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DIVISION II

NO. 51742-6-II

FLOYD and MARGARET SCOTT, husband and wife,
Plaintiffs/Appellants,

vs.

ALLY BANK CORP.; FEDERAL HOME LOAN MORTGAGE
CORPORATION; OCWEN HOME LOAN SERVICING, INC.;
QUALITY LOAN SERVICES CORP. OF WASHINGTON;
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC;
AND JOHN DOES 1-10
Defendants/Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON IN AND FOR THE COUNTY OF CLARK

APPELLANTS SCOTTS'
RESPONSE TO RESPONDENTS' REPLY

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I INTRODUCTION

This Response to Respondents' Reply Brief contains two Sections. The first section addresses claims made by Respondents in the Reply. The second section generally addresses the DOT and RCW 62A.9A-203.

II ARGUMENT

- A. **Disposing of the Non-Security-Follows-the-Note Claims in Ocwen's Reply Brief.**
1. **Under the Washington Deeds of Trust Act, Ocwen Could Not Have Commenced the Foreclosure as Freddie Mac's Agent.**

At page 4 of the Reply Brief ("Reply"), Ocwen makes the following claim:

The beneficiary of a deed of trust is the holder of the instrument or document evidencing the obligations it secures. (cite omitted). The beneficiary can act through an authorized agent in appointing the successor trustee and executing the statutory beneficiary declaration.

Reply at 4.

Respondents cite a string of cases that allegedly support this claim. *Id.* at 4-5. However, whether a beneficiary can act through an agent to appoint a successor trustee or to execute a beneficiary declaration is irrelevant to the outcome of this case, unless Respondents are claiming Ocwen acted through an unnamed beneficiary in appointing the successor trustee and in executing the beneficiary declaration.¹

¹ Respondents cannot make such a claim with a straight face. Ocwen appointed the successor trustee and executed the beneficiary declaration.

Under the current version of the Washington Deeds of Trust Act (“DTA”), Ocwen is the beneficiary of the DOT because it holds Plaintiffs’ Note. *Id.* It can’t be the principal and the agent of the principal at the same time.

Freddie Mac cannot be the “beneficiary” referred to on pages 4 through 6 of the Reply. Freddie Mac never held the Note during the foreclosure proceeding. Not for a single second. During the foreclosure proceeding, therefore, Freddie Mac never met the “beneficiary” definition contained in RCW 61.24.010(2). Not for a single second. Further, *Brown v. Dept. of Commerce*, 184 Wn. 2nd 509 (2015) specifically denies “beneficiary” status (i.e., “principal” status) to Freddie Mac under the facts presented in this case. Consequently, Freddie Mac could not have been the “principal” for whom Ocwen appointed the successor trustee and authored the beneficiary declaration.

Respondents’ agency argument is moronic.

Given the language of the current version of the DTA, agency can play no part in the decision of this case. Respondents’ confused claim that Ocwen is both the beneficiary of the DOT and the agent for the beneficiary of the DOT—at the same time—is the kind of confused analysis that is inevitable when one writes about a subject one clearly does not fully understand.

2. RCW 61.24.030(7)(a) Is Not a Provision in the UCC.

Respondents make the following claim at page five of the Reply: “The Court in *Brown* held that Washington’s Uniform Commercial Code at RCW 61.24.030(7)(a) authorized a holder of a note to enforce the obligation through foreclosure, even if another entity ‘owned’ it.” RCW 61.24.030(7)(a) is not part of the Washington version of the Commercial Code (“UCC”). It is part of the DTA. Moreover, under the current version of the DTA, Ocwen did not need, and could not have benefited from, Freddie Mac’s authorization to foreclose. Allegedly, Ocwen holds the Note. Under the DTA, therefore, Ocwen is the beneficiary, and Freddie Mac is not. Because it is not the beneficiary as that term is defined in the DTA, Freddie Mac cannot authorize Ocwen to foreclose. Either Ocwen may foreclose because it is the beneficiary, or Ocwen is not entitled to foreclose.

3. PETE Status Alone Does Not Give the PETE the Right to Foreclose.

The UCC, RCW 62A.3-301, authorizes the person entitled to enforce the note (the “PETE”) to enforce the borrower’s *personal obligation* to pay the note according to its terms. A foreclosure action, on the other hand, is an *in rem, or quasi in rem*, action. It has nothing to do with a borrower’s *personal obligation* on a promissory note. It has everything to do with the lender’s right to enforce its right to repayment of the mortgage debt by taking enforcement action against the property

placed in the trust to secure repayment of the mortgage debt. Foreclosure is an *in rem* action. Enforcement of a promissory note is an *in personam* action.

