

No. 49752-2-II

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

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BRAD L. BILLINGS and JOHNNITA D. BILLINGS,

Appellant,

v.

BANK OF NEW YORK MELLON F/K/A/ THE BANK OF NEW YORK  
AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE C. WALT,  
INC. ALTERNATIVE LOAN TRUST 2007-OA17 MORTGAGE PASS-  
THROUGH CERTIFICATES SERIES 2006-OA17, QUALITY LOAN  
SERVICING OF WASHINGTON, INC. and JOHN DOES 1-10,

Respondents.

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BRIEF OF RESPONDENT BANK OF NEW YORK MELLON F/K/A  
THE BANK OF NEW YORK AS TRUSTEE FOR THE  
CERTIFICATEHOLDERS OF THE C. WALT, INC. ALTERNATIVE  
LOAN TRUST 2007-OA17 MORTGAGE PASS-THROUGH  
CERTIFICATES SERIES 2006-OA17

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
I. INTRODUCTION .....	1
II. RESPONSE TO ASSIGNMENTS OF ERROR .....	2
III. RESPONSE TO ISSUES PRESENTED .....	2
IV. STATEMENT OF THE CASE .....	2
V. ARGUMENT .....	5
A. Standard of Review .....	5
B. The Trial Court Properly Determined That Borrowers Did Not Have Standing to Challenge the Assignment of the Deed of Trust to the Trust.....	6
1. The Billings Waived Their Right to Challenge the Nonjudicial Foreclosure Because They Did Not Seek to Enjoin the Sale Before It Occurred. ....	6
2. The Trust Was the Holder of the Note and Had Authority to Enforce the Deed of Trust as a Matter of Law. ....	7
C. The Affidavit of Marie McDonnell Did Not Create Any Issue of Material Fact That Precluded Summary Judgment. ....	12
VI. CONCLUSION.....	15

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Atl. Cas. Ins. Co. v. Or. Mut. Ins. Co.</i> , 137 Wn. App. 296, 153 P.3d 211 (2007) .....	5
<i>Bain v. Metro. Mortg. Grp., Inc.</i> , 175 Wn.2d 83, 285 P.3d 34 (2012) .....	7, 8
<i>Bavand v. OneWest Bank</i> , 196 Wn. App. 813, 385 P.3d 233 (2016) .....	9, 11, 12
<i>Brodie v. Nw. Tr. Servs., Inc.</i> , No. 12-CV-0469-TOR, 2012 WL 4468491 (E.D. Wash. Sept. 27, 2012) .....	10
<i>Brown v. Wash. State Dep’t of Commerce</i> , 184 Wn.2d 509, 359 P.3d 771 (2015) .....	7
<i>Bucci v. Nw. Tr. Servs., Inc.</i> , 197 Wn. App. 318, 387 P.3d 1139 (2016) .....	8, 13, 14
<i>Deutsche Bank Nat’l Tr. Co. v. Slotke</i> , 192 Wn. App. 166, 367 P.3d 600 (2016) .....	9
<i>Deutsche Bank Tr. Co. Ams. v. Walmsley</i> , 277 Or. App. 690, 374 P.3d 937 (2016) .....	10
<i>Fid. &amp; Deposit Co. of Md. v. Ticor Title Ins. Co.</i> , 88 Wn. App. 64, 943 P.2d 710 (1997) .....	8
<i>Frazer v. Deutsche Bank Nat’l Tr. Co.</i> , No. 11-cv-5454, 2012 WL 1821386 (W.D. Wash. May 18, 2012) .....	10
<i>Howard v. Shaw</i> , 10 Wash. 151, 38 P. 746 (1894) .....	8
<i>Int’l Marine Underwriters v. ABCD Marine, LLC</i> , 179 Wn.2d 274, 313 P.3d 395 (2013) .....	5

