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COURT OF APPEALS
DIVISION ONE

JUN 28 2013

No. 69652-1-I
DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

MATTHEW N. ORTEGA and JENNIFER C. ORTEGA,

Plaintiffs/Appellants

v.

NORTHWEST TRUSTEE SERVICES, INC.; MORTGAGE
ELECTRONIC REGISTRATION SERVICES, INC.; HSBC BANK USA,
National Association as Trustee for Wells Fargo Asset Securities Corp.
Mortgage Asset-Backed Pass-Through Certificates, Series 2008-1;
WELLS FARGO HOME MORTGAGE
Defendants/Respondents

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

ON APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT
(Hon. Eric. Z. Lucas)

**BRIEF OF RESPONDENTS WELLS FARGO HOME MORTGAGE,
HSBC BANK USA N.A., AND MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.**

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I. INTRODUCTION

This pro se appeal stems from the court's dismissal of a suit that appellants/plaintiffs Matthew and Jennifer Ortega brought to enjoin a trustee's sale. While some details may seem complicated, the essence of this case is relatively simple and undisputed. In 2007, the Ortegas obtained an \$805,000 interest-only loan for a newly constructed house near Puget Sound north of Seattle. About two years later, having fallen almost \$17,250 behind on their mortgage payments, the Ortegas received a notice of default. Because their loan was secured by a deed of trust, they also received a notice of trustee's sale (the form of nonjudicial foreclosure under a deed of trust). The Ortegas sought to stop the trustee's sale in late December 2009.

Simply put, the Ortegas attempted to enjoin the sale, even though they were in serious and sustained default on their interest-only payments. Nearly three years later, the trial court dismissed their suit. A series of procedural maneuvers preceded the dismissal. The relevant facts are given in more ample detail below. The net effect is that the Ortegas have lived in their home rent- and mortgage-free for more than three years.

Early in the case, the court had granted a pay-to-stay order, requiring the Ortegas to make monthly payments into the court registry while they stayed in the house pending resolution of their case.¹ After

¹ RP (Nov. 5, 2012) 9:24-10:2.

they failed to make most of the court-ordered payments, the court found them in contempt. The court warned the Ortegas that if they failed to purge (terminate) the contempt, it would dismiss the case.² The court subsequently extended them additional accommodations over the next eleven months, staying the case pending the outcome of Bain v. Metropolitan Mortgage Group, Inc.³ After Bain, the trial court dismissed the case, disbursing the mortgage payment funds to respondent Wells Fargo Bank, NA, and HSBC Bank USA, N.A. (collectively Wells Fargo).

For at least three reasons, this Court should affirm the superior court's orders declining to vacate the contempt order, dismissing the case, and disbursing the funds.

First, the trial court correctly acted within its broad discretion in issuing those orders. The Ortegas accepted the benefits of the pay-to-stay order but not the reciprocal burdens. They disobeyed the order and failed to purge the contempt finding. Their lawyer later conceded they had unclean hands when they moved to vacate the contempt finding.

Second, the Ortegas failed to establish that Bain changed the law in a way that would support vacating the contempt finding under CR 60(b)(11). Instead, Wells Fargo showed that Bain confirmed Wells Fargo

² Purge is a term of art for terminating a contempt order. See 17 C.J.S. Contempt § 199 (“Purging of Contempt”). Purge means to exonerate. Black's Law Dictionary at 1355 (9th ed. 2009).

³ 175 Wn.2d 83, 285 P.3d 34 (2012).

has the right to foreclose because it is the party with the payable-to-bearer note.

Third, the court should not consider the new issues and theories raised on appeal. Alternatively, those issues and theories fail to establish a manifest abuse of discretion.

II. COUNTERSTATEMENT OF STATEMENT OF ERRORS AND RELATED ISSUES

1. RCW 61.24.130(1) requires the court to condition a TRO or injunction against a trustee's sale on the borrower paying into the court registry the amount due on the loan secured by the deed of trust. The Ortegas violated an initial order requiring them to make monthly payments and a later order requiring them to resume payments. Did the court abuse its discretion in finding them in contempt for violating these orders?

2. The Ortegas moved under CR 60(b)(11) to vacate the contempt finding on the ground that Bain was an intervening change in the law that revoked Wells Fargo's authority to initiate the foreclosure. Bain follows the Uniform Commercial Code's and the Deed of Trust Act's policies that the note holder has authority to initiate foreclosure. When Wells Fargo had previously produced the payable-to-bearer note and when the Ortegas' expert did not dispute its authenticity, did the court abuse its discretion by denying the CR 60(b)(11) motion to vacate the contempt finding?

3. The Ortegas have raised new issues and theories on appeal. Ordinarily, the raise-it-or-waive-it rule applies: A party that fails to raise an issue below waives the issue for the purpose of an appeal. Have the Ortegas established that an exception to the rule should apply in this case?

4. Alternatively, have the Ortegas established a manifest abuse of discretion? Do alternative grounds support the orders below?

III. STATEMENT OF THE CASE

A. **The Ortegas Defaulted on a Mortgage Note That Wells Fargo Possesses.**

In November 2007, Golf Saving made an \$805,000 interest-only home loan to the Ortegas.⁴ A deed of trust secured the loan for the recently constructed home.⁵ Seven days after loan closing, Golf sent Wells Fargo a funding transmittal, which is used when Wells Fargo purchases a loan.⁶ Golf endorsed the note to Wells Fargo, and Wells Fargo kept the endorsed note at its offices.⁷ The Ortegas admit they never made loan payments to Golf. They admit that “[i]nstead, they were instructed to make their payments to Wells Fargo.”⁸

Roughly two years later, the Ortegas received a notice of default because they had fallen \$17,250 behind on their mortgage payments.⁹

⁴ CP 1385 ¶ 3, CP 1858-62 (Note).

⁵ The house is located at 4901 Ocean Avenue, Everett, Washington 98203. CP 1608 (street address on the deed of trust).

⁶ CP 1594 ¶ 3, CP 1598 (transmittal).

⁷ CP 1594 ¶ 4, CP 1600-04 (endorsed note).

⁸ CP 1892.

⁹ CP 1594 ¶ 6, CP 1624-25 (notice).

They later received a notice of trustee's sale, initially scheduled for December 28, 2009.¹⁰

B. The Ortegas Sought an Injunction to Restrain the Trustee's Sale and to Permit Them to Inspect the Note and Negotiate a Loan Modification.

On December 17, 2009, the Ortegas sued to enjoin the trustee's sale and recover damages.¹¹ The complaint named as defendants Wells Fargo, HSBC in a representative capacity (as trustee for the mortgage-backed security trust), Mortgage Electronic Registration Services (MERS, the nominee for the lender under the deed of trust), and the Northwest Trustee Services (the trustee on the deed of trust).¹² The complaint also named as defendants Golf (the originating lender), Keyna Willet (an agent for Golf), and Country Town Appraisal Services (an appraiser of the house).¹³ No record exists showing the Ortegas served the suit on these three defendants.

The Ortegas moved to quash the trustee's sale. They sought an order enjoining Wells Fargo from taking action until it produced the

¹⁰ CP 1885-88.

¹¹ CP 1918-36 (summons and complaint), CP 1920 (title of complaint). The Ortegas have brought other suits challenging trustees' sales and asserting claims for loan modifications. CP 94 n. 5 ("Ortegas in two other matters before this Court, Case Nos. 10-2-06913-2 and 11-2-04628-0.")

¹² CP 1920-22. The notices stated the creditor was HSBC Bank USA, NA, as trustee for Wells Fargo Asset Securities Corporation Mortgage Backed Pass Through Certificates Series 2008-1/Wells Fargo Home Mortgage. CP 1624 (Notice of Default), CP 1885-86 (Notice of Trustee's Sale referring to the assignment of the beneficial interest from Golf to the Wells Fargo mortgage backed security).

¹³ CP 1920-24.

original note, and until they received a reasonable period of time to pursue a loan modification with the holder of the note.¹⁴

C. The Court Enjoined the Trustee's Sale in January 2010.

On January 29, 2010, the court granted an order restraining the trustee's sale.¹⁵ The order also required the Ortegas to make monthly loan payments into the court's registry.¹⁶ The order scheduled the motion to quash and the trustee's motion for summary judgment to be heard three months later.¹⁷

D. The Court Required the Inspection of the Wet Ink Note and the Completion of Discovery, Before It Would Consider the Summary Judgment Dismissal Motions.

In July 2010, the Ortegas moved to continue the stay order and postpone the summary judgment motion until the parties completed loan modification discussions and discovery.¹⁸ Two months later, Wells Fargo and NWTs both moved for summary judgment.¹⁹ In November 2010, the court continued the hearing on the summary judgment motions for 90 days since Wells Fargo had not yet produced the original note.²⁰ By then, more than 120 days had elapsed since the original sale date of December 2009,

¹⁴ CP 1889-1903.

