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Case No.: 51976-3-II

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

GREGORY GRAHN and SUSAN GRAHN, husband and wife,

Plaintiffs-Appellants,

v.

THE BANK OF NEW YORK MELLON, AS TRUSTEE FOR THE
CERTIFICATEHOLDERS OF THE CWALT, INC.
ALTERNATIVE LOAN TRUST 2007-9T1,
MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-9T1;
and NISQUALLY BLUFF HOMEOWNERS ASSOCIATION,

Defendants-Appellees.

**APPELLEE THE BANK OF NEW YORK MELLON'S
ANSWERING BRIEF**

Gregor A. Hensrude, Esq., Bar No. 45918
Stephanie Olson, Esq., Bar No. 50100
KLINEDINST PC
ghensrude@klinedinstlaw.com
solson@klinedinstlaw.com
Attorneys for Defendant-Appellee
The Bank of New York Mellon Corp.

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I. INTRODUCTION

The question before the Court is whether a former attorney now acting *pro se* can obtain a \$600,000 home free-and-clear, because of a scrivener's error in the chain of title that was subsequently corrected. Law, equity, and the trial court all provide the same resoundingly answer: no. Appellants Gregory and Susan Grahns' numerous fabricated legal theories are all baseless, and indeed some courts have gone through the Grahns' exact litany of arguments pertaining to deeds and summarily rejected each one.¹ This case is no different, so the trial court should be affirmed.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court err in rejecting Grahns' third-party challenges to a chain of assignments when the Grahns lack standing to challenge the chain of title, the chain of title is proper, and the Grahns have conceded that the Bank of New York Mellon (BONY) owns interest in the Property?

¹ "The Court need not engage in a lengthy analysis of Plaintiff's underlying theories of recovery. They are not independent causes of action and lack of any legal authority..." and proceeding to briefly reject the very arguments the Grahns present here. *See, e.g., Borowski v. BNC Mortg., Inc.* No. C12-5867-RJB, 2013 U.S. Dist. LEXIS 122104 at *13, 2013 WL 4522253 (W.D. Wash. Aug. 27, 2013). *See also Beck v. U.S. Bank N.A.*, No. C17-0882JLR, 2017 U.S. Dist. LEXIS 205925 at *9-14, 2017 WL 6389330 (W.D. Wash. Dec. 14, 2017); *Douglass v. Bank of Am. Corp.*, No. CV-12-0609-JLQ, 2013 U.S. Dist. LEXIS 72063 at *18, 2013 WL 2245092 (E.D. Wash. May 21, 2013) ("Given Plaintiffs' lack of Article III standing and the tremendous amount written on these subjects by other courts (many of which are cited to in the briefs), the court need not write at length on the fact that Plaintiffs' underlying theories are not independent causes of action and lack legal authority.").

1. Did the trial court err in dismissing the Grahns' split-the-note arguments when such theories have long been rejected by Washington courts, and the Grahns have previously represented to a bankruptcy court that their loans are secured?

2. Did the trial court err in dismissing the Grahns' statute of limitations arguments when the promissory note was payable by ongoing installments that had not been accelerated, and enforcement tolled the limitations period by at least three years?

3. Did the trial court err in granting summary judgment when the Grahns' procedural (and concededly harmless) claims about the evidence and BONY's arguments are not supported by the record?

III. STATEMENT OF THE CASE

This case presents a long and winding history of substantial loans, default, foreclosure, and litigation. Many of the facts presented in the Grahns' opening brief lack citations to the record, likely because such evidence does not exist or contradicts their statements. Accordingly, BONY outlines the relevant facts below with appropriate citations to the record.

A. In 2007, the Grahns Borrowed \$608,000.

On February 22, 2007, the Grahns borrowed \$512,000 and \$96,000 from Kitsap Bank and executed two promissory notes for those loans.

Compl. ¶ 10;² CP 72-74; CP 96-98.³ The note for the \$512,000 (hereinafter, “Note”), endorsed in blank and held in BONY’s physical possession,⁴ mandated repayment in monthly installments and matured thirty years from the date of signing, on March 1, 2037. CP 72; 96. The Note incorporated a simultaneously-dated deed of trust, stating that it was a “uniform instrument” with the deed of trust dated the same day as the Note, and that the deed would “protect[] the Note Holder from possible losses that might result if [Appellants] do not keep the promises that I make in this Note.” CP 73; 97.

That same day, the Grahns signed two deeds of trust (“Deeds”) encumbering the real property located at 623 Alma Lane SE, Olympia, WA 98513 (“Property”) as security for the notes. CP 88-89; CP 99-104; CP 226-242; Compl. ¶ 11. Both Deeds of Trust were recorded the following day under the numbers 3905328 and 3905329. *See* CP 49 (Assignment referencing Deed of Trust with Recordation No. 3905329) CP 230-242 (Deed of Trust with Recordation No. 3905328); CP 174-157 (same). The deed recorded under the number 3905328 incorporated the

² Pursuant to RAP 9.6(a), BONY submits herewith SUPPLEMENTAL DESIGNATION OF CLERKS PAPERS designating the Complaint for Declaratory Judgment and to Quiet Title filed March 1, 2017 (hereinafter, “Compl.”).

³ While only the Note evidencing the loan for \$512,000 is in the record, it is undisputed that the Grahns also borrowed \$96,000 and executed a different note and deed related to that loan. Compl. ¶ 10.

⁴ The Grahns concede that they obtained a copy of the Note from BONY in discovery.

Note evidencing the loan for \$512,000, and the Grahns' promise to pay the \$512,000 loan. CP 232-233.

Four days later, on February 26, 2007, Kitsap Bank assigned "all beneficial interest" under both Deeds to Mortgage Electronic Registration Systems, Inc. ("MERS"). CP 48-49.

B. BONY Obtained Beneficial Interest Under the Deed.

On May 3, 2010, MERS assigned all beneficial interest under the Deed with recordation number 3905328 to "THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS ALTERNATIVE LOAN TRUST 2007-9TI MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-9T1 AS APPAORPRIATE." CP 55 ("May 2010 Assignment"). The May 2010 Assignment encompassed the Property "as more fully described in said Deed of Trust *together with the Note or Notes therein described or referred to, the money due and to become due thereon with interest*, and all rights accrued or to accrue under said Deed of Trust/Mortgage." CP 55 (emphasis added).

C. In 2009, the Grahns Defaulted on the Loan and Non-Judicial Foreclosure Proceedings Commenced.

Only two years after signing the Notes and the Deeds, in or about February 2009, the Grahns stopped paying any monthly installments and

subsequently fell into serious default. CP 27. On March 19, 2009, the Grahns received a “Notice of Intent to Accelerate,” informing them of the need to cure the default and the possibility of foreclosure if they did not do so. CP 84-85. Countrywide Home Loans, servicing the loan, sent the Notice of Intent “on behalf of the holder of the promissory note.” CP 84-85.

