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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 324745-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THOMAS F. MERRY,
Plaintiff/Appellant,

vs.

NORTHWEST TRUSTEE SERVICES, INC. and NATIONSTAR
MORTGAGE LLC,
Defendants/Respondents

RESPONDENT NATIONSTAR MORTGAGE LLC'S

ANSWERING BRIEF

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Table of Contents

I.	INTRODUCTION	1
II.	ASSIGNMENT OF ERROR	1
III.	STATEMENT OF CASE	2
	A. The Subject Note and Deed of Trust, and other liens on the Property	2
	B. Weirich’s Default and Foreclosure Proceedings.....	4
	C. This Action is Commenced in Chelan County Superior Court.....	5
	D. Appellate Proceedings and Respondents’ Motion on the Merits	7
IV.	ARGUMENT	8
	A. Judgment on the Pleadings Standard of Review is <i>De Novo</i>	8
	B. The trial court correctly granted NWTs’ Motion for Judgment on the Pleadings, and subsequently denying Mr. Merry’s Motion for Reconsideration.....	9
	C. Even if Waiver does not apply, Mr. Merry’s allegations fail on their merits.	18
	D. The legal authority relied on by Mr. Merry is inapposite to the case at bar.	21
V.	CONCLUSION.....	24
	CERTIFICATE OF SERVICE	26

TABLE OF AUTHORITIES

Cases

<i>Albice v. Premier Mortgage Services of Washington, Inc.</i> , 174 Wn.2d 560, 569, 276 P.3d 1277 (2012).....	6, 11, 21, 22
<i>Bowman v. John Doe</i> , 104 Wn.2d 181, 183, 704 P.2d 140 (1985)	8
<i>Brodie v. Northwest Trustee Services, Inc.</i> , No. 12-CV-0469-TOR, 2012 WL 6192723, at *2 (E.D. Wash., Dec. 12, 2012).....	19, 20
<i>Brophy v. JPMorgan Chase Bank Nat. Ass'n</i> , No. 13-CV-0293-TOR, 2013 WL 4048535, at *3 (E.D. Wash. Aug. 9, 2013)	19
<i>Brown v. Household Realty Corp.</i> , 146 Wn. App. 157, 189 P.3d223 (2008)	9
<i>Cox</i> , 103 Wn.2d at 389–90, 693 P.2d 683.....	11
<i>Cuddeback v. Bear Stearns Residential Mortgage Corp.</i> , No. 12-1300-RSM, 2013 WL 5692846, at *2 (W.D. Wash. Sept. 10, 2013).....	13
<i>Frizzell v. Murray</i> , 313 P.3d 1171 (2013).....	1, 6, 7, 9, 10, 11, 21, 22, 23, 24
<i>Gaspar v. Peshastin Hi-Up Growers</i> , 131 Wn.App. 630, 128 P.3d 627 (2006)...	8
<i>Gossen v. JPMorgan Chase Bank, N.A.</i> , 819 F.Supp.2d 1162, 1170 (W.D. Wash., 2011).....	20
<i>Haberman v. Wash. Pub. Power Supply Sys.</i> , 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987)	8
<i>In re MERS Litigation</i> , 2012 WL 932625 at *3 (D.Ariz., March 20, 2012)	19
<i>Javaheri v. JPMorgan Chase Bank N.A.</i> , 2012 WL 3426278 at *6 (C.D.Cal., Aug.13, 2012)	20
<i>Kuc v. Bank of Am., NA</i> , 2012 WL 1268126 at *2 (D.Ariz., Apr.16, 2012).....	20
<i>Mulcahy v. Federal Home Loan Mortg. Corp.</i> , 2014 WL 504836 (Feb. 2014)..	11
<i>Orwick v. Seattle</i> , 103 Wn.2d 249, 254, 692 P.2d 793 (1984)	9
<i>Plein v. Lackey</i> , 149 Wn.2d 214, 67 P.3d 1061 (2003).....	10, 11
<i>Reid v. Pierce County</i> , 136 Wn.2d 195, 200, 961 P.2d 333 (1998)	8
<i>Rouse v. Wells Fargo Bank, N.A.</i> , No. C13-5706 RBL, 2013 WL 5488817, at *3 (W.D. Wash. Oct. 2, 2013), appeal dismissed (June 5, 2014).....	14
<i>Rucker v. Novastar Mortgage</i> , 177 Wn. App. 1, 311 P.3d 31 (2013)	6, 11, 22
<i>Schroeder v. Excelsior Mgmt. Grp., LLC</i> , 177 Wn.2d 94, 297 P.3d 677 (2013)	23
<i>Tuttle v. Bank of New York Mellon</i> , No. C11-1048-RSM, 2012 WL 726969, at *5 (W.D. Wash. Mar. 6, 2012)	14
<i>Walker v. Quality Loan Service Corp. of Washington</i> , 176 Wn. App. 294, 308 P.3d 716 (2013).....	6, 23