TABLE OF AUTHORITIES

	Page(s)
<i>Lopez v. JPMorgan Chase &amp; Co.</i> , 198 Wn. App. 1048 (table), 2017 WL 1403679 (2017) (unpublished) .....	8, 10
<i>McPherson v. Homeward Residential</i> , No. C12–5920 BHS, 2014 WL 442378 (W.D. Wash. Feb. 4, 2014) .....	9
<i>Merry v. Nw. Tr. Servs., Inc.</i> , 188 Wn. App. 174, 352 P.3d 830 (2015) .....	7
<i>Rucker v. NovaStar Mortg., Inc.</i> , 177 Wn. App 1, 311 P.3d 31 (2013) .....	9, 11, 12
<i>Saterbak v. JPMorgan Chase Bank, N.A.</i> , 245 Cal. App. 4th 808, 199 Cal. Rptr. 3d 790 (2016) .....	15
<i>Slorp v. Lerner, Sampson &amp; Rothfuss</i> , 587 F. App’x 249 (6th Cir. 2014) .....	10, 11
<i>Slorp v. Lerner, Sampson &amp; Rothfuss</i> , No. 16-3936 (6th Cir. June 28, 2017) .....	11
<i>Slorp v. Lerner, Sampson &amp; Rothfuss</i> , No. 2:12-CV-498, 2016 WL 3951207 (S.D. Ohio July 20, 2016) .....	11
<i>Vacova Co. v. Farrell</i> , 62 Wn. App. 386, 814 P.2d 255 (1991) .....	5
<i>Wilson v. HSBC Mortgage Services, Inc.</i> , 744 F.3d 1 (1st Cir. 2014) .....	14
<i>Yhudai v. Impac Funding Corp.</i> , 1 Cal. App. 5th 1252, 205 Cal. Rptr. 3d 680 (2016) .....	14
<i>Zhong v. Quality Loan Serv. Corp.</i> , No. C13-0814JLR, 2013 WL 5530583 (W.D. Wash. Oct. 7, 2013) .....	10

## TABLE OF AUTHORITIES

	Page(s)
<b>Statutes</b>	
False Claims Act, 31 U.S.C. § 3730(b)(4)(B).....	4
RCW 61.24.005(2).....	8
RCW 61.24.030(7)(a) .....	9
RCW 61.24.127(1).....	6, 7
RCW 61.24.127(2)(b)-(c) .....	6
RCW 62A.3-112(b).....	13
RCW 62A.3-104(a).....	13
RCW 62A.3-205(b).....	7, 8
RCW 62A.3-308(a).....	7
RCW 64.04.010 .....	8
Uniform Commercial Code Article 3 .....	4
Uniform Commercial Code Article 9 .....	4
Washington Consumer Protection Act, RCW chapter 19.86.....	4
Washington Deed of Trust Act, RCW chapter 61.24 .....	4
<b>Rules</b>	
CR 56(c).....	5

## I. INTRODUCTION

After Appellants Brad and Johnnita Billings (collectively, the “Billings”) defaulted on their note, Respondent Bank of New York Mellon F/K/A the Bank of New York as Trustee for the Certificateholders of the C. Walt, Inc. Alternative Loan Trust 2007-OA17 Mortgage Pass-Through Certificates Series 2006-OA17 (the “Trust”) commenced a nonjudicial foreclosure proceeding. A trustee’s sale was held on February 12, 2016, and the Trust was the winning bidder. After the Trust initiated an eviction proceeding, the Billings, for the first time, challenged the trustee’s sale. As relevant to this appeal, the Billings asserted that the Trust did not have authority to enforce the Deed of Trust because the Assignment of Deed of Trust was recorded after the closing date on the Trust’s Pooling and Servicing Agreement (the “PSA”). They sought to quiet title to the property in their favor and an award of damages.

The Billings’ position is inconsistent with the weight of authority as well as the evidence presented to the trial court that the Trust was the holder of the original note, endorsed in blank, and therefore had authority to enforce the Deed of Trust. Nor did the Affidavit of Marie McDonnell, relied on by the Billings, create any issues of material fact that precluded the trial court’s order granting Respondents’ motions for summary judgment. For these reasons, the trial court’s order should be affirmed.

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

A. The trial court properly granted summary judgment in favor of Respondents and properly concluded that the Billings did not have standing to challenge the assignment of the Deed of Trust.

B. The trial court properly granted summary judgment in favor of defendants notwithstanding the Affidavit of Marie McDonnell.

