

No. 44810-6-II

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

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BIG BLUE CAPITAL PARTNERS OF WASHINGTON, LLC,

Appellant,

vs.

NORTHWEST TRUSTEE SERVICES, INC.;

Respondent.

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**OPENING BRIEF OF RESPONDENT  
NORTHWEST TRUSTEE SERVICES, INC.**

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## I. STATEMENT OF THE CASE

### A. Factual History.

On or about September 22, 2006, borrower Dawne Delay (“Delay”) executed a promissory note (the “Note”) in the amount of \$156,000.00, payable to Homecomings Financial Network, Inc. (“Homecomings”). CP 83-85. Delay secured repayment of the Note with a Deed of Trust. CP 87-104. On September 26, 2006, the Deed of Trust was recorded; it encumbered real property located in Thurston County (the “Property”). *Id.*

On or about March 1, 2012, Delay defaulted on the terms of the secured Note when she failed to make any further required loan payments. CP 55, 171 (Notice of Default).

On June 28, 2012, Delay filed a voluntary Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the District of Oregon under case number 12-35073-elp7. CP 106-153. Delay’s bankruptcy petition identified the value of her interest in the Property – listed as a rental – as \$148,050.00 with a secured claim of \$194,487.00. CP 109.<sup>1</sup> Delay did not identify any claims against Deutsche Bank or NWTS as

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<sup>1</sup> Delay intended to surrender the Property. CP 113.

assets in her petition. *Id.*; *see also* CP 125.

On or about July 27, 2012, Delay, the Chapter 7 trustee, and Appellant Big Blue Capital Partners of Washington LLC (“Big Blue”) agreed to a “global settlement” that sold four properties from Delay’s estate (including the Property) to Big Blue in exchange for \$20,000.00. CP 160. On August 9, 2012, the Bankruptcy Court granted relief from stay permitting foreclosure and possession of the Property. CP 155.<sup>2</sup>

On December 6, 2012, upon recordation of the Appointment of Successor Trustee, NWTS became vested with the powers of the original trustee under the Deed of Trust. CP 168.

On December 11, 2012, a sworn declaration was executed for NWTS’ benefit, averring to the status of Deutsche Bank Trust Company Americas as Trustee for RALI 2006-QS14 (“Deutsche Bank”) as the Note holder. CP 174.

The following day, the bankruptcy trustee recorded a conveyance of the Property to Big Blue through a deed “subject to all existing encumbrances....” CP 168.

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<sup>2</sup> On October 3, 2012, an Assignment of Deed of Trust in favor of Deutsche Bank Trust Company Americas as Trustee for RALI 2006-QS14 was recorded under Thurston County Auditor’s No. 4292103. CP 166.

On January 16, 2013, a Notice of Trustee's Sale was recorded under Thurston County Auditor's No. 4315338, setting a sale date for the Property.<sup>3</sup>

B. Procedural History.

On or about January 7, 2013, Big Blue commenced this action, naming only NWTS as a defendant. CP 6-21. On March 29, 2013, the trial court granted NWTS' Motion to Dismiss. CP 257-258.

On May 10, 2013, Big Blue filed another lawsuit concerning the *same Property*, with the *same claims* under the Deed of Trust Act ("DTA") and for Declaratory Relief against NWTS, but this time, added Deutsche Bank and Mortgage Electronic Registration Systems, Inc. ("MERS") as defendants. *See* Thurston County Superior Court Case No. 13-2-01029-9.<sup>4</sup>

On May 31, 2013, Big Blue's attempt to obtain a restraining order

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<sup>3</sup> The Court may take notice of this public record. *See* ER 201(f); *see also Berge v. Gorton*, 88 Wn.2d 756, 763, 567 P.2d 187, 192 (1977) (applied in CR 12(b)(6) context). The fact that a Notice of Trustee's Sale was recorded on January 16, 2013 is not intended to present new evidence, but instead to highlight that said recordation post-dated Big Blue's Complaint, and therefore none of the claims presented therein could possibly relate to that document. *See* CP 21 (Complaint dated January 7, 2013).

<sup>4</sup> This later-filed case is actually a re-filing of the same lawsuit that is now subject to this appeal, merely adding two defendants, and not a "separate proceeding" that happens to involve the same parties. *Swak v. Dep't of Labor & Indus.*, 40 Wn.2d 51, 53, 240 P.2d 560 (1952). As such, notice of that action can be taken solely for its procedural history. *Cf. Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 98, 117 P.3d 1117, 1122 (2005).

of the Property sale was denied. *See* Thurston County Superior Court Case No. 13-2-00041-2. On June 14, 2013, the Property sold at auction to Deutsche Bank; a Trustee's Deed was issued and recorded under Thurston County Auditor's No. 4344435.<sup>5</sup>

On February 27, 2014, just one day before NWTS' Motion for Summary Judgment on the re-filed case was scheduled for a hearing, Big Blue voluntarily dismissed the action without prejudice through an ex parte order. *See* Thurston County Superior Court Case No. 13-2-01029-9, Dkt. No. 73.1.

## **II. RESPONSE TO ASSIGNMENTS OF ERROR**

Although Big Blue delineates five separate Assignments of Error, all of those issues are related to the trial court's dismissal of this case pursuant to CR 12(b)(6), and the trial court did not err in reaching that result. Thus, the Order of Dismissal should be affirmed.

## **III. RESPONSE ARGUMENT**

### **A. Standard of Review.**

Dismissal pursuant to CR 12(b)(6) is reviewed de novo. *Dave Robbins Const., LLC v. First Am. Title Co.*, 158 Wn.App. 895, 899, 249

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<sup>5</sup> *See* fnote. 3, *supra*.