¹⁵ CP 1828-29 (Order on Stay and Mot. Consolidation, Jan. 29, 2010).

¹⁶ CP 1829.

¹⁷ Id.

¹⁸ CP 1761-71.

¹⁹ CP 1545-92, 1638-1712.

²⁰ CP 1484-85.

requiring the trustee to discontinue the sale under statutory deadline.²¹ During the interim, Wells Fargo offered the Ortegas a loan modification.²²

Two months later, the court granted Wells Fargo's motion to permit the inspection of the original "wet ink" note and substitute a copy as an exhibit in the record.²³ (GR 20(a) permits a party to petition for the admission of a negotiable instrument as an exhibit and withdraw the original, substituting a copy.)²⁴ The following month, Wells Fargo, MERS, and NWTs renewed their summary judgment motions.²⁵ Wells Fargo requested that, at a minimum, the court should require the Ortegas to resume the monthly mortgage payments.²⁶ By that time, the Ortegas had not made payments for eleven months.²⁷

In March 2011, the Ortegas moved to continue the renewed summary judgment motions until the court compelled Wells Fargo and NWTs to supplement their answers to the voluminous discovery.²⁸ Alternatively, the Ortegas requested the court stay the summary judgment motions until the supreme court decided the Bain case.²⁹

²¹ RCW 61.24.040(6).

²² CP 1639:4-11.

²³ CP 1472-73 (order).

²⁴ CP 1481-83 (motion). As noted above, a promissory note is also self-authenticating under ER 902(i).

²⁵ CP 1391-98, 1424-39.

²⁶ CP 1397:10-23.

²⁷ CP 1401 ¶ 9.

²⁸ CP 1314-90.

²⁹ CP 705.

E. After the Ortegas Failed to Make Monthly Mortgage Payments for a Year, the Court Ordered Them to Resume Payments by April 2011.

On March 25, 2011, the court granted an order compelling Wells Fargo and NWTs to supplement their responses to written discovery.³⁰ The order reserved ruling on a stay and continued the summary judgment motions until the parties completed discovery.³¹ The order required the Ortegas to arrange for their expert to inspect the wet ink note.³² The order also required the Ortegas “to resume ... monthly mortgage payments,” with the first payment “due on April 25, 2011.”³³ Six weeks later, on May 10, 2011, the court granted an order confirming “the amount of the regular monthly payment to be paid into the Court Registry is \$5669.18”³⁴ – the amount specified on the promissory note.³⁵

F. The Court Held the Ortegas in Contempt for Failing to Make Payments in November 2011.

When the Ortegas failed to make the renewed monthly payments for August, September and October 2011, Wells Fargo and MERS moved for contempt.³⁶ In response, the Ortegas moved to shorten time and cross-moved for contempt and to compel discovery.³⁷

³⁰ CP 699-700.

³¹ Id.

³² CP 700.

³³ Id.

³⁴ CP 694 (order, May 10, 2011).

³⁵ CP 1858-62 (Note).

³⁶ CP 678 ¶ 2. CP 687-691.

³⁷ CP 159-61, 687-91.

In a hearing on November 16, 2011, Wells Fargo confirmed the Ortegas and their expert had inspected the wet ink note.³⁸ Wells Fargo also confirmed that it had produced 1,500 pages of records, including “the pooling and servicing agreements, the master servicing agreement, [and] mortgage loan schedule.”³⁹ The court denied the Ortegas’ motion to shorten time to hear their cross-motions⁴⁰ and found them in contempt. The court granted the Ortegas 60 days to purge the contempt by paying the arrearage.⁴¹ In doing so, the court warned that if they failed to purge the contempt, it would dismiss their case.⁴² Roughly a month later, on December 15, 2011, the court signed the contempt order.⁴³

Four months later, Wells Fargo and MERS moved to dismiss the complaint for failure to purge the contempt.⁴⁴ The Ortegas retained counsel, who moved to dismiss their case without prejudice.⁴⁵ Wells Fargo and MERS responded that, consistent with the contempt order, the court should dismiss the complaint with prejudice. Alternatively, Wells Fargo and MERS requested that the court condition dismissal on the requirement that the Ortegas purge their contempt before filing a new

³⁸ RP (Nov. 16, 2011) 5:12-20, *id.* at 6:16-20.

³⁹ *Id.* at 5:12-15 (over 1,500 page); *id.* at 6:22-7:1-2 (describing the records produced).

⁴⁰ *Id.* at 10:22-11:9; 12:9-10.

⁴¹ *Id.* at 12:11-24.

⁴² *Id.* at 12:18-14:12.

⁴³ CP 107-09 (Order Granting Defs.’ Mot. for Contempt and Denying Pl.’s Mot. to Shorten Time and Counter Mot. For Contempt and to Compel, Dec. 15, 2011).

⁴⁴ CP 102-04.

⁴⁵ CP 98-100.

suit.⁴⁶ On March 29, 2012, at the request of the Ortegas, the court stayed the case pending the supreme court's decision in Bain.⁴⁷

G. Almost One Year After the Contempt Finding, the Court Declined to Vacate the Finding, Disbursed the Mortgage Payments, and Dismissed the Case.

Two months after the supreme court decided Bain,⁴⁸ and eleven months after the oral contempt finding, the Ortegas moved to vacate the contempt finding.⁴⁹ They also asked to withdraw their motion for voluntary dismissal, and asked the court to refund the money they had paid into the court registry.⁵⁰

Wells Fargo and MERS responded by renewing the motion to dismiss with prejudice, emphasizing that the Ortegas would have new remedies when a new notice of trustee's sale was recorded.⁵¹ Wells Fargo also moved to disburse the funds in the registry,⁵² arguing it had standing under Bain as the person possessing the payable-to-bearer note, the authenticity of which the Ortegas' expert had not challenged.⁵³ The Ortegas opposed the motions.⁵⁴

On November 5, 2012, the court heard argument and denied the Ortegas' motion to vacate the contempt finding and to withdraw the

⁴⁶ CP 94:13-95:18.

⁴⁷ CP 81-82.

⁴⁸ Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 285 P.3d 34 (2012).

⁴⁹ CP 60-69.

⁵⁰ Id.

⁵¹ CP 45-47.

⁵² CP 52-55.

⁵³ CP 53:9-14, Lorber Decl. ¶ 2, CP 42. Moreover, as commercial paper, the promissory note is self-authenticating. See ER 902(i).

⁵⁴ CP 17-22.

voluntary dismissal motion.⁵⁵ The court granted the motion to dismiss with prejudice.⁵⁶ The court also ordered that the funds in the court registry be disbursed to Wells Fargo and applied against the loan.⁵⁷ The Ortegas have appealed from these orders.⁵⁸

H. During the 35 Months While the Case Was Pending, the Ortegas Made 6.5 Monthly Mortgage Payments.

When the court held the Ortegas in contempt in November 2011, they owed nearly \$46,000 in court-ordered payments and over \$190,000 in arrears on their loan.⁵⁹ They had not made any payments since June 28, 2011.⁶⁰ During the thirty-five months while the case was pending,⁶¹ the Ortegas paid \$28,346 into the registry.⁶² That equaled five monthly payments of \$5,669 ($\$28,345 \div 5,669 = 5$).⁶³ They also made the equivalent of one and a half payments directly to Wells Fargo.⁶⁴ Thus, over the life of this case, the Ortegas made a total of six and a half monthly payments. They made no additional payments after the contempt

⁵⁵ RP (Nov. 5, 2012) 14:18-25.

⁵⁶ Id.

⁵⁷ CP 1 (Order re Nov. 5, 2012 Mots.).

⁵⁸ CP 1937-42 (Notice of Appeal).

⁵⁹ CP 103:13-20.

⁶⁰ CP 103:9-20 & n.1 (no payments since June 28, 2011).

⁶¹ CP 1918 (compl., Dec. 17, 2009), CP 1-2 (dismissal, Nov. 5, 2012)

⁶² CP 43 ¶ 3.

⁶³ CP 1881 (additional monthly payment of \$5,669).

⁶⁴ CP 1762:18-22 (referring to three payments under forbearance agreement; CP 1715-17 (letter and special forbearance agreement signed March 16, 2010, requiring payment of \$8,780 paid \$2,929/month).

order—during the eleven months preceding the dismissal order.⁶⁵ After filing this appeal, they have continued to live in the house payment free.

IV. SUMMARY OF ARGUMENT

Shortly after Wells Fargo produced the payable-to-bearer note, the Ortegas stopped making the renewed monthly payments, invoking a self-help remedy of ceasing payment rather than dismissing their suit. The trial court acted within its broad discretion to find the Ortegas in contempt for violating the pay-to-stay order. By statutory policy, a borrower must pay for a presale injunction in these circumstances. See RCW 61.24.130(1) (“The court shall require as a condition of granting the restraining order or injunction that the applicant pay to the clerk of the court the sums that would be due on the obligation secured by the deed of trust”).

