

No. 39763-3-II

DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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DANIEL SZMANIA,

Appellant

v.

COUNTRYWIDE HOME LOANS INC.,

Respondent

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ON APPEAL FROM CLARK COUNTY SUPERIOR COURT  
(Hon. Barbara D. Johnson)

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COUNTRYWIDE HOME LOANS, INC.'S RESPONSE BRIEF

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FILED  
COURT OF APPEALS  
MAY 25 2011  
10 MAY 25 PM 4:31  
STATE OF WASHINGTON  
BY Am  
IDENTITY

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## I. INTRODUCTION

Appellant Daniel Szmania's ("Szmania") brief contains little if any citation to relevant authority, omits nearly every necessary reference to the record, and contains contrary and incomplete requests for relief. Notwithstanding these irregularities, Respondent Countrywide Home Loans, Inc. ("Countrywide") has attempted, in good faith to respond to Szmania's assignments of error and corresponding arguments. What Szmania's constantly shifting and unsubstantiated allegations cannot change is that the trial court properly dismissed all of his claims and causes of action with prejudice and properly awarded Countrywide its reasonable attorney's fees and costs incurred in connection with the cancellation of the Notice of Lis Pendens Szmania filed against his own property.

The entire basis for Szmania's lawsuit against Countrywide was his claim that he created a unilateral modification of his residential mortgage loan by including a "contract" on a check for an amount less than his required monthly loan payment in July 2008. The trial court rejected this theory, rejected Szmania's motions for summary judgment and damages, and granted summary judgment in favor of Countrywide. Szmania has abandoned his unilateral loan modification argument on appeal, and now claims that: (1) Countrywide is liable to him for an alleged loss of other credit caused by Countrywide's accurate reporting to credit agencies that he was behind on his

mortgage payments; (2) the trial court improperly canceled Szmania's Notice of Lis Pendens; and (3) he in fact owes Countrywide no money at all because his debt was somehow discharged and vacated.

Notably, Szmania has only appealed the **denials** of his motions for summary judgment and damages. He has not appealed any of the summary judgment rulings in favor of Countrywide. However, even if this Court reviews the trial court's rulings granting summary judgment in favor of Countrywide, none of Szmania's arguments warrant reversal of the dismissal of his claims. Countrywide therefore requests that this Court affirm the trial court's summary judgment rulings and its mandatory award of attorney fees incurred in connection with Countrywide's motion to cancel Szmania's lis pendens.

## **II. COUNTERSTATEMENT OF THE CASE**

### **A. Factual Background.**

On November 6, 2006, Szmania obtained a residential mortgage loan of \$787,500.00 ("Loan") originated by E-Loan, Inc. ("E-Loan"). CP 200-201; CP 3. Szmania secured the promissory note ("Note") evidencing the Loan with a Deed of Trust on his real property commonly known as 17005 NE 164th Avenue, Brush Prairie, WA 98606 ("Property"). CP 200-201.

On January 19, 2007, Countrywide purchased the Loan “servicing released.” CP 200-201. This means that Countrywide purchased the Note evidencing Szmania’s debt and the Deed of Trust that secured the Note, as well as the right to service the loan. *Id.* Countrywide subsequently pooled and securitized the Loan but continued to service it. *Id.* With this securitization, title to the Loan passed to the EMC Mortgage Corporation (BSA Rm 2007-3) Trust (“Trust”). *Id.* The assignment of the Loan from E-Loan to Countrywide and the assignment of the Loan from Countrywide to the Trust were registered with Mortgage Electronic Registration Systems, Inc. (“MERS”). *Id.*

In accordance with common industry practice, assignment documents were not recorded in the Clark County land records.<sup>1</sup> CP 200-201. MERS was created by the mortgage banking industry to streamline the mortgage process by using electronic commerce to eliminate paper. *Id.*<sup>2</sup> MERS acts as nominee in the county land records for the lender and servicer. *Id.* When a loan is registered with MERS, there is no need for traditional assignments because MERS remains the nominal mortgagee no

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<sup>1</sup> Assignments do not need to be recorded to be effective. Rather, recordation is important for purposes of establishing priority. *See* RCW 65.08.070.

<sup>2</sup> For a detailed explanation of the history, functioning and purpose of the MERS system, *see* Gerald Korngold, LEGAL AND POLICY CHOICES IN THE AFTERMATH OF THE SUBPRIME AND MORTGAGE FINANCING CRISIS, 60 S.C. L. Rev. 727, 741-42 (2009).

matter how many times ownership of the loan or the servicing rights are transferred. *Id.*

In a letter dated June 11, 2008, Szmania contacted Countrywide and requested that the Loan be modified due to his claimed economic hardship. CP 71. Specifically, Szmania requested that the interest rate on the Loan be lowered from 6.25% to 3% or 3.25%. *Id.*

On July 7, 2008, Szmania sent Countrywide a letter seeking a loan modification and enclosing a check for a reduced monthly payment pursuant to his asserted loan modification. CP 73. In his letter, Szmania included the following statement:

**BY CASHING AND ACCEPTING THIS CHECK, COUNTRY WIDE [sic] FINANCIAL, COUNTRYWIDE HOME LOAN, IT'S [sic] AFFILIATES AND PARTNER'S [sic] AND SUBSIDIARY'S [sic] AND BANK OF AMERICA, ACCEPT NEW TERMS OF THE ABOVE NOTED LOAN AT 3%, INTEREST ONLY; WITH NO PREPAY PENALTIES FOR THE REMAINDER OF THE LIFE OF THE THIS LOAN OF 28 YEARS, 6 MONTHS. THESE NEW TERMS ARE EFFECTIVE FROM THE DATE OF: 6 JUNE 2008 (DATE OF LAST PAYMENT RECEIVED.) THESE NEW TERMS ARE LEGAL AND BINDING AND AGREED UPON BY ALL ABOVE MENTION [sic] PARTIES.**

CP 73 (emphasis in original). Countrywide, however, had authority under the Deed of Trust to accept partial payments without waiving its rights and remedies, and negotiated Szmania's check. CP 95; CP 64. Nevertheless, Szmania began making payments under the Loan as though the modification had been effective. CP 45. Because no modification had

occurred, Szmania's payments were only partial payments and, as a result, a past due balance began accruing on his account.

In an August 20, 2008 email, Szmania claimed that Countrywide employee Ashley Harrison orally accepted the above modification terms. CP 76. Countrywide, however, has no record of an Ashley Harrison employed with the company. CP 47. Szmania and Countrywide subsequently engaged in written and telephonic communication wherein Countrywide disputed the effectiveness of Szmania's alleged loan modification and Szmania insisted that the Loan had in fact been modified. CP 47-50. The parties were not able to come to resolution and this lawsuit ensued. *Id.*<sup>3</sup>

**B. Procedural History.**

On November 12, 2008, Szmania filed Clark County Superior Court Case No. 08-2-07251-1. CP 1-26. By stipulation, on January 12, 2009, Szmania filed an amended complaint. CP 109-191.

The parties filed several motions for summary judgment. Ultimately, the trial court denied Szmania's motions for summary judgment, and granted Countrywide's motions for summary judgment. The trial court dismissed all of Szmania's claims, and entered a Judgment

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<sup>3</sup> In his appeal, Szmania no longer claims that an effective loan modification occurred between the parties. App. Br., 18.

in favor of Countrywide. Szmania's notice of appeal and appellate brief only specifically pertain to the denial of his own motions for summary judgment.<sup>4</sup> Specifically, Szmania assigns error only to denials of his motions captioned as follows:<sup>5</sup>

1. "SUMMARY JUDGMENT: PLAINTIFF RESPA DAMAGES MOTION FOR SUMMARY JUDGMENT."<sup>6</sup> Supp. CP. \_\_\_\_<sup>7</sup>;
2. "SUMMARY JUDGMENT: LIS PENDENS ATTORNEY FEE'S FINAL JUDGMENT: \$4,000." *Id.*<sup>8</sup>; and

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<sup>4</sup> Szmania appeals the trial court's grant of Countrywide's Motion to Cancel Notice of Lis Pendens. This motion, however, was not styled as a motion for summary judgment.

<sup>5</sup> The exact assignments of error claimed by Szmania are not clear. Countrywide offers this summary to attempt to clarify the exact matters that are now at issue before the Court.

<sup>6</sup> On February 5, 2009, the Court wrote a letter to the parties explaining its ruling on issues regarding Szmania's RESPA claims. Before the court were Szmania's Motion for Summary Judgment and a summary judgment motion filed by Countrywide to dismiss the same claims. The Court sent a letter to the parties dismissing Szmania's RESPA-based claims. CP 208. On July 27, 2009, the Court denied Szmania's Motion for Reconsideration of the denial of his Motion for Damages. CP 260-261. Thus, the order denying Szmania's Motion for Damages appears to be the only order on this issue for him to appeal.

<sup>7</sup> Plaintiff did not designate his notice of appeal, but Countrywide has submitted a supplemental designation of this notice of appeal so it is included in the appellate record.

<sup>8</sup> Szmania's Motion to Quash is not designated in the Clerk's Papers and thus not before this Court. Szmania's notice of appeal and appellate brief suggest that he is appealing the trial court's order denying his Motion to Quash Defendant's Motion to Cancel Notice of Lis Pendens and granting Countrywide's Motion to Cancel Notice of Lis Pendens. His notice states, however, that he is appealing the denial of his motion for reconsideration of the same issues. Countrywide addresses the substantive issue of whether or not the trial court erred in granting Countrywide's Motion to Cancel and award of attorney fees. *See* CP 205-207.

3. “MOTION FOR RECONSIDERATION OF SUMMARY JUDGMENT DISCHARGING SUSPOSED [SIC] DEBT OF DANIEL G. SZMANIA WITH COUNTRYWIDE HOME LOANS INC.”<sup>9</sup>

*Id.*; App. Br., at 1.

The trial court rulings actually at issue are rather limited, but Countrywide has responded to the substance of these arguments in a good faith effort to address Szmania’s apparent claimed errors.