P.3d 625, 626 (2010), citing *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005).<sup>6</sup>

The gravamen of the inquiry is whether the plaintiff's claim is legally sufficient, which is answered by looking to the face of the pleadings. *Id.*; *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725, 189 P.3d 168 (2008). Dismissal is proper where the claims are legally insufficient even after considering hypothetical facts. *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005). Hypothetical facts must bear a logical relation to the claims raised in the complaint. *See McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 233 P.3d 861 (2010) (Johnson, J., dissenting). A court is "not required to accept a complaint's legal conclusions as true." *Rodriguez* at 717-18.

In addition to the pleadings, "[d]ocuments whose contents are alleged in a complaint but which are not physically attached to the pleading may also be considered in ruling on a CR 12(b)(6) motion to

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<sup>6</sup> Given that Big Blue's response to NWTS' Motion to Dismiss included a transcript from a collateral matter that was outside the pleadings, the trial court could have easily converted NWTS' motion to one of summary judgment. *See* CR 12(b). If so, then this Court need not assume the validity of any hypothetical facts in Big Blue's Complaint. *See Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 297, 545 P.2d 13 (1975) ("a dismissal motion should be treated as a motion for summary judgment, if only to keep the court from having to act completely in the dark as to the actual nature of the plaintiff's cause of action.").

dismiss.” *Id.* at 726. Submission of extraneous material normally converts a CR 12(b)(6) motion into summary judgment. *See Hansen v. Friend*, 59 Wn.App. 236, 797 P.2d 521 (1990). However, “if the court can say that no matter what facts are proven within the context of claim, plaintiffs would not be entitled to relief, [the] motion remains one under CR 12(b)(6).” *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 744 P.2d 1032 (1987).

Furthermore, this Court may affirm the ruling below on any ground supported in the record, “even if the trial court did not consider the argument.” *King County v. Seawest Inv. Associates, LLC*, 141 Wn. App. 304, 310, 170 P.3d 53, 56 (2007), *citing LaMon v. Butler*, 112 Wn.2d 193, 770 P.2d 1027 (1989).

Here, the presented facts did not entitle Big Blue to relief against NWTS.<sup>7</sup> As such, the trial court’s order should be affirmed for the reasons set forth below.

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<sup>7</sup> Regardless of whether considered under CR 12(b)(6) or converted to CR 56 summary judgment.

B. Big Blue Agreed to Purchase the Property “Subject to All Encumbrances.”

As a threshold matter, this case was subject to dismissal because of one simple fact: Big Blue knowingly purchased the Property “subject to all encumbrances,” which necessarily included the previously-recorded Deed of Trust identified in Delay’s bankruptcy petition. CP 125, 160-161.<sup>8</sup>

Except as provided in the DTA, a deed of trust is subject to all laws relating to mortgages on real property. *See* RCW 61.24.020. The general rule is that a grantee of mortgaged property who takes the property “subject to” the mortgage cannot dispute its validity.<sup>9</sup>

In *State Finance Co. v. Moore*, 103 Wash. 298, 174 P. 22 (1918), the State Supreme Court held that a purchaser of mortgaged premises who purchased subject to the mortgage, the amount of which was deducted from the purchase price which he paid, did not have the right to question the validity of the existing mortgage. *Id.* at 302.

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<sup>8</sup> “Big Blue... wishes to acquire the Estate’s interest in certain rental properties... subject to liens and interests of third parties.” CP 160.

<sup>9</sup> *See, e.g., Pac. First Fed. Sav. And Loan Ass’n v. Lindberg*, 64 Or.App. 140, 667 P.2d 535 (1983) citing *American Waterworks Co. v. Farmers’ Loan & Trust Co.*, 73 F. 956 (8th Cir. 1896), *cert. den.*, 163 U.S. 675, 16 S.Ct 1198, 41 L.Ed. 319 (1896); *Spinney, et al. v. Winter Park Building and Loan Association*, 120 Fla. 453, 162 So. 899 (1935); *United States Bond & Mortgage Co. v. Keahey, et al.*, 53 Okl. 176, 155 P. 557 (1916).

In reaching its decision, the Supreme Court stated, “It would be palpably unjust for the [grantees] who have received the benefit of the deduction of the face amount of the mortgage in purchasing the property to be able to reduce the amount to \$37,500.” *Id.* Furthermore, the Supreme Court presumed that the mortgage was deducted from the purchase price by relying on the “conveyance they received states a nominal consideration of \$1”. *Id.*

In this case, Big Blue received the benefit of the full amount stated in the Deed of Trust; as in *Moore*, it could not then later challenge the validity of that security instrument or the resulting foreclosure.

In fact, Big Blue’s related corporate entity, “Big Blue Capital Partners LLC” tried – and failed – on other occasions to assert similar declaratory judgment and wrongful foreclosure claims in other jurisdictions. *See, e.g., Big Blue Capital Partners, LLC v. ReconTrust Co., N.A.*, 2012 WL 2049455 (D. Or. June 4, 2012), appeal dismissed (Sept. 25, 2012); *Big Blue Capital Partners, LLC v. Recontrust Co., N.A.*, 2012 WL 1870752 (D. Or. May 21, 2012); *Big Blue Capital Partners, LLC v. Recontrust Co., N.A.*, 2012 WL 1605784 (D. Or. May 4, 2012) (Big Blue

lacked standing in each case).<sup>10</sup> The same result was properly reached here.

C. Even if Big Blue Could Bring this Action, it was Estopped From Raising Claims Not Noticed in the Bankruptcy Schedules and Disclosures.

