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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ROBERT C. TERHUNE, et al.,

Appellants,

v.

**U.S. BANK TRUST, N.A. as Trustee for LSF9 Master Participation
Trust, and CALIBER HOME LOANS, INC.,**

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The trial court properly granted summary judgment in favor of Respondents U.S. Bank Trust, N.A. as Trustee for LSF9 Master Participation Trust (“U.S. Bank Trust”) and Caliber Home Loans, Inc. (“Caliber”). Appellants Robert C. Terhune, Tara Terhune, and Equity Group NWest LLC (collectively, the “Terhunes”) failed to establish a genuine issue of material fact as to whether U.S. Bank Trust holds the promissory note and whether the 6-year statute of limitations on enforcement of the written loan documents had expired. Simply put, the trial court got it right on all points.

The only way the Terhunes could prevail in this case is to show that their mortgage was unequivocally accelerated, the acceleration was never abandoned, and U.S. Bank Trust does not hold the promissory note. They utterly failed to rebut Respondents’ evidence and thus failed to create a genuine issue of material fact on any of these issues.

On acceleration, the Terhunes rely on a notice of intent to accelerate that appellate courts have found does not constitute an acceleration as a matter of law. The Terhunes also ignore, as they must, the voluminous subsequent written communications to them that clearly show the loan was not accelerated. Even if the loan was accelerated by the

2009 notice—which it was not—the evidence shows that the acceleration was abandoned on numerous occasions.

On possession of the note, the Terhunes turn a blind eye to the beneficiary declaration by U.S. Bank Trust, which establishes an evidentiary presumption that U.S. Bank Trust holds the note. The Terhunes complain that U.S. Bank Trust and Caliber did not produce the original note in discovery, but Washington law does not require production of the original note in discovery or to foreclose. The Terhunes attack the numerous declarations showing possession of the note as failing in one manner or another but appellate courts have consistently upheld such declarations—even in cases where a loan servicer provides the declaration for the owner of the loan.

The Terhunes have engaged in a decade-long gambit to obtain a free house. To a degree, they have succeeded masterfully. After all, the Terhunes have lived rent free for ten years in a \$1.5 million home without paying their mortgage, property taxes, or insurance. But this Court should put an end to this dispute. The Terhunes have gamed the system long enough and their case is utterly without merit. The trial court correctly granted summary judgment in favor of U.S. Bank Trust and Caliber and this Court should affirm.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The Terhunes present four assignments of error to this Court. U.S. Bank Trust and Caliber contest the statement of the assignments of error as follows, in order to present the appeal to this Court in a manner which more accurately reflects the issues raised and argued before the superior court.

Answer to Assignment of Error No. 1.

The trial court properly granted summary judgment in favor of U.S. Bank Trust and Caliber. The only reasonable interpretation of the notice of intent to accelerate is that it is a pre-election warning, not a clear and unequivocal statement that the lender has already elected acceleration. The beneficiary declaration by U.S. Bank Trust establishes an evidentiary presumption that it holds the note. The declaration of Nathaniel Mansi at Caliber further shows that U.S. Bank Trust holds the note. Once the burden shifted to the Terhunes, they offered absolutely no evidence that U.S. Bank Trust does not hold the note.

Answer to Assignment of Error No. 2.

The trial court properly granted summary judgment in favor of U.S. Bank Trust and Caliber with respect to the Terhunes' claim for injunctive relief. The only reasonable interpretation of the notice of intent to accelerate is that it is a pre-election warning, not a clear and

unequivocal statement that the lender has already elected acceleration. The beneficiary declaration by U.S. Bank Trust establishes an evidentiary presumption that it holds the note. The declaration of Nathaniel Mansi at Caliber further shows that U.S. Bank Trust holds the note. Once the burden shifted to the Terhunes, they offered absolutely no evidence that U.S. Bank Trust does not hold the note.

Answer to Assignment of Error No. 3.

The trial court properly granted summary judgment in favor of U.S. Bank Trust and Caliber with respect to the Terhunes' claim for quiet title. The only reasonable interpretation of the notice of intent to accelerate is that it is a pre-election warning, not a clear and unequivocal statement that the lender has already elected acceleration. The evidence further showed that numerous subsequent written communications to the Terhunes sought payment of only past due sums; not the full principal amount of \$1,499,999.00.

Answer to Assignment of Error No. 4.

The trial court properly denied the Terhunes' motion for reconsideration. The records shows that the trial court did not abuse its discretion in denying the Terhunes' CR 59(a)(7) motion. The Terhunes did not seek to introduce additional evidence and merely attacked the evidence presented by U.S. Bank Trust and Caliber.

III. STATEMENT OF THE CASE

A. The Loan

In January 2008, the Terhunes refinanced their property with a \$1,499,999.00 loan (“Loan”) from Countrywide.¹ In exchange for the Loan, the Terhunes executed and delivered a promissory note (“Note”), secured by deed of trust (“Deed of Trust”) encumbering certain real property known as 18306 Driftwood Drive E, Lake Tapps, Washington 98391.² The Note is an installment note, requiring payments on the “first day of each month, beginning on March 01, 2008.”³ The maturity date on the Note is February 1, 2038.⁴

B. The Default

The Terhunes paid only 10 installments on the Loan.⁵ In event of default, the Deed of Trust sets forth the procedures for acceleration:

Lender shall give notice to Borrower prior to acceleration following Borrower’s breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law

¹ CP 7 (AC ¶ 10), CP 86 (Mansi Decl. ¶ 3, Ex. 1-2), CP 477 (Terhune Aff. ¶ 4, Ex. 2-3).

² *Ibid.*

³ CP 7 (AC ¶ 12), CP 86-87 (Mansi Decl. ¶¶ 3, 5, Ex. 1), CP 488 (Terhune Aff. ¶ 4, Ex. 2).

⁴ CP 95 (Mansi Decl., Ex. 1 § 3(A)), CP 489 (Terhune Aff., Ex. 2 § 3(A)).

⁵ CP 7-8 (AC ¶¶ 13-14), CP 87 (Mansi Decl. ¶ 5, Ex. 3), CP 477 (Terhune Aff. ¶ 7).

provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice **may result** in acceleration of the sums secured by this Security Instrument ...⁶

The Deed of Trust further provides that:

If the default is not cured on or before the date specified in the notice, **Lender at its option**, may require immediate payment in full of all sums secured by this security instrument...⁷

When the Terhunes defaulted in 2009, Countrywide was the loan servicer and sent out a series of three letters advising the Terhunes that certain remedies may be pursued if their default was not cured.⁸ These letters were sent on or about December 17, 2008 (“First NIA”), January 16, 2009 (“Second NIA”), and February 17, 2009 (“Third NIA”).⁹

The First NIA provided notice to the Terhunes that:

You have the right to cure the default. To cure the default, on or before January 16, 2009, Countrywide must receive the amount

⁶ CP 109 (Mansi Decl., Ex. 2 § 22) (emphasis added), CP 503 (Terhune Aff., Ex. 3 § 22).