On July 2, 2009, a Notice of Trustee’s Sale was recorded. CP 50-54. The Notice informed the Grahns that the “total amount due” to prevent the sale was \$23,566.89—demonstrating no acceleration had occurred. CP 51-52. The Notice did not mention any acceleration of payments. CP 50-54. Indeed, nothing in the record indicates that the payments were actually accelerated.

D. In 2010, the Grahns Declared Bankruptcy and Were Awarded the Discharge of all Non-Secured Debts, Which did not Include the Loans.

On September 30, 2009, the Grahns filed a Voluntary Bankruptcy Petition. CP 346-412. In the Petition, they represented under penalty of perjury that both the \$96,000 and the \$512,000 loans were secured. CP 359 (listing the “amount of secured claim” for the Property as \$596,294.00); CP 364 (listing the ‘amount of claim without deducting value of collateral’ for the Property as \$501,216.00 and \$95,078 and the ‘unsecured portion, if any’ as \$0.00 for each loan). The Grahns also

declined to list either loan on the 17 subsequent pages of unsecured claims. CP 366-384. Based on those representations, the bankruptcy court awarded discharge on January 27, 2010 for all non-secured debts, with a specific note that certain mortgager and security interests may remain if not avoided in the bankruptcy. CP 414-415; Compl. ¶ 15 (“In September 2009, PLAINTIFFS filed bankruptcy, and had all unsecured interests in the debts discharged.”).

E. The October 2010 Sale Inadvertently Omitted BONY’s Full Name.

The non-judicial foreclosure sale went forward on October 8, 2010 (“October 2010 Sale”). CP 27. Just prior to 2010 Sale, the Grahns still owed \$596,249 under the Note and Deed. CP 359; 364 (Voluntarily bankruptcy petition listing outstanding amounts of the loans).

On October 26, 2010, a trustee’s deed was issued to “The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificateholders, Alternative Loan Trust 2007-9T1 Mortgage Pass-Through Certificates, Series 2007-9T1.” CP 6-7; CP 203-204. This initial trustee’s deed omitted three words from BONY’s full name (“*of CWALT, Inc.*”) because that was the name on the May 2010 Assignment. However, on April 21, 2011, the trustee’s deed was re-recorded to reflect BONY’s full name as “The Bank of New York Mellon fka The Bank of New York,

as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2007-9T1 Mortgage Pass-Through Certificates, Series 2007-9T1.” CP 205-206 (emphasis added).⁵

F. The Parties Agreed to Void the October 2010 Sale in Light of the Scrivener’s Error.

On September 19, 2013, after realizing that an eviction should not occur because of the scrivener’s error, BONY filed a quiet title action for declaratory relief to affirmatively void the 2010 Sale (“2013 Action”). CP 62-66; CP 169-190. The Grahns did not contest the voiding of the trustee’s deed for the 2010 Sale, but attempted to obtain a ruling on the ownership of the title. CP 146-147 (24:21-147:6). During oral arguments, the Grahns conceded that BONY owned the beneficial interests in the Property: “I don’t agree I want a free house. It’s a subrogated interested owned by BNY or NBIA which I put in my brief.” CP 140 (18:7-10). The trial court rejected the Grahns’ attempt to determine anything other than the voidability of the sale, and specifically held that “*I’m not ruling in your favor about title.*” CP 147 (25:12-13). The final written order stated that “*per the agreement of the parties*, the Trustee’s Deed recorded October 26, 2010...and the re-recorded trustee’s deed...should both be declared void.” CP 209 (emphasis added). Thus, the trial court voided

⁵ The words “*of CWALT, Inc.*” were not included before the word “Certificateholders” on the initial trustee’s deed.

three things: 1) the October 2010 Sale; 2) the Trustee's Deed recorded on October 26, 2010, 2) the corrected Trustee's Deed recorded on April 21, 2011. CP 208-210. This left the last Deed of Trust in the record as the Deed of Trust in favor of "BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE HOLDERS ALTERNATIVE LOAN TRUST 2007-9TI MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-9TI AS APPROPRIATE" as though the October 2010 Sale had not actually occurred.

In an attempt to avoid further litigation that seemed inevitable by that ruling, BONY moved the court for an order affirming what the law seemed to make clear—that voiding the Trustee's Deed put the parties where they had been prior to the Trustee's Sale. CP 18-22. The Grahns disputed such action on procedural grounds, arguing that it was not specifically requested in BONY's Motion for Summary Judgment and procedurally improper. CP 215-225.

On January 13, 2015, the trial denied reconsideration on the summary judgment ruling, leaving the reinstatement open for future adjudication. CP 23-24; 212-213; *see also* CP 151-167. BONY later dismissed the 2013 Action in July 2016. Compl. ¶ 30.

G. The Grahns Filed this Case in Order to Obtain Title Free-and-Clear Without any Payments Since 2009.

As BONY anticipated, on March 10, 2017, the Grahns filed the underlying lawsuit to obtain free and clear title to the Property. *See* Compl.

While that lawsuit was pending, MERS corrected the scrivener's error on the May 2010 Assignment ("March 2018 Assignment"). While the May 2010 Assignment listed the Assignee as "THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS ALTERNATIVE LOAN TRUST 2007-9TI MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-9T1 AS APPAORPRIATE," the March 2018 Assignment added three words to reflect BONY's full name, and thus reflecting the assignee's name as the "THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWALT, INC., ALTERNATIVE LOAN TRUST 2007-9TI MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-9T1 AS APPAORPRIATE." CP 88-94 (emphasis added).

Both parties ultimately moved for summary judgment on all issues. CP 26-40; CP 105-117. On April 13, 2018, the trial court granted BONY's

Motion for Summary Judgment, CP 441-442, and subsequently denied the Grahns' Motion for Reconsideration. CP 448.

IV. ARGUMENT

Despite the Grahns' numerous creative and complex legal arguments—all of which the trial court correctly rejected—the record reveals that the Grahns' own stated purpose in this entire case is to obtain a free house, after paying for it for only two years. To do this, the Grahns create myriad novel arguments in hopes that one might have just enough merit to give them a glimmer of hope. None do.