In the proceedings below, Big Blue argued that it was entitled to act in Delay's stead, as an "interested party" in the Property by virtue of its purchase from the bankruptcy estate. CP 176-177. But if Big Blue held the same legal rights as Delay concerning the Property, then Big Blue was also barred from raising its claims for DTA violations and Declaratory Judgment.

The Ninth Circuit Court of Appeals has held that "[j]udicial estoppel will be imposed when the debtor has knowledge of enough facts to know that a potential cause of action exists during the pendency of the bankruptcy, but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001); *see also Hay v. First Interstate Bank of Kalispell, N.A.*, 978 F.2d 555, 557 (9th Cir. 1992)

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<sup>10</sup> Big Blue and its related corporate entities exist for the purpose of buying properties from bankruptcy trustees and then filing suit "to settle the outstanding liens using litigation." *See* [https://www.gust.com/c/big\\_blue\\_capital\\_partners](https://www.gust.com/c/big_blue_capital_partners) ("The Company will benefit from the rental income of the property during the entire process.").

(Failure to disclose possible claims to the bankruptcy trustee may result in the debtor being estopped from litigating the claim in a non-bankruptcy forum.); *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 385 (5th Cir. 2008) (bankruptcy code imposes on debtors “a continuing duty to disclose all pending and potential claims.”); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414 (3d Cir. 1988), *cert. denied*, 488 U.S. 967 (1988).<sup>11</sup>

Here, *Delay failed to advance any claims related to the Property in her bankruptcy filing*. CP 106-153. Consequently, even assuming that Big Blue was entitled to assume Delay’s role as the borrower/debtor for the purpose of asserting defects in the Deed of Trust, or concerning Deutsche Bank’s authority as beneficiary (which includes the ability to appoint a successor trustee per RCW 61.24.010), Big Blue would have been legally estopped from making those challenges.

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<sup>11</sup> “Failure to mention this potential claim either within the confines of its disclosure statement or at any stage of the bankruptcy court’s resolution precludes this later independent action.” *Id.* at 419.

D. Should the Court Reach the Merits, Big Blue’s Claim of DTA Violations Still Failed to Suggest a Grant of Relief Against NWTs.

1. The Unrefuted Evidence Shows that Deutsche Bank was the Beneficiary.

The DTA defines a beneficiary as “the holder of the instrument or document evidencing the obligations secured by the deed of trust.” RCW 61.24.005(2) (emphasis added).<sup>12</sup> One becomes a note holder through possession of the instrument either payable to that party or to bearer. RCW 62A.3-201.<sup>13</sup>

If a note is payable to bearer, it is negotiated by transfer of possession alone. *Id.* If a note is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. *Id.* This may be either a special indorsement,

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<sup>12</sup> Washington defines beneficiary strictly in the context of holding a note, not just receiving the beneficial interest in a deed of trust, such as Oregon or Idaho require. *Compare* RCW 61.24.005(2), ORS 86.705(2) (“Beneficiary means a person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or the persons successor in interest...”), I.C. § 45-1502(1) (same definition).

<sup>13</sup> The State Supreme Court expressly agrees that the UCC definition of “holder” is consistent with the term found in the DTA, stating in *Bain v. Metro. Mortg. Grp., Inc.*: [t]he plaintiffs argue that our interpretation of the deed of trust act should be guided by these UCC definitions, and thus a beneficiary must either actually possess the promissory note or be the payee.... We agree. This accords with the way the term ‘holder’ is used across the [DTA] and the Washington UCC. 175 Wn.2d 83, 104, 285 P.3d 34 (2012). The term “holder” under the DTA is consistent with, but not exclusively governed by the UCC; otherwise, a Deed of Trust could only ever secure negotiable instruments, which is not the case. *See, e.g., Rodgers v. Seattle-First Nat. Bank*, 40 Wn. App. 127, 129-30 & n.1, 697 P.2d 1009 (1985) (discussing notes secured by Deed of Trust, where the notes were not negotiable instruments).

which identifies a person to whom the note is now payable, or a blank indorsement that makes the note bearer paper. RCW 62A.3-109.

If there is negotiation of a note, the subsequent holder possesses the right to enforce it, as well as the right to enforce any instrument securing the note's repayment, *e.g.*, a deed of trust. *See Kennebec, Inc. v. Bank of the West*, 88 Wn.2d 718, 724-25, 565 P.2d 812, 816 (1977); *Carpenter v. Longan*, 83 U.S. 271, 275, 21 L. Ed. 313 (1872). If the borrower defaults on the note, a secured party may exercise its rights under a deed of trust with respect to any property securing such obligation. *See, e.g.*, RCW 62A.9A-203(g), RCW 62A.9A-308(e).

Here, the record shows that the Note was specially indorsed to Deutsche Bank. CP 85. As a matter of law, Deutsche Bank also became a secured party with respect to the Deed of Trust. CP 87-104. The United States Bankruptcy Court for the District of Oregon also recognized these facts when it granted relief from stay to Deutsche Bank to foreclose on the Property. CP 155.<sup>14</sup>

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<sup>14</sup> "Stay relief involving a mortgage, for example, is often followed by proceedings in state court or actions under nonjudicial foreclosure statutes to finally and definitively establish the lender's and the debtor's rights. In such circumstances, the concern of real party in interest jurisprudence for avoiding double payment is quite reduced." *In re Veal*, 450 B.R. 897, 914 (B.A.P. 9th Cir. 2011).