Nearly a year later, the Ortegas moved under CR 60(b)(11) to vacate the contempt finding. They failed to introduce any new facts or intervening change in the law supporting equitable intervention. Rather, they admitted they had unclean hands. After giving the Ortegas much latitude, the court dismissed the suit and disbursed the funds.

The court acted within its broad discretion in dismissing the complaint for contempt, and this court should affirm. This court may also affirm on the independent ground that under Bain, the Deed of Trust Act,

⁶⁵ CP ¶ 3 (\$28,346 in court registry on October 2, 2012).

and the Uniform Commercial Code, Wells Fargo had authority to enforce the note and deed of trust. Therefore, the Ortegas suffered no prejudice from the dismissal of their claims and the disbursement of the funds to Wells Fargo.⁶⁶

V. ANALYSIS AND ARGUMENT

A. The Deferential Abuse of Discretion Standard of Review Applies.

The Ortegas assert that de novo review applies.⁶⁷ But “[w]hether contempt is warranted in a particular case is a matter within the sound discretion of the trial court; unless that discretion is abused, it should not be disturbed on appeal.”⁶⁸ This court will uphold a contempt finding “as long as a proper basis can be found.”⁶⁹

The abuse of discretion standard also applies to the court’s order declining to grant the CR 60(b) motion,⁷⁰ disbursing funds in the court registry,⁷¹ dismissing the case for contempt,⁷² and declining to order additional discovery.⁷³

⁶⁶ LaMon v. Butler, 112 Wn.2d 193, 200–01, 770 P.2d 1027 (1989) (court may affirm on any ground supported by the record, whether the superior court considered it or not). The record supports these alternative grounds, because the parties briefed them below.

⁶⁷ Br. of Appellant at 7.

⁶⁸ Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995) (quoting In re King, 110 Wn.2d 793, 798, 756 P.2d 1303 (1988)).

⁶⁹ Stella Sales, Inc. v. Johnson, 97 Wn. App. 11, 20, 985 P.2d 391 (1999) (quoting State v. Boatman, 104 Wn.2d 44, 46, 700 P.2d 1152 (1985)).

⁷⁰ Summers v. Dep’t of Revenue, 104 Wn. App. 87, 89, 14 P.3d 902 (2001).

⁷¹ Wilson v. Henkle, 45 Wn. App. 162, 169, 724 P.2d 1069 (1986).

⁷² Woodhead v. Discount Waterbeds, Inc., 78 Wn. App. 125, 130–31, 133, 896 P.2d 66 (1995), review denied, 128 Wn.2d 1008, 910 P.2d 482 (1996).

⁷³ Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 777, 80, 819 P.2d 370 (1991) (requiring a showing of “an abuse of discretion which caused prejudice to the party”);

Abuse of discretion exists only upon a clear showing that the court's exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons.⁷⁴ "A discretionary decision rests on 'untenable grounds' or is based on 'untenable reasons' if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is 'manifestly unreasonable' if 'the court, despite applying the correct legal standard' to the supported facts, adopts a view 'that no reasonable person would take.'"⁷⁵

B. The Court Properly Exercised Its Discretion in Denying the Motion to Vacate the Contempt Finding and in Ordering Disbursement to Wells Fargo.

The third assignment of error challenges two orders: (1) the order declining to vacate the contempt finding and (2) the order disbursing to Wells Fargo the mortgage payment funds in the court registry.⁷⁶ The Ortegas, however, have not shown that the court committed a manifest abuse of discretion by granting these orders.⁷⁷

A decision denying a motion to vacate "should be overturned on appeal only if it plainly appears" that the court has abused its discretion.⁷⁸ The Ortegas' lawyer invoked CR 60(b)(11) the catch-all provision

Lindblad v. Boeing Co., 108 Wn. App. 198, 207, 31 P.3d 1 (2001) (court reviews denial of motion to compel discovery under abuse of discretion standard).

⁷⁴ Moreman v. Butcher, 126 Wn.2d at 40 (citations omitted).

⁷⁵ Magana v. Hyundai Motor Am., 167 Wn.2d 570, 583, 220 P.3d 191 (2009) (citations omitted).

⁷⁶ Br. of Appellant at 3.

⁷⁷ Wilson v. Henkle, 45 Wn. App. 162, 166, 169, 724 P.2d 1069 (1986).

⁷⁸ Haller v. Wallis, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978) (affirming the refusal to vacate).

allowing vacation for “[a]ny other reason justifying relief from the operation of the judgment.”⁷⁹ The catch-all is “confined to situations involving extraordinary circumstances not covered by any other section of the rule.”⁸⁰ The Ortegas failed to establish extraordinary circumstances; therefore, the court properly denied their motion.

1. Bain Confirms That Wells Fargo Was Entitled to Collect the Loan Payments and Enforce the Deed of Trust.

Below, the Ortegas contended Bain justified the vacation of the contempt finding, because, according to them, the decision changed the law and established Wells Fargo lacked standing to foreclose.⁸¹ In particular, they argued that for Wells Fargo to have the right to foreclose, it must receive that authority from either the original lender (Golf) or MERS.⁸² But Wells Fargo did have authority from the original lender—when it received the note that the original lender endorsed. Bain confirms that authority and follows the established law that the mortgage follows the note.

In Bain v. Metro Mortgage Group, Inc., 175 Wn.2d 83, 285 P.3d 43 (2012), the court addressed some of the rights and obligations of the parties to a deed of trust mortgage where, as here, the mortgage has been sold to a new lender. Bain, the Deed of Trust Act (RCW 61.24.005(2)),

⁷⁹ CP 68-69 (CR 60(b)(11)).

⁸⁰ Summers, 104 Wn. App. at 93 (affirming denial of motion to vacate).

⁸¹ CP 68:11-69:15.

⁸² CP 65:15-24; CP 68:11-24.

and Uniform Commercial Code provisions (RCW 62A.1-201(21)(A) and RCW 62A.3-301) support the court's disbursement order. Under them, Wells Fargo has authority to enforce the note and deed of trust, regardless MERS's identification on the Deed of Trust.

Since 1998, the Deed of Trust Act (Title 62.24 RCW) has defined a "beneficiary" of a deed of trust as "the **holder** of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation."⁸³ The U.C.C. defines the "holder" of a negotiable instrument as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." RCW 62A.1-201(21)(A).⁸⁴ A negotiable instrument is payable to bearer if it is indorsed in blank, as it is in this case. RCW 62A.3-205(b).⁸⁵

In Bain, the court explained that:

If the original lender ha[s] sold the loan, that purchaser would need to establish ownership of that loan, *either* by demonstrating that it actually held the promissory note *or* by documenting the chain of transactions.⁸⁶

Here, Wells Fargo established ownership under Bain's first prong: Wells Fargo holds the promissory note. Wells Fargo produced the

⁸³ Bain, 175 Wn.2d at 98-99 (citing RCW 61.24.005(2)) (emphasis added).

⁸⁴ Bain, 175 Wn.2d at 104 (quoting same).

⁸⁵ "When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed." RCW 62A.3-205(b).

⁸⁶ 175 Wn.2d at 111 (emphasis added).

Ortegas' "wet ink" note indorsed in blank.⁸⁷ Since the note was indorsed in blank and payable to bearer, the "holder" is the person that possesses it – Wells Fargo. RCW 62A.1-201(21); Bain, 175 Wn.2d at 104. Since Wells Fargo is the "holder" of the note it is the "beneficiary" of the deed of trust. RCW 61.24.005(2). Thus, under the Deed of Trust Act, the U.C.C., and Bain, Wells Fargo has authority to enforce both the note and deed of trust.

In response to the motion to vacate, Wells Fargo argued that Bain did not support the Ortega's MERS-based arguments, because Wells Fargo physically possessed the note.⁸⁸ The court properly rejected the contention that Wells Fargo needed to provide an additional affidavit before the court could decide whether to order disbursement to Wells Fargo.⁸⁹ Instead, the court properly dismissed the case,⁹⁰ directing the clerk "to release the funds being held in the court registry to Wells Fargo to be applied to the past due balance of the Ortegas' loan that is the subject of this dispute."⁹¹

⁸⁷ CP 53:9-14. Lorber Decl. ¶ 2, CP 42. RP (Nov. 16, 2011) 5:12-20. RP at 6:16-20.

⁸⁸ CP 5:19-15 (arguing Bain superseded Ortegas' arguments regarding MERS). RP (Nov. 5, 2012) 2:22-8:1 (arguing the options were to establish standing either through possession of the note or through a chain of transactions), id. at 13:8-14:7 (confirming Wells Fargo holds the note). Earlier in the case, the Ortegas had argued that the funds should not be disbursed to Wells Fargo "even if it possesses the note the [Ortegas] signed." CP 89:14-23.