Statutes

RCW 61.24.026.....	15, 17
RCW 61.24.040(1).....	6, 7, 9, 14, 18, 23
RCW 61.24.040(1)(f)(IX).....	6, 9, 18, 23
RCW 61.24.127.....	15, 16, 17, 23
RCW 61.24.127(1).....	15, 16, 23
RCW 61.24.127(2)(b).....	16, 17
RCW 61.24.127(2)(c).....	16, 17
RCW 61.24.130.....	10, 12
Title 19 RCW	15, 17

Rules

CR 12(b)(6)	1, 8
CR 59.....	7
CR 59(a)(7).....	6
CR 59(a)(9).....	6

I. INTRODUCTION

Mr. Merry brings this appeal, alleging that the lower court improperly dismissed his Complaint. Yet Mr. Merry never addresses basis for the dismissal: that his claims are waived under Washington law for failure to seek to enjoin the Trustee's Sale, and the Supreme Court's decision in *Frizzell v. Murray*, 179 Wn. 2d 301, 313 P.3d 1171 (2013). The lower court's decision to dismiss Mr. Merry's Complaint was based on the fact that the elements of waiver were established: that Mr. Merry had notice of his right to enjoin the Trustee's Sale; knew of his claims/defenses to the Sale; and did not seek to enjoin the Sale. Instead of addressing this issue, Mr. Merry continues to call into question Nationstar's beneficiary status, the foreclosure proceedings, and the validity of the subject note, without any discussion of the actual decision rendered by the lower court. The reason Mr. Merry does not dispute that his claims are subject to waiver is because the record is unequivocal that waiver was properly applied, and Mr. Merry's Complaint was properly dismissed with prejudice.

II. ASSIGNMENT OF ERROR

It is Nationstar's position that the lower court properly dismissed Mr. Merry's Complaint under CR 12(b)(6), and does not assign any errors in the case. However, the following issue is before this Court for review:

A. Whether the trial court correctly granted NWTs' Motion for Judgment on the Pleadings, and subsequently denied Mr. Merry's Motion for Reconsideration, when:

1. Waiver was properly applied under Washington Law.
2. The Requirements for Waiver have been established:
 - (a) Mr. Merry had notice of his right to enjoin the Trustee's Sale;
 - (b) Mr. Merry knew of his claims and defenses to foreclosure prior to the Trustee's Sale; and
 - (c) Mr. Merry failed to seek to enjoin the Trustee's Sale.
3. The Statutory Exceptions to Waiver do not apply in this case.
4. Even if Waiver did not apply to this matter, Mr. Merry's allegations fail because he lacks standing to contest the Assignments of Deed of Trust and Appointment of Successor Trustee.

III. STATEMENT OF CASE

A. **The Subject Note and Deed of Trust, and other liens on the Property**

On or about April 20, 2007, borrower Sharon Weirich (not a party to this litigation) executed a promissory note ("Note") in the amount of \$205,440.00. CP pp. 30, 39-40. The Note has been endorsed in blank by the originating lender, and is enforceable by the entity in possession of the original document. CP pp. 39-40. Ms. Weirich secured the Note with a deed of trust ("Deed of Trust") on her property commonly known as 8855 Josephine Ave., Dryden, WA 98821 ("the Property"). Id. The Deed of Trust was recorded in the Chelan County Auditor's Official Records at No. 2253965. CP pp. 31, 41-53.

A second deed of trust was recorded the same day securing a loan in the amount of \$25,680.00 and named the Property as security. CP p. 31. The second deed of trust was recorded under Chelan County Auditor's File No. 2253966 ("Second Deed of Trust"). CP pp. 53-62. The Second Deed of Trust identifies the beneficiary as Mortgage Electronic Registration Systems, Inc., solely as nominee for Lender (Countrywide Home Loans, Inc.) and Lender's successors and assigns.

On or about December 3, 2012, Mr. Merry acquired an interest in the Property when Ms. Weirich executed a third deed of trust, recorded in the Chelan County Auditor's File No. 2372554, as security for Weirich's repayment of an alleged \$68,000.00 loan ("Third Deed of Trust"). CP pp. 68-71.

B. Weirich's Default and Foreclosure Proceedings

On December 8, 2011, the (first) Deed of Trust was assigned to Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing LP, by an Assignment of Deed of Trust recorded in Chelan County under Chelan County Auditor's File No. 2353028. CP pp. 32, 62. Thereafter, and as a result of Ms. Weirich's default on her payment obligations pursuant to the Note, a Notice of Default was issued by NWTs to her on or about October 31, 2012. CP pp. 64-66.

On November 14, 2012, NWTs was appointed as the successor trustee on the Deed of Trust by Bank of America, N.A.. CP p. 67. The Appointment of Successor Trustee was recorded in Chelan County Auditor's Official Records at No. 2371645. Id. NWTs issued its notice of trustee's sale concerning the Property on or about December 14, 2012, which was recorded under Chelan County Auditor's No. 2373370 ("First Notice of Trustee's Sale"). CP pp. 72-77. This First Notice of Trustee's Sale set a sale date of April 19, 2013; however, the sale was not completed, and the 120-day period for holding a trustee's sale under the First Notice of Trustee's Sale expired. CP p. 33.