2. An Assignment of Deed of Trust is Irrelevant to the Propriety of Foreclosure.

Big Blue essentially contends that NWTS could not have been appointed as the successor trustee because of a “false” Assignment of Deed of Trust. Brief of Appellant at 8-9. This conclusion is erroneous for several reasons.

First, the steps required for a non-judicial foreclosure of owner-occupied residential real property in Washington include: 1) issuing a Notice of Default (RCW 61.24.030), 2) recording an Appointment of Successor Trustee if applicable (RCW 61.24.010(2)), 3) possessing proof of the beneficiary’s status (for trustees only, per RCW 61.24.030(7)), 4) recording a Notice of Trustee’s Sale (RCW 61.24.040), and 5) delivery and recording a Trustee’s Deed to the purchaser at sale (RCW 61.24.050). Noticeably absent is any requirement to “prove” one’s authority, or execute an Assignment of Deed of Trust. Indeed, *the word “assignment” does not appear in the DTA requirements at all.*

The purpose of an Assignment of Deed of Trust “is to put parties who subsequently purchase an interest in the property on notice of which entity owns a debt secured by the property.” *Corales v. Flagstar Bank, FSB*, 822 F. Supp. 2d 1102 (W. D. Wash. 2011), *citing* RCW 65.08.070.

In fact, “an Assignment of a deed of trust... is valid between the parties whether or not the assignment is ever recorded.... Recording of the assignments is for the benefit of the parties.” *In re United Home Loans*, 71 B.R. 885, 891 (Bankr. W.D. Wash. 1987).<sup>15</sup> Thus, an Assignment does not convey beneficiary status for the purpose of appointing a trustee. *See* RCW 61.24.005(2), RCW 61.24.010(2).

Second, Big Blue - who was not the borrower, never even received the Assignment, and was neither a party nor third-party beneficiary to that document either – lacked standing to undermine the Assignment’s validity. *See, e.g., Brummett v. Washington's Lottery*, 171 Wn. App. 664, 678, 288 P.3d 48 (2012); *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 56, 80 (2012) (reversible error to hold stranger to contract had standing to challenge it); *McGill v. Baker*, 147 Wash. 394, 266 P. 138 (1928) (only party to an assignment can challenge its validity); *Ukpoma v. U.S. Bank, N.A.*, 2013 WL 1934172, \*4 (E.D. Wash. May 9, 2013) (citing cases); *Brodie v. Northwest Trustee Services*,

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<sup>15</sup> *See also Williams v. Wells Fargo Bank, N.A.*, 2012 WL 72727 (W.D. Wash. Jan. 10, 2012); *Fed. Nat. Mortg. Ass'n v. Wages*, 2011 WL 5138724 (W.D. Wash. Oct. 28, 2011); *St. John v. Nw. Tr. Servs., Inc.*, 2011 WL 4543658 (W.D. Wash. Sept. 29, 2011) (“Washington State does not require recording of such transfers and assignments.”); *In re Reinke*, 2011 WL 5079561 at \*31, n. 10 (Bankr. W.D. Wash. Oct. 26, 2011) (“The WADOTA does not require that an assignment... be recorded in advance of the commencement of foreclosure.”).

*Inc.*, 2012 WL 6192723 (E.D. Wash. 2012) (even borrower lacks standing to attack a MERS assignment).

Third, even if the Assignment was both somehow relevant to the foreclosure process, *and* Big Blue could assert a challenge to its validity, it is simply an agreement between MERS (in a disclosed agency capacity) and Deutsche Bank, but *not* NWTS. CP 166; accord *Salmon v. Bank of Am. Corp.*, 2011 WL 2174554, \*8 (E.D. Wash. May 25, 2011) (“there is no basis for the Court to find that the [borrowers’] rights under the First Deed of Trust were affected by the recording of the [MERS] Corporation of Assignment of Deed.”). Big Blue could not maintain a claim against NWTS for a document that it did not participate in, and that did not affect the foreclosure process.

### 3. NWTS Adhered to the DTA.

Even if a pre-sale cause of action for “Violations of Washington Deed of Trust Act” exists<sup>16</sup>, it would be defined as the “[f]ailure of the trustee to materially comply with the provisions of this chapter [i.e. the DTA].” RCW 61.24.127(1)(c) (emphasis added); *see also Walker v.*

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<sup>16</sup> Assuming that anyone, let alone non-borrower Big Blue, could bring a cause of action for the wrongful initiation of a foreclosure in Washington – a position that NWTS disagrees with. The question of such claim generally has been certified for review in the State Supreme Court. *See Frias v. Asset Foreclosure Services, Inc.*, 2013 WL 6440205 (W.D. Wash. Sept. 25, 2013).

*Quality Loan Serv. Corp.*, 176 Wn. App. 294, 311, 308 P.3d 716 (2013),  
*as modified* (Aug. 26, 2013).<sup>17</sup>

Rather, the DTA is clear that only material non-compliance with the Act's provisions – and those violations prejudicing a *borrower* – are subject to this type of claim. Here, NWTS followed all required and material steps under the DTA, and the trial court accurately found that it was not liable for any violation of that law.

a. The Role of MERS in the Deed of Trust  
Should Not Impute Liability to NWTS.

In *Bain v. Metro. Mortg. Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012), the Washington Supreme Court found that MERS' representation that it was the beneficiary of the Deed of Trust in its own right, rather than as an agent, had the capacity to deceive within the meaning of the Consumer Protection Act – a claim not pled in this case – because MERS was not the Note holder.<sup>18</sup>

The relevant question certified to the Washington Supreme Court was: “[d]oes a homeowner possess a cause of action *against Mortgage*

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<sup>17</sup> Raising a broad challenge to the beneficiary's identity, or the beneficiary's power to appoint a trustee in the first place, does not fall under this limited type of claim.