⁸⁹ RP (Nov. 5, 2012) 11:4-10 (note previously produced), id. at 14:10-25 (rejecting claim that additional evidence was required).

⁹⁰ RP (Nov. 5, 2012) 14:18-25.

⁹¹ CP 2:3-6.

2. Florez v. OneWest Bank Corroborates the Dismissal.

Last year, Judge Coughenour (who certified Bain to the supreme court) granted a comparable motion to dismiss with prejudice in Florez v. OneWest Bank.⁹² He distinguished Bain on similar facts (*i.e.*, where the lender has the right to foreclose because it holds the note, not because MERS played any role). The court ruled:

[T]he situation at issue here is unlike the situation in Bain v. Metro. Mortg. Group Inc. In Bain, the alleged authority to foreclose was based solely on MERS's assignment of the deed of trust, rather than on possession of the Note. Here, however, the undisputed facts establish that OneWest had authority to foreclose, independent of MERS, since OneWest held Plaintiffs' Note at the time of foreclosure.⁹³

The same reasoning applies in this case. Because the unrefuted evidence shows Wells Fargo holds the note, MERS is irrelevant to Wells Fargo's right to foreclose. The Ortegas failed to establish that there was an intervening change in the law supporting the vacation of the contempt finding and the withdrawal of their motion for voluntary dismissal. The court correctly concluded that Wells Fargo had the right to enforce the endorsed note and to receive the funds deposited in the court registry.⁹⁴ Bain did not change the law as applied to this case. On this basis alone, this court should affirm the order denying the motion to vacate.

3. The Equities Failed to Support Vacating the Contempt Order under CR 60(b)(11).

⁹² Florez v. OneWest Bank, FSB, No. 11-2088, 2012 WL 1118179, *1, 2012 U.S. Dist. LEXIS 56111, *3-*4 (W.D. Wash. Apr. 3, 2012) (citation omitted).

⁹³ Id.

⁹⁴ RP (Nov. 5, 2012) 14:8-25, CP 1-2.

As demonstrated above, the motion to vacate failed on the basis of the substantive law. Nor did Bain constitute “extraordinary circumstances” justifying relief under CR 60(b)(11).⁹⁵ Rather, Bain confirms that the note holder may enforce the deed of trust.

Because CR 60(b) motions are equitable in nature, the court properly considered equitable principles as well as substantive law.⁹⁶ The facts in this case furnished no basis for equitable intervention.⁹⁷ The Ortegas’ lawyer invoked the equities, claiming “ours is a clean hands argument”—relying on a misreading of Bain and on a vague claim that the deed of trust’s description of property was incomplete.⁹⁸ But when the court asked, “You are in contempt of a court order, how is that clean hands?” the Ortegas’ lawyer conceded: “Yeah, there is only one way to—I follow the Court’s argument on that.”⁹⁹

While conceding that they had unclean hands from being in contempt, the Ortegas had unclean hands in another way. They accepted

⁹⁵ Summers, 104 Wn. App. at 93 (affirming denial of motion to vacate).

⁹⁶ Haller v. Wallis, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978) 12 James Moore et al., Moore’s Federal Practice § 60.22[5] at 60-80 (3d ed. 2013) (“The relief provided by Rule 60(b) is equitable in nature and, in exercising its discretion under Rule 60(b), a court may always consider whether the moving party has acted equitably.”); 11 Charles A. Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure § 2857 at 321 (2012) (“Equitable principles may be taken into account by a court in the exercise of its discretion under Rule 60(b).”).

⁹⁷ Dale v. Cohn, 14 Wn.2d 214, 218, 127 P.2d 412 (1942).

⁹⁸ RP (Nov. 5, 2012) at 8:3-9:2 (speaking of the equities and arguing a lack of authority to initiate the foreclosure and a flaw in the deed of trust’s description of property). Id. at 12:10-13:6 (arguing clean hands from the lack of authority). The complaint also asserted unclean hands as an affirmative claim against Wells Fargo. CP 1931:13-1932:4.

⁹⁹ RP (Nov. 5, 2012) 12:25-13:4. Id. at 9:24-10:2.

the benefit of a mortgage they signed, but then later claimed the deed of trust's description for that property was inaccurate, voiding the security. See infra Section G (“The Deed of Trust’s Property Description Is Correct”) at pages 35-37.¹⁰⁰

But as the law has long held, one who comes in equity must come with clean hands, and one who seeks equity must do equity.¹⁰¹ The Ortegas identified no “extraordinary circumstances” justifying vacating the contempt finding, and the court should affirm.

C. The Court Found the Ortegas in Contempt for Violating Two Orders in 2011 – Not the Original Order in 2010.

In first assignment of error and first issue, the Ortegas complain that the court erred in finding them in contempt for violating a conditional stay order.¹⁰² The Ortegas waived this issue by failing to raise it below. “While an appellate court retains the discretion to consider an issue raised for the first time on appeal, such discretion is rarely exercised.”¹⁰³ Even if

¹⁰⁰ Walsh v. Wescoatt, 131 Wash. 314, 316-17, 230 P. 160 (1926) (stating unclean hands if defendants misrepresented the land mortgaged and plaintiff relied upon it, defendants could not reformation of their unqualified endorsement to be without recourse). Id. at 319 (reversing judgment and remanding the case, with directions to the trial court to determine whether the respondents made the misrepresentations charged).

¹⁰¹ Wescoatt, 131 Wash. at 316-17 (discussing and applying both maxims). See 1 John Pomeroy, Jr. Pomeroy’s Equity Jurisprudence and Equitable Remedies § 397 at 656-57 (1905) (comparing and contrasting the two maxims). The first maxim (one who seeks equity must do equity) does not assume the plaintiff has done anything unconscientious or inequitable. It merely focuses on the link between the equitable remedy of the plaintiff (delaying the foreclosure) and the reciprocal remedy of the defendant (receiving payment for delay). Id. at 657. The second maxim (unclean hands) looks to whether the plaintiff “has violated conscience, or good faith, or other equitable principles in his prior conduct” allowing the court to refuse to interfere on his [or her] behalf.” Id.

¹⁰² Br. of Appellant at 1-2.

¹⁰³ Karlberg v. Otten, 167 Wn. App. 522, 531–32, 280 P.3d 1123 (2012).

the court were to consider this alleged error, it should still affirm the orders in this case.

RCW 7.21.010 defines contempt in part as the intentional “[d]isobeyance of any lawful ... order ... of the court.” RCW 7.21.010(b). The Ortegas argue that when they failed to make payments into the court registry, the defendants should have sought the court’s permission to lift the stay/injunction and restart foreclosure.¹⁰⁴ The Ortegas frame the first assignment of error in terms of the court finding them in contempt for disobeying a “*conditional* stay order to restrain the defendants’ sale of their residential home.”¹⁰⁵ But the court actually found the Ortegas in contempt for disobeying two unconditional orders to resume mortgage payments.¹⁰⁶

Washington courts have defined a stay as “[a] stopping; the act of arresting a judicial proceeding by the order of a court. ... The temporary suspension of the regular order of proceedings in a cause, by direction or order of the court.”¹⁰⁷ An injunction, by contrast, “is a means by which a court tells someone what to do or not do” and “does so with the backing of its full coercive powers.”¹⁰⁸ “[I]nstead of directing the conduct of a particular actor, a stay operates upon the judicial proceeding itself. It does

¹⁰⁴ Br. of Appellants at 1.

¹⁰⁵ Br. of Appellants at 2 (Assignment of Error No. 1) (*italics added*); *id.* at 3, 8-11.

¹⁰⁶ CP 107-09 (contempt order).

¹⁰⁷ *In re Koome*, 82 Wn.2d 816, 818, 514 P.2d 520 (1973) (quoting Black’s Law Dictionary 1583 (4th ed. rev. 1968)).

¹⁰⁸ *Nken v. Holder*, 556 U.S. 418, 129 S. Ct. 1749, 1757, 173 L. Ed. 2d 550, 562 (2009).

so either by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability.”¹⁰⁹

More than two years into this case, the court granted an order on March 29, 2012, staying the case pending the outcome of Bain.¹¹⁰ In contrast, the court’s first order, dated January 29, 2010, enjoined the trustee’s sale.¹¹¹ That order, however, used the term “stay” instead of “injunction.”¹¹² The Ortegas refer to this order as the “conditional stay order,” arguing the court erred in holding them in contempt for violating the conditional stay order.¹¹³ But the court did not find the Ortegas in contempt for violating the January 29, 2010 order.¹¹⁴

Rather, the contempt order cites the March 25 and May 10, 2011 orders as the orders at issue.¹¹⁵ The order’s findings and conclusions rest on the orders requiring the Ortegas to resume making payments into the court registry and on the fact they had not done so since June 2011.¹¹⁶ Therefore, the first assignment of error and the related issue collapse under minimum scrutiny.

¹⁰⁹ Id. at 1757.

