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Division III  
State of Washington

NO. 326039

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THOMAS F. MERRY,  
Appellant,

vs.

QUALITY LOAN SERVICE CORP. OF WASHINGTON, INC.; and  
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,  
Respondents,

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Appeal from Chelan County Superior Court  
The Honorable Lesley A. Allan, Case No. 13-2-01288-4

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**BRIEF OF RESPONDENT JPMORGAN CHASE  
BANK, NATIONAL ASSOCIATION**

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PHILIP R. LEMPRIERE, WSBA No. 20304  
MOLLY J. HENRY, WSBA No. 40818  
KEESAL, YOUNG & LOGAN  
1301 Fifth Avenue, Suite 3300  
Seattle, Washington 98101  
Telephone: (206) 622-3790  
Facsimile: (206) 343-9529

Attorneys for Respondent  
JPMORGAN CHASE BANK, N.A.

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## **INTRODUCTION**

In 2001, Gaery and Janet Rutherford (the “Rutherfords”) executed a promissory note in order to obtain a loan from Washington Mutual Bank. The Rutherfords secured this obligation by executing a deed of trust on the subject property. In 2009, Chase acquired possession of the note, thereby becoming the beneficiary of the deed of trust pursuant to Washington law. Appellant Thomas Merry, a purported junior lienholder, was not a party to any of these transactions.

The Rutherfords later defaulted on their loan, and foreclosure proceedings commenced. In an effort to wipe out Chase’s lien and move up in priority, Merry filed suit claiming that Chase is not the beneficiary of the Rutherford deed of trust with the corresponding right to initiate nonjudicial foreclosure proceedings on the Property under the Deeds of Trust Act (“DTA”). On summary judgment, Chase presented evidence showing that it holds the note indorsed in blank, which makes Chase the beneficiary under Washington law. Merry has never presented any evidence to the contrary.

The trial court granted summary judgment on the basis that Merry did not have standing to assert his claims under the DTA, without reaching the issue of whether Chase is the beneficiary with the right to foreclose. The trial court’s decision should be affirmed because (1) it correctly held

that Merry lacks standing to assert his claims, and (2) even if Merry did have standing to assert his claims, the uncontroverted evidence demonstrates that Chase is the proper beneficiary with the right to enforce the terms of the note and deed of trust.

### **RESTATEMENT OF THE ISSUES**

Whether summary judgment was properly granted where the appellant is a junior lienholder whose lien position is unaffected by Chase's lien, is a stranger to the transactions involving the note and deed of trust underlying Chase's lien, and where the uncontroverted evidence shows that Chase holds the original note indorsed in blank?

### **STATEMENT OF THE CASE**

On January 31, 2001, property owners and non-parties Gaery and Janet Rutherford signed a promissory note (the "Note") to obtain a \$210,000 loan from Washington Mutual Bank ("WaMu"). (CP 77-80) In the Note, the Rutherfords acknowledged that "[they] understand that [WaMu] may transfer the Note." (CP 77) To secure their obligations under the Note, the Rutherfords signed a deed of trust ("DOT"), granting WaMu a security interest in property located at 17600 Chumstick Highway, Leavenworth, WA 98826 ("Property"). (CP 73-74, 82-88) The DOT expressly provides that "The Note or a partial interest in the Note

(together with this Security Instrument) can be sold one or more times without prior notice to Borrower.” (CP 86, ¶19)

On September 25, 2008, Chase acquired WaMu’s loan assets, including all of WaMu’s loans, servicing rights, and obligations from the Federal Deposit Insurance Corporation (“FDIC”), after the Office of Thrift Supervision placed WaMu in receivership. (CP 7, ¶ 3.7; 41, ¶3.1) The Purchase and Assumption Agreement (“P&A Agreement”) sets forth the terms of the sale. The P&A Agreement is a self-authenticating public record pursuant to ER 902(a) and is available on the FDIC’s website at [www.fdic.gov/about/freedom/Washington\\_Mutual\\_P\\_and\\_A.pdf](http://www.fdic.gov/about/freedom/Washington_Mutual_P_and_A.pdf). Chase asked the trial court to take judicial notice of the P&A Agreement.<sup>1</sup> (CP 22, 29-72) Pursuant to the P&A Agreement, Chase now holds the Rutherford’s original Note and DOT. (CP 73-74, ¶¶ 3-4) The Note is indorsed in blank. (CP 80) Chase has held the original Note since 2009. (CP 250, ¶8). Due to the Rutherfords’ default, a trustee’s sale is currently scheduled for December 26, 2014. (Appellant’s Brief (“App. Br.”) 5)

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<sup>1</sup>Numerous courts have taken judicial notice of the P&A Agreement. See *Danilyuk v. JP Morgan Chase Bank, N.A.*, 2010 U.S. Dist. LEXIS 66211 at \* 6-7 (W.D. Wash. July 2, 2010) (“the court takes judicial notice of the P&A Agreement because it is a public record and not the subject of reasonable dispute”) (citing *Allen v. United Fin. Mortgage Corp.*, 660 F. Supp. 2d 1089, 1093-94 (N.D. Cal. 2009); *Molina v. Wash. Mut. Bank*, No. 09-CV-00894-IEG (AJB), 2010 U.S. Dist. LEXIS 8056 at \*3 (S.D. Cal. Jan. 29, 2010)).