## **III. RESPONSE TO ISSUES PRESENTED**

A. A trial court may grant summary judgment in favor of the holder of a note and assignee of a deed of trust even when an assignment has been challenged by a borrower.

B. The trial court properly grants summary judgment in favor of the holder of a note when both the statutory beneficiary declaration and the original note are presented to the court, even if the borrower presents an affidavit from a purported expert opining about the significance of other loan documents.

## **IV. STATEMENT OF THE CASE**

On or about August 16, 2006, the Billings executed a Monthly Adjustable Rate Payoption Note (the “Note”) in the principal amount of \$674,500.00. (Clerk’s Papers (“CP”) 281 at ¶ 3.1; 498-502.) The Note was secured by a Deed of Trust in favor of Countrywide Bank, N.A., for real property commonly known as 802 4th Avenue SW, Puyallup, WA

98371 (the “Property”). (CP 281 at ¶ 3.2; 504-14.) The Deed of Trust was recorded in the Pierce County records as Instrument No.

201106210720. (*Id.*)

The Note was subsequently endorsed to Country Wide Home Loans, Inc. (“Countrywide”) and then endorsed in blank by Countrywide. (CP 502.) The Note was subsequently transferred to the Trust. (CP 498-502.) An Assignment of Deed of Trust was recorded in the county records. (CP 515.) On February 26, 2015, Select Portfolio Servicing Corporation (“SPS”), as attorney in fact for the Trust, executed a Beneficiary Declaration declaring that the Trust was the actual holder of the Note. (CP 503.) On or about February 28, 2015, the Trust appointed Quality Loan Service Corporation of Washington (“QLS”) as Successor Trustee under the Deed of Trust.<sup>1</sup> (CP 634-35.)

In or about February 2011, the Billings defaulted on the Note and Deed of Trust by failing to make loan payments as they came due. (CP 495 at ¶ 6.) As a result, the Trust commenced a nonjudicial foreclosure proceeding, and a Notice of Trustee’s Sale was issued on October 13,

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<sup>1</sup> The Billings incorrectly contend that Mortgage Electronic Registration Systems, Inc. appointed QLS as Successor Trustee. (Op. Br. at 17, 22.) However, SPS executed the Appointment of Successor Trustee. (CP 634-35.)

2015. (CP 516-19.) The Trust was the winning bidder at the sale and, thereafter, moved to evict the Billings. (CP 267 at ¶ 1.0; 520-22.)

The Billings then moved for a temporary restraining order (“TRO”) to stay the eviction proceeding. (CP 267 at ¶ 1.0.) The court granted the motion for TRO on May 20, 2016, and ordered the Billings to file a complaint for wrongful foreclosure “within 30 days” of the TRO. (*Id.*) The Billings filed their Complaint in this action 31 days later, on June 20, 2016. (CP 573 at ¶ 3.) In their Complaint, the Billings alleged violations of the Washington Deed of Trust Act, RCW chapter 61.24; the False Claims Act, 31 U.S.C. § 3730(b)(4)(B); the Washington Consumer Protection Act, RCW chapter 19.86; and Uniform Commercial Code Articles 3 and 9, as well as fraud, breach of contract, and wrongful foreclosure. (*See generally* Second Amended Complaint, CP 266-324.) They sought declaratory and injunctive relief, to have title to the Property quieted in their favor, and an award of damages. (CP 323.)

The trial court granted defendants’ motions for summary judgment. (CP 641-44.) The court concluded that the Trust was the holder of the Note and had presented the original Note to the court. (Verbatim Report of Proceeding (Nov. 10, 2016) (“RP”) at 3:6-7, 44:21-45:18, 46:11-18; CP 637.) The court further held that the Deed of Trust followed the transfer of the Note and, therefore, the Trust had authority to

commence the nonjudicial foreclosure. (RP at 46:16-25.) Finally, the court concluded that the Billings had waived any right to challenge the validity of the foreclosure sale because they did not seek to enjoin the sale before it occurred. (RP at 48:12-15.)

The Billings moved for reconsideration of the trial court's order, which was denied on December 13, 2016. (CP 728.) The Billings appealed. (CP 729-34.)

