71003-6

71003-6

Case No. ~~71006~~ 71003-6

COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION I

Douglas S. Bryson,
Nettie M. Bryson,

Appellants,

v.

Stewart Title Guarantee Co.,
Northwest Trustee Services Inc.
JPMorgan Chase Bank, N.A.

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR SKAGIT COUNTY
JUDGE JOHN MEYER

REPLY BRIEF OF APPELLANT

Douglas S. Bryson-
unrepresented
Nettie M. Bryson-
unrepresented
26059 Hoehn Road
Sedro-Woolley, WA. 98284
360 856-5783

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I. Fiduciary and/or Common Law Duties of Accounting are Met.

It cannot be any more clearly stated with specificity and particularity that Appellants are due an accounting from not only Stewart Title Guarantee Co. ("STG"), but also from JPMorgan Chase Bank, N.A. ("Chase") and Northwest Trustee Services, Inc ("NWTSI").

STG admitted that it owes a duty of an accounting to Appellants at the time it served as trustee, up to and after the "closing", until the property of Appellants (original note and deed of trust, cash and original closing papers) were transferred away from the possession, control and custody of STG to some unknown third party.

While Appellants' reply brief addresses STG's duty as trustee to produce an accounting, Chase and NWTSI owe a duty of an accounting to Appellants. Appellants are third party beneficiaries, and at worse incidental beneficiaries, to the securitization indenture, PSA, prospectus, and supplemental agreements that comprise the entire verified chain of custody to the title (legal and beneficial) to the purported obligation claimed to be due and owing from Appellants.

Proof that Appellants and all homeowners similarly situated, are beneficiaries, is found in an amicus curiae brief filed in *Wells Fargo Bank, N.A v. Erobobo*, Supreme Court of New York, Appellate Div. 2nd Dept., Case No. 2013-6986 (Appendix App A).

STG admits being a Trustee during the Course of the Chain of Title (yet to be verified), but states only that they "were not a trustee at the time of any bankruptcy proceeding nor is it currently the trustee."

Such distinctions are without difference. Put simply, a homeowner has a right to know who did what with their property (money or money's worth) and what documents and instruments changed hands with respect to the largest purchase of their lives ***during the time*** that Stewart **WAS** a Trustee. It is just that simple. Just- That- Simple.

STG states further "Nor does STG have the ability or information necessary to provide the Brysons with any type of accounting…."

That is without merit and ridiculous. Appellants have a right to know "what did you do with any money, documents and instruments relative to the purchase of our home?"

In the new era, when banks, title companies, purported "servicers", purported "trustees" and its/their attorneys cannot be trusted to tell the truth, combined with the discovery of millions upon millions of forged, fabricated, falsified and/or fraudulent documents, instruments and bogus accounting records filed into court cases, the days of "take my word for it" are long gone.

Any "trust" that the banking and financial industry, as well as associated vendors (including STG), had with the public and the courts has long ago been squandered, as more and more evidence of wrongdoing is exposed. The fact that former LPS subsidiary, DocX president, Lorraine Brown is in jail-- for admitting to being responsible for the forgery, fabrication, and/or falsification of millions of documents and instruments-- is but one data point among hundreds of data points supporting the fact that the "word" of any of these actors cannot be taken absent strict proof. Any impartial, intellectually honest trier of fact would agree.

Homeowners have the right and duty to themselves and the public to not blindly accept the purported Chain of Title, and whether or not Stewart cares to fully acknowledge it, they are indeed part of the Chain of Title, pure and simple. STG had possession, custody and control of Appellant's property and owes a duty of an accounting that was very clearly defined with specificity and particularity in Appellants equitable bill for an accounting. See generally *Glaski v. Bank of America 218 Cal. App. 4th (5th Dist. 1079)* and *Cosajay v. MERS,* C. A. No. 10-442-M, 2013 U.S. Dist. LEXIS 160294 (Rhode Island 2013) pattern where the Court granted the right of the homeowner to establish the FACT that that a purported "Assignment" was a post-hoc fabrication in the Chain of Title. Likewise, Appellants are entitled to know the complete Truth. Note that *Glaski* is a 9th Circuit case, as is the recent victory in Snohomish County – *Bradburn v. ReconTrust*, Snohomish No. 11-2-08345-2 (January 30, 2014).

The Judge's letter is quite telling and included as Appendix B. SGT cannot run from its responsibility to document Good Faith conduct just because they are not presently the Trustee. For this Court to find otherwise would be to encourage invidious Trustee swapping, which we all know they get away with most of the time, so this time since the homeowner is prescient enough to call it correctly the Court is obliged to Do the Right Thing.

http://stafnetrumbull.com/wp-content/uploads/2014/01/01.30.2014-Letter-from-Judge-Bowden-Granting-Order.pdf (App B).

The next issue is that contrary to implication by the Court, there has never been any evidentiary exchange involved in this case. This is significant because once again, proactive homeowners who did not slumber on their rights, were run out of an equity Court without more than a perfunctory glance toward Due Process.

Note that Docket No. 12 in the trial court incorrectly indicates that a Summary Judgment hearing was held on September 16, 2013 when in fact it was a Motion to Dismiss, such that the Defendants/Appellees were at no time compelled to produce any documentation in support of their allegations relative to any interest in Appellants' property. As Summary Judgment is reserved for situations in which full discovery has been produced, Appellant does not wish this Court to be misled in any way.

12	09/16/2013	SMJHRG	SUMMARY JUDGMENT HEARING
		JDG01	JUDGE JOHN M. MEYER
	09/16/2013	CTRN	COURT REPORTER NOTES CD B-2 J.S

Despite the clear right (not privilege) of the Bryons to demand said verified accounting and the duty of the equity court to compel said verified accounting, the Superior Court, absent any finding of act, conclusions of law, equitable maxims, or any reason whatsoever, summarily, arbitrarily and capriciously dismissed the Appellants' verified bill as to STG on 24 September 2013 and NWTSI and Chase on 14 October 2013.

Below is an excerpt from Appellants' Brief, followed by a 9th Circuit case that expressly holds that Stewart can be found to owe a Fiduciary and/or Common Law Duty to provide an Accounting because they are handling funds and relevant documents, which is PRECISELY what Bryson argues. As such, the case must be remanded and discovery pursued.

****

V. LAW AND ARGUMENT

A. Equitable Doctrines and Equity Jurisprudence Are The Controlling Law Form in the Superior Court And Appellate Court.

An account can be sought at law and an accounting can be sought in equity, just as there is legal tracing and equitable tracing. The Brysons clearly and plainly invoked the inherent equity jurisdiction of the Superior Court as provided for in WA Const. art. IV, § 6 as amended in 1977 (Amend. 65) that states in part (emphasis in bold):

> Amendment 65, part (1977) -- Art. 4 Section 6- Jurisdiction of Superior Courts -- *The **superior court shall have original jurisdiction in all cases in equity** and in all cases at law...... The **superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court**;*

Despite the merger of the procedures at law and procedures of equity (still two separate and distinct jurisdictions), generally when there is a conflict and variance between the rules of the common law and rules of equity, with reference to the same matter, equity shall prevail (emphasis in bold).

It was clearly and unambiguously the intent of the Brysons, under the doctrine of election, to invoke the inherent equity jurisdiction of the

Superior Court. Said intent to compel an equitable accounting was

manifested in the preamble to the verified bill to wit (emphasis in bold):

> COMES NOW Douglas S. Bryson and Netti M. Bryson, husband and wife, ("Plaintiffs"), per Wash. Const. Art. IV, § 6, RCW 11.97.010(3), RCW 11.106.040, and **general principles of equity** as noted in *Weidert v. Hanson*, No. 30357–8–III (Ct App. Div. 3, Nov. 29, 2012),.....(CP 140-170)

See also the detailed factual and legal analysis shown in *Wood River Capital Res. v. Stewart Title Guar...*, 2013 Cal. App. Unpub. LEXIS 1346 (California Ct. App First Dist. Div. Three February 21, 2013) (App C)

2.Breach of Fiduciary Duty

Appellants assert a cause of action against Stewart for breach of fiduciary duty, alleging that Stewart assumed—and then breached—fiduciary duties to appellants as either a "co-escrow" or "joint escrow" along with Placer, the escrow agent named in the escrow instructions.

"The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) the breach of that duty; and (3) damage proximately caused by that breach. [Citation.]" (Mosier v. Southern California Physicians Ins. Exchange (1998) 63 Cal.App.4th 1022, 1044.)

The absence of any element is fatal to the cause of action. (LaMonte v. Sanwa Bank California (1996) 45 Cal.App.4th 509, 517.)

Appellants concede that Stewart was not a party to the escrow instructions. Appellants also concede that they did not have any direct contact with Stewart and did not submit any oral or written escrow instructions to Stewart. Nevertheless, appellants claim it is enough for purposes of the breach of fiduciary duty cause of action to allege that Placer retained Stewart to [*16] perform tasks Placer had contracted to perform in the escrow instructions, such as handling documents, payments, and the preparation of the deeds. Appellants argue that Stewart was a "co-escrow in the transaction" by virtue of performing tasks set forth in the escrow instructions.