Merry is not a party to the Rutherford Note or DOT. Instead, he alleges that he is a junior lienholder by way of a deed of trust given to him by an entity called “Just Plain Rentals, LLC.” (CP 7) Despite the fact that Merry is a stranger to the Note and DOT, Merry filed his action on December 19, 2013, seeking to declare Chase’s lien invalid, alleging that Chase is not the proper beneficiary of the Note and that the Note is “unenforceable and a nullity.”<sup>2</sup> (CP 3-11)

Chase filed its Motion for Summary Judgment with a supporting exhibit and declaration on March 5, 2014 (CP 21-88). At the summary judgment hearing on April 11, 2014, the trial court requested additional briefing to address the issue of whether Merry had standing to bring his claims. (CP 232) On May 23, 2014, after supplemental briefing was submitted, the court granted summary judgment, finding that this lawsuit did not fall within the “zone of interest” sought to be protected by the

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<sup>2</sup>Merry is no stranger to the courtroom. He has sued or been sued in countless other cases in Washington state and federal courts. *See, e.g., Merry v. Quality Loan Serv. Corp. of Wash., et al.*, Chelan County Case No. 14-2-00134; *Merry v. Northwest Trustee Svs.*, Chelan County Case No. 13-2-01255; *Merry v. EC Closing Corp.*, Pierce County Case No. 13-2-15700; *Merry v. Assurity Fin. Svs.*, Kitsap County Case No. 12-2-02376; *United States v. Merry*, 2000 U.S. App. LEXIS 12538 (9th Cir. June 2, 2000); *Merry v. Chelan County Auditor*, 1997 Wn. App. LEXIS 337 (March 13, 1997). Among other claims, his lawsuits include those with strikingly similar claims to the present case, such as a failed attempt to assign himself the right to pursue a mortgage fraud claim on behalf of a non-party borrower on a “contingency fee” basis by taking a personal stake in the borrower’s distressed property. *See Merry v. Assurity Fin. Svs.*, Kitsap County Case No. 12-2-02376.

DTA, and that Merry failed to show injury. (CP 283) The order granting Chase and QLS's summary judgment motions was entered on May 29. (CP 286-88)

Merry filed his Notice of Appeal on June 24, 2014, and filed his appellate brief on September 24, 2014. (CP 284-88)

### **ARGUMENT**

On review of an order of summary judgment, the Court engages in the same inquiry as the trial court; "all facts and reasonable inferences are considered in a light most favorable to the nonmoving party, while all questions of law are reviewed de novo." *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005); *Trujillo v. Nw. Trustee Servs., Inc.*, 181 Wn. App. 484, 491, 326 P.3d 768 (Wash. Ct. App. 2014).

Notably, the Court may affirm on any valid basis supported by the record. RAP 2.5(a) ("A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground."); *see also Nast v. Michels*, 107 Wash. 2d 300, 308, 730 P.2d 54, 59 (1986) ("an appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court."). To survive a motion for summary judgment, an appellant has "the burden of establishing *specific and material facts* to support [his] case." *Hiatt v. Walker Chevrolet Co.*,

120 Wn.2d 57, 66, 837, P.2d 618 (1992) (emphasis in original). Moreover, an appellant cannot rely on speculation or argumentative assertions. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 463-64, 98 P.3d 827 (2004).

**I. Summary judgment was proper because there is no justiciable controversy and Merry lacks standing to contest Chase’s ability to enforce the Note.**

**A. There is no justiciable controversy as Merry cannot demonstrate any actual injury.**

Merry argues that he has standing to seek a declaratory judgment invalidating Chase’s senior lien under Washington’s Declaratory Judgment Act. (App. Br. 11-12). Merry’s claims fail as a matter of law because there is no justiciable controversy as Merry has not been injured, and lacks standing to assert his claims.

Under Washington’s Declaratory Judgment Act, courts are authorized to “declare rights, status and other legal relations.” *Nollette v. Christianson*, 115 Wn. 2d 594, 598, (1990) (quoting RCW 7.24.010). However, absent major issues of public importance, courts “[adhere] to the virtually universal rule that, before the jurisdiction of a court may be invoked under the [A]ct, there must be a justiciable controversy.” *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411 (2001) (citations omitted). A “justiciable controversy” is defined as

(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement,

(2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

*Id.*

The third element of the justiciability requirement incorporates the doctrine of standing. *Id.* at 414. To have standing, a party must demonstrate a “sufficient factual injury” that the party seeks to protect that “is arguably within the zone of interests to be protected or regulated by the statute . . . in question.” *Id.* at 414 (citing *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 493-94, 585 P.2d 71 (1978) (quoting *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970))). “Without identifying a legal interest at issue, let alone an injury to that interest, [a party] cannot establish a justiciable controversy.” *League of Educ. Voters v. State*, 176 Wash. 2d 808, 819, 295 P.3d 743, 749 (2013). “Where the four justiciability factors are not met, ‘the court steps into the prohibited area of advisory opinions.’” *To-Ro Trade Shows*, 144 Wn.2d at 416 (quoting *Diversified Industries Development Corp. v. Ripley*, 82 Wn.2d 811, 815 (1973)).