The UCC *grants* the right to enforce the borrower's *personal* obligation to pay the note according to its terms—the enforcement of an *in personam* obligation—to any person in the world who holds the borrower's blank-endorsed promissory note, even a thief.² See RCW 62A.1-201(b)(21) and RCW 62A.3-301. But RCW 62A.9A-203 and Section 22 of the DOT restrict the right to enforce the borrower's obligation to repay the mortgage debt by selling the borrower's home—the enforcement of an *in rem* obligation—to only one person in the world—the lender.

Respondents fail to offer a nuts and bolts explanation for why or how holding the right to enforce the borrower's personal obligation to pay the note somehow enables the servicer to escape the need to meet the requirements of Section 22 of the DOT, RCW 61.24.030(3), and RCW 62A.9A-203 to enforce the DOT's *in rem* obligation. This escape is essentially perplexing because RCW 62A.9A-203 is the codification of the common-law security follows the note doctrine (*See Official Comment 9 to UCC § 9-203*), and Respondents claim Ocwen right to foreclose is based on the common-law security follows the note doctrine

² Does this Court, and all other Washington Courts, really want to continue to hold that a thief who steals a blank-endorsed, secured mortgage note has the right to sell a homeowner's home if the mortgage note falls into default? That, among other things, is what the current version of the DTA and the holding in *Brown* authorize.

4. Noteholder Is Not “Entitled to Payments Due under the Note.

At page six of the Reply, Respondents accuse Plaintiffs of conceding “that the noteholder is *entitled to payments due under the note.*” Nothing written on page 24 or 29 of the Opening Brief makes such a concession.

Plaintiffs concede that Ocwen is *entitled to collect payments* due under the note. However, Freddie Mac, not Ocwen, is *entitled to the payments* Ocwen collects. There is a big difference between our concession and what Respondents claim we have conceded. Ocwen is merely entitled *to collect* Freddie Mac’s payments. Saying that Plaintiffs have conceded that Ocwen is entitled to the payments suggests Plaintiffs believe Ocwen is entitled to the *economic benefit* of the payments it collects.

To be clear, Ocwen is not entitled to the economic benefit of the payments it collects. The deed of trust secures the *economic benefit* of the note payments, not the piece of paper that the note is written on. After all, it is the *economic benefit* derived from the collection of the payments, not the promise to pay, that pays off the mortgage debt. After Freddie Mac transferred the blank-endorsed note to Ocwen, the *economic benefit of the payments* continued to belong to Freddie Mac; and Plaintiffs continued to owe the mortgage debt to Freddie Mac, not Ocwen. Plaintiffs do not owe a debt to Ocwen.

The only thing Plaintiffs owe Ocwen is the legal obligation to make their payments to Ocwen. The DOT does not secure that obligation to Ocwen. It secures to Freddie Mac (the lender) the payments Plaintiffs are obligated by law (RCW 62A.3-412) to make to the noteholder, which happens to be Ocwen at this time.

The precision use of language is critically important to a proper resolution of this litigation. For too long the courts of this state have allowed lenders and servicers to bend and even break the law by interpreting loosely language the authors intended to be used very precisely. This, even though the courts are supposed to interpret the language of the DTA strictly in favor of borrowers.

5. Plaintiffs' Claim Does Not Rest on the Notion That Only the Original Lender May Commence a Foreclosure.

At page nine of the Reply, Respondents state “[t]he Appellants’ case rests heavily on the fanciful notion that only the originating lender under the Deed of Trust may commence a foreclosure sale (i.e. it can never be transferred or otherwise assigned)[.]” For good reason, Respondents do not cite any page of our brief as support for this assertion. This statement is a blatant fabrication that has nothing to do with any position Plaintiffs have taken. In fact, the statement represents the opposite of what we assert in the Opening Brief.

At pages 26 through 28 of the Opening Brief, Plaintiffs explain how Section 13 of the DOT enables the original lender (or any subsequent

successor lender or assignee lender) to transfer the security provided by the DOT by selling the mortgage note.³ And, at pages 39 through 44 of the Opening Brief, Plaintiffs explain how and when RCW 62A.9A-203 provides for the transfer of the note, the mortgage debt, and the DOT.

The fact that Respondents, who have an ethical obligation to tell the court the truth or say nothing, can state such a brazen falsehood about Plaintiffs' positions without fear of sanction or reprimand by the court is extremely disturbing.