On June 6, 2013, a second assignment of the Deed of Trust was recorded in Chelan County under Chelan County Auditor's File No. 2383649 ("Second Assignment"). CP pp. 32, 77. The Second Assignment assigned the

beneficial interest in the Deed of Trust as reflected within the county records to Nationstar Mortgage, LLC. Id. NWTS remained the trustee of the Deed of Trust.

On or about October 8, 2013, NWTS issued its Amended Notice of Trustee's Sale, which was recorded under Chelan County Auditor's No. 2391107 ("Amended Notice of Trustee's Sale"). CP pp. 79-83. This Notice set a sale date of November 15, 2013. Id. No attempt was made by Weirich or any party claiming an interest in the Property to seek restraint of the trustee's sale. CP p. 33. After a single postponement, the sale went forward on January 3, 2014, and a trustee's deed was recorded thereafter under Chelan County Auditor's File No. 2395521 ("Trustee's Deed"). CP pp. 84-85.

C. This Action is Commenced in Chelan County Superior Court

On or about October 31, 2013, Mr. Merry, Appellant herein, caused the Complaint and Summons to be issued to the parties. CP pp. 1-12. Thereafter, on December 13, 2013, Mr. Merry filed the Complaint in the court below asserting claims for lien priority, and to declare Nationstar's deed of trust and promissory note void and unenforceable. Mr. Merry's specific causes of action were the following: (1) NWTS was without standing to act as Trustee of the Deed of Trust; (2) Nationstar was without

standing to enforce the Note; and (3) The Note is unenforceable and a nullity. CP pp. 9-11.

The Property went to sale on January 3, 2014. On or about February 13, 2014, NWTS filed a Motion for Judgment on the Pleadings, asserting that Mr. Merry's claims are subject to statutory waiver pursuant to RCW 61.24.040(1)(f)(IX) and the Washington Supreme Court decision in *Frizzell v. Murray*, 313 P.3d 1171 (2013). CP pp. 30-84. The Chelan County Superior Court granted NWTS' Motion, and held that Mr. Merry's claims were waived for failure to seek and obtain an order restraining the Trustee's Sale pursuant to *Frizzell v. Murray*, and dismissed all claims with prejudice. CP pp. 147-148, 115-116.

On April 9, 2014, Mr. Merry filed a Motion for Reconsideration based on CR 59(a)(7) and CR 59(a)(9), contending that there was no evidence to justify the decision or that it is contrary to law, and that substantial justice has not been done. CP p. 119. Mr. Merry relied on the decisions in *Walker v. Quality Loan Service Corp. of Washington*, 176 Wn. App. 294, 308 P.3d 716 (2013); *Albice v. Premier Mortgage Services of Washington, Inc.*, 174 Wn.2d 560, 569, 276 P.3d 1277 (2012), and *Rucker v. Novastar Mortgage*, 177 Wn. App. 1, 311 P.3d 31 (2013), for the premise that his claims were not subject to waiver. CP pp. 120-125. Nationstar and NWTS opposed Mr. Merry's Motion for Reconsideration,

arguing that Mr. Merry's legal authority is distinguished and inapplicable to the case at bar, and that he failed to raise any grounds for reconsideration pursuant to CR 59. CP pp. 126-127, 132-133. On May 1, 2014, the court entered an order denying Mr. Merry's Motion for Reconsideration. CP p. 149.

D. Appellate Proceedings and Respondents' Motion on the Merits

Mr. Merry filed and served his Opening Brief herein on July 22, 2014. On or about August 19, 2014, Nationstar and NWTS filed a joint Motion on the Merits, arguing that Mr. Merry's claims were subject to dismissal pursuant to RAP 18.14 and *Frizzell v. Murray, supra*. Mr. Merry opposed the motion, and argument was heard by the Commissioner on November 5, 2014. Ultimately, the Court denied Nationstar and NWTS' Motion, holding that "...it is unclear whether Mr. Merry actually received a copy of the notice [of trustee's sale] and its incorporated right to enjoin the sale." Commissioner's Ruling, p. 2. The Commissioner further held that the record is unclear as to whether NWTS complied with RCW 61.24.040(1)(b)(ii), by sending the notice of sale to Mr. Merry. *Id.*

Nationstar submits contemporaneously with this Brief, for the Court's review, a Motion for Judicial Notice of the Declaration of Mailing executed by NWTS (Motion for Judicial Notice, Exhibit 1) and Proof of Delivery of the Notice of Trustee's Sale (*Id.*, Exhibit 2). These documents

establish that Mr. Merry actually received the Notice of Trustee's Sale that contained the explanation of his right to enjoin the Trustee's Sale.

For the reasons that follow, Nationstar and NWTs request that this Court affirm the decision of the lower court. The requirements for waiver to apply have been met in this matter, and Mr. Merry is not entitled to the relief he seeks.