<sup>18</sup> On remand, the trial court granted MERS' Motion for Summary Judgment on Plaintiff's CPA claim due to a lack of injury and causation. *See Order Granting Motion for Summary Judgment*, King County Superior Court Case No. 08-2-43438-9 SEA (Aug. 30, 2013).

*Electronic Registration Systems, Inc.*, if MERS acts as an unlawful beneficiary under the terms of the Washington Deed of Trust Act?” *Bain*, 285 P.3d at 38. Nothing in the *Bain* decision, or any case in Washington, holds that any element of a CPA claim, or other theory of liability, is satisfied against a non-judicial foreclosure trustee. *Accord Lynott v. Mortgage Elec. Registration Sys.*, 2012 WL 5995053 (W.D. Wash. Nov. 30, 2012) (“possession of the note makes [one] the beneficiary; the assignment merely publicly records that fact....;” “*Bain* did not... create a per se cause-of-action based solely on MERS’s involvement.”), *Zalac v. CTX Mortg. Corp.*, 2013 WL 1990728 (W.D. Wash. May 13, 2013), *citing Bain* at 120 (“[t]he mere fact that MERS is listed on the deed of trust as beneficiary is not itself an actionable injury.”), *Florez v. OneWest Bank, F.S.B.*, 2012 WL 1118179 (W.D. Wash. Apr. 3, 2012) (authority to foreclose based on holding note was independent of MERS.), *Bhatti v. Guild Mortg. Co.*, 2011 WL 6300229 (W.D. Wash. Dec. 16, 2011), *aff’d* 2013 WL 6773673 (9th Cir. Dec. 24, 2013) (no declaratory relief based on MERS’s capacity as nominee in deed of trust).

Because NWTS was not a party to the loan’s origination, it did not participate in executing the Deed of Trust, and thus made no representation

that MERS was a Note holder in its own right.<sup>19</sup> According to *Bain*, any public interest impact would relate to non-party MERS's actions (whatever they may be), and not those of NWTS.

*Bain* should not be stretched to infer presumptions or claims against NWTS, or to suggest it is somehow liable for DTA violations.

b. The Notice of Default was Accurate.

Under the DTA, a notice of default may be delivered by the beneficiary, its agent, or the trustee. See RCW 61.24.030(8); see also RCW 61.24.031 (“A trustee, beneficiary, or authorized agent” may issue notice of default) (emphasis added); see also, e.g., *In re Reinke*, supra at \*31, n. 10 (Bankr. W.D. Wash. Oct. 26, 2011) (“[a]lthough RCW 61.24.030 does not expressly authorize an agent to act for the beneficiary, the Court concludes that an authorized agent of the beneficiary may issue a notice of default on its behalf.”), *Klinger v. Wells Fargo Bank, NA*, 2010 WL 4237849 (W.D. Wash. 2010).

Here, the Notice of Default comports with the mandate of RCW 61.24.030, and contains all requisite information to be given to a

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<sup>19</sup> The Notice of Trustee's Sale compels a description of the original Deed of Trust (listing MERS as a *nominee* for the Lender, its successors and assigns), but does not assert that MERS is the beneficiary or attempting to foreclose. See *Massey v. BAC Home Loans Servicing LP*, 2013 WL 7219501 (W.D. Wash. Nov. 20, 2013), citing RCW 61.24.040(1)(f)(1).

borrower. CP 170-172.<sup>20</sup> This includes identifying the Note owner, loan servicer, and other relevant information set forth in the statute. *Id.*

c. The Appointment of Successor Trustee was Valid.

Big Blue argues that NWTS possessed, and purportedly violated, a statutory duty of good faith. Brief of Appellant at 13-15. In order to have a statutory duty of good faith, one must become a trustee. *See* RCW 61.24.010(4). Moreover, *only* a beneficiary is vested with the right to appoint a trustee under the DTA. *See* RCW 61.24.010(2).

Big Blue's claim is inherently contradictory, however, because it also asserts that NWTS "was *not* appointed by the note holder/owner and therefore lacked authority to act." *Id.* at 13 (emphasis added). NWTS could not breach a duty it never had, but instead, if the duty accrued, then only Deutsche Bank could have effectuated NWTS' appointment.

By contrast, NWTS position is logically consistent, *i.e.*, that Deutsche Bank was the beneficiary, made a legally-valid appointment of NWTS as the successor trustee, and NWTS followed the DTA's requirements in that role.

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<sup>20</sup> Big Blue did not receive title to the Property until almost one week later, and therefore, was not entitled to receipt of the Notice of Default. CP 163.

d. The Beneficiary Declaration was Received Prior to the Notice of Trustee's Sale.

The DTA requires a trustee to have “proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust” before recording a Notice of Trustee’s Sale. RCW 61.24.030(7)(a). One possible means of accomplishing this requirement is through a declaration averring that “the beneficiary is the actual holder of the promissory note or other obligation.” *Id.* (emphasis added).<sup>21</sup> The DTA does not require this declaration to be publicly recorded, or provided to either borrowers or third-party property owners. Moreover, “[u]nless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is *entitled to rely on the beneficiary’s declaration as evidence of proof required* under this subsection.” RCW 61.24.030(7)(b) (emphasis added).