⁷ *Ibid.*

⁸ CP 8 (AC ¶ 16), CP 87-88 (Mansi Decl. ¶¶ 6-8, Ex. 4-6), CP 478 (Terhune Aff. ¶ 8, Ex. 5).

⁹ *See id.*

of \$17,062.48 plus any additional regular monthly payment or payments, late charges, fees and charges, which become due on or before January 16, 2009.¹⁰

The First NIA further notified the Terhunes that:

If the default is not cured on or before January 16, 2009, the mortgage payments **will be accelerated** with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time. As such, the failure to cure the default may result in the foreclosure and sale of your property.¹¹

The Second NIA and Third NIA were substantially similar.¹² No notice followed advising the Terhunes that the remedy of acceleration had been elected.

C. Written Communications Showing No Acceleration

The following written communications to the Terhunes after the Third NIA shows the lender never elected to accelerate:

Document	Amount	Citation
Account Statement (October 29, 2009)	\$86,382.00	CP 431
Account Statement (November 27, 2009)	\$8,290.00	CP 432

¹⁰ CP 8 (AC ¶ 16), CP 87 (Mansi Decl. ¶ 6, Ex. 4), CP 478 (Terhune Aff. ¶ 8, Ex. 5).

¹¹ *Ibid.* (emphasis in original).

¹² CP 161, 164 (Mansi Decl., Ex. 5-6).

Notice of Default (“2010 NOD”)	\$169,476.25	CP 359
Notice of Foreclosure (“2010 NOF”)	\$256,210.39	CP 371-372
Notice of Trustee’s Sale (“2010 NOTS”)	\$219,736.39	CP 361-362
Caliber’s October 12, 2015 letter	\$538,874.11	CP 273
Notice of Default (“2015 NOD”)	\$732,627.78	CP 280
Notice of Trustee’s sale (“2016 NOTS”)	\$669,729.11	CP 287

In addition to the foregoing, at least two other written communications show no acceleration. First, in the lender’s response to the Terhunes’ request for information the lender states: “**As of December 23, 2010, the account is due for the January 2009 installment...**”¹³ Second, in Caliber’s notice to the Terhunes that it had acquired the servicing of the Loan, the June 5, 2015 letter states: “We **are not** requesting that you pay the entire loan balance...”¹⁴

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¹³ CP 88-89 (Mansi Decl. ¶ 12, Ex. 10) (emphasis in original).

¹⁴ CP 89 (Mansi Decl. ¶ 14, Ex. 12) (emphasis added).

D. Transfers of the Loan

The original lender on the Terhunes' Loan was Countrywide.¹⁵

Thereafter, the Loan transferred as follows:

Document	Date	Citation
Recorded Assignment of Deed of Trust to BAC Home Loans Servicing, LP, fka Countrywide Home Loans Servicing, LP	March 25, 2010	CP 9, 88 ¶ 9, 167
Recorded Assignment of Deed of Trust to U.S. Bank Trust, N.A. as Trustee for LSF9 Master Participation Trust	Sept. 15, 2015	CP 89 ¶ 16, 201-202

Caliber commenced servicing the Loan on May 26, 2015.¹⁶

E. First Nonjudicial Foreclosure and *Terhune I*

On or about March 19, 2010, Recontrust issued the 2010 NOD.¹⁷

On or about August 24, 2010, Recontrust issued the 2010 NOF.¹⁸ The next day Recontrust recorded the 2010 NOTS, setting a trustee's sale for December 3, 2010.¹⁹ On November 19, 2010, the Terhunes sought to avoid foreclosure when they filed a complaint in the superior court

¹⁵ CP 7 (AC ¶ 10), CP 86 (Mansi Decl. ¶ 3, Ex. 1-2), CP 477 (Terhune Aff. ¶ 4, Ex. 2-3).

¹⁶ CP 12 (AC ¶¶ 37-38), CP 89 (Mansi Decl. ¶ 13, Ex. 11).

¹⁷ CP 9 (AC ¶ 19), CP 356-360 (*Terhune I* Complaint, Ex. 6).

¹⁸ CP 371-374 (*Terhune I* Complaint, Ex. 8).

¹⁹ CP 9 (AC ¶ 21), CP 361-362 (*Terhune I* Complaint, Ex. 7).

(“*Terhune I*”).²⁰ In *Terhune I* they challenged the lender’s authority to enforce the Loan.²¹ And, the Terhunes sought to:

restrain the trustee’s sale schedule [sic] for December 3, 2010” along with “**verification of the right to enforce the Note, verification of the proper beneficiary under the Deed of Trust,** and discontinuance of the present sale for violations of RCW 61.24 et seq.”²²

One day before the scheduled trustee’s sale, the Terhunes obtained a temporary restraining order (“TRO”) enjoining “the December 3, 2010 trustee’s sale” of the property.²³ On February 18, 2011, the *Terhune I* court denied the preliminary injunction and dissolved the TRO on the merits.²⁴ The order was based on:

Defendants having submitted their opposition and supporting Declarations, a Show Cause hearing having been held and arguments heard on January 21, 2011.²⁵

²⁰ CP 9-10, 311, 315-375 (*Terhune I* Complaint with Exhibits).

²¹ CP 315-324 (*Terhune I* Complaint).

²² CP 321 (*Terhune I* Complaint ¶ 4.4) (emphasis added).

²³ CP 10 (AC ¶ 23), CP 375-379 (*Terhune I* Temporary Restraining Order and Order to Show Cause).

²⁴ CP 389-391 (*Terhune I* Order Dissolving Temporary Restraining Order and Denying Application for Preliminary Injunction).

²⁵ CP 389-390 (*Terhune I* Order Dissolving Temporary Restraining Order and Denying Application for Preliminary Injunction).

F. Loss Mitigation

Since May 2015, Caliber has offered the Terhunes four separate Trial Period Plans—in October 2015, January 2016, March 2016, and July 2016.²⁶ The Trial Period Plans would have reduced the monthly payments to \$8,184.94, \$7,464.79, \$7,525.88, and \$7,612.80, respectively.²⁷ The Terhunes never responded.²⁸

G. The Second Nonjudicial Foreclosure

On October 13, 2015, U.S. Bank Trust appointed North Cascade Trustee Services, Inc. (“NCTS”) as the successor trustee.²⁹ NCTS then issued another FDCPA 30-day debt validation letter on December 21, 2015.³⁰ On the same day, NCTS issued the 2015 NOD.³¹ The NOD specified the total amount due as \$732,627.78.³² Because the Terhunes’ default continued unabated, NCTS recorded the 2016 NOTS.³³ The trustee’s sale was set for February 17, 2017.³⁴ The Terhunes commenced

²⁶ CP 91-92 (Mansi Decl. ¶¶ 23-27, Ex. 21-24).