The trial court concluded that the facts as pleaded allowed an inference that Stewart was acting only as a "sub-escrow" on behalf of Placer, in that Stewart was acting only as directed and instructed by Placer. The court then observed that appellants had failed to present any authority holding that a sub-escrow, as opposed to an escrow agent or escrow holder, owes a fiduciary duty to parties to the escrow instructions. Even assuming Stewart owed a fiduciary duty to appellants, the trial court concluded that appellants failed to allege facts establishing a breach of that duty.

a. Existence of Fiduciary Duty

Our first task is to assess whether the facts as pleaded establish that Stewart owed a fiduciary duty to appellants. It is not helpful to label Stewart a "joint escrow" or a "co-escrow," because those labels are essentially an attempt to plead in a conclusory fashion that Stewart owed a fiduciary duty to appellants [*17] as an escrow holder. The existence of a fiduciary duty is a question of law. (*David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890.) "The allegation of a fiduciary relationship must be supported by either a contract, or a relationship that imposes it as a matter of law. [Citation.]" (*Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1558.) A mere allegation that a party assumed fiduciary duties to another party is a legal conclusion, not a well-pleaded fact. (*Ibid.*) Thus, we will disregard the labels applied by the parties, such as co-escrow, joint escrow, and sub-escrow, and instead focus on whether the facts as pleaded give rise to a fiduciary relationship as a matter of law.

"'An escrow involves the deposit of documents and/or money with a third party to be delivered on the occurrence of some condition.' [Citations.] An escrow holder is an agent and fiduciary of the parties to the escrow. [Citations.] The agency created by the escrow is limited—limited to the obligation of the escrow holder to carry out the instructions of each of the parties to the escrow. [Citations.]" (*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711 (*Summit*).)

Under California law, an agent may delegate its powers to a subagent when it is commonplace to designate such powers. (See Civ. Code, § 2349, subd. (3).) To the extent an agent's powers are lawfully delegated, a subagent "represents the principal in like manner with the original agent." (Civ. Code, § 2351.) "Because 'the subagent owes the same duties to the principal as does the agent' [citation], it follows that the relationship between subagent and principal is a fiduciary one." (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1405.)

Here, the allegations in the complaint support the conclusion that Placer was an escrow holder with fiduciary duties to the parties to the escrow, including appellants. The complaint further establishes that Stewart performed escrow functions otherwise required of the escrow holder, Placer, thus supporting an inference that Stewart was acting as Placer's subagent. Moreover, insofar as Placer had a limited agency to carry out the escrow instructions, Stewart as a subagent of Placer likewise had a limited obligation to the parties to carry out any escrow instructions it was delegated to perform by Placer. Thus, the allegations in [*19] the complaint arguably support the legal conclusion that Stewart owed a fiduciary duty to appellants to comply with the escrow instructions it was delegated to perform, assuming Stewart was an authorized subagent.

Stewart contends it is improper to rely on general agency principles—including rules applicable to subagents—because escrow holders are dual agents with duties to parties on both sides of a transaction. We agree with the proposition that an escrow does not create a *general* agency, because the interests of the parties to an escrow are conflicting. (See *Blackburn v. McCoy* (1934) 1 Cal.App.2d 648, 654-655.) However, we do not agree that subagency principles are always inapplicable in the escrow context. As noted above, an escrow creates a *limited* agency as to each party to the escrow in which the escrow holder's agency is restricted to the obligation to carry out the escrow instructions. (*Ibid.; Summit, supra,* 27 Cal.4th at p. 711.) Stewart has cited no authority suggesting that a limited agent, such as an escrow holder, cannot lawfully delegate powers to a subagent. The scope of a subagency created by an escrow holder is necessarily limited to carrying out the escrow instructions the escrow holder has lawfully delegated to the subagent.

Stewart also argues that a subagency theory fails because appellants did not allege facts demonstrating that Stewart was an *authorized* subagent. This contention has some merit. An agent cannot lawfully delegate its powers to a subagent unless one or more of the conditions in Civil Code section 2349 is satisfied.[4] An unauthorized subagent owes no duties to the principal. (See Civ. Code, § 2022 ["[a] mere agent of an agent is not responsible as such to the principal of the latter"].) Here, in their opening brief on appeal, appellants contend the subagency was authorized because it is commonplace to designate certain escrow functions to a subagent.

(See Civ. Code, § 2349, subd. (3).) They contend it "[i]s certainly reasonable and commonplace for Placer, located in California, to employ a title company in Pennsylvania, such as Stewart, to assist with an escrow on property in Pennsylvania." This allegation, however, does not appear in the complaint. According to Stewart, absent an allegation that it is commonplace for escrow holders to delegate to a subagent the types of escrow functions it performed, Stewart was an unauthorized subagent that owed no duties to appellants as a matter of law.

As a practical matter, appellants could quickly cure the deficiency in their complaint by adding a simple allegation on information and belief that it is commonplace for escrow holders to delegate certain escrow functions to subagents. Further, Stewart effectively concedes the point in its respondent's brief when it states, "escrow holders routinely delegate rudimentary escrow functions, such as recording documents and paying out funds, to title insurers." Although appellants' complaint is technically deficient because it does not plead facts establishing that Stewart's sub-agency is authorized, we will assume that appellants could easily overcome this pleading deficiency with a simple amendment. Accordingly, we will proceed to consider the remaining arguments concerning the existence of a fiduciary duty.

Stewart contends that the Supreme Court's decision in *Summit, supra,* 27 Cal.4th 705, is controlling and establishes that it owed no duty to appellants as a matter of law. We disagree. In *Summit,* the Supreme Court held that an escrow holder does not owe a fiduciary duty to a nonparty to the escrow, even when the escrow holder is aware of the nonparty's interest in the transaction. (*Summit, supra,* 27 Cal.4th at pp. 712-715.) According to Stewart, because appellants were not parties to any "sub-escrow" between Placer and Stewart, it did not owe any fiduciary duty to appellants.

Stewart's argument is unpersuasive because it rests on the unsupported factual assumption that Placer established *separate* escrows with Stewart—which it refers to as "sub-escrows"—"for the purpose of preparing and recording deeds, using escrowed funds to pay property and transfer taxes and processing documents tendered by the Seller." However, the complaint contains no such factual allegation. Instead, appellants allege that Stewart insured title and performed certain escrow functions. The precise nature of the relationship between Placer and Stewart is unclear. We do not know whether Placer and Stewart had a written agreement governing their relationship, whether they set up a separate escrow with respect to each set of investors, or whether Stewart simply agreed to perform some of the obligations contained in the escrow instructions to which appellants were parties. Although the facts as pleaded may support an inference that Placer set up separate escrows with Stewart, an equally plausible inference is that Stewart acted as Placer's subagent in carrying out the escrow instructions Placer was obligated to perform. Therefore, because we must indulge all inferences in favor of appellants (*Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1238), we cannot assume Placer set up separate escrows with Stewart or that appellants were not parties to any separate escrow involving Placer and Stewart. Thus, *Summit* is inapposite.

Stewart also relies on *Markowitz v. Fidelity National Title Co.* (2006) 142 Cal.App.4th 508 (*Markowitz*), for the proposition that it did not assume fiduciary duties to appellants by virtue of preparing deeds. In *Markowitz,* a bank agreed to extend a line of credit to a homeowner whose home was encumbered by a deed of trust securing a promissory note. To complete the transaction for the line of credit, the bank required that the promissory note be repaid in full and that the existing deed of trust be reconveyed. The bank retained Fidelity National Title Company (Fidelity) "to provide a policy of title insurance" and to "act as a sub-escrow to hold and exchange money and documents." (*Id.* at pp. 512-513.) Fidelity paid the promissory note in full but failed to record the reconveyance of the existing deed of trust. Nevertheless, the new line of credit was made available to the homeowner and a new deed of trust was recorded in the bank's favor.

Even though the promissory note had been fully satisfied, the holders of the promissory note subsequently caused a notice of default to be recorded and sought to foreclose on the deed of trust that Fidelity had failed to reconvey. (*Id.* at pp. 514-515.) The homeowner sued Fidelity, alleging that he had sustained damages by having to defend multiple wrongful foreclosure actions as a result of Fidelity's failure to properly reconvey the deed of trust. The [*25] homeowner alleged that a fiduciary relationship was formed between himself and Fidelity because Fidelity had agreed to assume certain duties as sub-escrow. (*Id.* at p. 515.)

The appellate court in *Markowitz* affirmed a nonsuit in favor of Fidelity and against the homeowner. (*Markowitz, supra,* 142 Cal.App.4th at p. 512.) Although the court concluded that an escrow existed, with Fidelity functioning as a sub-escrow holder, the court also concluded that the homeowner was not a party to the separate escrow instructions between the bank and Fidelity. The homeowner did not submit any instructions to Fidelity or have any contact with Fidelity. (*Id.* at p. 526.) The objective of the escrow instructions to which the bank and Fidelity were parties was to complete the refinance transaction, with the intent to serve the bank's interest and secure a policy of title insurance to protect the bank from the existence of defects in title. (*Id.* at p. 527.) Although the homeowner would have benefitted from the performance of the instructions, he was no more than "an incidental beneficiary of the [escrow] instruction[s]" between the bank and Fidelity. Thus, "[t]here were no instructions submitted by [the homeowner], or to which he was a signatory, with which Fidelity was obligated to comply . . . ." (*Id.* at p. 528.) Accordingly, Fidelity owed no duty to the homeowner.