¹¹⁰ CP 81-82.

¹¹¹ CP 1828-29.

¹¹² CP 1828-29.

¹¹³ Br. of Appellants at 2 (Assignment of Error No. 1: “erred when it found Plaintiffs to be in contempt of its conditional stay order to restrain defendants’ sale of their residential home.”); id. at 3 (Issue No. 1: “Was the Court’s Stay Order Conditional?”); id. at 8-11 (arguing error to find the Ortegas in contempt of the conditional stay order, when they could request a stay without security and when defendants never sought permission to restart the foreclosure proceeding).

¹¹⁴ CP 1828-30 (order, Jan. 29, 2010), CP 107-09 (contempt order, Dec. 15, 2011).

¹¹⁵ CP 107-09.

¹¹⁶ CP 108:7-20.

D. The Ortegas Failed to Preserve the Second Assignment of Error (a threshold finding of ability to pay the monthly mortgage payments).

The Ortegas failed to raise or develop the issue identified in the second assignment of error (the absence of “a finding that the [Ortegas] had the present ability to pay the existing mortgage payments into the [court] registry”).¹¹⁷ The related new theories include the Ortegas’ characterization of the contempt order as being punitive and as denying them due process. The Ortegas also make a fleeting reference to the Declaratory Judgment Act.¹¹⁸

This Court should exercise its discretion not to reach these new issues and theories. Under RAP 2.5(a), “[t]he appellate court may refuse to review a claim of error which was not raised in the trial court, subject to several exceptions.”¹¹⁹ The same policy applies to theories not presented below.¹²⁰ By not raising these theories below, the Ortegas deprived the trial court of the opportunity to correct the alleged errors, an opportunity that could have avoided an unnecessary appeal.¹²¹ No reason exists for exercising that discretion here.

¹¹⁷ Br. of Appellant at 2.

¹¹⁸ Br. of Appellant at 10-12.

¹¹⁹ See Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 441, 191 P.3d 879 (2008) (“A party who fails to raise an issue at trial normally waives the right to raise that issue on appeal.”).

¹²⁰ Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 780, 819 P.2d 370 (1991). Lindblad v. Boeing Co., 108 Wn. App. 198, 207, 31 P.3d 1 (2001) (“We will not review an issue, theory, argument, or claim of error not presented at the trial court level.”).

¹²¹ Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

Below, the court repeatedly invited the Ortegas to make their record. During the contempt hearing, the court rejected the Ortegas' request to lower the monthly mortgage payments, because "[t]here is no authority for me to remake that contract."¹²² The court had rejected the same request for lower payments earlier in the case.¹²³ Yet, the Ortegas had never moved to modify the earlier orders, leading the court to ask: "Why didn't you make a motion to come back in front of me?"¹²⁴ (The Ortegas also have not assigned error to the two earlier orders, so they are taken as verities on appeal.) When Ms. Ortega asked at the hearing to have the payments lowered, the court responded: "you have to ... demonstrate that to me that I have the power to do that."¹²⁵

During the hearing, the court observed that after a few months the Ortegas had stopped making any payments, a huge amount of time had passed before the court required them to resume payments.¹²⁶ Also, the court had not required them to make any back payments.¹²⁷ The court then gave the Ortegas 60 days to purge the contempt finding, warning that their failure to pay and get back on schedule would cause the court to strike their pleadings, resulting in the dismissal of the case.¹²⁸ When Ms. Ortega again asked if her ability to pay were relevant, the court

¹²² RP (Nov. 16, 2011) 11:24-12:7.

¹²³ RP 11:21-12:7.

¹²⁴ RP 8:6-20.

¹²⁵ RP 8:19-9:6.

¹²⁶ Id.

¹²⁷ RP 11:11-21.

¹²⁸ RP 12:9-13:6.

reiterated: “What you have to do is you have to come up with a legal argument that gives me authority to do what you want me to do.”¹²⁹

Subsequently, the Ortegas retained a lawyer who appeared on their behalf at two hearings. Even then, they failed to make any record of their inability to pay.¹³⁰ Instead, they relied on the hope that Bain might rule that MERS deeds of trust were void, granting them a windfall.¹³¹ But Bain did not grant the windfall. Bain, 175 Wn.2d at 112 (finding there was “no authority” for “the suggestion that listing an ineligible beneficiary on a deed of trust would render the deed void and entitle the borrower to quiet title”).

In these circumstances, where the court invited the Ortegas and their lawyer to make the record below and they failed to do so, this appellate court should decline to consider the second assignment of error and the related new arguments and issues, which were raised on appeal for the first time. In the event that the court considers, those arguments and theories, they do not support reversal, as established below.

E. Alternatively, the Deed of Trust Act Granted the Court No Authority to Modify the Amount of the Loan Payments.

In the event the court decides to consider the second assignment of error, the court should affirm on the basis that the contempt finding was properly granted. The Ortegas claim that the court erred in granting the

¹²⁹ RP 13:14-18.

¹³⁰ RP (Mar. 26, 2012); RP (Nov. 5, 2012).

¹³¹ See RP (Nov. 5, 2012) 9:7-14:25.

contempt motion without first finding that they had the present ability to pay.¹³² This assigned error fails for three reasons. First, the court lacked authority to modify the monthly mortgage payment. Second, the Declaratory Judgments Act does not trump the Deed of Trust Act. Third, the Ortegas failed to satisfy the burden of production and persuasion regarding the inability to pay.

1. RCW 61.24.130 Grants No Discretion to Adjust the Amount Payable.

The Ortegas disobeyed three orders requiring them to make the monthly mortgage payments, culminating in the December 15, 2011 contempt order.¹³³ The orders implemented the payment condition for a presale injunction under the Deed of Trust Act, RCW 61.24.130(1).¹³⁴ RCW 61.24.130's mandatory requirements are very tenable grounds supporting the court's discretionary decision.

RCW 61.24.130(1)'s first paragraph conditions a presale injunction on the moving party paying to the clerk the sums due on the loan. "The court shall require as a condition of granting the ... injunction that the applicant pay to the clerk of the court the sums that would be due on the obligation secured by the deed of trust if the deed of trust was not being foreclosed" RCW 61.24.130. The language is mandatory ("The

¹³² Br. of Appellants at 2 (Assignment of Error No. 2).

¹³³ CP 107-09 (order granting motion for contempt, Dec. 15, 2011). CP 1828-30 (order, Jan. 29, 2010), CP 698-700 (letter order, Mar. 25, 2011), CP 694 (letter order, May 10, 2011).

¹³⁴ CP 1850:5-14. (discussing RCW 61.24.130's requirements), CP 1857:2-5 (same).

court shall require as a condition”)—not discretionary. Id. The mandatory language is reinforced by the permissive “may” language in the third paragraph granting the court discretion to require other security for the payment of costs, damages and fees. RCW 61.24.130 (“court may condition ...”).¹³⁵ The rule of statutory construction (express mention, implied exclusion) bolsters this construction of the plain language. The permissive (may) language in the later sentence governing the injunction bond implies the mandatory (shall) language in the earlier sentence was an intentional distinction. Construed in context, the “shall” imposed a mandatory condition for an injunction restraining a trustee’s sale under RCW 61.24.130 – the condition was to make the mortgage payments.

The court followed the statute’s plain language. When the court rejected the Ortigas’ request to lower the monthly mortgage payments, the court stated: “[t]here is no authority for me to remake that contract.”¹³⁶ The principle that in the absence of a recognized equitable remedy, equity cannot rewrite contracts is well-established. “Equity, like it does in all other express contracts in which the terms of the contract are clear and plain, follows the law, and the courts have no authority on any equitable principle to rewrite the contract for the parties.”¹³⁷ The loan payments are the minimal security required to enjoin the sale. RCW 61.24.130 reflects

¹³⁵ RCW 61.24.130 (third paragraph). CP 1850:5-14 (discussing RCW 61.24.130’s requirements), CP 1857:2-5 (same).

¹³⁶ RP (Nov. 16, 2011) 11:24-12:7.

¹³⁷ Pacific Fin. Corp. v. Spokane., 160 Wash. 384, 389, 295 P. 110 (1931).

a legislative policy decision imposing a mandatory loan payment requirement for a presale injunction, while relaxing the general requirement for an injunction bond covering damages and costs.

The injunction statute's RCW 7.40.080 requires that an injunction bond covering damages and costs is a condition for granting a preliminary injunction.¹³⁸ Civil Rule 65(c) requires a bond for an injunction: "except as otherwise provided by the statute ...". RCW 61.24.130 is one of those statutes relaxing the requirement for an injunction bond, while imposing a requirement to make mortgage payments to secure a pretrial injunction against a trustee's sale.¹³⁹ The monthly payments are the consideration for delaying the sale.

