No. 45037-2-II

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

RICHARD L. IRWIN,

Appellant,

v.

NORTHWEST TRUSTEE SERVICES, INC., et al.,

Respondents.

BRIEF OF RESPONDENTS
JPMORGAN CHASE BANK, N.A., EMC MORTGAGE LLC, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AND WELLS FARGO BANK, N.A.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant borrowed money in 2007 to buy two houses within a few months of each other. Unable to keep up with the payments after accumulating more than $7 million in debts, he filed bankruptcy in 2011 and admitted the enforceability of his housing debts to the bankruptcy court. Many of Appellant's allegations in his complaint are demonstrably inconsistent with public records and Appellant's sworn bankruptcy court filings. Accordingly, the trial court properly dismissed all claims against Chase, EMC, MERS, and Wells Fargo with prejudice. This Court should affirm the trial court for the following reasons.

First, judicial estoppel bars Appellant from asserting claims against Defendants because he (a) did not identify those claims on his sworn bankruptcy schedules, and (b) conceded the enforceability of his debt on those schedules.

Second, Wells Fargo, acting through its servicer, had the right to enforce Appellant's note and deed of trust and foreclose on Appellant's property.

Third, the trial court properly dismissed the Consumer Protection Act claim because Defendants did nothing unfair or deceptive, and Appellant has not been injured by Defendants' actions.

Fourth, the trial court properly dismissed the fraud claim because Defendants made no misrepresentations, and Appellant was never injured by any alleged misrepresentations.

Fifth, the trial court properly dismissed the breach of contract claim because Defendants breached no contract with Appellant. Appellant, not Defendants, breached his agreements by defaulting on his loan.

Sixth, the trial court properly dismissed "robo-signing" claims because Defendants are in fact entitled to foreclose, and Appellant does not have standing to complain about the alleged "robo-signing" of instruments to which he is not a party.

II. STATEMENT OF ISSUES

Chase, EMC, MERS, and Wells Fargo believe this Court should affirm the trial court on the following issues.

1. The trial court properly applied judicial estoppel to dismiss Appellant's claims against Chase, EMC, MERS, and Wells Fargo because Appellant did not disclose those claims, and did not dispute his debt, on his sworn bankruptcy schedules.

2. The trial court properly dismissed Appellant's claims because Appellant has not alleged facts that would call into question Wells Fargo's right to foreclose.

3. The trial court properly dismissed Appellant's Consumer Protection Act claims because Appellant did not identify an unfair or deceptive act that injured Appellant.

4. The trial court properly dismissed Appellant's fraud claim because Defendants made no misrepresentations, and Appellant was never injured by any alleged misrepresentations.

5. The trial court properly dismissed Appellant's contract claims (based on alleged breaches of the implied covenant of good faith and fair dealing) because Appellant, not Defendants, breached his agreements by defaulting on his admitted debt.

6. The trial court properly dismissed Appellant's "robo-signing" claims because Wells Fargo was in fact entitled to foreclose, and Appellant does not have standing to complain about the alleged "robo-signing" of instruments to which he is not a party.

III. STATEMENT OF THE CASE

A. Appellant borrows money secured by a deed of trust.

On June 28, 2007, Appellant borrowed money through Greenpoint Mortgage Funding, Inc. ("*Greenpoint*") to buy property in Puyallup, Washington (the "*Property*"). (CP 3 ¶¶ 8–11.) As evidence of Appellant's obligations to repay the loan, Appellant executed an adjustable rate note (the "*Note*") in favor of Greenpoint in an original principal amount of $233,750. (CP 4 ¶ 13; CP 84–91.) To secure Appellant's obligations, Appellant executed a deed of trust (the "*Deed of Trust*") in favor of MERS and its successors and assigns (as nominee for Greenpoint and Greenpoint's successors and assigns) that was recorded in the Pierce County auditor's office on June 28, 2007. (CP 3 ¶ 10; CP 93–118.)

B. Greenpoint transfers the Note and Deed of Trust.

Appellant agreed Greenpoint could transfer the right to enforce obligations arising under the Note and Deed of Trust. The Note states that "[the] Lender or anyone who takes this Note by transfer and who is

entitled to receive payments under this Note is called the 'Note Holder.'" (CP 84 ¶ 1.) In the Deed of Trust, Appellant also agreed that:

> 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.

(CP 104 ¶ 20.)

Wells Fargo acquired the Note under the Pooling and Servicing Agreement. (CP 130 (date of agreement), CP 134 (transferring loans to Wells Fargo).) Appellant's loan was among the loans transferred to Wells Fargo in connection with that transaction. (CP 138 (same MERS identification number as Assignment of Deed of Trust).) After closing, Wells Fargo held "the documents (or certified copies thereof) delivered to it ... pursuant to Section 2.01" (CP 135), which included "the original Mortgage Note" (CP 134).

As noteholder, Wells Fargo is authorized under Washington law to enforce the Note and the Deed of Trust personally and through Chase, as servicer and agent. *See supra* Section V.B.2. Wells Fargo is automatically entitled to the benefit of the Deed of Trust because, under Washington law, the security follows the debt without the need for a separate assignment of the security instrument. *See supra* Section V.B.2.

Wells Fargo is also the beneficiary of record of the Deed of Trust. On June 29, 2011, MERS, acting in its capacity as nominee (i.e., agent) for Greenpoint and Greenpoint's successors and assigns, executed an Assignment of Deed of Trust assigning MERS's beneficial interest under the Deed of Trust (i.e., MERS's agency interest) to Wells Fargo, as trustee for the certificateholders of Structured Asset Mortgage Investments II Inc. Trust 2007-AR4, Mortgage Pass-Through Certificates, Series 2007-AR4. (CP 4–5 ¶ 20; CP 120–21.) The assignment was recorded in the Pierce County auditor's office on June 29, 2011. (CP 120–21.)

To be clear, Wells Fargo did not need (and did not rely on) the MERS assignment for the right to foreclose; rather, Wells Fargo's status as noteholder made it beneficiary as a matter of law, irrespective of any MERS assignment. RCW 61.24.005(2).