IV. ARGUMENT

A. Judgment on the Pleadings Standard of Review is *De Novo*.

A motion to dismiss for failure to state a claim and a motion for judgment on the pleadings raise identical issues and are subject to the same standard of review. *Gaspar v. Peshastin Hi-Up Growers*, 131 Wn.App. 630, 128 P.3d 627 (2006). CR 12(b)(6) dismissals are reviewed de novo. *Reid v. Pierce County*, 136 Wn.2d 195, 200, 961 P.2d 333 (1998). A court properly dismisses a claim under CR 12(b)(6) only if "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987) (internal quotations marks omitted) (quoting *Bowman v. John Doe*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985)). CR 12(b)(6) motions should be granted only "sparingly and with care." *Haberman*, 109

Wn.2d at 120 (quoting *Orwick v. Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984)).

Here, all of Mr. Merry's claims are subject to waiver pursuant to RCW 61.24.040(1)(f)(IX) because Mr. Merry knew of his right to enjoin the Trustee's Sale, knew of his claims and defenses prior to the Sale, and failed to seek to enjoin the Trustee's Sale. Accordingly, the lower court granted NWTs's motion for judgment on the pleadings. On review, Mr. Merry has never addressed the elements of waiver or why they may not apply, and the record is clear that waiver is appropriate. Accordingly, there are no set of facts that would entitle Mr. Merry to relief, and the lower court's dismissal should be affirmed.

B. The trial court correctly granted NWTs' Motion for Judgment on the Pleadings, and subsequently denying Mr. Merry's Motion for Reconsideration.

1. General Application of Waiver

The Deeds of Trust Act provides that objections to the Trustee's Sale must be raised prior to the sale or they may be deemed waived. RCW 61.24.040(1)(f)(IX). The Washington Supreme Court recently reaffirmed waiver, which restricts certain post-sale claims and prohibits challenges to the validity and finality of a completed sale. *Frizzell v. Murray*, 179 Wn. 2d 301, 313 P.3d 1171 (2013) (citing *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 189 P.3d223 (2008), and *Plein v. Lackey*, 149 Wn.2d 214, 67

P.3d 1061 (2003)). *Frizzell* cites to RCW 61.24.040(1)(f)(IX), which provides:

[a]nyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.

Waiver of a post sale contest occurs when “a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale.” *Frizzell v. Murray*, 179 Wn. 2d 301, 306-07, 313 P.3d 1171, 1174 (2013) (internal citations omitted).

In *Frizzell*, the borrower actually obtained a preliminary injunction enjoining the sale, but the injunction was conditioned upon payment into the court registry. *Frizzell, supra*, at 1173. When the borrower failed to make her payment into the court registry, the trustee proceeded with the foreclosure and a Trustee’s Sale was held. *Id.* The Supreme Court held that even when an order to enjoin sale is sought, ignoring "the conditions for an injunction would render aspects of the waiver provision and injunction statute meaningless." *Id.* at 1175. The Court found that "Frizzell could have paid the sum into the court to enjoin the sale, made a motion for reconsideration, or appealed the order, all of which she failed to do." *Id.* at 1175.

In applying the *Frizzell* decision, the U.S. District Court for the Western District of Washington provided a framework for determining whether waiver is appropriate. *Mulcahy v. Federal Home Loan Mortg. Corp.*, 2014 WL 504836 (Feb. 2014). The court noted:

Almost all of the cases in which the invalidation of a foreclosure sale is contemplated involved some sort of misleading behavior on the part of the lender or trustee that effectively deprived the borrower of a fair opportunity to obtain a pre-sale injunction. *See Albice*, 174 Wn.2d at 564, 276 P.3d 1277 (after accepting untimely payments for months, lender rejected final payment and failed to provide notice of breach, depriving borrower of an opportunity to object to sale); *Cox*, 103 Wn.2d at 389–90, 693 P.2d 683 (knowing that the existence of a default was disputed and that the borrowers believed they had taken the necessary steps to restrain the sale, trustee should not have proceeded with foreclosure); *Rucker v. NovaStar Mortg., Inc.*, 177 Wn. App. 1, 311 P.3d 31 (2013) (trustee told borrowers that sale would be postponed due to uncertainty related to the origination of the loans, creating issue of fact regarding waiver).

Mulcahy, at 4. In contrast, where the lender or trustee provides adequate notice of the sale and refrains from making false promises or statements regarding its intent to foreclose, Washington courts are not inclined to invalidate the sale for fear of making nonjudicial foreclosures unduly cumbersome and/or adversely affecting the reliability of land titles. *Mulcahy*, at 4 (citing *Frizzell v. Murray*, 179 Wn. 2d 301, 313 P.3d 1171 (2013)).