²⁷ See CP 91-92 (Mansi Decl., Ex. 21-24).

²⁸ CP 92 (Mansi Decl. ¶ 28).

²⁹ CP 13 (AC ¶ 43), CP 90 (Mansi Decl. ¶ 20, Ex. 18).

³⁰ CP 13 (AC ¶ 44).

³¹ CP 13 (AC ¶ 45), CP 90 (Mansi Decl. ¶ 21, Ex. 19).

³² CP 90-91 (Mansi Decl. ¶ 21, Ex. 19).

³³ CP 13 (AC ¶ 47), CP 91 (Mansi Decl. ¶ 22, Ex. 20).

³⁴ CP 287 (Mansi Decl., Ex. 20.)

this action against Respondents on February 7, 2017 to delay the second nonjudicial foreclosure.³⁵

IV. ARGUMENT

A. Standard of Review

An appellate court reviews a grant of summary judgment de novo, engaging in the same inquiry as the trial court. *Citizens All. for Prop. Rights Legal Fund v. San Juan Cty.*, 184 Wn.2d 428, 435 (2015). Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

Not all facts are material—a material fact is one on which the outcome of the case is determined in whole or in part. *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 803 (2001); *Cox v. Malcolm*, 60 Wn. App. 894, 897 (1991). Initially, the burden is on the moving party—here, U.S. Bank Trust and Caliber—to establish there is no genuine issue of material fact. *Cox*, 60 Wn. App. at 897.

The burden then shifts to the non-moving party—here, the Terhunes—to show, by setting forth specific facts, that there is a genuine issue requiring a trial. *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516 (1990). “If the

³⁵ CP 1-20.

nonmoving party fails to make a showing sufficient to establish the existence of an element essential to his case, then the trial court should grant the motion.” *Ibid.* More than mere allegations on “information and belief” is required. As the Supreme Court explained:

A nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.

Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13 (1986).

B. The Trial Court Correctly Granted Summary Judgment in Favor of Respondents on the Injunctive Relief and Quiet Title Causes of Action Because There Is No Acceleration

In support of their first (injunctive relief) and second (quiet title) causes of action, the Terhunes assert the 6-year limitations period on written contracts had expired prior to commencement of the nonjudicial foreclosure.³⁶ Specifically, the Terhunes contend the maturity date of the Note accelerated when they failed to cure a default by March 19, 2009—the deadline stated in Countrywide’s Third NIA.³⁷ Thus, according to the Terhunes, because the Note was accelerated as of March 19, 2009, the six-

³⁶ CP 15-16 (AC ¶¶ 55-56, 62-63).

³⁷ CP 8 (AC ¶¶ 16-17).

year limitations period to enforce the Note “ended on March 19, 2015 or at the very latest October 25, 2015.”³⁸

1. The Statute of Limitations on an Installment Loan is Six Years From the Maturity Date

The statute of limitations on a note and deed of trust is six years. RCW 4.16.040(1). Where the note provides for repayment in installments, “the statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it.” *Edmundson v. Bank of Am.*, 194 Wn. App. 920, 930 (2016) (quoting *Herzog v. Herzog*, 23 Wn.2d 382, 388 (1945)); *Merceri v. Bank of New York Mellon on behalf of holders of the Alternative Loan Tr. 2006-OA19*, --- P.3d ----, 2018 WL 3830033, at *2 (2018) (“*Merceri*”).

The last payment owed commences the final six-year period to enforce a deed of trust securing a loan. *4518 S. 256th, LLC v. Karen L. Gibbon, P.S.*, 195 Wn. App. 423, 434 (2016) *review denied sub nom. 4518 S. 256th, LLC v. Gibbon*, 187 Wn.2d 1003 (2017) (“*Gibbon*”). This situation occurs when the final payment becomes due, such as when the note matures or the holder unequivocally accelerates the note's maturity date. *Ibid.*; *see also Washington Fed. v. Azure Chelan LLC*, 195 Wn. App. 644, 663 (2016) (“*Azure*”) (citing cases). Thus, absent acceleration, “the

³⁸ CP 16 (AC ¶¶ 63).

final six-year period to take an action related to the debt does not begin to run until it fully matures...” *Merceri* at *2.

2. The Terhune Note is an Installment Note and the Limitations Period Does Not Begin to Run Until February 1, 2038

Here, there is no dispute that the Terhunes executed the Note and Deed of Trust in exchange for the Loan.³⁹ And, the Note provides for repayment in installments commencing on March 1, 2008.⁴⁰ Monthly installments become due on the first day of each month through February 1, 2038.⁴¹ Therefore, *unless* the maturity date of the Note was accelerated “the final six-year period to take an action related to the debt does not begin to run until it fully matures” on February 1, 2038 and that six-year period would not expire until February 1, 2044.

3. The Maturity Date of the Note Was Not Accelerated

The issue becomes whether the lender accelerated the maturity date on the Note. If so, then the start date of the limitations period would not be February 1, 2038; rather, the limitations period would begin to run when the maturity date was accelerated. *Azure* at 663; *Gibbon* at 434-35; *Merceri* at *2-3. Here, the answer to whether an acceleration occurred is a

³⁹ CP 477 (Terhune Aff. ¶ 4, Ex. 2-3).

⁴⁰ CP 488-489 (Terhune Aff., Ex. 2 § 3).

⁴¹ *Ibid.*

resounding “no” and the Terhunes cannot get their house for free. Put another way, the Terhunes must pay their mortgage like everyone else.

“Acceleration” means “[t]he advancing of a loan agreement’s maturity date so that payment of the entire debt is due immediately[.]” *See* Black’s Law Dictionary (10th ed. 2014). The Deed of Trust similarly defines “acceleration” as a remedy where the “Lender at its option, may require immediate payment in full of all sums secured...”⁴²

“To trigger acceleration, a creditor must clearly and unequivocally indicate, by some affirmative action, that the option to accelerate *has been* exercised.” *Glassmaker v. Ricard*, 23 Wn. App. 35, 37 (1979) (emphasis added) (quoting *Weinberg v. Naher*, 51 Wash. 591, 594 (1909)). “[A]cceleration must be made in a clear and unequivocal manner which effectively apprises the maker that the holder *has exercised* his right to accelerate the payment date.” *Glassmaker* at 38.