6. Plaintiffs Alleged Injuries and Causation under the CPA.

At page 10 of the Reply, Respondents allege "Petitioners have failed to establish how the transfer of the loan caused them any injuries." Wrong. Respondents moved under CR 12(b)(6) to dismiss on the pleadings. In deciding the motion, the trial court was required to assume to be true all factual allegations in the complaint. Regarding damages and causation in the CPA claim, Plaintiffs alleged the following:

4.5 The public interest is negatively impacted by the pattern of conduct engaged in by Defendants. Each homeowner in this state, including each of the Plaintiffs, has an absolute, unencumbered right to remain in his home – whether making the mortgage payments on the home or not -- until the *lawful beneficiary of a deed of trust* that lawfully encumbers his home utilizes the power of sale

³ Because the lender, at the commencement of the mortgage loan relationship, agrees to accept the note as the method of repaying the mortgage debt, the mortgage debt and the payments required by the mortgage note are always tied to one another and are always owned by the same person. Thus, the lender simultaneously sells the mortgage debt when it sells the mortgage note (i.e., it sells the *beneficial interest* in the note payments).

contained in that deed of trust to remove him from the home *lawfully*.

4.6 Thus, if the power of sale is unlawfully invoked, the homeowner is unlawfully injured, regardless of how many mortgage payments the homeowner has failed to make. Under such circumstances, defendants are the “but for” cause of Plaintiffs’ injuries. In this case, therefore, Defendants, and each of them, are the “but for” cause of Plaintiffs’ injuries.

4.7 As explained in far greater detail in the Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, for the following reasons *Plaintiffs have been unlawfully injured*: (1) The DOT secures only Freddie Mac (i.e., the person from whom the money was borrowed), the owner of the debt, against the possibility Plaintiffs will default on the obligation to repay the mortgage debt according to the covenants and agreements in the Note; (2) RCW 62A.9A-203 requires a person to own the mortgage debt, and to own and hold the mortgage note that is given in payment of the mortgage debt, to be entitled to enforce the DOT that secures the mortgage debt; (3) RCW 62A.3-310 and Official Comment 3 to UCC § 3-310 prohibits the mere holder of a note from enforcing the underlying debt obligation for which the note is taken as payment; and (4) the members of the Permanent Editorial Board (“PEB”) of the Uniform Commercial Code, the official interpreters of the correct meaning of provisions of the UCC, unanimously agree that the security follows the note doctrine as codified at RCW 62A.9A-203 (UCC § 9-203) means the security follows a transfer of ownership of a note.

4.8 Because each Defendant engages in the practices herein complained against as a routine matter, each Defendant’s actions in this matter affects the public interest.

4.9 Plaintiffs have been injured in their business and property. Plaintiffs have expended thousands of dollars *before commencing this litigation investigating Defendants’ actions to determine whether their actions were lawful. Plaintiffs have also lost business profits while investigating Defendants’ actions. Plaintiffs’ expenses are compensable. And Plaintiffs’ lost profits expenses are ongoing. These injuries are solely the result of Defendants’ conduct.*

Investigatory expenses prior to the commencement of litigation, and other expenses Plaintiffs incurred as a result of Respondents' unlawful foreclosure, satisfy the damage element of a CPA claim. *St. Paul Fire & Marine Ins. Co.*, 33 Wn. App 653, 659 (1983).

7. Plaintiffs Do Not Concede the Foreclosure Commenced as a Result of the Default.

At page 10 of the Reply, Respondents allege "Appellants concede the default under the loan, and that the foreclosure commenced as a result of the default." First, Respondents do not properly cite to the record. Second, Plaintiffs concede that we missed note payments and that a foreclosure commenced; but we do not concede that the foreclosure commenced as a result of the default.

Under Section 22 of the DOT, the only default in the obligation to make note payments that commences a foreclosure proceeding *is a default declared by the lender*. And under RCW 61.24.030(3), only a default, which, under the terms of Section 22 of the DOT, makes operative the power to sell the property, empowers the trustee to conduct a non-judicial foreclosure proceeding.

Consistent with the requirements of Section 22 of the DOT, RCW 61.24.030(3), and RCW 62A.9A-203, the only default in the borrower's obligation to make note payments that lawfully commences a non-judicial foreclosure proceeding is a default declared by the lender. In this case,

Freddie Mac has not declared the note in default. And it could not do so if it wanted to. Freddie Mac does not hold the note.

8. Plaintiffs Do Not Concede That They Reinstated the Note by Paying the Arrearages to Parties to Whom They Were Owed.

Also, at page 10, Respondents assert, “They [Plaintiffs] further concede that the underlying lawsuit was commenced in direct response to the foreclosure. (cite omitted). Moreover, they now concede that they have reinstated the loan by paying their admitted arrearage to the parties to whom they were owed.” First, again, Respondents improperly cite to the court record. Second, while we agree that this lawsuit commenced as a response to the unlawful foreclosure, we do not concede that we have paid the arrearages “to the parties to whom they were owed.”

