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COURT OF APPEALS
DIVISION II
LEWIS COUNTY

No. 45642-7-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

MARK VELASCO AND DANIKA VELASCO,

Appellants

v.

NORTHWEST TRUSTEE SERVICES, INC., WELLS FARGO BANK,
HSBC BANK USA, National Association as Trustee for WFMBS 2007-
011, WELLS FARGO HOME MORTGAGE, MERSCORP, INC., a
Delaware Corporation, MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC., a Delaware Corporation

Respondents

ON APPEAL FROM LEWIS COUNTY SUPERIOR COURT

**RESPONDENTS WELLS FARGO, HSBC, MERSCORP, AND
MERS' ANSWERING BRIEF**

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF ARGUMENT1

II. COUNTERSTATEMENT OF ISSUES PERTAINING TO
ASSIGNMENTS OF ERROR3

III. COUNTERSTATEMENT OF THE CASE.....3

 A. The Subject Loan and Property..... 3

 B. The Velascos’ Default..... 5

 C. Respondents Commenced and Then Discontinued a
Foreclosure Sale of the Property..... 7

 D. Procedural Posture 8

IV. STANDARD OF REVIEW8

V. ARGUMENT9

 A. The Velascos Are Not Entitled to An Order
Quieting Title..... 9

 B. The Velascos Are Not Entitled to Declaratory
Relief..... 12

 1. The Velascos Have Abandoned Their
Declaratory Relief Claim. 12

 2. The Trial Court Properly Dismissed the
Declaratory Relief Claim. 13

 C. The Velascos’ Substantive Claims Were Properly
Dismissed..... 15

 1. The Velascos Cannot Establish that Any
Respondent is Liable on Any Substantive
Claim..... 16

 a. HSBC was the Holder of the Note
and Beneficiary of the Deed of Trust..... 16

 b. MERS Issues 19

 c. Appointment of Successor Trustee 21

 d. Loan Modification 22

e.	The Velascos’ Arguments Regarding the Transfer of the Loan Into the Trust are Without Merit.	24
2.	The Velascos Cannot Establish Injury or Damages.....	28
D.	Each of the Substantive Claims Has Also Has Independent Flaws that Require Dismissal.....	31
1.	The DTA Claim Fails Against Respondents Because The Record Contains No Evidence to Support Vicarious Liability Under <i>Walker</i>	31
2.	The Negligence Claim is Barred by the Independent Duty Doctrine.....	34
3.	The CPA Claim Fails Because the Velascos’ Alleged “Injuries” Do Not Support the Claim as a Matter of Law.....	35
VI.	CONCLUSION.....	36

TABLE OF AUTHORITIES

<u>Cases</u>	Page(s)
<i>A.L. Mechling Barge Lines, Inc. v. United States</i> , 368 U.S. 324 (1961).....	14
<i>Alejandre v. Bull</i> , 159 Wn.2d 674, 153 P.3d 864 (2007).....	34
<i>Amresco Independence Funding, Inc. v. SPS Props.</i> , LLC, 129 Wn. App. 532, 119 P.3d 884 (2005)	32
<i>Babrauskas v. Paramount Equity Mortg.</i> , No. C13-0494RSL, 2013 WL 5743903 (W.D. Wash. Oct. 23, 2013)	35
<i>Badgett v. Sec. State Bank</i> , 116 Wn.2d 563, 807 P.2d 356 (1991).....	22, 23
<i>Bain v. Metro Mtg. Gp., Inc.</i> , 175 Wn.2d 83, 285 P.3d 34 (2012).....	13, 17, 18, 19
<i>Baldwin v. Sisters of Providence in Washington, Inc.</i> , 112 Wn.2d 127, 769 P.2d 298 (1989).....	28
<i>Bhatti v. Guild Mortg. Co.</i> , C11-0480-JLR, 2011 WL 6300229 (W.D. Wn. Dec. 16, 2011).....	11
<i>Bittinger v. Wells Fargo Bank N.A.</i> , 744 F. Supp.2d 619 (S.D. Tex. 2010).....	11
<i>Brodie v. Northwest Trustee Services, Inc.</i> , --- Fed. Appx.---, 2014 WL 2750123 (9th Cir. Jun. 18, 2014).....	20
<i>Cheesebrough-Ponds, Inc. v. Faberge, Inc.</i> , 666 F.2d 393 (9th Cir.), cert. denied, 459 U.S. 967 (1982).....	14

<i>Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.</i> , 324 P.3d 743 (Wn. App. 2014).....	28
<i>Corales v. Flagstar Bank, FSB</i> , 822 F. Supp. 2d 1102 (W.D. Wn. 2011).....	20
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	12
<i>Cuddeback v. Bear Stearns Residential Mortg. Corp.</i> , 2013 U.S. Dist. LEXIS 152989 (W.D. Wn. Sept. 10, 2013)	11
<i>Demopolis v. Galvin</i> , 57 Wn. App. 47, 786 P.2d 804 (1990)	35, 36
<i>Eastwood v. Horse Harbor Found., Inc.</i> , 170 Wn.2d 380, 241 P.3d 1256 (2010).....	34
<i>Evans v. BAC Home Loans Servicing LP</i> , No. c10-0656-RSM, 2010 WL 5138394 (W.D. Wn. 2010)	10, 12
<i>Glaski v. Bank of America, N.A.</i> , 218 Cal. App. 4 th 1079 (2013)	24, 25, 26, 27
<i>Grandmaster Sheng-Yen Lu v. King County</i> , 110 Wn. App. 92, 38 P.3d 1040 (2002).....	14
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	28
<i>In re Butler</i> , 12-01209-MLB (W.D. Wn. Bankr. Oct. 2, 2013), slip op. at 5.....	32
<i>In re Davies</i> , Case No. 12-60003, 2014 WL 1152800, --- Fed. Appx. --- (9th Cir. Mar. 24, 2014).....	25
<i>In re United Home Loans</i> , 71 B.R. 885 (Bankr. W.D. Wn. 1987)	20