The factual context of *Plein v. Lackey*, 149 Wn.2d 214, 225-27, 67 P.3d 1061, 1065-67 (2003), is also analogous to the case *sub judice*. In *Plein*,

the borrower was provided notice of the sale and his right to seek an injunction, but rather than seek a preliminary injunction, he filed a lawsuit for a permanent injunction. *Id.* The Court held that filing the lawsuit seeking the permanent injunction is not compliant with the requirements of RCW 61.24.130, and would not halt foreclosure proceedings:

Simply bringing an action to obtain a permanent injunction will not forestall a trustee's sale that occurs before the end of the action is reached. Moreover, if it did, it would render the requirements of RCW 61.24.130 meaningless because it would be unnecessary to obtain an actual order restraining the sale or to provide five days' notice to the trustee and payment of amounts due on the obligation. A statute must not be judicially construed in a manner that renders any part of the statute meaningless or superfluous. Nor does an action contesting the default satisfy the requirements of RCW 61.24.130. "[A]n action contesting the default, filed after notice of sale and foreclosure has been received, does not have the effect of restraining the sale."

Id. at 226-227 (internal citations omitted).

Here, there are no allegations of misleading statements that were made to Mr. Merry, leading him to believe the sale would not go forward. Further, his lawsuit in the lower court does not satisfy the requirement of seeking to enjoin the sale.

2. *The Requirements for Waiver Have Been Met.*

The three requirements necessary for waiver, (1) Merry received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to

bring an action to obtain a court order enjoining the sale, have all been established in this matter. First, it is undisputed that Mr. Merry had constructive notice of the Trustee's Sale. He explicitly pled in his Complaint, which was filed three weeks prior to the Trustee's Sale, that a Notice of Sale had been recorded under Chelan County Auditor's No. 2391107. CP p. 8. Further, *actual* notice was provided to Mr. Merry of the Notice of Trustee's Sale, and his right to seek to enjoin the Sale, as manifest in the Affidavit of Mailing. *See* Motion for Judicial Notice, Exhibits 1-2, filed contemporaneously with this Brief.

More importantly, Nationstar and NWTS have argued in the lower court and during the Motion on the Merits proceedings that Mr. Merry received notice of his right to enjoin the sale, and Mr. Merry has never disputed this. Not once has Mr. Merry claimed to not have received the Notice of Trustee's Sale, nor has he claimed that he did not have notice of his right to enjoin the sale.

Washington courts have repeatedly held in favor of the party claiming waiver where the aggrieved party does not expressly dispute that he received notice of his right to enjoin. *Cuddeback v. Bear Stearns Residential Mortgage Corp.*, No. 12-1300-RSM, 2013 WL 5692846, at *2 (W.D. Wash. Sept. 10, 2013) ("Mr. Cuddeback does not dispute receiving the Notice of Default and Notice of Trustee's Sale, and does not dispute that these notices

advised him of his right to seek to enjoin the sale.”); *Tuttle v. Bank of New York Mellon*, No. C11-1048-RSM, 2012 WL 726969, at *5 (W.D. Wash. Mar. 6, 2012) (“Plaintiff does not allege that he did not receive the Notice of Default and the Notice of Trustee’s Sale, or that those Notices failed to advise him of his right to enjoin the sale. Accordingly, Plaintiff’s cause of action for injunctive relief is subject to dismissal pursuant to the waiver provisions of the DTA.”); *Rouse v. Wells Fargo Bank, N.A.*, No. C13-5706 RBL, 2013 WL 5488817, at *3 (W.D. Wash. Oct. 2, 2013), appeal dismissed (June 5, 2014) (“The Notice of Trustee’s Sale provided Rouse with notice of her right to enjoin the sale.”). These cases do not discuss whether the specific procedures were followed under the DTA, and specifically, RCW 61.24.040(1)(b)(ii), for providing the plaintiffs notice of their right to enjoin. Rather, these cases held that if the plaintiffs received the Notice of Trustee’s Sale in any manner, which contains the explanation of the right to enjoin the sale, then the notice provision for waiver is satisfied. See *Rouse, supra*.

Here, Mr. Merry received the Notice of Trustee’s Sale well in advance of the sale date. His Complaint, served on October 31, 2013, cites to factual content regarding the sale date contained in the Notice, and its recording information, which is indicative of at least constructive notice of the Trustee’s Sale. CP pp. 9-10. Further, Mr. Merry received actual notice of the sale pursuant to RCW 61.24.040(1)(b)(ii), as reflected in the Declaration

of Mailing and Certified Mail returns. Exhibits 1-2 to Motion for Judicial Notice.

More importantly, Mr. Merry has not disputed that he received the Notice of Trustee's Sale at any point in the lower court, even while Nationstar and NWTS consistently argued that he has. The fact that Mr. Merry received the Notice of Trustee's Sale establishes that he received notice of his right to enjoin the sale, as the Notice contains the language explaining this right.

Further, Mr. Merry had actual knowledge of his alleged defenses to the foreclosure prior to the sale, as outlined in his Complaint. CP pp. 3-12. Finally, it is undisputed that neither Weirich nor Mr. Merry attempted to restrain the Property from being sold. There is no allegation that any party made false statements regarding the intent to move forward with the Trustee's Sale. Accordingly, waiver is appropriately applied in this matter, and Mr. Merry's claims are without merit.