C. Chase acts as servicer for Wells Fargo.

Effective September 3, 2007, Greenpoint transferred servicing of the loan to EMC. (CP 4 ¶ 17.) After Chase acquired EMC, Chase became the servicer. (CP 123–28.) (Appellant alleges he did not receive notice of that servicing transfer, but never identifies any injuries caused by the alleged lack of notice.) Chase, as servicer, is authorized by Wells Fargo to execute and deliver, on behalf of Wells Fargo, all documents and instruments necessary to conduct any foreclosure, as well as all documents and instruments necessary to assign any deeds of trust. (CP 123–28.) Chase's authority from Wells Fargo is also derived from the Pooling and

Servicing Agreement for the trust for which Wells Fargo acts as trustee. (CP 136–37.)

D. Appellant admits the enforceability of his debt in bankruptcy.

On April 29, 2011, Appellant, along with his wife, commenced a voluntary bankruptcy case under chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of Washington under case no. 11-43505. (CP 140–42.)

Appellant filed sworn schedules of assets and liabilities in the case, as required by federal bankruptcy law. (CP 144–85.) Under penalty of perjury and criminal sanctions, Appellant admitted owing $241,269.45 to EMC (Well Fargo's former servicer). (CP 155.) Appellant identified the debt as noncontingent, liquidated, and undisputed. (CP 155.) Appellant also admitted the debt was secured by a valid lien on the Property. (CP 146, 155.)

On his schedules, Appellant was required to identify all "contingent and unliquidated claims of every nature" as well as "other personal property of any kind not already listed." (CP 150–51.) Although Appellant identified certain claims against various persons, Appellant did *not* identify any claim against any Defendant. (CP 150–51.) Appellant received the benefit of a discharge order entered by the bankruptcy court on August 17, 2011. (CP 187–88.)

Appellant refers to himself as an "unsophisticated borrower[]" (Appellant Br. 16), but when he filed for bankruptcy in 2011, his assets

included interests in three separate limited liability companies that owned various undeveloped lots (which Appellant valued at more than $6 million), as well as the two properties now the subject of this appeal and another appeal in this Court. (CP 151–52, 155–56.) Appellant identified assets worth $643,371.54 and debts of $7,680,662.79. (CP 144.)

E. Appellant defaults, and Wells Fargo commences a nonjudicial foreclosure.

Appellant received a Notice of Pre-Foreclosure Options dated May 9, 2012 from Chase, the servicer of the loan for Wells Fargo. (CP 5 ¶ 22.) On September 12, 2012, Northwest Trustee Services, Inc., executed a notice of default. (Appellant's Br. 10.) Appellant alleges the notice of default did not "reference any promissory note" (Appellant's Br. 10), but in fact the notice identified Wells Fargo as the owner of the note, and Chase as the servicer (CP 201). Northwest Trustee delivered the notice of default as agent for Wells Fargo. (CP 202.)

On September 13, 2012, Wells Fargo, the beneficiary under the Deed of Trust, appointed Northwest Trustee to serve as trustee under the Deed of Trust. (CP 190–92.) On December 20, 2012, Northwest Trustee recorded a notice of trustee's sale identifying Appellant's default under the loan, with an arrearage of not less than $35,750.19, and notifying Appellant that a foreclosure sale would occur on March 22, 2013 absent payment in full of all delinquencies. (CP 245–49.) Appellant then commenced this action.

F. Appellant brings a related suit on another property.

This is not Appellant's only appeal to this Court in connection with his real estate purchases. On April 18, 2013, Appellant commenced an action against the same parties that are Defendants in this case under cause no. 13-2-08387-1 in connection with another property in Puyallup. That complaint contained many of the same boilerplate causes of action against the same Defendants as are alleged in this case. As with this action, however, Appellant's complaint about the enforceability of the debt against him is contradicted by his own sworn bankruptcy schedules, which reveal the debt to be undisputed. The trial court (the Honorable Susan K. Serko) signed an order on June 21, 2013 dismissing the claims against Chase, EMC, MERS, and Wells Fargo in that case with prejudice. The trial court's decision in that case is also on appeal to this Court under case no. 45149-2-II.

IV. STANDARD OF REVIEW

This Court should apply de novo review to the trial court's decision under CR 12(b)(6). *Atchison v. Great W. Malting Co.*, 161 Wn.2d 372, 376 (2007).

In its review, this Court, like the trial court, may properly consider documents mentioned in the complaint, as well as matters of public record. "Documents 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." *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 726–27 & n.44 (2008). Thus, where the pleadings refer to

documents that preclude relief as a matter of law, dismissal is proper under CR 12(b)(6). *See, e.g.*, *Guardianship of Robinson*, 9 Wn.2d 525, 536 (1941) ("[T]he court, in passing upon the demurrer and motion, had the right to, and did, take judicial notice of its own records, and was not bound to accept as true allegations in the petition or the amended petition contrary to such records."); *Hoffer v. State of Wash.*, 110 Wn.2d 415, 427 (1988) (accepting allegations as true only because documents referenced in the complaint did not contradict them).

Likewise, documents subject to judicial notice may be reviewed on a Rule 12 motion without converting the motion into one for summary judgment. *Rodriguez*, 144 Wn. App. at 725–27 & nn.43–45. This includes SEC filings, government publications, government websites, and other publicly filed or recorded documents whose "authenticity cannot be reasonably disputed." *Id.* at 725–28 ("SEC filings were properly considered by the court because they were also subject to judicial notice."); *Berge v. Gorton*, 88 Wn.2d 756, 763 (1977) (in "considering a CR 12(b)(6) motion, this court may take judicial notice of matters of public record"); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 199 n.18 (2008) (taking judicial notice of facts located on Indiana Bureau of Motor Vehicles website). This also includes publicly recorded documents. *E.g.*, *King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 549 n.6 (2000) (court may take judicial notice of deed of trust on motion to dismiss, but chose not do so for the first time on appeal).