The NIAs issued by Countrywide did not accelerate the Note. The First NIA states in salient part:

If the default is not cured on or before January 16, 2009, the mortgage payments **will be accelerated** with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time. As such, the failure to cure the default may

⁴² CP 503 (Terhune Aff., Ex. 3 § 22).

result in the foreclosure and sale of your property.⁴³

The Second NIA and Third NIA are substantially the same, differing only in the dates and amount past due.⁴⁴ This language is not a “clear and unequivocal” notice that the lender *has* accelerated the loan. Rather, it is a letter setting out the lender’s options should the Terhunes fail to cure the default. In other words, the NIAs are pre-election warnings—nothing more.

The same language was at issue in *Merceri*:

Here, the Bank sent *Merceri* a notice warning her that the entire debt would be accelerated if she failed to cure her default. The notice read, in pertinent part,

If the default is not cured on or before March 18, 2010, the mortgage payments **will be accelerated** with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time. As such, the failure to cure the default may result in the foreclosure and sale of your property.

Merceri at *3 (emphasis in original). Finding this language insufficient to accelerate the loan, the Court of Appeals in *Merceri* explained:

⁴³ CP 158 (Mansi Decl., Ex. 4) (emphasis in original).

⁴⁴ CP 520 (Terhune Aff., Ex. 5), CP 161 (Mansi Decl., Ex. 5), CP 164 (Mansi Decl., Ex. 6).

Thereafter, the Bank did not take an affirmative action in a clear and unequivocal manner indicating that the payments on the loan had been accelerated. The Bank never declared that the entire debt was due. Nor did it refuse to accept installment payments. (Citations) In addition, mortgage statements sent to Merceri after the February 2010 notice show the amount due as merely the sum of unpaid past due installments, not the full principal. The statements do not show an accelerated amount due.

*Ibid.*⁴⁵

Here, numerous communications—including foreclosure notices, mortgage statements, and letters—to the Terhunes show no affirmative action toward acceleration.

The 2010 NOD, for example, showed the amount due as \$169,476.25; not the full principal amount of \$1,499,999.00.⁴⁶ The 2010 NOF showed the amount due as \$256,210.39—again, not the full principal amount.⁴⁷ The 2010 NOTS also showed only past due installments,

⁴⁵ This is not a groundbreaking conclusion, merely common sense. A defaulting borrower should not be able to transmute the lender's remedies into a sword to obtain a free house. Another recent Court of Appeals decision also found that Countrywide's notice of intent to accelerate did not constitute an acceleration on its own. *See Erickson v. Am.'s Wholesale Lender*, 2018 WL 1792382, at *1 (Wash. Ct. App. Apr. 16, 2018) (Unpublished).

⁴⁶ CP 356-360 (*Terhune I* Complaint, Ex. 6).

⁴⁷ CP 371-372 (*Terhune I* Complaint, Ex. 8).

totaling \$219,736.39, not the full principal amount.⁴⁸ The 2015 NOD showed the amount due as \$732,627.78 and the 2016 NOTS showed the amount due as \$669,729.11, continuing the trend.⁴⁹

The Terhunes argue that the Deed of Trust Act (DTA) somehow mandates that these notices cannot state an accelerated amount.⁵⁰ They do not cite any authority explicitly supporting this theory. In reality, lenders *do* include the accelerated amount due when a loan is accelerated. Thus, for example, in *Washington Fed. v. Azure Chelan LLC*, the notice of default listed the total amount due as \$6,116,545.07 and included the “Accelerated balance due under Promissory Note” of \$5,656,151.29. *Azure, supra*, 195 Wn. App. at 663. The Court of Appeals thus concluded that the notice was “sufficient to indicate that Azure accelerated its loan...” and “the six-year statute of limitations had run...” *Ibid.* Here, the facts are contrary: each notice stated only past due sums and clearly supports the conclusion that there was no acceleration of the Loan.

Separate and apart from the notices, other written communications to the Terhunes showed no acceleration. For example, account statements issued shortly after the NIAs in 2009 stated the amount due as either

⁴⁸ CP 172-173 (Mansi Decl., Ex. 9), CP 361-362 (*Terhune I* Complaint, Ex. 7).

⁴⁹ CP 278-289 (Mansi Decl., Ex. 19-20).

⁵⁰ Appellants’ Brief at 31

\$86,382.00 or \$8,290.00; not the full principal amount of \$1,499,999.00.⁵¹ In concluding there was no acceleration notwithstanding an earlier notice of intent to accelerate, the Court of Appeals in *Merceri* found it dispositive that subsequent mortgage statements sought only past due amounts. *Merceri, supra*, at *3 (“In addition, mortgage statements sent to Merceri after the February 2010 notice show the amount due as merely the sum of unpaid past due installments, not the full principal.”)

Another example showing no acceleration is the lender’s response to the Terhunes’ request for information. The lender letter dated December 23, 2010, stated: “**As of December 23, 2010, the account is due for the January 2009 installment.**”⁵² In Caliber’s June 5, 2015, notice to the Terhunes that it had acquired the servicing of the Loan, the letter further shows no acceleration by stating: “**We are not** requesting that you pay the entire loan balance...”⁵³ In Caliber’s October 12, 2015 letter to the Terhunes’ regarding options for avoiding foreclosure the amount past due was \$538,874.11; not \$1,499,999.00.⁵⁴

⁵¹ CP 524-526 (Terhune Aff., Ex. 6), CP 431-432 (*Terhune I* AC, Ex. 4).

⁵² CP 178 (Mansi Decl., Ex. 10) (emphasis in original).

⁵³ CP 187 (Mansi Decl., Ex. 12) (emphasis added).

⁵⁴ CP 273 (Mansi Decl., Ex. 17).

In each of the foregoing communications beginning in October 2009 (the account statement) and continuing through 2015 (the 2015 NOD), the amount due was always substantially less than the full principal amount of \$1,499,999.00. Had the NIAs accelerated the Note as the Terhunes claim, each of the foregoing communications would have stated the amount due as the full debt—i.e., some amount greater than or equal to \$1,499,999.00. *Merceri* at *3; *Gibbon* at 429 (“Nothing in this notice of default to the borrowers stated that the lender chose to declare the unpaid balance of the loan due and payable.”)

4. The July 2011 Letter from Bank of America Does not Show Acceleration

The Terhunes assert that a letter from Bank of America (“BANA”) in July 2011 shows acceleration because the letter states the amount of the debt as of July 1, 2011 was \$1,830,002.00.⁵⁵ This argument is patently unavailing in light of the requirements imposed by the federal Fair Debt Collection Practices Act (“FDCPA”).