<i>International Harvester Co. v. Deere & Co.</i> , 623 F.2d 1207 (7th Cir.1980)	14
<i>Kahn v. Salerno</i> , 90 Wn. App. 110, 951 P.2d 321 (1998)	9
<i>Kobza v. Tripp</i> , 105 Wn. App. 90, 18 P.3d 621 (2001)	10
<i>Koegel v. Prudential Mut. Sav. Bank</i> , 51 Wn. App. 108, 752 P.2d 385 (1988)	33
<i>Larota—Florez v. Goldman Sachs Mortg. Co.</i> , 719 F. Supp. 2d 636 (E.D.Va. 2010).....	11
<i>Lipscomb v. Farmers Ins. Co. of Wn.</i> , 142 Wn. App. 20, 174 P.3d 1182 (2007)	9
<i>Lynott v. Mortg. Elec. Reg. Sys., Inc.</i> , No. 12-cv-5572-RBL, 2012 WL 5995053 (W.D. Wn. Nov. 30, 2012)	20
<i>Moseley v. CitiMortgage, Inc.</i> , No. C11–5349-RJB, 2011 WL 5175598 (W.D. Wn. Oct. 31, 2011)	11
<i>Muller v. Olin Mathieson Chemical Corp.</i> , 404 F.2d 501 (2nd Cir. 1968).....	14
<i>OgorSolka v. Residential Credit Solutions, Inc.</i> , Case No. 2:14–cv–00078–RSM, 2014 WL 2860742 (W.D. Wn. Jun. 23, 2014).....	26
<i>Osborn v. Grant County</i> , 130 Wn.2d 615, 926 P.2d 911 (1996).....	14
<i>Public Service Commission v. Wycoff Co.</i> , 344 U.S. 237 (1952).....	14
<i>Ronken v. Board of County Com'rs of Snohomish County</i> , 89 Wn.2d 304 572 P.2d 1 (1977).....	14
<i>Sign–O–Lite Signs, Inc. v. DeLaurenti Florists, Inc.</i> , 64 Wn. App. 553, 825 P.2d 714 (1992)	35

<i>Siliga v. Mortgage Electronic Registrations Systems, Inc.</i> , 219 Cal. App. 4th 75 (2013)	33
<i>State v. Rafay</i> , 168 Wn. App. 734, 285 P.3d 83 (2012)	9, 13
<i>Steward v. Good</i> , 51 Wn. App. 509, 754 P.2d 150 (1988)	33
<i>Thursman v. Wells Fargo Home Mortg.</i> , 2013 WL 3977662 (W.D. Wn. Aug. 2, 2013)	35
<i>Trujillo v. Northwest Trustee Services, Inc.</i> , --- P.3d ---, 2014 WL 2453092 (Wn. Ct. App. June 2, 2014)	15, 18
<i>Ukpoma v. U.S. Bank Nat. Assoc.</i> , Case No. 12–CV–0184–TOR, 2014 WL 1884395	26
<i>Walker v. Quality Loan Serv. Corp.</i> , 176 Wn. App. 294, 308 P.3d 716 (2013)	21, 31, 32, 33
<i>Wilton v. Seven Falls Co.</i> , 515 U.S. 277 (1995)	14
<i>Wn. State Grange v. Brandt</i> , 136 Wn. App. 138, 148 P.3d 1069 (2006)	10
<i>Young v. Whidbey Island Bd. of Realtors</i> , 96 Wn. 2d 729, 638 P.3d 1235 (1982)	29
<i>Yvanova v. New Century Mortgage Corporation</i> , 226 Cal.App.4th 495 (2014)	26
<i>Zemel v. Rusk</i> , 381 U.S. 1 (1965)	14

Statutes

28 U.S.C. § 2201 (1982)	14
RCW 7.70.020	14
RCW 61.24.005(2)	15, 16, 18

RCW 61.24.010(2).....	21
RCW 61.24.130(1).....	33
RCW 61.24 <i>et seq.</i>	16
RCW 62.A.3-205(b).....	17
RCW 62A.1-102(21)(A).....	15
RCW 62A.1-201(21).....	17
RCW 62A.1-201(21)(A).....	17, 18
RCW 62A.3-201	18
RCW 62A.3-205(b).....	17

Other Authorities

CR 56(c).....	8
RAP 10.3(g)	12
Washington Uniform Commercial Code	17

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In 2007, Appellants Mark and Danika Velasco (Velascos) borrowed \$577,400 (Loan) to refinance a loan secured by real property located in Lewis County, Washington. In January 2008, Wells Fargo, the loan servicer, gave the Velascos a three-month moratorium on their payments to assist them in dealing with the economic impact of the 2008 Lewis County flooding. At the end of the moratorium however, the Velascos still could not make their payments. Wells Fargo then began reviewing the Velascos for a loan modification.

The Velascos did not qualify for a modification and so HSBC, the original lender's successor-in-interest, began foreclosure proceedings. The trustee of the deed of trust recorded a notice of trustee's sale in December 2008 and then recorded a discontinuance of that sale in February 2010. No new foreclosure of the property was ever scheduled. The Velascos remained title owners of the property and have retained possession of the property since they purchased it but have made no payments on the property since June 5, 2009. In short, the Velascos have lived on the property for free for over five years.

Despite the fact that no foreclosure proceedings were pending, the Velascos brought this lawsuit in April 2011, over a year after the prior foreclosure proceedings were discontinued. The Velascos asserted claims

for damages against the Loan servicer, owner, successor trustee, and MERS. The Velascos also asserted a claim for declaratory relief and a claim to quiet title to the property in themselves.

This appeal arises out of the summary judgment dismissal of the Velascos' claims against Wells Fargo Bank, N.A., HSBC Bank USA, National Association as Trustee for WFMBS 2007-011, Wells Fargo Home Mortgage, MERSCORP, Inc., and Mortgage Electronic Registration Systems, Inc. (collectively, Respondents).¹

None of the Velascos' five causes of action can survive in the face of the undisputed facts of this case. The Velascos' negligence, Deed of Trust Act (DTA), and Consumer Protection Act (CPA) claims each fail because the Velascos presented no admissible evidence of damages. The Velascos' quiet title claim fails because they admit signing the DOT and defaulting on the Loan. The Velascos' declaratory relief claim fails because HSBC is the holder of the indorsed-in-blank note and no foreclosure of the Property has taken place.

¹ Wells Fargo Home Mortgage, a division of Wells Fargo Bank, N.A. (collectively, Wells Fargo).

HSBC Bank USA, National Association as Trustee for WFMBS 2007-011, Wells Fargo Home Mortgage ("HSBC").

MERSCORP, Inc. and Mortgage Electronic Registration Systems, Inc. (collectively, MERS).

The trial court dismissed the Velascos' five causes of action on summary judgment. This Court should affirm that decision as the Velascos have failed to raise genuine issues of fact in support of their claims and each of their claims fails as a matter of law.

II. COUNTERSTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The issue on this appeal is whether the trial court properly dismissed the Velascos' Complaint with prejudice on summary judgment. The undisputed evidence before the trial court showed that: (1) the Velascos took out the Loan; (2) the Velascos defaulted on their payment obligations; (3) there was no pending foreclosure of the Property at any point during the pendency of the lawsuit; and (4) at summary judgment, HSBC, the party that claimed to be the beneficiary, had physical possession of the indorsed-in-blank Note through Wells Fargo, HSBC's document custodian and servicing agent.

Based on this undisputed factual record, summary judgment was properly granted and the trial court's decision should be affirmed.