3. Statutory Exceptions to Waiver do not Apply

Mr. Merry's claims also do not fall into any of the statutory exceptions to waiver. RCW 61.24.127(1) identifies the claims that are not subject to waiver: common law fraud or misrepresentation; violation of Title 19 RCW; failure of the trustee to materially comply with the Deed of Trust Act; and a violation of RCW 61.24.026. The non-waived claims are limited

in that they may not seek any remedy other than damages, and they cannot affect the validity or finality of the Trustee's Sale. RCW 61.24.127(2)(b) and RCW 61.24.127(2)(c). These exceptions to waiver only apply to claims brought by a *borrower or grantor*. RCW 61.24.127(1) (emphasis added).

Here, because Mr. Merry is neither the borrower nor the grantor on the Note in question, he cannot claim the benefit of the limited exceptions to waiver found in RCW 61.24.127. Further, none of the claims pled in his complaint fall into the categories listed in RCW 61.24.127(1). The specific issues Mr. Merry raised in his opening brief are the following:

- MERS was never a lawful beneficiary with authority to sign the Note (Merry Brief, p. 12);
- Bank of American was never a lawful beneficiary and lacked authority to appoint NWTS as substitute trustee (Id., pp. 12, 15);
- Nationstar is not a holder in due course because it received its interest in the Note with knowledge that the loan was in default (Id., p. 13);
- Nationstar knew NWTS was not a lawful trustee and is therefore not a *bona fide* purchaser of the Property (Id., pp. 13, 17);

- Fannie Mae is not a bona fide purchaser of the Property (Id., pp. 14, 17-18);
- Because MERS was an unlawful beneficiary, any successor to MERS is also an unlawful beneficiary (Id., p. 15);
- The Trustee's Sale was unlawful because Nationstar was not a lawful beneficiary of the Deed of Trust (Id., p. 16); and
- The Note is a lost or stolen instrument, the endorsement is illegible, Nationstar is not a holder in due course entitled to enforce the instrument (Id. at pp. 18-21).

Fraud is not pled in Mr. Merry's Complaint, nor do any of these issues rise to the level of common law fraud. Similarly, no violation of Title 19 RCW is pled in the Complaint, nor are there any allegations that could comprise a claim that the trustee to materially comply with the Deed of Trust Act. Finally, Mr. Merry has not brought a claim for violation of RCW 61.24.026, nor are there facts that that would indicate a violation.

Even if Mr. Merry's claims were properly before the Court, Mr. Merry's remedy would be limited to monetary damages. RCW 61.24.127(2)(b). In other words, under no circumstances could Mr. Merry's action affect the validity or the finality of the trustee's sale. RCW 61.24.127(2)(c). Mr. Merry's claims are barred by waiver, and he is not

entitled to the limited exceptions to waiver, as he is neither borrower nor grantor.

There can be no doubt that Mr. Merry did not seek to enjoin the Trustee's Sale, and that his lawsuit does not have the effect of restraining the sale. Mr. Merry was advised that his claims may be waived pursuant to RCW 61.24.040(1)(f)(IX), and he knew of his claims prior to the Trustee's Sale taking place. Accordingly, Mr. Merry's claims are barred by waiver and the trial court properly dismissed his Complaint.

C. Even if Waiver does not apply, Mr. Merry's allegations fail on their merits.

All of Mr. Merry's allegations pertaining to Nationstar and NWTS are based on the idea that the Note and Deed of Trust were not properly assigned to Nationstar, and that Nationstar did not have authority to appoint NWTS as trustee. Specifically, Mr. Merry argues:

...Mortgage Electronic Registration Systems, Inc., while not holding Note or the Weirich DOT, nor holding any interest therein, assigned the Weirich DOT, but not the Note, to Bank of America, N.A. ("BOA"), on December 7, 2011...thus breaking the chain of title to Nationstar by passing no interest in the Note nor Weirich DOT to BOA, making BOA an unlawful beneficiary, and any successors in interest to MERS unlawful beneficiaries.

Merry Brief, pp. 5-6. This argument fails as a matter of law.

The lower court did not reach the issue of standing in determining that waiver precluded Mr. Merry's claims. CP pp. 147-148.

Even if waiver did not apply, however, Mr. Merry's claims fail because Washington does not recognize a cause of action for claims relating to an Assignment of Deed of Trust and/or Appointment of Successor Trustee. Mr. Merry does not have standing to contest Nationstar's authority as the beneficiary by asserting that the Assignment(s) are invalid, nor does he have standing to contest NWTS' authority as trustee by asserting that the Appointment of Trustee is void or invalid. *Brophy v. JPMorgan Chase Bank Nat. Ass'n*, No. 13-CV-0293-TOR, 2013 WL 4048535, at *3 (E.D. Wash. Aug. 9, 2013). The *Brophy* court specifically held that even if an appointment of trustee was somehow fraudulent, void or invalid, plaintiff-borrowers do not have standing to contest the appointments. The rationale is that a borrower cannot be injured by the allegedly fraudulent document because the borrower is not a party to the document or an intended beneficiary of the document/agreement. *Brodie v. Northwest Trustee Services, Inc.*, No. 12-CV-0469-TOR, 2012 WL 6192723, at *2 (E.D. Wash., Dec. 12, 2012).