Here, Merry has no standing to seek declaratory relief because he has failed to show any factual injury. *Id.* at 414 (plaintiff seeking declaratory relief must show a sufficient factual injury to have standing).

Significantly, Merry cannot show that any actions were taken against him or that his own lien against the Property has been affected in any way by Chase's actions. Merry previously claimed that he is "harmed by the loss of [his] security in the trustor's property." (CP 238, lines 16-18) Merry's argument fails for at least two reasons. First, it is false on its face. Merry has not lost his security interest in the Rutherford Property. The Property is still held by the Rutherfords and the property has not been foreclosed. Merry's lien is in the same position it was in on the day he filed it.

Second, an existing lien does not constitute an "injury" to a junior lien holder. *Robertson v. GMAC Mortg. LLC*, 2013 U.S. Dist. LEXIS 162635 at \*15 (W.D. Wash. Nov. 14, 2013) ("An existing obligation—a lien on the property—does not constitute an injury.") The mere fact that Chase has an existing superior lien is not an "injury" to Merry. Chase's lien was already public record when Merry filed his own purported lien. (CP 6-7) Merry is not injured by the existence or even enforcement of Chase's lien, which he was on notice of at the time he purports to have taken his own junior lien on the Property. Merry merely attempts to profit from litigation. Merry commenced this action seeking the windfall benefit of wiping clear Chase's senior lien on the Property. He has not suffered any actual injury by the existence or enforcement of Chase's pre-existing

lien. Merry merely seeks to advance his position, and has not sustained any injury that requires redress by the Court. (App. Br. 12)

*Robertson v. GMAC Mortg. LLC.*, 2013 U.S. Dist. LEXIS 162635 (W.D. Wash. 2013) is instructive. Like this case, the plaintiff in *Robertson* was a junior lienholder who sought a declaratory judgment against the senior lienholder that (1) defendants violated state laws in their efforts to foreclose on the property; (2) that defendants were not entitled to conduct the foreclosure; and (3) that the senior deed of trust should be declared void, invalid, and of no further effect as a lien against the property. *Id.* at \*5.

The court dismissed the declaratory judgment claims. Specifically, the court held that “Robertson is a stranger to the Nicholls’ Deed, which precludes his challenge to any procedural irregularities with the foreclosure process under [the DTA].” *Id.* at \*5-6. The court further held that plaintiff was “mistaken” that a junior lienholder had standing to challenge defendants’ past foreclosure efforts because “[t]he point of the Deed of Trust Act is to protect the borrowers.” *Id.* at \*6. The court noted that if the plaintiff had any remedies, they were limited to those prescribed by the DTA, which included payment of the arrears on the obligation. *Id.* at \*8-9; *see* RCW 61.24.090 (“[A]ny beneficiary under a subordinate deed of trust, or any person having a subordinate lien or encumbrance of record

on the trust property or any part thereof, shall be entitled to cause a discontinuance of the sale proceedings by curing the default or defaults set forth in the notice . . .”).

*Robertson* arguably had more at stake than Merry because Robertson had actually foreclosed on his junior deed of trust and become the subsequent owner of the property. *Id.* at \*2-3. Even then, the court held that “his current ownership of the property does not serve as a basis for a declaratory judgment under the DTA.” *Id.* at \*9. Here, Merry is merely a purported junior lienholder of a lien encumbering someone else’s property. His claim to standing is much weaker than *Robertson*. As explained, Merry has not sustained any injury that requires redress by the Court. Since Merry cannot establish a sufficient factual injury caused by Chase’s preexisting lien, Merry lacks standing. Therefore, this case does not present a justiciable controversy, and summary judgment was properly granted.

**B. Merry impermissibly seeks to assert a third party’s rights.**

Merry’s complaint is nothing more than an attempt to assert the Rutherfords’ legal rights. His first cause of action is for an order declaring that the foreclosure trustee on the Rutherford DOT was without authority because it allegedly was not appointed by a legal beneficiary, as required

by the DTA. (CP 8, ¶¶ 4.2, 4.3) Likewise, his second cause of action seeks an order declaring Chase lacks authority to enforce the Rutherford Note because the assignment of the Note from WaMu to Chase allegedly did not comply with the DTA. (CP 9, ¶¶ 5.2, 5.3) Finally, he seeks a declaration that the Rutherford Note is unenforceable and a nullity because it was not “negotiated to CHASE by a lawful beneficiary.” (CP 10, ¶ 6.3) Even assuming for the purposes of argument that these theories had any merit, which they do not, these are the Rutherfords’ claims to assert.