III. COUNTERSTATEMENT OF THE CASE

A. The Subject Loan and Property

In 2006, the Velascos purchased the real property commonly known as 136 Sargent Road, Winlock, WA 98596 (Property) as vacant land. CP 103. Using a construction loan from National City Mortgage,

the Velascos both purchased the land and financed the construction of a residence on the Property. CP 104. The Property is 23.5 acres with a house and five outbuildings. CP 106. The house is 3,200 square feet with three bedrooms and 2.75 bathrooms. CP 106-107. In 2007, the Velascos completed construction, moved into the house, and took out the refinance loan that is at issue in this case. CP 107-108.

On or about June 4, 2007, the Velascos borrowed \$577,400 from ComUnity Lending (ComUnity) in order to refinance the loan they used to acquire the Property and construct the improvements thereon. CP 109-110. In conjunction with the Loan, the Velascos executed a note (Note) and deed of trust (DOT). CP 160-164 (Note); CP 124-138 (DOT). The Velascos admit signing the Note and DOT. CP 108-109; CP 115. The DOT was recorded under Lewis County Auditor's No. 3282189 on June 8, 2007. CP 124. The Loan is a 6.5% interest fixed-rate loan with a 10-year interest only feature. CP 111-112. The monthly payments on the Loan for all times relevant to this suit were \$3,127.58/month. CP 112.

On or before June 29, 2007, ComUnity specifically indorsed the Note to Wells Fargo. CP 60. On or before January 18, 2012, Wells Fargo indorsed the Note in blank. CP 60-61. At all relevant times, Wells Fargo maintained custody of the Note as servicer for the HSBC, as trustee of the WFMBS 2007-011 trust (HSBC). CP 60.

Wells Fargo is the Velascos' loan servicer. CP 60. All of the Loan payments the Velascos made were made to Wells Fargo. CP 113. No entities besides Wells Fargo, HSBC, and Northwest Trustee Services, Inc. (the successor trustee of the DOT) have ever demanded payment from the Velascos on the Loan. CP 113-114.²

B. The Velascos' Default

In late 2007, the same year that the Velascos purchased the Property, Lewis County suffered record flooding that shut down I-5. CP 6. This natural disaster impeded the Velascos' ability to pay the Loan as they allegedly could not get to work to earn a living. CP 6. The record shows that, following the flooding, Mr. Velasco was able to return to work -- at the time of his deposition in 2013 his annual income was approximately \$92,000 per year. CP 100-101.

In January 2008, Mr. Velasco called Wells Fargo to see what his options were in light of the flooding. CP 6-7. Wells Fargo advised Mr. Velasco that his home was a part of a FEMA natural disaster area and there would be a moratorium on payments. CP 6-7. Wells Fargo

² In their Statement of the Case, the Velascos cite to the Complaint regarding allegations that mortgage broker Discover Mortgage engaged in improprieties in originating the Loan. Op. Br. 8. These allegations are not tied to any claim for relief against Respondents (*see generally* Op. Br.) and so these irrelevant allegations are not discussed further here.

customer servicing notes from Mr. Velasco's January 10, 2008 conservation state as follows:

H/O (homeowner) CALLED IN SAID HAD A FLOOD
FEMA RELATED FLAGGED ACCOUNT ADVISED
H/O ALL PAYMENTS WOULD BE DUE BY MARCH 8

CP 140.

Mr. Velasco then contacted Wells Fargo again on March 12, 2008 and explained that he would not be able to make the three-month lump sum payment following the moratorium. CP 140. Wells Fargo's customer servicing notes from that date state as follows:

BWWR (borrower) CALLED IN, SETUP ON
MORATORIUM THAT IS ENDING, WONT BE ABLE
TO PAY OFF FULL AMOUNT, TRANSFER OVER TO
LOSS MIT-RFD-NATURAL DISASTER

CP 140.

Mr. Velasco testified at his deposition that he does not recall if he ever discussed with Wells Fargo the specific terms of the moratorium, namely whether all payments would be due at the conclusion of the period. CP 120-121. Nevertheless, in October 2008, Wells Fargo sent Mr. Velasco a letter reiterating the terms of the moratorium period. CP 142. This letter is consistent with the entries in Wells Fargo's customer servicing notes that all payments would be due at the conclusion of the moratorium period. *Compare* CP 140 *with* CP 142.

Since failing to make the payments due at the end of the moratorium period in 2008, the Velascos have made only six monthly mortgage payments on the Loan; the Velascos made only 11 mortgage payments during this 72-month period. CP 151. At the time of the hearing on the motion for summary judgment, the Velascos had made no mortgage payment since June 5, 2009. CP 151.

It is undisputed that the Respondents offered the Velascos multiple forbearance agreements – trial plans that are part of the permanent loan modification process. RP 7:2-11. The Velascos made payments on some of those plans but ultimately rejected the plans or declined to continue making payments because the terms were not to the Velascos' liking. *Id.*

Additionally, the Velascos requested mediation under the Foreclosure Fairness Act (FFA). RP 8:11-19. The Velascos do not dispute that they unilaterally withdrew from the FFA mediation immediately before the mediation was to take place. *Id.*

C. Respondents Commenced and Then Discontinued a Foreclosure Sale of the Property.

On November 19, 2008, MERS assigned its agency, record interest in the DOT (Assignment) to HSBC. CP 49. On the same date, Wells Fargo, as attorney in fact for HSBC, executed an appointment of successor trustee (Appointment) appointing co-defendant Northwest Trustee Services, Inc. (NWTS) as the successor trustee under the DOT. CP 51.

On December 5, 2008, NWTs recorded a notice of trustee's sale (Notice of Sale) scheduling the foreclosure sale of the Property. CP 53.

On February 22, 2010, NWTs recorded a discontinuance of the trustee's sale of the Property (Discontinuance). CP 58. At the time of summary judgment, no new foreclosure sale had been scheduled. CP 46.

D. Procedural Posture

The Velascos filed this lawsuit on April 5, 2011 – more than a year after NWTs continued the trustee's sale. CP 1. The Velascos asserted five causes of action in their Complaint: (1) declaratory relief; (2) violation of the DTA; (3) negligence; (4) violation of the Consumer Protection Act (CPA); and (5) quiet title. CP 11-14. On November 15, 2013, the trial court granted Respondent's motion for summary judgment. CP 333-35. This appeal followed.

IV. STANDARD OF REVIEW

Respondents agree with the Velascos that the standard of review for a motion for summary judgment is de novo review. *See Op. Br. 14.*

Summary judgment is appropriate if the pleadings, depositions, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). Once the moving party establishes no dispute exists as to a material fact, the burden shifts to the nonmoving party to show the

existence of such fact. *Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998). “The nonmoving party must set forth specific facts that demonstrate a genuine issue of material fact and cannot rest on mere allegations.” *Lipscomb v. Farmers Ins. Co. of Wn.*, 142 Wn. App. 20, 27, 174 P.3d 1182 (2007).