In addition to the *Brophy* and *Brodie* decisions, other courts have also held that a borrower cannot contest an appointment of successor trustee or assignment of deed of trust. *Brodie, supra* (citing *In re MERS Litigation*, 2012 WL 932625 at *3 (D.Ariz., March 20, 2012) (unpublished) (holding that allegations of robo-signing failed to state a claim because plaintiff

lacked standing to challenge assignment); *Kuc v. Bank of Am., NA*, 2012 WL 1268126 at *2 (D.Ariz., Apr.16, 2012) (unpublished) (“[P]laintiff, as a third-party borrower, does not have standing to challenge the validity of any allegedly ‘robosigned’ recorded assignments.”); *Javaheri v. JPMorgan Chase Bank N.A.*, 2012 WL 3426278 at *6 (C.D.Cal., Aug.13, 2012) (unpublished) (accepting allegations of robo-signing as true, but holding that plaintiff lacked standing to challenge substitution of trustee agreement)). Further in the case of an assignment of deed of trust, Washington courts have held that in order to establish claims on a fraudulent assignment, a plaintiff must establish that he knew about the assignment, relied on the assignment to his detriment, and suffered damages. *Gossen v. JPMorgan Chase Bank, N.A.*, 819 F.Supp.2d 1162, 1170 (W.D. Wash., 2011) (internal citations omitted).

Here, there are no facts alleged to show that Mr. Merry knew about the Assignments at any point relevant to his allegations, received a copy of them, or relied on the Assignments to his detriment. As in *Brodie*, Mr. Merry could not have been injured by the Assignments. He is neither a party to them, nor is he an intended beneficiary of the Assignments/Appointment of Successor Trustee. Mr. Merry has even less connection to the documents than a borrower would, as Mr. Merry is not an obligor on the Note. He

would not, even theoretically, have a reason to receive or rely on the Assignments/Appointment at any point in time.

D. The legal authority relied on by Mr. Merry is inapposite to the case at bar.

Mr. Merry relies on several cases in Washington courts for support that his claims are not subject to waiver. First, Mr. Merry relies on *Albice v. Premier Mortgage Services of Washington, Inc.*, 174 Wn.2d 560, 569, 276 P.3d 1277 (2012) for the premise that his claims are not subject to waiver. *Frizzell*, however, distinguished *Albice*. The *Frizzell* Court noted that in *Albice*, the borrowers did not know of the alleged breach of the mortgage contract in time to restrain the sale based on the conduct of the lenders in continuing to accept late payments and because no notice of the borrowers' breach was received. *Frizzell v. Murray*, 179 Wn.2d 301, 308-09, 313 P.3d 1171, 1175 (2013) (citing *Albice, supra*, at 571-72, 276 P.3d 1277). The *Albice* borrowers also had an active forbearance plan in place, and the sale took place outside the statutory time period. *Frizzell, supra*. The *Frizzell* Court then held: "Here, in contrast, Frizzell [the borrower] failed to comply with the conditions necessary to enjoin the sale. Her failure was not due to the actions of a third party. It is not inequitable to conclude that Frizzell waived her sale claims where she had knowledge of

how to enjoin the sale and failed to do so through her own actions.” *Id.*

Based on the above analysis, this matter is more analogous to *Frizzell* than to *Albice*, as Mr. Merry knew of the sale and the situation surrounding the foreclosure well in advance of the trustee’s sale. It was his failure to act that resulted in the sale going forward, and this conduct cannot be attributable to any third party. Consequently, *Albice* is inapplicable to the case at bar.

Mr. Merry also cites *Rucker v. Novastar Mortgage*, 177 Wn. App. 1, 311 P.3d 31 (2013) for the premise that his claims were not waived. *Rucker* was decided in a context where the trustee allegedly made statements that the sale would not go forward, and the borrowers relied on these statements rather than seeking to enjoin the sale. *Id.* at 13. The court determined that there were issues of fact regarding the borrowers’ decision to not enjoin the sale and whether in this context their rights should be barred by waiver. *Id.*

Again, *Rucker* is inapplicable to the instant matter. There is no reason that Mr. Merry should have thought the trustee’s sale would not go forward. Similarly, there are no allegations that Northwest Trustee Services or Nationstar told him the sale would not go forward. Rather, Mr. Merry had every reason to believe it would go forward. He received notice of his right to enjoin the sale via the Notice of Trustee’s Sale, had knew of

his claims and defenses to the sale prior to the sale date, and he failed to seek an order enjoining the sale.