The facts of *Markowitz* bear some obvious similarities to the facts alleged here. Among other things, like the homeowner in *Markowitz* who had no contact with the title insurer that acted as a sub-escrow, appellants had no contact with Stewart and did not submit any instructions directly to Stewart. Nevertheless, *Markowitz* is distinguishable. The homeowner in *Markowitz* was not a party to the escrow instructions. Rather, the bank retained Fidelity to act as its escrow holder for purposes of completing the refinance transaction and issuing a policy of title insurance with the bank as beneficiary. The *Markowitz* court held that the duty Fidelity allegedly breached was owed to the bank, not the homeowner. (*Markowitz, supra,* 142 Cal.App.4th at p. 527.) Here, by contrast, appellants were parties to the escrow instructions, which Stewart is alleged to have carried out on Placer's behalf. To the extent Stewart may have failed to comply with escrow instructions delegated to it by Placer, any duty allegedly breached was owed to the parties to the escrow instructions, including appellants. Further, as mentioned above, there is no allegation that Placer created a series of separate sub-escrows for different investor groups, similar to the separate sub-escrow created by the bank and Fidelity in *Markowitz.*

Appellants and Stewart each cite and attempt to distinguish *Siegel v. Fidelity Nat. Title Ins. Co.* (1996) 46 Cal.App.4th 1181 (*Siegel*). There, the court reversed a judgment in favor of property owners who had sued a title insurance company for providing a preliminary title report that failed to disclose a lien recorded against the property. (*Id.* at pp. 1185, 1196.) The court held the fact the title insurance company agreed with the escrow company to serve as sub-escrow and undertake rudimentary escrow functions, such as paying out funds and recording documents, did not transform it into a "fiduciary of the purchasers for purposes of searching the records or transmitting information regarding title." (*Id.* at p. 1194.)

According to the court, because "the agency and fiduciary responsibilities owed by [the escrow holder] to [the property owners] were limited by the terms of the escrow instructions, the responsibilities of [the title insurance company] acting as sub-escrow were even more limited. [Citation.]" (*Ibid.*) Appellants claim that *Siegel* is distinguishable because in this case Stewart did more than just perform rudimentary escrow functions—they take the position that preparing deeds is more than a rudimentary escrow function. Stewart disputes the significance of *Siegel,* arguing that the case cannot be construed to suggest that anyone who prepares or reviews documents in connection with an escrowed transaction automatically assumes fiduciary duties to the parties to the escrow.

We do not suggest that anyone who prepares or reviews documents associated with an escrowed transaction necessarily has a fiduciary relationship with the parties to the escrow. However, if the person or entity who prepares or reviews documents is an authorized subagent of the escrow holder, who has lawfully delegated the performance of those escrow functions to the subagent, then the subagent owes a limited duty to the parties to the escrow to carry out the escrow functions lawfully delegated to it.[5] (See *Mendoza v. Continental Sales Co., supra,* 140 Cal.App.4th at p. 1405.)

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While this case is obviously persuasive and not controlling, the fact remains that this Court has to ask itself when on Earth it would in any way act to delimit the right of a homeowner to demand and inspect the chain of title when the Country is in the midst of a complete turnabout such that homeowners have that clear right, nor privilege.

II. Bryson's Cases Are Not Inapposite But Are In Fact, On Point.

Stewart gamely writes at p.5 of Appellee's Brief, "None of the case law cited in Appellant's Brief holds that a former trustee, who has been replaced by a successor trustee, is required to provide the debtor with a verified accounting."

This is a ridiculous argument in an attempt to artificially limit the scope of potential liability: To continue such an argument just one step further would be to argue that "None of the case law cited in Appellant's brief holds that a former Trustee, wearing a blue stuffed-shirt, who has been replaced by a successor trustee on the second Tuesday of the month, is require to provide the homeowner with a verified accounting….."

In addition to the previously-cited cases, to further educate the appellate court, Appellants add the following from *Algaier v. CMG Mortg. Inc.*, 2014 U.S. Dist. LEXIS 4784 (E.D. Washington January 14, 2014) (App D) (emphasis in bold).

> 6. Whether Plaintiffs Are Entitled to an Accounting
>
> Defendants allege that Plaintiffs have not demonstrated entitlement to an accounting because they have not demonstrated that Defendants owe them any duty, nor have they shown that the account is so complicated that the fiduciary duty requirement be waived. ECF No. 8 at 13.
>
> Actions for partnership accounting are now covered under statute in Washington; actions for common-law accounting arise under case law. The requisites for an accounting action are set forth in *Corbin v. Madison*, 12 Wash. App. 318, 327, 529 P.2d 1145 (1974), quoting with approval language from *Seattle Nat'l Bank v. School Dist. 40*, 20 Wash. 368, 55 P. 317 (1898):
>
> In general, a complaint for an accounting must show by specific averments that there is a fiduciary relation existing between the parties, or that the account is so complicated that it cannot conveniently be taken in an action at law. And it **must allege that the plaintiff has demanded an**

accounting from the defendant, and the latter's refusal to render it, in order to state a cause of action. Corbin, 12 Wash. App. at 327 (quoting *Seattle Nat'l Bank*, 20 Wash. 368, 55 P. 317).

A fiduciary relationship arises as a matter of law between an attorney and client, or a doctor and patient, for example. *Liebergesell v. Evans*, 93 Wash.2d 881, 890, 613 P.2d 1170 (1980). However, a fiduciary relationship can also arise in fact regardless of the legal relationship between the parties. *Id.* In some circumstances a fiduciary relationship which **allows an individual to relax his guard and repose his trust in another may develop**. *Id.* at 889. Such a fiduciary relationship is one in which one party "occupies such a relation to the other party as to justify the latter in expecting that his interests will be cared for. . . ." *Id.* at 889-90 (quoting Restatement Contracts § 472(1)(c)) (sufficient evidence of fiduciary relationship to overcome summary judgment where businessman induced a widowed school teacher to lend him money at 20 percent interest rate, even though he knew that rate was illegal). "'The facts and circumstances must indicate that the one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party.'" *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wash. App. 732, 742, 935 P.2d 628 (1997) (quoting *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 340 S.E.2d 786, 790 (1986)). In other words, the plaintiff must show some dependency on his or her part and some undertaking by the defendant to advise, counsel and protect the weaker party. *Id.* In *Goodyear*, the court found that counterclaim plaintiff had not created an issue of fact sufficient to avoid summary judgment where, though tire dealer was vulnerable, tire manufacturer was clearly interested in promoting itself as demonstrated by its reservation of right to compete. *Id.* at 743 ("the existence of conflicting profit incentives between a manufacturer and dealer is at odds with a fiduciary relationship").

> Plaintiffs' complaint does not allege any relationship between BANA and/or MERS and Plaintiffs that could give rise to a fiduciary relationship. An independent trustee in a nonjudicial foreclosure may owe a fiduciary duty to act impartially to fairly respect the interests of both the lender and homeowner. *See* *Klem v. Washington Mutual Bank,* 176 Wash.2d 771, 790, 295 P.3d 1179 (2013).
>
> But Plaintiff has not alleged that either BANA or MERS are trustees meeting this requirement. Accordingly, Plaintiffs' claim for an equitable accounting is dismissed. ***However, the Court grants Plaintiffs leave to amend their complaint, as explained below.***

****

III. Conclusion and Prayer for Relief.

Appellants assert that they certainly have made all of the necessary allegations in this case to bring themselves and all Defendants under the purview of *Klem* and its progeny, including *Algaier v. CMG Mortg. Inc.*, 2014 U.S. Dist. LEXIS 4784 (E.D. Washington January 14, 2014).

As such, the case must be remanded for full evidentiary hearings pursuant to Statute on Fiduciary Duty as well as Common Law Duty of Accounting.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 12th day of May, 2014 at Skagit County, Washington.

Douglas S. Bryson

Netti M. Bryson

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION SECOND DEPARTMENT

WELLS FARGO BANK, N.A., AS TRUSTEE FOR ABFC 2006-OPT3 TRUST, ABFC ASSET-BACKED CERTIFICATES, SERIES 2006-OPT3, **Plaintiff-Appellant,** **- against -** **ROTIMI EROBOBO, et al.** **Defendants-Respondent.**	**Appellate Department Case No. 2013-6986**

BRIEF OF AMICI CURIAE ROBERT GARRASI AND JAMES HUNTER IN SUPPORT OF DEFENDANT-RESPONDENT ROTIMI EROBOBO

Robert Garrasi, *Pro Se*
P.O Box 2591
Glenville, NY 12325
Tel. (518) 412-2030

James Hunter, *Pro Se*
123 Town Square Place, Ste. 241
Jersey City, NJ 07310
Tel. (718) 530-0738

January 15, 2014

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INTEREST OF AMICI CURIAE

Robert Garrasi and James Hunter request permission to appear as amici curiae in this matter. Amici's input in this matter will be very valuable to this Court because of amici's experience as co-litigants and non-debtor co-defendants in similar cases. Your amici's brief will shed new light upon Appellant's heretofore undisclosed motivations and business practices, as well as those of its affiliates, co-venturers, undisclosed third parties and other signatories to their Pooling and Servicing Agreement ("PSA"). The information provided herein applies not only to the present Appellant, but also to other plaintiffs similarly situated that appear before New York courts in securitized mortgage foreclosure actions. As such, our brief is designed to assist the Court in its public policy considerations regarding these matters.

Our brief focuses on four areas that are the subject matter of this appeal: (1) demonstration that mortgagors in Residential Mortgage Backed Securities ("RMBS') foreclosure actions are indeed third-party beneficiaries of the PSA's, and thus have standing to object to a trustee's *ultra vires* acts; (2) that EPTL §7-2.4 applies to RMBS trusts in New York making *ultra vires* transfers void, not voidable; (3) a showing that the subject mortgage notes are never transferred to the trusts; and (4) proving that the investor beneficiaries cannot legally ratify a trustee's *ultra vires* acts, thus making the acts void, not voidable. We also explain why the foreclosing deal principals claim that they have transferred the notes and mortgages to the trusts long after the closing date, and why the alleged transfers are not subject to the Internal Revenue Code's 100% prohibited contributions tax. Our brief suggests that the New York judiciary has been "had" by the RMBS foreclosing deal principals and their lawyers for at least the last six years.

