

13. *The day before the hearing on defendants’ motion for summary judgment, plaintiffs untimely filed a motion under CR 56(f) to attempt to delay.*

14. On April 18, 2014, the Court granted defendants' motion for summary judgment as to all claims.

15. ***Plaintiffs also filed the following, with the assistance of their counsel Mr. Sandlin, for the improper purpose of causing delay:***

a. Plaintiffs admitted that they filed for bankruptcy in order to prevent eviction. They filed for bankruptcy one business day before the scheduled hearing on defendants' summary judgment motion, resulting in cancellation of the hearing.

b. Plaintiffs repeatedly claimed that Capital One did not own the Note and that the Note had been securitized, but made no investigation and conducted no discovery to determine whether their claims were correct.

c. Plaintiffs named one expert (Lori Gileno) and encouraged defendants to incur substantial fees deposing this expert, only to rely on the opinions of different experts in their response to summary judgment and label Gileno a "consultant" during oral argument.

d. Plaintiffs filed a motion for continuance the day before the hearing on defendants' motion for summary judgment, even though the purported basis for the motion (the need for the original DOT) had been apparent for a month.

e. Plaintiffs' summary judgment opposition was based on experts who were unqualified and engaged in junk science, as evidenced by the fact that the Court excluded both of plaintiffs' experts from consideration.

f. Plaintiffs also spent considerable time arguing about whether the signatures on various original documents were genuine when, in fact, the plaintiffs admitted in the first lawsuit signing the Note and they attached a copy to their Verified Complaint, and thus whether plaintiffs signed the Note was not in dispute and whether Capital One possessed the original Note was not a material fact.

g. Plaintiffs signed a Warranty Deed and participated in the recording of numerous fraudulent documents on the title of the Property in an effort to cloud title and cause delay in the eviction. Defendants spent substantial time investigating the fraudulent title documents.

h. Defendants expended time and costs preparing a Joint Motion voiding the fraudulent title documents pursuant to an agreement with Mr. Sandlin, but Mr. Sandlin failed to provide comments on the Joint Motion and it was never filed.

**16. Plaintiffs have benefitted from their own delay in an amount exceeding \$900,000 for the four years and seven months that have elapsed since they defaulted on the Note and have continued to reside at the Property without making Loan payments.**

CP 1565-68 (emphasis added).

The trial court awarded fees under RCW 4.84.185, the frivolous action statute, after entering the following conclusion of law:

The entirety of plaintiffs' lawsuit against defendants was ***frivolous and advanced without reasonable cause because it could not be supported by any rational argument on the law or facts, since (1) Capital One owned the Note; (2) the Loan had never been securitized; and (3) even if the Note had been securitized, Capital One would still be entitled to collect on the Note.***

CP 1569 (emphasis added). The Alexanders do not assign error to this conclusion or argue that it is not supported by the unchallenged findings of fact. Nor have the Alexanders or Mr. Sandlin attempted to argue how they

complied with CR 11 when the action was frivolous and advanced without reasonable cause.

CR 11 deals with two types of filings: baseless filings and filings made for improper purposes. ... A filing is 'baseless' when it is '(a) not well grounded in fact, or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law.

*Stiles v. Kearney*, 168 Wn. App. 250, 261, 277 P.3d 9 (2012) (quoting *MacDonald v. Korum Ford*, 80 Wn. App. 877, 883-884, 912 P.2d 1052 (1996)).

If a party violates CR 11, the court may impose an appropriate sanction, which may include reasonable attorney fees and expenses. ... The court applies an objective standard to determine "whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified."

*Eller v. E. Sprague Motors & R.V.'s, Inc.*, 159 Wn. App. 180, 190, 244 P.3d 447 (2010) (quoting *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992)).

A trial court may not impose CR 11 sanctions for a baseless filing "unless it also finds that the attorney who signed and filed [it] failed to conduct a *reasonable inquiry* into the factual and legal basis of the claim."

*Stiles*, 168 Wn. App. at 261 (quoting *Bryant*, 119 Wn.2d at 220).

The trial court did not abuse its discretion by awarding CR 11 sanctions against the Alexanders and Mr. Sandlin. In their opening appellate brief, the Alexanders (and Mr. Sandlin) argue against the award

of sanctions as if a *de novo* standard of review applies. *App. Brief at 13-19*. This is incorrect. Orders granting CR 11 sanctions are reviewed for abuse of discretion. *Washington State Physicians Ins. Exch. & Ass'n*, 122 Wn.2d at 338. Thus, to prevail on this issue, the Alexanders and Mr. Sandlin must show the award of CR 11 sanctions was manifestly unreasonable or based on untenable grounds. *Id.* at 339. Given the unchallenged findings of fact quoted above, and the analysis below, the Alexanders and Mr. Sandlin cannot meet their substantial burden.

The trial court's conclusion that the Complaint in the 2013 Lawsuit was not well grounded in fact or law is amply supported. CP 1569. The Alexanders and Mr. Sandlin ignored the summary judgment evidence in the 2012 Lawsuit showing that Capital One owned the Note and that the Loan was never securitized. CP 1566, 1569. The Alexanders conducted no discovery on these issues (or any others). And, as discussed above, the Alexanders were unable on summary judgment to raise a genuine issue as to ownership of the Note or securitization of the Loan. The Alexanders didn't even attempt to demonstrate a prima facie case on any of their seven causes of action. CP 1566. Their summary judgment opposition was based entirely on claims that Capital One did not own the Note and that the Loan was securitized. These claims were baseless.

Moreover, the Alexanders do not challenge the trial court's findings that the 2013 Lawsuit was brought and pursued for the improper purpose of delay. CP 1567-68. This delay benefitted the Alexanders in an amount exceeding \$900,000. CP 1568.

Mr. Sandlin attempts to justify his conduct by asserting an obligation for zealous advocacy<sup>20</sup> including advocating for a good faith change in the law. *App. Brief at 15*. However, Mr. Sandlin fails to identify any change in law he was advocating.

Where, as here, a complaint lacks a factual basis, CR 11 sanctions are not proper unless the court also “finds that the attorney who signed and filed the complaint failed to conduct a *reasonable inquiry* into the factual and legal basis of the claim.” *Bryant*, 119 Wn.2d at 220.

The reasonableness of an attorney's inquiry is evaluated by an objective standard. ... In making this determination, the court may consider such factors as: the time that was available to the signer, the extent of the attorney's reliance upon the client for factual support, whether a signing attorney accepted a case from another member of the bar or forwarding attorney, the complexity of the factual and legal issues, and the need for discovery to develop factual circumstances underlying a claim.

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<sup>20</sup> The Comments to RPC 1.3 have not referred to “zeal in advocacy” since 2006. Comment 1 now refers to “diligence in advocacy.” The Washington State Bar Association Board of Governors was concerned that “zealous” advocacy “could inappropriately be interpreted to condone the extreme or fanatical behavior of a type that would be inconsistent with a lawyer's professional obligations.” Brooks Holland, *Confidentiality and Candor Under the 2006 Washington Rules of Professional Conduct*, 43 Gonz. L. Review 327, 332-34 (2008). The Washington Supreme Court apparently shared these concerns, rejecting the zealous advocacy model which had become associated with “Rambo” lawyering and a “win at all costs” mentality. *Id.* at 334-35.

*Id.* at 220-21.

The trial court made findings, not challenged on appeal, that Mr. Sandlin and the Alexanders ignored the evidence Capital One presented in the 2012 Lawsuit, that Mr. Sandlin failed to make a reasonable inquiry as to whether contrary evidence existed, and that Mr. Sandlin conducted no discovery or other meaningful post-filing investigation in the 2013 Lawsuit. CP 1566. These findings are amply supported in the record and are determinative of the remaining issues on the award of CR 11 sanctions. Nevertheless, Capital One briefly discusses the *Bryant* factors quoted above.

As to the first *Bryant* factor, Mr. Sandlin began representing the Alexanders by mid-April 2013. He did not file the 2013 Lawsuit until July 30, 2013 and did not have Capital One served until November 21, 2013. Mr. Sandlin had three and a half months to conduct a pre-filing investigation and, in effect, a similar period for a post-filing investigation before the litigation was truly underway. Mr. Sandlin had ample time to conduct a reasonable pre-filing and post-filing investigation.

As to the second *Bryant* factor, Mr. Sandlin was not reliant on the Alexanders for factual information on their claims. The pleadings in the 2012 Lawsuit were available for him to review, including the Verified

Complaint attaching the Note, Capital One's fully briefed summary judgment motion, and the Capital One declaration reflecting how Capital One acquired the Note and establishing that the Loan was never securitized. CP 86, 175-85, 361, 371-99, 1628-29. Beyond these sources, Mr. Sandlin or the Alexanders could have requested information concerning ownership of the Note and securitization of the Loan through a request for information under the Real Estate Settlement and Procedures Act. *See* 12 U.S.C. § 2605(e). Independent third party information on securitization was available through the servicer of the Chevy Chase Series 2007-2 Trust and AMBAC's counsel in the litigation against Capital One involving that and other securitization trusts. CP 257, 304.

The third *Bryant* factor does not apply because Mr. Sandlin did not receive the case from another member of the bar.

As to the fourth *Bryant* factor, the issues in the 2013 Lawsuit were not complex, factually or legally. Ownership of the Note and securitization of the Loan were straightforward factual issues. The law was well developed and fully briefed, at least from Capital One's perspective, before Mr. Sandlin began representing the Alexanders. Early in that representation, Mr. Sandlin reviewed the Complaint in the 2012 Lawsuit and Capital One's summary judgment motion. CP 1629.

On the final *Bryant* factor, Mr. Sandlin is hard pressed to argue that discovery was necessary to develop the facts underlying the claims in the 2013 Lawsuit because he never pursued any discovery. As discussed above, multiple avenues of informal investigation existed on the key factual issues. Mr. Sandlin named the Chevy Chase Series 2007-2 Trust as a defendant in the 2013 Lawsuit, but never served it with process. If discovery of the Trust was important, Mr. Sandlin could have promptly served the Trust and propounded discovery that would have been answered long before Capital One was served with the Complaint.

The 2013 Lawsuit was factually and legally baseless and pursued for an improper purpose. The Alexanders and Mr. Sandlin simply cannot show that the award of CR 11 sanctions was “manifestly unreasonable or based on untenable grounds.” Thus, the award of CR 11 sanctions should be affirmed. *See Sarvis v. Land Resources, Inc.*, 62 Wn. App. 888, 894, 815 P.2d 840 (1991), *rev. denied*, 118 Wn.2d 1020 (1992). Mr. Sandlin’s primary argument opposing sanctions is that he obtained reports from two loan auditors, Lori Gileno<sup>21</sup> and Mr. Wood, and subsequently retained

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<sup>21</sup> The Alexanders did not rely on Ms. Gileno’s report or testimony in opposing summary judgment. Thus, the trial court did not have occasion to rule on whether Ms. Gileno qualifies as an expert or whether her testimony would be helpful to the trier of fact. CP 299-312, 572-73. Several other courts, however, have found that Ms. Gileno does not qualify as an expert and that her declarations and securitization reports are speculative and inadmissible. CP 1722-23, 1734-37, 1755-56, 1763-65. At her deposition in this case, Ms. Gileno admitted that she has never been certified by a judge to give expert opinions as a loan auditor. CP 1790-91. Ms. Gileno also admitted that she had no

James Kelley, Ph.D. to opine on whether certain loan documents were counterfeit. *App. Brief at 14-15*. Mr. Sandlin relies on this information and the declarations of Mr. Wood and Dr. Kelley to challenge the award of sanctions. But all of these materials were stricken by the trial court on the sanctions motion (CP 1562). The Alexanders did not assign error to or appeal from this ruling.

Counsel cannot satisfy his CR 11 obligations simply by finding a self-reputed “expert” like Mr. Wood, Ms. Gileno or Dr. Kelley who offer the desired opinion – for a fee. *See Watson v. Maier*, 64 Wn. App. 889, 897, 827 P.2d 311, *rev. denied*, 120 Wn.2d 1015 (1992) (“blind reliance on a consulting firm’s advice did not even begin to satisfy [the attorney’s] CR 11 obligations”). A reasonable attorney analyzing the “reports” of any of these “experts” would undoubtedly have serious questions concerning the expert’s qualifications and the factual basis for, and admissibility of, the expert’s opinions.

Mr. Sandlin has not shown that he did anything other than blindly rely on the opinions and purported expertise of Mr. Wood, Ms. Gileno and Dr. Kelley. There is no evidence in the record concerning any investigation or analysis by Mr. Sandlin of the admissibility of their

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evidence the Loan was securitized, although she has an abiding belief that it was. CP 201. Ms. Gileno’s opinions are based on speculation and are not admissible.

opinions or the general acceptance of Dr. Kelley's methodology. Moreover, Mr. Sandlin misrepresented other courts' acceptance of the reports or testimony of the Alexanders' experts. Mr. Sandlin claims Dr. Kelley "was accepted as an expert in 80% of the cases discussed" and suggests Dr. Kelley's opinions were excluded in *Malin* solely on timeliness grounds. CP 561, 583, 584. In fact, a reasonable investigation would have established the following: (1) Dr. Kelley was excluded on substantive grounds in *Malin*; (2) Judge Lasnik declined to pre-qualify Dr. Kelley in *McDonald*; (3) a fully briefed *Daubert* motion was pending in *Ardern*; (4) plaintiff voluntarily dismissed *Jonson* shortly after a motion to strike Dr. Kelley's declaration was briefed; (5) a motion to strike Dr. Kelley's Affidavit was granted in *Wrick*; (6) Dr. Kelley was not allowed to submit a declaration in *Reiner*; and (7) there was no evidence a declaration of Dr. Kelley was ever filed in *Workum*. CP 1632-33.

Mr. Sandlin's secondary argument opposing sanctions is his claim, *App. Brief at 17*, without citation to any supporting authority, that CR 11 sanctions are inappropriate where attorney's fees are available under statute or a prevailing party contractual provision. CR 11 was intended to deter baseless filings and filings made for an improper purpose. *Suarez v. Newquist*, 70 Wn. App. 827, 855 P.2d 1200 (1993). Mr. Sandlin offers no good reason—and none exists—to exempt a large swath of cases from

these beneficial purposes of CR 11. The court should reject Mr. Sandlin's attempt to narrow the scope of CR 11.

The trial court's award of CR 11 sanctions against the Alexanders and Mr. Sandlin should be affirmed.

D. Capital One and MERS are Entitled to Attorney's Fees on Appeal.

The unchallenged findings of fact establish that the DOT provides as follows:

Lender shall be entitled to recover its reasonable attorneys' fees and costs in any action or proceeding to construe or enforce any term of this Security Instrument. The term "attorneys' fees" . . . shall include without limitation attorneys' fees incurred by Lender in any bankruptcy proceeding or *on appeal*.

CP 104, 1565 (emphasis added). "[W]here a contract provides for an award of reasonable attorney's fees to the prevailing party, such an award must be made." *Singleton v. Frost*, 108 Wn.2d 723, 727, 742 P.2d 1224 (1987); *see also* RCW 4.84.330. If Capital One and MERS prevail on this appeal, they are entitled to an award of attorney's fees and costs on appeal.

#### IV. CONCLUSION

The Alexanders and their counsel commenced this lawsuit, their second against Capital One and MERS, based on unsupportable factual allegations and inadmissible loan auditor declarations. The Alexanders and their counsel took all possible steps to delay and avoid summary judgment dismissal including an untimely motion for continuance,

switching experts and employing Dr. Kelley's "ink color" junk science. The delay saved the Alexanders hundreds of thousands of dollars in mortgage payments. The trial court properly dismissed the Alexanders' lawsuit and awarded fees and sanctions against the Alexanders and their counsel. The trial court's rulings should be affirmed.

RESPECTFULLY SUBMITTED this 16th day of January, 2015.

WILLIAMS, KASTNER & GIBBS PLLC

By



John A. Knox, WSBA #12707  
Mary H. Spillane, WSBA #11981  
Attorneys for Respondents

## APPENDIX

1. *Bain v. Metro. Mortgage Group, Inc.*, No. C09-0149-JCC, 2010 U.S. Dist. LEXIS 22690 (W.D. Wash. Mar. 11, 2010)
2. *Bhatti v. Guild Mortgage Co.*, No. C11-0480-JLR, 2011 U.S. Dist. LEXIS 145181 (W.D. Wash. Dec. 16, 2011)
3. *Borowski v. BNC Mortgage, Inc.*, No. C12-5867-RJB, 2013 U.S. Dist. LEXIS 122104 (W.D. Wash. Aug. 27, 2013)
4. *Hanson v. Wells Fargo Bank, N.A.*, No. C10-1948Z, 2011 U.S. Dist. LEXIS 57599 (W.D. Wash. May 26, 2011)
5. *Mikhay v. Bank of Am., N.A.*, No. 2:10-cv-01464-RAJ, 2011 U.S. Dist. LEXIS 7326 (W.D. Wash. Jan. 12, 2011)
6. *Ukpoma v. U.S. Bank Nat'l Ass'n*, No. 12-CV-0184-TOR, 2013 U.S. Dist. LEXIS 66576 (E.D. Wash. May 9, 2013)
7. *Wells Fargo Bank, N.A. v. Genung*, No. C11-1698JLR, Docket No. 23 (W.D. Wash. July 23, 2012)

# **APPENDIX 1**

## **Bain v. Metro. Mortg. Group, Inc.**

United States District Court for the Western District of Washington

March 11, 2010, Decided; March 11, 2010, Filed

Case No. C09-0149-JCC

### **Reporter**

2010 U.S. Dist. LEXIS 22690; 2010 WL 891585

KRISTIN BAIN, Plaintiff, v. METROPOLITAN MORTGAGE GROUP INC., INDYMAC BANK, FSB; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS; REGIONAL TRUSTEE SERVICE; LENDER PROCESSING SERVICES; and Doe Defendants 1 through 20, inclusive, Defendants.

**Subsequent History:** Related proceeding at *Selkowitz v. Litton Loan Servicing, LP, 2010 U.S. Dist. LEXIS 105086 (W.D. Wash., Aug. 31, 2010)*

Summary judgment granted, in part, summary judgment denied, in part by, Claim dismissed by, Dismissed without prejudice by, in part, Stay granted by *Bain v. OneWest Bank, F.S.B., 2011 U.S. Dist. LEXIS 26318 (W.D. Wash., Mar. 15, 2011)*

## **Core Terms**

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summary judgment, trust deed, documents, foreclosure, employees, asserts, outrage, fiduciary duty, appointed, vice president, contracts, deceptive, mortgage, execute, titles, infliction of emotional distress, challenges, successor, parties, lender, cases

**Counsel:** [\*1] For Kristin Bain, Plaintiff: Melissa A Huelsman, LEAD ATTORNEY, SEATTLE, WA.

For Mortgage Electronic Registration Systems, IndyMac Bank FSB, Defendants: Douglas Lowell Davies, LEAD ATTORNEY, DAVIES LAW GROUP, SEATTLE, WA.

For Regional Trustee Services Corporation, Defendant: Jennifer L Tait, LEAD ATTORNEY, ROBINSON & TAIT PS, SEATTLE, WA; Nicolas A Daluiso, ROBINSON TAIT, SEATTLE, WA.

**Judges:** THE HONORABLE JOHN C. COUGHENOUR, UNITED STATES DISTRICT JUDGE.

**Opinion by:** JOHN C. COUGHENOUR

## **Opinion**

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ORDER

This matter comes before the Court on Defendant Lender Processing Services' Motion for Summary Judgment (Dkt. No. 73), Plaintiff Kristin Bain's Response (Dkt. No. 48), Defendant's original Reply (Dkt. No. 62), Plaintiff's Supplemental Response (Dkt. No. 72), and Defendant LPS' Reply (Dkt. No. 79), as well as all declarations and exhibits. <sup>1</sup> Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motion for the reasons explained herein.

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<sup>1</sup> The Court issued a modified briefing schedule in consideration of ongoing discovery; based on the stipulation of the parties, Plaintiff was given an opportunity to supplement her Response after conducting [\*2] a relevant deposition. (See Dkt. Nos. 55, 56.) Then the Court

## I. BACKGROUND

Plaintiff, a young woman with "severe ADD," purchased a condominium in Everett, Washington, and then defaulted on her mortgage payments. After the initiation of non-judicial foreclosure proceedings, she filed suit in Washington state court, alleging that Defendants--a group of lending organizations, banks, and foreclosure service providers--committed common-law torts and violations of federal and Washington statutes in connection with their issuance and administration of a deed of trust, and their subsequent foreclosure, on her home. (Compl. (Dkt. No. 2 at 49 *et seq.*) Defendants removed the matter to this Court. (Notice of Removal 1-2 (Dkt. No. 1).) <sup>2</sup>

The instant motion for summary judgment concerns only one Defendant: Lender Processing Services ("LPS"). LPS "process[es] the necessary paperwork to pursue non-judicial foreclosure on behalf of its servicer and lender clients." (Allen Decl. (Dkt. No. 74 at 1).) LPS had contracts with Defendants IndyMac Bank (now IndyMac Federal Bank) and Mortgage Electronic Registration Systems ("MERS"). Under the contract with MERS, LPS <sup>3</sup> employees were "appointed as assistant secretaries and vice presidents of [MERS] and, as such, are authorized to . . . execute any and all documents necessary to foreclose upon the property securing any mortgage loan registered on the MERS system . . . including but not limited to (a) substitution of trustee on Deeds of Trust . . ." (*Id.* at 12.) Similarly, LPS had separate contractual authority to execute documents as signing officers of IndyMac. (*Id.* at 19.) [\*4] LPS maintains that it acted as an agent for these companies, pursuant to express contractual relationships that allowed its employees to sign as executive officers of MERS and IndyMac.

LPS's involvement with the foreclosure process on Plaintiff's home was as follows. Bethany Hood, an LPS employee, signed an "Assignment of Deed of Trust" on behalf of MERS, which transferred MERS's beneficial interest in Plaintiff's loan to IndyMac. (Dkt. No. 51 at 2; Dkt. No. 74 at 7.) Christina Allen, another LPS employee, signed an "Appointment of Successor Trustee" on behalf of IndyMac, which appointed Regional Trustee Service as the successor trustee under the deed of trust. (Dkt. No. 74 at 15; Dkt. No. 51 at 5.) Next to both signatures in both documents, the LPS employees listed "VP" or "AVP" as their titles--which [\*5] apparently signified vice president of MERS and assistant vice president of IndyMac. (Resp. 5 (Dkt. No. 48).) LPS then sent those documents to Defendant Regional Trustee Service to be recorded. (Mot. 2 (Dkt. No. 73).) Both Bethany Hood and Christina Allen are listed as LPS employees authorized to sign on behalf of IndyMac and MERS. (Dkt. No. 74 at 13, 22.)

Plaintiff alleges that Hood and Allen were "actively participating in fraudulently executing documents in connection with this foreclosure sale by making false representations regarding their employment capacity." (Compl. P 2.6 (Dkt. No. 2 at 54).) She also maintains that no one had the authority to foreclose on her loan. (*Id.* at 6; *see also* Resp. 16 (Dkt. No. 48).) There are only two claims in the moved the trial date, struck the noting dates on two pending motions for summary judgment and invited the parties to reopen the motions later, if necessary. (Dkt. No. 71.) Defendant LPS immediately re-filed its motion. (Dkt. No. 73.) It was acceptable for Plaintiff to rest on her previously filed responsive briefing, and the Court assumes she did so.

<sup>2</sup> Removal jurisdiction was predicated on the federal questions in the complaint, as well as the fact that IndyMac Bank, [\*3] FSB, one of the Defendants, went into receivership in 2008 with the Federal Deposit Insurance Corporation ("FDIC") appointed as its receiver and successor in interest. Any civil suit in which the FDIC, in any capacity, is a party is "deemed to arise under the laws of the United States." 12 U.S.C. § 1819(b)(2)(A).

<sup>3</sup> LPS was formerly a subsidiary of Fidelity National Foreclosure Solutions, Inc., ("FSI"), and is now a spin-off company. (See Dkt. No. 21.) FSI is named in the relevant contracts, and was originally named as a party. The Court granted Plaintiff's motion to substitute LPS in place of FSI. (Order (Dkt. No. 29).) Where necessary in this Order, the Court thus simply substitutes LPS for FSI.

original Complaint against LPS. First, Plaintiff asserts that LPS, along with all Defendants, committed the tort of intentional infliction of emotional distress. (Compl. P 3.6 (Dkt. No. 2 at 56).) Plaintiff also appears to assert a breach of fiduciary or quasi-fiduciary duty against LPS. (*Id.* P 3.8, 3.9 (listing LPS in the body of the paragraphs, but not in the header). In her Response, Plaintiff also asserts that she "can prevail on her [\*6] claims against Defendant LPS for violations of the Washington Consumer Protection Act," ("CPA") although she did not assert a CPA claim against LPS in her complaint. (*Compare* Resp. 20 (Dkt. No. 48) with Compl. PP 3.10, 3.11 (Dkt. No. 2 at 57) (Consumer Protection Act claims asserted only against Metropolitan Mortgage).)