**C. Facts Related to Szmania’s Claim for Damages Under RESPA.**

Szmania claims that Countrywide violated 12 U.S.C. § 2605(e)(3) and that Countrywide is therefore liable to him for damages. App. Br., at 9. Szmania argues that after he sent Countrywide various communications which he now alleges were qualified written requests (“QWR”) under the Real Estate Settlement Procedures Act (“RESPA”), Countrywide impermissibly reported to credit agencies that Szmania’s residential mortgage payments were past due. *Id.*, at 10. Szmania claims that as a result of this allegedly wrongful reporting he was damaged in the amount of \$1,319,600.00 – the “fair value of the credit” he supposedly had access to before Countrywide’s alleged communication with the credit agencies. *Id.*, at 12.

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<sup>9</sup> The Order denying Szmania’s Motion to Discharge Debt can be found at CP 290-292. The Order denying Szmania’s Motion for Reconsideration can be found at CP 306-307.

Even assuming such a claim is legally cognizable, Szmania failed to support it with any competent evidence at the trial court level. At no point did Szmania submit any of the following to the trial court: (1) copies of communications between Countrywide and credit rating agencies; (2) competent evidence that would support that the fair value of his credit lines was \$1,319,600.00; or (3) evidence of actual damages stemming from the alleged loss of the credit lines.

Although Mr. Szmania lists five alleged QWR's in his brief, he does not explain where in the record copies of these requests can be found. App. Br., 11. Apparently, Szmania is claiming that his August 20, 2008 e-mail to Countrywide employee Steve Bailey, a September 8, 2008 letter to Countrywide Executive Research Specialist Monica Castillejos, and a November 14, 2008 letter to Ms. Castillejos are his alleged QWRs. CP 75-78; CP 83-84; CP 92. Significantly, each of these communications concerned the validity of Szmania's alleged loan modification, not the actual servicing activities related to his loan. *Id.* Szmania provides no citation to the alleged December 15, 2008 and February 17, 2009 QWRs and no such written communications appear in the record.

Szmania's Loan was transferred to Countrywide for servicing on July 17, 2007. CP 44. Szmania's first alleged QWR was not sent until August 20, 2008, however. App. Br., 11; CP 75-78. Thus, over one year

elapsed between the time Szmania's Loan was transferred to Countrywide and the date of the first alleged QWR.

**D. Facts Related to the Cancellation of Szmania's Notice of Lis Pendens.**

On December 12, 2008, Szmania recorded and filed a notice of lis pendens against the Property. CP 365-366. On January 13, 2009, Countrywide moved to cancel the notice of lis pendens. CP 370. On January 15, 2009, Szmania filed an Opposition to Countrywide's Motion. CP 192. On January 20, 2009, Countrywide filed a joint reply in support of its motion to cancel the notice of lis pendens and opposition to Szmania's motion to quash the motion to cancel lis pendens.<sup>10</sup> CP 195. On January 23, 2009, the trial court entered an order granting Countrywide's Motion to cancel notice of lis pendens. On February 10, 2009, Szmania filed a Motion for Plaintiff's Reconsideration on Ruling for Attorneys Fees and Removing Lis Pendens. CP 239. On February 27, 2009 the trial court denied Szmania's motion for reconsideration. CP 258-259.

**E. Facts Related to Szmania's Motion to Discharge Debt.**

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<sup>10</sup> Szmania did not designate for inclusion in the Clerk's Papers the pleadings related to his Motion to Quash Defendants' Motion to Cancel Notice of Lis Pendens

Although Szmania premised his lawsuit against Countrywide on the alleged unilateral loan modification resulting from Countrywide's receipt of a partial loan payment, Szmania eventually moved for summary judgment seeking discharge of his over \$700,000.00 in loan debt on the theory that no loan agreement of any kind existed between the parties. *See generally* CP 264-289. In his motion (and also in his appellate brief) Szmania argued, "I have never signed and accepted any loan agreement with the Defendant, Country Wide Home Loans Inc. There has never been a signed and accepted loan modification agreement of the parties either." CP 265 (emphasis omitted). Accordingly, Szmania claims, the debt he owes to Countrywide should be discharged and Countrywide should refund any and all payments Szmania tendered to it. Essentially, Szmania seeks forgiveness of over \$700,000.00 in mortgage loan debt and free and clear title to his property. The trial court properly found that Szmania was not entitled to this extraordinary relief and its ruling should be affirmed.

### **III. LEGAL ARGUMENT**

#### **A. Standards of Review.**

This Court reviews *de novo* a trial court's summary judgment rulings. *Cox v. O'Brien*, 150 Wn. App. 24, 33, 206 P.3d 682 (2009). "The facts required by CR 56(e) to defeat a summary judgment motion are

evidentiary in nature. Ultimate facts or conclusions of fact are insufficient. Likewise, conclusory statements of fact will not suffice.” *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).