V. ARGUMENT³

The trial court properly granted summary judgment to Respondents because each of the Velascos’ causes of action fails as a matter of law. The Velascos’ claims fall into three categories (1) the request for the remedy of quiet title; (2) declaratory relief; and (3) the substantive claims for damages sought via the Velascos’ DTA, negligence and CPA causes of action (collectively, Substantive Claims). This Court should uphold the dismissal of all of the Velascos’ claims for the following reasons.

A. The Velascos Are Not Entitled to An Order Quieting Title.

The trial court properly dismissed the Velascos’ quiet title claim. An action to quiet title is an equitable proceeding “designed to resolve

³ Defendant MERSCorp, Inc. (MERSCorp) is named in the Complaint. CP 1. MERSCorp is not mentioned anywhere in the Opening Brief except the caption. *See Op. Br.* The Court should affirm the summary judgment dismissal of MERSCorp where the Velascos make no arguments regarding that defendant. *See, e.g., State v. Rafay*, 168 Wn. App. 734, FN 1, 285 P.3d 83 (2012).

competing claims of ownership.” *Kobza v. Tripp*, 105 Wn. App. 90, 95, 18 P.3d 621 (2001). As plaintiffs seeking the remedy of quiet title, the Velascos must prevail, if at all, on the strength of their own title, and not on the weakness of the title of their adversary. *Wn. State Grange v. Brandt*, 136 Wn. App. 138, 153, 148 P.3d 1069 (2006).

Indeed, to maintain a quiet title action against a mortgagee, a plaintiff must first pay the outstanding debt on which the subject mortgage is based. *See Evans v. BAC Home Loans Servicing LP*, No. c10-0656-RSM, 2010 WL 5138394, at *3 (W.D. Wn. 2010) (“Plaintiffs cannot assert an action to quiet title against a purported lender without demonstrating they have satisfied their obligations under the Deed of Trust.”). In *Evans*, Judge Martinez explained the basis for this principle:

The logic of such a rule is overwhelming. Under a deed of trust, a borrower’s lender is entitled to invoke a power of sale if the borrower defaults on its loan obligations. As a result, the borrower’s right to the subject property is contingent upon the borrower’s satisfaction of loan obligations. Under the circumstances, it would be unreasonable to allow a borrower to bring an action to quiet title against its lender without alleging satisfaction of those loan obligations.

Id.

Here, the Velascos argue:

The property, evidenced by the deed, serves as collateral for the Note. When the Note is sold into a mortgage-backed security pool, it is converted into a stock and fully discharged. The Velascos’ Deed of Trust secures a promissory note, (CP 125) and if the promissory note is

destroyed through permanent conversion, then the Deed of Trust secures nothing.

Op. Br. 32. The Velascos do not cite case law (nor is there any) that supports the argument that securitization of a loan renders it void. *See Cuddeback v. Bear Stearns Residential Mortg. Corp.*, 2013 U.S. Dist. LEXIS 152989, *7 (W.D. Wn. Sept. 10, 2013) (“Courts have routinely rejected claims where securitization of a promissory note voids the instrument.”). This is because securitization merely creates “a separate contract, distinct from Plaintiffs’ debt obligations under the reference credit (i.e. the Note).” *Larota—Florez v. Goldman Sachs Mortg. Co.*, 719 F. Supp. 2d 636, 642 (E.D.Va. 2010) (granting summary judgment to lender because debtor’s securitization theories regarding separation and satisfaction of secured interests fail as a matter of law). *See also Bhatti v. Guild Mortg. Co.*, C11-0480-JLR, 2011 WL 6300229, at *5 (W.D. Wn. Dec. 16, 2011) (“[s]ecuritization merely creates a separate contract, distinct from the Plaintiffs’ debt obligations under the Note, and does not change the relationship of the parties in any way.”); *Moseley v. CitiMortgage, Inc.*, No. C11-5349-RJB, 2011 WL 5175598, at *7 (W.D. Wn. Oct. 31, 2011); *Bittinger v. Wells Fargo Bank N.A.*, 744 F. Supp.2d 619, 625–26 (S.D. Tex. 2010) (finding that obligee under a note did not have standing to sue for breach of contract even though his loan had been bundled into the PSA).

It is undisputed that the Velascos were, and are in serious default on their Loan payments and it is also undisputed that the Velascos have not paid off the obligation secured by the Deed of Trust they seek to void. CP 109 (signed note); CP 115 (signed DOT); CP 60-61; CP 151 (default). There is no basis to quiet title to the Property in the Velascos. Doing so would give the Velascos the Property essentially “for free.” Because the Velascos failed to satisfy their obligations under the Deed of Trust, the trial court properly dismissed the quiet title claim. *See Evans*, 2010 WL 5138394, at *3.

B. The Velascos Are Not Entitled to Declaratory Relief.

The Velascos’ first cause of action was for declaratory relief. CP 11. The dismissal of this claim should be upheld on appeal.

1. The Velascos Have Abandoned Their Declaratory Relief Claim.

The Velascos do not address their declaratory relief claim in their Opening Brief other than to list it as one of their causes of action. Op. Br. 7. This is insufficient to preserve the issue for appeal. Under RAP 10.3(g) the “appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.” To be considered, any assignments of error that a party does make must be supported by citation to legal authority and the relevant portions of the record. *Cowiche Canyon Conservancy v. Bosley*,

118 Wn.2d 801, 809, 828 P.2d 549 (1992). Because the Velascos' Opening Brief does not cite to any legal authority or evidence regarding their declaratory relief claim, the Velascos have abandoned their declaratory relief claim and the trial court's order dismissing it should be affirmed. *See, e.g., Rafay*, 168 Wn. App. at FN 1 (argument waived where appellant devoted no argument to issue on appeal and did not address issue in grounds for review).

2. The Trial Court Properly Dismissed the Declaratory Relief Claim.

Even if the Velascos have not abandoned their claim for declaratory relief, this Court should affirm its dismissal. The Velascos' basis for seeking declaratory relief from the trial court was that "the Deed of Trust was transferred separately from the Note ... [and] therefore the Deed of Trust has been separated from the note and is a nullity." CP 11. Under Washington law, however, it is well-established that the transfer of the debt obligation (the Note) carries with it the security (the Deed of Trust) as a matter of law, not vice versa. *Bain v. Metro Mtg. Gp., Inc.*, 175 Wn.2d 83, 104, 285 P.3d 34 (2012) ("Washington's deed of trust act contemplates that the security instrument will follow the note, not the other way around."). As demonstrated in § V.A above, mere securitization of a loan does not render it void.