LPS now moves for summary judgment on all claims against it. First, LPS asserts that, at all material times, it was acting as an agent for other Defendants in this case, and is therefore not liable for actions taken within the scope of its authority. (Resp. 2 (Dkt. No. 73).) LPS also asserts, in the alternative, that Plaintiff cannot withstand summary judgment on her other claims, because she cannot prove their essential elements. (*Id.*)

## II. STANDARD OF REVIEW

Under *Federal Rule of Civil Procedure 56(c)(2)*, the Court shall grant summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Summary judgment is appropriate against a nonmoving party who fails to make a showing sufficient to establish the existence [\*7] of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). That is, after the movant has carried its burden of demonstrating that there is no genuine issue of material fact, the burden shifts to the nonmovant, who must present a quantum of evidence such "that a reasonable jury could return a verdict" in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In determining whether summary judgment is appropriate, the Court must view the facts in the light most favorable to the non-moving party and draw reasonable inferences in its favor. *Scheuring v. Traylor Bros., Inc.*, 476 F.3d 781, 784 (9th Cir. 2007).

## III. DISCUSSION

### A. Procedural challenges

Plaintiff asserts a few initial procedural challenges, none of which has merit. First, although Plaintiff does not contest that the documents attached as exhibits to declarations in Defendant's Motion were also disclosed to her, she nonetheless complains about the quality of LPS's initial disclosures, and asserts that the redactions in those documents are inappropriate. (Resp. 14 (Dkt. No. 48).) But Plaintiff does not explain how [\*8] the redacted details would be relevant to the particular challenges brought in this motion. Nor does Plaintiff allege prejudice; nor did she bring a motion to compel at any time; nor did she challenge the redactions before this motion; nor did she, apparently, request any supplemental documentary discovery from LPS. (Spoonmore Decl. 2 (Dkt. No. 63).) Plaintiff's discovery challenges are meritless.

Plaintiff also asserts that many of the documents used to support LPS's motion are hearsay. She misunderstands the kind of evidence used at summary judgment in the federal system. The challenged documents are authenticated by Greg Allen, the Assistant Vice President for Customer Support at LPS. He alleges that he has personal knowledge of the facts in his declarations, all of which deal with contracts between LPS and its customers, IndyMac and MERS. (Dkt. No. 64 at 1, Dkt. No, 74 at 1.) His declaration of personal knowledge is all that is required to authenticate a document, particularly at summary judgment, when a party need not produce evidence in a form

that would be admissible at trial. *FED. R. EVID. 901(b)(1)*. *Block v. City of Los Angeles*, 253 F.3d 410, 418-19 (9th Cir. 2001). Plaintiff's [\*9] challenges based on alleged evidentiary infirmities are also meritless.

## B. Agency

Defendant first claims that Plaintiff cannot pursue claims against LPS for actions that were within the scope of its authority as an agent for IndyMac and MERS. (Mot. 2 (Dkt. No. 73).) In support of this contention, Defendant cites *Davis v. Bafus*, 3 Wn. App. 164, 473 P.2d 192, 193 (Wash. Ct. App. 1970): "[A] complaint against a known agent, acting within the scope of his authority for a disclosed principal, fails to state a claim upon which relief can be granted against the agent." Plaintiff raises an army of arguments against application of this rule to her case, but she misses a vital point, which the Court would be remiss to ignore. *Davis* was a contract case. The rules of agency apply differently when the matter sounds in tort or remedial statute. In fact, "an agent, when sued for its own tortious act, may not avail itself of the immunities of its principal although it may have been acting at the direction of the principal." *Aungst v. Roberts Constr. Co., Inc.*, 95 Wn.2d 439, 625 P.2d 167, 168 (Wash. 1981) (citing *RESTATEMENT (SECOND) OF AGENCY* § 347 (1958)). Nor is there such immunity for statutory private rights of action, including [\*10] the Consumer Protection Act. *Id.* at 169. The complaint alleges violations of common-law tort and statutory principles against LPS. The Court cannot, in fidelity to the law of Washington, hold that LPS's agency status alone grants it immunity.

## C. Intentional Infliction of Emotional Distress

In Washington, the tort of outrage<sup>4</sup> requires the proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress. *Kloepfel v. Bokor*, 149 Wn.2d 192, 66 P.3d 630, 632 (Wash. 2003) (citing cases). The first prong requires that the defendant have engaged in behavior "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* (internal punctuation omitted) (citing *Grimsby v. Samson*, 85 Wn.2d 52, 530 P.2d 291 (Wash. 1975) and *RESTATEMENT (SECOND) OF TORTS* § 46 cmt. d).

The Court finds that LPS did not engage in outrageous conduct. Plaintiff [\*11] conclusorily argues that she "was entitled to have the foreclosure conducted in conformity with the laws of the State of Washington, and not to be forced into a sale of her home by someone or some entity that did not have the legal authority to do so." (Resp. 19 (Dkt. No. 48).) But she neglects to discuss how LPS, particularly, caused her harm. LPS employees signed two papers that changed the ownership on her deed of trust. As far as can be discerned from the evidence before the Court, LPS had no direct contact with Plaintiff whatsoever. LPS's conduct in simply assigning the deed of trust and appointing a successor trustee, in reasonable accordance with contracts with IndyMac and MERS, simply does not "go beyond all possible bounds of decency," and cannot be regarded as "atrocious and utterly intolerable in a civilized community." *Kloepfel*, 66 P.3d at 632. Neither can Plaintiff prove the second prong of outrage. The emotional distress complained of must be inflicted intentionally or recklessly. Bad faith or malice is not enough to prove an outrage claim. *Dicomes v. State*, 113 Wn.2d 612, 782 P.2d 1002 (Wash. 1989). Plaintiff has proffered no evidence whatsoever that LPS had the requisite intent. The [\*12] Court finds as a matter of law that LPS is entitled to summary judgment on Plaintiff's claims of intentional infliction of emotional distress.

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<sup>4</sup> "Outrage" and "intentional infliction of emotional distress" are synonymydistress" are synonyms for the same tort. *Kloepfel v. Bokor*, 149 Wn.2d 192, 66 P.3d 630, 631 n.1 (Wash. 2003).ms for the same tort. *Kloepfel v. Bokor*, 149 Wn.2d 192, 66 P.3d 630, 631 n.1 (Wash. 2003).

## D. Fiduciary Duty

Plaintiff's complaint alleges that "Defendants IndyMac, MERS and [LPS] owed a fiduciary duty or quasi-fiduciary duty to Plaintiff. . . . Defendant Regional Trustee has a fiduciary duty as an alleged trustee under the [Deed of Trust Act] . . . ." (Compl. P 3.8, 3.9 (Dkt. No. 2 at 56).) Although Plaintiff's Complaint only mentioned the Washington Deed of Trust Act against Regional Trustee *alone*, it is apparent from her Responses to LPS's motion for summary judgment--so far as the Court can parse them--that Plaintiff believes that the Act created a fiduciary relationship between LPS and Plaintiff, too.

It did not. A deed of trust differs from a standard mortgage because it involves not only a lender and a borrower, but a neutral third party called the trustee. *Kezner v. Landover Corp.*, 87 Wn. App. 458, 942 P.2d 1003, 1007 n.9 (1997). Under Washington's Deed of Trust Act ("DTA"), a "trustee" is the person designated as the trustee in the deed of trust or appointed under the statute; the trustee holds an interest in the titled to the borrower's property [\*13] on behalf of the lender. *WASH. REV. CODE 61.24.005(13)*; *Kezner*, 942 P.2d at 1007 n.9. It is true that the trustee bears an "exceedingly high" fiduciary duty towards both the mortgagee and mortgagor. *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683, 686 (Wash. 1985). But Plaintiff concedes that Regional Trustee was the trustee on the deed of trust. (Resp. 11 (Dkt. No. 48).) Defendant LPS's employees "execute[d] documents *at the behest* of the foreclosing trustee." (Supp. Resp. 8 (Dkt. No. 66) (emphasis added).) Nowhere in *any* of her pleading papers or any of the documents on file does Plaintiff produce a scintilla of evidence that LPS was a trustee, such that its actions would be covered by the duties imposed by the DTA. Plaintiff forgets that, in order to incur a fiduciary duty, the particular party must, first, be a fiduciary. Such duties are not free-floating. Plaintiff has not carried her burden in demonstrating that there is a material issue of fact as to whether LPS had a fiduciary duty toward *Plaintiff*. <sup>5</sup> *Anderson*, 477 U.S. at 248.

Plaintiff also made no argument to show that LPS was covered by a quasi-fiduciary obligation. She cites no cases for this proposition. The Court finds that, based on the circumstances of this case, LPS and Plaintiff were not in a "relationship [that] involve[d] more trust and confidence than is true of ordinary arm's length dealing." *Tokarz v. Frontier Fed. Sav. and Loan Ass'n*, 456, 33 Wn. App. 456, 656 P.2d 1089 (Wash. Ct. App. 1982) (citing *Hutson v. Wenatchee Fed. Sav. & Loan Ass'n*, 22 Wn. App. 91, 588 P.2d 1192 (Wash. Ct. App. 1978)).

Plaintiff finally attempts to resist summary judgment by arguing that there is an issue of fact as to the precise nature of the relationship between LPS and the other Defendants. (Resp. 13-19 (Dkt. No. 48).) But Plaintiff neglects to elucidate why this information would be relevant to the fundamental question of *whether LPS was a trustee*, such that a duty toward Plaintiff would arise under [\*15] the Washington Deed of Trust Act. "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. There is no genuine issue of *material* fact. Defendant carried its burden. Summary judgment is therefore granted as to Plaintiff's DTA claims.

## E. Consumer Protection Act Claims

<sup>5</sup> Nor did LPS exceed its authorities as an agent for the trustee. An agent may perform "mere ministerial acts" relating to a foreclosure. *Buse v. First Am. Title Co.*, C08-0510-MJP, 2009 U.S. Dist. LEXIS 45119, 2009 WL 1543994, at \*3 (W.D. Wash. May 29, 2009) [\*14] (citing cases). That is precisely what LPS did here in assigning the deed of trust and appointing a successor trustee. Plaintiff did not allege that these actions involved discretion or judgment, and it is apparent from the record that they were simple preparation and dissemination of documents.

For the first time in her Response, Plaintiff asserts Washington Consumer Protection Act ("CPA") claims against LPS. (Resp. 20 (Dkt. No. 48).) Even if the Court were to treat this unpleaded issue as properly presented, Plaintiff could not resist summary judgment by relying on it. The CPA prohibits "unfair or deceptive acts in the conduct of any trade or commerce." WASH. REV. CODE 19.86.020. To prevail in a private CPA action, a plaintiff must establish five distinct elements: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) that impacts the public interest; (4) injury to plaintiff in his or her business or property; and (5) [\*16] causation. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 719 P.2d 531, 533 (Wash. 1986).

Plaintiff conclusorily states that "LPS was and is engaged in numerous unfair and deceptive acts in order to increase their profits . . . [and] speed along the foreclosure sale and benefit the other defendants to the detriment of Ms. Bain . . . rather than acting in conformity with the DTA." <sup>6</sup> (Resp. 21 (Dkt. No. 48).) Reading her brief as liberally as possible, Plaintiff believes that LPS was giving "phony 'officer' titles to employees . . . so that they can execute documents on [IndyMac and MERS]'s behalf giving the appearance of actual legal authority when in fact, Defendant LPS' employees are simply pushing paper in order to expedite the foreclosure of an individual's home." (Resp. 8 (Dkt. No. 48).) Whether the conduct constitutes an unfair or deceptive act can be decided by this court as a question of law. Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 930 P.2d 288, 297 (Wash. 1997).

The Court cannot find that LPS's use of the titles "vice president" and "assistant vice president" of MERS and IndyMac, pursuant to express contracts, was deceptive within the meaning of the CPA. First, LPS did not commit a "knowing failure to reveal something of material importance," because Plaintiff has not established materiality. Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 170 P.3d 10, 18 (Wash. 2007). Plaintiff has articulated no theory, and cited no cases, that would demonstrate that letters "VP" or "AVP" next to the signatures were all material to the foreclosure process on Plaintiff's home. Moreover, LPS did not commit an "affirmative misrepresentation of fact," because of the simple fact that, for purposes of signing these papers, LPS misrepresented nothing: Allen and Hood *did* bear the titles that they used. The employees' use of the titles was expressly authorized by contracts with IndyMac <sup>7</sup> and MERS. Plaintiff admits that lists of LPS employees who are granted the power to sign documents on behalf of these entities are "attached to publicly available documents regularly." (Resp. 14 (Dkt. No. [\*18] 48).) LPS openly and lawfully allows its employees to sign on behalf of its clients, pursuant to contract--which is the essence of ordinary agency action everywhere. There is simply nothing deceptive about using an agent to execute a document, and this practice is commonplace in deed of trust actions. See, e.g., Russell v. Lundberg, 120 P.3d 541, 544, 2005 UT App 315 (Utah Ct. App. 2005) ("[I]t appears to be accepted practice for [deed of trust] trustees to use third parties to perform foreclosure activities"); Buse, 2009 U.S. Dist. LEXIS 45119, 2009 WL 1543994, at \*2 (citing cases).

## F. Final Observation

The Court has not yet addressed the heart of Plaintiff's argument, which is that *no one* could initiate a foreclosure of Ms. Bain's loan, [\*19] because no party has yet demonstrated the location or

<sup>6</sup> To the extent that Plaintiff is alleging that a violation of the DTA necessarily shoehorns her complaint into a violation of the CPA, this claim fails because the Court has found that Plaintiff failed [\*17] to allege that LPS has any fiduciary duty under the DTA.

<sup>7</sup> Plaintiff also asserts that, when IndyMac was placed into receivership, and the FDIC created IndyMac Federal Bank, Hood had no authority under the contract to sign for IndyMac, because the *specific named* entity no longer existed. (Resp. 8 (Dkt. No. 48).) But Plaintiff has not coherently explained why the change in ownership gave Allen's signature "the capacity to deceive a substantial portion of the public." Indoor Billboard, 170 P.3d at 19 (Wash. 2007). There is no material issue of fact here.

existence of the promissory note that established the original deed of trust. (See Resp. 16 (Dkt. No. 48).) That note was originally held by IndyMac Bank, FSB; after the bank failed, the FDIC assumed all rights, titles, powers, privileges, and operations of the failed institution. (Notice of Removal 2 (Dkt. No. 1).) The FDIC then created a new institution, IndyMac Federal Bank, FSB, to which it transferred "all of the insured deposits and substantially all of the assets of the failed institution." (*Id.*) The FDIC is now operating IndyMac Federal Bank. (*Id.*) Plaintiff apparently argues that, because no one has affirmatively produced evidence that the note is in possession of IndyMac Federal Bank, she was entitled to cease making payments on her mortgage altogether, "no matter how delinquent she might have been on her payments." (Resp. 16 (Dkt. No. 48).)

The Court need not tackle this argument today, because Plaintiff has not alleged any statute or common law principle that would allow her to proceed against *LPS particularly* on this theory. Neither common-law outrage, nor the CPA, nor the DTA--which are the only laws alleged--establish [\*20] liability for this particular Defendant under these circumstances.

#### **IV. CONCLUSION**

For the foregoing reasons, LPS's Motion for Summary Judgment (Dkt. No. 73) is GRANTED.

DATED this 11th day of March, 2010.

/s/ John C Coughenour

John C. Coughenour

UNITED STATES DISTRICT JUDGE

## **APPENDIX 2**

## **Bhatti v. Guild Mortg. Co.**

United States District Court for the Western District of Washington

December 16, 2011, Decided; December 16, 2011, Filed

CASE NO. C11-0480JLR

### **Reporter**

2011 U.S. Dist. LEXIS 145181; 2011 WL 6300229

NUSRAT BHATTI, Plaintiff, v. GUILD MORTGAGE COMPANY, et al., Defendants.

**Subsequent History:** Affirmed by *Bhatti v. Guild Mortg. Co.*, 2013 U.S. App. LEXIS 25659 (9th Cir. Wash., Dec. 24, 2013)

### **Core Terms**

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Plaintiffs', trust deed, Mortgage, motion to dismiss, foreclosure, servicing, notice, written request, letters, allegations, trustee sale, documents, subject to dismissal, wrongful foreclosure, amended complaint, promissory note, borrower, default, quiet title, futile, amend, declaratory judgment, proposed claim, denies, cause of action, home loan, recorded, declaratory relief, leave to amend, beneficiary

**Counsel:** [\*1] For Nusrat Bhatti, Erfan Samuel, individuals, Plaintiffs: Charles M. Greenberg, TRIAD LAW GROUP, EDMONDS, WA.

For Guild Mortgage Company, Mortgage Electronic Registration Systems Inc, Defendants: Ann T Marshall, Katie A Axtell, BISHOP WHITE MARSHALL & WEIBEL, PS, SEATTLE, WA.

For Northwest Trustee Services Inc., Defendant: Joshua Schaer, ROUTH CRABTREE OLSEN, BELLEVUE, WA.

**Judges:** JAMES L. ROBART, United States District Judge.

**Opinion by:** JAMES L. ROBART

### **Opinion**

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ORDER

#### **I. INTRODUCTION**

Before the court are (1) Defendants Guild Mortgage Company ("Guild Mortgage") and Mortgage Electronic Registration System's ("MERS") motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)* (Dkt. # 8), (2) Defendant Northwest Trustee Services, Inc.'s ("NWTS") motion to join Guild Mortgage and MERS' motion to dismiss (Dkt. # 11), (3) Plaintiffs Nusrat Bhatti and Erfan Samuel's motion to continue Defendants' motion to dismiss and to file an amended complaint (Dkt. # 16), and (4) Guild Mortgage and MERS' motion to strike Plaintiffs' amended complaint (Dkt. # 21). Having considered the motions, all papers filed in support or opposition thereto, and being fully advised, the court GRANTS Guild Mortgage and MERS' motion to dismiss [\*2] (Dkt. # 8),

GRANTS NWTS's motion to join the motion to dismiss (Dkt. # 11), DENIES Plaintiffs' motion to continue the motion to dismiss (Dkt. # 16) as MOOT, and GRANTS Guild Mortgage and MERS' motion to strike Plaintiffs' amended complaint (Dkt. # 21).<sup>1</sup>

## II. FACTUAL AND PROCEDURAL BACKGROUND

On March 17, 2009, Plaintiffs executed a promissory note to Guild Mortgage to refinance their real property located in Marysville, Washington. (Compl. ¶¶ 6, 13.) As security for this refinance, Plaintiffs executed a Deed of Trust that encumbered the property. (*Id.* ¶ 14.) The amount owed to Guild Mortgage and secured by the Deed of Trust was \$325,244.00. (Axtell Decl. (Dkt. # 10) Ex. C.) Under the terms of the Deed of Trust, Guild Mortgage is listed as the "Lender" and MERS is listed as the "nominee" for Guild Mortgage. (Compl. ¶¶ 18, 20.) Fidelity National Title Company of Washington is listed as the trustee under the Deed of Trust. (NWTS Mot. (Dkt. # 11) Ex. 2.) The Deed of Trust provides that it secures "repayment [\*3] of the debt evidenced by the Note" to Guild Mortgage. (Compl. ¶ 28.)

On or about October 29, 2010, MERS recorded an Assignment of the Deed of Trust under Snohomish County Auditor's Number 201010290550. (Axtell Decl. Ex. A.) MERS assigned all beneficial interest under the Deed of Trust described above to Guild Mortgage under the Assignment of Deed of Trust. (*Id.*; Compl. ¶¶ 47-48.) On or about October 29, 2010, Guild Mortgage recorded an Appointment of Successor Trustee naming NWTS as Successor Trustee and vesting NWTS with the powers of the original trustee. (NWTS Mot. Ex. 3.)

On or about December 1, 2010, NWTS recorded a Notice of Trustee's Sale under Snohomish County Auditor's Number 201012010330. (Axtell Decl. Ex. B; NWTS Mot. Ex. 4.) As the beneficiary, Guild Mortgage alleged a default under the Deed of Trust, and NWTS scheduled a trustee's sale for March 4, 2011. (See Axtell Decl. Ex. B; NWTS Mot. Ex. 4.) The Notice of Trustee's Sale recites that Plaintiffs are past due on their monthly payments in the amount of \$13,047.18. (See Axtell Decl. Ex. B; NWTS Mot. Ex. 4.)

Plaintiffs allege that "[t]he amount stated as due and owing is misstated in the notice of default and payments were [\*4] applied in contravention to the terms of the deed of trust." (Am. Compl. (Dkt. # 20) ¶ 81.) However, they allege no factual details as to how or why they believe this is so. They allege that they "paid approximately \$18,000 to bring the account current . . . on or about May 2010. (*Id.* ¶ 82.) They further allege that an insurance settlement was applied to their mortgage that rendered their payments "current," but that "no payment relief was offered" by Guild Mortgage that would enable them to maintain the property "as a performing asset." (See *id.* ¶¶ 87-96.) They do not allege that they were able to remain current on their loan payments following the May 2010 \$18,000 payment, nor do they allege that they were not in default or were current with their payments at the time of foreclosure on March 4, 2011. Indeed, Plaintiffs admit that they "fell behind on their mortgage payments" when Ms. Bhatti lost her job (Am. Compl. ¶ 88), and that they were unable to obtain a loan modification or payment relief that would allow them to maintain "a performing asset." (*Id.* ¶¶ 88-97.) Plaintiffs have acknowledged that "they had an obligation to satisfy the principle balance . . . ." (*Id.* ¶ 94.)

In January [\*5] 2011, Plaintiffs sent two letters to Guild Mortgage requesting information. (Compl. ¶ 84; see Klika Decl. Ex. A.) Guild Mortgage responded to Plaintiffs in writing, on or about February 20, 2011, stating that the requests did not constitute Qualified Written Requests for purposes of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601, et seq., because they were

<sup>1</sup> No party requested oral argument with regard to any of the referenced motions, and the court deems these motions to be appropriate for disposition without the oral argument of counsel.

simply a list of demands for information and did not specify a servicing related issue. (Compl. ¶¶ 85-86; Klika Decl. Ex. B.)

On March 3, 2011, Plaintiffs filed a complaint in Superior Court for the State of Washington alleging causes of action against Guild Mortgage, MERS, and NWTS for declaratory judgment, violations of RESPA, and quiet title. <sup>2</sup> (Compl. (Dkt. # 1-1).) Although Plaintiffs filed their complaint on March 3, 2011 (one day before the scheduled trustee's sale), they did not seek to enjoin the trustee's sale.

On March 4, 2011, the property was sold at a trustee's sale to Guild Mortgage as the successful bidder. (Axtell Decl. Ex. C; NWTS Mot. Ex. 5.) Following the sale, NWTS recorded a Trustee's Deed under Snohomish County [\*6] Auditor's Number 201103090315. (Axtell Decl. ¶ 4, Ex. C; NWTS Mot. Ex. 5.)

Guild Mortgage and MERS filed a motion seeking dismissal of Plaintiffs' claims for (1) declaratory judgment, (2) violation of RESPA, and (3) quiet title. (Def. Mot. (Dkt. # 8).) NWTS also filed a motion to join Guild Mortgage and MERS' motion, asserting that Plaintiffs' post-sale claims were barred under Washington law and that none of Plaintiffs' claims pertained to NWTS. (NWTS Mot. (Dkt. # 11).) Plaintiffs then filed a motion seeking to continue Defendants' motions to dismiss and to seeking to amend their complaint to add claims for wrongful foreclosure, negligent infliction of emotional distress, and violation of Washington's Consumer Protection Act ("CPA"), *RCW 19.86, et seq.* (Plaint. Mot. (Dkt. # 16).) On September 13, 2011, while this motion was pending and one day before the deadline to amend pleadings under the court's case schedule (Dkt. # 14), Plaintiffs' filed their proposed Amended Complaint, which added the three referenced new causes of action. (Am. Compl. (Dkt. # 20).) In response, Guild Mortgage and MERS filed a motion to strike the amended complaint. (Mot. to Strike (Dkt. # 21).)