A trial court’s decision to deny a motion for reconsideration is reviewed only for abuse of discretion. *In re Estate of Peterson*, 102 Wn. App. 456, 9 P.3d 845 (2000). Abuse of discretion occurs only where the trial court’s decision rests on untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

**B. Szmania Has Failed to Appeal or Otherwise Assign Error to the Grants of Summary Judgment in Favor of Countrywide and This Court Should Decline to Review These Orders and Dismiss the Appeal.**

The Rules of Appellate Procedure require a party to designate in its notice of appeal “the decision or part of decision which the party wants reviewed.” RAP 5.3(a). “The party filing the notice of appeal should attach to the notice of appeal a copy of the signed order or judgment from which the appeal is made.” *Id.* Szmania’s notice of appeal designates only the orders dated February 3, 2009, January 23, 2009, and August 14, 2009. CP 208; 205-207; 306-307.<sup>11</sup> Accordingly, even if the Court were to reverse on the three issues presented by Szmania’s appeal, Szmania

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<sup>11</sup> See pp. 4-5, *supra* and footnotes regarding the basis of Szmania’s appeal.

would still lose as he has not actually appealed the orders granting Countrywide summary judgment and dismissing his claims. Accordingly, the Court should decline to review these orders, and dismiss Szmania's appeal.<sup>12</sup>

Countrywide, however, acknowledges this Court's discretion to disregard technical defects in a party's notice of appeal if the party's notice clearly reflects an intent to seek review. *See* RAP 5.3(f); *S & K Motors, Inc. v. Harco Nat. Ins. Co.*, 151 Wn. App. 633, 639, 213 P.3d 630 (2009). Countrywide respectfully submits that it would be improper to exercise this discretion where a party's underlying litigation and present appeal are interposed for purposes of avoiding an undisputed debt. Nonetheless, for the reasons that follow, all trial court orders potentially implicated by this appeal should be affirmed in their entirety.

**C. The Trial Court Properly Denied Szmania's Motion for Summary Judgment for Damages Under RESPA and Granted Countrywide's Motion on the Same Issues.**

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<sup>12</sup> Countrywide has, in the course of this brief, attempted to give Szmania the benefit of the doubt and respond to what it perceives to be the substance of his appellate allegations. Whatever this Court understands the scope Szmania's appeal to be, Countrywide states that the trial court correctly ruled on all issues related to Szmania's RESPA claims, Szmania's filing of a notice of Lis Pendens, and Szmania's claims for discharge of debt.

Szmania's damages argument is difficult to follow, but its gravamen appears to be that Countrywide should be liable to him for over \$1.3 million in unsubstantiated lost credit damages. App. Br., at 10-12.

The only basis Szmania identifies for holding Countrywide liable for these alleged damages is its alleged violation of RESPA's QWR provisions by accurately reporting the delinquency in his account resulting from the difference between what he paid each month under his incorrect belief he modified his loan and what he actually owed.

This argument fails because: (1) Szmania's communications were not QWRs; (2) Countrywide promptly investigated and responded to Szmania's complaints; (3) Szmania failed to present any competent evidence of damages; (4) Szmania never presented evidence that Countrywide impermissibly contacted the credit rating agencies; and (5) Szmania improperly "stacked" his alleged qualified written requests.

The primary purpose of RESPA is to protect home buyers from material non-disclosures in settlement statements and abusive practices in the settlement process, but RESPA also applies to the servicing of federally related mortgage loans. *MorEquity, Inc. v. Naeem*, 118 F. Supp. 2d 885, 900 (N.D. Ill. 2000). Szmania bases his argument on 12 U.S.C. § 2605(e)(3), which provides that:

During the 60-day period beginning on the date of the servicer's receipt from any borrower of a qualified written request relating to

a dispute regarding the borrower's payments, a servicer may not provide information regarding any overdue payment, owed by such borrower and relating to such period or qualified written request, to any consumer reporting agency (as such term is defined under section 1681a of Title 15).

12 U.S.C. § 2605(e)(3). Thus, even assuming Szmania has adequately appealed the trial court's rulings on his damages claims, he must as a threshold matter establish that his communications were QWRs under RESPA. *See* App. Br., at 9-12. Szmania cannot overcome this initial barrier to his damages argument.

**1. None of Szmania's Communications to Countrywide Qualify as QWRs Because They All Relate to a Legal Dispute Over the Validity of His Alleged Loan Modification, Not the Actual Servicing of His Loan.**

To be a QWR under RESPA, a borrower's communication regarding his or her loan must "relate[] to the servicing of such loan." 12 U.S.C. § 2605(e)(1)(A). "Servicing" in this context "means receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan ... and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan." 12 U.S.C. § 2605(e)(3). The communication must also enable the servicer to identify the name and account of the borrower and include "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)(i), (ii). If a borrower’s communication does not meet these criteria, it is not a QWR.

Caselaw construing the QWR provisions of RESPA confirms that a communication is not a QWR if it disputes the validity of the loan rather than some aspect of its servicing. *See, e.g., Keen v. American Home Mortgage Servicing, Inc.*, 664 F. Supp. 2d 1086, 1096-97 (E.D. Cal. 2009); *Consumer Solutions, REO v. Hillery*, 658 F. Supp. 2d 1002, 1013-14 (N.D. Cal. 2009); *MorEquity*, 118 F. Supp. 2d at 900.

In *Keen*, the communication the borrower relied upon for her claim sought to rescind the loan and demanded cancellation of the trustee’s foreclosure sale. *Id.*, at 1097. Because this communication disputed the validity of the loan rather than its servicing, the Court dismissed the borrower’s RESPA QWR claim. *Id.* Similarly, in *Consumer Solutions*, the Court dismissed the borrower’s RESPA QWR claim because the communication at issue disputed the debt and therefore pertained to the validity of the loan, rather than its servicing. *Id.*, at 1014. Finally, in *MorEquity*, the Court held that a borrower’s communication alleging a forged deed and irregularities with respect to the recording of the loans did not relate to loan servicing and therefore did not constitute a QWR under RESPA. *Id.*, at 901.