A. **The Voiding of the October 2010 Sale Reinstated BONY's Interests in the Deed.**

The voiding of the October 2010 Sale reverted all beneficial interests under the Deeds back to the Assignee designated in the May 2010 Assignment, which was subsequently corrected to reflect BONY's full and complete name. It is well-established that in foreclosures, the voiding of a trustee's sale puts the parties back in the position before the sale occurred. "A void judgment is, in legal effect, no judgment. *By it no rights are divested*. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. In neither binds nor bars anyone." *State ex rel. Reed v. Gormley*, 40 Wn. 601, 605, 82 P.929

(1905) (emphasis added); *see also Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 427 fn.2, 334 P.3d 529 (2014).

Here, because the trial court voided the October 2010 Sale, it “never happened at all for legal purposes.” *Frias*, 181 Wn.2d at 427 fn. 2. Thus, the last action immediately prior to the October 2010 Sale determined the rights and title to the Property, which was the May 2010 Assignment assigning the beneficial interests under the Deed to MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS ALTERNATIVE LOAN TRUST 2007-9TI MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-9T1 AS APPAORPRIATE.” CP 55. BONY subsequently corrected the May 2010 Assignment by adding the three words “of CWALT, Inc.” to BONY’s official name. CP 92-94. Notably, this corrective assignment was not a transfer and simply clarified the assignee by adding the three words “of CWALT, Inc.”, which were inadvertently omitted from the prior assignment and which had spawned the entire previous litigation.

Not only is this argument eminently logical, but it is really the only conclusion that one could reach and still serve the interests of the Washington Deed of Trusts Act. If a typographical error in an assignment could not be corrected, or a lender who realized an error and properly went about to set aside the sale then *lost all interest as a result*, it would lead to

absurd consequences. Which is likely why no court in Washington known to BONY has ever done anything even remotely close.

B. Well-Established Law Summarily Rejects Each of the Grahns' Arguments Pertaining to the Deeds of Trust.

The trial court correctly rejected all of the Grahns' arguments pertaining to the Deeds of Trust. In a case squarely on all fours with this one, a *pro se* plaintiff filed a lawsuit seeking to quiet title and to obtain declaratory relief due to alleged "unlawful" transfers and assignments of a promissory notes and mortgage. *See Borowski v. BNC Mortg., Inc.*, 2013 U.S. Dist. LEXIS 122104 at *2, 2013 WL 4522253 (W.D. Wash. Aug. 27, 2013). The court unequivocally dismissed the quiet title claim with prejudice because of the plaintiff's outstanding balance on the mortgage. *Id.* at *9 (citing *Kelley v. MERS, Inc.*, 642 F. Supp. 2d 1048, 1057 (N.D. Cal. 2009), for the proposition that a plaintiff must allege facts demonstrating that they have satisfied their obligations under the deed of trust to quiet title). The court then dismissed plaintiff's request for declaratory relief for at least four reasons.

First, noting that it "need not engage in a lengthy analysis of Plaintiff's underlying theories of recovery" because "they are not independent causes of action and lack of any legal authority," *Id.*, the court simply held that "Plaintiffs' contention that separation of the Note

from their Deeds of Trust render the Note unenforceable or excuses payment is contrary to *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1044 (9th Cir. 2011) (rejecting the ‘separation of the note’ theory).”

Second, the court rejected the argument that lack of successor trustees invalidates the deed for want of any authority. *Id.* (“there is no authority which provides that the failure to appoint a successor trustee on the Deed of Trust is a basis for extinguishing the instrument.”).

Third, it denied plaintiff’s challenge to the chains of title because “there is ample authority that borrowers, as third parties to the assignment of their mortgage (and securitization process), cannot mount a challenge to the chain of assignments unless a borrower has a genuine claim that they are at risk of paying the same debt twice if the assignment stands.” *Id.*

Fourth, it rejected the plaintiff’s attempt to rely on *Bain* as support for voiding the deed, reasoning that “the *Bain* decision does not stand for the proposition that naming MERS as a beneficiary on a Deed of Trust voids the deed or invalidates a lender’s entitlement to repayment on the loan.” *Id.* Instead, it held that “[t]he *Bain* Court specifically stated that it ‘tended to agree’ that a violation of the Deed of Trust Act ‘should not result in a void deed of trust.’” *Id.* (citing *Bain*, 175 Wn.2d 83, 113, 285 P.3d 34 (2012)).

Thus, the court concluded that “[a]t present Plaintiff has asserted no more than a mere demand that Defendants prove their legal status with respect to the Deed of Trust and Note. This does not suffice to establish a case or controversy.” *Id.* at *12-13. Accordingly, the court dismissed the plaintiff’s complaint and causes of actions in their entirety with prejudice. *Id.* at *13-14.

Here, just like the plaintiff in *Borowski*, the Grahns’ arguments contradict numerous and well-established points of law and should be rejected for at least five reasons.

1. The Grahns’ outstanding debt precludes all quiet title claims.

First, like in *Borowski*, the Grahns’ quiet title claims were appropriately dismissed because of their undisputed outstanding balance on the mortgage totaling over half a million dollars. *See Id.* at *7-9. “[T]o bring a quiet title claim, Plaintiffs must first allege facts demonstrating they have paid their outstanding debt.” *Gelinas v. Bank of Am., N.A.*, No. 16-1355-RAJ, 2017 U.S. Dist. LEXIS 45845 at *6, 2017 WL 1153859 (W.D. Wash. Mar. 28, 2017); *see also Kelley v. MERS, Inc.*, 642 F. Supp. 2d 1048, 1057 (N.D. Cal. 2009) (“Plaintiffs have not alleged...that they have satisfied their obligations under the Deed of Trust. As such, they have not stated a claim to quiet title.”).

Here, the Grahns have not only failed to allege any facts demonstrating that they have paid their outstanding debt, they freely admit that they have *not* paid anything on their combined debt ***for over nine years*** while simultaneously enjoying the benefits of a \$608,000 house. Compl. ¶ 14. The Grahns' own Complaint facially precludes their quiet title claims.