### III. ANALYSIS

#### A. [\*7] STANDARDS

When considering a motion to dismiss under *Rule 12(b)(6)*, the court construes the complaint in the light most favorable to the non-moving party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). The court must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff. *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)); see *al-Kidd v. Ashcroft*, 580 F.3d 949, 956 (9th Cir. 2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Dismissal under *Rule 12(b)(6)* can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

In [\*8] general, leave to amend "shall be freely given when justice so requires." *Fed. R. Civ. P. 15(a)*. However, leave to amend may be denied if the proposed amendment either lacks merit or would not serve any purpose because to grant it would be futile in saving plaintiff's suit. *Universal Mortg. Co. v. Prudential Ins. Co.*, 799 F.2d 458, 459 (9th Cir. 1986). If a claim is not based on a proper legal theory, dismissed without leave to amend is appropriate because any amendment based on a faulty legal theory would be futile. *Fed. Nat'l Mortg. Assoc. v. Wages*, No. 11-cv-05396

<sup>2</sup> On March 21, 2011, Defendants removed the action to federal court. (Dkt. # 1.)

*RBL, 2011 U.S. Dist. LEXIS 125212, 2011 WL 5138724, at \*2 (W.D. Wash. Oct. 28, 2011)* ("[W]here the facts are not in dispute, and the sole issue is whether there is liability as a matter of substantive law, the court may deny leave to amend.") (citing *Albrecht v. Lund, 845 F.2d 193, 195-96 (9th Cir. 1988)*); *Oliver v. Countrywide Home Loans, Inc., No. CIV S-09-1381 FCD/GGH, 2009 U.S. Dist. LEXIS 94913, 2009 WL 3122573, at \*4 (E.D. Cal. Sept. 29, 2009)* ("[A]mendment would be futile considering the legal baselessness of plaintiff's claims, and thus, dismissal without leave to amend is appropriate.") (citing *Vasquez v. L.A. Cnty., 487 F.3d 1246, 1258 (9th Cir. 2007)*).

## **B. MATERIALS THE [\*9] COURT CONSIDERS ON THE MOTIONS TO DISMISS**

Generally, a district court may not consider any material beyond the pleadings in ruling on a *Rule 12(b)(6)* motion to dismiss. *Lee v. City of L.A., 250 F.3d 668, 688 (9th Cir. 2001)* (citations omitted). The Ninth Circuit, however, has carved out certain exceptions to this rule. A court may consider "documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading . . ." *Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994)*. A court also may take judicial notice of matters of public record. *Lee, 250 F.3d at 688-89* (citations omitted).

Guild Mortgage and MERS have asked the court to consider certain publicly recorded documents, including: (1) an Assignment of the Deed of Trust (Axtell Decl. Ex. A), (2) a Notice of Trustee Sale (*id.* Ex. B), and (3) a Trustee's Deed (*id.* Ex. C). NWTS also has asked the court to consider publicly recorded documents, including: (1) the Deed of Trust (NWTS Mot. Ex. 2), (2) an Appointment of Successor Trustee (*id.* Ex. 3), (3) the same Notice of Trustee Sale presented by Guild Mortgage and MERS (*id.* Ex. 4), and (4) the same Trustee's [\*10] Deed presented by Guild Mortgage and MERS. These documents are all matters of public record of which the court may take judicial notice when considering the parties' motions to dismiss.

In addition to these matters of public record, Guild Mortgage and MERS have also asked the court to consider copies of three letters. (See Klika Decl. Exs. A, B.) The first two letters were sent to Guild Mortgage by Plaintiffs and are both entitled "QUALIFIED WRITTEN REQUEST." (*Id.* Ex. A.) The third letter is a response from Guild Mortgage to Plaintiffs with regard to the first two letters. (*Id.* Ex. B.) These letters are described in Plaintiffs' complaint and relied upon with respect to their claim under RESPA. (Compl. ¶¶ 84-86, 88-89, 91.) NWTS has also asked the court to consider a copy of the Note at issue in this action. (NWTS Mot. Ex. 1.) The Note also is specifically described by Plaintiffs and relied upon in their complaint. (Compl. ¶ 13.) No party has challenged the authenticity of any of these documents. Accordingly, the court may consider these documents when ruling on the parties' motions to dismiss.

## **C. GUILD MORTGAGE AND MERS' MOTION TO DISMISS**

### **1. The Waiver Doctrine under Washington's Deed [\*11] of Trust Act**

Initially, the court notes that Plaintiffs' state law claims for declaratory judgment and quiet title are both barred by the waiver doctrine under Washington's Deed of Trust Act, RCW ch. 61.24. See *Gossen v. JPMorgan Chase Bank, 819 F. Supp. 2d 1162, 2011 U.S. Dist. LEXIS 120275, 2011 WL 4939828, at \*5 (W.D. Wash. Oct. 18, 2011)*. The Deed of Trust Act sets out the procedures that must be followed to properly foreclose a debt secured by a deed of trust. RCW ch. 61.24. A proper foreclosure action extinguishes the debt and transfers title to the property to the beneficiary of the deed of trust or to the successful bidder at a public foreclosure sale. *Gossen, 2011 U.S. Dist. LEXIS 120275, 2011 WL 4939828, at \*5* (citing *Albice v. Premier Mortg. Servs. of Wash., Inc., 157 Wn. App. 912, 920, 239 P.3d 1148 (2010)*).

Washington's Deed of Trust Act provides a procedure by which any enumerated entity may restrain a trustee's sale on any proper ground. *2011 U.S. Dist. LEXIS 120275, [WL] at \*6* (citing *Brown v.*

*Household Realty Corp.*, 146 Wn. App. 157, 189 P.3d 233, 235 (Wash. Ct. App. 2008)). This statutory procedure is the only means by which a grantor may restrain a sale once foreclosure has begun with receipt of the notice of sale and foreclosure. *Id.* (citing *Brown*, 189 P.3d at 236.) A borrower's [\*12] failure to take advantage of the pre-sale remedies under the Deed of Trust Act results in waiver of their right to object to the trustee's sale where the party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale. *Id.* (citing *Brown*, 146 Wn. App. at 163); see generally *Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061, 1066-68 (Wash. 2003).

The court has taken judicial notice of the Notice of Trustee's Sale, which contains a notice stating that "[a]nyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those obligations if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130." (See Axtell Decl. Ex. B; NWTS Mot. Ex. 4.) Plaintiffs have not alleged or otherwise asserted that they did not receive Notice of Trustee's Sale. Although they filed their lawsuit one day prior to the Trustee's sale, Plaintiffs did not invoke any pre-sale remedy afforded to them with respect to their causes of action seeking to set aside sale of the foreclosed property. Accordingly, the quiet title and [\*13] declaratory judgment claims may be deemed waived. *Gossen*, 2011 U.S. Dist. LEXIS 120275, 2011 WL 4939828, at \*5 (citing *Brown*, 189 P.3d at 236; RCW 61.24.127; RCW 61.24.130). Plaintiffs' claims for declaratory judgment and quiet title are therefore subject to dismissal pursuant to the waiver doctrine of Washington's Deed of Trust Act. *Id.*

## **2. Plaintiffs' Cause of Action for Declaratory Judgment**

Even assuming that Plaintiffs' claim for declaratory judgment is not barred under Washington's Deed of Trust Act, it is subject to dismissal on other grounds. Plaintiffs base their cause of action for declaratory relief on allegations that the role played by MERS in the Deed of Trust, which lists MERS as the "nominee" for Guild Mortgage, was improper, and MERS' assignment of all beneficial interest under the Deed of Trust to Guild Mortgage under the Assignment of the Deed of Trust was invalid. (See Compl. ¶¶ 20-27, 35-36, 47-53, 63, 66-73; NWTS Mot. Ex. 2 (Deed of Trust) at 1; Axtell Decl. Ex. A (Assignment of Deed of Trust).) MERS is a private electronic database, operated by MERSCORP, Inc., that tracks the transfer of the "beneficial interest" in home loans, as well as any changes in loan servicers. *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1039 (9th Cir. 2011). [\*14] In the event of default on the loan, the lender may appoint a trustee to initiate foreclosure on its behalf. *Id.* To have the legal authority to foreclose, the trustee must have authority to act as the holder, or agent of the holder, of both the deed and the note together. *Id.* One of the main premises of Plaintiffs' lawsuit is that MERS impermissibly splits the note and the deed by facilitating transfer of the beneficial interest in the loan among lenders while maintaining MERS as the nominal holder of the deed. (See Compl. ¶¶ 20-27, 35-36, 47-53, 63, 66-73). Plaintiff also makes vague allegations concerning MERS' role in the securitization of home loans. (See *id.* ¶¶ 52-53.)

The claims Plaintiffs make regarding the role of MERS are similar to other claims which have been rejected in past cases brought in this district. See, e.g., *Vawter v. Quality Loan Serv. Corp. of Wash.*, 707 F. Supp. 2d 1115, 1125-1126 (W.D. Wash. 2010); *Cebun v. HSBC Bank USA, N.A., No. C10-5742BHS*, 2011 U.S. Dist. LEXIS 9891, 2011 WL 321992, at \*3 (W.D. Wash. Feb. 2, 2011); *Daddabbo v. Countrywide Home Loans, Inc., No. C09-1417RAJ*, 2010 U.S. Dist. LEXIS 50223, 2010 WL 2102485, at \*5 (W.D. Wash. May 20, 2010). Further, Plaintiffs' claims are without merit because they [\*15] cannot establish that they were misinformed about the MERS system, relied on any misinformation in entering into their home loan, or were injured as a result of the misinformation. See *Cervantes*, 656 F.3d at 1042. In fact, the provisions in the Deed of Trust, which Plaintiffs signed, specifically provides MERS with the rights to foreclose and to sell the property, and to transfer

interests under the Deed of Trust. (See NWTS Mot. Ex. 2 (Deed of Trust) at 2 ("Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.")).

Finally, although Plaintiffs' claim, if any, arising out of MERS' role in the securitization of home mortgages is unclear, even if otherwise properly plead, such a claim would nevertheless fail. Securitization merely creates a separate [\*16] contract, distinct from the Plaintiffs' debt obligations under the Note, and does not change the relationship of the parties in any way. See Moseley v. CitiMortgage, Inc., No. C11-5349RJB, 2011 U.S. Dist. LEXIS 125805, 2011 WL 5175598, at \*7 (W.D. Wash. 2011) (citing Commonwealth Prop. Advocates, LLC v. First Horizon Home Loan Corp., 2010 U.S. Dist. LEXIS 121743, 2010 WL 4788209, at \*2 (D. Utah Nov.16, 2010) (quoting Larota—Florez v. Goldman Sachs Mortg. Co., 719 F. Supp. 2d 636, 642 (E.D. Va. 2010))).

The court concurs with the reasoning and conclusions set forth in Vawter, Daddabbo, Ceburn, and Moseley. MERS has the authority to act as a beneficiary under the Deed of Trust where such authority is explicitly granted upon execution of the instrument. In this case, Plaintiffs specifically agreed to MERS' role as beneficiary under the Deed of Trust they signed. Their allegations that MERS did not have authority do not state a claim for relief.

To establish a claim for declaratory relief, there must be a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant issuance of a declaratory judgment." Marin v. Lowe, 8 F.3d 28 (9th Cir. 1993). Unless an actual controversy exists, the district [\*17] court is without power to grant declaratory relief. See Daines v. Alcatel, S.A., 105 F. Supp. 2d 1153, 1155 (E.D. Wash. 2000) (quoting Garcia v. Brownell, 236 F.2d 356, 357-58 (9th Cir. 1956)). As discussed above, Plaintiffs' contentions regarding MERS' role in the Deed of Trust and subsequent foreclosure are without merit. Moreover, they have offered no other allegations demonstrating the existence of a "substantial controversy." Accordingly, they have not stated a claim for declaratory relief. See, e.g., Dooms v. Cal-Western Reconveyance Corp. of Wash., No C11-5419RJB, 2011 U.S. Dist. LEXIS 132445, 2011 WL 5592760, at \*7 (W.D. Wash. Nov. 16, 2011) (ruling that because plaintiffs' contentions regarding the assignment by MERS are without merit they fail to state a claim for declaratory relief as well). Further, the court declines to grant leave to amend this claim. Because the court has rejected Plaintiffs' underlying claim regarding MERS on legal grounds, any amendment of this claim would be futile.

### **3. Plaintiffs' Cause of Action for Quiet Title**

Even if Plaintiffs' claim for quiet title was not barred by Washington's Deed of Trust Act as discussed above, it would be subject to dismissal on other grounds. Plaintiffs' [\*18] allegations underlying their claim for quiet title rehash their position with respect to MERS. Plaintiffs allege that their "property is encumbered by a Deed of Trust which is null and void because MERS has no valid recorded interest in plaintiffs' Deed of Trust, Note, or Property." (Compl. ¶ 98.) As a result, Plaintiffs allege that their "property is encumbered by a Deed of Trust which is null and void, but is clouding title to the Property," and "seek[] an order from the court quieting title to the property in favor of plaintiffs." (*Id.* ¶¶ 101, 104.) The court has already rejected the underlying legal basis for Plaintiffs' claims against MERS. Accordingly, this claim is subject to dismissal as well. For the same reasons that court declined to permit Plaintiffs an opportunity to amend their claim for declaratory judgment, the court declines to permit amendment of this claim as well. Because the underlying legal basis for the claim is not well-founded, any amendment would be futile.

### **4. Plaintiffs' Cause of Action for Alleged Violation of RESPA**

Plaintiffs sent two letters, dated in January 2011, to Guild Mortgage. (Compl. ¶ 84; Klika Decl. Ex. A.) Plaintiffs entitled both letters with [\*19] the words "QUALIFIED WRITTEN REQUEST." (Klika Decl. Ex. A.) Plaintiffs allege that Guild Mortgage violated RESPA, 12 U.S.C. § 2605(e), by failing to respond to their alleged qualified written requests. (Compl. ¶¶ 80-95.) Plaintiffs' letters, however, are not "qualified written requests" as contemplated by section 2605(e)(1)(B) of Title 12, and accordingly, the court dismisses this claim.

Section 2605(e)(1)(B) defines a "qualified written request" as "a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that— (i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and (ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower." 12 U.S.C. § 2605(e)(1)(B).

Plaintiffs' purported qualified written requests, however, demand a laundry list of information without identifying the reasons Plaintiffs believe their account is in error. Although the letters reference servicing in passing and provide Plaintiff' names, loan number, and [\*20] property address, Plaintiffs' requests are not related to the servicing of their loan, but rather relate more generally to allegations of underlying fraud or mischief in the transaction, involving not only the Note, but the Deed of Trust as well.

The first paragraph of their first letter states:

I dispute the amount that is owed according to my Monthly Billing Statement and request that you send me information about the fees, costs and escrow accounting on the above-referenced loan. In addition, there is a serious concern regarding the actual ownership and servicing of the loan and underlying security interest and whether such ownership has been properly disclosed to (Me/US) [sic] the mortgagor and properly recorded with the County Clerk and Recorder's Office.

(Klika Decl. Ex. A.) The letter goes on to demand over-broad categories of 45 different types of information or documents, including:

- (1) "[a] Statement of Account and application of all payments made on this Promissory Note from inception of the loan to the date of your response to this request;"
- (2) "[t]he original Promissory Note; please accompany with a verified statement identifying the owner and holder in due course, and stating [\*21] whether the Promissory Note is in the possession of the holder thereof and has not been lost or destroyed,"
- (3) "[a]n accounting of payment history from borrower on the Promissory Note and Deed of Trust, including who such payments went to, the breakdown of such payments as to the principal, interests, fees, costs and a detail of each and every credit and debit posted on relating to this Deed of Trust and Promissory Note,"
- (4) [t]he original Deed of Trust; please accompany with a verified statement identifying the owner and holder in due course, and that it is in the possession of the owner and holder thereof and has not been lost or destroyed,"
- (5) "[i]dentify all assignments, transfers, allonges, or other documents related to this Deed of Trust and/or Promissory Note, including but not limited to, copies of all such documents,"
- (6) "[a]n explanation of how the amount due on the Monthly Billing Statement was calculated and an explanation and dates when this amount was adjusted and why this amount was adjusted,"

(7) "[a] statement of all fees, rebates, refunds, kickbacks, profits and gains made to any entity involved in this Deed of Trust and Promissory Note and or Settlement Services,"

(8) [\*22] "[a]ll letter, emails, faxes, recordings and or other correspondence (including transmittals) regarding this Deed of Trust and Promissory Note," and

(9) "[n]ames and addresses of all servicers, sub-servicers and designated agents of this Deed of Trust and/or Promissory Note, and all payments for services rendered on this Deed of Trust and Promissory Note that went to such servicers and sub-servicers including inspection fees, appraisals, BPO's, etc."

(*Id.*) Plaintiffs' second letter to Guild Mortgage is similar to the first, but requests an additional seven categories of information or documents. (*Id.*)

Because Plaintiffs letters effectively demand anything and everything that relates to their loan, from its inception, as well as to the Deed of Trust, their letters do not assist Guild Mortgage in identifying and investigating any purported discrepancies with the servicing of their loan. Such broad requests for information and documentation related generally to Plaintiffs' loan are not covered by section 2605 of Title 12. See Derusseau v. Bank of Am., N.A., No. 11 CV 1766 MMA (JMA), 2011 U.S. Dist. LEXIS 136508, 2011 WL 5975821, at \*4 (S.D. Cal. Nov. 29, 2011); see also Rymal v. Bank of Am., No. CV 10-00280 DAE-BMK, 2011 U.S. Dist. LEXIS 140491, 2011 WL 6100979, at \*4 (D. Hawaii Dec. 6, 2011) [\*23] (dismissing complaint for failing to adequately allege facts to establish that request was "qualified written request" under RESPA); Lettenmaier v. Fed. Home Loan Mortg. Corp., No. CV-11-156-HZ, 2011 U.S. Dist. LEXIS 88277, 2011 WL 3476648, at \*12 (D. Or. Aug. 8, 2011) (dismissing a RESPA claim because plaintiffs failed to "attach a copy of their correspondence to the Complaint or to allege facts showing the communication concerned servicing of the loan as defined by the statute").

Section 2605 only requires loan servicers to respond to a proper qualified written request by correcting the account discrepancy, explaining why the account is correct, or if the information is unavailable, by providing contact information for someone who can assist the borrower with her inquiry. See 12 U.S.C. §§ 2605(e)(2)(A)-(C). Thus, even if Plaintiffs' letters were otherwise proper qualified written requests under the statute, their requests far exceed the scope of information that Guild Mortgage is required to provide in response. Guild Mortgage has no statutory obligation under RESPA to provide Plaintiffs the extraordinary amount of information and documents that they requested in their letters. See Derusseau, 2011 U.S. Dist. LEXIS 136508, 2011 WL 5975821, at \*4.

Finally, [\*24] Plaintiffs' complaint fails to adequately allege that they suffered damages as a result of Guild Mortgage's alleged conduct. Under section 2605(f)(1) of Title 12, at a minimum, Plaintiffs must allege the "actual damages" they suffered as a result of Guild Mortgage's failure to respond to their purported qualified written requests. See Derusseau, 2011 U.S. Dist. LEXIS 136508, 2011 WL 5975821, at \*4 (citing Garcia v. Wachovia Mortg. Corp., 676 F. Supp. 2d 895, 909 (C.D. Cal. 2009)); see also Rymal, 2011 U.S. Dist. LEXIS 140491, 2011 WL 6100979, at \*5-6 (dismissing RESPA claim where plaintiff provided only conclusory allegations of damages, and collecting myriad similar cases). Plaintiffs' vague, conclusory allegations that they are entitled to damages as a result of Guild Mortgage's alleged statutory violation (Compl. ¶¶ 94-95) are insufficient, as they do not identify any specific identifiable damages Plaintiffs suffered as a result of Guild Mortgage's alleged failure to respond. See 12 U.S.C. § 2605(f)(1). "General allegations of harm are insufficient." See Derusseau, 2011 U.S. Dist. LEXIS 136508, 2011 WL 5975821, at \*4.

Plaintiffs' letters do not constitute "qualified written requests" under section 2605(e) of Title 12. Further, Plaintiffs do not identify or allege the [\*25] actual damages they suffered. For both reasons, Plaintiffs have failed to state a RESPA violation. Moreover, the court concludes leave to amend this

claim would be futile because Plaintiffs' underlying letters are not qualified written requests, and therefore cannot serve as the basis for a RESPA violation. See 2011 U.S. Dist. LEXIS 136508, [WL] at \*5.

#### **D. NWTs' MOTION TO DISMISS**

For many of the same reasons stated above, the court also grants NWTs' motion to join Guild Mortgage and MERS' motion to dismiss (Dkt. # 11). Plaintiffs' claims for declaratory relief and quiet title, which are based on faulty legal grounds concerning the alleged impropriety of the role of MERS in Plaintiffs' loan transaction and Deed of Trust, and which are deemed waived under Washington's Deed of Trust Act, are as worthy of dismissal when asserted against NWTs as they are when asserted against Guild Mortgage and MERS. Further, RESPA creates no obligations on the part of the trustee to respond to qualified written requests. See 12 U.S.C. § 2605(e)(1). In any event, Plaintiffs have stated no factual allegations that they directed a qualified written request to NWTs. Plaintiffs' complaint is devoid of sufficient factual matter alleged against [\*26] NWTs to "state a claim to relief that is plausible on its face." Iqbal, 129 S.Ct. at 1949. Accordingly, the court dismisses Plaintiffs' claims with respect to NWTs as well.

#### **E. PLAINTIFFS' MOTION TO CONTINUE DEFENDANTS' MOTIONS TO DISMISS AND/OR AMEND THEIR COMPLAINT**

Plaintiffs have moved for leave to file an amended complaint that adds three additional causes of action: (1) wrongful foreclosure, (2) intentional infliction of emotional distress or the tort of outrage, and (3) violation of Washington's CPA, RCW 19.86, et seq. (Plaint. Mot. at 2.) As discussed below, the court denies Plaintiffs' motion to amend their complaint because the additional claims they propose are subject to dismissal under Federal Rule of Civil Procedure 12(b)(6). Accordingly, Plaintiffs' proposed amendments would be futile. See Ventress v. Japan Airlines, 603 F.3d 676, 680-81 (9th Cir. 2010) (noting that district court acts within its discretion to deny leave to amend when the amendment would be futile). Plaintiffs also have moved to continue Defendants' motions to dismiss until Defendants had an opportunity to "expand their motion[s] to dismiss" to encompass the additional causes of action in Plaintiffs' proposed [\*27] amended complaint. (Plaint. Mot. at 2.) The court also denies Plaintiffs' motion to continue as moot.

Initially, the court notes that, like Plaintiffs' claims for declaratory relief and quiet title, Plaintiffs' proposed state law claims for wrongful foreclosure against Guild Mortgage and intentional infliction of emotional distress would be barred by the waiver doctrine under Washington's Deed of Trust Act, RCW ch. 61.24. The same would not be true, however, with regard to Plaintiffs' proposed claim under Washington's CPA, RCW 19.86, et seq., or with respect to their proposed claims for wrongful foreclosure against NWTs. The Deed of Trust Act was amended in 2009 to permit claims for money damages after a foreclosure sale based upon (1) fraud or misrepresentation, (2) claims under Title 19 RCW, (3) the failure of the trustee to "materially comply" with the provisions of the Act, and (4) a violation of RCW 61.24.026. See RCW 61.24.127; Gossen, 2011 U.S. Dist. LEXIS 120275, 2011 WL 4939828, at \*6. Plainly, subsection two of this provision would apply to Plaintiffs' proposed CPA claim. It is less clear to the court whether subsection three would apply to Plaintiffs' claim for wrongful foreclosure against NWTs. The court [\*28] found no case law providing any guidance. Ultimately, however, the court need not decide this issue, because even if not barred by the waiver doctrine as a result of the 2009 amendments to Washington's Deed of Trust Act, all of the Plaintiffs' proposed claims would be subject to dismissal on other grounds as well, as discussed below.

#### **1. Plaintiffs' Proposed Claim for Wrongful Foreclosure**

Plaintiffs' proposed claim for wrongful foreclosure is subject to dismissal under Rule 12(b)(6). Washington's Deed of Trust Act, RCW ch. 61.24, et seq., governs non-judicial foreclosure procedures.

In order for a foreclosure to begin, a borrower must be in default on his mortgage and then be given 30 days notice and an opportunity to cure the default. See RCW 61.24.030. Here, Plaintiffs do not allege that they did not default on their mortgage, that Defendants failed to give them proper notice, or that they otherwise violated any foreclosure procedures under the Deed of Trust Act.