Here, the communications on which Szmania relies suffer from fatal deficiencies similar to those at issue in *Keen, Consumer Solutions*, and *MorEquity*. As noted above, Szmania relies on communications dated August 20, 2008, September 9, 2008, and November 14, 2008, and alleged communications December 15, 2008, and February 17, 2008. App. Br., at 11.

First, there is no evidence of any communications dated December 15, 2008 or February 17, 2008 in the record before this Court. There is no proof either of these communications exist and they cannot form the basis of Szmania's RESPA damages claim. Thus, the only communications that could even arguably constitute QWRs are Szmania's August 20, 2008, September 9, 2008, and November 14, 2008 communications.

Second, it is doubtful at best whether Szmania can even base his damages argument on appeal on the August 20, 2008, September 9, 2008, or November 14, 2008 communications. See RAP 2.5(a); *Brower v. Ackerley*, 88 Wn. App. 87, 96, 943 P.2d 1141 (1997). Szmania's damages motion does not include a single reference to any of these communications or otherwise argue that he made a QWR. CP 29-32. And his Amended Complaint makes only passing reference to the August 20, 2008 and September 9, 2008 communications – merely reciting, with no factual

explanation, that they are QWRs. *See* CP 116-117. Szmania's Amended Complaint does not allege that his November 18, 2008 communication (made after he filed his lawsuit) constitutes a QWR. *See* CP 118-119. Indeed, this communication was made the same day as Szmania filed his motion for damages; needless to say this is before Countrywide's 60 days to respond had expired. *See* 12 U.S.C. 2605(e). Szmania cannot base his QWR claim on this communication.

Third, and most importantly, none of these three communications concern the servicing of the loan; they all concern Szmania's incorrect theory that he modified his loan by making a partial payment – an argument he has abandoned on appeal. Szmania's August 20, 2008 email includes many of the same allegations regarding the alleged loan modification he included in his complaint and also appears to seek some kind of loan modification on the basis of a Countrywide press release – in there is no discussion of the actual servicing of the loan. CP 75-78. Similarly, the September 9, 2008 communication is actually a rebuttal to Countrywide's response to the August 20, 2008 correspondence. CP 83-84. In it, Szmania reiterated his arguments why his attempted unilateral loan modification was effective and threatened to sue. *Id.* Finally, Szmania's November 14, 2008 communication reiterated his legal argument and actually enclosed a copy of his summons and complaint, a

purported temporary restraining order and his initial motion for summary judgment, and a proposed loan modification agreement. CP 92-95.

Simply put, the August 20, 2008, September 9, 2008, and November 12, 2008 communications concern the validity of Szmania's alleged modification and thus the terms of his loan, not any issue related to the actual servicing of the loan. *See* CP 75-78; 83-84; 92-95. Moreover, a complaint does not meet the definition of a QWR and it would be anomalous if communications disputing legal issues and threatening to sue could constitute QWRs. *See Delino v. Platinum Community Bank*, 628 F. Supp. 2d 1226 (S.D. Cal. 2009).

**2. Szmania Fails to Point to Any Evidence Tending to Show That Countrywide Impermissibly Contacted Consumer Credit Reporting Agencies.**

Even assuming one or more of the communications at issue were QWRs, Szmania fails to provide the Court with evidence that establishes even a prima facie case of a RESPA violation. 12 U.S.C. § 2605(e)(3).

Although Szmania submitted to the trial court some unauthenticated correspondence purportedly from other creditors regarding lines of credit unrelated to his mortgage loan, he did not provide any evidence as to when the allegedly improper reporting by Countrywide took place. Thus, Szmania did not and cannot establish that Countrywide's allegedly improper reporting occurred within 60 days after

its receipt of Szmania's alleged qualified written requests (indeed, such reporting, if it occurred, may have happened before communications from Szmania were received at all). This lack of evidence on an essential element of Szmania's RESPA claim is reason enough to affirm the trial court's denial of Szmania's Motion for Damages.

**3. Szmania Does Not Dispute That Countrywide Promptly Responded to His "Qualified Written Requests" Before Reporting to Credit Agencies.**

12 U.S.C. § 2605(e) governs a servicer's duty to respond to a borrower's QWR. The statute sets periods for confirming receipt of inquiries and for responding to them. 12 U.S.C. § 2605(e)(1), (2). As noted above, the statute prohibits a servicer from reporting to credit agencies for 60 days after receipt of a QWR. U.S.C. § 2605(e)(3). This 60-day time frame corresponds with the time period in which a servicer must investigate and respond to borrower inquiries. U.S.C. § 2605(e)(2). Thus, the statute ensures that a servicer has investigated and responded to a borrower's inquiry before the servicer reports to the credit agencies. Here, the record establishes that Countrywide did not report to the credit rating agencies, if at all, until after investigating and responding to Szmania's inquiries. Thus, Countrywide's actions are in concert with the goals of the statute.