2. The Grahns' reliance on the long-rejected "split-the-note theory" appropriately prevented declaratory judgment.

Second, just as in *Borowski*, the trial court appropriately sided with a long line of Washington precedent in rejecting the Grahns' "split-the-note" theory. *See Borowski*, 2013 U.S. Dist. LEXIS 122104 at *12. "[I]t is not a violation in Washington to split the note from the deed." *Beck v. U.S. Bank N.A.*, No. C17-0882JLR, 2017 U.S. Dist. LEXIS 205925 at *10, 2017 WL 6389330 (W.D. Wash. Dec. 14, 2017) (quoting *Zamzow v. Homeward Residential, Inc.*, No. C12-5755 BHS, 2012 U.S. Dist. LEXIS 179639, 2012 WL 6615931, at *1 (W.D. Wash. Dec. 19, 2012) (further citing *Bain*, 285 P.3d at 48-49). "Thus, any contention...that foreclosure is improper because the note and the deed of trust are 'split' fails as a matter of law." *Beck*, 2017 U.S. Dist. LEXIS 205925 at *10 (citing *Robinson v. Wells Fargo Nat'l Ass'n*, No. C17-006JLR, 2017 U.S. Dist. LEXIS 81354, 2017 WL 2311662, at *4 (W.D. Wash. May 25, 2017)); *see also*

Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034, 1044 (9th Cir. 2011) (“Even if we were to accept the plaintiffs’ premises that MERS is a sham beneficiary and the note is split from the deed, we would reject the plaintiffs’ conclusion that, as a necessary consequence, no party has the power to foreclose.”); *Lablond v. PHH Mortg. Corp.*, 2016 U.S. Dist. LEXIS 110963 (W.D. Wash. Aug. 19, 2016) (“If she is arguing that the sale of the Note itself discharged her debt, that claim is without support. Indeed, it has been rejected by the Washington Supreme Court, as well as the Ninth Circuit, which concluded that such a theory ‘has no sound basis in law or logic.’”) (citing both *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034 (2011) and *Bain v. Metropolitan Mortg. Grp., Inc.*, 175 Wash. 2d 83, 285 P.3d 34 (2012)).

Here, the Grahns’ “split-the-note” arguments fail as a matter of law. *See supra*. The Grahns reveal the weakness of their “split-the-note” argument by basing it entirely on *Bain*, *see* App. Br. at 15-18, which actually directly undercuts “split-the-note” theories. *Bain* affirmatively held that there was insufficient evidence in the record to determine a split, but then opined that an equitable mortgage may be the appropriate remedy for any such hypothetical split. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 112-13, 285 P.3d 34 (2012) (“In the alternative, *Selkowitz* suggests the court create an equitable mortgage in favor of the noteholder.

If in fact such a split occurred, the *Restatement* suggests that would be an appropriate resolution. But since we do not know whether or not there has been a split of the obligation from the security instrument, we have no occasion to consider this remedy.”).

But more ludicrous than the Grahns’ clearly rejected “split-the-note” argument is their factually unsupported claim that their 2010 bankruptcy discharged all their secured debts. Without any citation to authority, the Grahns claim that their bankruptcy in 2010 “fully discharged” “all rights of the debt-owner” “and no secured interests survive.” App. Br. at 17 (emphasis added). But the Grahns fail to cite any evidence showing that the 2010 bankruptcy fully discharged all their secured interests. Earlier, they alleged the exact opposite in their Complaint. *See* Compl. ¶ 15 (“In September 2009, PLAINTIFFS filed bankruptcy, and had all unsecured interests in the debts discharged.”) (emphasis added). But regardless of the Grahns’ contradictory statements and lack of supporting authority, “[s]ettled law holds that such a lien [on a deed of trust on property that secures payment of a promissory note] is not

discharged and remains enforceable after such a discharge.” *Edmundson v. Bank of Am., NA*, 194 Wn. App. 920, 922, 378 P.3d 272 (2016).⁶

3. *The Grahns lack standing to obtain declaratory relief for challenges based on the chain of title.*

Third, just as in *Borowski*, the Grahns lack standing “to mount a challenge to the chain of assignments of their mortgage (and securitization process)” without any “genuine claim that they are at risk of paying the same debt twice if the assignment stands.” *Borowski*, 2013 U.S. Dist. LEXIS 122104 at *12; *see also Beck v. U.S. Bank N.A.*, No. C17-0882JLR, 2017 U.S. Dist. LEXIS 205925 at *14, 2017 WL 6389330 (W.D. Wash. Dec. 14, 2017) (holding that Plaintiffs lack standing to challenge the assignments for failure to allege any risk of paying the same debt twice if the assignment stands). “In Washington, Plaintiffs, as third parties, lack standing to challenge the chain of their Assignment unless they can show that they are at risk of paying the same debt twice.” *Gelinas v. Bank of Am., N.A.*, No. 16-1355-RAJ, 2017 U.S. Dist. LEXIS 45845 at *7, 2017 WL 1153859 (W.D. Wash. Mar. 28, 2017). Failure to allege risk of double-payment means a lack of standing to challenge the chain of

⁶ Further, the Grahns have previously represented that the loans would remain secured. In Appellant’s Voluntary Bankruptcy Petition filed with the bankruptcy court on September 30, 2009, the Grahns declared under penalty of perjury that their debt to BONY was a secured debt. CP 350. Further, they declined to list their debt to BONY on the 17 subsequent pages of unsecured claims. CP 367-384. The bankruptcy court awarded discharge based on those representations, with a specific note that certain mortgage and security interests may remain if not avoided in the bankruptcy. CP 414-415.

assignments. *Gelinas*, 2017 U.S. Dist. LEXIS 45845 at *7 (citing *Borowski*); *see also Douglass*, 2013 U.S. Dist. LEXIS 72063 at *19-20 (rejecting the plaintiffs’ claims that “rest[ed] upon the allegation that no one in the world exists who can demonstrate they own their First and Second Notes, and therefore no trustee exists or can be appointed who can legitimately enforce their First and Second Deeds of Trust” based in part on lack of standing); *Brodie v. Nw. Tr. Servs., Inc.*, 12-CV-0469-TOR, 2012 WL 4468491 (E.D. Wash. Sept. 27, 2012) (collecting cases).

Here, the Grahns devote the first third of their arguments to challenging the chain of assignments in some way, even going so far as to argue that BONY has no interest in the underlying debt whatsoever. App. Br. at 13-18 (encompassing the Grahns’ Issues #1, 2B, and 2A). But the Grahns never alleged that they are at risk of double-payment on the debt—indeed, as stated above, the Grahns openly admit that they have hardly paid off *any debt at all* (specifically, only two years’ worth out of a 30-year mortgage). App. Br. at 20. Because the Grahns are not even remotely at risk of double payment, they lack standing to challenge the chain of assignments—and thus obviously cannot obtain any declaratory judgment based off of those impermissible challenges. *See supra*.