Indeed, in their proposed amended complaint, Plaintiffs concede that they "fell behind on their mortgage payments when primary borrower, Nusrat Bhatti, lost her job as a nurse." (Am. Comp. ¶ 88.) Although they allege that she [\*29] soon found new work, her reduced hourly rate "not only made them fall behind on the mortgage, but all other debt" as well. (*Id.*) Plaintiffs allege that application of an insurance settlement to their mortgage "brought the mortgage current,"<sup>3</sup> but the lack of any payment relief from the bank did not allow them to maintain "a performing asset." (*Id.* ¶ 89.) A claim for wrongful foreclosure is properly dismissed where there are no allegations that the plaintiff is not in default. See Cervantes, 656 F.3d at 1043; Marks v. Green Tree Serv. and Default Resolution Network, No. 10-17478, 2011 U.S. App. LEXIS 22181, 2011 WL 5316758, at \*1 (9th Cir. Nov. 2, 2011) ("The district court properly dismissed [plaintiff's] wrongful foreclosure claim because [plaintiff] failed to show that she was in default on her mortgage loan.") (unpublished).

Plaintiffs also allege that they repeatedly applied for a loan modification, and also sought bank approval of a short-sale. (*Id.* ¶¶ 90-97.) They allege that the bank declined to approve a loan modification multiple times, and rejected the proposed [\*30] short-sale. (*Id.* ¶¶ 91, 93, 95-97.) Guild Mortgage was under no legal obligation to approve a short sale on Plaintiffs' property or to approve a loan modification prior to the institution of foreclosure proceedings. See, e.g., Lawson v. Ocwen Loan Serv., LLC, No. C10-5481BHS, 2011 U.S. Dist. LEXIS 12125, 2011 WL 564376, at \*2 (W.D. Wash. Feb. 8, 2011) (dismissing claim for wrongful foreclosure and stating that ". . . [Plaintiff] fails to show, even assuming Defendants did in fact enter into the forbearance agreements as he alleges, how Defendants violated the Deed of Trust Act in proceeding with the foreclosure process when [plaintiff] failed to cure his default."), vacated in part on other grounds, No. C10-5481BHS, 2011 U.S. Dist. LEXIS 48371, 2011 WL 1739997 (W.D. Wash. May 5, 2011). Accordingly, the court denies Plaintiffs' motion to amend their complaint to state a claim for wrongful foreclosure.

## **2. Plaintiffs' Proposed Claim for Intentional Infliction of Emotional Distress**

Plaintiffs' proposed claim for intentional infliction of emotional distress also would be subject to dismissal under Federal Rule of Civil Procedure 12(b)(6). Intentional infliction of emotional distress, also called the tort of outrage, requires proof of (1) extreme [\*31] and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress. Kloepfel v. Bokor, 149 Wn.2d 192, 66 P.3d 630, 632 (Wash. 2003). The first element requires proof that the conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Robel v. Roundup Corp., 148 Wn.2d 35, 59 P.3d 611, 619 (Wash. 2002). The Court makes the initial determination of whether "reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability." Dombrosky v. Farmers Ins. Co. of Wash., 84 Wn. App. 245, 928 P.2d 1127, 1137 (Wash. Ct. App. 1996).

The conduct Plaintiff complains of predominately relates to the role of MERS in the Deed of Trust and the foreclosure process. The court has already ruled against Plaintiffs with respect to their allegations concerning MERS. Further, Plaintiffs "have not plead any facts from which the court could reasonably infer that any of the defendants committed any 'extreme and outrageous' conduct in their dealings with [Plaintiffs], or that the emotional distress complained [\*32] of was inflicted

<sup>3</sup> (See also Am. Compl. ¶ 82 (" . . . Plaintiffs paid approximately \$18,000 to bring the account current with Guild [Mortgage] on or about May 2010."))

intentionally or recklessly." See, e.g., *Thepvongsa v. Reg'l Trustee Serv. Corp.*, No. No. C10-1045RSL, 2011 U.S. Dist. LEXIS 7853, 2011 WL 307364, at \*3-\*4 (W.D. Wash. Jan. 26, 2011) (no outrageous conduct in foreclosure process), *Schanne v. Nat'l Mortg., LLC*, No. C10-5753BHS, 2011 U.S. Dist. LEXIS 124645, 2011 WL 5119262, at \*4-\*5 (W.D. Wash. Oct. 27, 2011) (same); *Bain v. Metro. Mortgage Group Inc.*, No. C09-0149 JCC, 2010 U.S. Dist. LEXIS 22690, 2010 WL 891585, at \*3-\*4 (W.D. Wash. Mar. 11, 2010) (same). Accordingly, the court denies Plaintiffs' motion to amend their complaint to add a claim for intentional infliction of emotional distress. To amend their complaint to add such a claim would be futile because it is subject to dismissal under *Federal Rule of Civil Procedure 12(b)(6)*.

### **3. Plaintiffs' Proposed Claim for Violation of the CPA**

To prevail on a CPA claim, a plaintiff must show: (1) an unfair or deceptive act or practice; (2) that occurs in trade or commerce; (3) a public interest; (4) injury in their business or property; and (5) a causal link between the unfair or deceptive act and the injury suffered. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054, 1061 (Wash. 1993). Failure to satisfy even one of the elements is fatal [\*33] to a CPA claim. See *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531, 540 (1986) ("A successful plaintiff is one who establishes all five elements of a private CPA claim.").

Plaintiffs' proposed CPA claim is based on their theory that the Deed of Trust is "null and void because MERS has no valid recorded interest in plaintiffs' Deed of Trust, Note, or Property," and that "Defendants all engaged in a scheme which was designed to deceive Plaintiffs in this matter." (Am. Compl. ¶¶ 115-126.) The court has already rejected Plaintiffs' argument based on MERS' role. As discussed above, where borrowers have specifically agreed to MERS' role by executing the Deed of Trust, they cannot later challenge that role. See *Cebrun v. HSBC Bank USA, N.A.*, No. C10-5742BHS, 2011 U.S. Dist. LEXIS 9891, 2011 WL 321992, at \*3 (W.D. Wash. Feb. 2, 2011) ("[C]ourts consistently hold, when evaluating similar deeds, that MERS acted as a beneficiary and possessed the rights set out [in the deed of trust]."); *Vawter*, 707 F. Supp. 2d at 1125-1126 (dismissing claim on basis that MERS is a proper beneficiary under the language of the deed of trust). Further, Plaintiffs allege no facts underpinning its conclusory allegation [\*34] that they suffered harm as a result of MERS' role as beneficiary under the Deed of Trust and its assignment to Guild Mortgage. (See Am. Compl. ¶ 130.) Such conclusory allegations are insufficient to "state a claim to relief that is plausible on its face." *Iqbal*, 129 S.Ct. at 1949. Accordingly, the court denies Plaintiffs' motion to amend its complaint to add this cause of action.

Because the court has found that each of the proposed claims that Plaintiffs seek to add in their proposed amended complaint would be subject to dismissal under *Federal Rule of Civil Procedure 12(b)(6)*, the court denies Plaintiffs' motion to amend their complaint (Dkt. # 16). The court further denies their motion for a continuance of Defendants' motion to dismiss their original complaint (Dkt. # 16) as moot. Finally, because the court has denied Plaintiffs' motion to amend their complaint, the court grants Defendants' motion to strike Plaintiffs' amended complaint (Dkt. # 21).

### **IV. CONCLUSION**

Based on the forgoing, the court GRANTS Guild Mortgage and MERS' motion to dismiss in its entirety. (Dkt. # 8.) The court also GRANTS NWTs' motion to join Defendants' motion to dismiss (Dkt. # 11). Accordingly, all claims [\*35] against all Defendants are dismissed with prejudice in this matter. The court also DENIES Plaintiffs' motion to continue Defendants' motion to dismiss and to amend Plaintiffs' complaint (Dkt. # 16). As discussed above, Plaintiffs' proposed new claims are subject to dismissal under *Rule 12(b)(6)*, and therefore the amendments would be futile. Finally, the court GRANTS Guild Mortgage and MERS' motion to strike Plaintiffs' amended complaint. (Dkt. # 21).

Dated this 16th day of December, 2011.

/s/ James L. Robart

JAMES L. ROBART

United States District Judge

## **APPENDIX 3**

## **Borowski v. BNC Mortg., Inc.**

United States District Court for the Western District of Washington

August 27, 2013, Decided; August 27, 2013, Filed

CASE NO. C12-5867 RJB

### **Reporter**

2013 U.S. Dist. LEXIS 122104; 2013 WL 4522253

EDWARD C. BOROWSKI, Plaintiff, v. BNC MORTGAGE, INC.; LEHMAN BROTHERS HOLDINGS, INC.; STRUCTURED ASSET SECURITIES CORPORATION; STRUCTURED ASSET INVESTMENT LOAN TRUST 2004-2; BANK OF AMERICA, NA; JPMORGAN CHASE BANK, NA; AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS (MERS); ALL PERSONS CLAIMING BY, THROUGH OR UNDER SUCH PERSON, ALL PERSONS UNKNOWN, CLAIMING ANY LEGAL OR EQUITABLE TITLE, ESTATE, LIEN OR INTEREST IN THE PROPERTY DESCRIBED IN THE COMPLAINT ADVERSE TO PLAINTIFF'S TITLE THERETO; AND DOES 1 TO 10, inclusive, Defendants.

**Subsequent History:** Reconsideration denied by, Stay denied by *Borowski v. BNC Mortg., Inc., 2013 U.S. Dist. LEXIS 153161 (W.D. Wash., Oct. 24, 2013)*

### **Core Terms**

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mortgage, trust deed, summary judgment, lender, allegations, quiet title, beneficiary, provides, cause of action, ownership, borrower, parties, void, foreclosure, genuine, declaratory relief, material fact, mortgage loan, real estate, declaration, obligations, Settlement, successor, servicer, assigns

**Counsel:** [\*1] Edward C Borowski, Plaintiff, Pro se, CAMAS, WA.

For Mortgage Electronic Registration Systems Inc (MERS), JP Morgan Chase Bank NA, Defendants: Daniel E Stowe, Michael J McMahon, ETTER MCMAHON LAMBERSON CLARY TPOPPMANN & ORESKOVICH, SPOKANE, WA.

**Judges:** ROBERT J. BRYAN, United States District Judge.

**Opinion by:** ROBERT J. BRYAN

### **Opinion**

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#### ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on cross-motions for summary judgment. Defendants JPMorgan Chase Bank, NA (Chase) and Mortgage Electronic Registration Systems, Inc. (MERS) move to dismiss Plaintiff's complaint and causes of action in their entirety. Dkt. 22. In filing a response, the Plaintiff has filed a "countermotion" for summary judgment. Dkt. 26. The Court has considered the pleadings in support of and in opposition to the motions and the record herein.

#### **INTRODUCTION AND BACKGROUND**

This is an action brought by Plaintiff Edward C. Borowski for declaratory judgment and to quiet title. Dkt. 1 pp. 1-2. As alleged in Plaintiff's *pro se* Complaint, Plaintiff is the current owner of certain real

property located at 23613 Northeast 9th Street - Camas, Washington (Property). Dkt. 1 p. 2. Plaintiff disputes the current mortgage recorded against title [\*2] to this property, "in that originating mortgage lender, and others alleged to have ownership, have unlawfully sold, assigned and/or transferred their ownership and security interest in a Promissory Note and mortgage related to the Property, and, thus, do not have lawful ownership or a security interest in Plaintiff's home." Dkt. 1 pp. 2. Plaintiff seeks a declaration of interests in the property and for the cancellation of his mortgage. *Id.* Plaintiff's Complaint asserts the following causes of action (1) quiet title, (2) declaratory relief, (3) violation of the Real Estate and Settlement Procedures Act, 12 U.S.C. § 2601, et seq., and (4) violation of the Truth in Lending Act, 15 U.S.C. § 1641(g). Dkt. 1. <sup>1</sup> Within the Complaint, Plaintiff acknowledges that he has a mortgage on the subject property (Dkt. 1 p. 2), that the Defendant Chase is servicing the "underlying promissory note and associated mortgage" (Dkt. 1 pp. 2-3), and that the Defendant MERS is identified as the "Beneficiary under the Mortgage or mortgage associated with Plaintiffs Note " (Dkt 1 p. 10).

In support of the motion for summary judgment, Defendants Chase and MERS have introduced documentary evidence that on November 6, 2003, as part of the original loan documents for the subject property, the Plaintiff executed an "Adjustable Rate Note" promising to pay \$185,000.00 and a "Deed of Trust" with the lender BNC Mortgage, Inc. Dkt. 23-1 pp. 2-5; Dkt. 23-1 pp. 7-21. On November 15, 2011, the Plaintiff executed a "Loan Modification Agreement" with CHASE bearing an effective date of December 1, 2011. Dkt. 23-1 pp. 23-28. The 2011 Loan Modification Agreement necessarily makes reference to and, as indicated, modifies the first lien "Security Instrument" and "Note" which were executed by the Plaintiff in 2003. Dkt. 23-1 p. 23. As it relates to MERS and CHASE, respectively, the Loan Modification Agreement provides in paragraphs K and L as follows:

K. That MERS holds only legal title to the interests granted by the Borrower in the mortgage, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of [\*4] those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of lender including, but not limited to, releasing and cancelling the mortgage Loan.

L. I acknowledge and agree that if the Lender executing this Agreement [CHASE] is not the current holder or owner of the Note and Mortgage, that such party is the authorized servicing agent for such holder or owner, or its successor in interest, and has full power and authority to bind itself and such holder and owner to the terms of this modification.

Dkt. 23-1 p. 26.

The Deed of Trust executed by the Plaintiff in 2003 provides that MERS is acting as a nominee, or agent, for the original lender BNC Mortgage, Inc., and the lender's successors and assigns. Dkt. 23-1 p. 7-8. The Deed of Trust also provides that MERS is the beneficiary under the security instrument. *Id.* The Adjustable Rate Note executed by the Plaintiff in 2003 contains the rights and obligations of the respective parties which include (1) Borrower's Promise to Pay; (2) Borrower's Failure to Pay as Required; (3) Giving of Notices; (4) Obligations of Persons Under this Note"; and (4) Secured Note. Dkt. 23-1 pp. 2-4.

In [\*5] response to Defendants' motion for summary judgment, and apparently in support of his counter motion for summary judgment, the Plaintiff has filed a multitude of documents, most which

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<sup>1</sup> Of the multiple Defendants named in the Complaint, only Chase and MERS have appeared in this action. Dkt. 6 and Dkt. 7. The [\*3] remaining named Defendants do not appear to have been properly served. See Dkt. 10 and Dkt. 11.

appear irrelevant to the claims made in his Complaint. See Dkt. 25-40. Plaintiff "cannot expect the Court to comb the record and make the party's case for it." *Fye v. Oklahoma Corp. Comm'n*, 516 F.3d 1217, 1223 (10th Cir. 2008). A review of the record does reveal that many of Plaintiff's allegations appear to be based upon a document entitled "Closed Loan Forensic Loan Securitization Legal Chain of Title and Analysis Report" that Plaintiff obtained from a company called Audit Pros Inc., and the accompanied affidavit of Javier A. Taboas, a purported expert on residential mortgage finance transactions. Dkt. 31- Dkt. 39. Despite the volume of materials, including the analysis of the chain of ownership of the Deed of Trust and Note, Plaintiff's submissions do not support any of Plaintiff's claims.

## **SUMMARY JUDGMENT STANDARDS**

Summary judgment is appropriate only when the pleadings, depositions, answers to interrogatories, affidavits or declarations, stipulations, admissions, answers to interrogatories, and other [\*6] materials in the record show that "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. In assessing a motion for summary judgment, the evidence, together with all inferences that can reasonably be drawn there from, must be read in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

The moving party bears the initial burden of informing the court of the basis for its motion, along with evidence showing the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). On those issues for which it bears the burden of proof, the moving party must make a showing that is sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party. *Idema v. Dreamworks, Inc.*, 162 F.Supp.2d 1129, 1141 (C.D. Cal. 2001).

To successfully rebut a motion for summary judgment, the non-moving party must point to facts supported by the record which demonstrate a genuine issue of material fact. *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736 (9th Cir. 2000). A "material [\*7] fact" is a fact that might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute regarding a material fact is considered genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, at 248. There must be specific, admissible evidence identifying the basis for the dispute. *S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co., Inc.*, 690 F.2d 1235, 1238 (9th Cir. 1980). The mere existence of a scintilla of evidence in support of the party's position is insufficient to establish a genuine dispute; there must be evidence on which a jury could reasonably find for the party. *Anderson*, at 252.

## **QUIET TITLE**

The portions of Plaintiff's Complaint relating to the quiet title claim allege as follows:

The basis for Plaintiff seeking of quiet title is that the current mortgage security instrument held against title is invalid in that it lists MERS as a beneficiary of the mortgage. As cited previously, if MERS is a beneficiary of a security instrument, then that security instrument is invalid.

...

Plaintiff is entitled to equitable relief and quiet title ... declaring [\*8] Plaintiff to be the title owner of record of the property as to effective date of said cancellation of any Mortgage recorded against title and quieting Plaintiffs title therein[.] ... Plaintiffs Note has been paid off. All of Plaintiffs Note obligations have been satisfied.

Dkt. 1 pp. 17-18.

Quiet title actions are "designed to resolve competing claims of ownership ... [or] the right to possession of real property." *Kobza v. Tripp*, 105 Wn.App. 90, 95, 18 P.3d 621 (2001). Washington's statute governing quiet title actions recognizes that a deed of trust creates only a secured lien on real property, and does not convey any ownership interest or right to possess the subject property. *RCW 7.28.230(1)*.

The fact that MERS cannot lawfully act as a beneficiary under the Deed of Trust does not void the Deed of Trust. As the Washington Supreme Court stated in *Bain v. Metropolitan Mortg. Group*, 175 Wn.2d 83, 285 P.3d 34 (2012), 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.* p. 112. While declining to address the question, the court stated that it "tend[s] to agree" with MERS' [\*9] 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.* p. 114. Plaintiff's claim that the title is void because MERS is designated a beneficiary of the Deed of Trust is without merit.

A quiet title claim against a mortgagee requires an allegation that the mortgagor is the rightful owner of the property, that is, that the mortgagor has paid an outstanding debt secured by the mortgage. If the action is against a purported lender or otherwise involves a deed of trust, a plaintiff must also allege facts demonstrating they have satisfied their obligations under the deed of trust. See *Kelley v. MERS, Inc.*, 642 F. Supp. 2d 1048, 1057 (N.D. Cal. 2009). Although Plaintiff contends that he has paid the debt owed on the mortgage loan, the evidence is clear that there is an outstanding balance owed by Plaintiff. Plaintiff cannot show the required prerequisite for a quiet title action.

Plaintiff's quiet title claim will be dismissed with prejudice.

## **DECLARATORY RELIEF**

Plaintiff's Complaint provides the following allegations against the Defendants in the cause of action seeking declaratory relief:

Plaintiff [\*10] contends that [CHASE] has no legal right to collect mortgage payment relating to the mortgage recorded against title of Plaintiffs property.

Plaintiff contends that ... MERS cannot validly assign its interests in a mortgage or deed of trust. As such the appointment of MERS renders any mortgage or deed of trust listing MERS as beneficiary as a void instrument.

Plaintiff therefore request[s] a judicial determination of the rights, obligations and interest of the parties with regard to the Property [.]

Dkt. 1 pp. 19.

The Declaratory Judgment Act, *28 U.S.C. § 2201*, provides a federal court with discretionary jurisdiction to hear declaratory judgment actions. *Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1223 (9th Cir. 1998). The Act states that in a case of actual controversy within its jurisdiction any court of the United States may declare the rights and other legal relations of any interested party seeking such declaration. *28 U.S.C. § 2201*. This is an incorporation of the Article III constitutional case or controversy requirement. *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 669 (9th Cir. 2005).

One element of the case-or-controversy requirement is that Plaintiffs must establish [\*11] that they have standing to sue. Raines v. Byrd, 521 U.S. 811, 818, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997). To establish Article III standing, a Plaintiff must establish an invasion of a legally protected interest which must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." Monsanto Co. v. Geertson Seed Farms, \_\_\_\_\_ U.S. \_\_\_\_\_, 130 S. Ct. 2743, 2751, 177 L. Ed. 2d 461 (2010).

Plaintiff has not alleged an imminent injury traceable to the Defendants, nor is the controversy in this case of sufficient immediacy to warrant declaratory relief. There is no allegation in the Complaint that any of these Defendants have begun or threatened to initiate foreclosure proceedings. Although, at some point, it is possible someone might commence foreclosure proceedings against Plaintiff, there is no evidence that any of the Defendants have done so yet, and there is no allegation showing that foreclosure proceedings are imminent. The claimed threat of numerous foreclosure actions, from entities that may or may not have authority to foreclose, is speculative because they are future events that may never occur. The request that the Court determine the legal rights of the parties [\*12] in order to preclude anyone from initiating foreclosure proceedings is in actuality a request for an advisory opinion, which the court may not give. Plaintiff's allegations are insufficient to show there exists a substantial controversy of sufficient immediacy to warrant declaratory relief.

The Court need not engage in a lengthy analysis of Plaintiff's underlying theories of recovery. They are not independent causes of action and lack of any legal authority. First, to the extent Plaintiff claims his note is invalid because no Defendant can produce the original notes, a discredited serially advanced theory known as the "show me the note" theory, the Washington Deed of Trust Act does not require that a mortgage servicer or mortgagee produce the original note to the borrower on demand or prior to foreclosure. Rather, Washington law requires that the foreclosing lender demonstrate proof of beneficial ownership of the underlying note to the trustee. RCW 61.24.030(7)(a); Bain v. Metr. Mortg. Group, Inc., 175 Wn.2d 83, 285 P.3d 34 (2012). Second, Plaintiffs' contention that separation of the Note from their Deeds of Trust render the Note unenforceable or excuses payment is contrary to Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034, 1044 (9th Cir. 2011) [\*13] (rejecting the "separation of the note" theory). Third, there is no authority which provides that the failure to appoint a successor trustee on the Deed of Trust is a basis for extinguishing the instrument. Indeed, RCW 61.24.010(2) sets out a process for appointing a replacement or successor trustee. Fourth, there is ample authority that borrowers, as third parties to the assignment of their mortgage (and securitization process), cannot mount a challenge to the chain of assignments unless a borrower has a genuine claim that they are at risk of paying the same debt twice if the assignment stands. Finally, the Bain decision does not stand for the proposition that naming MERS as a beneficiary on a Deed of Trust voids the deed or invalidates a lender's entitlement to repayment on the loan. The Bain Court specifically stated that it "tended to agree" that a violation of the Deed of Trust Act "should not result in a void deed of trust." Bain, 175 Wn.2d 83, 113, 285 P.3d 34 (2012). At present Plaintiff has asserted no more than a mere demand that Defendants prove their legal status with respect to the Deed of Trust and Note. This does not suffice to establish a case or controversy.

Plaintiff is not entitled [\*14] to declaratory judgment and this claim is subject to dismissal.

## **REAL ESTATE AND SETTLEMENT PROCEDURES ACT**

Plaintiff's third cause of action alleges violations of the Real Estate Settlement and Procedures Act (RESPA):

The loans to Plaintiff by Defendants, BNC MORTGAGE, INC. are federally regulated mortgage loans defined in the Real Estate Settlement Procedures Act ("RESPA") ...

Defendants have violated [RESPA] 12 U.S.C. § 2607(a) which provides: that "no person shall give and no person shall accept any fee, kickback or thing of value pursuant to any agreement or understanding, oral or otherwise that business incident to or a part of a real estate settlement service involving a federal related mortgage loan shall be referred to any person."

Defendants also violated [RESPA], 12 U.S.C. §2607(b) which provides that "no person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed."

Dkt. 1 p. 20.

Plaintiff makes reference to the Defendants generically and makes no specific reference [\*15] to Defendants Chase and MERS in the allegations relating to RESPA violations. See Dkt. 1 pp. 20-22. Plaintiff's RESPA claim, to the extent that it is asserted against the moving Defendants, should be dismissed. Plaintiff makes allegations regarding the original loan, but does not dispute that these Defendants were not involved in that transaction. Plaintiff had failed to plead factual allegations which would entitle Plaintiff to relief under RESPA against Defendants Chase or MERS.

The Defendants are entitled to summary judgment and dismissal of the RESPA claim.

#### **TRUTH IN LENDING ACT**

Plaintiff's fourth cause of action alleges violations of the Truth in Lending Act (TILA). Plaintiff alleges:

Plaintiff alleges that each assignment of his/her promissory note/mortgage required the Defendants and each of them to notify him/her within thirty (30) days of when his loan had been transferred. Plaintiff contends that each Defendant violated 15 U.S.C. §1640, et seq. in that no notice was ever provided to the Plaintiff of the sale of his/her promissory note to each subsequent purchaser of their note.

Dkt. 1 p. 23.