In Szmania's August 20, 2008 communication, he advanced an argument that he had unilaterally modified his loan agreement with Countrywide, an argument he lost below, has not appealed, and expressly disclaims on appeal. CP 75-78. On September 4, 2008 Countrywide promptly replied to this communication, refuted Szmania's claimed loan modification, and explained the reason for a past due balance on his account. CP 80-81. As noted above, Szmania points to no evidence in the record as to how soon after this alleged QWR Countrywide communicated with the credit rating agencies or that Countrywide even did so. This lack of evidence, combined with the fact that Countrywide responded to Szmania's communication within 15 days (a quarter of the time allowed by statute), demonstrates that Countrywide fully complied with intent and purposes of 12 U.S.C. § 2605. Similarly, Countrywide responded in detail to Szmania's September 9, 2008 communication by reiterating that Szmania had not modified his loan, offering him a loan modification agreement for an actual modification of his loan, and waiving a late payment fee. CP 86. Because Countrywide promptly investigated and responded to Szmania's inquires, Countrywide's actions cannot be the basis for liability under RESPA. Accordingly, the trial court properly denied Szmania's motion for summary judgment and properly granted Countrywide's motion for summary judgment.

**4. Szmania Did Not Prove His “Actual” Damages Under RESPA as a Matter of Law.**

A plaintiff seeking to recover damages must meet his burden of establishing by the required standard of proof that he has actually sustained the amount of damages requested. *See, e.g., Northwest Independent Forest Mfrs. v. Dept. of Labor and Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995); *St. John Medical Center v. State ex rel. Dept. of Social and Health Svcs*, 110 Wn. App. 51, 64, 38 P.3d 383 (2002). Szmania alleges that Countrywide owes him “\$1,319,600.00 in Damages for the fair value of the credit worth of the Appellant . . .” App. Br., at 12. The thrust of his claim is that Countrywide’s reporting of the fact that he was making only partial payments and thus had fallen in arrears on this mortgage caused him to lose certain lines of credit. *Id.* Szmania’s Motion for Damages, however, is devoid of the proof necessary to establish his alleged damages as a matter of law.

The *Katz v. Dime Sav. Bank, FSB*, 992 F. Supp. 250 (W.D.N.Y. 1997) decision presents a similar factual pattern as is presented here and illustrates that Szmania’s Motion for Damages was properly denied. In *Katz*, the plaintiff mortgagor contended that he had orally agreed to a loan modification with the defendant servicer and began tendering checks to the servicer for the purported modified amount. *Id.*, at 252-53. The servicer, however, denied that a modification had taken place and reported

to consumer credit rating agencies that the mortgagor's loan was in default. *Id.*, at 253. The mortgagor sought actual damages for economic loss (and other damages) under RESPA and the servicer moved for summary judgment dismissal of these claims. *Id.*, at 251. In opposition to the servicer's motion, the mortgagor submitted an "affirmation" claiming that as a result of the servicer's wrongful reporting he was "unable to refinance or sell his home." *Id.* at 257. The court held that:

Plaintiff's unsupported claim of economic injury contained in paragraph 83 of his affirmation does not meet this standard. Plaintiff has not provided any evidence that he either intended to refinance or sell his home or that he was denied such opportunities as a result of defendants' conduct. Plaintiff cannot defeat defendants' motion merely by listing economic harm that might have occurred as a result of defendants' conduct. Plaintiff's contentions that he will provide such proof at trial are inadequate as a matter of law. Without some objective evidence of the economic harm he alleges, plaintiff's claim for damages for economic loss cannot survive defendants' motion for summary judgment as a matter of law.

*Id.* Szmania's appeal in this case must fail for similar reasons.

As a threshold matter, Szmania does not appeal the trial court's determination that there was no effective loan modification between the parties (indeed, he now argues that no modification took place). App. Br., 18. Since there was no valid modification, Szmania's reduced payments were in fact insufficient and past due balances were in fact accruing under his Loan. Accordingly, even if Szmania's communications with Countrywide were QWRs, Countrywide would have been entitled to

report Szmania's past due balance to the credit reporting agencies 60 days after receiving the requests. Szmania does not offer any argument or cite any evidence in the record that would be sufficient to establish that his alleged "damages" were caused by Countrywide reporting accurate information within the 60 day period rather than after it.

Szmania's damages argument has additional deficiencies. Szmania argues that he was damaged because he lost the ability to borrow money. Szmania offers neither evidence nor argument that he would have borrowed money if he had been able to so. Szmania's alleged damages are exactly the sort of speculative claims for damages that were dismissed by the Court in *Katz*. Moreover, the *Katz* court ruled on a *defendant's* motion for summary judgment; the issue here is, the *plaintiff's* motion for summary judgment. If speculative claims for damages are not enough to defeat a defendant's motion for summary judgment, they certainly cannot be enough for a plaintiff to carry his ultimate burden of proof, as would be necessary to prevail on such a motion.

**5. Szmania Is Not Entitled to Damages Because His Alleged "QWRs" Were Not Timely.**

RESPA's implementing regulations also establish that none of Szmania's alleged QWRs were timely. 24 C.F.R. § 3500.21(e)(2)(ii) establishes that a written request is not a "QWR" if it is delivered to a servicer more than one year after either the date of transfer of servicing or

the date that the mortgage servicing loan amount was paid in full, whichever date is applicable. 24 C.F.R. § 3500.21(e)(2)(ii). Countrywide became the servicer of Szmania's loan on January 19, 2007. CP 44. Szmania's alleged QWRs were sent between August 20 and November 14, 2008, well after this one-year period expired. App. Br., at 11. Thus, Szmania's "requests" were not QWRs because they were untimely. Since Szmania's communications were not qualified written requests, Countrywide cannot be liable under 12 U.S.C. § 2605(e)(3).