Moreover, declaratory relief is not an automatic right. A trial court has the discretion whether or not to grant a plaintiff his requested declaratory relief. *Ronken v. Board of County Com'rs of Snohomish County*, 89 Wn.2d 304, 310 572 P.2d 1 (1977).⁴ A justiciable controversy must exist between the parties before a court may grant declaratory relief. *Osborn v. Grant County*, 130 Wn.2d 615, 631, 926 P.2d 911 (1996).⁵

Although a party may obtain a declaration of its rights and status under a deed or written instrument, RCW 7.70.020, at the time of the

⁴ Similarly, the federal Declaratory Judgment Act does not grant litigants an absolute right to a legal determination. *Zemel v. Rusk*, 381 U.S. 1, 19 (1965); *Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 241 (1952); 28 U.S.C. § 2201 (1982). The decision to grant declaratory relief is a matter of discretion, *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 331 (1961); *Cheesebrough-Ponds, Inc. v. Faberge, Inc.*, 666 F.2d 393, 396 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982), even when the court is presented with a justiciable controversy. *International Harvester Co. v. Deere & Co.*, 623 F.2d 1207, 1217 (7th Cir.1980); *Muller v. Olin Mathieson Chemical Corp.*, 404 F.2d 501, 505 (2nd Cir. 1968). The “district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites.” *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995).

⁵ A justiciable controversy is: (1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive. *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 98, 38 P.3d 1040 (2002).

summary judgment hearing, there was no pending foreclosure sale of the Property (the prior foreclosure sale having been discontinued) ***and*** HSBC had established that it was the holder of Plaintiff's Note and thus the beneficiary of the DOT. *See* CP 46 (no pending foreclosure); CP 60-61 (Wells Fargo has custody of indorsed-in-blank note on behalf of HSBC); RCW 62A.1-102(21)(A); RCW 61.24.005(2); *Trujillo v. Northwest Trustee Services, Inc.*, --- P.3d ---, 2014 WL 2453092, *5 (Wn. Ct. App. June 2, 2014) (testimony under penalty of perjury that entity possesses indorsed in blank note is sufficient to establish status as beneficiary under DTA). Accordingly, any of the Velascos' requested declaratory relief was either (1) moot; or (2) unavailable as a matter of law.

C. The Velascos' Substantive Claims Were Properly Dismissed.

The Velascos' DTA, negligence, and CPA claims all rest on the same flawed premise that Respondents failed to meet their obligations under the DTA and are therefore liable to the Velascos for damages. CP 11-14. Respondents address these three claims together because the claims rely on the same flawed premise and because the Velascos cannot establish any damages related to any of the Respondents' allegedly wrongful acts.

1. **The Velascos Cannot Establish that Any Respondent is Liable on Any Substantive Claim.**

The Velascos bring three claims for damages against Respondents: (1) violation of the DTA, (2) negligence, and (3) violation of the CPA. CP 11-14. These claims each fail because the Velascos cannot present any admissible evidence of damages. The claims also fail because the Velascos fail to demonstrate any actionable wrongdoing by Respondents as a matter of law.

a. **HSBC was the Holder of the Note and Beneficiary of the Deed of Trust.**

The Velascos' Substantive Claims rest on the premise that the Respondents lacked authority to initiate non-judicial foreclosure proceedings against the Property. CP 12 ("wrongfully commenced" foreclosure proceeding is basis of damages claim). However, at summary judgment, Respondents demonstrated that HSBC was the holder of the Note and therefore beneficiary of the Deed of Trust as a matter of law. CP 60; RCW 61.24.005(2). The Velascos offered no admissible evidence to the contrary. *See generally* Op. Br.

Deeds of trust and foreclosures thereof, such as are at issue here, are governed by RCW 61.24 *et seq.*, the Washington DTA. Since 1998, the DTA has defined a "beneficiary" of a deed of trust as "the ***holder*** of

the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.” *Bain*, 175 Wn.2d at 98-99, (citing RCW 61.24.005(2) (emphasis added).

The Washington U.C.C. defines the “Holder” of a negotiable instrument in relevant part as “the person in possession if the instrument is payable to bearer.” RCW 62A.1-201(21)(A); *Bain*, 175 Wn.2d at 104. A negotiable instrument is payable to bearer if, as is the case with the Note here, it is indorsed in blank. *See* RCW 62A.3-205(b); CP 160-164.⁶ In *Bain*, the court explained that:

If the original lender ha[s] sold the loan, that purchaser would need to establish ownership of that loan, *either* by demonstrating that it actually held the promissory note *or* by documenting the chain of transactions.

175 Wn.2d at 111 (emphasis added).

The evidence Respondents presented in support of their motion for summary judgment demonstrated full compliance with *Bain* and was sufficient to establish HSBC’s status as holder of the Note and beneficiary of the DOT. CP 60 (Wells Fargo had custody of indorsed-in-blank Note on behalf of HSBC); RCW 62A.1-201(21) (“holder” of note is person in

⁶ “When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.” RCW 62A.3-205(b).

possession of note payable to bearer); *Bain*, 175 Wn.2d 111 (successor lender can prove beneficiary status by demonstrating it holds note). Indeed, Respondents presented sworn testimony that Wells Fargo, as custodian and servicing agent for HSBC, kept physical possession of the indorsed-in-blank note on HSBC's behalf since at least March 5, 2012. CP 60 (testimony); CP 164 (indorsed-in-blank). Wells Fargo is permitted to possess this instrument on behalf of HSBC as Washington law specifically permits the use of agents in the course of servicing notes secured by deeds of trust. *Bain*, 175 Wn.2d at 106 (“[N]othing in this opinion should be construed to suggest an agent cannot represent the holder of a note. Washington law, and the DTA itself, approves of the use of agents.”). And it is perfectly permissible for a person to maintain the possession required for holder status through an agent. RCW 62A.3-201 Cmt. 1.

Having physical possession of the indorsed-in-blank note, HSBC was the holder of the Note under the UCC at the time of summary judgment. RCW 62A.1-201(21)(A); CP 60. As holder of the Note, HSBC was the beneficiary of the DOT and was entitled to enforce the same. RCW 61.24.005(2); *Bain*, 175 Wn.2d at 111 (successor lender may demonstrate beneficiary status by showing that it possesses note); *Trujillo v. Northwest Trustee Services, Inc.*, --- P.3d ---, 2014 WL 2453092, *5

(Wn. Ct. App. June 2, 2014) (testimony under penalty of perjury that entity possesses note is sufficient to establish status as beneficiary under DTA). Thus, there is no basis for holding Respondents liable under the Substantive Claims and the dismissal of these claims should be affirmed.

b. MERS Issues

The record before the Court shows that MERS (1) was named as beneficiary of the DOT in a nominee capacity and (2) executed the Assignment in favor of HSBC. CP 126, 49. The Velascos claim that these actions by MERS are actionable. Op. Br. 18. This claim fails as a matter of law.

In *Bain* the Supreme Court held that the presence of MERS in a deed of trust loan could be the basis of liability. 175 Wn.2d at 119-20. The Court found that whether liability attaches depends on the circumstances of the case. *Id.* at 119. Particularly, the Court was concerned about situations where the use of MERS in the loan transaction led to foreclosures started by multiple parties, or confusion by the borrower as to whom the debt was owed. *Id.*

That confusion is simply not present here. There are no allegations that multiple parties foreclosed on the Property. *See generally* Op. Br. There are no allegations that the Velascos were confused regarding to whom they should make their payments. *Id.* Rather, the evidence shows

that all payments were made to Wells Fargo and all communications regarding the Loan were made to Wells Fargo. CP 113. The record further shows that Wells Fargo was the servicing agent of HSBC, the beneficiary. CP 60.