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<sup>21</sup> Federal judges that have reviewed claims related to RCW 61.24.030(7) uniformly agree that a declaration of holder status is adequate “proof” for the trustee to rely on. *See, e.g., Rouse v. Wells Fargo Bank, N.A.*, 2013 WL 5488817 (W.D. Wash. Oct. 2, 2013); *Petheram v. Wells Fargo Bank*, 2013 WL 4761049 (W.D. Wash. Sept. 3, 2013); *Elene-Arp v. Fed. Home Fin. Agency*, 2013 WL 1898218 (W.D. Wash. May 6, 2013) (“[a]lthough there are probably many ways to satisfy the statute’s proof requirement, the statute itself establishes one way.”); *Abram v. Wachovia Mortg.*, 2013 WL 1855746 (W.D. Wash. Apr. 30, 2013); *Beaton v. JPMorgan Chase Bank N.A.*, 2013 WL 1282225 (W.D. Wash. Mar. 25, 2013).

The DTA provides that: “[t]he trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor.” RCW 61.24.010(4).<sup>22</sup> As part of performing that duty, there is *no* statutory authority or case law mandating an additional investigation or confirmation regarding a sworn Beneficiary Declaration (or any other aspect of foreclosure). *Cf.* Brief of Appellant at 15.<sup>23</sup>

In addressing whether a trustee has an “affirmative duty of investigation,” the United States District Court for the Western District of Washington found in *Mickelson v. Chase Home Fin. LLC*, that:

[t]he duty of good faith does not create a duty to conduct an independent verification of sworn affidavits. This expansive view of good faith remains untenable. NWTS relied, as they are specifically permitted to do, on a declaration made under penalty of perjury. They did not breach their duty of good faith in so doing.<sup>24</sup>

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<sup>22</sup> In general, “good faith” is also the “absence of intent to defraud or to seek unconscionable advantage.” *See* Black’s Law Dictionary, 701 (7th ed. 1999); *see also Indus. Indem. Co. of the Northwest, Inc. v. Kallevig*, 114 Wn.2d 907, 792 P.2d 520 (1990). (A “covenant of good faith and fair dealing cannot be read to prohibit a party from doing that which is expressly permitted by an agreement.”)

<sup>23</sup> It is circular reasoning for Big Blue to imply NWTS’ reliance on the Beneficiary Declaration creates the very lack of good faith which would lead to an inability to rely on that same Declaration. *See* Brief of Appellant at 15.

<sup>24</sup> *See also Mickelson v. Chase Home Fin. LLC*, 2011 WL 5553821 (W.D. Wash. Nov. 14, 2011) (“Plaintiffs would have every trustee conduct a secondary investigation into the papers filed by the beneficiary, which is simply too great a demand.”). *Accord Hallquist v. United Home Loans, Inc.*, 715 F.3d 1040, 1048 (8th Cir. 2013) (“[I]n the absence of unusual circumstances known to the trustee, he may, upon receiving a request for foreclosure from the creditor, proceed upon that advice without making any affirmative investigation and without giving any special notice to the debtor.”).

2012 WL 6012791, \*3 (W.D. Wash. Dec. 3, 2012); *see also US Bank Nat'l Ass'n v. Woods*, 2012 WL 2031122 (W.D. Wash. June 6, 2012) (finding the borrower's claim of a violation under RCW 61.24.030(7) is "without merit.").

In *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013), the Supreme Court addresses a trustee's duties, but based on *underlying facts dating from an earlier version of the DTA*. In fact, that version of the DTA – which was also relied upon in *Walker, supra*. – did not have a "beneficiary declaration" requirement.

At any time after the July 2009 statutory creation of a "beneficiary declaration," the Legislature could have amended the DTA and compelled trustees to conduct an open-ended investigation into every transfer of a secured note and to investigate unchallenged sworn documents provided by the beneficiary or its authorized agent. Yet, the Legislature did not take such action.

As a result, the facts of this case, and the law that was applied, are clear. Prior to the Notice of Trustee's Sale at issue, Deutsche Bank

executed a declaration affirming its status as Note holder. CP 174.<sup>25</sup> Big Blue did not contend that NWTS violated its statutory duty in any manner *apart from* the notion that receiving that document was bad faith per se. CP 17 (Compl., ¶ 3.1.2).<sup>26</sup> NWTS was therefore entitled to rely on the Beneficiary Declaration when it recorded the Notice of Trustee’s Sale.

e. NWTS’ Actions as Trustee Did Not Prejudice Delay, Let Alone Big Blue.

Under established case law, a *borrower* must show prejudice from actual material defects in foreclosure notices. *See Amresco Independence Funding, Inc. v. SPS Props., LLC*, 129 Wn.App. 532, 119 P.3d 884 (2005); *Steward v. Good*, 51 Wn.App. 509, 515, 754 P.2d 150 (1988) (noting a “requirement that prejudice be established” where a “technical violation’ of the DTA occurs and finding that there [was] no showing of harm to the debtor”); *see also Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 581 n.4, 276 P.3d 1277 (2012) (Stephens, J., concurring).

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<sup>25</sup> While it is peculiar for a declaration that one holds a note to be deemed sufficient evidence that one owns a note, Deutsche Bank’s declaration established the proof that the Washington Legislature expressed in RCW 61.24.030(7)(a).

<sup>26</sup> Certainly this allegation is strange in light of the fact that NWTS had not actually recorded a Notice of Trustee’s Sale when the Complaint was prepared. *Compare* CP 21 (Complaint dated January 7, 2013), Thurston County Auditor’s No. 4315338 (Notice recorded January 16, 2013).