PRELIMINARY STATEMENT AND STATEMENT OF FACTS

Amici adopt the facts stated in Defendant-Respondent Rotimi Erobobo's brief, subject to the following qualifications:

I. The subject note and mortgage were never transferred to the Plaintiff-Appellant's trust, late or otherwise.

II. Because there was no transfer of the note and mortgage to the trust in contravention of the Pooling and Servicing Agreement, the Appellant trustee never violated EPTL §7–2.4.

III. The Plaintiff-Appellant and its Servicer feigned the mortgage and note transfer solely for the purpose of being able to obtain the protections afforded them under general contract law, i.e., that since Respondent Erobobo was not a signatory to the PSA, nor a third-party beneficiary, he lacked standing to object to the purported late transfer of the mortgage and note in the pending mortgage foreclosure action.

IV. Because there was no real transfer of the note and mortgage to the trust, there could be no imposition of the Internal Revenue Code's 100% Prohibited Contribution Tax for late contributions.

I. THE RESPONDENT-DEFENDANT'S STANDING TO CHALLENGE THE ASSIGNMENT AS A THIRD-PARTY BENEFICIARY

Wells Fargo bases its case chiefly on the fact that the Respondent-Defendant was not a party to the PSA nor was he a third–party beneficiary. And while it is true that the Respondent was not a signatory to the PSA, neither were the Certificateholder investors. Nevertheless, both of these parties' participations were indispensable to the creation of the trust; the sale of the certificates; the funding of mortgage loans; the earning of interest income; and the generation of fees for the PSA signatories, a/k/a deal principals. Moreover, the deal principals could only earn their fees if the mortgagors and investors participated in the enterprise. And the mortgagors benefited directly from the creation of the trust because it was the trust, allegedly, that was the source of funding for their mortgage loans.

The following two examples show how RMBS mortgagors are both incidental beneficiaries to the PSA, and also third-party beneficiaries to the PSA.

EXAMPLE NO. 1

MORTGAGOR IS *NOT* A THIRD PARTY BENEFICIARY BUT MERELY AN INCIDENTAL BENEFICIARY

Section 3.01 of the PSA, states that the mortgage Servicer has the following authority:

> The Servicer may waive, modify or vary any term of any Mortgage Loan or consent to the postponement of strict compliance with any such term or in any manner grant indulgence to any Mortgagor if in the Servicer's reasonable and prudent determination such waiver, modification, postponement or indulgence is not materially adverse to the Certificateholders; provided, however, that the Servicer shall not make future advances and, except as set forth in the following sentence or Section 3.03,[1] * * *. In the event that the Mortgagor is in default with respect to the Mortgage Loan or such default is, in the judgment of the Servicer, reasonably foreseeable, the Servicer may permit a modification of such Mortgage Loan to reduce the Principal Balance thereof and/or extend the term, but not beyond the latest maturity date of any other Mortgage Loan. [R-250]

Thus, the Bank's own PSA clearly states that the Servicer has the authority to confer a number of ***significant benefits*** upon the mortgagors, benefits that are not materially adverse to the interests of the Certificateholder investors.

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[1] Section 3.03 Realization Upon Defaulted Mortgage Loans. With respect to any defaulted Mortgage Loan, the Servicer shall have the right to review the status of the related forbearance plan and, subject to the second paragraph of Section 3.01, may modify such forbearance plan; including extending the Mortgage Loan repayment date for a period of one year or reducing the Mortgage Interest Rate up to 50 basis points.

Yet the benefits specifically conferred upon the mortgagors as described in the PSA do not render the mortgagors third-party beneficiaries. That's because those benefits are *incidental* and not sufficiently immediate. When the mortgagors take out their loan, they are unaware of the benefits that Sect. 3.01 or 3.03 confers upon them. And even absent these Sections, the RMBS trust can still be created, certificates sold and mortgages funded.

EXAMPLE NO. 2

MORTGAGOR *IS* A THIRD PARTY BENEFICIARY

Controlling legal authority establishing that mortgagors are third-party beneficiaries of PSAs is found in the Restatement Contracts (Second), as well as New York and Federal case law.

> A nonparty to a contract is a third-party beneficiary where that party's right to performance is appropriate to effectuate the intention of the parties to the contract, and either the performance will satisfy a money debt obligation of the promise to the beneficiary, or the circumstance indicates that the promise intends to give the beneficiary the benefit of the promised performance.

Clearly, mortgage originators and sponsors spent millions advertising the availability of mortgage loan funds in an attempt to get prospective mortgagors such as the Defendant to obtain their mortgage loans through the originator and its mortgage brokers. Anyone responding to such solicitations, who applied for one of the originator's mortgages and who obtained a firm loan commitment from the originator, was entitled to rely upon the originator's promise to fund the loan. So even though the borrower was not aware of the trust's existence nor a party to the PSA, the promises made therein by the PSA parties regarding their commitments to fund and acquire mortgage loans, were made for his benefit. The court in Septembertide Publ'g, B.V. v. Stein and Day, Inc., 884 F.2d 675, 679 (2d Cir.1989) held that in addition to the agreement itself, the court would look to the surrounding circumstances in making its determination, as third party beneficiaries need not be named in the agreement at issue.

New York State law holds that in order for a third party to be a contract beneficiary, the party must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit [although not necessarily exclusively for his benefit], and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost. Burns Jackson v. Lindner, 59 NY2d 314 (1983). All three of these conditions apply to Defendant.

As an example, consider the individual who wanted to purchase another home and needed a mortgage loan to do so. After hearing several marketing pitches from various loan brokers and the PSA's Sponsor originator, the Defendant chose to go with the PSA Sponsor or one of its affiliates. The individual applied for the Sponsor's loan, met all the underwriting requirements, and was given a firm loan commitment from the Sponsor. On that basis, the individual put his existing home on the market, and put a purchase offer in on a new home. He quickly had a sales contract on his existing home, and had his offer accepted on the new home. Further assume that markets for MBS securities got a case of the jitters, or that one of the deal principals filed for bankruptcy or was indicted, and the trust certificate underwriting was delayed, resulting in a cancellation of the Sponsor's firm loan commitment. The homeowner now finds himself having to perform on the contract to sell his existing home, while being unable to perform on the new home purchase contract. In entering into these purchase and sale agreements, the individual justifiably relied upon the promises that the PSA principals had made to each to sell the certificates and use the proceeds to fund mortgage loans. The failure of the parties to the PSA to sell the MBS securities as scheduled has now caused the individual damages for which he is entitled to be compensated. This makes him a third-party beneficiary to the PSA contract.

In Blessing v. Freestone, 520 U.S. 329, 349 (1997), the U.S. Supreme Court gave a simple example of a third-party beneficiary: "In contract law, when **A** promises to pay **B** money, in exchange for which **B** promises to provide services to **C**, the person who receives the benefit of the exchange of promises between the two others, **C**, is called a third-party beneficiary."

In the case at bar we have the following:

A. The Sponsor promised to fund and acquire the required mortgage loans for the Seller to purchase.

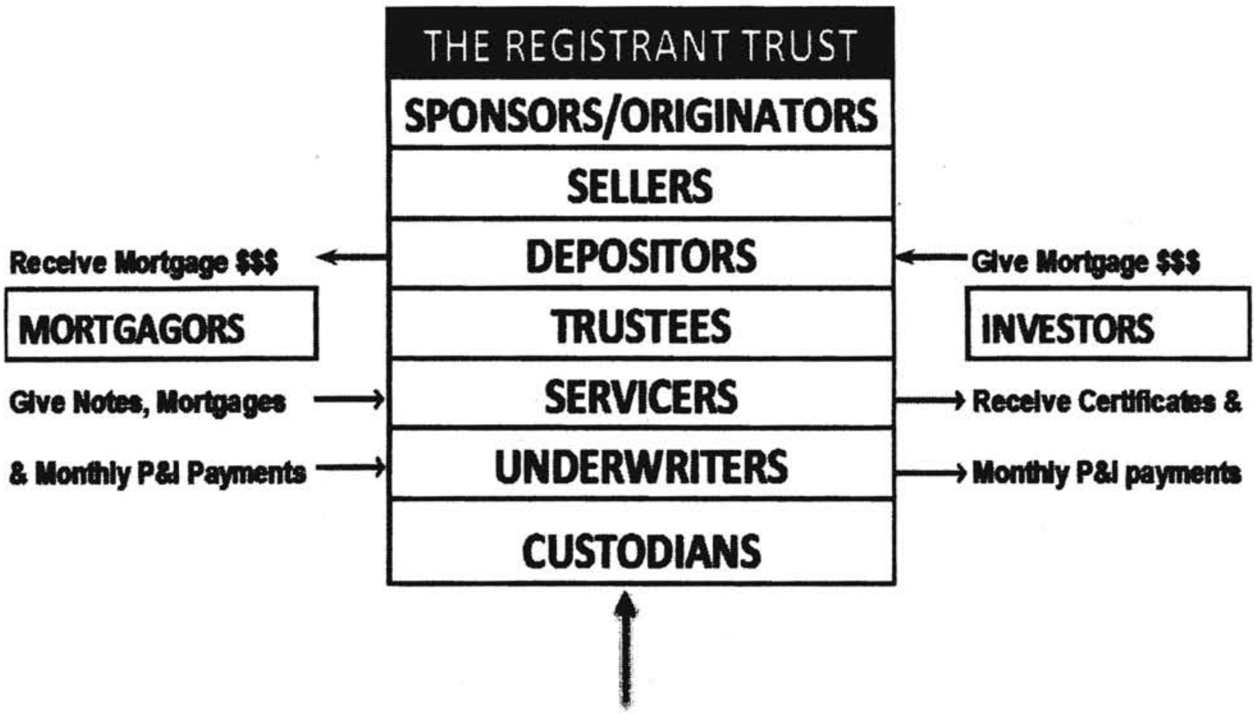
B. The Seller promised to purchase the mortgage loans from the Sponsor.