With respect to MERS' execution of the Assignment, the Assignment was executed for the benefit of record title only. As the Federal Courts have recognized, an assignment does not have any effect on the rights and obligations of the borrowers under the Note and the Deed of Trust, and the beneficiary's authority to act does not derive from the assignment. *See, e.g., Lynott v. Mortg. Elec. Reg. Sys., Inc.*, No. 12-cv-5572-RBL, 2012 WL 5995053, at *2 (W.D. Wn. Nov. 30, 2012) (holding that "U.S. Bank is the beneficiary of the deed because it holds Plaintiff's note, not because MERS assigned it the deed"). "Washington State does not require the recording of such transfers and assignments." *Corales v. Flagstar Bank, FSB*, 822 F. Supp. 2d 1102, 1109 (W.D. Wn. 2011). This is because the recording is for the benefit of third parties. *Id.*; *see also In re United Home Loans*, 71 B.R. 885, 891 (Bankr. W.D. Wn. 1987) ("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 third parties[.]").

Further, the Velascos do not have standing to challenge the Assignment because they were not a party to it. *Brodie v. Northwest Trustee Services, Inc.*, --- Fed. Appx.---, 2014 WL 2750123, *1 (9th Cir. Jun. 18, 2014) (“The district court also correctly concluded that Brodie lacks standing to challenge the transfer and assignment of the note and deed of trust. She is neither a party to nor a beneficiary of the assignment and transfer.”)

Thus, the actions of MERS do not give rise to liability here.

c. Appointment of Successor Trustee

The Velascos allege that Wells Fargo’s appointment of NWTS as successor trustee of the DOT was unlawful because there was “no written resignation of the original trustee, Lewis County Title Company, who had not ceased to act.” Op. Br. 10. However, the DTA provides in relevant part:

The trustee ***may resign*** at its own election ***or be replaced by the beneficiary***.

RCW 61.24.010(2) (emphasis added).

Thus, there is no requirement in the DTA that the trustee resigns or ceases acting before being replaced. As such, Wells Fargo’s execution of

the appointment was not wrongful and cannot be the basis for Respondents' liability.⁷

d. Loan Modification

The Velascos' Substantive Claims are based, in part, on their allegations that Wells Fargo acted improperly during the parties' loan modification negotiations. Op. Br. 22. This claim fails as a matter of law.

First, and most importantly, a lender's refusal to provide its borrower with a loan modification is not actionable under Washington law – a lender is entitled to insist upon performance of the original loan terms. *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 570, 807 P.2d 356 (1991) (“As a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms.”). Thus, failure to provide a loan modification cannot support the Velascos' Substantive Claims.

Second, the Velascos contend that Wells Fargo refused to grant a loan modification because it “claimed that the ‘investors’ would not allow for a modification.” Op. Br. 22. This contention fails in the face of the undisputed evidence that the Velascos rejected multiple forbearance plans offered by Respondents. RP 7:2-11.

⁷ The Velascos **do not** contend that the Appointment was wrongful because it was not executed by the beneficiary. *See, e.g., Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 305-6, 308 P.3d 716 (2013).

Not only did they reject forbearance plans, the Velascos' attorney referred them to FAA mediation, which the Velascos unilaterally withdrew from just before the mediation was scheduled to take place. RP 8:11-19.

Thus, the record actually shows that it was the Velascos, rather than Wells Fargo, who refused to meaningfully negotiate a loan modification.

Third, the Velascos contend that:

Wells Fargo and HSBC deceived the Velascos by accepting forbearance payments and continuing to request information from the Velascos, knowing full well that Wells Fargo and HSBC never intended to modify the loan, and instead continued forward with the foreclosure process.

Op. Br. 23.

The Velascos do not offer evidentiary support for this contention. *Id.* Further, this allegation is belied by the evidence that (1) the Velascos made only 11 mortgage payments in the 72 months they had the Loan; and (2) the Respondents voluntarily discontinued the foreclosure without the Velascos even filing a lawsuit, much less obtaining a TRO. CP 151; CP 58; CP 1.

This actual evidence, as opposed to the Velascos' mere allegations, critically undermines the Velascos' claim that the Respondents' actions during loan modification negotiations support a claim for relief.

e. **The Velascos' Arguments Regarding the Transfer of the Loan Into the Trust are Without Merit.**

The Velascos include a section in their Opening Brief discussing case law in other jurisdictions where courts have found that borrowers have standing to challenge whether an asset-backed trust properly took possession of their mortgage loan. Op. Br. 26-29. The Velascos make no attempt to apply this argument to the instant case. *Id.* Even if they did, the Velascos' transfer-based argument fails to overcome the summary judgment dismissal of their claims.

i. **The Glaski Case**

The core argument in the Velascos' Response is their reliance on the *Glaski* case. Op. Br. 27-28 (citing *Glaski v. Bank of America, N.A.*, 218 Cal. App. 4th 1079 (2013)). *Glaski* is a post-sale wrongful foreclosure case concerning residential real property in Fresno, California. *Glaski*, 218 Cal. App. 4th at 1083. The California trial court dismissed the case on a motion to dismiss (demurrer) and the plaintiff borrower appealed. *Id.* at 82-83. Plaintiff alleged that a WaMu asset-backed trust did not effectively acquire ownership of plaintiff's loan because the loan was purportedly sold into the trust after the trust's closing date. *Id.*

The California Court of Appeals overruled the trial court's dismissal. *Id.* The court remarked regarding its ruling:

In this appeal, the borrower contends the trial court erred by sustaining defendants' demurrer as to all of his causes of action attacking the non-judicial foreclosure. We conclude that, although the borrower's allegations are somewhat confusing and may contain contradictions, he nonetheless has stated a wrongful foreclosure claim *under the lenient standards applied to demurrers*.

Id. (emphasis added).