We paid who we were forced to pay to avoid losing our investment in the home. We don’t know whether Freddie Mac owns the promissory note. Whether Freddie Mac owns the Note is one of the things we hope to find out through this lawsuit. Freddie Mac claims it owns the Note, and it probably does, but it has never been required to prove it.

9. Plaintiffs Could Not Have Made the Constitutional Claim in the Trial Court.

Respondents claim this Court should not consider Plaintiffs’ constitutional argument because we did not make the constitutional argument in the lower court. Nonsense.

We are constitutionally challenging RCW 61.24.030(7)(a) because the legislature has replaced the word “owner” with “holder.” Our claim is that the DOT contract, and RCW 62A.9A-203 for that matter, requires the *owner* of the note to foreclose. RCW 61.24.030(7)(a), as amended on June 7, 2018, is facially unconstitutional. A statutory provision is facially unconstitutional when “no set of circumstances exists in which the statute, as currently written, can be constitutionally applied.” *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P. 3rd 875 (2004). We argue that no set of circumstances exists in which RCW 61.24.030(7)(a) can be constitutionally applied because the provision as amended unconstitutionally impairs the obligations of the DOT contract (1) that the lender (i.e., the *owner* of the mortgage note) initiate foreclosure and (2) that the trustee be empowered to sell the property only *after the lender* has declared a default.

The Washington legislature replaced the word “owner” in RCW 61.24.030(7)(a) with the word “holder” effective June 7, 2018. Respondents moved to dismiss this case with prejudice on or about March 1, 2018. The trial court granted the motion with prejudice on or about March 16, 2018, almost three months before the June 7th amendments to the DTA took effect. Plaintiffs had no opportunity to raise the issue in the trial court. This is just another among numerous examples of Respondents throwing baseless, smelly allegations against the wall and hoping that they stick and that this Court doesn’t notice the smell.

10. Respondents Are Not Entitled to Attorney Fees.

Respondents demand attorney fees. If they win, they will not be entitled to attorney fees. *Worm v. Northwest Trustee Services of Washington*, 2016 Wash. App. LEXIS 2844 * 22. But they should not win.

11. RCW 61.24.030(3) Requires a Court Determination Whether a Default Occurred, which, by the terms of the DOT, Made Operative the Power to Sell the Property.

Finally, at page 15 of the Reply, Respondents claim that “[t]he plain language of the statute does not require a court adjudication to determine whether the default occurred for a trustee’s sale to commence.” That is true; but what does that fact have to do with any issue relevant to the decision of this case.

Plaintiffs have never claimed that the DTA requires a court adjudication to determine that a default has occurred for a trustee’s sale to commence. A trustee’s sale is a result of a *non*-judicial foreclosure. However, the court *is* required to determine whether a default has occurred, which, by the terms of the DOT, made operative the power to sell the property *if* the homeowner sues to prevent the sale. The court is required to apply the same DTA a trustee is required to apply in a non-judicial context.

B. How a Standard DOT Works.

From the perspective of the mortgage-loan borrower, a mortgage note is an *obligation to make payments* over a period of years, as the method of repaying the debt the borrower incurs by accepting the loan. As

the entity that loaned the money, the lender always owns each of the payments in the stream of payments the borrower is required to make and always owns the debt the borrower incurs by accepting the loan.

From the perspective of the lender, however, the same mortgage note represents the *right to receive periodic payments* over a period of years (i.e., the right to receive a stream of payments from the borrower over a period of years) as the agreed upon method of repaying the debt the borrower incurred by accepting the loan.

The deed of trust (“DOT”) secures *to the lender* repayment of the mortgage debt by the stream of payments the borrower personally obligates himself to make when he delivers the promissory note to the lender as the agreed upon method of repaying the debt. The relevant language of the DOT is clear:

This Security Instrument secures *to Lender*: (i) the *repayment of the Loan*, and all renewals, extensions and modifications of the Note; and (ii) the *performance* of Borrower’s covenants and agreements under this Security Instrument and the Note.

DOT, Transfer of Rights in the Property Section at _____. (emphasis and underscoring added).

The word “performance” is not defined in the DOT contract. Therefore, it has its ordinary meaning, which can be determined by reference to a standard dictionary. The dictionary defines the word “performance” as the *execution or accomplishment* of work, acts, feats, etc.”