As noted in its letter, BANA was attempting to comply with the FDCPA’s debt validation requirements. Under section 1692g, a debt validation notice must state, inter alia, “the amount of the debt.” Under 15 U.S.C. § 1692a, the term “debt” is broadly defined as “any obligation or

⁵⁵ Appellants’ Brief at 30 (citing CP 537, *Terhune Aff.*, Ex. 9).

alleged obligation of a consumer to pay money arising out of a transaction...” The FDCPA, of course, has no bearing on whether a loan has been accelerated under state law. To comply with federal law BANA stated the total amount of the debt—essentially a conservative approach to compliance with the FDCPA. To accelerate a loan, however, BANA would have had to “clearly and unequivocally indicate, by some affirmative action, that the option to accelerate *has been* exercised.” *Glassmaker, supra*, 23 Wn. App. at 37 (emphasis added). The Terhunes’ attempt to compare apples (the FDCPA compliance letter) with oranges (a clear and unequivocal affirmative act showing acceleration had been exercised) to obtain a free house is unavailing.

Indeed, the Terhunes were obligated to pay the principal and interest on the Loan—*whether or not the Loan was accelerated*. At the time of BANA’s letter, the amount of the debt had increased—not because of acceleration—but because of the years of unpaid interest, taxes and insurance during the Terhunes chronic delinquency. Recall, the Terhunes have lived in a \$1.5 million property for a decade without paying their mortgage, taxes, or insurance. As a result, the debt increased because the Terhunes were freeloading on the Property *for years* while letting the lender foot the bill for taxes and insurance, which coupled with the unpaid interest, was accumulating as additional debt.

BANA thus stated the entire amount owed on the Loan and not just the past due sums. Tellingly, BANA *does not* request payment or state what is “due” as neither is required under the FDCPA. Rather, BANA provides the Terhunes with 30 days—as required by the FDCPA—to notify it in writing that they dispute the validity of the debt.

Upon closer examination, moreover, the Terhunes’ argument is simply disingenuous—another frivolous attempt to acquire a free house. Just a few months earlier in December 2010, when BANA responded to the Terhunes’ correspondence from November 2010, BANA stated that:

As of December 23, 2010, the account is due for the January 2009 installment. The loan went into default effective with the December 2008 installment. BAC Home Loans acquired the loan on January 18, 2008, with the loan due for the March 2008 installment.⁵⁶

Had the Note been accelerated, BANA’s letter from December 2010 would have said that the account was due for all installments.

5. The Loan Documents Do Not Show Acceleration Either

The Terhunes attempt to save their acceleration theory by asserting that the NIAs coupled with the loan documents established acceleration.⁵⁷

Merceri also championed this argument. *Merceri* at *4 (“Merceri ...

⁵⁶ CP 178 (Mansi Decl., Ex. 10) (emphasis in original).

⁵⁷ See Appellants’ Brief at 26-29.

claimed that language in [section 22 of] the deed of trust compelled the conclusion that the debt was accelerated in 2010.”). Like the borrower in *Merceri*, the Terhunes cite to Section 22 of the Deed of Trust as support for their acceleration theory.⁵⁸ To get there, the Terhunes must ignore key aspects of both the Deed of Trust and the NIAs. For example, both documents set forth potential remedies that include acceleration, foreclosure, inspections of the property, and pursuit of a deficiency judgment if permitted by law.

Section 22 of the Deed of Trust, however, provides that the various remedies are at the option of the lender. The section also provides that the remedies of acceleration and foreclosure each require a pre-election warning setting forth enumerated information and setting the minimum time frames following issuance of the warning wherein the remedy may be elected. The NIA is a combined pre-election warning that refers to both remedies and sets forth the information required under section 22. The Terhunes’ reliance on the NIAs is absurd and disingenuous.

6. Even if Countrywide Accelerated the Loan by its NIA, the Evidence Shows the Acceleration was Abandoned

Even assuming the Third NIA caused an acceleration of the Loan—which it did not as explained above—the evidence shows that

⁵⁸ Appellants’ Brief at 28.

months later any acceleration was abandoned.

Acceleration is a remedy under the Note and Deed of Trust. *See Gibbon, supra*, 195 Wn. App. at 441. And, like any remedy, acceleration may be abandoned. *See Bremner v. Shafer*, 181 Wash. 376, 382 (1935); 11 Am. Jur. 2d Bills and Notes § 170 (“The exercise of an option to accelerate is not irrevocable, and the holder of a note who has exercised the option of considering the whole amount due may subsequently waive this right and permit the obligation to continue in force under its original terms for all purposes.”).

Within months of the purported acceleration in March 2009, mortgage statements issued in late 2009 demanded only past due sums.⁵⁹ In the mortgage statement dated October 29, 2009, the amount due is \$96,382.00; not the full principal amount of \$1,499,999.00.⁶⁰ In the mortgage statement dated November 27, 2009, the amount due is \$8,290.00; not \$1,499,999.00.⁶¹ The Terhunes argue, as they must, that these notices and the voluminous later notices showing no acceleration are insufficient to establish an abandonment. This argument rings hollow, however, because in the lender’s response letter to the Terhunes, the

⁵⁹ CP 8 (AC ¶ 18), CP 396 (*Terhune I* AC ¶ 3.8, Ex. 4), CP 480 (*Terhune Aff.* ¶ 13, Ex. 6).

⁶⁰ CP 524-525 (*Terhune Aff.*, Ex. 6).

⁶¹ CP 526-527 (*Terhune Aff.*, Ex. 6).

lender stated: “As of December 23, 2010, the account is due for the January 2009 installment.”⁶² There is no reference to an acceleration.⁶³ Leaving no doubt that any acceleration was abandoned, in Caliber’s notice to the Terhunes that it had acquired the servicing of the Loan, the June 5, 2015 letter states: “We **are not** requesting that you pay the entire loan balance...”⁶⁴ It is difficult to imagine how a lender can be any more clear that the loan is not accelerated.

Assuming there was an acceleration—and as noted above, there was not—the issue becomes whether the foregoing written notices abandoned acceleration in time. The Terhunes theory is that acceleration occurred on March 19, 2009. Thus, without any tolling events, the last day to abandon acceleration would have been March 19, 2015. As such, any of the 2009 and 2010 written notices would have abandoned acceleration well before expiration of the limitations period.

Caliber’s June 5, 2015 letter also suffices because the first nonjudicial foreclosure tolled the limitations period for 379 days—thus pushing out the March 19, 2015 expiration to April 1, 2016—almost a year after Caliber unequivocally told the Terhunes that it was **not** asking them to pay the entire loan balance. The first nonjudicial foreclosure tolled

⁶² CP 178 (Mansi Decl., Ex. 10) (emphasis in original).

⁶³ *Ibid.*

⁶⁴ CP 187 (Mansi Decl., Ex. 12) (emphasis added).

the limitations period for 379 days because the 2010 NOD was issued on March 19, 2010, which commenced tolling. *Edmundson v. Bank of Am.*, 194 Wn. App. 920, 930 (2016) (issuance of notice of default is a resort to the remedy of foreclosure under RCW 61.24.030 and tolls the limitations period). And, the 2010 NOTS set the trustee's sale for December 3, 2010.⁶⁵ This tolled the limitations period until April 2, 2011—120 days from the date of the sale as specified in the 2010 NOTS. *Bingham v. Lechner*, 111 Wn. App. 118, 131 (2002) (because lender is permitted to continue a sale date by up to 120 days the tolling effect of a notice of trustee's sale is no more than 120 days).