Initially, it appears that Chase is the loan servicer, not "the creditor that is the new [\*16] owner or assignee of the debt" as set forth in the statute, and therefore, Chase cannot have violated this provision. In addition, the Court acknowledges that the TILA claims may be time-barred based on the relevant statutes of limitation. Plaintiff has not provided evidence as to when these alleged violations were to have occurred. The Court makes no finding as to the timeliness of the TILA claims. Further, the failure to comply with the notice provisions results in civil liability for "any actual damage sustained by such person as a result of the failure [.]" 15 U.S.C. § 1640(a)(1). In order to state a TILA claim for actual damages, a plaintiff must demonstrate detrimental reliance upon an inaccurate or incomplete disclosure. Gold Country Lenders v. Smith, 289 F.3d 1155, 1157 (9th Cir. 2002).

Plaintiff has not alleged any facts demonstrating or supporting the inference that he relied to his detriment on the lack of TILA disclosures nor has Plaintiff alleged any actual damages or finance charges related to Chase or MERS alleged TILA violation.

The TILA claim fails and Defendants are entitled to summary judgment.

#### **CONCLUSION**

Based on the foregoing the defendants Chase and MERS are entitled [\*17] to summary judgment dismissing Plaintiff's Complaint.

Therefore, it is ORDERED:

1. Defendants JPMorgan Chase Bank, NA and Mortgage Electronic Registration Systems, Inc.'s Motion for Summary Judgment (Dkt. 22) is **GRANTED**.
2. Plaintiff's Counter Motion for Summary Judgment (Dkt. 26) is **DENIED**.
3. Plaintiff's Complaint and causes of action in their entirety are **DISMISSED WITH PREJUDICE** as to Defendants JPMorgan Chase Bank, NA and Mortgage Electronic Registration Systems, Inc.'s
4. The Clerk is directed to send uncertified copies of this Order to all counsel of record and to Plaintiff, appearing *pro se*, at said party's last known address.

Dated this 27th day of August, 2013.

/s/ Robert J. Bryan

ROBERT J. BRYAN

United States District Judge

## **APPENDIX 4**

## **Hanson v. Wells Fargo Bank N.A.**

United States District Court for the Western District of Washington

May 26, 2011, Decided; May 26, 2011, Filed

No. C10-1948Z

### **Reporter**

2011 U.S. Dist. LEXIS 57599; 2011 WL 2144836

EDGAR L. HANSON, Plaintiff, vs. WELLS FARGO BANK N.A., Defendant.

### **Core Terms**

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Audit, Deed, foreclosure, summary judgment motion, summary judgment, lis pendens, recorded, cancellation, Auditor, notice, Declaration, securitized, contends, default, voluntary dismissal, successor, quiet

**Counsel:** [\*1] Edgar L Hanson, Plaintiff, Pro se, Vancouver, WA.

For Wells Fargo Bank NA, Defendant: Abraham K Lorber, Ronald E Beard, LANE POWELL PC (SEA), SEATTLE, WA.

**Judges:** THE HONORABLE THOMAS S. ZILLY, United States District Judge.

**Opinion by:** THOMAS S. ZILLY

### **Opinion**

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ORDER

THIS MATTER comes before the Court on defendant Wells Fargo Bank, N.A.'s ("WF") motion for summary judgment, docket no. 15. Having reviewed the papers filed in support of, and opposition to, defendant's motion, the Court GRANTS the motion.

#### **I. BACKGROUND**

This case arises out of a dispute over certain real property owned by Plaintiff Edgar Hanson, and located at 215 Haddon Road, Anacortes, Washington, 98221 (the "Property"). Compl. at 2, docket no. 1. On August 9, 2006, Hanson refinanced his existing mortgage on the Property with WF. Long Decl., Ex. A, docket no. 18. <sup>1</sup> In exchange for the \$80,000.00 advanced by WF for the refinance,

<sup>1</sup> Hanson moves to strike Exhibit A to the Long Declaration, docket no. 18, which consists of a copy of the promissory note Hanson executed in August 2006. Resp. at 1, docket no. 20. Hanson contends that the promissory note must be stricken because it is currently located in Montana and is not accessible in this district. *Id.* The location of the document, however, is immaterial to its admissibility, and its authenticity is attested to on personal knowledge by Ms. Long, which is sufficient under the rules of evidence for purposes of summary judgment. *See Fed. R. Evid. 901(b)(1); Fed. R. Civ. P. 56(c)*. In the alternative, Hanson argues that the Long declaration, as well as the Lorber Declaration, docket no. 16, and the Hansen Declaration, docket no. 17, should be stricken because the declarations were filed in contravention of a Consent Order between WF and the United States Treasury Department. *See id.*, Ex. A. However, the Consent Order cited by Hanson provides:

Hanson executed a promissory note (the "Note") and deed of trust (the "Deed") in favor of WF. Id.; see also Lorber Decl., Ex. A, docket no. 16. The Deed named Wells Fargo Financial National Bank as the trustee. Lorber Decl., Ex. A, docket no. 16. WF perfected its security interest in the Property by recording the Deed with the Skagit [\*2] County Auditor on August 28, 2006. Id.

Hanson made regular monthly payments on the Note until August 2009. Hansen Decl., Ex. A, docket no. 17. Since then, Hansen has made no payments on the Note. Id. On January 21, 2010, WF recorded an appointment of successor trustee with the Skagit County Auditor that named Bradley Boswell Jones, P.S., ("BBS") as the successor trustee on the Deed. Lorber Decl., Ex. B, docket no. 16.

On August 15, 2010, fourteen months after Hanson stopped making payments on the Note, BBS initiated nonjudicial foreclosure proceedings by issuing a notice of trustee's sale. Id. Ex. C. Around the time BBS issued the notice of trustee's sale, Hanson sought and obtained a "forensic loan audit" (the "Audit Report") that [\*4] purported to show that WF violated a number of federal laws when it originated the loan in 2006. See Resp., Ex. B, docket no. 20. <sup>2</sup> The Audit Report also stated that WF had securitized the Note, and transferred it to an investment trust. Id.

On December 2, 2010, Hanson filed the present lawsuit seeking to halt the nonjudicial foreclosure commenced by the trustee in August. Compl., docket no. 1. Shortly thereafter, Hanson recorded a lis pendens against the Property. Lorber Decl., Ex. D, docket no. 16.

## **II. DISCUSSION**

Although plaintiff's complaint is not a model of clarity, it appears to seek relief from WF's nonjudicial foreclosure, alleging that all of the relevant documents, including the Deed, the Note, the appointment of successor trustee, and the notice of trustee's sale are fraudulent and/or void, and by extension, that WF has no authority to proceed with the foreclosure. Compl., docket no. 1. In the alternative, plaintiff contends that Washington's Deed of Trust Act ("WDOTA") is unconstitutional under the *Thirteenth* [\*5] and *Fourteenth Amendments to the United States Constitution*. Id. Plaintiff also contends that the Court should quiet title in his favor, and award damages for WF's alleged violations of the Truth in Lending Act ("TILA") and the Real Estate Settlement Procedures Act ("RESPA"). <sup>3</sup> Id. WF has moved for summary judgment on all of plaintiff's claims. Mot., docket no. 15.

### **A. Summary Judgment Standard**

The Court shall grant summary judgment if no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) (2010). The moving

Nothing in this Stipulation and Consent or this Order, express or implied, shall give to any person or entity, other than the parties hereto, and their successors hereunder, any benefit or [\*3] any legal or equitable right, remedy or claim under the Stipulation and Consent or this Order.

Id., Ex. A at 27. By its express terms, Hanson does not have standing to enforce the Consent Order. Moreover, the Consent Order does not preclude WF from submitting the subject declarations in this case. To the contrary, the Consent Order merely provides that WF must develop new policies and procedures for conducting foreclosures. See id. at 25. Accordingly, the Court DENIES Hanson's motions to strike.

<sup>2</sup> A more complete version of the Audit Report that has been authenticated by its author is attached as Exhibit C to the complaint. Compl., Ex. C (Mathews Aff.), docket no. 1.

<sup>3</sup> Plaintiff's complaint also makes passing references to the Fair Debt Collection Practices Act and Home Ownership Equity Protection Act, although it contains no allegations relating to these statutes. See Compl. at ¶¶ 12, 25, docket no. 1.

party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A fact is material if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In support of its motion for summary judgment, the moving party need not negate [\*6] the opponent's claim, Celotex, 477 U.S. at 323; rather, the moving party will be entitled to judgment if the evidence is not sufficient for a jury to return a verdict in favor of the opponent. Anderson, 477 U.S. at 249. To survive a motion for summary judgment, the adverse party must present affirmative evidence, which "is to be believed" and from which all "justifiable inferences" are to be favorably drawn. Id. at 255, 257. When the record taken as a whole, could not lead a rational trier of fact to find for the non-moving party, summary judgment is warranted. See, e.g., Beard v. Banks, 548 U.S. 521, 529, 126 S. Ct. 2572, 165 L. Ed. 2d 697 (2006).

## B. Hanson's Withdrawn Claims

In response to WF's motion for summary judgment, Hanson has requested leave to withdraw his claims for violations of TILA, violations of RESPA, and for quiet title. Resp. at ¶¶ 8-9, docket no. 20. Hanson also requests leave to withdraw his constitutional challenges to the WDOTA. Id. at ¶ 5. However, a plaintiff may not voluntarily withdraw claims after the defendant has filed a motion for summary judgment without first obtaining leave of the Court. Fed. R. Civ. P. 41(a)(1)(A)(i). Accordingly, the Court construes Hanson's response as a motion for [\*7] voluntary dismissal.

"The decision to grant a voluntary dismissal under Rule 41(a)(2) is addressed to the sound discretion of the District Court." Hamilton v. Firestone Tire & Rubber Co., 679 F.2d 143, 145 (9th Cir. 1996). In exercising its discretion, "[a] district court may consider whether the plaintiff is requesting a voluntary dismissal only to avoid a near-certain adverse ruling." See Terrovona v. Kincheloe, 852 F.2d 424, 429 (9th Cir. 1988). Here, Hanson's claims face certain dismissal with prejudice. Hanson's TILA and RESPA claims arose, if at all, when Hanson executed the Note and Deed in August 2006. Therefore, Hanson's claims necessarily arose more than four years before he initiated the present lawsuit, and are barred by the respective one and three-year limitations periods in TILA and RESPA. See 15 U.S.C. § 1640(e); 12 U.S.C. § 2614.<sup>4</sup>

Plaintiff's constitutional arguments also lack merit. As the Washington Supreme Court held in 1977, the WDOTA does not violate the due process clause of the Fourteenth Amendment to the United States Constitution. [\*8] See Kennebec, Inc v. Bank of the W., 88 Wn.2d 718, 726, 565 P.2d 812 (1977) ("We hold that [the WDOTA] . . . is passive state involvement and does not constitute significant 'state action' and, therefore, it is [not] violative of the due process clause of the Fourteenth Amendment."). This Court sees no compelling reason to depart from the reasoning in Kennebec.<sup>5</sup>

Similarly, plaintiff's claim that the United States Constitution's Thirteenth Amendment prohibition on involuntary servitude somehow invalidates the WDOTA is frivolous. The Thirteenth Amendment prohibits the "compulsion of services by the use or threatened use of physical or legal action." United States v. Kozminski, 487 U.S. 931, 948, 108 S. Ct. 2751, 101 L. Ed. 2d 788 (1988). [\*9] Plaintiff

<sup>4</sup> To the extent plaintiff contends that WF is liable for common law fraud, any such claim is also barred by Washington's three-year limitations period. RCW 4.16.080(4).

<sup>5</sup> The Court further notes that plaintiff's contention that the WDOTA provides no nonjudicial remedies to individuals is factually incorrect. Plaintiff has the option to halt foreclosure proceedings through the payment of the delinquent amounts owing on the Note. RCW 61.24.090(1) ("At any time prior to the eleventh day before the date set by the trustee for the [foreclosure] sale . . . the borrower . . . shall be entitled to cause a discontinuance of the sale proceedings by curing the default or defaults set forth in the notice.").

has not been compelled to perform any services. To the contrary, plaintiff voluntarily entered into a contract with WF and is free to walk away at any time, which cannot give rise to a *Thirteenth Amendment* claim. See *Wicks v. S. Pac. Co.*, 231 F.2d 130, 138 (9th Cir. 1956) (holding that the defendant union did not violate the *thirteenth amendment* prohibition on involuntary servitude where "[t]here is no contention that [the plaintiff union members] cannot freely leave their employment . . . and thus escape the payment of dues, fees and assessments to these railroad unions.").

Finally, plaintiff's quiet title claim is necessarily derivative of, and dependent upon, the vitality of his other claims. Plaintiff is not entitled to an order quieting title in his favor if WF is within its rights to proceed with the foreclosure. As plaintiff's other claims lack merit, his quiet title claim is equally deficient.

The Court concludes that plaintiff has moved for voluntary dismissal of the foregoing claims in a last-ditch effort to avoid an adverse ruling on WF's motion for summary judgment. Therefore, the Court DENIES plaintiff's motion for voluntary dismissal. See *Terrovona*, 852 F.2d at 429. [\*10] The Court further GRANTS WF's motion for summary judgment and DISMISSES plaintiff's withdrawn claims with prejudice.

### C. Hanson's Remaining Claims

Hanson raises two additional arguments against the dismissal of the case. First, Hanson contends that he is not in default of his obligations under the Note. However, WF submits evidence demonstrating that Hanson has failed to make any payments on the Note since August 2009. Hansen Decl., Ex. A, docket no. 17. Nonpayment is an event of default under the express terms of the Note. Long Decl., Ex. A at § 12, docket no. 18. Hanson submits nothing to refute WF's evidence of non-payment except for his conclusory, unsupported statement that he is not in default, which is insufficient as a matter of law to preclude summary judgment. See *Clouthier v. Cnty. of Contra Costa*, 591 F.3d 1232, 1252 ("[C]onclusory assertions are insufficient to avoid summary judgment.").

In the alternative, Hanson argues that the Note, the Deed, and the other related mortgage documents are invalid or otherwise unenforceable by WF. However the only evidence Hanson submits in opposition to summary judgment is the Audit Report, purportedly prepared by a "Certified Forensic Loan [\*11] Auditor." <sup>6</sup> Resp., Ex. B, docket no. 20. Hanson contends that the Audit Report demonstrates that WF securitized the Note in 2006, and sold it to investors as part of a larger investment trust. As a consequence, Hanson argues that WF has effectively assigned the Note to the trust, and no longer has the authority to foreclose on the Deed.

The Audit Report is sparse on details, and names only the "most likely one or two" trusts in which plaintiff's Note may have been securitized. The Audit Report goes on to [\*12] allege that Hanson's Note was most likely securitized in 2006 as part of the newly created Wells Fargo Home Equity Asset-Backed Securities 2006-3 Trust (the "Trust"), and suggests that Hanson's Note is the loan identified in the Trust's SEC filings as loan number 0156255317 ("Loan '317"). *Id.* at 2. Upon closer inspection of the actual SEC filings, however, the Audit Report's findings are completely baseless.

<sup>6</sup> The credibility of the Audit Report is dubious, and the Court notes that the Federal Trade Commission has issued a consumer alert regarding forensic mortgage loan audit scams. See Federal Trade Commission, FTC Consumer Alert, *Forensic Mortgage Loan Audit Scams: A New Twist on Foreclosure Rescue Fraud* (March 2010) <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt177.shtm>. For purposes of the present motion, however, the Court presumes that the Audit Report is legitimate. See *Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1113 (9th Cir. 2010) (holding that, on summary judgment, the Court must draw all factual inferences in the light most favorable to the nonmoving party).

Indeed, with the exception of the location of the properties, <sup>7</sup> all of the distinguishing characteristics of the two loans are different:

**TABLE 1**

|                                      | <b>Hanson's Note</b> | <b>Loan '317</b> |
|--------------------------------------|----------------------|------------------|
| <b>Amount of Loan</b>                | \$80,000.00          | \$629,000.00     |
| <b>Date Promissory Note Executed</b> | 08/06/2006           | 10/26/2006       |
| <b>Maturity Date</b>                 | 08/28/2021           | 11/1/2036        |
| <b>Date of First Payment</b>         | 09/28/2006           | 12/1/2006        |
| <b>Interest Rate</b>                 | 8.24%                | 8.125%           |
| <b>Length of Loan Term</b>           | 179 Months           | 359 Months       |

Long Decl., Ex. A, docket no. 18; Wells Fargo Home Equity Asset-Backed Securities 2006-3 Trust, Free Writing Prospectus (Nov. 30, 2006) available at <http://www.sec.gov/Archives/edgar/data/1382300/000091412106003659/we6371791-fwp.txt>.

The Audit Report's speculation [\*13] as to the possible securitization of Hanson's Note does not create a dispute of fact, where the underlying SEC filing demonstrates unequivocally that Hanson's Note is not Loan '317. *Newman v. Cty. of Orange*, 457 F.3d 991, 995 (9th Cir. 2006) (holding that speculation is insufficient to preclude summary judgment). The Court has exhaustively reviewed the SEC filings referenced in the Audit Report, and it appears that there is only one other loan in the Trust for property located in Anacortes, Washington: loan 0155712078 ("Loan '078"). Loan '078 is not Hanson's Note either. <sup>8</sup>

The Audit Report does not show that Hanson's loan was securitized or transferred, and Hanson has submitted no other evidence that calls into question the Note, Deed, appointment [\*14] of successor trustee, or the notice of trustee's sale. To the contrary, the record reflects that the documents are valid, and that Hanson has been in default of his obligations under the Note since August 2009. See Lorber Decl., Exs. A-D, docket no. 16; Hansen Decl., Ex. A, docket no. 17. Accordingly, Hanson has failed to meet his burden to show a genuine issue of material fact for trial, and WF is within its rights under the Note and Deed to commence foreclosure proceedings. The Court therefore GRANTS WF's motion for summary judgment, and DISMISSES Hanson's remaining claims with prejudice.

#### **D. The Lis Pendens**

As part of his efforts to halt the foreclosure process, when Hanson initiated this litigation in December 2010, he also recorded a lis pendens against the Property. Lorber Decl., Ex. D, docket no. 16. The lis pendens was recorded with the Skagit County Auditor, and is identified as document number 201012080035. *Id.* WF requests that the Court cancel the lis pendens. Mot., docket no. 15.

The procedure for recording and canceling a lis pendens is governed by statute as follows:

In an action in a United States district court for any district in the state of Washington affecting the title [\*15] to real property in the state of Washington, the plaintiff, at the time

<sup>7</sup> Both Loan '317 and Hanson's Note relate to properties located in Anacortes, Washington. Compare Compl. at 2, docket no. 1, with *id.*, Ex. C at 2.

<sup>8</sup> Loan '078 was executed on September 27, 2006, in the amount of \$192,500.00, at an interest rate of 7.625%, for a term of 358 months. Wells Fargo Home Equity Asset-Backed Securities 2006-3 Trust, Free Writing Prospectus (Nov. 30, 2006) available at <http://www.sec.gov/Archives/edgar/data/1382300/000091412106003659/we6371791-fwp.txt>. As set forth in Table 1 above, none of Loan '078's identifying characteristics match the terms of Hanson's Note.

of filing the complaint . . . may file with the auditor of each county in which the property is situated a notice of the pendency of the action . . . . [T]he court in which the said action was commenced may, in its discretion, at any time after the action shall be settled, discontinued or abated . . . order the notice authorized in this section to be canceled . . . and such cancellation shall be evidenced by the recording of the court order.

RCW 4.28.325 (emphasis added). In light of this Court's Order granting WF's motion for summary judgment and dismissing Hanson's claims, the Court concludes that WF has shown good cause for the cancellation of the lis pendens. Accordingly, the Court hereby CANCELS the lis pendens, recorded with the Skagit County Auditor as Document No. 20102080035. WF shall record a copy of this Order with the Skagit County Auditor to finalize the cancellation. See RCW 4.28.325.

### **III. CONCLUSION**

For the foregoing reasons, the Court GRANTS WF's motion for summary judgment, docket no. 15, and DISMISSES plaintiff's claims with prejudice.

Pursuant to Fed. R. Civ. P. 5.1(b) and 28 U.S.C. § 2403, the Court [\*16] hereby notifies the Washington State Attorney General that the constitutional challenge brought in this case has been REJECTED.

The Clerk is directed to send a copy of this Order to all counsel of record, to plaintiff pro se, and to the Office of the Attorney General, 1125 Washington St. SE, P.O. Box 40100, Olympia, WA 98504-0100.

IT IS SO ORDERED.

DATED this 26th day of May, 2011.

/s/ Thomas S Zilly

Thomas S. Zilly

United States District Judge

## **APPENDIX 5**

## **Mikhay v. Bank of Am., N.A.**

United States District Court for the Western District of Washington

January 11, 2011, Decided; January 12, 2011, Filed

No. 2:10-cv-01464 RAJ

### **Reporter**

2011 U.S. Dist. LEXIS 7326; 2011 WL 167064

ANDREY MIKHAY, Individually, and ANDREY MIKHAY and ELENA MIKHAY, husband and wife, as a marital community. Plaintiffs, vs. Bank of America, N.A. d/b/a Bank of America Home Loans and /or BAC Home Loans, LP; et al.; Defendants.

### **Core Terms**

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Plaintiffs', trust deed, merits, serious question, promissory note, assignation, beneficiary, foreclosure, injunction, likely to prevail, recorded

**Counsel:** [\*1] For Andrey Mikhay, Individually, Elena Mikhay, individually and on behalf of the marital community, Plaintiffs: Edward L. Mueller, MUELLER & ASSOCIATES INC PS, BELLEVUE, WA.

For Bank of America, doing business as Bank of America Home Loans, doing business as BAC Home Loans LP, Mortgage Electronic Registration System Inc, (MERS), Bank of New York Mellon, as trustee for the certificateholders CWALT Inc., Alternative Loan Trust 2006-OA16, Mortgage Pass-Through Certificates formerly known as Bank of New York, ReconTrust Company NA, as agent for Beneficiary, Defendants: John S Devlin , III, Kathleen A Nelson, LANE POWELL PC (SEA), SEATTLE, WA.

For Countrywide Home Loans Inc, also known as Countrywide Home Loans, Defendant: John S Devlin , III, LANE POWELL PC (SEA), SEATTLE, WA.

For Fidelity National Title Company of Washington, Defendant: Adam R. Asher, Thomas F. Peterson, SOCIUS LAW GROUP PLLC, SEATTLE, WA.

For Foreclosure Expeditors/Initiators LLC, Defendant: Lance E Olsen, ROUTH CRABTREE OLSEN, BELLEVUE, WA.

**Judges:** The Honorable Richard A. Jones, United States District Judge.

**Opinion by:** Richard A. Jones

### **Opinion**

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#### **ORDER**

#### **I. INTRODUCTION**

This matter comes before the court on the Plaintiffs' second motion for temporary restraining [\*2] order or preliminary injunction (Dkt. # 24). The court has considered the parties' briefing and supporting evidence, and heard from counsel at a telephone conference. For the reasons explained below, the court DENIES the motion (Dkt. # 24).

## II. BACKGROUND

This case arises from the Plaintiffs Andrey and Elena Mikhay's promissory note (signed on or about June 29, 2006) evidencing a mortgage loan with a Deed of Trust (recorded on June 30, 2006) secured by real property located in Redmond, Washington. According to the Complaint, Defendant Countrywide Bank N.A. ("Countrywide") was the original lender of the loan, and Defendant Mortgage Electronic Registration System, Inc. ("MERS") was the "nominee of the beneficiary" that Countrywide named in the Deed of Trust. See 2d Am. Compl. (Dkt. # 31) ¶¶ 1.4, 1.5.

The Plaintiffs stopped making their mortgage payments, and on June 1, 2010, Defendant ReconTrust Company N.A. ("ReconTrust") sent them a notice of default on behalf of Defendant Bank of New York Mellon ("Mellon"), which identified ReconTrust as agent for the beneficiary and Mellon as the "owner of the note." Mikhay Decl. (Dkt. # 25), Ex. B. On June 14, 2010, MERS recorded a document naming [\*3] ReconTrust as the trustee under the deed of trust. See Nelson Decl. (Dkt. # 39), Ex. B. That same day, MERS recorded a document assigning all beneficial interest in the deed of trust to Mellon. See Nelson Decl. (Dkt. # 39), Ex. C. On July 7, 2010, ReconTrust issued to Plaintiffs a notice of trustee's sale, which has been rescheduled multiple times and is currently scheduled to occur on January 28, 2011.

Plaintiffs filed this lawsuit on September 10, 2010, against, *inter alia*, Mellon, MERS, ReconTrust, and Foreclosure Expeditors/Initiators, LLC ("FEI"). Though the Second Amended Complaint (Dkt. # 31) is far from a model of clarity, it appears that the Plaintiffs' claim against Mellon is that Mellon may not actually own the June 29, 2006 promissory note, given that Plaintiffs never received any evidence of the note's transfer to Mellon. See 2d Am. Compl. ¶ 1.10. Furthermore, Plaintiffs allege that ReconTrust lacks the authority to act as trustee. See 2d Am. Compl. ¶ 1.11. Plaintiffs request, *inter alia*, a declaratory judgment as to who owns the June 29, 2006 promissory note, and that is the only request for relief that is sought against Mellon and Recon Trust. See 2d Am. Compl. ¶¶ 3.1, [\*4] 3.7.