The execution of a promise to pay is the promised payment. Thus, the deed of trust secures to the lender (i.e., the owner of the payments the borrower promises to make) the payments the borrower promises to make to repay the secured mortgage debt. This is the only sense in which the DOT secures the note.

A borrower would not breach the DOT agreement by stating that he or she would no longer promise to make the monthly note payments. The DOT does not secure the borrower's promise to make note payments. And if it doesn't secure the borrower's promise to make payments, and it doesn't, it certainly doesn't secure the servicer's right to enforce the borrower's promise to make payments.

The DOT secures "*performance*" of the borrower's promise to make note payments. *CP* at 62. Thus, while a borrower would not breach the agreement by stating he no longer promises to make monthly note payments, he surely breaches the agreement by failing to make any monthly payment that is due.

The security for any secured obligation (not just the secured obligation to repay a mortgage loan) will be transferred from one entity to another only when the interests the security secures are transferred from one entity to another. Consequently, if the DOT secures *to the lender* (i.e., the person who owns the mortgage debt and the monthly note payments the borrower is required to make) repayment of the mortgage debt by the

payments required by the note, then the security provided by the DOT (i.e., the borrower's ownership interest in the home) will transfer from the lender to a third party only if ownership of the mortgage debt and of the monthly note payments are transferred from the lender to that third party.

If you don't understand the meaning of the four immediately-preceding paragraphs, read them again! Understanding those paragraphs is critical to understanding why the notion that the transfer of a blank-endorsed mortgage note to a transferee simultaneously transfers the security for the mortgage note to the transferee is utter, thoughtless nonsense.

Other than by gift, there is only one way to transfer a mortgage debt for which a lender has accepted a mortgage note as the method of repayment. Similarly, there is only one way to transfer ownership of the stream of payments a borrower obliges himself to make by issuing a mortgage note. In each case, the lender may transfer the obligation *only by selling the promissory note*.

A lender does not transfer ownership of a mortgage debt, or ownership of the stream of payments a note obligates a borrower to make, by transferring a blank-endorsed, secured note to a third party while retaining ownership of the note. All that is transferred by such a transaction is PETE status. PETE status is not secured by a DOT.

1. RCW 62A.9A-203 Supports the Above DOT Analysis.

RCW 62A.9A-203, the codification of the common-law security follows the note doctrine, supports the DOT analysis in this Section B of this Response. The only legal authority Ocwen offers this Court as support for the claim that it is entitled to foreclose is the common-law security follows the note doctrine. Accordingly, if RCW 62A.9A-203 does not support their position, there is *no* legal support for their position.

RCW 62A.9A-203 does not support their position.

RCW 62A.9A-203 is written with math-like precision. For those who know how to analyze RCW 62A.9A-203 (unfortunately, very few, if any, lawyers or judges in this state know how to read it), it is a detailed road map to understanding the precise meaning of the common-law *security follows the debt/note⁴ doctrine.*

⁴ There is only one way in which the note and the mortgage debt are synonymous: the ownership interest in the note (i.e., the right to the payments required by the note (sometimes called the beneficial interest in the note)) and the ownership of the debt *always* belong to the same person. The same cannot be said of the right to enforce the note. RCW 62A.3-412 and 3-301 allow the owner of the note to separate *the right to the payments* required by the note from *the right to enforce the right to the payments* required by the note. When this voluntary separation occurs, the right to the payments (i.e., the right to the beneficial interest in the note) remains bound to the mortgage debt.

The DOT secures to the owner of the debt (i.e., the lender) repayment of the mortgage debt by the payments required by the note (i.e., by the beneficial interest in the note). Both secured interests (i.e., the mortgage debt and the payments required by the note to pay-off the mortgage debt) continue to be owned by the lender *after* the lender transfers the blank-endorsed note to the servicer.

Thus, after the servicer becomes the PETE, it does not own or hold either of the interests secured by the DOT; nor does it own the interest that secures the interests secured by the DOT (i.e., the beneficial interest in the borrower's ownership of the home). Those interests continue to be held by the lender. Given these indisputable facts, facts that Ocwen doesn't even attempt to dispute, how can any reasonable judge intelligent judge conclude that Ocwen, a person who is not a party to the DOT agreement; is not the owner of the note; is not the owner of the underlying mortgage debt; and is not

The security follows the note doctrine is not an abracadabra clause that one can simply sprinkle on any transfer of a secured promissory note, causing the transfer to then magically transfer the security for the note to the bedazzled transferee. As proven by the requirements of RCW 62A.9A-203, the doctrine refers to a specific type of transfer.