Merry is not a party to the Note, DOT, or any assignments thereof. Only parties to those contracts have standing to attack their enforceability. *Ukpomo v. U.S. Bank Nat’l Ass’n*, 2013 U.S. Dist. LEXIS 66576 \*13 (E.D. Wash. May 9, 2013) (as a third party, borrower lacks standing to challenge effectiveness of documents executed to commence foreclosure proceeding) (citing *Bateman v. Countrywide Home Loans*, 2012 U.S. Dist. LEXIS 162703 at \*4 (D. Hawaii 2012) (“The reason debtors generally lack standing to challenge assignments of their loan documents is that they have no interest in those assignments, and the arguments they make do not go to whether the assignments are void *ab initio*, but instead to whether the various assignments are voidable. Debtors lack standing to challenge voidable assignments; only the parties to the assignments may seek to avoid such assignments.”) (citing WILLISTON ON CONTRACTS § 74:50

(4th ed.)); *Kuc v. Bank of Am., N.A.*, 2012 U.S. Dist. LEXIS 53278 at \*2 (D. Ariz. 2012) (plaintiff has no standing to challenge validity of alleged “robo-signed” recorded assignments).

Moreover, these courts have routinely held that borrowers lack standing to attack later transfers of their own promissory notes to other banks on the basis that the borrowers are not parties to those later transfers. *Id.* If borrowers do not have standing to challenge these transactions, then certainly Merry, as a mere third party lienholder, lacks standing.<sup>3</sup> *See also Massey v. BAC Home Loans Servicing LP*, 2013 U.S. Dist. LEXIS 180472 at n.3 (W.D. Wash. Dec. 23, 2013) (borrower lacks standing to challenge the validity of an assignment of her promissory note as void or voidable); *Brodie v. Northwest Trustee Servs., Inc.*, 2012 U.S. Dist. LEXIS 176193 at \*5 (E.D. Wash. Dec. 12, 2012) (same); *Maynard v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. LEXIS 130800 at \*26-28 (S.D. Cal. Sept. 11, 2013) (same).

In short, Merry was not a party to any of the transactions he attacks. Nor is he a party to the contracts underlying the transactions. As a stranger to the transactions, Merry lacks sufficient standing to challenge

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<sup>3</sup>The *Frias* decision held that borrowers do not have a right to seek damages under the DTA where there has been no foreclosure sale, as is the case here. *Frias*, 2014 Wash. LEXIS 763 at \*21. If borrower’s rights are so limited prior to a foreclosure sale, a junior lienholder cannot credibly argue that it has rights under the DTA where there has not been a foreclosure sale.

a contract's validity or the manner in which the contract was handled. Accordingly, he may not seek a declaratory judgment contesting the manner in which the Rutherford Note or DOT were handled or administered among the parties involved.

**C. Merry lacks standing to seek declaratory relief under the DTA.**

Even if Merry could establish some actual injury, he lacks standing to assert a claim based on violations of the DTA. Declaratory relief is only available to parties who: (1) show they are within the zone of interest protected by the statute at issue (in this case the DTA); and (2) demonstrate an injury in fact. (CP 239); *see also Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802 (2004). Moreover, the standing requirement for declaratory judgment “is clarified by the common law doctrine of standing, which prohibits a litigant from raising another’s legal right.” *Grant County Fire Prot. Dist. No. 5*, 150 Wn.2d at 802. Merry fails both prongs of the inquiry.

Merry is not within the zone of interests that the DTA was intended to protect. *See Frias v. Asset Foreclosure Servs., Inc.*, 2014 Wash. LEXIS 763 at \*10; 27-28 (Wash. Sept. 18, 2014); *Robertson*, 2013 U.S. Dist. LEXIS 162635 at \*6 (the point of the DTA is to protect borrowers, not junior lien holders); *Albice v. Premier Mortg. Servs. Of*

*Wash., Inc.* 174 Wn.2d 560, 567 (2012) (holding that “courts must strictly construe the statutes in the borrower’s favor” because nonjudicial foreclosure “dispenses with many protections commonly enjoyed by borrowers under judicial foreclosure”); accord *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915 (2007); *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 789 (2013) (“This court has frequently emphasized that the deed of trust act ‘must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers’ interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales.’”) (quoting *Udall*, 159 Wn.2d at 915-16); see also *Barnhart v. Fid. Nat’l Title Ins. Co.*, 2013 U.S. Dist. 121248, at \*11-12 (E.D. Wash. 2013) (finding plaintiff lacked standing to challenge the foreclosure because “[t]he purpose of the DTA is to protect borrowers,” but plaintiff was “a ‘stranger’ to the loan transaction”). The purpose of the DTA is to protect the interests of borrowers from the practices of their lenders.