In some circumstances, equity may intervene to permit the adjustment of the monthly payments. For example, in Bowcutt v. Delta North Star Corp.,¹⁴⁰ the court ruled that RCW 61.24.130's requirement for mortgage payments as security for an injunction of a trustee's sale might be relaxed in fraud case brought under the state criminal profiteering (RICO) statute. There, a private plaintiff brought a state RICO action against equity skimmers, seeking equitable relief and triggering the court's

¹³⁸ CP 1856:23-57:12 (discussing RCW 7.40.080). Irwin v. Estes, 77 Wn.2d 285, 286, 461 P.2d 875 (1969) (courts are not at liberty to disregard RCW 7.40.080's requirement for a bond).

¹³⁹ See RCW 26.09.060 (family law cases) and RCW 4.92.080 (cases brought by the state seeking injunctive relief).

¹⁴⁰ 95 Wn. App. 311, 319, 976 P.2d 643 (1999).

“exclusive equitable jurisdiction” to remedy fraud.¹⁴¹ The Ortegas, however, do not have a RICO case, nor did they plead fraud. They offered the trial court no actionable basis to reduce the mortgage loan payments.

2. The Declaratory Judgment Act Does Not Trump RCW 61.24.030’s More Specific Requirements.

On appeal, the Ortegas quote RCW 7.24.190, the Declaratory Judgment Act’s provision, permitting the court to stay proceedings “in its discretion and upon such conditions and with or without bond or other security as it deems necessary and proper” and restrain parties.¹⁴² But that statute does not displace the Deed of Trust Act’s more specific provision, RCW 61.24.130. A canon of statutory construction gives preference to a specific statute over a general statute.¹⁴³ Under the canon, RCW 61.24.130 (the more specific statute governing the presale injunctions) has preference over RCW 7.24.190 (a general provision in the Declaratory Judgment Act). Therefore, RCW 7.24.190 did not grant the court the authority to rewrite the contract or the Deed of Trust Act.

3. The Ortegas Failed to Establish an Inability to Pay Defense.

On appeal, the Ortegas argue that they raised the affirmative defense of an inability to pay, the court failed to make a threshold finding regarding their ability to pay the monthly installments, causing the

¹⁴¹ Id.

¹⁴² Br. of Appellants at 10 (quoting RCW 7.24.190) (emphasis added).

¹⁴³ Dash Point Village Assocs. v. Exxon Corp., 86 Wn. App. 596, 606, 937 P.2d 1148 (1997) (“we apply a specific statute over a general statute.”).

contempt finding to be punitive and a denial of due process.¹⁴⁴ The Ortegas, however, never informed the court that an inability to pay was any kind of defense.

If they did raise such a defense, they failed to establish their inability to pay. They offered no direct evidence of their income and expenses. It is well settled that “the law presumes that one is capable of performing those actions required by the court ... [and the] inability to comply is an affirmative defense.”¹⁴⁵ Thus, at the show cause hearing, Ortega “had both the burden of production and the burden of persuasion regarding his claimed inability to comply with the court's order.”¹⁴⁶

The Ortegas failed to satisfy their burden of production and persuasion. The ball was in their court. They failed to provide direct evidence in the form of a verified financial or income statements or transactional records like 1099s, W-2s and receipts. Instead, they relied on ambivalent circumstantial evidence.

Just two paragraphs in their 49-paragraph declaration addressed the inability to pay.¹⁴⁷ Paragraph 42 made a conclusory statement about

¹⁴⁴ Brief of Appellant at 12.

¹⁴⁵ Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995) (quoting In re King, 110 Wn.2d 793, 804, 756 P.2d 1303 (1988)); see also Smith v. Smith, 17 Wash. 430, 432, 50 P. 52 (1897) (“The rule is that the burden of showing inability to comply with an order of this nature is upon the respondent.”).

¹⁴⁶ Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995) (quoting King, 110 Wn.2d at 804).

¹⁴⁷ CP 189 ¶¶ 42-43.

“financial difficulties and reduced income” but offered no specifics.¹⁴⁸ Paragraph 43 stated the Ortegas were unable to pay \$5,669 a month but would commit to \$2,432 a month, the amount Wells Fargo had computed in a hardship application.¹⁴⁹ Earlier in the case, Wells Fargo had offered them loan modifications, but the Ortegas rejected those offers. The first offer required an upfront payment in June 2010 and a later offer in May 2011 required no upfront payment but required the dismissal of the moot case.¹⁵⁰ But these stale offers were not dispositive evidence demonstrating inability to pay five months later. Eleven months later, the Ortegas failed to mention these stale offers, when they moved to vacate the contempt finding.¹⁵¹

In summary, the Ortegas failed to establish the factual predicates for an inability to pay defense supporting second assignment error (the absence of a finding on ability to pay).¹⁵² Also, they waived the error by failing to raise the issue when they were represented by counsel in two hearings below.¹⁵³

F. The Contempt Finding Was Not Punitive.

¹⁴⁸ CP 189 ¶ 42.

¹⁴⁹ CP 189 ¶¶ 43-44.

¹⁵⁰ CP 154:3-22. RP (Nov. 16, 2011) 11:11-25.

¹⁵¹ CP 60-79 (Oct. 26, 2012).

¹⁵² Br. of Appellants at 2.

¹⁵³ RP (Mar. 26, 2012). RP (Nov. 5, 2012).

In support of the second assignment of error, the Ortegas also argue that the contempt order was punitive instead of remedial/coercive.¹⁵⁴ Their argument rests on a misunderstanding about the two kinds of sanctions: punitive versus remedial/coercive. The contempt statute authorizes remedial/coercive sanctions “designed to ensure compliance with a prior order of the court.” RCW 7.21.030(2).

The Ortegas argue that the contempt order was punitive and a denial of due process, citing Britannia Holdings Ltd. v. Greer.¹⁵⁵ But the nature of the contempt sanction in Britannia Holdings (imprisonment) fundamentally differs from the remedial dismissal sanction in this case. Britannia Holdings had obtained an \$11 million judgment against the Greers for securities fraud and initiated proceedings to collect the judgment.¹⁵⁶ The court held the Greers in contempt for disobeying multiple orders to deliver assets and provide a credible accounting.¹⁵⁷ The Greers appealed from an order requiring them to deliver \$635,000 in four months or be jailed for contempt.¹⁵⁸ The conclusion that the contempt order was a violation of due process was tied to the imprisonment sanction:

¹⁵⁴ 127 Wn. App. 926, 933-34, 113 P.3d 1041 (2005). Br. of Appellant at 1, 2 (Second Assignment of Error); id. at 11-12 (Issue No. 2).

¹⁵⁵ 127 Wn. App. 926, 933-34, 113 P.3d 1041 (2005). Br. of Appellant at 1, 2 (Second Assignment of Error); id. at 11-12 (Issue No. 2).

¹⁵⁶ 127 Wn. App. at 928.

¹⁵⁷ Id. at 928.

¹⁵⁸ Id.

A contempt sanction involving imprisonment remains coercive, and therefore civil, **only if** the contemnor is able to purge the contempt and obtain his release by committing an affirmative act. In other words, the contemnor “carries the keys of his prison in his own pocket” Accordingly, there must be a showing that the contemnor has the means to comply. Coercive incarceration loses its coercive character and becomes punitive where the contemnor cannot purge the contempt.¹⁵⁹

The court reversed the imprisonment sanction, because there was “not a finding that at the time of the contempt order ... [the Greers] could purge the contempt. We must therefore reverse, because without this finding, the contempt was not coercive but impermissibly penal.”¹⁶⁰

Unlike the inherently punitive imprisonment sanction, the dismissal sanction in this case is not inherently punitive. “A distinction may be drawn between a plaintiff in contempt of court and a defendant. A plaintiff in contempt may not be entitled to proceed with the trial of his case on the merits, as a matter of right, but a defendant, who is refused a trial, may be deprived of a constitutional right to a hearing.”¹⁶¹

The court has inherent authority to sanction a party for willfully disobeying a court order and express authority for an involuntary dismissal under Civil Rule 41(b).¹⁶² When Wells Fargo moved for the dismissal of

¹⁵⁹ *Id.* at 933 (emphasis added).

¹⁶⁰ *Id.* at 934; *id.* at 928 (“we reverse the contempt order, because the contemnor must hold the keys to his release, and the court made no finding that Greers had the present ability to pay the purge amount.”).

¹⁶¹ *Mitchell v. Watson*, 58 Wn.2d 206, 213, 361 P.2d 744 (1961); see *Yamaha Motor Corp. v. Harris*, 29 Wn. App. 859, 868-69, 631 P.2d 423 (error to dismiss counterclaim as a penalty for contempt arising from defendant’s noncompliance with a payment order), *review denied*, 96 Wn.2d 1013 (1981).