Washington courts, financial institutions, and servicers unanimously claim that a transfer of a blank-endorsed, secured mortgage note simultaneously transfers the security for that note. But none of these institutions ever explains the nuts and bolts of how this miraculous transfer of the security occurs. None of these institutions bothers to explain how transferring the right to enforce a note-maker's personal obligation to pay a promissory note—an *in personam* obligation—magically, automatically, and simultaneously also transfers the right to enforce the security obligation for that promissory note—an *in rem*, or quasi *in rem*, obligation—to the transferee. None of these institutions attempt to explain how this miraculous security transfer occurs because there is no explanation for how the transfer occurs. As Plaintiffs prove in the Opening Brief and in this Response, in nuts and bolts fashion, a transfer of the DOT does not occur when the lender merely transfers the right to enforce the note.

the beneficial owner of the security placed in the trust (i.e., is not the beneficial owner of the homeowner's ownership interest in the home) is the beneficiary of the DOT. The idea is ludicrous.

In fact, the clause, “*the security follows the debt/note*” was created *centuries* ago as a short-hand method of identifying what happens to the security for a promissory note when the promissory note is *sold*. In Washington, the doctrine has been codified at RCW 62A.9A-203:

9. Collateral Follows Right to Payment or Performance. Subsection (g) codifies the common law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien [i.e., the security follows the payment right (*not the right to enforce* the payment right, but *the payment right itself*).
Official Comment 9 to UCC § 9-203.

From the commencement of this litigation until the present day, Respondents have claimed Ocwen is entitled to foreclose because it is in possession of a secured, blank-endorsed note, and *the security for the note followed Freddie Mac’s transfer of the note into Ocwen’s hands*; even though Freddie Mac admittedly did not simultaneously transfer ownership of the note to Ocwen. The security follows the note doctrine is the only authority Respondents have offered for the claim that Ocwen is entitled to foreclose.

From the commencement of this litigation until the present day, Plaintiffs have claimed the opposite: The security did not follow Freddie Mac’s transfer of the blank-endorsed Note to Ocwen because Freddie Mac intentionally retained ownership of the two interests secured by the DOT – ownership of the payments required by the Note and ownership of the mortgage debt – when it transferred the Note to Ocwen.

The battle lines could not be more clearly drawn. Either Ocwen is right and, therefore, is entitled to foreclose; or Plaintiffs are right, and Ocwen is not entitled to foreclose. There is no ambiguity. Accordingly, RCW 62A.9A-203's requirements hold the key to the proper resolution of this case. That statutory provision explains in detail—in language that can be misconstrued only if one has difficulty assimilating and digesting abstract, complex ideas and analyzes the language with the objective of finding ways to obscure its meaning—exactly what kind of transfer of a secured promissory note the security for the note follows.

In our opening brief, we analyze RCW 62A.9A-203 extensively at pages 19, 20, 25, and 39-44. How many pages of the Reply does Ocwen devote to the discussion of RCW 62A.9A-203? None. How many paragraphs? None. How many words? None!

Plaintiffs' analysis of RCW 62A.9A-203, the only authority Respondents offer in support of their claim that Ocwen was entitled to foreclose when it commenced the foreclosure, is unrebutted. Either Respondents do not know RCW 62A.9A-203 is the codification of the *security follows the note doctrine*; or they do know RCW 62A.9A-203 is the codification of that doctrine, which means they know it does not support their position. In either event, it is astounding that Respondents never mention the provision in their Reply, even though analysis of the provision is prominent in Plaintiffs' Opening Brief.

Brown is the only Washington Supreme Court case, ever, to attempt to analyze RCW 62A.9A-203. Plaintiffs know this because our consultants assisted Rocio Trujillo in the preparation of her Article 9 arguments in *Trujillo v. NWTS*,⁵ at both the Appellate and Supreme Court levels. They gave the Report of the PEB of the UCC: *Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes* to Ms. Trujillo in early 2013; and she made the Report an exhibit in the appendix of her Opening, Division 1 Appellate Court Brief. The appellate court briefly mentioned RCW 62A.9A-203 in relation to an argument Ms. Trujillo made concerning RCW 62A.9A-313:

This argument is primarily based on footnote 38 of the Report.⁶ That footnote cites UCC § 9-313 and then discusses how possession of collateral may not be relinquished when it is delivered to another person. (ftn. Omitted). However, it is vital to understand the context of this footnote. The main text of the Report that is associated with this footnote states:

Section 9-203(b) of the Uniform Commercial provides that three criteria must be fulfilled *in order for the owner of a*