## **V. ARGUMENT**

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

Summary judgment rulings are reviewed de novo, with the appellate court engaging in the same inquiry as the trial court. *Int'l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 281, 313 P.3d 395 (2013); *Atl. Cas. Ins. Co. v. Or. Mut. Ins. Co.*, 137 Wn. App. 296, 302-03, 153 P.3d 211 (2007). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Int'l Marine Underwriters*, 179 Wn.2d at 281. Unsupported conclusory allegations or argumentative assertions are insufficient to defeat summary judgment. *See Vacova Co. v. Farrell*, 62 Wn. App. 386, 395, 814 P.2d 255 (1991).

**B. The Trial Court Properly Determined That Borrowers Did Not Have Standing to Challenge the Assignment of the Deed of Trust to the Trust.**

On appeal, the Billings ignore the unrefuted evidence that the Trust was the holder of the original Note, endorsed in blank, and therefore had authority to enforce the Deed of Trust through a nonjudicial foreclosure. The Billings instead argue that, because the Assignment of Deed of Trust was recorded in 2015, it was untimely and ineffective under the Trust's PSA. (Appellants Billings' Opening Brief ("Op. Br.") at 12-14.) In so contending, the Billings misstate the factual record in this case and misconstrue the law.

**1. The Billings Waived Their Right to Challenge the Nonjudicial Foreclosure Because They Did Not Seek to Enjoin the Sale Before It Occurred.**

As an initial matter, the trial court correctly concluded that the Billings "waived their right to challenge the validity of the foreclosure sale because they did not seek to enjoin the trustee sale before it occurred." (RP at 48:12-15.) While RCW 61.24.127(1) allows a borrower to bring a wrongful foreclosure claim for damages, subsections (2)(b)-(c) provide that the borrower's claim "may not seek any remedy at law or in equity other than monetary damages [and] may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property." Here, the Billings continue to rely on this proceeding to avoid relinquishing the Property to the Trust as a result of the sale. (CP 323 at ¶ 12.9; Op. Br.)

Such relief is improper under RCW 61.24.127(1); *see also Merry v. Nw. Tr. Servs., Inc.*, 188 Wn. App. 174, 195, 352 P.3d 830 (2015) (plaintiff waived right to challenge foreclosure sale by not seeking to have it restrained prior to date of sale).

**2. The Trust Was the Holder of the Note and Had Authority to Enforce the Deed of Trust as a Matter of Law.**

The trial court correctly determined that the Trust was the holder of the Note and entitled to enforce it. The Note was endorsed to Countrywide and was then endorsed “in blank” by Countrywide.<sup>2</sup> (CP 498-502.) An instrument endorsed in blank is “bearer” paper. RCW 62A.3-205(b) (instrument endorsed in blank becomes payable to bearer and may be negotiated; holder of note includes any party who takes possession of note, endorsed in blank, by transfer); *Brown v. Wash. State Dep’t of Commerce*, 184 Wn.2d 509, 524 n.3, 359 P.3d 771 (2015) (discussing RCW 62A.3-205(b)); *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 104, 285 P.3d 34 (2012) (““Holder” with respect to a

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<sup>2</sup> The Billings assert that the endorsement cannot be relied on because it was “undated and unauthenticated” and that the Trust did not produce “any witness to testify as to the authenticity or genuineness of the signatures” or the signers’ authority to sign. (Op. Br. at 14.) Although the Billings had a copy of the endorsed Note and attached it to their Second Amended Complaint (CP 465-70), they did not challenge the authenticity of the endorsement in their Second Amended Complaint. Therefore, they cannot challenge it now. RCW 62A.3-308(a) (“In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings.”).

negotiable instrument, means the person in possession if the instrument is payable to bearer” (citation omitted)).