Finally, the scope of review on a motion to dismiss also includes consideration of prior court records, because those records are likewise subject to judicial notice. *E.g.*, *Berge*, 88 Wn.2d at 763 (taking notice of statements made in oral argument); *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 98 (2005) (court may take judicial notice of the record in underlying case on motion to dismiss).

V. ARGUMENT

A. The trial court properly held that Appellant could not assert claims that he failed to disclose to his creditors in bankruptcy.

Appellant is judicially estopped from asserting claims against Defendants because he (1) did not identify those claims on his sworn bankruptcy schedules, and (2) conceded the enforceability of his debt on those same schedules. "We have recognized that judicial estoppel can be used to prevent a party from pursuing a claim that he or she had an obligation to disclose in bankruptcy and failed to do so. ... The failure to disclose a potential claim in bankruptcy is considered inconsistent with a later attempt to pursue such a claim outside the bankruptcy proceedings." *Miller v. Campbell*, 164 Wn.2d 529, 540–41 (2008). Courts invoke judicial estoppel under these circumstances "not only to prevent a party from gaining an advantage by taking inconsistent positions, but also because of 'general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings,' and to 'protect against a litigant playing fast and loose with the courts.'" *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) (citation omitted). "In

the bankruptcy context, a party is judicially estopped from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure statements." *Id.* at 783; *see also Hay v. First Interstate Bank of Kalispell*, 978 F.2d 555, 557 (9th Cir. 1992); *In re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5th Cir. 1999) (debtor barred from bringing claims not disclosed in bankruptcy schedules); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419 (3d Cir. 1988) (failure to list claims against creditor "worked in opposition to preservation of the integrity of the system which the doctrine of judicial estoppel seeks to protect," and debtor was estopped by reason of such failure to disclose).

During bankruptcy, a debtor must disclose all of his assets included in the bankruptcy estate for the potential benefit of creditors. 11 U.S.C. § 521(1); *see also Cusano v. Klein*, 264 F.3d 936, 945–46 (9th Cir. 2001). The bankruptcy estate includes all the debtor's potential claims or causes of action that existed at the time he filed for bankruptcy. 11 U.S.C. § 541(a)(1); *see also In re Swift*, 129 F.3d 792, 795 (5th Cir. 1997); *Coastal Plains*, 179 F.3d at 207–08 ("the Bankruptcy Code and Rules impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, including contingent and unliquidated claims"). If a debtor fails to schedule claims, and that failure is brought to the debtor's attention, it is important that the debtor demonstrate good faith and inadvertence by both explaining the omission and taking steps to correct to the deficient

disclosures, such as by reopening the bankruptcy case and amending his schedules. *See Ah Quin v. County of Kauai Dep't of Transp.*, 733 F.3d 267, 272–73 (9th Cir. 2013) (when a debtor does not move to reopen his bankruptcy proceedings to correct inaccurate schedules, courts should presume deliberate manipulation, not good faith); *Dzakula v. McHugh*, Case No. 11-16404, slip op. at 4–5 (9th Cir. Dec. 11, 2013) (applying judicial estoppel for lack of adequate explanation of original misstatement, even after debtor reopened case and amended schedules).

Unscheduled claims remain property of the bankruptcy estate, even after entry of an order discharging the debtor from personal liability on his debts. *See, e.g.*, *In re DeLash*, 260 B.R. 4, 9 (Bankr. E.D. Cal. 2000) ("if the debtor has failed to schedule an asset, the closing of the case will not result in its abandonment. When an asset is omitted from the schedules, it cannot be presumed that the trustee knew of the asset and meant to abandon it"); *Vreugdenhill v. Navistar Int'l Transp. Corp.*, 950 F.2d 524, 526 (8th Cir. 1991) ("in order for property to be abandoned by operation of law pursuant to section 554(c), the debtor must formally schedule the property. ... It is not enough that the trustee learns of the property through other means"); *In re Lowery*, 398 B.R. 512, 515 (Bankr. E.D.N.Y. 2008) ("[s]ince the [debtor's personal injury lawsuit] was not disclosed by [debtor], it could not have been administered or abandoned by a trustee"). Debtors have a continuing obligation to correct misrepresentations made in schedules. "The debtor's duty to disclose potential claims as assets does

not end when the debtor files schedules, but instead continues for the duration of the bankruptcy proceeding." *Hamilton*, 270 F.3d at 785.

In his bankruptcy schedules, Appellant admitted (under penalty of perjury) that he owed a debt of no less than $241,000, and that the debt was secured by a lien on the Property. (CP 145, 155.) Although Appellant was careful to identify various causes of action against other persons, Appellant did not identify any claim against any Defendant. (CP 151–52, CP 155.) Relying on the record before it, which included Appellant's bankruptcy schedules, the bankruptcy court entered a discharge order on August 17, 2011. (CP 187–88.)

Appellant complains of conduct that occurred before and during the bankruptcy in 2011, which is sufficient to impose on him an obligation to schedule his alleged claims against Defendants. Appellant alleges that Defendants do not have the right to enforce the debt because of the involvement of MERS in his original loan transaction in 2007, despite Appellant's admissions in his schedules that the debt is undisputed, noncontingent, and liquidated. (CP 155.) Appellant also bases his complaint on several events before and during the bankruptcy, including a loan transaction from June 2007 (CP 3 ¶¶ 8, 10), a servicing transfer in August 2007 (CP 4 ¶ 17), a notice delivered to him in June 2011 (CP 4 ¶ 18), an assignment recorded in June 2011 (CP 4–5 ¶ 20), and discussions with Defendants in the summer or fall of 2011 (CP 5 ¶ 21). Although Appellant also complains about conduct occurring after his bankruptcy,

such as alleged confusion about the nature of the foreclosure proceedings against him, that conduct did not give Appellant a new post-bankruptcy right to dispute the enforceability of his debt.