Mr. Merry also relies on *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013) for the premise that his claims are not waived. *Schroeder*, however, did not reach the issue of whether the borrower's claims were waived under RCW 61.24.040 and RCW 61.24.127(1); but rather, *Schroeder* dealt with the specific issue of whether the trustee lacked the power to foreclose nonjudicially because the property was primarily agricultural:

In *Schroeder*, where we held that RCW 61.24.040(1)(f)(IX) did not foreclose damage actions, it was unnecessary to consider RCW 61.24.127(1) because we determined that if *Schroeder's* property was primarily agricultural, then the trustee lacked the statutory power to foreclose nonjudicially. *Schroeder*, 177 Wash.2d at 112, 297 P.3d 677. The statutory provisions for enjoining a nonjudicial foreclosure sale, including the waiver provision, were inapplicable thus rendering RCW 61.24.127(1) inapplicable.

Frizzell, supra, at 311-312. Accordingly, the *Schroeder* case is inapplicable to the instant matter.

Finally, Mr. Merry relies on *Walker v. Quality Loan Service Corp. of Washington*, 176 Wn. App. 294, 308 P.3d 716 (2013) for the premise that NWTs did not have authority to conduct the Trustee's Sale. Merry Brief, pp. 16-17. *Walker*, however, addresses whether a borrower has a pre-foreclosure cause of action for damages against a trustee under the

Deed of Trust act. *Id.* at 313. *Walker* is inapplicable to this matter, as Mr. Merry is not the borrower, is seeking declaratory relief (not damages), post-foreclosure. Accordingly, any application of *Walker* is inapposite to the instant case.

Thus, none of the cases cited by Mr. Merry are applicable to this matter, nor do they contravert the decision of the lower court in this matter, and the controlling application of *Frizzell v. Murray, supra*. Accordingly, the decision of the trial court should be affirmed on the merits.

V. CONCLUSION

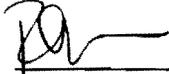
Mr. Merry's Complaint and this Appeal fail under Washington law. The lower court properly found that his claims contesting the validity of the Note, Deed of Trust and the foreclosure are subject to waiver. It is undisputed that Mr. Merry had notice of his right to enjoin the sale. The record establishes that Mr. Merry received the Notice of Trustee's Sale prior to the sale because he cites to the language and terms in the Notice in his Complaint, which was served just over two months prior to the Trustee's Sale. Further, the Complaint outlines his objections to the sale, yet he never sought to enjoin the sale. All of these facts are undisputed on the record in the lower court and on appeal. Accordingly, Nationstar

requests that this Court affirm the lower court's dismissal of the Complaint with prejudice in its entirety.

Dated this 23rd day of December, 2014.

Respectfully submitted,

BISHOP, MARSHALL & WEIBEL, P.S.



Rebecca R. Shrader, WSBA #43918

Attorneys for Respondent Nationstar Mortgage LLC.

CERTIFICATE OF SERVICE

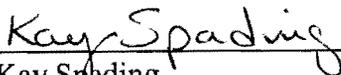
I, Kay Spading, certify that on the 23 day of December, 2014, I caused the foregoing document, RESPONDENT NATIONSTAR MORTGAGE LLC'S ANSWERING BRIEF, to be delivered to the following parties in the manner indicated below:

Thomas F. Merry	<input checked="" type="checkbox"/> By First Class Mail
10541 Merry Canyon Road	<input type="checkbox"/> By ABC Legal Messenger
Leavenworth, WA 98826	<input type="checkbox"/> By Email
<i>Pro se Plaintiff</i>	<input type="checkbox"/> By Facsimile

John A. McIntosh	<input checked="" type="checkbox"/> By First Class Mail
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<i>Attorneys for Defendant Northwest Trustee Services, Inc.</i>	

Under penalty of perjury of the laws of the State of Washington, the foregoing is true and correct.

Dated this 23 day of December, 2014, at Seattle, Washington.



Kay Spading

FILED
DECEMBER 24, 2014
Court of Appeals
Division III
State of Washington



No. 324745-III
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THOMAS F. MERRY,
Plaintiff/Appellant,

vs.

NORTHWEST TRUSTEE SERVICES, INC. and NATIONSTAR
MORTGAGE LLC,
Defendants/Respondents

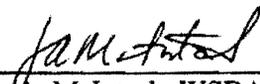
RESPONDENT NORTHWEST TRUSTEE SERVICES, INC.'S
ANSWERING BRIEF

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Respondent Northwest Trustee Services, Inc. ("NWTS") hereby joins Respondent Nationstar Mortgage, LLC's ("Nationstar") brief pursuant to RAP 10.1(g). The facts and arguments set forth in Nationstar's brief are equally applicable to NWTS. NWTS requests that this Court affirm the lower court's dismissal of the Complaint with prejudice in its entirety.

DATED this 24th day of December, 2014.

RCO LEGAL, P.S.

By: 
John A. McIntosh, WSBA No. 43113
Of Attorneys for Appellee Northwest
Trustee Services, Inc.

CERTIFICATE OF SERVICE

I, Mei He, certify that on the 24th day of December, 2014 I cause the foregoing document, Answering Brief, to be delivered to the following parties in the manner indicated below:

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Under the penalty of perjury of the laws of the State of Washington, the foregoing is true and correct.

Dated this 24th day of December, 2014, at Bellevue, Washington.



Mei He, Paralegal