**6. Szmania Should Not Be Allowed to "Stack" His Qualified Written Requests to Prevent Accurate Credit Reporting and Impose Unwarranted Liability.**

Szmania's QWR argument rests on the premise that as a borrower continues to dispute the balance of his account, no matter how frivolous such dispute maybe, a servicer is prohibited from reporting non-payment or under-payment to consumer credit agencies. After Countrywide promptly responded to Szmania's August 20, 2008 communication, Szmania sent another two communications. CP 75-78; 83-84; 92-95. These three communications all advance the same frivolous argument regarding Szmania's attempt to unilaterally modify his loan by sending in checks for less than what he owed. Thus, Szmania does not claim that Countrywide is prevented from reporting to credit agencies for two

months, as stated by the statute, but for nine months (August 2008 through April, 2009 – two months after his last alleged QWR).

By “stacking” his alleged QWRs, Szmania seeks to frustrate the purpose of the RESPA and prevent Countrywide from accurately reporting to the credit agencies for much longer than the 60-day period the statute contemplates. To accept Szmania’s argument and consider his communications to be QWRs would allow borrowers to delay accurate credit reporting by their servicers for an indefinite period. Szmania has presented no authority that Congress intended this result or to impose liability under this set of facts.

**D. The Trial Court Properly Cancelled Szmania’s Notice of Lis Pendens and Made the Required Award of Attorney Fees.**

Szmania takes issue with the trial court’s award of mandatory attorney fees incurred in connection with Countrywide’s motion to cancel the lis pendens he filed against his property.

A lis pendens has “the effect of clouding the title to real property.” RCW 4.28.328(1)(a). The underlying purpose of a lis pendens is to give notice to subsequent purchasers or encumbrances that they will be bound by the outcome of the action to the same extent as if they were a party to the action. *R.O.I., Inc. v. Anderson*, 50 Wn. App. 459, 462, 748 P.2d 1136 (1988).

If a party files a lis pendens in an action that does not affect title to real property, it is automatically liable to the aggrieved party for the aggrieved party's actual damages and reasonable attorney fees.

Subsection (2) of RCW 4.28.328 states:

(2) A claimant in an action not affecting the title to real property against which the lis pendens was filed is liable to an aggrieved party who prevails on a motion to cancel the lis pendens, for actual damages caused by filing the lis pendens, and for reasonable attorneys' fees incurred in canceling the lis pendens.

RCW 4.28.328(2).<sup>13</sup> The Washington legislature specifically amended the lis pendens statutes to provide for an attorney fee award in order to deter litigants from improperly clouding title to real property. As reported in the House Bill Report for Second Substitute House Bill 1009, the testimony in favor of the bill stated that a wrongful lis pendens statute would "provide a remedy to parties who are injured by improperly filed lis pendens and will serve as a deterrent to filing lis pendens improperly." House Bill Report, SSHB 1009 (1994), at 2.

**1. The Dispute Between the Parties Does Not Affect Title to Real Property.**

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<sup>13</sup> A party can also be liable for attorney fees and damages under the lis pendens statute even if the action does affect title to real property if lis pendens was filed without substantial justification. RCW 4.28.328(3). Here, however, Countrywide sought and the court awarded attorney fees under subsection (2) of RCW 4.28.328, the "not affecting title to real property" prong of the statute. CP 206.

In Washington, a party's right to file a notice of lis pendens is predicated on the action at issue being one "affecting title to real property":

At any time after an action affecting title to real property has been commenced ... the plaintiff ... may file with the auditor of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the real property in that county affected thereby.

RCW 4.28.320. *See also Richau v. Rayner*, 98 Wn. App. 190, 197-98, 988 P.2d 1052 (1999); *Foster v. Nehls*, 15 Wn. App. 749, 753, 551 P.2d 768 (1976). "Title, in the context of real property, is defined as 'the means whereby the owner of lands has the just possession of his property[.]' *Schwab v. City of Seattle*, 64 Wn. App. 742, 749, 826 P.2d 1089 (1992) (citing *Black's Law Dictionary*, at 1331 (5th ed. 1979)).

Because none of the relief requested by Szmania in his Amended Complaint affected title to real property, Szmania's filing of the notice of lis pendens was improper, the trial court properly cancelled it and awarded Countrywide its reasonable attorney fees. Notably, Szmania does not dispute the amount of fees awarded on appeal.

**2. Countrywide Is an Aggrieved Party Under RCW 4.28.328(1).**

Szmania disputes Countrywide's ability to bring a motion to cancel the notice of lis pendens on the ground that Countrywide was not an

‘aggrieved party’ under RCW 4.28.328(1). App. Br., 14. The statute defines aggrieved party as “(i) a person against whom the claimant has asserted the cause of action in which the lis pendens was filed, but does not include parties fictitiously named in the pleading.” It cannot be reasonably disputed that Countrywide is an aggrieved party because Szmania named it as a defendant in his lawsuit.