⁵ Division 1 of the Court of Appeals ruled nothing in Article 9 applies because Article 9 covers only personal property and a deed of trust is real property. In 2017, two years after the Washington Supreme Court attempted to apply RCW 62A.9A-203 in *Brown*, Division 1 still claimed, in *Pelzel v. _____*, Article 9 does not apply to foreclosures. We know this because our consultants also consulted with Keith Pelzel on the Article 9 issues in his case. In fact, it was our consultants who provided the Supreme Court with its first glimpse of the PEB's November 14, 2011 Report in late 2013. The document was almost 2 years old when the Washington Supreme Court got its first glimpse of the document. Our consultants began analyzing the document on November 15, 2011, one day after it was released to the public. They have continued to analyze the document ever since. They understand the concepts in the document a little bit better than everybody else.

They also consulted with the lawyers for Doris Brown on the Article 9A issues in *Brown v. Department of Commerce*. They have been involved in trying to bring the Courts up to speed on the importance of RCW 62A.9A-203 for several years now.

⁶ The "Report" referenced is the Report of the Permanent Editorial Board for the Uniform Commercial Code: *Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes*.

mortgage note effectively to create a “security interest” (either an interest in the note securing an obligation or the outright sale of the note to a buyer) in it.

****The third criterion may be fulfilled in either one of two ways.*** Either the debtor/seller must “authenticate” a “security agreement” that describes the note or ***the secured party must take possession of the note pursuant to the debtor’s security agreement.*** (ftn. Omitted). (emphasize in original).

Report at 9.

Trujillo, 181 Wn. App. 484, 503 (2014).

In the thousands of foreclosure cases that have been decided in Washington over the years, this brief reference to RCW 62A.9A-203 in *Trujillo* was the first time any Washington state court had commented on RCW 62A.9A-203 in relation to a non-judicial foreclosure proceeding. Every other reference to the provision in a Washington state court case occurs after June 2014, the month and year in which Division 1 decided the *Trujillo* case . . . wrongly as it turned out.

Plaintiffs know every other reference to the provision occurs after June 2014 because we conducted a search using the search terms “foreclosure” and “RCW 62A.9A-203.” The search returned seven cases: (1) *Brown v. Dept. of Commerce* (2015); *Malloy v. Quality Loan Services of Washington* (2017); *Riverstone Holdings Limited NW, LLC v. Lopez* (2017); *Worm v. NWTS* (2016); *Hendrickson v. HW Partners, LLC* (2013); *Cummings v.*

NWTS (2016); and *Hermosillo v. Quality Loan Services Corp. of Washington* (2017).⁷

Hendrickson, a case out of the United States Bankruptcy Court for the Eastern District of Washington, is the only one of the seven that was decided before June of 2014. It is a very gratifying case. *Hendrickson* analyzed RCW 62A.9A-203 in the context of a foreclosure.

The case is gratifying because the court's analysis of the statutory provision mirrors Plaintiffs' analysis of the provision. The analysis is gratifying because it confirms that at least someone in the court system understands that the provision applies in the foreclosure context and understands how to apply it. Here is what the bankruptcy court had to say about Article 9A's application to real property foreclosures and about how to analyze RCW 62A.9A-203.

Please read the following quote *carefully*. It will instruct you – as Plaintiffs have attempted to do – in the correct interpretation of the *security follows the note doctrine* in the real estate foreclosure context:

The UCC applies to transactions that create security interests in personal property. *RCW 62A.9A-109(a)(1)*. These notes all represent promises to pay monetary obligations arising out of the Eritage Project and secured by essentially the same real estate collateral. MKA argues that because the notes are secured by real estate the personal

⁷ Our consultants consulted on the Article 9 issues in five of the seven cited cases.

property rules (UCC) do not apply.⁸ MKA argues that Article 9 does not apply to “the creation or transfer of an interest or lien [in] or lien on real property . . .” *RCW 62A.9A-109(d)(11)*. Therefore, MKA was able to perfect its interest in the real estate mortgages pursuant to Washington’s real estate recording statute *RCW 65.08.070*, separate [from] and independent of the UCC rules.

This argument is *not persuasive* when one considers all the provision of *RCW 62A.9A-109* which defines the scope of the UCC in Washington.

Notes are instruments and by themselves are personal property. *RCW 62A.9A-102(a)(47)*. *In re Allen*, 134 B.R. 373, 375 (9th Cir. B.A.P. 1991). The fact that the notes are themselves secured by real estate mortgages is immaterial to their status as personal property. *RCW 62A.9A-109(b)* provides:

Security interest in secured obligation.