Bank of New York Mellon, MERS, and ReconTrust filed a motion to dismiss (Dkt. # 45), noted for January 14, 2011. Plaintiffs filed this motion for a temporary restraining order against Mellon, ReconTrust, and FEI, to enjoin the nonjudicial foreclosure. Mellon and ReconTrust opposed the motion.

## III. ANALYSIS

### A. Legal Standards.

Preliminary injunctive relief is appropriate if the plaintiff establishes "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008). The Ninth Circuit has also held that "serious questions going to the merits and a hardship balance that tips sharply towards the plaintiff can support issuance of an injunction, so long as the plaintiff also shows a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 622 F.3d 1045, 2010 WL 3665149, at \*8 (9th Cir. 2010).

### B. Plaintiffs Have Not Shown the Existence of Serious Questions Going to the Merits of their Claims Against [\*5] Mellon or ReconTrust.

#### 1. Plaintiffs Have Not Established Serious Questions as to Whether Mellon is the Beneficiary of the Promissory Note With the Right to Foreclose.

Plaintiffs' claim regarding Mellon is two-fold: (1) that there is no evidence the note was ever transferred to Mellon, and (2) that any assignment of MERS's beneficial interest in the deed of trust to Mellon is defective because there is no evidence that the assignment included delivery and endorsement of the note.

Plaintiffs acknowledge the existence of a document titled "Corporation Assignment of Deed of Trust" — dated June 1, 2010, notarized June 9, 2010, and recorded on June 14, 2010 — wherein MERS appoints Mellon as the beneficiary of the deed of trust. See Mikhay Decl. (Dkt. # 25), Ex. C. Plaintiffs argue that this document is insufficient to establish that the promissory note was properly transferred to Mellon, because that document does not establish that all the requirements of "The Prospectus Supplement to Pooling and Servicing Agreement" were met.<sup>1</sup> See Mikhay Decl. (Dkt. # 41), Ex. F at 35-36.

It appears that the thrust of Plaintiffs' argument with regard to the Corporation Assignment of Deed of Trust is that Mellon has not proved that its June 2010 assignment was proper under the terms of the Prospectus Supplement, but Plaintiffs do not cite any obligation on Mellon to inform Plaintiffs of its compliance with those terms or explain why the burden - in the context of the claims made in this lawsuit - should be on Mellon to prove the propriety of its conduct. Furthermore, the terms of the Prospectus Supplement appear to relate to assignments before the closing date, but the Corporation Assignment of Deed of Trust was recorded nearly four years after the closing date. Though Plaintiffs argue that "MERS's belated attempt to assign the loan almost four years after the closing date is invalid and was ineffective to transfer [\*7] to the Plaintiffs' home loan into the trust," Plaintiffs fail to cite any authority prohibiting such assignment or suggest what prejudice occurred as a result. See Pltfs.' Mot. (Dkt. # 40) at 10.

Plaintiffs' arguments regarding Mellon amount to generalized accusations or assumptions of impropriety, but do not connect to specific statutes or laws that render Mellon's assignment invalid. For example, multiple times in the Plaintiffs' briefing, Plaintiffs argue that Mellon has not proved that it owns the promissory note, but Plaintiffs do not cite any authority requiring Mellon to affirmatively prove that ownership to the Plaintiffs. See, e.g., Pltfs.' Reply at 3:15, 7:11, 8:8, 11:11. *But see RCW 61.24.030(7)* (requiring that a trustee has proof that the beneficiary is the owner of the promissory note or obligation secured by the deed of trust, as a prerequisite of instituting a trustee's sale). Furthermore, courts have rejected other plaintiffs' attempts to bring a cause of action based on a beneficiary's failure to produce original notes. See *Vawter v. Quality Loan Serv. Corp. of Washington*, 707 F. Supp. 2d 1115, 1127 (W.D. Wash. 2010); *Freeston v. Bishop, White & Marshall, P.S.*, 2010 U.S. Dist. LEXIS 28081, 2010 WL 1186276 \*6 (W.D. Wash. Mar. 24, 2010).

As [\*8] Plaintiffs agree, Plaintiffs bear the burden of showing that they are likely to prevail on the merits of their claims. See Pltfs.' Reply at 4:13. Plaintiffs' briefing has not clearly identified the legal basis of the claims, let alone showed that they are likely to prevail on their claims or that there are serious questions going to the merits. On the basis of the record before the court, the court cannot find that Plaintiffs have shown they are likely to prevail in their claims against Mellon, or that there are serious questions as to the merits.

## **2. Plaintiffs Have Not Established Serious Questions as to the Merits of Any Valid Claim Against ReconTrust.**

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<sup>1</sup> It is unclear what Plaintiffs are actually arguing, because they also appear to argue that Mellon has the burden to [\*6] prove that its assignment was valid as of August 30, 2006 - but the assignment was dated in June 2010, and Mellon has never contended that the assignment was valid in August 2006. Regardless, Plaintiffs fail to cite any authority imposing such a burden on Mellon, and it is unclear from the convoluted pleadings and briefing from where such a burden originates.

It is difficult to discern from either the Plaintiffs' Complaint or the Plaintiffs' motion precisely what legal claim they raise against ReconTrust. They allege that ReconTrust is not qualified to be a successor trustee because it "did not and still does not maintain a street address, physical presence and telephone service required by RCW 61.24.030(6) to qualify as a trustee to do a non-judicial foreclosure sale at any time relevant to the Notice of Default . . . or the Notice of Trustee's Sale . . . ." Pltfs.' Mot. at 12. Plaintiffs [\*9] also argue that ReconTrust's hiring Washington business FEI to conduct the foreclosure sale does not cure ReconTrust's violation of RCW 61.24.030(6). They do not, however, cite any authority supporting a cause of action for violation of RCW 61.24.030(6). To the extent that Plaintiffs' claim against ReconTrust could be construed as a claim for wrongful institution of a non-judicial foreclosure proceeding, Plaintiffs have not cited any authority supporting their ability to raise such a claim where no trustee's sale has occurred and a number of courts have recently found that such a cause of action does not exist. See Vawter, 707 F. Supp. 2d at 1123-24 (following a number of Washington cases holding that there is no statutory or case authority establishing the existence of a cause of action for wrongful initiation of a foreclosure sale). Thus, the court cannot find that Plaintiffs are likely to prevail on the merits of a claim against ReconTrust, or that they have shown that serious questions exist as to the merits of such a claim.

Because the Plaintiffs have not shown that they are likely to prevail on their claims or that there are serious questions about the merits of their claims, they [\*10] have not shown that they are entitled to injunctive relief. Thus, the court will deny their motion.

#### **IV. CONCLUSION**

For the reasons explained above, the court DENIES Plaintiffs' motion (Dkt. # 24).

DATED this 11th day of January, 2011.

/s/ Richard A. Jones

The Honorable Richard A. Jones

United States District Judge

## **APPENDIX 6**

**Ukpoma v. United States Bank Nat'l Ass'n**

United States District Court for the Eastern District of Washington

May 9, 2013, Decided; May 9, 2013, Filed

NO: 12-CV-0184-TOR

**Reporter**

2013 U.S. Dist. LEXIS 66576; 2013 WL 1934172

ANGELA UKPOMA, Plaintiff, v. U.S. BANK NATIONAL ASSOCIATION, et al., Defendants.

**Subsequent History:** Motion denied by Ukpoma v. U.S. Bank N.A., 2014 U.S. Dist. LEXIS 65780 (E.D. Wash., May 12, 2014)

**Core Terms**

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trust deed, foreclose, assignments, entitled to summary judgment, indorsement, securitized, security interest, foreclosure, notice, summary judgment motion, Mortgage, Services, asserts, lack of standing, trustee sale, allegations, documents, allonge, reasons

**Counsel:** [\*1] For Angela Ukpoma, Plaintiff: Lakisha M Morris, LEAD ATTORNEY, Morris Law Office, Seattle, WA.

For U S Bank National Association, as Trustee, on behalf of the Holders of Adjustable Rate Mortgage Trust 2007-2 Adjustable Rate Mortgage-Backed Pass-Through Certificates, Series 2007-2, Mortgage Electronic Registration Systems Inc, as Nominee for Credit Suisse Financial Corporation, Defendants: John Eugene Glowney, Stoel Rives LLP - SEA, Seattle, WA.

For Quality Loan Service Corporation of Washington, Defendant: Mary Stearns, LEAD ATTORNEY, McCarthy & Holthus LLP - Poulsbo, Poulsbo, WA.

For Select Portfolio Servicing Inc, Defendant: John Eugene Glowney, LEAD ATTORNEY, Stoel Rives LLP - SEA, Seattle, WA.

**Judges:** THOMAS O. RICE, United States District Judge.

**Opinion by:** THOMAS O. RICE

**Opinion**

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ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment (ECF Nos. 34, 37 and 46 1). These matters were heard with telephonic oral argument on May 8, 2013. Lakisha M. Morris appeared on behalf of the Plaintiff. John E. Glowney appeared on behalf of Defendants U.S. Bank National Association, Mortgage Electronic Registration Systems, Inc. and Select Portfolio Servicing, Inc. Mary

<sup>1</sup> Plaintiff has made several amendments and corrections to her motion for summary judgment. The operative motion is filed at ECF No. 46.

Stearns [\*2] appeared on behalf of Defendant Quality Loan Service Corp. of Washington. The Court has reviewed the briefing and the record and files herein, and is fully informed.

## BACKGROUND

Plaintiff asserts a variety of claims stemming from Defendants' efforts to foreclose on her home. Plaintiff's main contention is that Defendants no longer have an enforceable security interest in her home given that her loan was sold into a securitized trust. She also alleges that Defendants violated various state and federal statutes by attempting to foreclose upon an invalid security interest. For the reasons discussed below, the Court finds that Defendants are entitled to summary judgment on all of Plaintiff's claims.

## FACTS

Plaintiff, Angela Ukpoma ("Plaintiff") purchased a home in Kettle Falls, Washington in December of 2006. To finance the purchase, Plaintiff borrowed \$252,000 from Credit Suisse Financial Corporation ("Credit Suisse"). Plaintiff's obligation to repay the loan was memorialized in an adjustable rate note dated December 13, 2006. ECF No. 35-1. The loan was secured [\*3] by a deed of trust in favor of Credit Suisse, with Defendant Mortgage Electronic Registration Systems, Inc. ("MERS") listed as the beneficiary. ECF No. 35-4. The deed of trust was recorded in the Stevens County Auditor's Office on December 21, 2006.

In May of 2007, Credit Suisse indorsed the note in blank by way of an allonge executed by its attorney-in-fact, Lydian Data Services, thereby rendering the note a bearer instrument. ECF No. 35-2. Shortly thereafter, the note was transferred to Defendant U.S. Bank National Association ("U.S. Bank"). U.S. Bank asserts that "MERS assisted in this transaction in an agency capacity to effectuate the transfer." ECF No. 38-1. Plaintiff's loan was ultimately transferred into a securitized trust known as the Adjustable Rate Mortgage-Backed Pass-Through Certificates, Series 2007-2.

Plaintiff defaulted on her loan in late 2007. U.S. Bank subsequently appointed Defendant Quality Loan Service Corp. ("Quality") as successor trustee on February 1, 2008. ECF No. 40-1, Exhibit A. On that same date, Quality mailed Plaintiff a notice of default and arranged for the same to be posted on Plaintiff's residence. ECF No. 40-1, Exhibit B. On March 3, 2008, Quality [\*4] executed a notice of trustee's sale, which was recorded in the Stevens County Auditor's Office two days later. ECF No. 40-1, Exhibit C. On March 18, 2008, MERS executed a corporate assignment of deed of trust which purported to transfer beneficial interest in the deed of trust to U.S. Bank. ECF No. 47-4. For reasons that are not clear from the record, Quality did not proceed with the trustee's sale.

Quality resumed its efforts to foreclose on the property in 2010. Upon learning of these efforts, Plaintiff sued the servicer of her loan, Defendant Select Portfolio Services, Inc. ("SPS"), in U.S. District Court for the Eastern District of Washington. See Case No. 10-CV-0420-LRS. One week later, Plaintiff filed a Chapter 7 bankruptcy petition. See Case No. 10-6815-PCW7. Plaintiff's civil complaint was subsequently dismissed on the ground the claims belonged to Plaintiff's bankruptcy estate rather than Plaintiff herself. Plaintiff's bankruptcy was eventually discharged in early 2011.

Quality resumed its efforts to foreclose on the property by filing a new notice of trustee's sale on August 22, 2011. Plaintiff responded by filing the instant lawsuit in Stevens County Superior Court, which [\*5] was subsequently removed to this Court. To date, no sale of Plaintiff's property has occurred.

## DISCUSSION

Summary judgment may be granted upon a showing by the moving party "that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed.*

*R. Civ. P. 56(a)*. The moving party bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The burden then shifts to the non-moving party to identify specific genuine issues of material fact which must be decided by a jury. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

For purposes of summary judgment, a fact is "material" if it might affect the outcome of the suit under the governing law. *Id.* at 248. A dispute concerning any such fact is "genuine" only where the evidence is such that a reasonable jury could find in favor of the non-moving party. *Id.* In ruling on a summary judgment motion, [\*6] a court must construe the facts, as well as all rational inferences therefrom, in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007). Finally, the court may only consider admissible evidence. *Orr v. Bank of America, NT & SA*, 285 F.3d 764 (9th Cir. 2002).

### **TA. Breach of Contract Claim**

Plaintiff's breach of contract claim is grounded in an alleged breach of the deed of trust. According to Plaintiff, U.S. Bank and others breached the terms of the contract by failing to reconvey the property to her unencumbered following the sale of her mortgage into the securitized trust. In Plaintiff's view, the sale of the note into the securitized trust extinguished any security interest evidenced by the deed of trust because the original owner(s) of the note "received full consideration for their interest in the note" when it was securitized. Pl.'s Compl., ECF No. 1-1, at ¶ 39. As a result, Plaintiff argues, "Defendants and others claiming an interest in the note no longer have a secured interest in Plaintiff's home." Pl.'s Compl., ECF No. 1-1, at ¶ 41.

Contrary to Plaintiff's assertions, securitization of the note through the MERS system did not extinguish the [\*7] security interest evidenced by the deed of trust. See *McCarty v. U.S. Bank, N.A.*, 2012 U.S. Dist. LEXIS 68588, 2012 WL 1751791 at \*2 (W.D. Wash. 2012) (unpublished); *Van Kirk v. Bank of America Corp.*, 2012 U.S. Dist. LEXIS 116093, 2012 WL 3544735 at \* 7 (D. Idaho 2012) (unpublished) (collecting cases); *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1044 (9th Cir. 2011) (holding that securitization of note through MERS system did not deprive lender of right to foreclose). The note remained secured by the deed of trust despite the fact that the former was securitized. *Tripoli v. Branch Banking & Trust Corp.*, 2012 U.S. Dist. LEXIS 94609, 2012 WL 2685090 at \*3 (D. Utah 2012) (unpublished) ("Thus, even if BB & T or MERS had attempted to separate the Note from the Trust Deed, the security was paired, as a matter of fact, with the Note at all times, regardless of any purported attempt to separate the two."). Accordingly, Defendants are entitled to summary judgment on this claim.

### **B. Wrongful Foreclosure Claim**

Plaintiff's wrongful foreclosure claim rests on the theory that MERS cannot act as a "beneficiary" of a deed of trust under Washington law, and that, as a result, any assignments of the deed of trust by MERS to other entities were void. Citing to the Washington [\*8] Supreme Court's decision in *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wash.2d 83, 110, 285 P.3d 34 (2012), Plaintiff argues that, upon the execution of the corporate assignment of successor trustee by MERS, "U.S. Bank became an unsecured creditor, with absolutely no right to foreclose." Pl.'s Compl., ECF No. 1-1, at ¶ 61. Plaintiff further suggests that the note has been "separated" from the deed of trust, thereby invalidating the security interest in her home.

Contrary to Plaintiff's assertions, the fact that MERS is listed as a beneficiary of the deed of trust is not relevant to the outcome of this case. U.S. Bank is currently in possession of the original note and

deed of trust. The note is indorsed in blank, making it payable to the "bearer" (that is to say, anyone in physical possession) rather than to a specific payee. See generally RCW 62A.3-205(b) ("If an indorsement is made by the holder of an instrument and it is not a special indorsement [as defined by RCW 62A.3-205(a)], it is a 'blank indorsement.' When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.").<sup>2</sup> Thus, by virtue of being in possession [\*9] of the note, U.S. Bank is the lawful owner. Its right to receive payment on the note does not depend upon any assignment of the note from MERS.

Nor have the note and deed of trust been forever "separated." Indeed, Plaintiff's own authorities compel the opposite conclusion. As Plaintiff correctly observes, the assignment of a deed of trust without a transfer of the underlying debt obligation [\*10] is a legal nullity. See Pl.'s Compl., ECF No. 1-1, at ¶ 60 (citing Carpenter v. Longan, 83 U.S. 271, 274, 21 L. Ed. 313 (1872)). The logical corollary of this rule is that "[t]he transfer of [a] note carries with it the security, without any formal assignment or delivery, or even mention of the latter." Carpenter, 83 U.S. at 275. Here, the transfer of the note from Credit Suisse to U.S. Bank automatically carried with it the security interest evidenced by the deed of trust. *Id.*; see also Tripoli, 2012 U.S. Dist. LEXIS 94609, 2012 WL 2685090 at \*3 (D. Utah 2012) (unpublished) ("[T]he security was paired, as a matter of fact, with the Note at all times, regardless of any purported attempt to separate the two."). Accordingly, any subsequent transfers of the deed of trust by MERS to other entities are irrelevant. Because the note remains secured by the deed of trust, Defendants are entitled to summary judgment on this claim.

Finally, the Court must address Plaintiff's request for leave to amend her wrongful foreclosure claim to state a cause of action for individual violations of the Washington Deed of Trust Act, RCW Chapter 61.24. ECF No. 53 at 12-13. Based upon the rulings above, the Court finds that any such amendment would be [\*11] futile. U.S. Bank and its appointed successor trustee(s) have authority to foreclose on the deed of trust. To the extent that U.S. Bank or any other Defendant violated one or more provisions of the Deed of Trust Act in their prior attempts to foreclose on Plaintiff's property, Plaintiff cannot establish that she was injured by the violation. Given that no foreclosure has taken place, Plaintiff could not have been injured. Thus, Plaintiff's request for leave to amend is denied.

### **C. Quiet Title Claim**

Plaintiff's quiet title claim is based upon the theory that Defendants' security interest in her home was extinguished by the securitization of her loan. For the reasons discussed above, this theory lacks merit. Defendants are entitled to summary judgment on this claim.

### **D. Slander of Title Claim**

In Washington, "the initiation of foreclosure proceedings cannot form the basis of a slander of title claim." Beaton v. JPMorgan Chase Bank N.A., 2012 U.S. Dist. LEXIS 35988, 2012 WL 909768 at \*3 (W.D. Wash. 2012) (unpublished) (citing Krienke v. Chase Home Finance, LLC, 140 Wash. App. 1032, 2007 WL 2713737 at \*5 (Wash. App. 2007)); see also Tuttle v. Bank of New York Mellon, 2012 U.S. Dist. LEXIS 29853, 2012 WL 726969 at \*6 (W.D. Wash. 2012) (unpublished) (holding

<sup>2</sup> Plaintiff suggests that the indorsement is invalid because (1) it was made on an allonge rather than on the note itself, and (2) the allonge is not physically attached to the note. Neither argument is persuasive. Under RCW 62A.3-204, "[a]n indorsement on an allonge is valid even though there is sufficient space on the instrument for an indorsement." RCW 62A.3-204, UCC Comment 1. Further, the allonge in this case specifically identifies the note to which it became permanently "affixed." See ECF No. 35-2. Given that there are no competing claims to payment on the note, there is no need to strictly construe the "affixation" requirement to mean "permanent physical attachment." The fact that both documents were two-hole punched and bound together with other documents in the same folder is sufficient.

[\*12] that the filing of a Notice of Trustee's Sale cannot give rise to a slander of title claim because "Washington law requires a trustee to record such a notice following a borrower's default." (citing RCW 61.24.030); Buddle-Vlasyuk v. Bank of New York Mellon, 2012 U.S. Dist. LEXIS 9600, 2012 WL 254096 at \*5 (W.D. Wash. 2012) (unpublished) (same); Oliveros v. Deutsche Bank Nat. Trust Co., N.A., 2012 U.S. Dist. LEXIS 4467, 2012 WL 113493 at \*5 (W.D. Wash. 2012) (unpublished) (same). Defendants are entitled to summary judgment on this claim.

#### **E. Fraud, Misrepresentation and Aiding and Abetting Fraud Claims**

Plaintiff's claims for fraud, misrepresentation and aiding and abetting fraud are grounded in allegations that Defendants attempted to foreclose on her property (1) with knowledge that they lacked legal authority to do so; and (2) by relying upon fraudulently executed documents. The first of these arguments is derivative of the arguments addressed above concerning U.S. Bank's ownership of the note and attached security interest. For the reasons previously stated, this argument is not persuasive. U.S. Bank was entitled to initiate foreclosure proceedings by virtue of being the lawful owner of the note and the deed of trust.

Plaintiff's second [\*13] argument relates to so-called "robo-signing" of the documents used to initiate foreclosure proceedings. Even assuming for the sake of argument that the assignments in question were fraudulently executed, Plaintiff, as a third party, lacks standing to challenge them. See Bateman v. Countrywide Home Loans, 2012 U.S. Dist. LEXIS 162703, 2012 WL 5593228 at \*4 (D. Hawaii 2012) (unpublished) ("The reason debtors generally lack standing to challenge assignments of their loan documents is that they have no interest in those assignments, and the arguments they make do not go to whether the assignments are void *ab initio*, but instead to whether the various assignments are voidable. Debtors lack standing to challenge voidable assignments; only the parties to the assignments may seek to avoid such assignments.") (citing Williston on Contracts § 74:50 (4th ed.)); In re MERS Litigation, 2012 U.S. Dist. LEXIS 37134, 2012 WL 932625 at \*3 (D. Ariz. 2012) (unpublished) (holding that allegations of robo-signing failed to state a claim because plaintiff lacked standing to challenge assignment); Kuc v. Bank of Am., NA, 2012 U.S. Dist. LEXIS 53278, 2012 WL 1268126 at \*2 (D. Ariz 2012) (unpublished) ("[P]laintiff, as a third-party borrower, does not have standing to challenge the validity of [\*14] any allegedly 'robo-signed' recorded assignments."); Javaheri v. JPMorgan Chase Bank N.A., 2012 U.S. Dist. LEXIS 114510, 2012 WL 3426278 at \*6 (C.D. Cal. 2012) (unpublished) (accepting allegations of robo-signing as true, but holding that plaintiff lacked standing to challenge substitution of trustee agreement). Defendants are entitled to summary judgment on these claims.

#### **F. "Violations of Trustee's Duties" Claim**

Plaintiff asserts that Quality violated its duties as a trustee under the Washington Deed of Trust Act by, *inter alia*, failing to provide adequate notice of default, providing deficient notice of the trustee's sale, failing to validate that U.S. Bank actually owned the promissory note, and acting in bad faith. See Pl.'s Compl., ECF No. 1-1, at ¶¶ 114-124. These claims fail as a matter of law because Plaintiff has not been injured by the alleged violations. Given that Defendants discontinued both prior attempts to foreclose on Plaintiff's property, there is no injury fairly traceable to the alleged violations. If Defendants wish to foreclose on Plaintiff's property, presumably they will start the notification process anew. Thus, Defendants are entitled to summary judgment on this claim.

#### **G. FDCPA Claim**

Plaintiff [\*15] alleges that Defendant SPS violated the Fair Debt Collection Practices Act by falsely representing the amount owed on her loan and making unlawful communications. This claim fails as a matter of law because "the activity of foreclosing on [a] property pursuant to a deed of trust is not

the collection of a debt within the meaning of the FDCPA." Hulse v. Ocwen Fed. Bank, FSB, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002); see also Van Kirk, 2012 U.S. Dist. LEXIS 116093, 2012 WL 3544735 at \*4 (unpublished) (holding that "lenders and mortgage companies are not 'debt collectors' within the meaning of the FDCPA"). Defendants are entitled to summary judgment on this claim.