Because the Trust was the holder of the Note, it was the beneficiary of the Billings’ Deed of Trust by operation of law.<sup>3</sup> RCW 61.24.005(2) (beneficiary is “holder of the [promissory note] evidencing the obligations secured by the deed of trust”); *see also Bain*, 175 Wn.2d at 104 (well-established that “security instrument will follow the note” (citation omitted)); *Fid. & Deposit Co. of Md. v. Ticor Title Ins. Co.*, 88 Wn. App. 64, 68, 943 P.2d 710 (1997) (noting “the maxim that the mortgage follows the debt” (citation omitted)). As the beneficiary of the Deed of Trust, the Trust was entitled to enforce it through a nonjudicial foreclosure. *See, e.g., Bucci v. Nw. Tr. Servs., Inc.*, 197 Wn. App. 318, 327, 387 P.3d 1139 (2016) (“The holder of the note is the beneficiary of a deed of trust securing the note and is entitled to enforce the deed of trust through the nonjudicial foreclosure procedure set out in Washington’s

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<sup>3</sup> The Billings incorrectly assert that the Note had to be transferred in compliance with RCW 64.04.010. A note, however, is not a deed and need not be recorded in the first instance, nor would any transfer of a note need to be recorded. Instead, “[w]hen 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); *cf. Howard v. Shaw*, 10 Wash. 151, 155-56, 38 P. 746 (1894) (interpreting virtually identical precursor to RCW 64.04.010, court held that assignments of mortgages are not subject to transfer-by-deed requirement); *Lopez v. JPMorgan Chase & Co.*, 198 Wn. App. 1048 (table), 2017 WL 1403679, at \*4 (2017) (unpublished) (rejecting argument that assignment of deed of trust fell within requirements of RCW 64.04.010).

DTA.”); *Rucker v. NovaStar Mortg., Inc.*, 177 Wn. App 1, 14, 311 P.3d 31 (2013) (“[O]nly the actual holder of the promissory note . . . may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property.” (citation omitted)); *cf. Deutsche Bank Nat’l Tr. Co. v. Slotke*, 192 Wn. App. 166, 168, 367 P.3d 600 (2016) (“As the holder of the note, Deutsche Bank had authority to enforce the note” through foreclosure). Moreover, pursuant to RCW 61.24.030(7)(a), the Trust, through its attorney in fact, executed a Beneficiary Declaration declaring that it was the holder of the Note. (CP 503.) That is sufficient proof to enforce the Deed of Trust. *See, e.g., Bavand v. OneWest Bank*, 196 Wn. App. 813, 824, 385 P.3d 233 (2016).

Against that legal backdrop, the Billings contend that the Trust did not have authority to foreclose on the Property because the Assignment of Deed of Trust was recorded after the closing date of the PSA. (Op. Br. at 12-14.) As discussed above, however, the Assignment of Deed of Trust is irrelevant because the Trust, as holder of the endorsed-in-blank Note, was the beneficiary of the Deed of Trust by operation of law.<sup>4</sup> Even if that were not the case, the trial court correctly concluded that the Billings did

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<sup>4</sup> Indeed, “the sole purpose of recording assignments of deeds of trust is to provide notice to third parties of the security interest . . .” *McPherson v. Homeward Residential*, No. C12–5920 BHS, 2014 WL 442378, at \*5 (W.D. Wash. Feb. 4, 2014). The Trust’s right to enforce the Note and Deed of Trust through foreclosure is based on its status as holder of the original, endorsed Note, not the Assignment of Deed of Trust. *See supra*.

not have standing to challenge the assignment because they are not parties to the assignment of the PSA. (RP at 47:2-9.)

The weight of authority supports the trial court's decision. *See, e.g., Lopez v. JPMorgan Chase & Co.*, 198 Wn. App. 1048 (table), 2017 WL 1403679, at \*2-3 (2017) (unpublished) (holding that borrower did not have standing to challenge assignment of deed of trust to securitized trust because assignment was only voidable, not void); *Zhong v. Quality Loan Serv. Corp.*, No. C13-0814JLR, 2013 WL 5530583, at \*3 (W.D. Wash. Oct. 7, 2013) (concluding that plaintiff, as borrower and third party to the transactions, did not have standing to challenge assignment of trust deed); *Frazer v. Deutsche Bank Nat'l Tr. Co.*, No. 11-cv-5454, 2012 WL 1821386, at \*2 (W.D. Wash. May 18, 2012) ("Plaintiffs are not parties to the pooling and servicing agreement and present no authority suggesting standing to challenge it."); *Brodie v. Nw. Tr. Servs., Inc.*, No. 12-CV-0469-TOR, 2012 WL 4468491, at \*4 (E.D. Wash. Sept. 27, 2012) (dismissing borrower's claims alleging that assignment of deed of trust to securitized trust was improper because borrower lacked standing to challenge PSA); *Deutsche Bank Tr. Co. Ams. v. Walmsley*, 277 Or. App. 690, 697, 374 P.3d 937 (2016) (trust's "own contractual obligations and privileges under the trust PSAs . . . have no bearing on plaintiff[s] right to enforce the note through judicial foreclosure as the holder of the note").<sup>5</sup>