¹⁶² *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn. App. 125, 130-31, 133, 896 P.2d 66 (1995), *review denied*, 128 Wn.2d 1008, 910 P.2d 482 (1996) (affirming dismissal

the case, the Ortegas responded with counter- or cross-motion for a voluntary dismissal without prejudice.¹⁶³ When moving for the voluntary dismissal, the Ortegas acknowledged that the Foreclosure Fairness Act granted them new rights in the event that the foreclosure were restarted.¹⁶⁴ After the stay of the suit pending Bain expired, the Ortegas moved to retract their motion for a voluntary dismissal and to pursue claims based on Bain.¹⁶⁵ But they failed to establish any prejudice would result from the dismissal and disbursement order. Also, they did not suggest a lesser sanction was appropriate.¹⁶⁶ They simply ignored the threat of dismissal. The court deferred the dismissal for eleven months, allowing the Ortegas through their counsel to make a record or to purge the contempt.

The dismissal embodies the equitable maxim (one who seeks equity must do equity).¹⁶⁷ The Ortegas invoked an injunction (the strong arm of equity) but failed to comply with the reciprocal statutory duty to make the monthly mortgage payments. Their violation of the court order was willful, continuing over months, without any record of their inability to make the renewed payments. Their refusal to make payments substantially prejudiced Wells Fargo—depriving it of almost thirty

order); Apostolis v. City of Seattle, 101 Wn. App. 300, 3 P.3d 198 (2000) (same); Jewell v. City of Kirkland, 50 Wn. App. 813, 750 P.2d 1307 (same).

¹⁶³ CP 98-101.

¹⁶⁴ CP 88:1-11 (Foreclosure Fairness Act).

¹⁶⁵ CP 60-79.

¹⁶⁶ See Rivers v. Wash. State Conference of Mason Contractors, 145 Wn.2d 674, 41 P.3d 1175 (2002) (discussing the hierarchy of sanctions for violating a discovery order).

¹⁶⁷ Malo v. Anderson, 62 Wn.2d 813, 384 P.2d 867 (1963).

monthly payments, to which it was entitled both under the plain terms of RCW 61.24.130 and the note. The court repeatedly accommodated the Ortigas' requests over a thirty-five month period. The trial court was in the best position to weigh the competing interests, deny their counter-motion to withdraw the voluntary dismissal, and end a moot case.

For similar reasons, "an appellate court possesses inherent powers to dismiss an appeal when the appellant disobeys certain trial court orders."¹⁶⁸ The Supreme Court has affirmed the Washington Supreme Court's dismissal of an appeal where the superior court had found an appellant union in contempt of a supplemental proceeding order to deliver bonds to a receiver.¹⁶⁹ In that case, the state supreme court had affirmed a contempt order, warning that the appeal would be dismissed, if the union failed to purge the contempt in a timely manner, and carrying through on that warning.¹⁷⁰

In this case, the trial court gave the Ortigas' multiple bites at the litigation apple and multiple opportunities to purge their contempt. The record does not support their new claim that the court's orders were punitive and a denial of due process. Therefore, the second assignment of

¹⁶⁸ State v. Ralph Williams NW Chrysler Plymouth, 87 Wn.2d 298, 311, 553 P.2d 423 (1976) (citations omitted).

¹⁶⁹ Nat'l Union of Marine Cooks & Stewards v. Arnold, 348 U.S. 37, 75 S. Ct. 92, 99 L. Ed. 2d 46 (1954).

¹⁷⁰ Id. See Meyer v. Wolvos, 707 N.E.2d 1029 (Ind. Ct. App. 1999) (affirming dismissal of plaintiff's case as a contempt sanction); Cambell v. Justices of Superior Ct., 187 Mass. 509, 73 N.E. 659 (1905) (citing cases for the proposition that a plaintiff while in contempt cannot proceed to trial). Cf. Peker v. Fader, 965 F. Supp. 454 (S.D.N.Y. 1997) (dismissing pro se plaintiff's copyright infringement suit as a sanction after screaming at the judge).

error (along with the related issues and arguments) is not a basis for reversing the dismissal of the case.

G. The Deed of Trust’s Property Description Is Correct.

In Issue E, the Ortegas challenge the disbursal of the funds on the ground that NWTS failed to strictly complied with the requirements of the Deed of Trust Act.¹⁷¹ Issue E is another dead-end for two independent reasons. First, the actions of NWTS do not affect Wells Fargo’s right to payment under the mortgage note. Second, the Ortegas have failed to establish that NWTS lacked authority to initiate the foreclosure.

The Ortegas argue that the deed of trust “did not provide a legal description for their property,” and the NWTS “was aware of the defective deed of trust,” initiating the foreclosure “without first initiating the deed reformation proceedings.”¹⁷² Yet, the Ortegas fail to cite any portion of the record supporting this claim or to the authority governing property descriptions. No wonder, when there is no defect in the description. Below, the Ortegas mentioned that the property had been short platted, vaguely claiming the platting caused a problem with the legal description.¹⁷³ Because they failed to develop this issue below, they are precluded from pursuing the issue on appeal.

¹⁷¹ Br. of Appellant at 4, 22.

¹⁷² Br. of Appellant at 1, 6. Br. of Appellant at 1; *id.* at 21-22 (raising legal description claim and asserting the secured party should have brought a reformation action); *id.* at 24 (Item 7, lack of legal description citing CP 1532-35). They cite a declaration that does not address the legal description claim. Br. of Appellant (citing CP 1532-25).

¹⁷³ CP 1533 ¶ 4.

Below, the Ortegas complained that deed of trust's third page has no legal description and lot number.¹⁷⁴ In making this argument, they ignored the property description on the other pages. Indeed, the very first page has the property's tax parcel number along with an abbreviated legal description (Lot 36, David's Marine Acres),¹⁷⁵ as well as the same street address used on the third page. A detailed legal description is attached to the instrument as Exhibit A.¹⁷⁶ The descriptions are legally sufficient under the standard requiring an intelligent means of identifying the property.¹⁷⁷ Either a tax parcel number or a legal description is a valid method to identify the property being conveyed.¹⁷⁸ Here, there are both kinds of identifications: the parcel number and the legal description.

For these reasons, the Ortegas have failed to establish that the deed of trust has an invalid written description of the property undermining NWTS's authority to initiate the foreclosure. Therefore, Issue E cannot support the reversal of the trial court's discretionary decisions to find the Ortegas in contempt and disburse the mortgage funds to Wells Fargo.

¹⁷⁴ CP 61 ¶ 6.

¹⁷⁵ CP 1606 (first page of the deed of trust).

¹⁷⁶ CP 1622 (legal description, Ex. A to deed of trust).

¹⁷⁷ 18 William B. Stoebeck, John W. Weaver Wash. Practice, Real Estate § 13.3 at 78 (2d ed. 2004); see id. § 16.3 at 225. See CP 1520:10-1521:23.

¹⁷⁸ See Martin v. Seigel, 35 Wn.2d 223, 212 P.2d 107 (1949); City of Centralia v. Miller, 31 Wn.2d 417, 197 P.2d 244 (1948) (description by tax lot number is adequate in tax foreclosure proceedings).

H. The Court Did Not Abuse Its Discretion in Denying the Motion to Compel.

The fourth assignment of error is the denial of the Ortegas' motion to compel discovery,¹⁷⁹ which was a cross-motion made in response to the motion for contempt.¹⁸⁰ The court did not decide the merits of the motion. Instead, the court denied the motion to shorten time on their cross motion to compel discovery and for contempt of the prior order compelling discovery.¹⁸¹ The Ortegas did not appeal the denial of the motion to shorten time, so the underlying motion is not on review.

Alternatively, if the court considers the denial of the motion to shorten time, the court acted within its broad discretion.¹⁸² Although Wells Fargo had filed the contempt motion five weeks before the scheduled hearing date,¹⁸³ the Ortegas waited until two days before the hearing to file a cross motion and motion to shorten time including a voluminous declaration.¹⁸⁴ They violated CR 6(d)'s requirement to file a motion five days before the hearing. They also failed to comply with the local rule requiring them to obtain the order to shorten time before filing the

¹⁷⁹ Br. of Appellant at 3.

¹⁸⁰ CP 159-676.

¹⁸¹ RP (Nov. 16, 2011) at 10:22-12:7. CP 159-161 (Mot. to Shorten Time and declaration).

¹⁸² State ex rel. Citizens Against Tolls (CAT) v. Murphy, 151 Wn.2d 226, 236, 88 P.3d 375 (2004).

¹⁸³ CP 687 (indicating motion was filed on October 11, 2011 and noted for November 16, 2011).