C. The Depositor promised to purchase the mortgage loans from the Seller.

D. The Trust promised to register and issue its certificates to the Depositor for the conveyance of the mortgage loans.

E. And the Depositor promised to sell the certificates to the public and, purchase the mortgage loans from the Seller, and then convey the mortgage loans to the Trust.

Because of the inability of some of the PSA principals to perform, they ended up failing to deliver upon their promises to each other. As a consequence, our homeowner had to sell his existing home but didn't have enough money to pay for his new home. He was thereby damaged and entitled to be compensated. Thus, by this test the Defendant mortgagor qualifies as a third–party beneficiary of the subject PSA. Another way of looking at this is by a simple diagram, as found on the following page.



The Fee Generation Machine
& Its Internal Deal Principals

Note that the Trust is really designed principally for the purpose of generating fees from the Investors and the Mortgagors for the benefit of the deal principals. Without the Trust, the Investors and the Mortgagors can get along just fine. Indeed, a local bank that does not securitize its mortgage loans has no need for such a trust: it lends its own money to the mortgagors, eliminating the Wall Street middlemen. This is how mortgage lending used to be done.

From the diagram on the previous page it can be seen that only the Mortgagors and the Investors are necessary to consummate a mortgage loan transaction. These two parties are the essential and indispensable parties to the transaction, not the internal PSA deal principals. Without the Investors, there is no mortgage loan funding, and without the Mortgagors, there are neither notes nor mortgages to collateralize the Investors' certificates and to pay monthly principal and interest for the benefit of the Investors. Remove either or both of these parties, and the MBS Trust never gets created. And that means the internal deal principals never get to earn any fees. Essentially, the ***real*** deal principals are the Investors and the Mortgagors. The named PSA deal principals are in reality nothing more than agents of and for the Investors and the Mortgagors.

In summation then, without both the Mortgagors notes, mortgages and promises to pay monthly principal and interest to the Investors, the Investors wouldn't have invested a dime. And without the trust principals' mortgage funding commitments and mortgage funding, the prospective Mortgagors would not have signed any notes or mortgages. And without the homeowner mortgagors paying principal and interest into the trust monthly, the originators, sponsors, depositors, underwriters, custodians, servicers, trustees and investors could not have benefited and profited from the arrangement. Thus and to the extent that homeowners got their mortgages funded through the Bank's trust, they are indeed third–party beneficiaries of the trust, whether disclaimed or not, as well as trust obligors and benefactors. As for the general principle that one not a party to a contract or trust agreement has no standing to challenge the terms of the trust agreement, the U.S. Supreme Court settled that matter over a hundred years ago when it held that the Standard Oil Trust was in violation of the antitrust laws, declared that the trust agreement was no longer legally valid and enforceable as against public policy, and broke up the trust (U.S. v Standard Oil, 221 U.S. 1 [1911]). Subsequently many parties that were harmed by unlawful restraint of trade practices have successfully challenged the contracts that gave rise to the harm, even though they were not parties to the contract, nor third-party beneficiaries. Thus, the real issue giving rise to one's right to challenge a contract to which he is not a party, is not solely whether he is a party or third-party beneficiary, but rather whether he will be unjustly harmed by the contracting parties' unlawful actions. In the instant litigation, Respondent will be harmed by the unlawful acts of the Appellant not by breach of contract but in tort, because if Appellant is not the lawful owner and holder of the note, then Respondent risks losing his property to not entitled to enforce the terms of the note.

II. Application Of New York's EPTL §7–2.4 & Choice Of Law

Appellant Wells Fargo, in opposition to the Defendant-Respondent's argument, claims as stated above that the Defendant lacks standing to invoke EPTL §7–2.4 to enforce the terms of the PSA, and thus only New York mortgage foreclosure law controls the outcome of this action. Ordinarily, this would be the case except for the natty problem that the PSA parties agreed that New York law would govern. And unfortunately for the Plaintiff, New York's EPTL §7–2.4 has erected an impenetrable legal barrier that prevents the Bank's trust from acquiring the Defendant's purported note and mortgage after the Trust's closing date regardless of whether the transfer is being challenged by a nonparty or non-third-party beneficiary.

EPTL 7–2.4. states:

> If the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust, except as authorized by this article and by any other provision of law, is void.

There are no other provisions of EPTL Article 7 that would authorize a trustee to act in contravention of a trust. Nor are there any other provisions of New York law that would so authorize an *ultra vires* act by a trustee. Moreover, the Internal Revenue Code ("IRC") specifically prohibits any trustee act that would disqualify the subject trust's tax–exempt REMIC status. And the Bank's PSA was designed to be in complete compliance with the IRC REMIC statute and applicable REMIC Treasury regulations.

This Court and the Fourth Department Appellate Court[2] are the only New York appellate courts to specifically address the literal application of EPTL §7–2.4. This Court did so in 2000 when it decided the Matter of Pepi, 268 AD2d 477 (2000), and held as follows:

> It was the duty of the appellants [banks] to inquire as to whether the proceeds obtained through the use of a trust asset were to be used for the ultimate benefit of the trust (*see, Dye v Lewis,* 40 AD2d 582, *affd sub nom. Dye v Lincoln Rochester Trust Co.,* 31 NY2d 1012). Since the appellants had reason to know that the conveyance was made in contravention of the trust, the transaction is void (*see,* EPTL 7-2.4; *see also, National Sur. Co. v Manhattan Mtge. Co.,* 185 App. Div. 733, 736-737, *affd* 230 N.Y. 545; *Boskowitz v Held,* 15 App. Div. 306, 310-311, *affd* 153 N.Y. 666).

It would be incredible as a matter of law for appellant Wells Fargo to claim that it did not know that the late transfer of the note and mortgage to the trust was made in contravention to the trust agreement. And this Court has held that such knowledge alone would make the transfer void, not voidable.

The next and latest reported application of EPTL §7–2.4 came in the Erobobo case (Wells Fargo Bank, N.A. v. Erobobo, 39 Misc.3d 1220(A) [N.Y.Sup.Ct. 2013]). The Erobobo court held that the terms of the PSA govern,

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2 Dye v. Lewis, 67 Misc.2d 426; affd as modified, 39 AD2d 828 (4th Dept., 1972).

and that any act by the trustee in contravention of the PSA (such as a late note transfer) would render that act void pursuant to EPTL §7–2.4. Both the Glaski [3] and Saldivar [4] courts correctly adhered to the Erobobo court's reasoning and holding.

The Erobobo decision, the subject of this appeal, was profound and unique, because it is the *only* case in all of New York common law history that applied EPTL §7–2.4 to an RMBS indenture trust, as opposed to a lifetime trust. This is particularly important due to the Bassman holding based upon prior New York case law. (See Bank of America N.A. v. Bassman FBT, LLC, 981 N.E.2d 1 [2012]).

Appellant correctly points out that in 767 Third Avenue LLC v. Orix Capital Markets, LLC, 26 AD3d 216 (1st Dept., 2006), the plaintiffs were not entitled to a mortgage assignment (as opposed to a satisfaction piece), when they refinanced their property. The court observed and held

> * * * no such right was granted by the terms of the mortgage and loan documents, nor is it provided by statute. * * * (And) Plaintiffs lack standing to enforce the pooling and servicing agreement between defendant and the mortgagee as third-party beneficiaries. The best evidence of the intent to bestow a benefit upon a third party is the language of the contract itself (*see 243-249 Holding Co. v. Infante,* 4 AD3d 184 [2004]), and

[3] Glaski v Bank of America, N.A., 160 Cal. Rptr. 3d 449 (2013).

[4] In re Saldivar v. JPMorgan Chase Bank, N.A. (Bankr.S.D.Tex., June 5, 2013, No. 11-10689)

> here, a provision of the agreement expressly negates enforcement by third parties (*see Mendel v. Henry Phipps Plaza W., Inc.*, 16 AD3d 112 [2005], *lv granted* 5 NY3d 703 [2005]).

The application of 767 Third Avenue to the appeal presently before this Court is indeed appropriate, but not for the reasons advanced by appellant. The court in 767 Third Avenue looked to the contracts before it, and found no language or right in the contracts that mandated an assignment rather than a satisfaction piece. Likewise, in the case being appealed, there is no language in the PSA that authorizes the late transfer of a note or mortgage to the trust. More importantly the PSA mandates that notes and mortgages must be transferred to the trust no later than the trust's closing date. And EPTL §7–2.4 specifically prohibits such as transfer as being an *ultra vires* act that is void *ab initio*.

The appellant and its trust co-principals specifically chose New York's laws as the governing laws for their trust. They did this with eyes wide open and with the advice and counsel of the nation's ablest New York trust attorneys to guide them. They wanted all the benefits that New York trust law afforded them, with all the protections afforded to New York trusts. They also wanted to be able to enforce their New York mortgages and notes in New York courts. Thus they chose New York trust law as the law governing their trust: except when there is a provision in New York trust law, such as EPTL §7–2.4, that they don't like, then they say "We were only kidding about New York trust law governing…we didn't mean ALL of New York trust law…just the parts we like."