The Washington Supreme Court has held because of the DTA’s anti-deficiency provision – providing that after a nonjudicial foreclosure, a borrower is absolved of any further liability on the Note, even if the foreclosure is wrongful – that where, as here, the borrower is in default and cannot cure, the borrower is economically indifferent to any defects in the foreclosure process and cannot suffer prejudice. *Udall v. T.D. Escrow Serv., Inc.*, 159 Wn.2d 903, 154 P.3d 882 (2007) (reversing holding that wrongful foreclosure should be vacated); *see also Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 113, 752 P.2d 385 (1988) (sale not invalid where a borrower identified “technical, formal error[s], non-prejudicial, and correctable.”).<sup>27</sup>

In sum, Big Blue is correct that the DTA “must be construed in favor of borrowers.” *Id.* at 915-16 (emphasis added). But Big Blue was not the borrower, and Delay – the actual borrower – was not a party to the action below. In fact, Deutsche Bank was not even a party to the lawsuit

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<sup>27</sup> In *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034 (9th Cir. 2011), the Ninth Circuit Court of Appeals lists several examples of actionable prejudice. *Cervantes* at 1043, *citing Ed Peters Jewelry Co. v. C & J Jewelry Co., Inc.*, 124 F.3d 252, 263, n. 8 (1st Cir.1997). For instance, if a sale notice alleged that the sale would take place on a Friday, but instead it took place the day before, such information would materially violate the DTA and prejudice the borrower. *See* RCW 61.24.040(5). Or, if a notice informed the borrower that he or she could reinstate the loan up to five days prior to the sale, when the DTA instead requires reinstatement eleven days prior to sale; that would also materially violate the DTA and prejudice the borrower. *See* RCW 61.24.090.

either. NWTS' actions as the properly-appointed successor trustee did not prejudice Delay, let alone Big Blue, who willingly purchased the Property "subject to" Deutsche Bank's Deed of Trust. CP 160.

In sum, Big Blue raised no suggestion that it could cure Delay's default, and it did not claim a lack of statutorily-required notices. Therefore, *even if* Big Blue's purported allegations were all true and the incorrect entity foreclosed, Big Blue would have suffered no prejudice from either the foreclosure process or a sale itself, as it did not argue that *no* entity had the right to foreclose based on Delay's undisputed default. Therefore, CR 12(b)(6) dismissal was the correct outcome below.

4. *Rucker Does Not Help Big Blue Because of a Different Factual Record.*

Big Blue cites to *Rucker v. Novastar Mortg., Inc.*, 177 Wn. App. 1, 311 P.3d 31 (2013), as influential authority for its position, but that case contained markedly different facts than this matter.

In *Rucker*, the servicer foreclosed under authority derived from a pooling agreement in which the servicer was expressly deemed an "independent contractor." *Id.* at 7. Division One found that "at the time that NovaStar appointed... [the] successor trustee, it did not hold the promissory note, having already conveyed the note to JPMorgan Chase

and J.P. Morgan Trust as cotrustees of the Funding Trust.” *Id.* at 14.

Consequently, an inference arose “that NovaStar acted without direction from any lawful principal.” *Id.* at 15, *citing Bain, supra.* at 107.

Furthermore, the borrowers were deemed to not have waived their right to challenge the completed sale because they “reasonably relied upon the representation of a [trustee] employee that the sale would not take place.” *Id.* at 20.

Here, unlike *Rucker*, the loan servicer was not foreclosing on the Note holder’s behalf. Rather, the Note was specially indorsed to Deutsche Bank. CP 85. The Bankruptcy Court granted relief from stay to Deutsche Bank to “foreclose on, and obtain possession of, the property, to the extent permitted by applicable nonbankruptcy law.” CP 156. NWTS received a sworn declaration averring to Deutsche Bank’s status as Note holder prior to recording the Notice of Trustee’s Sale. CP 174. Also, unlike *Rucker*, neither Delay nor Big Blue pled reliance on representations made by the trustee concerning the sale date.

Perhaps most importantly, Deutsche Bank was not a litigant in this case; in other words, NWTS was placed in the position of having to refute Big Blue’s conclusory assertions concerning another entity’s authority to foreclose. *Rucker* does not stand for the proposition that a non-borrower

can require a trustee to disprove a negative assertion against a non-party, or that the mere assertion itself automatically generates standing to litigate a DTA violation claim.

Ultimately, this case is about a business buying property in order to challenge the efficacy of the secured transaction naming that property as collateral, asserting the secured party has no authority to enforce its lien while not naming that party in a lawsuit, and then suggesting such claim automatically leads to a possible grant of relief against only the trustee tasked with carrying out the enforcement process.

If bare allegations based on the statement that “NWTS [was] acting without authority because it was not appointed by the true beneficiary,” without any factual support whatsoever, can defeat a CR 12(b)(6) motion, then that Court Rule has no meaning. *Cf.* Brief of Appellant at 13. As a result, any borrower who is unquestionably in default, a legitimate – or illegitimate – business who swoops in to purchase title, or even a random third-party, could recite similar “magic words” and advance litigation against *only* a trustee under the rubric that its allegations must be true. Big Blue’s desired outcome in this appeal would undermine both CR 12(b)(6) and the DTA itself.

5. Robertson v. GMAC Mortgage LLC et al. Should be Persuasive as to Big Blue's Declaratory Judgment Claim.

Under Washington law, the elements to establish a right to declaratory relief are:

(1) an actual, present, and existing dispute, as compared to a possible, speculative or moot disagreement; (2) parties having genuine and opposing interests which are direct and substantial rather than potential or abstract; and (3) a judicial determination which will be final and conclusive.