The statute was never intended to be used as a tool by junior lien holders seeking to improperly increase their own equity in a third party’s property. There is no authority that allows Merry to use the DTA as a sword to attack a senior lienholder by obtaining a declaratory judgment. Merry is not within the zone of interest protected by the DTA. Merry failed to cite any authority to the contrary, and has likewise failed to cite

any case law applying the Declaratory Judgment Act to a junior lien holder attacking a third party's senior security interest.

Merry attempts to support his argument that he has standing to seek declaratory relief under the DTA by citing two cases: *Paris Am. Corp. v. McCausland*, 52 Wash. App. 434, 759 P.2d 1210 (1988) (App. Br. 12) and *Walker v. Quality Loan Serv. Corp. of Wash.*, 176 Wash. App. 294, 308 P.3d 716 (2013) (CP 276-77). Both cases are inapposite, and neither support Merry's argument that he has standing to seek declaratory relief under the DTA.

*Paris* is a decision from 1988 involving a seller with a security interest in personal property contesting the validity of a landlord's senior, statutory lien for unpaid rent. *Paris*, 52 Wash. App. at 435-39. The landlord's lien had expired by operation of law because its notice of public sale of the personal property was not timely given. *Id.* at 440-42. The court allowed the seller to assert the tenant's defense that the landlord's lien had expired, cursorily stating that the seller had a "distinct and personal interest in the issue" because seller's lien would be deemed superior to the landlord's lien if the defense was valid. *Id.* at 437-38.

Merry cites this decision in an attempt to argue that he also has a "personal interest" because his lien priority would move up if Chase's lien was declared invalid. (App. Br. 12.) However, *Paris* does not advance

Merry’s argument that he has standing to seek declaratory judgment under the DTA. The *Paris* decision did not involve the DTA, and did not make any inquiry into whether the seller was within the “zone of interest” sought to be protected by the relevant statute. The relevant inquiry in *this* instance is whether Merry is within the zone of interest protected by the DTA— the *Paris* decision does nothing to support any contention by Merry that he is within the DTA’s zone of interest. *Robertson* and the other cases make clear that the DTA does not protect third parties such as Merry, regardless of their interest in the property as junior lienholders. *Robertson*, 2013 U.S. Dist. LEXIS 162635 at \*6; *see also Frias v. Asset Foreclosure Servs., Inc.*, 2014 Wash. LEXIS 763 at \*10; 27-28 (Wash. Sept. 18, 2014).

In prior briefing, Merry cited *Walker v. Quality Loan Services*, claiming that the court there “placed a junior lienholder in the same standing as the borrower or grantor when it comes to non-waiver of claims . . . .” (CP 277) The *Walker* court did no such thing— the case did not even involve a junior lienholder. Merry may have mistakenly gleaned this incorrect proposition from the court’s citation of RCW 61.24.130, which states that “[n]othing contained in this chapter shall prejudice the right of the borrower, grantor, or [lienholder] to restrain . . . a trustee’s sale.” *Walker*, 176 Wash. App. at 307; RCW 61.24.130(1) (emphasis added).

But that part of the statute, which merely says that the DTA does not prejudice rights arising under other laws, does nothing to afford a third party such as Merry with rights *under the DTA*.<sup>4</sup>

**II. Even if Merry did have standing, summary judgment was properly granted because there is no issue of material fact as to Chase’s beneficiary status and ability to enforce the Note.**

**A. The uncontroverted evidence shows Chase holds the original Note indorsed in blank, and is therefore the beneficiary with the right to enforce the Note and DOT.**

Merry’s action hinges on his unsupported assertion that Chase is not the proper beneficiary of the DOT. The DTA provides that the beneficiary of the deed of trust is “the holder of the instrument or document evidencing the obligations secured by the deed of trust.” RCW 61.24.005(2); *Bain v. Metro. Mortg. Grp. Inc.*, 175 Wn.2d 83, 88, 285 P.3d 34 (2012) (“The act gives subsequent holders of the debt the benefit of the act by defining ‘beneficiary’ broadly . . .”). Absent evidence to the contrary, a beneficiary declaration executed under penalty of perjury stating that an entity holds the note should be taken as true. *Trujillo v. Nw. Tr. Servs., Inc.*, 181 Wash. App. 484, 496, 326 P.3d 768 (2014). To the extent that Merry argues that Chase cannot enforce the Note because it does not own the note (App. Br. 15, n.8), Merry’s argument does nothing

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<sup>4</sup>Additionally, *Walker* was implicitly overruled by *Frias* when the Washington Supreme Court held that borrowers cannot seek damages under the DTA where there has not been a foreclosure sale. *Frias*, 2014 Wash. LEXIS 763 at \*7, 20.

to challenge Chase's beneficiary status. A "holder" may enforce the note even if the holder does not own the note. *Id.* at 500. In other words, if Chase holds the Note, it is the beneficiary of the DOT with the right to enforce the Note and terms of the DOT.