Appellant may not have articulated a legal theory for relief during his bankruptcy case, but judicial estoppel applies whenever a debtor had "knowledge of enough *facts* to know that a potential cause of action exists during the pendency of the bankruptcy." *Hamilton*, 270 F.3d at 784 (emphasis added). Appellant knew that MERS was named in the Deed of Trust because he signed the Deed of Trust in 2007, years before his bankruptcy. (CP 93–118.) Appellant knew how much he owed, and to whom, because he identified these facts on his schedules. (CP 151–52, CP 155.) The bankruptcy forms provide a convenient place to identify any disputed debts, but Appellant did not identify any disputes. (CP 151–52, CP 155.) The bankruptcy schedules also provide a place to identify any claims or causes of action, and again, Appellant failed to identify the allegations he now asserts. (CP 155.)

Appellant's alleged ignorance of the legal theories he is now asserting does not change the fact that the claims do not belong to Appellant to assert. They still belong to his bankruptcy estate because they arise from pre-bankruptcy facts (i.e., Appellant's complaints about MERS's role under his Deed of Trust). *See* 11 U.S.C. § 541(a)(1); *Miller v. Campbell*, 164 Wn.2d 529, 541 (2008). Appellant's failure to schedule his claims means that the claims remain property of the estate, and must be

administered in the bankruptcy case. As the Washington Supreme Court in *Campbell* noted, Appellant's chapter 7 bankruptcy trustee would not be bound by judicial estoppel if the trustee chose to prosecute this action. 164 Wn.2d at 541–42. The trustee is not a party to this proceeding, however, and so far as Defendants know, Appellant has made no effort to introduce the trustee as a party. In the absence of an intervention by the trustee, the trial court properly determined that Appellant is bound by his admissions in his bankruptcy schedules and is estopped from proceeding with this action.

B. Wells Fargo was entitled to commence a nonjudicial foreclosure proceeding.

Wells Fargo is entitled to enforce the Note because it holds the Note (through its agents), indorsed in blank. Wells Fargo is entitled to enforce the Deed of Trust because, under Washington law, the security (Deed of Trust) follows the debt (the Note). Appellant expressly agreed that transferees of Greenpoint's rights, such as Wells Fargo, could enforce the Note and Deed of Trust, and Wells Fargo is entitled to do so under the terms of the Deed of Trust.

1. Wells Fargo holds the original note, indorsed in blank.

Wells Fargo is the holder of the Note and entitled to enforce it. RCW 62A.3-301 provides that the entity entitled to enforce the Note is "the holder of the instrument." Wells Fargo qualifies as a "person entitled to enforce" the Note because Wells Fargo possesses the Note (through its agents). The blank indorsement on the back of the Note, coupled with

Wells Fargo's possession of the Note, makes Wells Fargo the "holder" of the Note. RCW 62A.3-205(b) states (with emphasis added): "If an endorsement is made by the holder of an instrument and it is not a special endorsement [to an identifiable person], it is a 'blank endorsement.' *When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.*" Because Wells Fargo holds the Note, indorsed in blank, it has the right to enforce the Note and to foreclose on the Deed of Trust.
RCW 61.24.005(2).

Wells Fargo acquired the original note under the August 31, 2007 Pooling and Servicing Agreement. (CP 133–34, 138.) After closing, Wells Fargo held "the documents (or certified copies thereof) delivered to it ... pursuant to Section 2.01" (CP 135), which included "the original Mortgage Note" (CP 134). Wells Fargo has authorized Chase to act as its attorney-in fact to service and enforce the loan. (CP 136–37; CP 123–28.)

Wells Fargo acquired the Note under the PSA, but it in fact makes no difference how Wells Fargo acquired the Note. Since the Note is bearer paper, even if Wells Fargo stole the Note, Wells Fargo still would be entitled to enforce the Note. *See* RCW 62A.3-301 ("A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument."); *see also id.* official comment ("The quoted phrase includes a person enforcing a lost or stolen instrument."). Transfer of the Note and Deed of

Trust should come as no surprise to Appellant, having acknowledged and agreed that the Greenpoint could transfer the Note and Deed of Trust: "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." (CP 104.)

2. Wells Fargo is entitled to enforce the Deed of Trust by virtue of its rights under the Note.

The right to enforce the Note carries with it the right to enforce the Deed of Trust. As the Supreme Court observed in *Bain*, the holder of a note secured by a deed of trust is entitled to foreclose on the deed of trust. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 101–02 (2012). The deed of trust follows the note. "Washington's deed of trust act contemplates that the security instrument will follow the note, not the other way around." *Id.* at 104. That proposition is confirmed by prior authorities. "[T]ransfer of the obligation ... should carry the mortgage along with it. This is indeed the universal result in American law. ... Washington decisions, though old, support this proposition." Wm. B. Stoebuck & John W. Weaver, 18 *Wash. Prac., Real Estate* § 18.20 (2d ed. May 2012) (citations omitted); *Fid. & Deposit v. Ticor*, 88 Wn. App. 64, 68–69 (1997); *Price v. N. Bond & Mortg. Co.*, 161 Wash. 690, 695 (1931) ("the note is considered the obligation, and the mortgage ... passes with it"); *Nance v. Woods*, 79 Wash. 188, 191 (1914) ("mortgage follows the note"); *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 90 (1909) ("assignment of the notes ipso facto passes the security"); *Bartlett Estate Co. v. Fairhaven Land Co.*, 49 Wash.

58, 63 (1908) (mortgage "passes to the assignee by an assignment of the debt").

Under *Bain* and the authorities preceding it, Wells Fargo, as the holder of the Note, is entitled to enforce the Deed of Trust as a matter of course. To avoid any potential confusion about MERS's designation as a nominee for the noteholder, Wells Fargo took the additional step of having its agent (MERS) assign MERS's nominee and record interest in the Deed of Trust back to Wells Fargo (essentially terminating the agency relationship). (CP 120–21.) That assignment, although helpful to avoid confusion, was in no way necessary under Washington law because under *Bain*, Wells Fargo is entitled to enforce the Deed of Trust as the holder of the Note.