4. *The Grahns previously conceded that BONY properly acquired interest in the Note.*

Fourth, even if the Grahns had standing to challenge the chains of title—which they do not, as evidenced by their own arguments—then that challenge would be rejected since the record clearly reveals that BONY is the holder of the Note. The Grahns have already twice conceded BONY’s status as Note Holder. First, in the 2013 Action, the Grahns argued that “I don’t agree I want a free house. It’s a *subrogated interested owned by BNY or NBIA* which I put in my brief.” CP 140 (18:7-10). Second, the Grahns admitted that they received the Note endorsed in blank from BONY in discovery, thereby conceding that BONY had physical possession of the Note. CP 42 (#17 Promissory Note: Copy received by BNY-Trust from prior court action), CP 72-74 (Note endorsed in blank). In Washington, “actual physical possession of the original note endorsed in blank conveys holder status under Washington law.” *Blair v. Nw. Tr. Servs., Inc.*, 193 Wn. App. 18, 33, 372 P.3d 127 (2016); *see also U.S. Bank Nat’l Ass’n v. La Mothe*, 2016 Wash. App. LEXIS 394, 2016 WL 885001 (“Because the note was endorsed in blank and U.S. Bank had actual physical possession of the note, it was the holder of the note with the right to enforce it.”). Because BONY had actual physical possession of the note endorsed in blank, it is considered the “holder” of the Note. The

chain of title for the Note and the Deeds are clear and undisputable: the Note and the Deeds were assigned from Kitsap to MERS in February 2007, CP 48-49, and then from MERS to BONY in May 2010, CP 55, which was the assignment that was subsequently corrected. CP 92-93.

5. The Grahns' misrepresentations of Bain do not warrant declaratory relief.

Fifth, also as in *Borowski*, the Grahns attempt to contort *Bain* to invalidate attempts to obtain repayments on the loans. But “the *Bain* decision does not stand for the proposition that naming MERS as a beneficiary on a Deed of Trust voids the deed or invalidates a lender's entitlement to repayment on the loan.” *Borowski*, 2013 U.S. Dist. LEXIS 122104 at *13; *see also Douglass v. Bank of Am. Corp.*, No. CV-12-0609-JLQ, 2013 U.S. Dist. LEXIS 72063 at *19-20, 2013 WL 2245092 (E.D. Wash. May 21, 2013). Instead, “[t]he *Bain* Court specifically stated that it ‘tended to agree’ that a violation of the Deed of Trust Act ‘should not result in a void deed of trust.’” *Borowski*, 2013 U.S. Dist. LEXIS 122104 at *13 (citing *Bain*, 175 Wn.2d 83, 113, 285 P.3d 34 (2012)); *Douglass*, 2013 U.S. Dist. LEXIS 72063 at *19-20. This accords with the general principle that “[t]he law will not relieve a party of an obligation due to another’s mistake...[because] leaving the Bank without security for its loans would create an inequitable windfall” for the borrower. *U.S Bank*

Nat'l Ass'n v. Oliverio, 109 Wn. App. 68, 73, 33 P.3d 1104 (2001)

(affirming the trial court's decision to reinstate the Bank's security interest in the trust's property). Washington courts devote a special consideration to equity when ruling on mere defects in the conveyance instruments:

Here Walker does not allege a claim to quiet title based on the strength of his own title. Instead, he asks the court to void a consensual lien against his property because of a defect in the instrument creating that lien: the designation of an ineligible entity as beneficiary of the deed of trust. As previously noted, ***he cites no authority recognizing this defect as a basis to void a deed of trust and offers no equitable reason why a court should recognize his claim.*** As a matter of first impression, we decline to do so. We reject the argument that this defect in a deed of trust, standing alone, renders it void ***and note that Washington courts have repeatedly enforced between the parties a deed or mortgage that failed to comply with the statutory requirement of an acknowledgement.*** The trial court properly dismissed Walker's action to quiet title.

Walker v. Quality Loan Serv. Corp. of Wash., 176 Wn. App. 294, 322-23, 308 P.3d 716 (2013) (emphasis added).

But here, the Grahns seek the very inequitable windfall Washington courts are loath to entertain. Instead of reverting back to the same spot the parties were before the voided October 2010 Sale, the Grahns urge this Court to reverse the trial court and rule that they are entitled to a free-and clear title to a largely unpaid house merely because

they allege, without accurate citations, that BONY does not hold the Note at this point or at some other unspecified point throughout the history of the chain of assignments. App. Br. at 13-14. Even *if* that were true, then *Bain* cautions against the very outcome the Grahns request by holding that mere mistakes cannot give rise to voidance of an entire deed. *See Bain*.

6. *The Grahns are judicially and equitably estopped from quieting title and obtaining declaratory judgment.*

Finally, related to the equitable considerations that *Bain* urges this court to consider, the Grahns are both judicially and equitably estopped from succeeding on their claims. The Grahns essentially seek a free home to avoid paying off more than half a million dollars in debt, but both estoppel doctrines require a rejection of such attempts.

First, the Grahns are judicially estopped from asserting free-and-clear title because they previously took an inconsistent position in the 2013 Action, which the trial court relied on when deciding to leave the question of title undecided (and thus requiring years' worth of more litigation). "Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (quoting *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)). "The

doctrine seeks to preserve respect for judicial proceedings, and to avoid inconsistency, duplicity, and ... waste of time.” *Arkison*, 160 Wn.2d at 538 (internal quotations removed) (quoting *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 225, 108 P.3d 147 (2005)).

“Three core factors guide a trial court's determination of whether to apply the judicial estoppel doctrine: (1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.”

Arkison, 160 Wn.2d at 538-39 (internal quotations removed) (citing *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808 (2001)).

Here, all three factors weigh in favor of judicial estoppel. **First**, the Grahns' attempts to obtain a house free-and-clear of a mortgage after only two years of payments in this lawsuit is “clearly inconsistent” with its position in the 2013 Action, when they represented to the trial court that “I don't agree I want a free house. It's a *subrogated interested owned by BNY or NBIA* which I put in my brief.” CP 140 (18:7-10). **Second**, acceptance of the Grahns' now-inconsistent position means that either this Court or the prior court in the 2013 Action were misled. Indeed, the prior

court in the 2013 Action accepted and considered the Grahns' contention when it declined to make any specific ruling on ownership or title. The resulting Order omitted any decision to render the liability null and void and *eliminate all liabilities* on the Grahns' loan. **Third**, the Grahns would derive an unfair advantage or impose an unfair detriment on BONY if not estopped. Had the Grahns been transparent about their true motives in the 2013 Action (i.e., that they wanted a house free-and-clear of any mortgage) and not attempted to raise a faux dispute of fact, the trial court likely would have ruled immediately on the issue instead of declining summary judgment based on the Grahns' attempt to raise lingering factual disputes. The Grahns previously represented that they did not want "a free house" in order to obtain a desired result, and they secured that result (delaying ultimate summary judgment). That position spawned years of additional litigation. They cannot now argue the opposite and derive an unfair advantage and windfall from that prior inconsistent position.