Glaski came before the California Court of Appeals on the trial court's granting of a motion to dismiss. *Glaski*, 218 Cal. App. 4th at 1088. Thus, there was no independent evidence that the asset-backed trust in *Glaski* actually owned the subject loan. The instant case, however, came to the trial court on a motion for summary judgment. Respondents' motion for summary judgment was backed by undisputed evidence establishing HSBC was the holder of the Note and beneficiary of the DOT. CP 60. While the *Glaski* trial court may have been overruled "under the lenient standards applied to demurrers," this Court, reviewing the trial court's summary judgment order, has no such constraints. Indeed, the *evidence* before the Court on the MSJ demonstrated that the Velascos' claims failed as a matter of law and were properly dismissed.

ii. ***Glaski's Holding is Unsupported by Washington Law.***

Glaski is a case analyzing a California deed of trust under California law. *See generally Glaski*, 218 Cal. App. 4th 1079. There are no Washington cases adopting the *Glaski* holding and the Velascos fail to

cite any Washington authority that comes to a similar conclusion independent of *Glaski*. Simply put, the Velascos' argument that the Loan was transferred to the HSBC trust after the closing date and is therefore void has no basis in Washington law and should be rejected. See *In re Davies*, Case No. 12-60003, 2014 WL 1152800, *1, --- Fed. Appx. --- (9th Cir. Mar. 24, 2014) (noting even California courts are divided on propriety of *Glaski* and affirming grant of motion for judgment on pleadings dismissing *Glaski* claims); *Ogorsolka v. Residential Credit Solutions, Inc.*, Case No. 2:14-cv-00078-RSM, 2014 WL 2860742, *3 (W.D. Wn. Jun. 23, 2014) (holding no California courts have followed *Glaski* and that borrowers lack standing to challenge purchase of loan by asset-backed trust); *Ukpoma v. U.S. Bank Nat. Assoc.*, Case No. 12-CV-0184-TOR, 2014 WL 1884395, FN 4 ("Plaintiff also cites *Glaski*...., an August 8, 2013, California decision which is not binding on this Court.").

In fact, even the California courts are retreating from *Glaski*'s conclusion. *Yvanova v. New Century Mortgage Corporation*, 226 Cal.App.4th 495, 502 (2014) (no California court has followed *Glaski* on this point [improper securitization argument], and many have pointedly rejected it – citing cases).

iii. **The Velascos Fail to Raise a Genuine Issue of Material Fact in Support of their *Glaski*-Style Theory.**

Even if *Glaski* were the law of the land in Washington (which it certainly is not), the Velascos are unable to close the evidentiary circle on their *Glaski* argument.

One, there is no evidence regarding the closing date of the trust at issue here.

Two, there is no evidence that the Loan was transferred into the trust after the closing date.

Three, even if the Loan was transferred into the HSBC trust after the trust's closing date (which the Velascos' have not demonstrated), the Velascos have made no legal or factual showing that this was wrongful. *See generally* Op. Br. The Response contains no analysis of the HSBC trust's governing provisions nor does it explain how loans that are transferred after the closing date are to be treated.

Glaski is not law in Washington. Even if it were, the Velascos fail to make an evidentiary showing sufficient to defeat the motion for summary judgment on a *Glaski*-style theory of the case. Because the Velascos' *Glaski*-style argument fails, so too do their derivative causes of action.

The Velascos' three damages claims each require some wrongful act by Respondents in order to support a finding of liability – the Velascos failed to raise a genuine issue of material fact in support of these claims. Accordingly, the trial court properly granted Respondents' motion for summary judgment.

2. The Velascos Cannot Establish Injury or Damages.

Demonstrating that injury or damages was proximately caused by Respondents' allegedly wrongful acts are essential elements of the Velascos' DTA, negligence and CPA claims. *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 324 P.3d 743, 749 (Wn. App. 2014) (causation and damages are each essential elements of negligence claim); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986) (causation and damages to business or property are essential elements of CPA claim); CP 11-14. Here, the Velascos cannot establish injury or damages in connection with their DTA, negligence or CPA claims for the following reasons:

First, the record on appeal does not contain any admissible evidence of legally cognizable damages. It is axiomatic that on summary judgment “[t]he nonmoving party must set forth specific facts showing a genuine issue and cannot rest on mere allegations.” *Baldwin v. Sisters of Providence in Washington, Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298

(1989) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986)).

Here, the Velascos allege that they “incurred investigative expenses, legal fees, and loss of work time, as well as additional late fees, inspection fees, and damage to credit, thus proving causation and damages.” Op. Br. 25. However, there is no supporting citation to the record, much less actual evidentiary support for these claims. *Id.*; *and see id.* at 26 (same); *id.* at 30 (same). The Velascos attempt exactly what is forbidden by the case law – they attempt to resist summary judgment based on mere allegations. This attempt should be rejected and the trial court should be affirmed.

Second, the Velascos cannot establish any damages related to contesting the initiated but incomplete foreclosure. Critically, the Velascos filed this lawsuit on April 5, 2011, after the foreclosure of their Property had been discontinued on February 22, 2010. *Compare* CP 1 *with* CP 58. Because the foreclosure was stopped without the Velascos having to do anything, the Velascos cannot establish any damages related to the uncompleted foreclosure process – a process they agreed could be started if, as is undisputed, they defaulted on the Loan. CP 126, 136 (Velascos signed DOT and DOT contains power of sale allowing for foreclosure on the Property). It is no surprise that the Velascos did not

present any admissible evidence of damages – a claim for damages simply does not make sense under these facts.

Third, to the extent the Velascos have suffered damages caused by the Respondents, any such damages are offset by the massive windfall the Velascos have received by possessing the Property for 72 months while making only 11 mortgage payments during this time. *See Young v. Whidbey Island Bd. of Realtors*, 96 Wn. 2d 729, 730, 638 P.3d 1235 (1982) (affirming trial court's decision to offset from CPA damages amount by which plaintiff failed to mitigate damages). The Velascos enjoyed continuous possession of the Property from the time they purchased it in 2006. CP 149. The Velascos admit that they took out the Loan and signed the DOT. CP 109; CP 115. The Velascos also admit that they made only 11 mortgage payments between 2007 and the November 2013 summary judgment hearing. CP 151. Indeed, the Velascos' monthly payments under the Loan were \$3,127.58. CP 112. This monthly payment is a fair measure of the monthly value to the Velascos of possessing the Property. Multiplied by 61 months of non-payment, the Velascos received a windfall of \$190,782.38 from possessing the Property without paying. CP 151 (only 11 payments made towards loan). Even if the Velascos had presented admissible evidence of damages (they did not), such damages are heavily outweighed by this windfall. While

Respondents have not chosen to pursue a counterclaim against the Velascos for unjust enrichment, setoff is nevertheless proper.

Fourth, even if the Velascos did present evidence of damages (they do not), they cannot prove causation. The damages the Velascos claim to have suffered, such as late fees, inspection fees, and damage to credit, are all the result of their admitted default on the Loan, and not the result of any wrongful actions of the Respondents. The Velascos' unfortunate situation was not caused by Respondents; it was caused by the Velascos' default on the Loan. CP 6. The Court should affirm the summary judgment dismissal of the Velascos' damages claims as they failed to raise a genuine issue of material fact in support of causation, an essential element of each of these claims.

D. Each of the Substantive Claims Has Also Has Independent Flaws that Require Dismissal.

Not only do the Velascos fail to raise a genuine issue of material fact in support of each essential element of their substantive claims (as shown above), the Substantive Claims fail on other grounds as well.

1. The DTA Claim Fails Against Respondents Because The Record Contains No Evidence to Support Vicarious Liability Under Walker.