But there is more to it than this. The deal principals in RMBS trusts choose New York trust law because EPTL §7–2.4 specifically insulates them from committing *ultra vires* acts that might jeopardize their Federal tax exemptions and impose the prohibited transactions and contributions taxes on them. If the IRS questions the alleged late mortgage transfers, the trustee can point to EPTL §7–2.4 and argue that any such act was void *ab initio*. In support they can point to a lack of proper allonges transferring the notes and mortgages to the trust; a lack of wire transfer payments for the notes; and a lack of transfer instructions and delivery receipts. And there are never any proper allonges negotiating the notes directly to the trustee (all indorsements are in blank), nor is there ever any evidence of wire transfers or delivery instructions and receipts for the notes. In fact, the deal principals have successfully used EPTL §7–2.4 as a two-edged sword, invoking it when they need to and convincing courts that even if a mortgagor defendant has standing to challenge a foreclosure action, EPTL §7–2.4 only applies to acts of the trustees, and there is no proof that the trustee acted in contravention to EPTL §7–2.4. As a specific example, the court in Deutsche Bank National Trust Co. v. Stafiej et al., Case No. 10 C 50317. (United States District Court, N.D. Illinois. March 15, 2013.) stated as follows:

> Assuming defendants' reading of the PSA is correct and that they have standing to raise the challenge concerning the validity of the assignment, this court would still not find that assignment void. EPTL §7–2.4 only purports to void an act "of the trustee" that violates the terms of the trust. The assignment, which was not accompanied by proof that it

> followed the correct chain of assignment to get to the trust, was not filled out by the trustee; it was signed by an agent of Accredited Home Lenders, Inc., the original lender, with a blank endorsement. Because defendants have not pointed to an act "of the trustee" in contravention of the PSA's terms, this court would find their attempt to void the assignment unpersuasive.[5]

Appellant wants this Court to disregard the plain language of the EPTL §7–2.4 statute, because it hasn't been literally applied consistently by New York trial courts. The statute has, however, been literally applied by New York appellate courts.

With choice of law comes its consequences. In Roberts v. Tishman Speyer, 13 NY3d 270 (2009), the Court of Appeals addressed the issue of statutory interpretation. In that case, nine plaintiff-tenants contended that defendant Tishman Speyer Properties et al., were not entitled to take advantage of the luxury decontrol provisions of the Rent Stabilization Law, while simultaneously receiving tax benefits under the City of New York's J-51 program. The court stated that a pure issue of statutory reading and analysis was involved; and if the Legislature had intended the statutory provision to mean something other than the words used in the statute, it would have done so. The Roberts court was unable to find language anywhere in the statute delineating two supposedly distinct benefit categories, and saw no indication that the Legislature ever intended such a distinction. Nor was

5 How the note actually got into the trust without delivery to and acceptance by the trustee, allowing the trustee to initiate the foreclosure action, was never explained by the court.

the court concerned about the New York City real estate industry's predictions of dire financial consequences from its ruling. The predictions were deemed to be speculative. The court stated that if the statute imposed unacceptable burdens, defendant' remedy was to seek legislative relief. And that precisely is appellant Wells Fargo's remedy herein.

In the hundreds of cases that your amici have examined, the one question that never gets asked by the courts nor explained by the trustees, is why the notes and mortgages were never *timely* transferred to the trusts in conformance with the PSA. If the notes and mortgages existed at the trust's inception, there was no credible reason why they couldn't have been transferred to the trust at that time. And it was the deal principals' obligation to do so, not the mortgagors. Had the notes and mortgages been transferred properly, this litigation–as well as thousands of similar cases–would not even exist.

III. So Why Would A Trustee Acquire A Defaulted Mortgage Note And Convey It To The Trust Years After The Trust's Closing Date ?

For some time now courts have wondered why a trustee would acquire a defaulted mortgage loan in the middle of a national financial meltdown, caused by defaulted subprime mortgage loans, do so years after the trust closed, and in the process jeopardize the REMIC's tax–exempt status. Moreover, the entire value of the defaulted mortgage loan would be a prohibited contribution, subject to the 100% prohibited contribution tax as provided in the Internal Revenue Code. Further, in order to make such an acquisition, the trustee would need an opinion letter from tax counsel that the proposed acquisition would not jeopardize the trust's tax-exempt status nor would it trigger the 100% prohibited contribution tax. No such tax opinion letters are ever produced.

So why then do the trustees make such acquisitions? The answer is simple. The trustee *does not* acquire such loans in the manner that it appears to acquire and convey them to the trust.

We refer the Court to the Complaint found in the following case: John Hancock et al. v. JPMorgan Chase et al, Supreme Court State of New York, New York County, Index No. 650195/2012. This case is a RMBS case. Plaintiff John Hancock Life Insurance alleges that JPMorgan Chase and its affiliates and officers defrauded the Plaintiff of many millions of dollars by selling the Plaintiff mortgage backed securities of dubious value due to the fraud alleged in the Complaint.

What is relevant to the discussion herein is found on pages 212–216 of the Complaint, a summary of which is reproduced here. The John Hancock entities purchased RMBS in a number of the JPMorgan trusts. The following paragraphs of the Complaint show what percentage of par that the MBS were trading at, at the time that John Hancock filed its Complaint:

545. BSABS 2006-HE6 – 65.23% of par.
546. LBMLT 2004-3 – 14.75% of par.
547. LBMLT 2004-1 – 46.95% of par.
548. BSABS 2004-HE1 – Certificates have since been downgraded and are currently rated Ca.
549. BSABS 2004-HE3 – 72.75% of par.
550. BSABS 2004-AC3 – 55.51% of par.
551. BSABS 2004-AC5 – 33.54% of par.
552. BSABS 2006-IM1 – 39.13% of par.
553. BSABS 2004-SD4 – 76.27% of par.
554. JPMAC 2006-FRE2 – 81.51% of par.
555. BSARM 2006-1 – 82.41% of par.
556. CFLX 2006-1 – 1.02% of par.
557. WAMU 2003-AR3 – 43.9% of par.
558. WAMU 2003-AR1 – 47.57% of par.
559. JPALT 2006-S3 – 51.85% of par.
560. WMALT 2007-OA3 – 42.68% of par.
561. WMALT 2006-9 – 56.55% of par.
562. BSMF 2006-AR4 – Currently rated Caa.
563. BSMF 2006-AR4 – Currently rated Caa3.
564. JPALT 2006-A7, Tranche 1A3 – 62.43% of par.
565. BSMF 2006-AR5 – Currently rated Caa2.
566. BSABS 2007-HE2, Tranche II-M3 – 0.38% of par.

The Servicers and the Trustees know which trusts or tranches therein are most likely to suffer high rates of default, ratings agency downgrades, and resulting dramatic decreases in the prices of the certificateholders' RMBS. With their own funds, the Servicers and Trustees and/or their affiliates purchased credit default swap insurance on the subprime tranches of the trusts. (Because they used their own funds, these purchases and payoffs never show up on the official

> Section 2.03, 3.32 or 10.01, is an amount equal to the sum of (i) 100% of the Principal Balance thereof as of the date of purchase (or such other price as provided in Section 10.01), (ii) in the case of a Mortgage Loan, accrued interest on such Principal Balance * * *. [R-206]

Assume therefore that the Servicer wants to acquire a busted tranche's mortgage loans cheaply so as to get access to the mortgages, their foreclosure rights and the underlying real property collateral. The above provisions, however, make it relatively expensive, time consuming and difficult to achieve this by way of purchasing the mortgage loans directly, because the Servicer would have to pay par for them, and do so under certain conditions. However, it the Servicer buys up the busted certificates, the Servicer can acquire the notes, the mortgages and the foreclosure rights at a fraction of what it would cost to buy the notes at par. And this can all be done external to the PSA and its reporting and disclosure requirements.

The deal principals and/or their designees buy up 100% of the RMBS associated with the busted tranches. Having accomplished that, they then "put" the certificates to the Trustee, retiring the tranche and CUSIPS, and receiving in exchange all the mortgages and mortgage loans in the tranche. The next two pages show monthly distribution reports for the subject trust: one at the trust's inception, and the other as of November, 2013. Note that all the subprime tranches are fully populated at inception, but are presently empty: all the certificates, notes and mortgages are gone. Yet all the prime mortgage tranches at the top of the report are fully populated, because they are not in default, and are paying the investors like clockwork.

What happens next is that the tranche's mortgages that are in default are stripped out for foreclosure processing. The ones that aren't in default can be resecuritized and resold to another trust. In this way the servicers and their friends get another windfall in the form of a capital gain when those mortgages are repackaged and resold. And if those mortgage loans had higher interest rates than present market interest rates, the servicers et al. can make millions more on the resecuritization and resale. [6] For example, assume that there are 200 good mortgages left in the tranche, with 24 years to run, at a 7% interest rate, with total unamortized principal of $60,000,000. Repackaging/resecuritizing those notes to yield 5% means that they can be resold for $72,000,000, a $12,000,000 gain.

The diagram on the page following the distribution reports shows how the tranches are actually populated.

[6] This also explains the multiple notices that homeowners receive during the life of their loan, telling them that their loan has been transferred to a new servicer.