3. Securitization is irrelevant to Wells Fargo's right to enforce the Note and Deed of Trust.

Wells Fargo's right to enforce the Note and Deed of Trust is not affected by arguments about securitization because Wells Fargo holds the Note (through its agents), the Note is indorsed in blank, and the Deed of Trust follows the Note. Wells Fargo is both beneficiary as a matter of law as holder of the Note (CP 84–91) under RCW 61.24.005(2), and also beneficiary of record under the Deed of Trust (CP 93–118; CP 120–21). As discussed above, the security necessarily follows the debt. This means a transfer of the Note is sufficient to transfer the Deed of Trust, even if Wells Fargo were not beneficiary of record by assignment (which it is).

The fact that Wells Fargo is acting as trustee for the benefit of others makes no difference to Wells Fargo's right to enforce the Note and Deed of Trust. "The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument. It is not necessary for the holder to first establish that he has some beneficial interest in the proceeds." *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 222–23 (1969) (citation omitted). "Securitization" simply does not matter in this case. *See Sidorenko v. Nat'l City Mortg.*, 2012 WL 3877749, at *2 (W.D. Wash. 2012) (plaintiff's "securitization argument and his 'true lender' arguments fail as a matter of law."). Securitization did not and could not relieve Appellant of the obligation to repay his loan.

> Under established rules, the maker should be indifferent as to who owns or has an interest in the note so long as it does not affect the maker's ability to make payments on the note. Or, to put this statement in the context of this case, the [borrowers] should not care who actually owns the Note—and it is thus irrelevant whether the Note has been fractionalized or securitized—so long as they do know who they should pay. Returning to the patois of Article 3, so long as they know the identity of the "person entitled to enforce" the Note, the [borrowers] should be content.

In re Veal, 450 B.R. 897, 912 (B.A.P. 9th Cir. 2011). This makes sense because "securitization merely creates a separate contract, distinct from plaintiffs' debt obligations under the Note and does not change the relationship of the parties in any way." *Lamb v. MERS, Inc.*, 2011 WL

5827813, at *6 (W.D. Wash. 2011) (citing cases) (emphasis added); *Bhatti v. Guild Mortg. Co.*, 2011 WL 6300229, at *5 (W.D. Wash. 2011) (citing cases); *Moseley v. CitiMortgage, Inc.*, 2011 WL 5175598, at *7 (W.D. Wash. 2011) (securitization irrelevant); *Horvath v. Bank of N.Y., N.A.*, 641 F.3d 617, 626 n.4 (4th Cir. 2011) (securitization irrelevant to debt; rejecting argument that only original lender can foreclose); *Logvinov v. Wells Fargo Bank*, 2011 WL 6140995, at *3 (N.D. Cal. 2011) ("The argument that parties lose their interest in a loan when it is assigned to a trust pool or REMIC has been rejected by numerous courts.").

Appellant does not explain how or why securitization should relieve him of his promise to repay his debt. Appellant says that the securitization was "fraudulent" (Appellant's Br. 12), but Appellant never alleges he was a party to the securitization, and Wells Fargo's authority to enforce the Note does not depend upon anything other than its possession of the original Note. Wells Fargo need not establish that it has a beneficial interest in the proceeds of the Note. *Davis*, 75 Wn.2d at 222–23.

C. The trial court properly dismissed the CPA claim.

The trial court properly dismissed the CPA claim because Wells Fargo is entitled to enforce the Note and Deed of Trust. Appellant cannot satisfy all five of the essential elements for a Washington CPA claim, which requires proof of: (1) an unfair or deceptive act or practice; (2) that occurs in trade or commerce; (3) impacts the public interest; (4) which causes injury to the plaintiff in his or her business or property; and (5) the injury is causally linked to the unfair or deceptive act. *Guijosa v. Wal-Mart*

Stores, Inc., 144 Wn.2d 907, 917 (2001). Defendants did nothing unfair or deceptive, and Appellant has not been injured by Defendants' actions.

1. Defendants committed no unfair or deceptive act.

No Defendant committed an unfair or deceptive act by seeking to foreclose on property securing a defaulted loan. "[W]hether the [alleged] conduct constitutes an unfair or deceptive act can be decided by this court as a question of law." *Indoor Billboard Wash., Inc. v. Integra Telecom of Wash.*, 162 Wn.2d 59, 74 (2007). The first CPA element requires establishing "a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest." *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 787 (2013).

No Defendant committed any *per se* unfair trade practice. Only the Washington Legislature has the authority to declare a trade practice to be *per se* "unfair." *Hangman Ridge Tr. Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 787 (1986). Appellant cites no statutory violation that is a legislatively declared *per se* CPA violation, and thus there is no basis for a CPA claim tied to a *per se* "unfair" act or practice.

Nor does Appellant plead facts that, if proven, would establish an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of the public interest.

MERS. MERS did not commit an unfair or deceptive act when it assigned its interest in the Deed of Trust to Wells Fargo. That is the only "deceptive" act Appellant believes MERS committed (*see* Appellant's Br. 22), but before MERS assigned its interest, it was in fact identified as the beneficiary in a nominee capacity of the Deed of Trust (CP 93–94), and the assignment accurately reflects that (CP 120). Appellant does not explain why this assignment was "unlawful[]." (Appellant's Br. 22.) The assignment from MERS to Wells Fargo was not deceptive. It plainly disclosed MERS's role as nominee and its assignment of any beneficial interest to Wells Fargo. The court in *Estribor v. Mountain States Mortgage* recently dismissed similar allegations. "The Deed of Trust clearly states MERS is a nominee for the lender and lender's successors and assigns. It is unclear how actions within that capacity are unfair or deceptive." *Estribor*, 2013 WL 6499535, at *3 (W.D. Wash. 2013) (going on to note that even if plaintiffs could carry their burden on deception, they still could not show injury). MERS took no other action in this case. MERS did not attempt to foreclose in its own name. MERS did not appoint a new trustee. MERS did not service the loan or communicate with Appellant. MERS did not send default notices, and MERS is not trying to collect Appellant's debt. MERS cannot be liable under the CPA because it did not do anything other than assign any interest in the Deed of Trust to Wells Fargo.