**3. The Trial Court Properly Awarded Countrywide \$4,000.00 In Attorney Fees.**

RCW 4.28.328(2) and (3) establish two alternative prongs for awarding attorney’s fees arising out of the filing of notices of lis pendens. In its order cancelling the notice of lis pendens, the trial court clearly stated that “Countrywide is awarded reasonable attorney fees pursuant to 4.28.328(2).” CP 206. Thus, the trial court awarded attorney fees under the “not affecting title to real property” prong of the statute as opposed to the “without substantial justification” prong.

In his appellate brief, Szmania confuses this two-prong attorney fee approach. Szmania cites *Keystone Land and Development Co. v. Xerox Corp.*, 353 F.3d 1070 (9th Cir. 2003) for the proposition that attorney’s fees are not automatic under RCW 4.28.328. App. Br., 17. As an initial matter, *Keystone Land* does not contain the quoted text cited in Szmania’s brief. Secondly, *Keystone Land* dealt with imposition of attorney’s fees under RCW 4.28.328(3), the “without substantial

justification” prong as opposed to RCW 4.28.328(2). *See generally Keystone Land*, 353 F.3d 1070 (9th Cir. 2003). Finally, the *Keystone Land* court held that no attorney fees were to be imposed because there was substantial justification for the filing of a notice of lis pendens. Thus, the authority cited by Szmania provides no competent argument that the trial court erred in awarding attorneys fees under RCW 4.28.328(2), the automatic lis pendens attorney’s fee provision.

**E. The Trial Court Properly Denied Appellant’s Motion for Summary Judgment Discharging Debt.**

**1. The Sale and Assignment of the Loan to Countrywide Are Entirely Valid.**

In support of his motion below – in which he requested that his entire debt be forgiven – Szmania argued that the Loan was voided when it was sold to Countrywide. CP 265. Szmania’s primary support for this position is Plaintiff’s assertion that RCW 65.08.070 voided the assignment of the loan from E-Loan, Inc. to Countrywide because the assignment was not recorded. Szmania completely misconstrues the statute.

RCW 65.08.070 provides in pertinent part:

*A conveyance of real property*, when acknowledged by the person executing the same (the acknowledgement being certified as required by law), may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his heirs or devisees, of the

same real property or any portion thereof whose conveyance is first duly recorded[.]

*See* RCW 65.08.070. (Emphasis added.) By its terms, the statute only applies to conveyances of real property and has no application whatsoever to assignments of promissory notes or deeds of trust. In fact, no Washington statute requires that assignments of deeds of trust be recorded in order to be effective. *See* RCW 61.24.005 to 61.24.140. Even the Federal National Mortgage Association (“Fannie Mae”), which each year purchases millions of loans secured by mortgages and deeds of trust, does not require that assignments be recorded. In fact, when the assignments are registered with MERS, the sellers are not even required to prepare forms of assignment, much less record them. *See* Fannie Mae Single Family Seller Guide, VI, 301.01; CP 200-202; RCW 65.08.070. Therefore, the fact that the assignment of the loan from E-Loan, Inc. to Countrywide was not recorded in the public records is not grounds for vacating the deed of trust or for discharging the debt.

**2. Szmania Agreed to the Sale of the Loan to Countrywide and the Assignment of the Loan Is Not Void Under the Creditor Statute of Frauds**

Contrary to his assertions, Szmania expressly agreed, in writing, to the sale and assignment of the loan from E-Loan, Inc. to Countrywide when Plaintiff executed the Deed of Trust on November 6, 2006. Section 20 of the deed of trust signed by Szmania states:

**20. Sale of Note; Change of Loan Servicer; Notice of Grievance.** *The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower.* A sale might result in a change in the entity (known as the “Loan Servicer”) that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

CP 65-66. (emphasis added). Since Szmania agreed in writing to the sale and assignment of the loan, the sale can not be void under Washington’s Creditor Statute of Frauds. *See* 19.36.110. As such, the sale of the loan did not release Szmania from his obligations under the note and deed of trust and the trial court properly denied Szmania’s motion for summary judgment.

#### **IV. CONCLUSION**

For the reasons above, Respondent Countrywide Home Loans, Inc. respectfully requests that the trial court orders implicated by Appellant Daniel Szmania’s appeal be affirmed in their entirety.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of May, 2010.

LANE POWELL PC

By   
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Home Loans, Inc.

**CERTIFICATE OF SERVICE**

I, hereby certify that on May 26, 2010, I caused to be served a copy of the foregoing on the following person via (1) facsimile; (2) electronic mail; and (3) U.S. First Class Mail to the following address:

Daniel Szmania  
17005 NE 164<sup>th</sup> AVE  
Brush Prairie, WA 98606

Fax No. (360) 604-0566  
[dszmania@quixnet.net](mailto:dszmania@quixnet.net)

I certify under penalty of perjury under the laws of United States of America and the laws of the State of Washington that the foregoing is true and correct.

DATED this 26 day of May, 2010, at Seattle, Washington.

  
Deborah Strayer

FILED  
COURT OF APPEALS  
10 MAY 26 PM 4:31  
STATE OF WASHINGTON  
BY Sam  
DEPUTY