¹⁸⁴ CP 159-676.

cross-motions.¹⁸⁵ The denial of the motion to shorten time was not a manifest abuse of discretion.¹⁸⁶

In the event the court were to review the merits of the motion to compel discovery, the Ortegas failed to prove “prejudice.”¹⁸⁷ “Whether a court abuses its discretion in controlling discovery depends on the interests affected and the reasons for and against the decision.”¹⁸⁸

The court weighed those interests. The requested discovery was for the “paper/electronic trail to establish the chain of custody” for the note and deed of trust,¹⁸⁹ along with the names of witnesses and documents.¹⁹⁰ But the Ortegas did not need “chain of custody” evidence after Wells Fargo produced the indorsed payable-to-bearer note, as established above in Section B.1 (discussing Bain). The court later ruled it did not need additional evidence to order disbursement of the funds.¹⁹¹ Wells Fargo had already produced over 1,500 pages of records, including, in addition to the wet ink note, the pooling and servicing agreement and

¹⁸⁵ Snohomish County Local Civil Rule 7(b)(D)(9)(D) (stating: “Before taking any action on less notice than that required by this or any other rule, a party must present a motion and affidavit, and must obtain an order to shorten time.”)

¹⁸⁶ 3A Karl B. Tegland Wash. Practice., Rules Practice CR 7 (6th ed. 2013) (“If notice of the cross motion is inadequate, the court need not consider it. ... Kistner v. Califano, 579 F.2d 1004, 25 Fed. R. Serv. 2d 1511 (6th Cir. 1978) (granting cross motion for summary judgment improper where party did not waive notice provision of local rule).”)

¹⁸⁷ Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 777, 80, 819 P.2d 370 (1991) (requiring a showing of “an abuse of discretion which caused prejudice to the part”); Lindblad v. Boeing Co., 108 Wn. App. 198, 207, 31 P.3d 1 (2001) (denial of motion to compel discovery is reviewed under the abuse of discretion standard).

¹⁸⁸ King v. Olympic Pipeline Co., 104 Wn. App. 338, 348, 16 P.3d 45 (2000), review denied, 143 Wn.2d 1012 (2001).

¹⁸⁹ Br. of Appellant at 23.

¹⁹⁰ Br. of Appellant at 2; id. at 22-24.

¹⁹¹ RP (Nov. 5, 2012) 11:4-10 (Bain provides two tracks); id. at 14:8-25 (stating absence of an affidavit is not an impediment in this case).

mortgage loan schedules.¹⁹² Referring to Wells Fargo’s representation that it had produced more records in this case than in other local cases, the court stated to Ms. Ortega: “So you have gotten what you came here for. But in turn you have to perform. If you don’t perform, then this case is over.”¹⁹³

The record demonstrates that the court balanced the interests and acted within its discretion to deny the motion to shorten time and additional discovery on the irrelevant issues. Therefore, this court should affirm the decision denying the motion to compel.

I. The Court Did Not Violate the Ortegas’ Constitutional Rights.

The fifth assignment of error is the denial of the Ortegas’ right to a trial.¹⁹⁴ They list 17 factual and legal issues.¹⁹⁵ The court should not consider the list of issues, because Ortegas fail to support these issues with argument and citations.¹⁹⁶

In the event the court were to consider the conclusory list of issues, they do not establish an abuse of discretion. Instead, the record establishes the court repeatedly exercised its discretion in favor of the Ortegas by postponing the early summary judgment motions.¹⁹⁷ But as established above, their primary claims did not pan out, which likely influenced their

¹⁹² RP (Nov. 16, 2011) 5:12-20; *id.* at 6:15-7:15.

¹⁹³ RP 14:6-12.

¹⁹⁴ Br. of Appellant at 3, 23-25.

¹⁹⁵ *Id.* at 24-25.

¹⁹⁶ *Transamerica Ins. Group v. United Pac. Ins. Co.*, 92 Wn.2d 21, 28-29, 593 P.2d 156 (1979).

¹⁹⁷ CP 1545-60, 1638-51. CP 1391-1471. CP 816-22. CP 1533 ¶¶ 4-8 (Ortegas arguing lack of proper legal description, loan had not been assigned to HSBC until September 2009). CP 1534 ¶ 20 (not the real party in interest).

decision to move for voluntary dismissal. They later backtracked hoping that the Bain decision might resuscitate their claims or create new ones. But that also did not pan out.

Some of their other claims were not actionable in the first place. Wells Fargo moved to dismiss the first four causes of action,¹⁹⁸ because there was no private right of action for loan modification refusal under the TARP and HAMP programs.¹⁹⁹ The absence of a private right of action is well established. The consumer protection act claim rested on the defective claims for the violation of the federal statutes.²⁰⁰

Wells Fargo moved to dismiss the fifth and ninth causes of action for breach of contractual and statutory duties.²⁰¹ Those claims had multiple defects including that the Deed of Trust Act has no cause of action for wrongful initiation of a foreclosure.²⁰² Even if there were such a statutory claim, Wells Fargo/HSBC's possession of the payable-to-bearer note, authorized them to initiate the foreclosure and extinguished the claim for declaratory relief regarding their authority.²⁰³ Also, the Ortigas failed to come forward with any evidence of damage caused by any violations of the statute. Meanwhile, the benefit they received from

¹⁹⁸ CP 1931:3-1933:4 (claims for the violation of loan mitigation and servicing requirements, unclean hands, illegal charges in violation of the note and mortgage, unjust enrichment/double dipping from the use of TARP funds).

¹⁹⁹ CP 1643:13-14, 1644:23-1646:21.

²⁰⁰ CP 1639:12-19, 1644:23-1648:7.

²⁰¹ CP 1933-34 (fifth claim and ninth claims).

²⁰² CP 1643:15-16, 1646:3-1648:7.

²⁰³ CP 1934:20-25 (requesting the holder of the note be identified).

residing at the property payment free for years exceeds any increment of hypothetical damage.

Separately, elements of the claim for breach of contract and the implied duty of good faith failed, because the well-settled law is a lender has no contractual duty to modify a loan.²⁰⁴ While the complaint made vague claims for unconscionable actions and the violation of federal law, the Ortegas failed to come forward with supporting evidence and law in response to the summary judgment motions.²⁰⁵

In addition, the tort claims for emotional distress did not satisfy the threshold requirements.²⁰⁶ The Mortgage Broker Act claims failed, because Wells Fargo and other defendants did not originate the loan.²⁰⁷ The Ortegas never moved to amend or supplement their complaint to assert a consumer protection act claim against MERS.²⁰⁸ On this record, they could not prove proximately caused injuries arising from the listing of MERS in the deed of trust,²⁰⁹ when the record shows that Wells Fargo was the servicer and note holder/custodian of the loan.

²⁰⁴ See Badgett v. Sec. State Bank, 116 Wn.2d 563, 569-70, 807 P.2d 356 (1991) (“the duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract.”). Br. of Appellant at 24-25.

²⁰⁵ CP 1933:5-15 (breach of contract claim).

²⁰⁶ CP 1648:8-1650:20, CP 1558-59.

²⁰⁷ CP 1648:8-1650:20.

²⁰⁸ CR 15(a) (requiring a copy of proposed amended complaint); CR 15(d) (supplemental pleadings).

²⁰⁹ See, e.g., Kullman v. Nw Trustee Servs., Inc., No. 12–5852, 2012 WL 5922166, at *2 (W.D. Wash. Nov. 26, 2012) (“Plaintiffs have failed to allege any prejudice arising from MERS’s role in the foreclosure.”); Mickelson v. Chase Home Fin. LLC, No. 11-1445, 2012 WL 5377905, at *2-3 (W.D. Wash. Oct. 31, 2012) (refusing to reconsider prior

In summary, the record fails to support the fifth assignment of error regarding the denial of the Ortegas' right to a trial.²¹⁰ The Ortegas failed to establish a triable issue. They moved for the voluntary dismissal of their claims, and the record fails to establish that the court abused its discretion when it dismissed those claims.

VI. CONCLUSION

After finding the Ortegas in contempt for disobeying the pay-to-stay order, the court granted the Ortegas an ample and extended opportunity to purge the contempt. The court waited eleven months before granting the dismissal, disbursing the monthly mortgage payments to Wells Fargo and denying the Ortegas' counter-motions. The Ortegas failed to establish a clear showing that court acted in a manifestly unreasonable manner, abusing its discretion. Accordingly, this court should affirm the dismissal and the related orders.

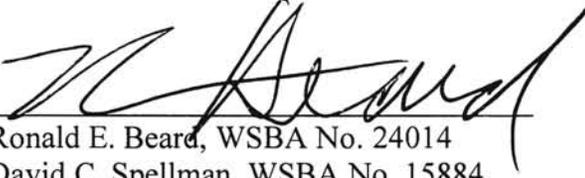
orders dismissing CPA claims based in part on characterizing MERS as beneficiary where plaintiffs could not make plausible claims of injury).

²¹⁰ Br. of Appellants at 3.

RESPECTFULLY SUBMITTED this ____ day of June, 2013.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury and the laws of the state of Washington that on the date indicated below I served a copy of the foregoing document on the following persons in the following manner:

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SIGNED June 28, 2013 at Seattle, Washington.

/s/ Julie L. Kelly

Julie L. Kelly
Legal assistant