The Grahns are also equitably estopped from obtaining the Property free-and-clear of any mortgage. "Equitable estoppel may apply where there has been an admission, statement or act which has been justifiably relied upon to the detriment of another party." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 19, 43 P.3d 4 (2002) (citing *Lybbert v. Grant County*, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000); *Beggs v.*

City of Pasco, 93 Wn.2d 682, 689, 611 P.2d 1252 (1980)). “Establishment of equitable estoppel requires proof of (1) an admission, act or statement inconsistent with a later claim; (2) another party's reasonable reliance on the admission, act or statement; and (3) injury to the other party which would result if the first party is allowed to contradict or repudiate the earlier admission, act or statement.” *Id.* at 19-20.

Here, the Grahns now want to vacate a very large debt that they have admittedly not paid on for numerous years, in complete contradiction of their prior statement in the 2013 Action. BONY reasonably relied upon the Grahns’ prior statement by initiating non-judicial foreclosure process to secure its interest prior to this instant lawsuit. If the Grahns were to succeed on its contradictory claims, BONY would be undoubtedly injured by the extinguishing of its security interest of over \$500,000.

Thus, the equitable doctrines themselves prevent the Grahns from succeeding on any of its quiet title or declaratory relief claims, and the trial court should be affirmed.

C. The Current Foreclosure is Timely Because BONY Initiated Lawful Proceedings Which Tolled the Statute of Limitations.

Likely recognizing meritless nature of their arguments pertaining to the Note and Deeds, the Grahns focus the second third of their

arguments on the statute of limitations. App. Br. 19-26. Their limitations arguments fail for at least four reasons.

1. The Note was payable in installments which have not yet become due.

First, the statute of limitations has not barred enforcement of the Note because it is an “installment” promissory note under which not all payments have become due. “Washington law distinguishes between demand promissory notes and installment promissory notes.” *Merceri v. Bank of N.Y. Mellon*, 4 Wn. App.2d 755, 759, 2018 Wash. App. LEXIS 1923, 2018 WL 3830033 (2018). “An installment promissory note....is payable in installments and matures on a future date.” *Merceri*, 4 Wn. App.2d at 759. “When recovery is sought on an obligation payable by 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.” *Merceri*, 4 Wn. App.2d at 759-60 (internal brackets removed) (quoting *Edmundson v. Bank of Am., N.A.*, 194 Wn. App. 920, 930-31, 378 P.3d 272 (2016)); see also *Herzog v. Herzog*, 23 Wn.2d 382, 388, 161 P.2d 142 (1945); *Erickson v. Am.'s Wholesale Lender*, No. 77742-4-I, 2018 Wash. App. LEXIS 811, 2018 WL 1792382, at *5 (Wash. Ct. App. Apr. 16, 2018). Thus, “[a] separate cause of action arises on each installment, and the statute of limitations runs separately

against each such installment.” *Spesock v. United States Bank, N.A.*, No. C18-0092JLR, 2018 U.S. Dist. LEXIS 165545 at *10 (W.D. Wash. Sept. 26, 2018).

Here, because this Note requires payment by monthly installments, it gives rise to ongoing causes of action. *See* CP 73-74 (“If I do not pay the fully amount of each monthly payment on the day it is due, I will be in default...”). Spanning over 30 years with a maturity date of **March 1, 2037**, the Note has accrued overdue payments even up through the filing of this appeal. CP 72. This allows for timely enforcement, if BONY so chooses.

2. The Note has not been accelerated.

Second, in an attempt to circumvent the ongoing limitations period, the Grahns levy an unsupported claim that their payments became accelerated in 2009, which fails as a matter of fact and law. “Acceleration 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.” *Merceri*, 4 Wn. App.2d at 759 (internal brackets removed) (citing *Glassmaker v. Ricard*, 23 Wn. App. 35, 38, 593 P.3d 179 (1979)); *see also Erickson v. America's Wholesale Lender*, No. 77742-4-I, 2018 Wash. App. LEXIS 811, 2018 WL 1792382 (Wn. Ct. App. Apr. 16, 2018). A “Notice of Intent to Accelerate” without more does **not** accelerate any

payments. *Merceri*, 4 Wn. App.2d at 759. Instead, “some affirmative action is required by the holder of the note that makes it clear and unequivocal to the payer that the holder has, in fact, declared the entire debt due.” *Merceri*, 4 Wn. App.2d at 756 (emphasis added); *Erickson*, 2018 Wash. App. LEXIS 811 at *7 (The notices simply informed [the plaintiff] of a future contingent event. For that event—acceleration of the entire debt—to take place, Countrywide had to take affirmative action manifesting its intent to do so).

Merceri is especially instructive because in that case, also involving BONY, the court clarified that payment obligations were not accelerated simply from BONY’s issuance of a Notice of Intent to Accelerate. In *Merceri*, a “[BONY] sent *Merceri* a notice warning her that the entire debt would be accelerated if she failed to cure her default.” *Id.* at 761. However, “[t]hereafter, [BONY] did not take an affirmative action in a clear and unequivocal manner indicating that the payments on the loan had been accelerated.” *Id.* “[BONY] never declared that the entire debt was due. Nor did it refuse to accept installment payments.” *Id.* The court also noted that “*Merceri* never received a notice of default setting forth an ‘accelerated balance due.’” Therefore, because “there [was] no evidence in the record that this lender exercised its option [to accelerate all payments

of the loan” the court held that the trial court erred in ruling that the payments were accelerated. *Id.* at 762, 760.

Here, without any citation to authority on the effects, application, or nuances of acceleration, and only ever citing only to a Notice of Intent to Accelerate, App. Br. at 5, the Grahns erroneously claim that “the debt was fully accelerated as of April 18, 2009” and therefore “the final bell on limitations rang on April 15, 2015.” App. Br. at 20.⁷ Notably, the Notice of Intent in this case uses the exact same language that the *Merceri* court found insufficient for the purposes of acceleration. *Compare*

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, 4 Wn. App.2d at 757 (emphasis in original) *with*

If the default is not cured on or before April 18, 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.

⁷ The Grahns also only ever relied on the 2009 Notice of Intent to Accelerate below. *See* CP 38 (Grahns’ Motion for Summary Judgment citing only the Notice of Intent of Acceleration); CP 421 (Grahns’ Reply in support of Motion for Summary Judgment citing only the Notice of Intent of Acceleration”); CP 260 (Grahns’ Response to BONY’s Motion for Summary Judgment citing only the Notice of Intent of Acceleration).