There is no genuine disputed issue of material fact. As set forth in the Alegria Declaration, Chase holds the Rutherford's original Note, one of WaMu's assets acquired from the FDIC pursuant to the P&A Agreement. (CP 73-74, ¶3; 41, ¶3.1) Merry has not presented evidence contradicting the executed beneficiary declaration stating that Chase holds the Note. (CP 184). Thus, the beneficiary declaration must be taken as true. Moreover, the Note is indorsed in blank. Courts have consistently held that this is all that is required under Washington law to establish that Chase is the lawful beneficiary with the right to appoint a substitute trustee and direct the trustee to foreclose. *Trujillo*, 181 Wash. App. at 500-02; *Gogert v. Regional Trustee Svs.*, 2012 U.S. Dist. LEXIS 62973, at \*9-10 (W.D. Wash. May 4, 2012) (proof that bank possessed promissory note "satisfies Wells Fargo's burden on summary judgment of showing that there is no genuine issue of material fact that Wells Fargo had the right to initiate foreclosure proceedings."); *Michelson v. Chase Home Fin.*, 2012 U.S. Dist. LEXIS 110800 at \*8 (W.D. Wash. Aug. 7, 2012) ("Chase was permitted to initiate foreclosure because it held the Note endorsed in

blank.”); *see also* RCW 62A.3-205 (“When endorsed in blank, an instrument becomes payable to bearer. . . .”); *see also* RCW 61.24.005 (defining “beneficiary” as the “holder of the instrument or document evidencing the obligations secured by the deed of trust.”)

The court in *McMullen v. JPMorgan Chase Bank*, 2013 U.S. Dist. LEXIS 165885 (E.D. Wash. Nov. 20, 2013), recently addressed the very issue raised by Merry’s complaint. Like the present case, the loan in *McMullen* was originated by WaMu, and WaMu’s rights in the loan were acquired by Chase as set out in the P&A Agreement after WaMu was placed into receivership. The plaintiff filed suit alleging, among other things, that he was never provided any documentation showing how Chase became the beneficiary of the relevant deed of trust. Chase brought a motion to dismiss, asserting that it held the original promissory note, indorsed in blank. Where the evidence demonstrated that Chase held the note indorsed in blank, the court found that Chase was the holder with the right to initiate nonjudicial foreclosure, “even if it obtained the loan illegally.” *Id.* at \* 9. In other words, so long as Chase holds the Note indorsed in blank, it makes no difference how Chase came to hold the note. Argument as to how Chase came to hold the Note is immaterial.

As set forth in the Declaration of Amber Alegria, Chase holds the original Rutherford Note indorsed in blank. Thus, under Washington law,

Chase is the beneficiary of the DOT, flatly contradicting Merry's unsupported allegation to the contrary. Merry has not submitted evidence to contradict Chase's evidence showing that it holds the note, as required by CR 56(e). The deeds of trust that Merry attached to his response to Chase's motion for summary judgment do not create a genuine issue of material fact for trial because they say nothing about who holds the original Rutherford Note. (CP 104-123) That Washington Mutual Bank was the original lender under the Rutherford DOT does not compel the conclusion that Chase is not the current beneficiary. Indeed, the Rutherford DOT expressly contemplates that the Note can be sold one or more times. (CP 73-74, ¶ 19) Accordingly, Merry has failed to raise any genuine dispute as to whether Chase holds the original Rutherford Note and is the beneficiary of the associated DOT.

Pursuant to CR 56(e), Merry's claims cannot survive summary judgment by "rest[ing] upon the mere allegations or denials of his pleading." Rather, his response to Chase's motion, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Id.* Nevertheless, Merry chose to rely entirely on the unsupported accusations in his pleadings. He submitted no declarations or "specific facts" contradicting the Alegria Declaration.

Since Merry failed to submit any contrary evidence, there is no disputed issue of material fact.

Rather than submit contrary evidence, Merry attacks the validity of the Declaration of Amber Alegria in Support of Chase's Motion for Summary Judgment (CP 73-88), claiming she did not "provide her qualifications for determining authenticity of original documents, or that she has personal knowledge of the creation and signing of the documents in the file she has access to," and takes issue with the fact that the Note was not produced for inspection. (App. Br. 16). For the first time on appeal, Merry makes similar allegations regarding the Declaration of Sunserayer W. Edwards in Support of Standing. (CP 249-256) Since Merry never presented the argument regarding the Edwards Declaration to the trial court, it is improper for him to present this argument to this Court. *Kofmehl v. Baseline Lake, LLC*, 177 Wash. 2d 584, 594, 305 P.3d 230, 236 (2013) ("[T]he appellate court may consider only the evidence and issues called to the attention of the trial court") (*citing* RAP 9.12).