The application of this Article to a security interest in a secured obligation by the fact that the obligation is itself secured by a transaction or interest to which this Article does not apply.

Admittedly *RCW 62A.9A-109(d)(11)* takes creation or transfer of an interest [in] or lien on real property outside of the scope of Article 9. However it provides a specific exception for liens on real property. It provides in part as follows:

(d) **Inapplicability of Article.** This Article does not apply to:

...

(11) The creation or transfer of an interest in our [sic] lien on real property, including a lease or rents thereunder, except to the extent that provision is made for:

(A) Liens on real property in *RCW 62A.9A-203* and *RCW 62A.9A-308*.

...

Section *RCW 62A.9A-203* provides when attachment of a security interest⁹ takes place. Section (g) of that section provides:

(g) **Lien securing right to payment.** *The attachment of [a] security interest in a right to payment* or performance secured by a

⁸ This is precisely what Division 1 held in *Trujillo*. *Trujillo*, 181 Wn. App. at 502-504.

⁹ Remember, the term “security interest” includes the interest of the purchaser of a promissory note in a transaction governed by Article 9A. *RCW 62A.1-201(b)(35)*.

security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.

Thus, Washington's enactment of Article 9 adopts the rule that attachment of the security interest in the right to payment, in this case the notes/instruments, also constitutes attachment to the collateral securing the right to payment, i.e., the real estate mortgages.

This idea that the mortgage follows the obligation [i.e., that the security follows the note] is firmly established in Washington law

In Washington, “[a] mortgage creates nothing more than a lien in support of the *debt*¹⁰ which it is given to secure.” *Pratt v. Pratt*, 121 Wash. 298, 300, 209 Pac. 535 (1922) (citing *Gleason v. Hawkins*, 32 Wash. 464, 73 Pac. 533 (1903)); see also 18 STOEBUCK & WEAVER, *supra*, § 18.2, at 105.

Hendrickson, 2013 Bankr. LEXIS 3820 * 43-45.

PETE status is not a “security interest” that attaches to a *right to payment* (i.e., the beneficial interest in the note payments). Under 9A-203(g), a security interest attaches to the security for a secured mortgage note (i.e., a secured payment right) only if the security interest first attaches to the secured payment right (i.e., attaches to the mortgage note). When the lender transfers the blank-endorsed note to the servicer, the PETE status does not attach to the payment right because the lender retains the payment right (i.e., the beneficial interest in the note) and ownership of the mortgage debt—proving yet again that ownership of the payment and ownership of the mortgage debt always reside in the same person.

Although Plaintiffs were not aware of the existence of

¹⁰ In Washington, the deed of trust secures *repayment of the debt* and the payments required by the note. The widely-accepted, fallacious dogma that the DOT secures the note is just that: fallacious dogma.

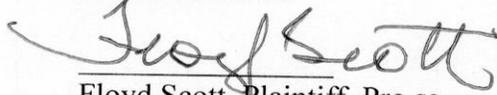
Hendrickson, or *Pratt*, or *Gleason* when we prepared our Opening Brief, the material quoted above tracks perfectly with the analysis of RCW 62.9A-203 provided at pp. 39-44 of our Opening Brief. Our analysis is more detailed, but the result is the same: Ocwen was not entitled to foreclose.

There is a great deal more that could and should be said, but we have a 25-page page limit. *RAP 10.4(b)*. The trial court's dismissal should be reversed, and the case should be returned to the trial with instructions for the court to take evidence on the issue of Respondents' compliance with the terms of the DOT and RCW 62A.9A-203.

Dated this 15th day of April 2019 at Ridgefield, Washington.

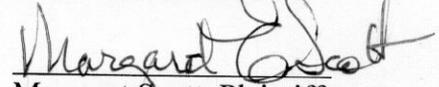
Respectfully Submitted

FLOYD SCOTT



Floyd Scott, Plaintiff, Pro se

MARGARET SCOTT



Margaret Scott, Plaintiff,
Pro se

CERTIFICATE OF SERVICE

I hereby certify that I have this day, April 15, 2019 served copies of the forgoing documents to the counsel of record listed below via USPS:

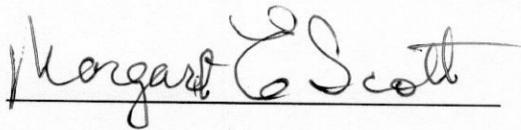
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DATED this 15th day of April 2019.

A handwritten signature in cursive script that reads "Margaret E. Scott". The signature is written in black ink and is positioned above a horizontal line.

Margaret E. Scott

MARGARET SCOTT - FILING PRO SE

April 15, 2019 - 8:29 PM

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