7. The Statute of Limitations Does Not Apply Piecemeal to Nonjudicial Foreclosure and Whether it Does is Not Material

A material fact for purposes of summary judgment is a fact on which the outcome of the case is determined in whole or in part. *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 803 (2001). Put another way, for purposes of summary judgment a “material fact is one controlling the litigation’s outcome.” *Peyton Bldg., LLC v. Niko's Gourmet, Inc.*, 180 Wn. App. 674, 679 (2014).

The Terhunes argue that even if the statute of limitations has not expired on the entire loan, it expired as to a subset of payments. In this

⁶⁵ CP 88 (Mansi Decl. ¶ 11, Ex. 9).

action, the argument is simply immaterial because the Terhunes claims seek injunctive relief against foreclosure pursuant to RCW 61.24.130 and quiet title pursuant to RCW 7.28.300.⁶⁶ Indeed, the Terhunes sought to enjoin the trustee's sale and to extinguish the Deed of Trust.⁶⁷

Whether the limitations period has run on particular installments is therefore immaterial because the requisites to a trustee sale include only that “a default has occurred in the obligation secured ...” RCW 61.24.030(3) (emphasis added); *see also Vawter v. Quality Loan Serv. Corp. of Washington*, 707 F. Supp. 2d 1115, 1121 (W.D. Wash. 2010) (“Once a default on the secured obligation occurs ... the nonjudicial foreclosure process” may initiate.). Put another way, as long as there is a single default for which the limitations period has not run it is immaterial whether the statute of limitations has ran on other installments under the Loan for purposes of the Terhunes' claims to bar nonjudicial foreclosure. Nothing in the DTA provides that nonjudicial foreclosure based on “a default” results in anything less than a sale of the entire property to make the lender whole on the entire indebtedness secured by the deed of trust.⁶⁸

⁶⁶ CP 14-17 (AC ¶¶ 50-74).

⁶⁷ CP 17 (AC ¶¶ 1-2 of Relief Requested).

⁶⁸ There is nothing unprecedented about the foregoing. It is well established that the right to enforce a lien by foreclosure may survive the termination of the right to collect on individual installments on a note. For instance, the United States Supreme Court held in *Johnson v. Home State*

C. The Trial Court Correctly Granted Summary Judgment in Favor of Respondents on the Injunctive Relief Cause of Action Because U.S. Bank Trust Holds the Note

On appeal, the Terhunes assert that respondents are not entitled to summary judgment on the injunctive relief claim because there is a genuine issue of material fact as to whether U.S. Bank Trust or Caliber is the holder of the note.⁶⁹ They also asserted in their complaint, “upon information and belief,” that U.S. Bank Trust is not the holder of the Note.⁷⁰ In the end, however, there is clearly no genuine issue of material fact on this point and the trial court correctly granted summary judgment.

1. U.S. Bank Trust Proved its Possession of the Note by its Beneficiary Declaration

Possession of the note for purposes of the deeds of trust act (DTA) “can be proved in different ways.” *Lyons v. U.S. Bank Trust Nat. Ass'n*, 181 Wn.2d 775, 790 (2014). One way to prove possession is by “a declaration by the beneficiary made under penalty of perjury stating that the beneficiary is the actual holder of the promissory note...” *Id.* (quoting RCW 61.24.030(7)(a)).

Bank that a borrower’s discharge from personal liability on a note in bankruptcy did not bar the lender’s right to enforce its lien by foreclosing on the deed of trust encumbering the borrower’s home. *Johnson v. Home State Bank*, 501 U.S. 78, 82-83 (1991); *Edmundson v. Bank of Am.*, 194 Wn. App. 920, 925 (2016).

⁶⁹ Appellants’ Brief at 19.

⁷⁰ CP 15 (Complaint ¶ 59).

Here, U.S. Bank Trust stated under penalty of perjury that it holds the Note. The declaration of beneficiary attached to Robert Terhune's Affidavit in opposition to summary judgment shows that the beneficiary declaration was executed pursuant to RCW 61.24.030(7) and provides in salient part:

U.S. BANK TRUST, N.A., AS TRUSTEE
FOR LSF9 MASTER PARTICIPATION
TRUST is the beneficiary (as defined by
RCW 61.24.005(2)) and actual holder of the
promissory note or other obligation secured
by the deed of trust.⁷¹

This alone is sufficient proof that U.S. Bank Trust holds the note. *Lyons* at 790; *Bavand v. OneWest Bank*, 196 Wn. App. 813, 824 (2016), as modified (Dec. 15, 2016); RCW 61.24.030(7)(a). And, it certainly should suffice to shift the burden on summary judgment from U.S. Bank Trust and Caliber to the Terhunes. *See Cox*, 60 Wn. App. at 897; *Hash by Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 915 (1988).

2. The Terhunes' Attempt to Avoid RCW 61.24.030(7)(A) is Unavailing Because U.S. Bank Trust's Declaration Does Not Refer to a "Copy" and Does Not Contain an "Or" Alternative

The Terhunes understand this glaring weakness in their case and attempt to manage it by disingenuous arguments attacking U.S. Bank Trust's beneficiary declaration. First, the Terhunes assert that "possession

⁷¹ CP 559.

of a copy of the note” is insufficient.⁷² Second, they assert that the Supreme Court in *Lyons* held that a declaration stating the beneficiary is the “actual holder of the promissory note or other obligation secured by the deed of trust” is insufficient.⁷³ Neither argument holds water.

First, the evidence in this case *does not* refer to a “copy of the note.” Rather, U.S. Bank Trust’s beneficiary declaration speaks to the promissory note without qualifiers. Specifically, the declaration states unambiguously that U.S. Bank Trust is the “actual holder of the promissory note or other obligation secured by the deed of trust.”⁷⁴ This is the exact statement that is required under RCW 61.24.030(7)(a).

Nowhere in the record is there reference to a “copy of the note.” In his Affidavit, Mr. Terhune asserts that “Defendants ... failed to produce the original Note for inspection as demanded by our discovery responses.”⁷⁵ This assertion is immaterial because demanding production of the original note in discovery is not a well-founded discovery request. *Bavand, supra*, 196 Wn. App. at 824. As the *Bavand* court explained, “because the legislature has specified that a holder of a promissory note

⁷² Appellants’ Brief at 20 (citing *Lyons v. U.S. Bank Trust Nat. Ass’n*, 181 Wn.2d 775, 791 (2014)).

⁷³ Appellants Brief at 22 (citing *Lyons* at 791).