Asset Backed Funding Corporation
Asset-Backed Certificates
Distribution Date: 27-Nov-06

06-Dec-2006 9:05:35AM

Contact: Customer Service-CTSLink
Wells Fargo Bank, N.A.
Securities Administration Service
Frederick, MD 21701-4746
7485 New Horizon Way
www.ctslink.com
Telephone: (301) 815-6600
Fax: (301) 815-6660

Asset Backed Funding Corporation
Asset Backed Certificates
Series 2006-OPT3

Certificateholder Distribution Summary

Class	CUSIP	Certificate Pass-Through Rate	Beginning Certificate Balance	Interest Distribution	Principal Distribution	Current Realized Loss	Ending Certificate Balance	Total Distribution	Cumulative Realized Losses
R	ABF060P3R	0.000%	-	-	-	-	-	-	-
A-1	00075VAA9	5.460%	114,273,000	225,308	1,372,792	-	112,900,208	1,598,100	-
A-2	00075VAB7	5.460%	114,343,000	225,446	250,062	-	114,092,938	475,508	-
A-3-A	00075VAC5	5.380%	236,422,000	459,315	4,999,475	-	231,422,525	5,458,790	-
A-3-B	00075VAD3	5.480%	165,145,000	326,804	-	-	165,145,000	326,804	-
A-3-C	00075VAE1	5.570%	5,469,000	11,000	-	-	5,469,000	11,000	-
M-1	00075VAF8	5.580%	35,032,000	70,589	-	-	35,032,000	70,589	-
M-2	00075VAG6	5.650%	32,078,000	65,448	-	-	32,078,000	65,448	-
M-3	00075VAH4	5.680%	18,572,000	38,093	-	-	18,572,000	38,093	-
M-4	00075VAJO	5.740%	16,039,000	33,245	-	-	16,039,000	33,245	-
M-5	00075VAK7	6.050%	15,617,000	34,119	-	-	15,617,000	34,119	-
M-6	00075VAL5	6.300%	13,928,000	31,686	-	-	13,928,000	31,686	-
M-7	00075VAM3	6.820%	13,507,000	33,265	-	-	13,507,000	33,265	-
M-8	00075VAN1	7.820%	12,240,000	34,564	-	-	12,240,000	34,564	-
M-9	00075VAP6	7.820%	10,552,000	29,798	-	-	10,552,000	29,798	-
B	00075VAQ4	7.820%	10,130,000	28,606	-	-	10,130,000	28,606	-
CE	00075VAR2	0.000%	30,812,461	4,632,444	-	-	30,812,461	4,632,444	-
p	00075VASO	0.000%	-	58,954	-	-	-	58,954	-
R-X	ABF60P3RX	0.000%	-	-	-	-	-	-	-
Totals			844,159,461	6,338,686	6,622,329	-	837,537,132	12,961,015	-

Asset Backed Funding Corporation
Asset-Backed Certificates
Distribution Date: 26-Dec-13

23-Dec-13 2:42:01PM

Asset Backed Funding Corporation
Asset Backed Certificates
Series 2006-OPT3

Contact: Customer Service-CTSLink
Wells Fargo Bank, N.A.
Securities Administration Service
8480 Stagecoach Circle
Frederick, MD 21701-4747
www.ctslink.com
Telephone: 1-866-846-4526
Fax: 240-586-8675

Certificateholder Distribution Summary

Class	CUSIP	Record Date	Certificate Pass-Through Rate	Beginning Certificate Balance	Interest Distribution	Principal Distribution	Current Realized Loss	Ending Certificate Balance	Total Distribution	Cumulative Realized Losses
R	ABF060P3R	11/29/2013	0.000%	-	-	-	-	-	-	-
A-1	00075VAA9	11/29/2013	0.306%	35,697,336	9,406	185,204	-	35,512,132	194,610	-
A-2	00075VAB7	11/29/2013	0.306%	40,987,962	10,800	111,994	-	40,875,968	122,794	-
A-3-A	00075VAC5	11/29/2013	0.226%	-	-	-	-	-	-	-
A-3-B	00075VAD3	11/29/2013	0.326%	120,457,180	33,815	397,504	-	120,059,676	431,319	-
A-3-C	00075VAE1	11/29/2013	0.416%	5,270,675	1,888	17,393	-	5,253,282	19,281	-
M-1	00075VAF8	11/29/2013	0.426%	-	-	-	-	-	-	35,032,000
M-2	00075VAG6	11/29/2013	0.496%	-	-	-	-	-	-	32,078,000
M-3	00075VAH4	11/29/2013	0.526%	-	-	-	-	-	-	18,572,000
M-4	00075VAJ0	11/29/2013	0.586%	-	-	-	-	-	-	16,039,000
M-5	00075VAK7	11/29/2013	0.896%	-	-	-	-	-	-	15,617,000
M-6	00075VAL5	11/29/2013	1.146%	-	-	-	-	-	-	13,928,000
M-7	00075VAM3	11/29/2013	1.666%	-	-	-	-	-	-	13,507,000
M-8	00075VAN1	11/29/2013	2.666%	-	-	-	-	-	-	12,240,000
M-9	00075VAP6	11/29/2013	2.666%	-	-	-	-	-	-	10,552,000
B	00075VAQ4	11/29/2013	2.666%	-	-	-	-	-	-	10,130,000
CE	00075VAR2	11/29/2013	0.000%	-	-	-	-	-	-	-
P	00075VAS0	11/29/2013	0.000%	-	-	-	-	-	-	-
R-X	ABF60P3RX	11/29/2013	0.000%	-	-	-	-	-	-	-
Totals				202,413,153	55,909	712,095	-	201,701,058	768,004	177,695,000

This report is compiled by Wells Fargo Bank, N.A., from information provided by third parties. Wells Fargo Bank, N.A. has not independently confirmed the accuracy of the information.

All Record Dates are based upon the governing documents and logic set forth as of closing.

A TRANCHE'S SIDE VIEW
SHOWING ITS POPULATED LAYERS

INVESTOR CERTIFICATES
MORTGAGE NOTES
MORTGAGES
COLLATERAL

Note also that in the 2013 report, all the subprime tranches are not only empty, but their cumulative losses are also equal to their beginning balances at the trust's inception date, to the penny. Further note that the trustee's disclaimer at the bottom of the pages pretty much says "Hey, we got these numbers from some other guys. We don't know if this information is right or not, and we're not going to try and confirm it, either. So there."

So even though the MBS certificates and the defaulted notes weren't worth much, the real property underlying them was. That's why the deal principals moved swiftly on the tranche purchases, and why the foreclosure plaintiffs can walk from the litigation if the going gets tough, or can offer "generous" loan mods should it be necessary.

Although the notes were never transferred to the trust as required, they then had to be so transferred, at least on paper. And the reason for this was two-fold. First, for appearances sake the transfers had to look like they occurred because the deal principals had warranted and represented to the investors that the transfers took place. But the note transfers couldn't be back dated, because MERS would have back dated the mortgage assignments and recorded them with county clerks retroactively. This is something that could not be accomplished, for obvious reasons.

So the late assignments and transfers of the mortgages and notes were fabricated. This left one problem, however: that was that such transfers would have triggered the 100% prohibited contribution tax on late contributions of the non-qualified mortgage loans to the trust; further, such conveyances would have required an opinion of tax counsel that such conveyances would not trigger the 100% prohibited contribution tax. Yet in all these proceedings, one never sees such a tax opinion letter, nor the IRS revoking the REMIC status of the trusts or applying the 100% prohibited contributions tax. *And that is because there never was a prohibited late contribution to the trust.*

Further, the Trustee is responsible for preparing and signing the Trust's tax return. The trustee, however, is not going to take in \$20 million+ per year in prohibited contributions and not disclose that fact to the IRS; nor is the trustee going to take in such late contributions and not disclose that fact to the IRS. In the first instance, the \$20 million+ gets taxed away and the REMIC loses its tax exempt status; in the second instance the trustee would face a felony tax fraud charge. The trustee is not going to do either. And the trustee doesn't need to do either, *because there never are any actual late contributions to the trust...it is all a fiction to con the courts.*

So what really happened?

What really happened is that the documents were fabricated for the court, purporting a late transfer of the mortgage and note to the Trust, a transfer that never really occurred. This phantom transfer avoided any potential breach of fiduciary duty charge by investors pursuant to EPTL §11–2.3, alleging that the loan was never brought into the trust; but since the transfer never really occurred, there was no triggering of the 100% prohibited contribution tax nor any revoking of the trust's REMIC tax exemption. [7]

The notes were alleged to have been transferred to the Trust, because this allowed the Servicers and Trustee plaintiffs in foreclosure actions to succeed in their foreclosures simply by telling the courts that the homeowner defendants lacked standing to challenge the late note transfers, because those defendants were not parties to the PSA nor third party beneficiaries. And it is this non-beneficiary argument that up until now has successfully provided the insulating cover for the Servicers' and Trustees' actions. And that is why it was absolutely essential to convince the judiciary and the parties that the notes and mortgages were transferred to the trusts, late or not. In effect, for at least the last six years, New York courts have been "had" by the Trustees, the Servicers and their lawyers.

[7] There are thousands of RMBS trusts, and there have been hundreds of thousands of late note transfers to these trusts; yet there is not a single instance of the IRS applying the 100% Prohibited Contributions Tax against any trust, or revoking the REMIC tax exempt status of any trust for prohibited transactions or contributions. Does that not seem passing strange to this Court?

These indenture Trustees generally receive annual fees of about .0075% of the trust fund's corpus. So for the subject trust's current balance, Wells Fargo only gets about $15,000 for the year. It is highly unlikely that Wells Fargo, as indenture trustee, is even going to get out of bed for $15,000 a year, let alone do any trust work or assume any liability for trust matters.

With respect to trust matters, the typical RMBS Trustee sees nothing, hears nothing, and knows nothing…and likes it like that.