Wells Fargo. Wells Fargo did not commit an unfair or deceptive act by seeking to enforce its lien on Appellant's property. As discussed above, Wells Fargo, through its agents, is the holder of Appellant's note. Under *Bain*, that means Wells Fargo is entitled to collect on Appellant's debt and foreclose on Appellant's property because the security follows the note automatically and as a matter of law. 175 Wn.2d at 104. Appellant appears to dispute Wells Fargo's rights under some theory based on securitization; Appellant does not identify any other allegedly unfair or deceptive act in its brief. (*See* Appellant's Br. 23.) As discussed above, however, securitization simply does not matter. The Washington Supreme Court explained in *Bain* that the beneficiary of a deed of trust is the person entitled to enforce the note secured by the deed of trust. 175 Wn.2d at 101–02. And, as the Washington Supreme Court has held before, "[t]he holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument. It is not necessary for the holder to first establish that he has some beneficial interest in the proceeds." *Davis*, 75 Wn.2d at 222–23 (citation omitted).

Chase and EMC. There are no facts pled that could give rise to a CPA claim against Chase or EMC. Each acted as servicer for Wells Fargo, the noteholder and the person lawfully entitled to enforce Appellant's debt. Neither Chase nor EMC acted unfairly or deceptively by explaining to Appellant that if he did not repay his loan, Wells Fargo might exercise its rights under Appellant's deed of trust.

Appellant argues that Chase and EMC violated the Foreclosure Fairness Act because they allegedly would not discuss a loan modification. (Appellant Br. 9.) The Foreclosure Fairness Act does not impose a general obligation to discuss loan modifications. There is a statutory obligation to participate in mediation if requested by a housing counselor or attorney within certain specified periods, *see* RCW 61.24.163(1), but Appellant never alleges Chase or EMC failed to comply with those statutory procedures.

2. Appellant suffered no injury caused by Defendants.

Appellant was not injured by any of the acts identified in the complaint. To plead a valid CPA claim, Appellant must allege facts demonstrating that any injuries were caused by the deceptive practice; to prove causation, the "plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." *Indoor Billboard*, 162 Wn.2d at 84. "[A] causal link between the misrepresentation and the plaintiff's injury" must be demonstrated. *Id.* at 83. Notably, the Washington Supreme Court in *Bain v. Metropolitan Mortgage Group, Inc.*, emphasized that it was "unclear whether the plaintiffs can show injury" under the facts presented, that a "borrower ... may not be injured ... and MERS ... may not have had a causal role," and that "*the mere fact MERS is listed on the deed of trust as a beneficiary is not itself actionable injury.*" 175 Wn.2d at 119, 120

(emphasis added). On remand, the trial court in *Bain* granted summary judgment in favor of MERS due to a lack of injury and causation:

> I have to say at least for the past five years plaintiff has been in good shape because she's been living in the home without interference, without any mortgage payments, and indeed any costs but legal fees. [¶] Also under *Panag v. Farmers Insurance Company,* 166 Wn.2nd 27 (2009), legal fees are not enough for an injury . . . . [¶] And because I don't see injury here, not on any interpretation of the facts, not even on inferences from the facts before me, I can't find any but for causal relationship between what MERS did and didn't do and the harm that wasn't suffered. Because even if the filing of foreclosure actions is an injury, and I don't think the showing has been made that there was any injury here, I'll point out that it's also clear that MERS didn't initiate those foreclosure proceedings, lend money, make representations to plaintiff, send plaintiff any default notice or initiate the foreclosure. MERS may have greased the wheels for other people, but I don't think that's enough for but for causation in particular, because there is no but for causation to injury that I can detect on this record. [¶] I'll point out the obvious which is if you can't make the showing under prong four injury, it's impossible to make the showing under prong five of causation.

See Bain v. Metro. Mortg. Grp. Inc., 2013 WL 6193887, at *6 (Wash. Super. Ct. Aug. 30, 2013).

As in *Bain*, Appellant here cannot show any allegedly deceptive acts or practices caused them injury. *See Estribor*, 2013 WL 6499535, at *3 (rejecting CPA claim based on MERS assignment). Appellant only

states he was injured by "Chase and MERS" (Appellant's Br. 27), but alleges no causal link between the injuries allegedly sustained and the acts of Defendants (Appellant's Br. 27). Certainly MERS never initiated foreclosure (or is alleged to have had any contact with Appellant at all). There is no logical basis for Appellant to argue that "damage to credit, loss of credit opportunities, loss of business opportunities and potential loss of their home to foreclosure" (Appellant's Br. 27) was caused by the use of MERS as beneficiary, or MERS's assignment of its interest to the holder of the Note, Wells Fargo. Appellant's complaint lacks a "causal link" between MERS and Appellant's alleged injuries. *Indoor Billboard*, 162 Wn.2d at 84.

Any damage to Appellant's credit results from Appellant's admitted default, not the conduct of Defendants. Appellant filed for bankruptcy in 2011, admitted the enforceability of his debt, and admitted his default. (CP 151–52, 155.) And any credit reporting claim is preempted by the Fair Credit Reporting Act ("*FCRA*") in any event. *Dvorak v. AMC Mortg. Services, Inc.*, 2007 WL 4207220, at *4–*5 (E.D. Wash. 2007) (FCRA preempted common law defamation of credit and CPA claims relating to credit reporting: "This court, however, agrees with the approach of the majority of the district courts in the Ninth Circuit that the FCRA preempts ... Plaintiffs' common law defamation claim"); *Ornelas v. Fidelity Nat'l Title Co. of Wash., Inc.*, 2005 WL 3359112 (W.D. Wash. 2005) (state CPA claims preempted by FCRA because "Congress intended

the FCRA to be the sole remedy for a consumer against furnishers of information to credit reporting agencies"), *aff'd*, 245 Fed. Appx. 708 (9th Cir. 2007).