⁷⁴ CP 559.

⁷⁵ CP 482.

need not produce the original note to prove the right to enforce the deed of trust” a borrower’s “discovery request to see her original note is not well founded.” *Id.*

Regarding the second argument, the Supreme Court in *Lyons* did not simply hold that a declaration stating the beneficiary is the “actual holder of the promissory note or other obligation secured by the deed of trust” is insufficient. Rather, the beneficiary in *Lyons* executed an ambiguous beneficiary declaration stating:

Wells Fargo Bank, NA, as Trustee for Soundview Home Loan Trust 2006–WFI is the actual holder of the promissory note or other obligation evidencing the above-referenced loan **or** has requisite authority under RCW 62A.3–301 to enforce said obligation.

Lyons, 181 Wn.2d at 780 (emphasis added).

The Supreme Court held that use of the “or” alternative rendered the declaration ambiguous. Accordingly, the *Lyons* court concluded that the declaration did not give rise to the evidentiary presumption under RCW 61.24.030(7). *Lyons*, 181 Wn.2d at 787; *see also Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 826 (2015) (rejecting the same “or” alternative language in another Wells Fargo beneficiary declaration).

Here, U.S. Bank Trust’s declaration *does not* use the “or” alternative.⁷⁶ And, the declaration is unequivocal—U.S. Bank Trust is the “actual holder of the promissory note.”⁷⁷ Accordingly, the Terhunes cannot avoid the evidentiary presumption under RCW 61.24.030(7)(a).

3. The Caliber Declaration Further Shows That U.S. Bank Trust Holds the Note

U.S. Bank Trust’s possession of the note is further evidenced by the declaration of Nathaniel Mansi of Caliber.⁷⁸ Predictably, the Terhunes assert that Mr. Mansi lacks personal knowledge to attest to U.S. Bank Trust’s possession of the note.⁷⁹ Again, the Terhunes are misguided.

“To be considered on summary judgment, CR 56(e) requires a declaration be made on personal knowledge...” *Barkley v. GreenPoint Mortgage Funding, Inc.*, 190 Wn. App. 58, 66 (2015). “Statements in a declaration based on a review of business records satisfy the personal knowledge requirement of CR 56(e) if the declaration satisfies the business records statute, RCW 5.45.020.” *Id.* at 67; *see also Discover Bank v. Bridges*, 154 Wn. App. 722, 725-26 (2010).

A business record is admissible as competent evidence

⁷⁶ CP 559.

⁷⁷ *Ibid.*

⁷⁸ CP 86 (Mansi Decl. ¶ 3).

⁷⁹ Appellants’ Brief at 16.

if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020. “Reviewing courts broadly interpret the statutory terms ‘custodian’ and ‘other qualified witness.’” *State v. Quincy*, 122 Wn. App. 395, 399 (2004). And, “[i]f the statutory requisites are met, computerized records are treated the same as any other business records.” *Id.*

Here, Mr. Mansi declared under penalty of perjury that he is an officer of Caliber; has personal knowledge of his company’s practices of maintaining business records; has personal knowledge from his own review of the records related to the Terhunes’ loan, and attached true and correct copies of the business records.⁸⁰ As such, Caliber’s business records are admissible as competent evidence pursuant to RCW 5.45.020 and CR 56(e). *Barkley, supra*, 190 Wn. App. at 67.

Indeed, in *Barkley*, Chase was the servicer for U.S. Bank and acted as its attorney-in-fact. *Barkley, supra*, 190 Wn. App. at 63. Like the Terhunes here, the borrower in *Barkley* contended “that the court should not have considered the Declaration[] of John Simionidis, assistant

⁸⁰ CP 86-87.

secretary for Chase...” *Id.* at 66. The *Barkley* court rejected the objection, explaining:

Both declarations satisfy the requirements of CR 56(e) and RCW 5.45.020. Simionidis and Stenman declared under penalty of perjury that (1) they were officers of Chase and NWTS, respectively; (2) they had personal knowledge of their companies practices of maintaining business records; (3) they had personal knowledge from their own review of records related to Barkley's note and deed of trust; and (4) the attached records were true and correct copies of documents made in the ordinary course of business at or near the time of the transaction.

Id. at 67.

Appellate courts “review a trial court's decision to admit or exclude business records for a manifest abuse of discretion.” *Discover Bank v. Bridges*, 154 Wn. App. 722, 726 (2010) (citing *State v. Garrett*, 76 Wn. App. 719, 722 (1995)). “A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds.” *Id.* (citing *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833 (2007)). Here, the trial court’s decision was neither unreasonable nor untenable because Mr. Mansi established his own personal knowledge and also declared under penalty of perjury numerous facts showing that Caliber was in a position to know whether U.S. Bank Trust possessed the note.

For example, Mr. Mansi declared that Caliber has been the loan servicer on the Terhunes' loan since May 2015.⁸¹ As the loan servicer, Caliber was responsible for receiving and applying all payments on the loan on or after May 26, 2015.⁸² Toward this end, Caliber maintained a record of the history of the ownership of the loan and the series of assignments by which U.S. Bank Trust ultimately acquired the loan.⁸³ Caliber also advanced sums for property taxes and insurance to protect the property—and the security held by U.S. Bank Trust—from loss.⁸⁴

Caliber also maintained records of any prior actions to ascertain the status of the loan. Thus, for example, Caliber maintained records of each notice of intent to accelerate issued by Countrywide and letters explaining the status of the loan.⁸⁵ And, Caliber maintains records of the foreclosure actions by the prior beneficiaries in addition to coordinating foreclosure activity on behalf of U.S. Bank Trust after it acquired the loan.⁸⁶

⁸¹ CP 89 (Mansi Decl. ¶ 13, Ex. 11).

⁸² CP 86-87 (Mansi Decl. ¶¶ 3, 5, Ex. 1-3).

⁸³ *See, e.g.*, CP 88-89 (Mansi Decl. ¶¶ 3, 9-11, 13-16, Ex. 1-2, 7-14).

⁸⁴ CP 87 (Mansi Decl. ¶ 5, Ex. 3).

⁸⁵ *See, e.g.*, CP 87-89 (Mansi Decl. ¶¶ 6-8, Ex. 4-6).

⁸⁶ *See, e.g.*, CP 87-88 (Mansi Decl. ¶¶ 10-11, Ex. 8-9).

Caliber was also responsible for loss mitigation and maintained programs to assist distressed homeowners.⁸⁷ Toward this end Caliber offered the Terhunes four pre-approved trial plans that would have matured to permanent loan modifications had the Terhunes paid the trial plan payments.⁸⁸ Caliber also maintained contact information for the Terhunes' and attempted contact by telephone and in writing.⁸⁹

Based on the foregoing, the trial court had ample grounds to find that the Mansi Declaration was competent evidence that U.S. Bank Trust holds the note.