CP 84 (emphasis in original). Further, in this case and just like in *Merceri*, “[BONY] did not take an affirmative action in a clear and unequivocal manner indicating that the payments on the loan had been accelerated” after the issuance of the Notice of Intent. *Id.* Indeed, the subsequent Notice of Trustee’s Sale recorded in July 2009 affirmatively revealed that the full payment obligations (which exceeded over \$608,000) had **not** been accelerated CP 52 (“The default(s) referred to in paragraph III, together with any subsequent payments, late charges, advance costs, and fees thereafter due, must be cured by 09/21/2009...to cause discontinuance of the sale.”) ([Paragraph] III...**Total Amounts Due: \$23,566.89**. Other potential defaults do not involve payment of the Beneficiary.”) (emphasis added); *see also* CP 56-61. Also in this case and just like in *Merceri*, “[BONY] never declared that the entire debt was due. Nor did it refuse to accept installment payments.” *Id.* Further, the Grahns here also “never received a notice of default setting forth an ‘accelerated balance due.’” *Id.*

The Grahns’ attempt to skew the standard for acceleration by pointing to **their** failure to pay since 2009 as support of acceleration, *see* App. Br. 20. But acceleration is determined by the **holder’s** conduct, not the borrower’s. *See Merceri*, 4 Wn. App.2d at 756. Further, they have previously admitted under oath that their failure to pay had nothing to do with any subjective belief that the loan payments had been accelerated. CP

428; 438 (“Q: Why did you stop making your mortgage payments in January 2009?...A: We just couldn’t make them. Q: Did something happen that caused you to be unable to make your payments? A: We just couldn’t make them. Didn’t have any money.”). Finally, the Grahns never acknowledge the total amount due and owing on the date that they allege the acceleration occurred, further revealing that acceleration never happened.

Accordingly, because the Grahns have failed to provide any evidence that BONY “exercised its option [to accelerate all payments of the loan],” the Grahns’ incorrect, conclusory assertions of accelerations similarly fail. *Id.* at 762, 760.

3. *The non-judicial foreclosure proceedings tolled the statute of limitations.*

Third, there is no reasonable dispute in Washington that the pendency of non-judicial foreclosure tolls the statute of limitations. *Bingham v. Lechner*, 111 Wn. App. 118, 127, 45 P.3d 462 (2002); *see also Spesock v. United States Bank, N.A.*, 2018 U.S. Dist. LEXIS 165545 at *11 (W.D. Wash. Sept. 26, 2018) (noting that it was undisputed that “Washington courts recognize that the commencement of non-judicial foreclosure proceedings tolls the running of the statutory period.”); *Kerrigan v. Qualstar Credit Union*, No. C16-1528-JCC, 2016 U.S. Dist.

LEXIS 168597 at *10, 2016 WL 7103750 (W.D. Wash. Dec. 16, 2016) (“the Court concludes that *Bingham* is persuasive authority and agrees with Defendant and the other Western District of Washington court that has also applied *Bingham* to a similar set of facts: nonjudicial foreclosures toll the statute of limitations.”). Washington courts have further held “that the statutory limitation period applicable to enforcing payment of a loan is tolled during the duration of a foreclosure proceeding [beginning date of recordation of Notice of Sale] ***up to 120 days after the original sale date...even when the trustee does not exercise his ability to continue the sale.***” *Erickson v. Am.'s Wholesale Lender*, No. 77742-4-I, 2018 Wash. App. LEXIS 811, 2018 WL 1792382, at *9-10 (Wash. Ct. App. Apr. 16, 2018) (emphasis added); *see also Albice v. Premier Mortgage Servs. of Wash., Inc.*, 157 Wn. App. 912, 927, 239 P.3d 1148 (2010). “Washington courts similarly recognize that multiple, incomplete nonjudicial foreclosure proceedings may be counted together to toll the limitations period.” *Spesock*, 2018 U.S. Dist. LEXIS 165545 at *11 (W.D. Wash. Sept. 26, 2018) (citing *Erickson v. Am.'s Wholesale Lender*, No. 77742-4-I, 2018 Wash. App. LEXIS 811, 2018 WL 1792382, at *4 (Wash. Ct. App. Apr. 16, 2018) (combining four notices of trustee's sales to toll the statutory period for a total of over six years); *Fujita v. Quality Loan Serv. Corp. of Wash.*, No. C16-925-TSZ, 2016 U.S. Dist. LEXIS 111756, 2016

WL 4430464, at *2 (W.D. Wash. Aug. 22, 2016) (“Although the entire debt became due on July 16, 2009, the statute of limitations on [the bank's] ability to foreclose was tolled during the pendency of two Notices of Trustee Sale which were ultimately discontinued.”).⁸

In this case, the pendency of the non-judicial foreclosure stretched between the Notice recorded in July 2009 and the Sale that occurred in October 2010, and the litigation where the outcome of the sale was similarly pending:

07/02/09 (Notice) → 2/5/11 (Oct. Sale + 120 days) = **584 days**
07/13 → 07/16 (2013 Action) = **3 years**

More than four years of tolling provides more than enough time to cure any purported limitations issues.

The Grahns ignore this well-established authority and instead argue that only a statute (and not numerous courts interpreting the Deed of Trust Act (“DTA”)) can explicitly permit tolling, absent rare circumstances of equitable tolling. App. Br. at 20-22. However, under the DTA, a foreclosing party is *statutorily prohibited* from commencing or maintaining an action during the pendency of a non-judicial foreclosure. See RCW 61.24.030(4) (“It shall be requisite to a trustee’s sale: . . . That no

⁸ The Grahns claim that “the more analogous case [instead of *Bingham*] is *Dowell Co. v. Gagnon*, 36 Wn. App. 775, 667 P.2d 783, 785 (2004),” App. Br. at 23, but that case has nothing to do with non-judicial foreclosures.

action commenced by the beneficiary of the deed of trust is now pending to seek satisfaction of an obligation secured by the deed of trust in any court by reason of the grantor's default on the obligation secured.”). It is eminently reasonable and equitable to toll a period that limits when actions can be brought, during a time when DTA prohibits any actions from being brought.

The Grahns proffer a number of other arguments against tolling, all of which the trial court properly summarily rejected.

First, the Grahns incorrectly imply that the pendency of the litigation concerning the nonjudicial foreclosure should not toll any limitations period, App. Br. at 23-24, but the pendency of litigation on the underlying nonjudicial foreclosure is intrinsically and inseparably tied to the finality of the nonjudicial foreclosure itself. Indeed, without the litigation, the legal effect of the nonjudicial foreclosure would forever remain in limbo and undecided in the event of a dispute. In this particular case especially, the sale needed to be voided before a proper one could commence. But even more fundamentally, BONY could not possibly have instituted a foreclosure action during the three years BONY owned the property and until a judgment setting aside that sale was rendered.