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<sup>5</sup> The Sixth Circuit's unpublished decision in *Storp v. Lerner, Sampson & Rothfuss*, 587 F. App'x 249 (6th Cir. 2014), does not support

Neither *Rucker* nor *Bavand* supports the Billings' contention that they have standing to challenge the timeliness of the transfer of the Note to the Trust. Instead, in *Bavand*, the court held that a borrower had standing to challenge *the appointment of a successor trustee*. *Bavand*, 196 Wn. App. at 834-35. Similarly, in *Rucker*, the court considered the borrower's challenge to a nonjudicial foreclosure sale based on her assertion that the *successor trustee* had not been properly appointed.<sup>6</sup> *Rucker*, 177 Wn. App. at 16-17.

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the Billings' position. There, the borrower appealed the district court's order granting defendants' motion to dismiss and denying borrower's request for leave to replead. *Id.* at 253. The court reiterated its earlier holding that "a person who is neither a party to the contract nor in privity with the parties, and who is not a third-party beneficiary of the contract, is said to lack 'standing' to enforce the contract's terms and to challenge its validity." *Id.* at 254. It then went on to state that a homeowner could challenge the validity of a foreclosure proceeding based on the foreclosing party's lack of authority. *Id.* at 255. The court in *Slorp* did not address the issue presented in this case—whether a borrower can challenge the timeliness of a transfer of a note to a securitized trust when it is not a party to the PSA. Moreover, on appeal after remand, the Sixth Circuit affirmed the dismissal of the borrower's claim because Bank of America had established that it had authority to enforce the deed of trust. *Slorp v. Lerner, Sampson & Rothfuss*, No. 16-3936 (6th Cir. June 28, 2017) (slip op.) (affirming dismissal because Bank of America established that it was the legitimate mortgagee); *see also Slorp v. Lerner, Sampson & Rothfuss*, No. 2:12-CV-498, 2016 WL 3951207, at \*7 (S.D. Ohio July 20, 2016) (Bank of America established that it was holder of original, endorsed note and, therefore, had authority to enforce deed of trust). In this case, the Trust similarly established that it had authority to enforce the Deed of Trust because it was the holder of the endorsed-in-blank Note.

<sup>6</sup> Although not identified as an assignment of error, relying on *Rucker* and *Bavand*, the Billings also assert that QLS was not properly appointed as Successor Trustee. (Op. Br. at 17-18.) The Billings are

For these reasons, the nonjudicial foreclosure procedure was proper and the trial court correctly granted defendants’ motions for summary judgment dismissing the Billings’ claims.

**C. The Affidavit of Marie McDonnell Did Not Create Any Issue of Material Fact That Precluded Summary Judgment.**

The Billings assert that the Affidavit of Marie McDonnell (the “McDonnell Affidavit”)—a self-identified expert in dealing “with the aftermath of unsafe and unsound mortgage lending practices”—“specifically states facts which demonstrate why Respondent could not have legally inherited any interest in the Note or Deed of Trust” and, therefore, argue that summary judgment was improper. (Op. Br. at 25.) However, the Billings do not identify what “facts” they believe are established by the McDonnell Affidavit and how those “facts” contradict the evidence supporting the trial court’s conclusion that the Trust was the