Even if Merry could properly raise all of his arguments regarding the Declarations, his allegations are unfounded. Ms. Alegria and Mr. Edwards testified that they are Assistant Secretaries with Chase. In this role, they have access to loan documents for loans serviced by Chase, including the Rutherford loan. They personally requested and reviewed

the Rutherford loan file. Based on their personal review of that file, they confirmed that Chase in fact holds the original Rutherford Note. Personal knowledge of the “creation and signing of the documents in the file that [they have] access to” is not necessary for the declarants to testify to their personal knowledge that the Note is *now* held by Chase. (App. Br. 16) Their testimony is based on their personal inspection of the original Rutherford Note and DOT from Chase’s file, not on knowledge of the Rutherford’s loan from years ago. Furthermore, Merry’s implied argument that the declarants are unqualified to identify a document as original is without merit— it does not take a handwriting expert to know whether a document is a black and white copy or a blue ink original.

Merry’s argument that the Note is unauthenticated is similarly without merit. “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” ER 901(a). Production of the original note is not necessary for the declarants to testify that they have personal knowledge of the fact that Chase holds the Note. Merry has presented no reason as to why Chase must produce the original Note for inspection as he demands. Alegria and Edwards’s Declarations are based on their personal knowledge, and are admissible evidence that Chase holds the original documents. CR 56(e).

Moreover, a beneficiary declaration executed under penalty of perjury must be taken as true if there is no evidence to the contrary. *Trujillo*, 181 Wash. App. at 496. Since Merry failed to produce a shred of evidence to contradict this established fact, it must be taken as true that Chase holds the Note, as set forth in the beneficiary declaration and the Alegria and Edwards Declarations. (CP 184, 73-75, 249-56).

**B. Merry’s chain of title arguments fail because public record shows how Chase came to possess the Note, and even if it did not, how Chase came to hold the Note is irrelevant to whether Chase is the beneficiary with the right to foreclose.**

Merry also attacks Chase’s beneficiary status on the grounds that there is no “chain of title” showing how Chase came to hold the Rutherford Note. (App. Br. 14-15) This argument fails for two reasons. First, the public records, which Merry himself acknowledges, establish the “chain of title.” As Merry points out, there is a recorded assignment of the DOT from the FDIC as receiver for Washington Mutual to Chase. (CP 7, 127). Moreover, the Purchase and Assumption Agreement (“P&A Agreement”) submitted with Chase’s moving papers shows how Chase came to own the Rutherford Note. (CP 29-72) Thus, there are clear public records showing how and when Chase took possession of the Rutherford Note.

Second, even if there was no public “chain of title,” those facts are immaterial to determining whether Chase is the beneficiary. All that matters under Washington law is that Chase is now the holder of the Rutherford Note, indorsed in blank. *Trujillo*, 181 Wash. App. at 500-02; *McMullen*, 2013 U.S. Dist. LEXIS 165885 (E.D. Wash. Nov. 20, 2013). Accordingly, argument about how Chase came to hold the Rutherford Note cannot raise a genuine issue of material fact as to whether it is currently the beneficiary.

**1. The chain of title is public record.**

Merry admits that Chase purchased WaMu’s assets from the FDIC after WaMu was placed into receivership. (CP 7, ¶¶ 3.6-3.7) Despite this acknowledgement, Merry makes an unsupported accusation that perhaps the Rutherford Note was not one of the assets purchased by Chase, and that the Note was “lost or assigned by WaMu to another party prior to the FDIC takeover.” (App. Br. 14-15) There is no merit to this contention. Chase acquired all of WaMu’s loan and loan servicing assets as set out in the P&A Agreement. (CP 41, ¶ 3.1) Merry cites no case law whatsoever to support his assertion that Chase can be “collaterally estopped from denying the existence and controlling elements of this private document” (another argument Merry improperly raises for the first time on appeal) on the basis that a California court declined to take judicial notice of the P&A

Agreement under California law. *Jolley v. Chase Home Fin., LLC*, 213 Cal. App. 4th 872, 887 (2013). *Jolley* did not hold that such a “private document” existed, so there is no question of estoppel. *See id.*

Moreover, no Washington court, state or federal, has followed the *Jolley* decision. On the contrary, courts in Washington routinely take judicial notice of the P&A Agreement for this purpose. *Tonseth v. WaMu Equity Plus*, 2012 U.S. Dist. LEXIS 2455 at n.2 (W.D. Wash., Jan. 9, 2012); *Danilyuk v. JPMorgan Chase Bank, N.A.*, 2010 U.S. Dist. LEXIS 66211 at \*6-7 (W.D. Wash. July 2, 2010).

Even if this Court were to look past the P&A Agreement, the recorded assignment of the Rutherford Loan from the FDIC as receiver for Washington Mutual to Chase is further evidence of the “chain of title” that Merry alleges is missing. (CP 127) That document clearly sets forth the transfer from Washington Mutual to Chase before WaMu was placed into receivership, and also states that it merely memorializes the transfer that occurred by operation of law in September 2008. Thus, public records show how Chase came to possess the Rutherford Note.