#### **H. CPA Claim**

To prevail on a claim for a violation of Washington's Consumer Protection Act ("CPA"), a plaintiff must demonstrate: (1) an unfair or deceptive act or practice; (2) occurring in the conduct of trade or commerce; (3) which impacts the public interest; (4) an injury to business or property; and (5) a causal link between the injury and the deceptive act or practice. Columbia Physical Therapy, Inc. v. Benton Franklin Orthopedic Assocs., PLLC, 168 Wn.2d 421, 442, 228 P.3d 1260 (2010). Here, Plaintiff has asserted CPA claims against MERS, Quality and U.S. [\*16] Bank. Her claims against Quality and U.S. Bank are derivative of the claims addressed above—specifically that neither Defendant had legal authority to initiate foreclosure proceedings. For the reasons discussed above, this argument is not persuasive.

Plaintiff's CPA claim against MERS is based upon the theory that "MERS is claiming to have authority to assign the deed of trust and note, when it does not." Pl.'s Compl., ECF No. 1-1, at ¶ 139. While it is true that listing MERS as a beneficiary of a deed of trust is "presumptively" an unfair or deceptive act or practice for purposes of a CPA claim, see Bain, 175 Wash.2d at 117, a plaintiff asserting such a claim must also demonstrate that he or she was injured as a result of the act or practice, see id. at 119 ("Depending upon the facts of a particular case, a borrower may or may not be injured by the disposition of the note, the servicing contract, or many other things, and MERS may or may not have a causal role."). Here, Plaintiff's only alleged injury is that she had difficulty determining who actually owned her loan. ECF No. 46 at 39. She fails to adequately explain how this difficulty resulted in an actual injury to her business [\*17] or property. At bottom, Plaintiff simply has not been injured by MERS's involvement with her loan. Defendants are entitled to summary judgment on this claim.

#### **I. Claims for Declaratory and Injunctive Relief**

Plaintiff's claims for declaratory and injunctive relief are entirely derivative of claims which have been dismissed above. Accordingly, Plaintiff is not entitled to declaratory or injunctive relief. Defendants are entitled to summary judgment on these claims.

#### **IT IS HEREBY ORDERED:**

1. The Motion for Summary Judgment filed by Defendants U.S. Bank National Association, Mortgage Electronic Registration Systems, Inc. and Select Portfolio Servicing, Inc. (ECF No. 34) is **GRANTED**.
2. The Motion for Summary Judgment filed by Defendant Quality Loan Service Corporation (ECF No. 37) is **GRANTED**.
3. Plaintiff's Amended Motion for Summary Judgment (ECF Nos. 42 and 46) is **DENIED**.

The District Court Executive is hereby directed to enter this Order, provide copies to counsel, enter judgment in favor of all Defendants, and **CLOSE** the file.

**DATED** May 9, 2013.

/s/ Thomas O. Rice

THOMAS O. RICE

United States District Judge

# **APPENDIX 7**

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WELLS FARGO BANK, N.A.,

Plaintiff,

v.

PAUL F. GENUNG, et al.,

Defendants.

CASE NO. C11-1698JLR

ORDER ON PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

**I. INTRODUCTION**

This matter comes before the court on Plaintiff Wells Fargo Bank, N.A.'s ("Wells Fargo") motion for summary judgment on (1) its claims for quiet title and fraudulent conveyance against Defendants Paul F. Genung and Craig W. Rhyne, and (2) Mr. Genung's counterclaims for quiet title, declaratory relief, and injunctive relief against Wells Fargo. (Mot. (Dkt. # 15).) Mr. Genung filed a response (Resp. (Dkt. # 18)), but Mr. Rhyne did not.

1 In brief, Wells Fargo claims that it is the beneficiary and holder of the note and  
2 deed of trust for Mr. Genung's home loan, and that Mr. Genung and Mr. Rhyne  
3 fraudulently clouded Wells Fargo's title prior to a nonjudicial foreclosure sale. (*See*  
4 *generally* Mot.) Mr. Genung responds that Wells Fargo is not the proper party in interest  
5 because it securitized the note. (*See generally* Resp.) Having reviewed the submissions  
6 of the parties, the balance of the record, and the relevant law, and neither party having  
7 requested oral argument, the court GRANTS in part and DENIES in part Wells Fargo's  
8 motion (Dkt. # 15). Additionally, the court ORDERS Wells Fargo to show cause, within  
9 15 days of the date of this order, why the court should not grant summary judgment in  
10 favor of Defendants on Wells Fargo's quiet title claim pursuant to Federal Rule of Civil  
11 Procedure 56(f)(1). If Wells Fargo fails to timely respond, the court will enter an order  
12 granting summary judgment to Defendants on Wells Fargo's quiet title claim.

## 13 II. EVIDENTIARY ISSUES

14 As an initial matter, the court must address: (1) Mr. Genung's assertion that he  
15 needs additional discovery (Resp. at 5); (2) the admissibility of certain facts contained in  
16 Roy Gissendanner's Declaration (Gissendanner Decl. (Dkt. # 16)) submitted by Wells  
17 Fargo, to which Mr. Genung objects (Resp. at 12-13); (3) the admissibility of a Real  
18 Estate Securitization Audit ("Audit Report") (Resp. Ex. 1) submitted by Mr. Genung, to  
19 which Wells Fargo objects (Reply (Dkt. # 20) at 6); and (4) the admissibility of Lori  
20 Gileno's Declaration (Gileno Decl. (Dkt. # 19)) submitted by Mr. Genung, to which  
21 Wells Fargo objects (Reply at 8).

1 **A. Additional Discovery**

2 In his response, Mr. Genung asserts that he can establish one of his primary  
3 contentions in opposition to Wells Fargo's motion for summary judgment "once full  
4 discovery is conducted and documents are analyzed." (Resp. at 5.) He asserts further  
5 that he is entitled to discovery. (*Id.*)

6 Federal Rule of Civil Procedure 56(d) states: "If a nonmovant shows by affidavit  
7 or declaration that, for specified reasons, it cannot present facts essential to justify its  
8 opposition, the court may: (1) defer consideration of the motion or deny it; (2) allow  
9 time to obtain affidavits or declarations or to take discovery; or (3) issue any other  
10 appropriate relief." Fed. R. Civ. P. 56(d). To obtain relief under Rule 56(d), "[t]he  
11 requesting party must show: (1) it has set forth in affidavit form the specific facts it  
12 hopes to elicit from further discovery; (2) the facts sought exist; and (3) the sought-after  
13 facts are essential to oppose summary judgment." *Family Home & Fin. Ctr., Inc. v. Fed.*  
14 *Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008). "Failure to comply with  
15 these requirements 'is a proper ground for denying discovery and proceeding to summary  
16 judgment.'" *Family Home*, 525 F.3d at 827 (quoting *State of Cal. on behalf of Cal. Dep't*  
17 *of Toxic Substances Control v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998) (internal  
18 citation omitted)); see also *Spirtos v. Allstate Ins. Co.*, 173 Fed. Appx. 538, 541 (9th Cir.  
19 2006) (affirming district court's denial of Rule 56(d) motion where "the motion was not  
20 supported by the required affidavit and did not otherwise satisfy the rule's explanatory  
21 requirements").

1 Mr. Genung has not satisfied the requirements of Rule 56(d), and therefore the  
2 court denies his request for additional discovery. His request is not accompanied by an  
3 affidavit, which is itself grounds to deny the motion. *See Campbell*, 138 F.3d at 779  
4 (affirming denial of Rule 56(d) motion where defendants made implicit request for  
5 additional time for discovery). Further, Wells Fargo has submitted evidence that it  
6 responded to 21 interrogatories and 28 requests for production of documents propounded  
7 by Mr. Genung, produced 100 pages of documents, and allowed Mr. Genung and his  
8 counsel to examine the original note and deed of trust that are central to this litigation.  
9 (Supp. Moore Decl. (Dkt. # 21) ¶¶ 2-4.) There is no indication that additional discovery  
10 would lead to the facts Mr. Genung hopes to uncover. For these reasons, the court denies  
11 Mr. Genung's request for additional discovery.

12 **B. Admissibility of the Gissendanner Declaration**

13 Wells Fargo has submitted the declaration of Mr. Gissendanner, who is employed  
14 as the Loan Administration Manager for Vault Operations and Custodian of Records for  
15 Wachovia Mortgage, formerly known as Wachovia Mortgage, F.S.B, which is currently a  
16 division of Wells Fargo. (Gissendanner Decl. ¶ 1.) He states that he has personal  
17 knowledge of the matters set forth in the declaration and attests to some of the business  
18 practices of Wachovia Mortgage. (*Id.* ¶¶ 1, 5.) Mr. Genung claims that Mr.  
19 Gissendanner's testimony regarding Wachovia Mortgage's business practices is  
20 inadmissible because Mr. Gissendanner's declaration does not state how long he has been  
21 employed at Wachovia Mortgage or how he obtained personal knowledge of the facts to  
22 which he attests. (Resp. at 12-13.)

1 “It is well settled that only admissible evidence may be considered by the trial  
2 court in ruling on a motion for summary judgment.” *Beyene v. Coleman Sec. Servs., Inc.*,  
3 854 F.2d 1179, 1181 (9th Cir. 1988); Fed. R. Civ. P. 56(c)(2). “An affidavit or  
4 declaration used to support or oppose a motion must be made on personal knowledge, set  
5 out facts that would be admissible in evidence, and show that the affiant or declarant is  
6 competent to testify on the matters stated.” Fed. R. Civ. P. 56(c)(4). Having reviewed  
7 the Gissendanner Declaration, the court concludes that it satisfies the requirements of  
8 Rule 56(c)(4), and therefore denies Mr. Genung’s request to find the declaration and its  
9 contents inadmissible.

#### 10 **C. Admissibility of the Audit Report**

11 Mr. Genung has submitted the Audit Report as an attachment to his response brief.  
12 (*See* Resp. Ex. 1.) The Audit Report purports to have been prepared for Mr. Genung by  
13 “Federal Trustee Services,” but it does not include a specific author or otherwise indicate  
14 who prepared the document. (*Id.* at 1.) The Audit Report concludes that Mr. Genung’s  
15 home loan was sold by Wachovia Mortgage, F.S.B. to the PHH Mortgage Trust, Series  
16 2008-CIM2 on July 25, 2008. (*Id.* at 15-16.) Wells Fargo contends that the Audit Report  
17 is inadmissible because it is not authenticated, among other reasons. (Reply at 6.)

18 The Ninth Circuit has made clear that “unauthenticated documents cannot be  
19 considered in a motion for summary judgment.” *Las Vegas Sands, LLC v. Nehme*, 632  
20 F.3d 526, 532 (9th Cir. 2011) (quoting *Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir.  
21 2002)). The authentication of a document requires “evidence sufficient to support a  
22 finding that the matter in question is what its proponent claims.” *Id.* at 532-533 (quoting

1 Fed. R. Evid. 901(a)). A document authenticated through personal knowledge must be  
2 attached to an affidavit, and the affiant must be a competent “witness who wrote [the  
3 document], signed it, used it, or saw others do so.” *Id.* at 533 (quoting Fed. R. Evid.  
4 901(b)(1)). But the requirement that documents be authenticated through personal  
5 knowledge when submitted in a summary judgment motion “is limited to situations  
6 where exhibits are introduced by being attached to an affidavit” of a person whose  
7 personal knowledge is essential to establish the document is what it purports to be—that  
8 it is authentic. *Id.* “Where documents are otherwise submitted to the court, and where  
9 personal knowledge is *not* relied upon to authenticate the document, the district court  
10 must consider alternative means of authentication under Federal Rule of Evidence  
11 901(b)(4).”<sup>1</sup> *Id.* (citing *Orr*, 285 F.3d at 777-78) (emphasis in *Las Vegas Sands*). Under  
12 Rule 901(b)(4), “documents . . . could be authenticated by review of their contents if they  
13 appear to be sufficiently genuine.” *Id.* (quoting *Orr*, 285 F.3d at 778 n.24).

14 Mr. Genung makes no attempt to authenticate the Audit Report by anyone with  
15 personal knowledge. Indeed, it is merely attached to his response brief. Furthermore, the  
16 alternative means of authenticating a document identified in Rule 901(b)(4) are not  
17 applicable here. The Audit Report is unsigned, undated, and its credibility is dubious, at  
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21 <sup>1</sup> Federal Rule of Evidence 901(b)(4) provides that authentication sufficient for  
22 admissibility can be satisfied by the object’s “[a]pppearance, contents, substance, internal  
patterns, or other distinctive characteristics, taken in conjunction with circumstances.” Fed. R.  
Evid. 901(b)(4).

1 best.<sup>2</sup> The court has no information regarding who created the report or their  
2 qualifications for doing so. The court thus concludes that the Audit Report is  
3 inadmissible and will not considering it in ruling on Wells Fargo's motion for summary  
4 judgment.

5 **D. Admissibility of the Gileno Declaration**

6 Mr. Genung also has submitted the Gileno Declaration, which Wells Fargo  
7 contends is inadmissible (Reply at 8). Ms. Gileno states that she formerly worked at  
8 Federal Trustee Services as a forensic auditor, and that she currently owns and manages  
9 RGFS, LLC, which focuses on fraud, securitization, and data management issues.  
10 (Gileno Decl. ¶¶ 2-3.) She states that she is a member of the National Association of  
11 Certified Fraud Examiners, is a Certified Forensic Loan Auditor, is "Bloomberg trained  
12 and certified through CFLA," and is a teacher of forensics in mortgage fraud,  
13 securitization, and Bloomberg. (*Id.* ¶¶ 6-9.) Ms. Gileno states further that she reviewed  
14 Mr. Genung's loan documents used to create the Audit Report, and researched the loan in  
15 the Bloomberg database. (*Id.* ¶¶ 2, 10-11.)

16 Ms. Gileno opines that Mr. Genung's loan was securitized. (*Id.* ¶ 12.) She  
17 explains that Wachovia was facing financial troubles and inquiries from the federal  
18 government at the time Mr. Genung's loan originated and that it "stands to reason that  
19 due to the pending investigations and subsequent fines Wachovia Corporation would not

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21 <sup>2</sup> The Federal Trade Commission has issued a consumer alert regarding forensic  
22 mortgage loan audit scams. See Federal Trade Commission, FTC Consumer Alert, *Forensic  
Mortgage Loan Audit Scams: A New Twist on Foreclosure Rescue Fraud* (March 2010)  
<http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt177.shtm>.

1 be able to fund or privately hold any loans during this time.” (*Id.*) She further states,  
2 “Upon reviewing public and private articles pertaining to the crash of 2008, it is clear that  
3 Wachovia’s assets and ability to originate loans were limited if not impossible at the time  
4 Mr. Genung’s loan was funded.” (*Id.* ¶ 13.) Finally, she notes that “[t]he trust mentioned  
5 in the [Audit Report] was one of only a few MBS trusts established in early 2008. This  
6 trust reflects a dumping ground for loans for companies having troubles.” (*Id.* ¶ 15.)

7 Attached to Ms. Gileno’s declaration are several documents, which are cited but  
8 not otherwise identified or discussed in her declaration. Exhibit 4 (the first exhibit  
9 attached to the declaration) includes a screenshot of an unidentified website and some  
10 typed notes below the screenshot. (Gileno Decl. Ex. 4.) Exhibit 5 is another screenshot  
11 of an unidentified website. (*Id.* Ex. 5.) Exhibit 6 includes two typewritten pages that  
12 appear to be part of a 2005 “Pooling and Servicing Agreement” among various banking  
13 entities, including Wachovia Bank, N.A. (*Id.* Ex. 6.) Exhibit 7 and 8 include screenshots  
14 of unidentified websites. (*Id.* Exs. 7-8.) Exhibit 9 is a typewritten “summary” by “the  
15 Auditor” that reflects some of the statements made by Ms. Gileno in her declaration. (*Id.*  
16 Ex. 9.)

17 Expert declarations offered in the summary judgment context are subject to Rule  
18 56 and the Federal Rules of Evidence governing expert testimony. Rule 56 requires that  
19 declarations supporting or opposing summary judgment “be made on personal  
20 knowledge, set out facts that would be admissible in evidence, and show that the affiant  
21 or declarant is competent to testify on the matters stated.” Fed. R. Civ. P. 56(c)(4).  
22 Experts may satisfy the personal-knowledge requirement if they provide declarations

1 containing an opinion formed within their area of expertise and based on their own  
2 assessment or analysis of the underlying facts or data. *See Doe v. Cutter Biological, Inc.*,  
3 971 F.2d 375, 385-86 n.10 (9th Cir. 1992); Fed. R. Evid. 703. The expert's declaration  
4 must, however, explain the factual basis and methodology used to arrive at the opinion,  
5 although the declaration need not include all of the facts and data relied on in forming the  
6 opinion. *See Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1316-17 (9th Cir. 1985) (per  
7 curiam); *Walton v. U.S. Marshals Serv.*, 492 F.3d 998, 1008 (9th Cir. 2007).

8 An expert's conclusory opinions, set forth in a declaration, do not meet the  
9 requirements of Rule 56(e). *Clouthier v. Cnty. of Contra Costa*, 591 F.3d 1232, 1252  
10 (9th Cir. 2010); *see also In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1425-27 (9th  
11 Cir. 1994) (concluding that expert's "conclusory allegations" do not defeat summary  
12 judgment where the record clearly rebuts the inference the expert suggests).

13 Additionally, under Federal Rule of Evidence 702, "if the basis for an expert's opinion is  
14 clearly unreliable, the district court may disregard that opinion in deciding whether a  
15 party has created a genuine issue of material fact." *Volterra Semiconductor Corp. v.*  
16 *Primarion, Inc.*, 796 F. Supp. 2d 1025, 1044 (N.D. Cal. 2011). "Relevant expert  
17 testimony is admissible only if an expert knows of facts which enable him to express a  
18 reasonably accurate conclusion." *City of Fresno v. United States*, 709 F. Supp. 2d 934,  
19 943 n.5 (E.D. Cal. 2010).

20 Assuming without deciding that Ms. Gileno is competent to give an expert opinion  
21 regarding the securitization of Mr. Genung's loan, the factual basis set forth in her  
22 declaration does not support her opinion. The only "facts" included in her declaration are

1 that (1) Wachovia was facing financial troubles and inquiries from the federal  
2 government at the time of Mr. Genung's loan origination; (2) Wachovia's assets and  
3 ability to originate loans were "limited if not impossible" at the time Mr. Genung's loan  
4 was funded; and (3) the trust mentioned in the Audit Report was one of only a few MBS  
5 trusts established in early 2008 and was a "dumping ground" for loans for companies  
6 having troubles. (Gileno Decl. ¶¶ 12-13, 15.) These general "facts," however, do not  
7 support the conclusion that Wachovia Mortgage, F.S.B. securitized Mr. Genung's loan.  
8 Based on the information before the court, it appears that Mr. Gileno's opinion is mere  
9 speculation. Furthermore, the record lacks any evidence that would establish the  
10 reliability of Ms. Gileno's methods. As such, Ms. Gileno's declaration is inadmissible  
11 and the court will not consider it in ruling on Wells Fargo's motion for summary  
12 judgment. The exhibits attached to Ms. Gileno's declaration are similarly inadmissible  
13 because they are not authenticated by Ms. Gileno, nor are they appropriate for the court  
14 to otherwise authenticate under Rule 901(b)(4).

### 15 III. BACKGROUND

#### 16 A. Facts

17 The following facts are undisputed. Mr. Genung signed a promissory note  
18 ("Note") and deed of trust ("Deed of Trust"), both dated April 8, 2008, to obtain a home  
19 loan in the amount of \$999,999.00 from Wachovia Mortgage, F.S.B. (Gissendanner  
20 Decl. ¶¶ 2-3, Ex. A (Note), Ex. B (Deed of Trust).) The property securing the loan under  
21 the Deed of Trust is located at 1633 Windermere Drive East, Seattle, Washington 98122-  
22 3737 ("the Property"). (*Id.* Exs. A, B.)

1 The Note states that failure to “pay the full amount of each monthly payment on  
2 the date it is due” constitutes a “default” under the loan. (Gissendanner Decl. Ex. A §  
3 8(B).) Non-payment also constitutes a “breach of duty” under the Deed of Trust that  
4 authorizes the Lender to “exercise the power of sale, take action to have the Property sold  
5 under any applicable law, and invoke such other remedies as may be permitted under any  
6 applicable law.” (*Id.* Ex. B § 28.) The Deed of Trust defines “Lender” as including  
7 Wachovia Mortgage, F.S.B., as well as its “successors and/or assignees.” (*Id.* Ex. B §  
8 I(C).) The Deed of Trust further provides that “Lender may at any time appoint a  
9 successor trustee and that Person shall become the Trustee under this Security Instrument  
10 as if originally named as Trustee.” (*Id.* Ex. B § 27.)

11 At some point that is not disclosed in the record, Mr. Genung defaulted on his loan  
12 by failing to make timely payments. (Genung Counterclaim (Dkt. # 9) ¶ 5; *see also*  
13 Moore Decl. (Dkt. # 17) ¶ 5, Ex. 4 (2009 Not. of Trustee’s Sale) at 3.)

14 On July 30, 2009, Wachovia Mortgage, F.S.B. appointed Cal-Western  
15 Reconveyance Corporation of Washington (“Cal-Western”) as the successor trustee  
16 under the Deed of Trust. (Moore Decl. ¶ 3, Ex. 2 (Appointment of Successor Trustee).)  
17 On August 3, 2009, the Appointment of Successor Trustee was recorded in King County,  
18 Washington. (*Id.* Ex. 2.)

19 On September 10, 2009, Cal-Western recorded a Notice of Trustee’s Sale setting a  
20 sale date of December 11, 2009. (*Id.* Ex. 4 at 2.) The Notice stated that the reason for  
21 default was that Mr. Genung was almost \$47,000.00 in arrears. (*Id.* Ex. 4 at 3.) After  
22 some delays, Cal-Western recorded a second Notice of Trustee’s Sale on March 10, 2010,

1 setting a sale date of June 11, 2010. (*Id.* ¶ 6, Ex. 5 (2010 Not. of Trustee’s Sale) at 2.)

2 The second Notice stated that the amount now in arrears was over \$75,000.00. (*Id.* Ex. 5  
3 at 3.)

4 In late 2009, Wachovia Mortgage, F.S.B. merged into and became a division of  
5 Wells Fargo known as Wachovia Mortgage. (Gissendanner Decl. ¶ 4; Moore Decl. ¶ 4,  
6 Ex. 3.) Wachovia Mortgage continues to operate as a division of Wells Fargo.  
7 (Gissendanner Decl. ¶ 4.)

8 On or about June 7, 2010, Mr. Genung signed a Notice of Removal of Trustees,  
9 which was recorded in King County on June 8, 2010. (Moore Decl. ¶ 7, Ex. 6.) The  
10 Notice of Removal purports to revoke, cancel, void, and rescind any and all duties,  
11 appointments, or assignments originally granted through the Note and Deed of Trust. (*Id.*  
12 Ex. 6 at 3.) The document further purports to remove, release, and discharge all trustees,  
13 successor trustees, and beneficiaries and bar them from further action with respect to the  
14 Deed of Trust. (*Id.*) Also on or about June 7, 2010, Mr. Genung signed a Notice of  
15 Revocation of Power of Attorney, which was recorded in King County on June 8, 2010.  
16 (*Id.* ¶ 8, Ex. 7.) The Notice of Revocation alleged that Wachovia Mortgage, F.S.B. and  
17 its assignees engaged in fraudulent activity with respect to Note and Deed of Trust, and  
18 purported to rescind Mr. Genung’s signatures related to the Note and Deed of Trust. (*Id.*  
19 Ex. 7 at 2.)

20 On June 10, 2010, Mr. Genung signed and caused to be recorded in King County a  
21 quitclaim deed (“the Quitclaim Deed”) purporting to convey the Property to Mr. Rhyne,  
22 his good friend, as “trustee” of the “1633 Windermere Dr. E. Land Trust.” (Moore Decl.

1 ¶ 9, Ex. 8; *see also* Rhyne Ans. (Dkt. # 10) ¶ 1.1 (admitting friendship with Mr.  
2 Genung).) Also on June 10, 2010, Mr. Rhyne signed a Deed of Full Reconveyance,  
3 which was recorded in King County that same day. (Moore Decl. ¶ 10, Ex. 9.) The Deed  
4 of Reconveyance stated that it was secured by the Deed of Trust and was “fully  
5 SATISFIED” as a result of consideration in the amount of \$1,162,064.75. (*Id.* Ex. 9 at  
6 2.) The Deed of Reconveyance also stated that “Property is currently held in Grantor’s  
7 possession without further obligation.” (*Id.*)

8 On June 11, 2010, the trustee’s sale did not go forward as planned.

9 On September 30, 2010, Wells Fargo executed a Notice of Nonacceptance of a  
10 Recorded Deed, stating that the Deed of Full Reconveyance was recorded without the  
11 knowledge or consent of the true trustee or beneficiary. (Moore Decl. ¶ 11, Ex. 10.) The  
12 Notice of Nonacceptance further stated that the Deed of Reconveyance was not accepted  
13 by Wells Fargo and was without any force or effect. (*Id.* Ex. 10.) Wells Fargo recorded  
14 the Notice of Nonacceptance in King County on October 12, 2010. (*Id.* Ex. 10.)