The Velascos' cause of action against Respondents for alleged violation of the DTA was properly dismissed.

The Washington Court of Appeals has recognized a pre-sale claim for damages against *foreclosure trustees* who commit material violations of the DTA or act without proper authority, while recognizing that a beneficiary *might* have vicarious liability for the trustee's actions if its control over the trustee makes it an agent rather than a neutral third party. *Walker v. Quality Loan Svc. Corp.*, 176 Wn. App. 294, 313, 308 P.3d 716 (2013).⁸

In other words, a beneficiary can be liable under a *Walker* pre-sale DTA claim—if at all—only when (1) the current trustee violates the DTA and (2) the beneficiary exercises the requisite degree of control over the trustee so as to make the trustee its agent. *See also In re Butler*, 12-01209-MLB (W.D. Wn. Bankr. Oct. 2, 2013), slip op. at 5 (recognizing that any pre-sale DTA claim against loan owner and servicer in light of *Walker* must be based on conduct of successor trustee after its appointment). The Velascos do not and cannot point to any evidence in the record that would establish that HSBC or any other Respondent so controlled the trustee as to give rise to the imposition of the vicarious liability necessary for a pre-sale DTA damages claim. *See generally*, Op. Br.

⁸ *Walker* represents a change in the law in that previously Washington courts did not recognize a pre-sale cause of action under the DTA. The question of whether the DTA supplies a pre-sale claim for damages has been certified to the Washington Supreme Court in *Frias v. Asset Recovery Svcs.*, Case No. 89343-8.

Moreover, even if HSBC or another Respondent could be vicariously liable for the trustee's actions, there can be no actionable pre-sale claim under the DTA without prejudice. It is settled that technical violations of the DTA are not grounds for avoiding a trustee's sale; the borrower must make a showing of prejudice. *See, e.g., Amresco Independence Funding, Inc. v. SPS Props., LLC*, 129 Wn. App. 532, 537, 119 P.3d 884 (2005); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 112-13, 752 P.2d 385 (1988); *Steward v. Good*, 51 Wn. App. 509, 515, 754 P.2d 150 (1988).

There is even greater reason to adhere to a prejudice requirement in pre-sale cases, as the Property has not been lost and the borrower has typically availed itself of the statutorily prescribed injunction remedy. *See* RCW 61.24.130(1). *See also Siliga v. Mortgage Electronic Registrations Systems, Inc.*, 219 Cal. App. 4th 75, 85 (2013) (borrowers lacked standing to complain about loan servicer's and assignee's alleged lack of authority to foreclose on deed of trust where borrowers were in default under the note, absent evidence that the original lender would have refrained from foreclosure).

The pre-sale DTA damages claim advanced by the Velascos should therefore be contingent upon a showing of prejudice. The Velascos did not, and cannot, make any showing of prejudice on the record before

this Court. Indeed, the Velascos still own the Property and did not even sue until after the foreclosure proceedings ceased. CP 58, 1. Thus, even if *Frias* affirms *Walker*, the Velascos' pre-sale claim for violation of the DTA fails as a matter of law.

2. **The Negligence Claim is Barred by the Independent Duty Doctrine.**

In addition to failing on the elements, the Velascos' negligence claim is barred by Washington's independent duty doctrine. Formerly known as the "economic loss rule," the independent duty doctrine bars recovery for alleged breach of tort duties where a contract governs the parties' relationship unless a plaintiff's injury is "traceable also to a breach of a tort law duty of care arising independently of the contract." *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 387, 389-94, 241 P.3d 1256 (2010). If the independent duty doctrine applies, a plaintiff "will be held to contract remedies, regardless of how the plaintiff characterizes the claim." *See Alejandre v. Bull*, 159 Wn.2d 674, 683, 153 P.3d 864 (2007). Here, there is no legal or evidentiary basis for establishing an independent duty owed to the Velascos by any Respondent that would be separate from the Note and Deed of Trust. The Velascos' negligence claim fails based on the independent duty doctrine as well.

3. **The CPA Claim Fails Because the Velascos' Alleged "Injuries" Do Not Support the Claim as a Matter of Law.**

For the reasons above, the Velascos cannot establish any injury or damages to support their CPA claim. Even if there was a material issue of fact with respect to the existence of the Velascos' claimed damages, the specific types of damages the Velascos claim, such as investigation costs, lost work time, and legal fees, should be not recoverable damages under the CPA under the facts of this case. Op. Br. 25; and see *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 564, 825 P.2d 714 (1992) ("having to prosecute" a claim under the CPA "is insufficient to show injury to [a plaintiff's] business or property."). See also *Demopolis v. Galvin*, 57 Wn. App. 47, 786 P.2d 804 (1990) (subsequent purchaser's prosecution of CPA claim brought to protect property against lender's non-judicial foreclosure insufficient to establish CPA injury); *Thursman v. Wells Fargo Home Mortg.*, 2013 WL 3977662, * 3-4 (W.D. Wn. Aug. 2, 2013) (resources spent pursuing CPA claim are not recoverable injuries under the CPA; collecting cases); *Babrauskas v. Paramount Equity Mortg.*, No. C13-0494RSL, 2013 WL 5743903 (W.D. Wn. Oct. 23, 2013) at *4 (citing *Sign-o-Lite* and stating "the fees and costs incurred in litigating the CPA claim cannot satisfy the injury to business or property element: if plaintiff were not injured prior to bringing suit, he

cannot engineer a viable claim through litigation” and dismissing CPA claim where plaintiff sought emotional distress and litigation costs as damages, but plaintiff’s “failure to meet his debt obligations is the “but for” cause of the default, the threat of foreclosure, any adverse impact on his credit, and the clouded title.”).

The Velascos did not bring this action until after foreclosure proceedings against the Property had ceased. CP 58, 1. Thus, the Velascos cannot establish that they expended time and money in an effort to investigate Respondents’ authority to foreclose and stop the sale such that they have sustained a legally cognizable injury under the CPA. Allowing the Velascos to recover under the CPA in these circumstances would be contrary to *Sign-o-Lite*, *Demopolis* and the other authorities cited above.

VI. CONCLUSION

The Velascos took out the Loan, signed the DOT, and defaulted. HSBC has physical possession of the original indorsed-in-blank Note. No foreclosure sale of the subject Property is pending nor has such a sale been completed. The Velascos remain in possession of the Property despite not having made a payment in the last five years.

This was the undisputed record before the trial court on summary judgment. It is a record that required summary judgment dismissal of the

Velascos' claims, which the trial court properly granted. This Court should now affirm the trial court's correct ruling.

RESPECTFULLY SUBMITTED this 9th day of July, 2014.

LANE POWELL PC



By _____

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury and the laws of the United States and the State of Washington that I caused to be served a copy of the foregoing document on the following person(s) by First Class Mail and email:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Executed on this 9th day of July, 2014, at Seattle, Washington.


Linda Cooper

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