*Lechelt v. City of Seattle*, 32 Wn. App. 831, 835-36, 650 P.2d 240, 243 (1982), citing *Ronken v. Board of County Com'rs*, 89 Wn.2d 304, 572 P.2d 1 (1977); see also *Kitsap Co. v. Smith*, 143 Wn. App. 893, 902-903, 180 P.3d 834 (2008), citing *Nollette v. Christianson*, 115 Wn.2d 594, 598, 800 P.2d 359 (1990); RCW 7.24.

In addition, RCW 7.24.110 requires that “[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and *no declaration shall prejudice the rights of persons not parties to the proceeding.*” (Emphasis added); accord *Massey v. BAC Home Loans Servicing*, 2012 WL 5295146 (W.D. Wash. Oct. 26, 2012).

In the recent case of *Robertson v. GMAC Mortgage, LLC et al.*, 2013 WL 6017482 (W.D. Wash. Nov. 14, 2013), the United States District

Court for the Western District of Washington specifically addressed claims by a third-party who owned the subject property but was never a party to either the Note or Deed of Trust.

In *Robertson*,

[Borrower] Nicholls executed a Deed of Trust against the property in favor of Old Kent Mortgage. The Nicholls Deed of Trust was recorded in King County. Since 1999, the Nicholls' Note and Deed of Trust have been assigned several times. Plaintiff has never been a party to those instruments.

In 2006, Nicholls borrowed money from Plaintiff. The loan was secured by a... deed of trust, which was junior to the Nicholls' Deed of Trust. Nicholls defaulted on the loan from Robertson. Robertson then foreclosed on his deed of trust. In the resulting non-judicial foreclosure sale, Robertson purchased the property. The Nicholls' Deed of Trust continued to encumber the property, even after Robertson's foreclosure on the junior obligation.

*Id.* at \*1 (internal citations omitted).

District Court Chief Judge Marsha Pechman concluded that:

Plaintiff is under the mistaken belief that he has standing to challenge any aspect of Defendants' past efforts to foreclose on the property. The point of the Deed of Trust Act is to protect *borrowers* from harsh practices by lenders during non-judicial foreclosures.

*Id.* at \*2, citing *Walker v. Quality Loan Serv. Corp.*, 176 Wn.App. 294,

308 P.3d 716 (2013) (emphasis added). The Court added:

Nor does the statute itself support the theory that Robertson is a 'grantor.' The DTA defines grantor as: 'a person, or its successors, who executes a deed of trust to encumber the person's interest in

property as security for the performance of... the borrower's obligations.' RCW 61.24.005(7). From the plain language of that provision, it cannot be inferred that a 'grantor' is any person with an interest in the property. Robertson never executed the Nicholls' Deed of Trust nor is he a successor to Ms. Nicholls.

*Id.* at \*3 (internal citation omitted).

The Court thus rejected the owner's theory that he could raise a justiciable controversy as either a "grantor" or "successor," finding that:

Plaintiff bought a piece of property encumbered by a Deed of Trust, *his current ownership of the property does not serve as a basis for declaratory judgment under the DTA.*

*Id.*, \*3 (emphasis added).

Just like Robertson, Big Blue was the Property's owner, and neither a "grantor" nor "successor" with respect to the borrower. Big Blue's declaratory judgment claim was properly dismissed as a result.

#### **IV. CONCLUSION**

All of Big Blue's allegations attacked non-party Deutsche Bank's authority as beneficiary, and sought to force NWTs, as the sole defendant, into disproving accusations challenging the foreclosure's propriety.

But at the same time, Big Blue conspicuously ignored certain key facts, such as: 1) Big Blue was not the borrower, 2) the borrower signed a Note and Deed of Trust stating that foreclosure of the Property was the appropriate remedy upon default in her payments, 3) the borrower

defaulted, but filed bankruptcy which stayed foreclosure activity, 4) the bankruptcy trustee sold the Property as a rental to Big Blue, “subject to” all encumbrances, which included Deutsche Bank’s Deed of Trust, 5) the Bankruptcy Court granted relief from stay to Deutsche Bank to foreclose, and 6) Big Blue then sued only the foreclosure trustee (twice in the same court), asserting that NWTS improperly carried out its duties as proscribed under the Deed of Trust and the DTA.

However, Big Blue lacked standing to bring these claims on the borrower’s behalf. Big Blue was also estopped from raising its allegations given the borrower’s failure to schedule them in her bankruptcy. But even if the merits were reached, NWTS fully complied with all material requirements of the DTA.

Based on these facts and the record presented, the trial court’s CR 12(b)(6) dismissal was not erroneous, and this Court should affirm the decision below.

DATED this 19th day of March, 2014.

**RCO LEGAL, P.S.**

By:   
Joshua S. Schaer, WSBA #31491  
Of Attorneys for Respondent  
Northwest Trustee Services, Inc.

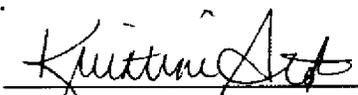
### Certificate of Service

I certify under penalty of perjury under the laws of the State of Washington that I mailed a true and correct copy of the **Opening Brief of Respondent Northwest Trustee Services, Inc.** postage pre-paid, regular first class mail on the 19<sup>th</sup> day of March, 2014 to the following parties:

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Signed this 19<sup>th</sup> day of March, 2014.

  
\_\_\_\_\_  
Kristine Stephan, Paralegal

**RCO LEGAL, P.S.**

**March 19, 2014 - 1:41 PM**

**Transmittal Letter**

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Case Name: Big Blue Capital Partners, Appellant v. Northwest Trustee Services, Respondent

Court of Appeals Case Number: 44810-6

Is this a Personal Restraint Petition? Yes  No

**The document being Filed is:**

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

**Comments:**

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