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incorrect. In *Bavand*, the court rejected the borrower’s contention that the trustee was not properly appointed because defendant One West Bank had established that it was the holder of borrower’s endorsed-in-blank note and, therefore, had authority to appoint the successor trustee. *Bavand*, 196 Wn. App. at 847. The appellate court affirmed the trial court’s summary judgment order dismissing borrower’s claims. *Id.* at 848. In *Rucker*, the court reversed the summary judgment order because the defendant, NovaStar, “concede[d] that it did not hold the promissory note at the time that it appointed QLS as successor trustee.” 177 Wn. App. at 15. In this case, as in *Bavand*, the Trust established through the Beneficiary Declaration, dated February 26, 2015, that it was the holder of the endorsed-in-blank Note and, therefore, had authority to appoint QLS as Successor Trustee on February 28, 2015. (CP 503, 634-35.)

holder of the Note and, therefore, had authority to enforce it through the nonjudicial foreclosure. (RP at 46:11-25.)

McDonnell’s opinion rests on her assertion that the Note was “non-negotiable” because it contained a “negative amortization.” (CP 47-49.) As a result, she opines that the endorsement on the Note is insufficient to transfer it to the Trust as bearer paper and, therefore, the Trust had to establish that the Note was assigned to it before the closing date on the PSA. (CP 49-52.) The McDonnell Affidavit does not present any issues of material fact, but merely rests on two incorrect assertions of law. As the trial court correctly concluded, the Note was negotiable and the Billings did not have standing to challenge the timeliness of the assignment of the Note to the Trust. (RP at 46:16-18.)

First, the Note is a negotiable instrument. To be negotiable, a note must contain an “unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order.” *Bucci*, 197 Wn. App. at 329 (citing RCW 62A.3-104(a)).

Further, under RCW 62A.3–112(b):  
“Interest may be stated in an instrument as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. . . .” Thus, negotiability exists if the fixed amount can be determined from the face of the instrument, except for amounts of interest, for which reference to information not contained in the note is allowable.

*Id.* at 330.

The Note in this case meets these requirements. It provides for the repayment of a principal amount of \$647,500.00 and interest at a variable rate. (CP 498-99.) The fact that the Note may result in a negative amortization does not render it non-negotiable. *Bucci*, 197 Wn. App. at 331 (holding that borrower's note was negotiable even though it might result in a negative amortization).

Second, relying on *Wilson v. HSBC Mortgage Services, Inc.*, 744 F.3d 1 (1st Cir. 2014), McDonnell states that a borrower may challenge a void assignment. (*See* CP 49-52.) She then opines that the assignment in this case is void. (*Id.*) While *Wilson* does state that under Massachusetts law, a borrower may challenge a void assignment, it distinguished between assignments that are void and those that are voidable, which are not subject to challenge by borrowers. 744 F.3d at 8-9. *Wilson* did not involve a securitized trust and, therefore, the court offered no opinion as to whether an assignment to a securitized trust was a void or voidable transfer. Other courts have addressed this question and have concluded that assignments to securitized trusts are merely voidable transactions and, therefore, cannot be challenged by borrowers. *See, e.g., Yhudai v. Impac Funding Corp.*, 1 Cal. App. 5th 1252, 1259, 205 Cal. Rptr. 3d 680 (2016) (plaintiff did not have standing to challenge assignment because

“postclosing assignment of a loan to an investment trust that violates the terms of the trust renders the assignment voidable, not void, under New York law”); *Saterbak v. JPMorgan Chase Bank, N.A.*, 245 Cal. App. 4th 808, 815, 199 Cal. Rptr. 3d 790 (2016) (same).

For these reasons, the McDonnell Affidavit did not create any issues of material fact that precluded the trial court’s order granting defendants’ motions for summary judgment.

## VI. CONCLUSION

For the reasons stated above, the trial court’s order granting defendants’ motions for summary judgment should be affirmed.

DATED: July 7, 2017.

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**CERTIFICATE OF SERVICE**

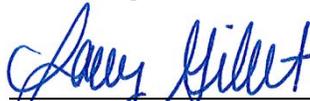
I hereby certify that I caused a true and correct copy of the foregoing **BRIEF OF RESPONDENT BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE C. WALT, INC. ALTERNATIVE LOAN TRUST 2007-OA17 MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2006-OA17** to be served on the following named persons on the date and in the manner indicated below:

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DATED: July 7, 2017 at Portland, Oregon



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