4. The Terhunes Failed to Create an Issue of Material Fact on Whether U.S. Bank Trust Holds the Note

The Terhunes do nothing to create an issue of material fact as to whether U.S. Bank Trust holds the note. The only evidence they proffer is the Affidavit of Robert C. Terhune. Predictably, the affidavit provides no facts to establish that U.S. Bank Trust does not hold the note.⁹⁰ Throughout the affidavit, however, Mr. Terhune admits facts showing the series of transfers and the notices provided to the appellants or recorded in the public records. Their complaint, similarly, relies only on information and belief allegations concerning who is the beneficiary of the note and

⁸⁷ CP 89 (Mansi Decl. ¶ 15, Ex. 13).

⁸⁸ CP 91-92 (Mansi Decl. ¶¶ 23-27, Ex. 21-24).

⁸⁹ CP 90 (Mansi Decl. ¶ 18, Ex. 16).

⁹⁰ See CP 476-559 (Terhune Aff.).

who is the holder of the note.⁹¹ Statements made upon information and belief, however, do not create an issue of material fact. *Cofer v. Pierce Cty.*, 8 Wn. App. 258, 262 (1973) (citing CR 56(e)); *see also Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 880 (1967) (citing cases).

D. The Motion for Reconsideration was Properly Denied

A trial court's denial of a motion for reconsideration is reviewed for abuse of discretion. *Kleyer v. Harborview Med. Ctr. of Univ. of Washington*, 76 Wn. App. 542, 545 (1995) (citing *Meridian Minerals Co. v. King Cy.*, 61 Wn. App. 195, 203–04, review denied, 117 Wn.2d 1017, (1991)). Abuse of discretion occurs where the trial court's decision rests on untenable grounds or untenable reasons. *Ibid.*

The Terhunes argue the trial court wrongly denied their motion for reconsideration under CR 59(a)(7). They assert “[t]here is nothing in the record to show that U.S. Bank or Caliber are the actual holder of the note.”⁹² As noted above, however, there is evidence in the record. The beneficiary declaration by U.S. Bank Trust and the declaration of Nathaniel Mansi at Caliber were ample evidence to shift the burden on summary judgment to the Terhunes who offered nothing in response.

⁹¹ See CP 7, 9, 11-12, 15 (Complaint ¶¶ 11, 20-21, 30, 59).

⁹² Appellants' Brief at 41.

The beneficiary declaration established an evidentiary presumption that U.S. Bank Trust holds the note under RCW 61.24.030(7)(a).⁹³ The Washington Supreme Court expressly recognized that a beneficiary declaration pursuant to RCW 61.24.030(7)(a) is sufficient evidence. *Lyons v. U.S. Bank Trust Nat. Ass'n*, 181 Wn.2d 775, 790 (2014). The declaration by Nathaniel Mansi further showed that U.S. Bank Trust possesses the original note as explained in Section IV.C.3 of this brief.

Like the standard for reconsideration, Appellate courts “review a trial court's decision to admit or exclude business records for a manifest abuse of discretion.” *Discover Bank v. Bridges*, 154 Wn. App. 722, 726 (2010) (citing *State v. Garrett*, 76 Wn. App. 719, 722 (1995)). “A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds.” *Id.* (citing *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833 (2007)).

There was no abuse of discretion by the trial court in its decision to admit the business records of Caliber or U.S. Bank Trust and there was no abuse of discretion when the trial court denied the Terhunes motion for reconsideration under CR 59(a)(7). Tellingly, the Terhunes did not move for reconsideration under CR 59(a)(4) because the Terhunes have

⁹³ CP 559 (Terhune Aff., Ex. 16).

absolutely no evidence to rebut Respondents' proof that U.S. Bank Trust holds the note.

E. U.S. Bank Trust and Caliber are Entitled to An Award of Attorney Fees on Appeal

In their opening brief, the Terhunes agree that attorney fees are available to the prevailing party in this dispute.⁹⁴ If the Court affirms, Respondents request that the Court award them the attorney fees and costs incurred defending this appeal. *See* RAP 18.1(a)

V. CONCLUSION

There are no genuine issues of material fact.

The 2009 NIA did not accelerate the Loan. Even if it had, the mortgage statements issued later in 2009, the response letter by the lender issued in 2010, and Caliber's notice of servicing transfer in 2015 each clearly show that the Loan was no longer accelerated. In between, numerous foreclosure notices showed that the lender never sought payment of the full principal balance of \$1,499,999.00. Acceleration is wishful thinking by the Terhunes and their hope that they will not have to pay their mortgage to keep the property.

There is also no genuine issue whether U.S. Bank Trust holds the Note. The Terhunes rely solely on information and belief (and a healthy

⁹⁴ Appellants' Brief at 42.

dose of wishful thinking) to support their claim that neither U.S. Bank Trust nor Caliber possesses the Note. The evidence in the form of U.S. Bank Trust's beneficiary declaration and declaration of Nathaniel Mansi show otherwise. Moreover, the Terhunes never offered evidence to the contrary. Indeed, in their motion for reconsideration they did not seek leave to introduce additional evidence—because they have none.

In the end, the Terhunes' disingenuous action is not supported by the law or evidence. Accordingly, with respect, this Court should affirm the trial court's granting of summary judgment and award the Respondents' attorney fees on appeal.

RESPECTFULLY SUBMITTED this 31st day of August, 2018.

By: s/ Thomas N. Abbott

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Attorneys for Respondents U.S. BANK
TRUST, N.A. as Trustee for LSF9 Master
Participation Trust, and CALIBER
HOME LOANS, INC.

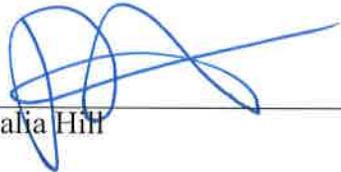
CERTIFICATE OF SERVICE

On August 31, 2018, I caused to be served upon the below named counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

Michele K. McNeill SKYLINE LAW GROUP PLLC 2155 112th Ave NE Bellevue, WA 98004 Phone: (425) 455-4307 Fax: (800) 458-1184 Email: michele@skylinelaw.com Counsel for Plaintiffs/Appellants	<input checked="" type="checkbox"/> Via the Appellate Court Web Portal <input type="checkbox"/> Via hand delivery <input checked="" type="checkbox"/> Via U.S. Mail, 1st Class, Postage Prepaid <input type="checkbox"/> Via Overnight Delivery <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Email
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**I certify under penalty of perjury under
the laws of the State of Washington that
the foregoing is true and correct.**

EXECUTED at San Francisco, California, on August 31, 2018.



Dalia Hill

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PERKINS COIE LLP

August 31, 2018 - 2:02 PM

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