D. Appellant's fraud claim fails.

Appellant's fraud claim fails because he does not allege facts showing Defendants misrepresented an existing fact or that Appellant relied on any alleged misrepresentations. Fraud requires proof of nine elements: "(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff." *Stiley v. Block*, 130 Wn.2d 486, 505 (1996). Appellant fails to plead two essential elements: (1) a misrepresentation, and (2) reliance or injury.

1. Appellant does not plead any false representation of a material fact.

The basic predicate of any fraud action is a misrepresentation of a material existing fact, but none is alleged in the complaint. As discussed above, Wells Fargo, acting through its agents, is entitled to enforce Appellant's Note and Deed of Trust. Appellant has conceded the validity of the debt and the validity of the lien on the Property. Accordingly, none of the statements identified in the complaint were false or misleading.

For his fraud claim, Appellant leans heavily on *Bain*, but the facts here are very different from those in *Bain*. MERS did not try to foreclose in this case, and did not try to assign the promissory note. Judge Coughenour distinguished *Bain*—which he certified to the Washington Supreme Court—on this basis in *Florez v. OneWest Bank, F.S.B.*, 2012 WL 1118179 (W.D. Wash. 2012):

> Plaintiff bases its claims on the notion that MERS is not a viable entity holding legitimate beneficial interest, and that therefore any assignment made by MERS is invalid. There are ... key defects in Plaintiffs' logic. ... [T]he situation at issue here is unlike the situation in *Bain v. Metro. Mortg. Group Inc.* In *Bain*, the alleged authority to foreclose was based solely on MERS's assignment of the deed of trust, rather than on possession of the Note. Here, however, the undisputed facts establish that OneWest had authority to foreclose, independent of MERS, since OneWest held Plaintiffs' Note at the time of foreclosure.

Id., at *1 (dismissing with prejudice) (citations omitted). Moreover, in *Bain*, the Washington Supreme Court expressed concern about a flawed assignment document (probably containing a scrivener's error) in which MERS purported to act as nominee for its own successors and assigns. 175 Wn.2d at 117. That did not happen in this case.

Wells Fargo, not MERS, was foreclosing here, and Wells Fargo was not relying on the MERS assignment for its right to foreclose. Because Wells Fargo's right to foreclose was tied to its status as noteholder, Appellant's MERS argument fails as a matter of law. *See*

Myers v. Mortg. Electr. Registration Sys, Inc., 2012 WL 678148, at *3 (W.D. Wash. 2012) ("Even if MERS had improperly assigned the Deed, Flagstar is empowered as the beneficiary to appoint the trustee because it holds Mr. Myers's Note, *not because of the [MERS] assignment.*"); *Cameron v. Acceptance Capital Mortg. Corp.*, 2013 WL 5664706, at *3 (W.D. Wash. 2013) ("Flagstar derived its authority from holding the Note itself," not any MERS assignment); *Lynott v MERS, Inc.*, 2012 WL 5995053, at *2 (W.D. Wash. 2012) ("Plaintiff's claims arise from a fundamental misunderstanding of the law. U.S. Bank is the beneficiary of the deed because it holds Plaintiff's note, not because MERS assigned it the deed … . [P]ossession of the note makes U.S. Bank the beneficiary; the assignment merely publicly records that fact."). MERS was not foreclosing here and did not appoint a new trustee—indeed, MERS's role ended before any foreclosure had begun—which makes this case different from *Bain*.

Appellant's confusion allegedly caused by communications from Defendants is also not enough to rise to any false representation of a material fact. Appellant must allege that each Defendant misrepresented an existing fact, not Defendants' intentions. *See Shook v. Scott*, 56 Wn.2d 351, 355 (1960) (rejecting as "mere estimate" statements about future performance because "[t]he first essential [for a fraud claim] is that the statement be a representation of an *existing fact.*"). Setting aside why Appellant believes he is entitled to a loan modification—from persons

who he now denies are entitled to enforce his debt—representations about Defendants' willingness to discuss a loan modification are insufficient to support a fraud claim. As discussed below, Defendants have no obligation to modify Appellant's loan.

2. Appellant does not plead reliance or injury.

The Court should dismiss Appellant's fraud claim for lack of injury attributable to Appellant's alleged reliance. Appellant has no injury because there has been no foreclosure, and Appellant has paid no foreclosure fees. Appellant simply does not plead any facts describing a cognizable injury. Nor has Appellant explained how any injury was caused by Defendants. Appellant has not identified any action he took in reliance on the alleged misrepresentations made by the Defendants. He has not alleged, for example, that he paid the wrong person. Indeed, he does not deny defaulting on his loan. Nor does Appellant allege that any of the alleged misrepresentations prevented him from curing his defaults. The substantial debts contracted by Appellant (which are apparent on his bankruptcy schedules) make it evident that Appellant simply has no ability to repay his loans. (CP 144.) Appellant has not alleged he is willing to, or even able to, pay the right party once that party has been identified. *See Atkins v. Litton Loan Serv., LLP*, 2010 WL 3184350, at *3 (N.D. Cal. 2010) ("if plaintiffs were in fact able and willing to make the payments had they allegedly been advised not to do so, they have not alleged facts explaining why their purported reliance on Litton's representations rendered them unable to pay the amounts past due once it became clear

that foreclosure was going forward."); *Mortenson v. MERS, Inc.*, 2010 WL 5376332, at *8 (S.D. Ala. 2010) ("Because the record unequivocally shows that Mortensen would have defaulted—even in the absence of purportedly fraudulent representations by defendants—because he was simply out of money, he cannot meet the reliance element of his fraud claims as a matter of law").

E. Defendants breached no duty of good faith and fair dealing.

Appellant appears to have abandoned any argument that Chase, EMC, MERS, or Wells Fargo breached a covenant of good faith and fair dealing. In his briefing, he refers only to alleged breaches by Northwest Trustee. Even if Appellant tries to revive claims against the other Defendants on reply, the trial court was right to dismiss them.

Defendants neither breached the terms of their agreements with Appellant, nor any duty of good faith or fair dealing associated with those agreements. The predicate for a breach of contract action is the existence of a contract between Appellant and a Defendant. By alleging a contract claim, Appellant effectively admits he is bound by the terms of the Note and Deed of Trust. Appellant does not, however, identify any breach of contract or of any duty associated with those contracts.