**2. Chain of title and how Chase came to possess the Note is immaterial to determining beneficiary status.**

More importantly, how Chase came to hold the Rutherford Note is completely immaterial to determining whether it is the proper beneficiary

of the DOT. As the *McMullen* court explained, the only relevant inquiry for determining whether Chase is the beneficiary under the DTA is whether it holds the Note, indorsed in blank. 2013 U.S. Dist. LEXIS 165885 (E.D. Wash. Nov. 20, 2013). Merry's "chain of title" arguments are thus unpersuasive. The uncontested evidence shows that Chase holds the original Rutherford Note, indorsed in blank. *Trujillo*, 181 Wash. App. at 496 (absent evidence to the contrary, a beneficiary declaration should be taken as true); (CP 184, 73-75, 249-56). That is fatal to Merry's claims.

**C. Merry's "Holder in Due Course" arguments fail.**

Merry cannot avoid summary judgment by making bare assertions that Chase is not a "holder in due course" of the Rutherford Note. (App. Br. 12-14, 19; CR 10, ¶¶ 6.4) First, Merry's argument is based on the allegation that Chase knew or should have known that the Rutherfords had defaulted on their Note at the time Chase purchased the loan. (App. Br. 12-13) There is absolutely no evidence in the record to support this allegation. Merry attempts to support his claim by arguing that since Chase was assigned the DOT in February 2013, and the May 2013 Notice of Default stated that the Rutherfords had defaulted on their November 2012 payment, Chase took possession of the Note knowing it was overdue. (App. Br. 12-13) However, the Edwards Declaration shows that Chase took possession of the original Note in 2009. (CP 250, ¶8) Thus,

Chase took possession of the Note, and attained beneficiary status, before the Note became “overdue.” There is no evidence that Chase took the Note knowing of any default. Similarly, Merry’s claim that Chase cannot be a holder in due course because it was attorney-in-fact for the FDIC at the time of the assignment is without merit since Chase was the beneficiary long before the assignment. (App. Br. 13-14)

Second, Merry’s argument fails as a matter of law. As set forth in the Alegria and Edwards Declarations, Chase is currently in possession of the original Rutherford Note and DOT. (CP 73-74, ¶3; CP 250, ¶¶6-8) The Note is indorsed in blank. (CP 73-74, ¶3) “When endorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone . . . .” RCW 62A.3-205(b). Thus, simply by being in possession of the Rutherford Note, Chase is the lawful beneficiary. Its right to receive payment does not depend upon the intricacies of how Chase purchased the Note from Washington Mutual. *Ukpomo v. U.S. Bank Nat’l Ass’n*, 2013 U.S. Dist. LEXIS 66576 \*7-9 (E.D. Wash. May 9, 2013).

Finally, even if Chase were not a holder in due course, such a fact would be irrelevant to Chase’s status as a beneficiary under the DTA. Merry has not pointed to a single case for the proposition that an entity must be a holder in due course to qualify as a beneficiary under the DTA.

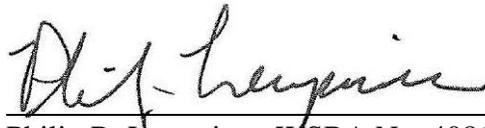
The DTA defines “beneficiary” as “holder,” not “holder in due course.” RCW 61.24.005(2). Merry has presented no evidence or authority demonstrating that Chase must be a holder in due course in order to enforce the Note and terms of the DOT.

**CONCLUSION**

For all the above reasons, the trial court’s decision should be AFFIRMED.

DATED this 24<sup>th</sup> day of October, 2014.

KEESAL, YOUNG & LOGAN

A handwritten signature in cursive script, appearing to read "Philip R. Lempriere", written over a horizontal line.

Philip R. Lempriere, WSBA No. 40818  
Molly J. Henry, WSBA 40818  
Attorneys for Respondent  
JPMORGAN CHASE BANK, N.A.

**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that, on the date given below, she caused to be served a copy of the foregoing BRIEF OF RESPONDENT JPMORGAN CHASE BANK, NATIONAL ASSOCIATION upon the following person via the following methods:

**VIA U.S. MAIL:**

Thomas F. Merry  
10541 Merry Canyon Road  
Leavenworth, WA 98826

*Plaintiff/Appellant, Pro Per*

**VIA U.S. MAIL:**

Joseph Ward McIntosh  
McCarthy ♦ Holthus LLP  
108 1<sup>st</sup> Avenue S., Suite 300  
Seattle, WA 98104

*Attorneys for Defendant Quality Loan  
Service Corp. of Washington, Inc.*

**VIA ELECTRONIC FILING:**

Court of Appeals: Division III  
State of Washington  
Renee S. Townsley, Clerk  
500 North Cedar Street  
Spokane, WA 99201

DATED this 24<sup>th</sup> day of October, 2014.

  
Hillary Thelen