15 **B. Procedural History**

16 On October 12, 2011, Wells Fargo initiated the instant lawsuit against Defendants.  
17 (Compl. (Dkt. # 1).) On November 2, 2011, Wells Fargo filed its first amended  
18 complaint, seeking to quiet title against Defendants and bringing a claim for fraudulent  
19 conveyance. (Am. Compl. (Dkt. # 7) ¶¶ 23-33.) Wells Fargo seeks an order setting aside  
20 the documents recorded by Defendants prior to the scheduled June 2010 trustee’s sale, an  
21 order quieting title to Wells Fargo’s interests in the Property, and injunctive relief to  
22

1 restrain and enjoin Defendants from asserting any claim or right adverse to Wells Fargo's  
2 interest in the Property. (*Id.* at 7.)

3 On November 21, 2011, Mr. Genung filed his answer and affirmative defenses.  
4 (Genung Ans. (Dkt. # 9).) He also counterclaimed for declaratory relief regarding the  
5 parties' interests in the Property, quiet title to the Property, and injunctive relief. (*See*  
6 *generally id.*) On November 23, 2011, Mr. Rhyne filed his answer and affirmative  
7 defenses. (Rhyne Ans.) Defendants are both represented by counsel.

8 On April 24, 2012, Wells Fargo filed the motion for summary judgment that is  
9 currently before the court. (Mot.) Mr. Genung filed a response (Resp.), but Mr. Rhyne  
10 did not. The motion is now ripe for the court's disposition.

#### 11 IV. ANALYSIS

12 Wells Fargo moves for summary judgment in its favor on: (1) its quiet title claim  
13 against Defendants; (2) its fraudulent conveyance claim against Defendants; (3) Mr.  
14 Genung's quiet title counterclaim; (4) Mr. Genung's declaratory judgment counterclaim;  
15 and (5) Mr. Genung's injunctive relief counterclaim. (*See generally* Mot.) The court will  
16 address each issue in turn, and for the reasons described below, the court denies summary  
17 judgment with respect to Wells Fargo's quiet title claim, but grants summary judgment to  
18 Wells Fargo on all other issues.

##### 19 A. Summary Judgment Standard

20 Summary judgment is appropriate if the evidence, when viewed in the light most  
21 favorable to the non-moving party, demonstrates "that there is no genuine dispute as to  
22 any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ.

1 P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v. Cnty. of*  
2 *L.A.*, 477 F.3d 652, 658 (9th Cir. 2007). The moving party bears the initial burden of  
3 showing there is no genuine issue of material fact and that he or she is entitled to prevail  
4 as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party meets his or her  
5 burden, then the non-moving party “must make a showing sufficient to establish a  
6 genuine dispute of material fact regarding the existence of the essential elements of his  
7 case that he must prove at trial” in order to withstand summary judgment. *Galen*, 477  
8 F.3d at 658. The court is “required to view the facts and draw reasonable inferences in  
9 the light most favorable to the [non-moving] party.” *Scott v. Harris*, 550 U.S. 372, 378  
10 (2007).

#### 11 **B. Wells Fargo’s Quiet Title Claim**

12 “An action to quiet title allows a person in peaceable possession or claiming the  
13 right to possession of real property to compel others who assert a hostile right or claim to  
14 come forward and assert their right or claim and submit it to judicial determination.”  
15 *Kobza v. Tripp*, 18 P.3d 621, 624 (Wash. Ct. App. 2001). In Washington, quiet title  
16 actions are governed by RCW 7.28.010. The statute provides in relevant part:

17 Any person having a valid subsisting interest in real property, and a right to  
18 the possession thereof, may recover the same by action in the superior court  
19 of the proper county, to be brought against the tenant in possession; if there  
20 is no such tenant, then against the person claiming the title or some interest  
therein, and may have judgment in such action quieting or removing a  
cloud from plaintiff’s title. . . .

21 RCW 7.28.010; *see also Wash. Sec. & Inv. Corp. v. Horse Heaven Heights, Inc.*, 130  
22 P.3d 880, 884 (Wash. Ct. App. 2006) (“RCW 7.28.010 requires that a person seeking to

1 quiet title establish a valid subsisting interest in property and a right to possession  
2 thereof.”). “The plaintiff in an action to quiet title must succeed on the strength of his  
3 own title and not on the weakness of his adversary.” *Desimone v. Spence*, 318 P.2d 959,  
4 961 (Wash. 1957); *see also Wash. State Grange v. Brandt*, 148 P.3d 1069, 1077 (Wash.  
5 Ct. App. 2006); RCW 7.28.120. Quiet title actions are equitable in nature and do not  
6 provide for an award of damages. *See, e.g., Kobza*, 18 P.3d at 622.

7 Wells Fargo asserts that it is the successor of the beneficiary under the Deed of  
8 Trust, Wachovia Mortgage, F.S.B., and that, as such, it possesses a valid lien against the  
9 Property and was authorized to direct the trustee under the Deed of Trust to foreclose on  
10 the Property after Mr. Genung defaulted. (Mot. at 7.) Wells Fargo maintains that the  
11 documents signed and recorded by Defendants are fraudulent and constitute a “cloud” on  
12 Wells Fargo’s lien on the Property. (*Id.* at 8.) Wells Fargo argues that by purporting to  
13 revoke the signatures on the Note and Deed of Trust, remove the trustee to the Deed of  
14 Trust, convey the Property to Mr. Rhyne, and then have Mr. Rhyne reconvey the Property  
15 as if Mr. Genung had “fully satisfied” his loan obligations, Defendants attempted to write  
16 the Note and Deed of Trust out of existence and have Mr. Genung own the Property free  
17 and clear. (*Id.*)

18 Regardless of whether Wells Fargo has valid lien rights or whether Defendants  
19 improperly attempted to orchestrate Mr. Genung’s ownership of the Property free and  
20 clear, however, Wells Fargo has not satisfied all of the statutory elements for a quiet title  
21 action. Namely, Wells Fargo has not established that it has a right to possession of the  
22 Property. *See* RCW 7.28.010; *Wash. Sec. & Inv. Corp.*, 130 P.3d at 884 (“RCW 7.28.010

1 requires that a person seeking to quiet title establish a valid subsisting interest in property  
2 *and a right to possession thereof.*” (italics added)). Indeed, “[a] mortgagee has no right  
3 to possession of mortgaged real property unless there is a ‘foreclosure and sale according  
4 to law.’” *T.G. Chambers v. Cranston*, 558 P.2d 271, 273 (Wash. Ct. App. 1977)  
5 ((quoting RCW 7.28.230)). It is undisputed that there has been no foreclosure and sale  
6 with respect to the Property in Wells Fargo’s favor to date. Accordingly, Wells Fargo  
7 has no existing right to possession of the Property. *See id.* Because Wells Fargo has not  
8 established an essential element of its cause of action, the court denies Wells Fargo’s  
9 motion for summary judgment on its quiet title claim.<sup>3</sup>

10 Additionally, as it appears to the court that Wells Fargo cannot prevail on its quiet  
11 title claim, *see* RCW 7.28.230, the court orders Wells Fargo to show cause within 15  
12 days of the date of this order why the court should not enter summary judgment in favor  
13 of Defendants pursuant to Rule 56(f)(1) and dismiss this claim. If Wells Fargo fails to  
14 timely respond, the court will enter summary judgment in Defendants’ favor on Wells  
15 Fargo’s quiet title claim.

### 16 **C. Wells Fargo’s Fraudulent Conveyance Claim**

17 A fraudulent conveyance or transfer is a transaction by which the owner of real or  
18 personal property has attempted to place the land or goods beyond the reach of his or her  
19 creditors or any other person who has legal or equitable rights to the property. *Rainier*  
20 *Nat’l Bank v. McCracken*, 615 P.2d 469, 474 (Wash. Ct. App. 1980). Under

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21  
22 <sup>3</sup> The court notes that a more prudent course of action for Wells Fargo may have been to file a judicial foreclosure action in state court.

1 Washington's Uniform Fraudulent Transfer Act ("UFTA"), a transfer may be fraudulent  
2 if the transfer was made by a debtor with actual intent to hinder, delay, or defraud a  
3 creditor. RCW 19.40.041(a)(1); *Clearwater v. Skyline Constr. Co., Inc.*, 835 P.2d 257,  
4 266 (Wash. Ct. App. 1992). A transfer also may be constructively fraudulent if it was  
5 made without adequate consideration. RCW 19.40.041(a)(2); *Clearwater*, 835 P.2d at  
6 266.

7 In determining whether there was actual intent to defraud under RCW  
8 19.40.041(a)(1), the court may consider these nonexclusive factors: whether (1) the  
9 transfer was to an insider; (2) the debtor retained possession or control of the property  
10 transferred; (3) the transfer was disclosed or concealed; (4) before the transfer, the debtor  
11 had been threatened with suit; (5) the transfer was of substantially all the debtor's assets;  
12 (6) the debtor absconded; (7) the debtor concealed assets; (8) the debtor did or did not  
13 receive reasonably equivalent value for the transfer; (9) the debtor was insolvent or  
14 became insolvent soon after the transfer, (10) the debtor incurred a substantial debt  
15 shortly before or after the transfer; and (11) the debtor transferred the assets of the  
16 business to a lienor who transferred the assets to an insider. RCW 19.40.041(b).

17 The court may find constructive fraud under RCW 19.40.041(a)(2) if the debtor  
18 did not receive a reasonably equivalent value in exchange for the transfer and any one of  
19 the following exists: (1) the debtor was left by the transfer with unreasonably small  
20 assets (RCW 19.40.041(a)(2)(i)); (2) the debtor intended to incur more debts than he or  
21 she would be able to pay (RCW 19.40.041(a)(2)(ii)); or (3) the debtor was insolvent at  
22

1 the time of the transfer or as a result of the transfer (RCW 19.40.051(a)). *Clearwater*,  
2 835 P.2d at 266.

3 Creditors may also bring UFTA claims against the first transferee involved in a  
4 fraudulent transfer. RCW 19.40.081; *Thompson v. Hanson*, 219 P.3d 659, 662 (Wash.  
5 2009). “Once the threshold fraudulence has been established, RCW 19.40.081(b)(1)  
6 allows for judgment against first transferees.” *Thompson*, 219 P.3d at 663.

7 Any party making a claim under the UFTA carries the burden of proving that the  
8 transfer in question was fraudulent. *Sedwick v. Gwinn*, 873 P.2d 528, 531 (Wash. Ct.  
9 App. 1994). Proof of actual intent to defraud must be clear and satisfactory, while proof  
10 of constructive fraud must be shown by substantial evidence. *Clearwater*, 835 P.2d at  
11 266. Both actual intent to defraud and constructive fraud may be decided as a matter of  
12 law, when appropriate. *See Douglas v. Hill*, 199 P.3d 493, 497-98 (Wash. Ct. App. 2009)  
13 (holding that transfer was fraudulent as a matter of law).

14 Here, Wells Fargo contends that the undisputed evidence establishes that Mr.  
15 Genung’s Quitclaim Deed to Mr. Rhyne and Mr. Rhyne’s Deed of Full Reconveyance  
16 were fraudulent transfers under both the intentional and constructive fraud provisions of  
17 the UFTA. (Mot. at 11.) For the reasons described below, the court concludes that Wells  
18 Fargo is entitled to summary judgment on its fraudulent transfer claim because Mr.  
19 Genung acted with actual intent to hinder Wells Fargo’s efforts to collect on the loan.  
20 Accordingly, the court does not address whether Wells Fargo also is entitled to summary  
21 judgment on the issue of constructive fraud.  
22

1 Wells Fargo argues that several factors identified in RCW 19.40.041(b) are  
2 present. (*Id.*) Wells Fargo contends that the second factor, the debtor's possession of the  
3 property transferred, is satisfied because it is undisputed that Mr. Genung remained in  
4 possession of the Property both before and after execution of the Quitclaim Deed. (*Id.*)  
5 It also asserts that the fourth factor, the threat of suit, is satisfied because Cal-Western,  
6 the trustee, was pursuing a nonjudicial foreclosure against Mr. Genung when he executed  
7 the Quitclaim Deed. (*Id.*) Wells Fargo further maintains that factor eight, reasonably  
8 equivalent value, indicates that the transfer was fraudulent because Mr. Genung did not  
9 receive anything of reasonably equivalent value. (*Id.*) Finally, Wells Fargo argues that  
10 the tenth factor, the occurrence of the transfer shortly before or after a substantial debt  
11 was incurred, is met because Mr. Genung was in arrears almost \$75,000.00 on his loan  
12 and owed over \$1,024,000.00 on the loan at the time of the transfers. (*Id.* at 11-12.)

13 The court concludes that Wells Fargo has satisfied its initial burden on summary  
14 judgment of presenting clear and satisfactory evidence that Mr. Genung intended to  
15 defraud Wells Fargo by executing the Quitclaim Deed to Mr. Rhyne. Wells Fargo  
16 presented evidence that Mr. Genung retained possession of the Property after he executed  
17 the Quitclaim Deed (Rhyne Ans. ¶ 1.1), and that at the time he executed the Quitclaim  
18 Deed, he owed Wells Fargo a total of over \$1,024,000.00 on the loan and was in arrears  
19 almost \$75,000.00 (Moore Decl. Ex. 5). Even though Mr. Genung had not been directly  
20 threatened with a lawsuit (*see* RCW 19.40.041(b)(4)), the threat of litigation was  
21 inherently present given his default on the loan, *see Rainier*, 615 P.2d at 473 (finding that  
22 the threat of litigation was inherently present because of the large debt the defendant

1 owed the bank and his extreme financial trouble). Mr. Rhyne also admitted that he gave  
2 Mr. Genung no reasonably equivalent value for the Quitclaim Deed. (Rhyne Ans. ¶ 1.1.)

3       Additionally, as the factors articulated in RCW 19.40.041(b) are nonexhaustive,  
4 the court considers it indicative of an intent to defraud Wells Fargo that Mr. Genung  
5 executed the Quitclaim Deed on June 10, 2010 (Moore Decl. Ex. 8), the day before the  
6 scheduled nonjudicial foreclosure sale (*id.* Ex. 5). Mr. Genung, moreover, executed the  
7 Quitclaim Deed in favor of his good friend, Mr. Rhyne, who then executed the Deed of  
8 Full Reconveyance the same day, which purported to reconvey the Property back to Mr.  
9 Genung free and clear of any bank lien. (*Id.* at 9.) The court thus concludes that the  
10 above-described facts constitute clear and satisfactory evidence of an intent to defraud.

11       The burden thus shifts to Mr. Genung to establish a genuine issue of material fact  
12 that would preclude summary judgment. In an attempt to avoid summary judgment, Mr.  
13 Genung asserts that Wells Fargo is not a “creditor” and therefore has no standing to bring  
14 its UFTA claim. (Resp. at 6-7.) Along the same lines, Mr. Genung contends that Wells  
15 Fargo is not the legal holder of the Note or Deed of Trust for the Property. (*Id.* at 7.) For  
16 the reasons described below, Mr. Genung’s contentions are without merit.

17       Under the UFTA, a “creditor” is a person who has a claim. RCW 19.40.011(4). A  
18 “claim” is defined as “a right to payment, whether or not the right is reduced to judgment,  
19 liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed,  
20 legal, equitable, secured, or unsecured.” RCW 19.40.011(3). Despite Mr. Genung’s  
21 arguments to the contrary and as articulated in more detail below, Wells Fargo has  
22 presented undisputed evidence establishing that it has a valid lien on the Property.

1 Therefore, it has a claim and is a creditor that has standing to bring a UFTA action  
2 against Defendants.

3 The evidence establishes that Wells Fargo is the successor to Wachovia Mortgage,  
4 F.S.B., which is the Lender under the Note. (Gissendanner Decl. ¶ 4, Ex. A.) The  
5 evidence also establishes that Mr. Genung's loan was never sold or assigned and that  
6 Wells Fargo is the actual holder of the Note. *Id.* ¶ 6; *see also* RCW 61.24.030(7)(a).  
7 Under the Deed of Trust, once Mr. Genung defaulted on his loan obligations, Wells  
8 Fargo became authorized to direct the trustee to foreclose so that it could collect the  
9 amounts owed to it. Gissendanner Decl. Ex. B § 28; *see also Vawter v. Quality Loan*  
10 *Serv. Corp. of Wash.*, 707 F. Supp. 2d 1115, 1121 (W.D. Wash. 2010) ("In the event the  
11 borrower defaults on his or her debt or other obligation, the beneficiary may direct the  
12 trustee to foreclose pursuant to a nonjudicial foreclosure sale."). Mr. Genung's primary  
13 argument on this issue is that Wachovia Mortgage, F.S.B. securitized the loan and  
14 therefore Wells Fargo is not a proper party in interest. (Resp. at 5.) Mr. Genung,  
15 however, has failed to present admissible evidence on this issue and therefore has created  
16 no genuine issue, as discussed above, of material fact that would preclude summary  
17 judgment.

18 In sum, Wells Fargo has submitted clear and satisfactory evidence that Mr.  
19 Genung intentionally acted to hinder Wells Fargo's efforts to collect the amounts due and  
20 owing on Mr. Genung's loan. In response to Wells Fargo's motion for summary  
21 judgment, Mr. Genung did not submit any evidence that he did not intend to fraudulently  
22 transfer his interest in the Property. Indeed, neither Defendant submitted any admissible

1 evidence that created an issue of material fact. The court thus grants summary judgment  
2 to Wells Fargo on its fraudulent transfer claim against Defendants.

3 **D. Mr. Genung's Quiet Title Counterclaim**

4 To maintain a quiet title action against a mortgagee, the mortgagor must first pay  
5 the outstanding debt on which the subject mortgage is based. *See Their v. Recontrust*  
6 *Co., N.A.*, No. C11-5939BHS, 2012 WL 527530, at \*2 (W.D. Wash. Feb. 16, 2012)  
7 (citing *Evans v. BAC Home Loans Servicing LP*, No. C10-0656 RSM, 2010 WL  
8 5138394, at \*3 (W.D. Wash. Dec. 10, 2010) ("Plaintiffs cannot assert an action to quiet  
9 title against a purported lender without demonstrating they have satisfied their obligations  
10 under the Deed of Trust."); *see also Treece v. Fieldston Mortg. Co.*, No. 11-5981 RJB,  
11 2012 WL 123042, at \*6 (W.D. Wash. Jan. 17, 2012) ("[A] quiet title claim against a  
12 mortgagor requires that a mortgagor is the rightful owner of the property, that is, that the  
13 mortgagor has paid an outstanding debt secured by the mortgage."). Here, the undisputed  
14 evidence establishes that Mr. Genung has not paid his outstanding debt to Wells Fargo.  
15 Accordingly, he cannot maintain his quiet title counterclaim, and the court grants  
16 summary judgment in Wells Fargo's favor on this counterclaim and dismisses Mr.  
17 Genung's quiet title counterclaim.

18 **E. Mr. Genung's Declaratory Judgment Counterclaim**

19 Mr. Genung, through his declaratory judgment counterclaim, seeks a declaration  
20 that Wells Fargo was not entitled to conduct a foreclosure. (Genung Counterclaim ¶¶ 19-  
21 26.) As stated above, Wells Fargo has presented undisputed evidence that it is the  
22 beneficiary under the Deed of Trust, and that it was authorized to initiate the nonjudicial

1 foreclosure against Mr. Genung upon Mr. Genung's default under the Note. The  
2 undisputed evidence also establishes that Wells Fargo could appoint Cal-Western as the  
3 successor trustee pursuant to the Deed of Trust, despite Mr. Genung's arguments to the  
4 contrary. The court, therefore, grants summary judgment to Wells Fargo on Mr.  
5 Genung's declaratory judgment counterclaim and dismisses this counterclaim.

#### 6 **F. Mr. Genung's Injunctive Relief Counterclaim**

7 Through his injunctive relief counterclaim, Mr. Genung seeks to enjoin any  
8 foreclosure on the Property because Wells Fargo is not the real party in interest. (*See*  
9 Counterclaim ¶¶ 53-73; Resp. at 12.) In Washington, nonjudicial foreclosures are  
10 governed by the Deed of Trust Act ("DTA"). *Vawter*, 707 F. Supp. 2d at 1121. The  
11 DTA permits the borrower or grantor, among others, to restrain a trustee's sale by court  
12 action "on any proper legal or equitable ground." RCW 61.24.130(1); *see also Brown v.*  
13 *Household Realty Corp.*, 189 P.3d 233, 235 (Wash. Ct. App. 2008). The DTA does not  
14 define what constitutes proper grounds for restraint. The statutory language, however,  
15 suggests a broad scope. As the court in *Vawter* explained:

16 Presumably "proper grounds" would include defenses to the default(s) such  
17 as payments having been made, lender liability issues, fraud, usury,  
18 violation of truth in lending and consumer protection laws. "Proper  
19 grounds" should also refer to non-technical flaws in the foreclosure  
20 process-is the land used for agricultural purposes, is the alleged default  
21 actually a default under the terms of the documents, or have errors been  
22 made in identifying the documents, real property, and defaults which are of  
sufficient magnitude to cause real confusion.

*Vawter*, 707 F. Supp. 2d at 1122 (quoting Marjorie Dick Rombauer, Washington  
Practice: Creditors' Remedies-Debtors' Relief § 3.62 (2008)). Courts must condition any

1 restraint of the trustee's sale on the applicant paying the clerk of court "the sums that  
2 would be due on the obligation secured by the deed of trust if the deed of trust was not  
3 being foreclosed." RCW 61.24.130(1).

4 In support of summary judgment, Wells Fargo argues that Mr. Genung has not  
5 satisfied the requirements of the DTA to restrain a trustee's sale, particularly the  
6 requirement that Mr. Genung "pay to the clerk of court the sums that would be due on the  
7 obligation secured by the deed of trust if the deed of trust was not being foreclosed."

8 (Mot. at 15 (quoting RCW 61.24.130(1)).) Wells Fargo also argues, throughout its  
9 motion and reply brief, that Mr. Genung's contention that Wells Fargo is not the real  
10 party in interest is contradicted by the undisputed evidence. (*See generally* Mot; Reply.)

11 As discussed above, the court agrees with Wells Fargo that it is the holder of the Note  
12 and the beneficiary under the Deed of Trust. As such, it had the authority under the Deed  
13 of Trust to appoint Cal-Western as the successor trustee and to initiate, through Cal-  
14 Western, the nonjudicial foreclosure proceedings. Mr. Genung's arguments to the  
15 contrary (*see, e.g.*, Resp. at 15) are unfounded and not supported by admissible evidence.

16 Because Mr. Genung has failed to establish a genuine issue of material fact as to the  
17 propriety of the nonjudicial foreclosure proceedings against him and has not put forth  
18 valid alternative grounds supporting his claim for injunctive relief, the court grants  
19 summary judgment to Wells Fargo on this issue and dismisses Mr. Genung's  
20 counterclaim for injunctive relief.

1 **V. CONCLUSION**

2 For the foregoing reasons, the court GRANTS in part and DENIES in part Wells  
3 Fargo's motion for summary judgment (Dkt. # 15). The court denies summary judgment  
4 on Wells Fargo's quiet title claim and ORDERS Wells Fargo to show cause, within 15  
5 days of the date of this order, why the court should not grant summary judgment in favor  
6 of Defendants pursuant to Federal Rule of Civil Procedure 56(f)(1) and dismiss this  
7 claim. If Wells Fargo fails to timely respond, the court will enter an order granting  
8 summary judgment to Defendants on Wells Fargo's quiet title claim. The court grants  
9 summary judgment in Wells Fargo's favor on its fraudulent conveyance claim, and on  
10 Mr. Genung's quiet title, declaratory relief, and injunctive relief counterclaims.

11 Dated this 23rd day of July, 2012.

12  
13 

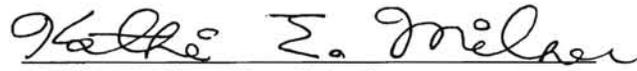
14 JAMES L. ROBART  
15 United States District Judge  
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 16th day of January, 2015, I caused a true and correct copy of the foregoing document, "BRIEF OF RESPONDENTS," to be delivered by U.S. mail, postage prepaid, to the following counsel of record:

Counsel for Appellants:  
J.J. Sandlin, WSBA #7392  
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DATED this 16th day of January, 2015, at Seattle, Washington.

  
Kathi E. Milner, Legal Assistant