In the trial court, Appellant referred to alleged misrepresentations about Wells Fargo's right to enforce the Note and Deed of Trust, but Wells Fargo is entitled to require Appellant to pay his debts. Wells Fargo and its servicers were not required by their contract to discuss or consent to a loan

modification. A duty of good faith and fair dealing "does not extend to obligate a party to accept a material change in the terms of its contract." *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569 (1991). "Nor does it inject substantive terms into the parties' contract." *Id.* (internal quotations and citation omitted). "Rather, it requires only that the parties perform in good faith the obligations imposed by their agreement." *Id.* "[T]he duty arises only in connection with [the] terms agreed to by the parties." *Id.*

It is Appellant that has breached his agreements by failing to perform as required under the Note and Deed of Trust. In his bankruptcy case, Appellant admitted the enforceability of his debt. (CP 151–52.) Appellant, not Defendants, is liable for breaching his obligations.

F. Defendants are entitled to foreclose, and Appellant lacks standing to challenge assignments.

Appellant does not have standing to challenge the alleged deficiencies in the assignments and agreements that he is not a party to. As the U.S. District Court for the Eastern District of Washington recently noted, "several courts faced with similar allegations of robo-signing have concluded that a borrower lacks standing to challenge an allegedly fraudulent assignment of a deed of trust and/or an appointment of a successor trustee." *Brodie v. N.W. Tr. Servs., Inc.*, 2012 WL 6192723, at *2 (E.D. Wash. 2012). The court in *Brodie* explained that "a borrower cannot be injured by the allegedly fraudulent conduct because the borrower is neither a party to nor an intended beneficiary of the challenged agreements." *Id.*; *see also Mickelson v. Chase Home Fin., LLC*, 2012 WL

1301251, at *2, *5 (W.D. Wash. 2012) (Pechman, J.) (robo-signing allegations "nothing more than legal conclusions unsupported by factual allegations"; regardless, the theory "fail[s] to demonstrate how Plaintiffs suffered damages from this conduct, and the Court is unable to comprehend the nature of the claims); *Cameron*, 2013 WL 5664706, at *3 (Martinez, J.) ("Nor does the alleged robo-signing of the assignment and appointment instruments lead the Court to doubt their validity or Flagstar's consequent ability to enforce the Deed."). "To the contrary, courts routinely reject "robo-signing" as a cognizable legal theory." *Zhong v. Quality Loan Serv. Corp.*, 2013 WL 5530583, at *3 (W.D. Wash 2013) (Robart, J.) (citing *Bain v. Metro. Mortg. Group, Inc.*, 2010 WL 891585, at *6 (W.D. Wash. 2010) (Coughenour, J.) ("There is simply nothing deceptive about using an agent to execute a document, and this practice is commonplace in deed of trust actions.")).

MERS's act of recording an assignment—a document to which Appellant is not a party—has no effect on Appellant's relationship with his lender. The purpose of recording an assignment is to put parties who subsequently purchase an interest in the property on notice of which entity owns a debt secured by the property. RCW 65.08.070. The only way assignment of a deed of trust might affect a borrower is if the borrower continues to make monthly mortgage payments to the assigning lender. *See Ross v. Johnson*, 171 Wash. 658 (1933).

Indeed, the recording of an assignment does not affect the creditor's relationship with its borrower. *See also Borowski v BNC Mortg. Inc.*, 2013 WL 4522253, at *5 (W.D. Wash. 2013). "[T]here is ample authority that borrowers, as third parties to the assignment of their mortgage (and securitization process), cannot mount a challenge to the chain of assignments unless a borrower has a genuine claim that they are at risk of paying the same debt twice if the assignment stands." *Id.*; *see also 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*, 266 P. 138 (Wash. 1928) (only party to an assignment can challenge its validity).

Washington law provides that absent direct notice of the assignment to the borrower—and Appellant does not and cannot allege direct notice—that borrower is *never* at risk of paying twice based on an assignment because the "recording of an assignment of a mortgage is not in itself notice to the mortgagor, his or her heirs, assigns or personal representatives, to invalidate a payment made by any of them to a prior holder of the mortgage." RCW 65.08.120; *see also Bridge v. Aames Cap. Corp.*, 2010 WL 3834059, at *3 (N.D. Ohio 2010) (a borrower "certainly has an interest in avoiding foreclosure. But the validity of the assignments does not affect whether Borrower owes its obligations, but only to whom Borrower is obligated.").

Although Appellant offers conclusory allegations of robo-signing, he does not explain why he was injured or how he has standing to complain about the execution of documents to which he is not a party. As discussed above, as long as Wells Fargo holds the Note indorsed in blank, Appellant knows whom he must pay to avert foreclosure. Indeed, Appellant knows and has known who to pay for some time now, as evidenced by the admissions in his bankruptcy schedules (which identify Wells Fargo's former servicer, EMC). (CP 151–52.) Appellant never alleges that he mistakenly paid the wrong person or identifies any other injury attributable to his alleged confusion about his loan. To the contrary, Appellant's failure to pay is the cause of the foreclosure, not alleged defects in assignments or other instruments to which he is not a party.

VI. CONCLUSION

For the foregoing reasons, Chase, EMC, MERS, and Wells Fargo respectfully request the Court to affirm the trial court.

RESPECTFULLY SUBMITTED this 3rd day of February, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2014, I caused the foregoing document to be served upon counsel of record as follows:

Jill Smith Natural Resource Law Group, PLLC 2217 N.W. Market Street, Suite 27 Seattle, WA 98107-4062	☑ Messenger ☐ U.S. Mail, postage prepaid ☐ Federal Express ☐ Facsimile ☑ Electronic
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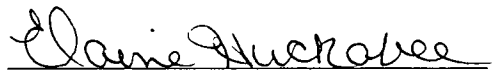
Dated this 3rd day of February, 2014.



Elaine Huckabee

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