Second, the Grahns argue that the voiding of the October 2010 Sale negates all tolling associated with the sale because of the nullifying

legal effect of voidable actions, but voided actions simply negate the *legal effect* of that action, and not the actual *time* that it took to complete that action. See *State ex rel. Reed v. Gormley*, 40 Wn. 601, 605, 82 P.929 (1905) (“A void judgment is, *in legal effect*, no judgment.”) (emphasis added). Otherwise, beneficiaries would still be precluded from filing actions on the underlying obligations during the pendency of nonjudicial foreclosures for a substantial amount of time regardless of the ultimate outcome of that action.

Third, the Grahns’ “parade of horrors” argument that parties will henceforth initiate improper foreclosure proceedings to toll the statutes of limitations is nonsensical. App. Br. at 23-24, 25-26. Courts have already held that nonjudicial foreclosures that ultimately do not result in a sale still toll the limitations period. *Spesock*, 2018 U.S. Dist. LEXIS 165545 at *11 (W.D. Wash. Sept. 26, 2018) (“Washington courts similarly recognize that multiple, incomplete nonjudicial foreclosure proceedings may be counted together to toll the limitations period.”). Further, if and when the beneficiary does initiate nonjudicial foreclosure proceedings, the borrower enjoys several protections, such as the right to use and enjoy the property during the pendency of the nonjudicial foreclosure proceedings like the Grahns have here.

4. *The Grahns conceded the existence of a debt.*

Fourth, it is axiomatic that a debtor can re-start the statute of limitations by acknowledging the existence of the debt. RCW 4.16.280 dictates that the limitations period can be re-started by:

(1) an acknowledgement of the debt; (2) in writing; and (3) signed by the debtor.

When a writing is made before the limitations period has expired, any acknowledgment of the obligation necessarily implies an agreement to pay, unless something in the acknowledgment requires a contrary conclusion. An effective acknowledgement must either expressly promise to pay or acknowledge that the obligation exists. Either is sufficient, but it need not contain both. If the writing contains the latter, it must express a clear admission of the debt. Moreover, it must be communicated to the creditor and not indicate an intention not to pay.

Fetty v. Wenger, 110 Wn.App. 598, 602, 36 P.3d 1123 (2001) (footnotes omitted). In *Fetty*, a letter stating “I am writing again to request an itemized billing from you for your services and would like to know how much we owe you. . . .” was deemed an acknowledgement. *Id.* at 603. Notably, the court held that a dispute over the amount did not negate the acknowledgement. *Id.*

Here, in 2013, the Grahns acknowledged in writing that the underlying obligation to pay exists, and admitted the amount and original

note pertaining to the debt. CP 169-175 (2013 Action Compl.); CP 192-199 (Grahns' Answer Complaint, ¶¶ 8, 9). For example, the Grahns admitted as follows:

BONY's Quiet Title Complaint Filed in 2013

7. On February 22, 2007, Gregory Grahns and Susan Grahns borrowed the principal sum of \$512,000.00 from Kitsap Bank ("Kitsap"). The loan is evidenced by a promissory note ("Note") executed by the Grahns.

8. As security for the Note, Gregory Grahns and Susan Grahns, husband and wife, executed a Deed of Trust (the "Deed of Trust") in favor of Kitsap, on property commonly known as 623 Alma Lane SE, Olympia, WA 98513 (the "Property"). The Deed of Trust is recorded under Thurston County Recorder's No. 3905328. A copy of the Deed of Trust is attached hereto as Exhibit 1.

Grahns' Answer to Quiet Title Complaint

7. Admit, but affirmatively deny that said document stated therein has been attached to the complaint.

8. Admit.

CP 170-171; 193.⁹ These acknowledgments were made in 2013 and well before any statute of limitation expired and make any action timely on the installment loan obligations. Thus, the Grahns lack a valid claim for extinguishment of any security interest based upon RCW 7.28.300 because the installment note extends well beyond the six-years alleged; BONY's non-judicial foreclosure and prior litigation tolled the limitations

⁹ These same admissions mirror the Grahns' allegations (¶¶ 10 and 11) in this case.

period; and the Grahns acknowledged the debt in writing thereby extending the limitations period.

D. The Grahns' Objections to BONY's Arguments and Representations of Previous Proceedings are Easily Settled by the Record.

As a last-ditch effort to obtain a free house, the Grahns devote the last third of their arguments to re-hashing their objections to 1) BONY's statements in the underlying action as compared to the 2013 Action, 2) BONY's characterization of the ruling in the 2013 Action; and 3) BONY's argumentation submitted in the briefings. App. Br. at 27-32 (encompassing Issues #4 and #4A). The Grahns cannot cite to any law showing this has any bearing on the outcome of the trial court's ruling, because there is none. Even the Grahns admit that these "matters could be seen as harmless errors"—and in this respect, they are right.

Regardless, a quick review of the record easily refutes the Grahns' tired objections. For example, the Grahns repeatedly cry foul with the fact that MERS was identified as a beneficiary in previous pleadings and argue that such labeling means that BONY cannot now be a beneficiary. But simply because MERS was a beneficiary at one point in time does not preclude BONY from acquiring interests at a later point—indeed, the acquisition of those interests is the entire subject of this case. App. Br. at 29. Further, in continuing to complain about BONY's statements

describing the 2013 Action and related ruling on title reinstatement, the Grahns simply ignore the fact that the trial court in that case denied *summary judgment* of the title reinstatement based *on material issues of fact*, therefore leaving the question of reinstatement open for trial. The trial court did not “absolutely deny reinstatement” – it simply denied the issue at the summary judgment stage. The record easily refutes the Grahns’ semantic objections, and instead directly supports BONY’s statements and synopses.

V. CONCLUSION

The Grahns’ numerous and novel legal theories are resoundingly rejected by clear principles of law and equity. Their attempts to circumvent their prior covenants and warranties to obtain title free-and-clear to a \$600,000 house must fail. BONY respectfully requests that this Court affirm the trial court.

DATED: October 5, 2018

KLINEDINST PC

By: /s/ Gregor A. Hensrude
Gregor A. Hensrude, WSBA No. 45918
Stephanie Olson, WSBA No. 50100
Attorneys for Defendant-Appellee THE
BANK OF NEW YORK MELLON
CORP., as Trustee for the Certificate
holders of CWALT, INC., Alternative
Loan Trust 2007-9T1 Mortgage Pass-
Through Certificates, Series 2007-9T1

PROOF OF SERVICE

I, Sharon K. Hendricks, certify that on October 5, 2018, I filed the foregoing APPELLEE THE BANK OF NEW YORK MELLON'S ANSWERING BRIEF with the Clerk of the Court for the Washington State Court of Appeals, Division II, by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Sharon K. Hendricks

Sharon K. Hendricks, Legal Assistant

KLINEDINST PC

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