SUMMARY

- Respondent was a third-party beneficiary of the PSA.
- New York EPTL §7–2.4, Choice of Law and the terms of the PSA prevented anyone from transferring or assigning anything to the subject trust after the trust's closing date.
- EPTL §7–2.4 notwithstanding, the Note and Mortgage were never transferred to the trust by any signatory to the trust.
- Absent a valid assignment/transfer of the mortgage/note to the trust, the Appellant-Plaintiff lacked both standing and capacity to bring this action.
- Pursuant to the terms of the PSA, the investor beneficiaries are precluded from ratifying any ultra vires acts of the trustee, and thus all such acts are void not voidable.
- Like the *Tishman Speyer* defendants, Wells Fargo's remedy is legislative, not judicial.

CONCLUSION & FINAL THOUGHT

The Erobobo note was never transferred to the subject trust, legally or otherwise. It is therefore irrelevant whether the Respondent-Defendant had standing to enforce the terms of the PSA or not. Thus, Appellant Wells Fargo lacked standing and/or capacity to commence a foreclosure action against the Respondent under New York law. Accordingly, this Court should affirm the lower court and remand for further proceedings.

Finally (and as a way to clear the Second Department trial court dockets of fraudulent RMBS foreclosure actions), this Court should require foreclosing trustees to produce a certified and unredacted copy of their trust's Federal REMIC annual tax return, Form 1066, along with the opinion of tax counsel that no actions by the trustee for the subject tax year were in violation of the REMIC tax statutes and regs. Form 1066 Schedule J, Part III (See following pages) will show the trust's taxable mortgage loan contributions after the startup or closing date, for each taxable year. (Note that such late contributions are subject to the 100% late contribution tax.) Form 1066, along with all supporting schedules and worksheets identifying the defendant homeowner's mortgage and note as a contribution after the startup date, will conclusively establish that the defendant's mortgage loan was actually transferred to the RMBS trust prior to the initiation of the foreclosure action. If the loan is identified as a late contribution, the IRS will tax 100% of the value of the loan. If the tax return shows no late contribution for the subject loan for the subject tax year, then the mortgage note never made it into the trust and the trustee has no title to the loan and was thus not entitled to bring the foreclosure action against the homeowner.

Heretofore, the homeowner has been pointing to EPTL 7-2.4, claiming that the late note transfer is void because it was done in contravention of the terms of the trust agreement. The plaintiff's argument has always been that the homeowner defendant was not a party to the PSA nor a third-party beneficiary, and therefore the homeowner could not challenge the late note transfer or enforce the terms of the PSA. Focusing on Form 1066 eliminates the need for both arguments: either the loan was placed in the trust or it was not. The production of Form 1066 establishes the truth, one way or the other.

Thus the PSA's Certificateholder/Investor beneficiaries are precluded from ratifying or setting aside any of the trustee's acts. All they can do if they don't like the way the trust is being run is to band together and vote to sue the trustee and/or servicer. And then it will be up to a court either to ratify or set aside the acts of the trustee or servicer, not the beneficiaries. Simply put, by the terms of the PSA, the investor beneficiaries could not legally ratify an *ultra vires* act of the trustee even if they wanted to.

V. THE TRUSTEE'S ROLE...IN A NUTSHELL

The Trustee in a RMBS trust is clueless, has chosen to be so, and has every intention of remaining so. As an indenture trustee, his only duties are ministerial until there is a default by one of the signatories to the PSA. Then and only then is he obligated to act as a fiduciary. This provides the trustee with perfect cover: he can disclaim any knowledge of mortgage defaults, servicer abuses, initiation of foreclosure actions, forged documents, fabricated evidence, etc., etc. He doesn't know if the servicer's numbers are correct or where the money is going. He never: initiates foreclosure actions (the servicer does), nor receives notes specifically indorsed to the trustee, nor accepts late contributions of mortgages/notes to the trust, nor issues transfer instructions or delivery receipts for any mortgages/notes, nor wires funds to anybody as consideration for the notes or mortgages alleged to be transferred to him as trustee, nor fails to report late contributions to the IRS (there aren't any); and he never falsifies tax returns.

Form **1066**

Department of the Treasury
Internal Revenue Service

U.S. Real Estate Mortgage Investment Conduit (REMIC) Income Tax Return

▶ **Information about Form 1066 and its separate instructions is at *www.irs.gov/form1066*.**

OMB No. 1545-1014

2013

For calendar year 2013 or short tax year beginning , 20 , ending , 20

Please Type or Print		
	Name	**A** Employer identification number
	Number, street, and room or suite no. (If a P.O. box, see instructions.)	**B** Date REMIC started
	City or town, state or province, country, ZIP or foreign postal code	**C** Enter total assets at end of tax year $

D Check applicable boxes: (1) ☐ Final return (2) ☐ Name change (3) ☐ Address change

Section I—Computation of Taxable Income or Net Loss

Income (excluding amounts from prohibited transactions)

1	Taxable interest	1	
2	Accrued market discount under section 860C(b)(1)(B)	2	
3	Reserved	3	
4	Ordinary gain or (loss) (attach Form 4797)	4	
5	Other income (attach statement—see instructions)	5	
6	**Total** income (loss). Add lines 1 through 5	6	

Deductions (excluding amounts allocable to prohibited transactions)

7	Salaries and wages	7	
8	Rent	8	
9	Amount accrued to regular interest holders in the REMIC that is deductible as interest . .	9	
10	Other interest	10	
11	Taxes	11	
12	Depreciation (see instructions)	12	
13	Other deductions (attach statement)	13	
14	**Total deductions.** Add lines 7 through 13	14	
15	Taxable income (or net loss). Subtract line 14 from line 6. Enter here and on Schedule M, column (c)	15	

Section II—Tax and Payments

1	**Total tax** (Schedule J, line 12)	1	
2	Tax paid with Form 7004	2	
3	**Tax due.** Enter excess of line 1 over line 2. (See **Payment of Tax Due** in instructions.) . .	3	
4	**Overpayment.** Enter excess of line 2 over line 1	4	

Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

▶ Signature ▶ Date

May the IRS discuss this return with the preparer shown below (see instructions)? ☐ Yes ☐ No

Paid Preparer Use Only

Print/Type preparer's name	Preparer's signature	Date	Check ☐ if self-employed	PTIN
Firm's name ▶			Firm's EIN ▶	
Firm's address ▶			Phone no.	

For Paperwork Reduction Act Notice, see instructions. Cat. No. 64383U Form **1066** (2013)

Schedule J **Tax Computation**

Part I—Tax on Net Income From Prohibited Transactions

1	Income—See instructions.			
a	Gain from certain dispositions of qualified mortgages	1a		
b	Income from nonpermitted assets	1b		
c	Compensation for services	1c		
d	Gain from the disposition of cash flow investments (except from a qualified liquidation)	1d		
2	**Total** income. Add lines 1a through 1d	2		
3	Deductions directly connected with the production of income shown on line 2 (excluding deductions attributable to prohibited transactions resulting in a loss)	3		
4	Tax on net income from prohibited transactions. Subtract line 3 from line 2	4		

Part II—Tax on Net Income From Foreclosure Property (as defined in section 860G(a)(8)) **(Caution:** *See instructions before completing this part.***)**

5	Net gain or (loss) from the sale or other disposition of foreclosure property described in section 1221(a)(1) (attach statement)	5		
6	Gross income from foreclosure property (attach statement)	6		
7	Total income from foreclosure property. Add lines 5 and 6	7		
8	Deductions directly connected with the production of income shown on line 7 (attach statement)	8		
9	Net income from foreclosure property. Subtract line 8 from line 7	9		
10	Tax on net income from foreclosure property. Enter 35% of line 9	10		

Part III—Tax on Contributions After the Startup Day
(Do not complete this part if the startup day was before July 1, 1987. See instructions.)

11	Tax. Enter amount of taxable contributions received during the calendar year after the startup day. See instructions (attach statement)	11		

Part IV—Total Tax

12	**Total tax.** Add lines 4, 10, and 11. Enter here and on page 1, Section II, line 1	12		

Designation of Tax Matters Person

Enter below the residual interest holder designated as the tax matters person (TMP) for the calendar year of this return.

Name of designated TMP ▶ Identifying number of TMP ▶

Address of designated TMP ▶

Additional Information (see instructions)

		Yes	No
E	What type of entity is this REMIC? Check box ▶ ☐ Corporation ☐ Partnership ☐ Trust ☐ Segregated Pool of Assets If you checked "Segregated Pool of Assets," enter the name and type of entity that owns the assets: Name Type		
F	Number of residual interest holders in this REMIC ▶		
G	Check this box if this REMIC is subject to the consolidated entity-level audit procedures of sections 6221 through 6231 . . . ▶ ☐		
H	At any time during calendar year 2013, did the REMIC have a financial interest in or signature or other authority over any foreign financial account, including bank, securities, or other types of financial accounts in a foreign country? . . .		
	If "Yes," the REMIC may have to file FinCEN Form 114 (formerly TD F 90-22.1). See instructions. If "Yes," enter name of foreign country ▶		
I	During the tax year, did the REMIC receive a distribution from, or was it the grantor of, or transferor to, a foreign trust? If "Yes," see instructions for other forms the REMIC may have to file . . .		
J	Enter the amount of tax-exempt interest accrued during the year ▶		
K	Check this box if the REMIC had more than one class of regular interests . . . ▶ ☐ If so, attach a statement identifying the classes and principal amounts outstanding for each at the end of the year.		
L	Enter the sum of the daily accruals determined under section 860E(c) for the calendar year ▶		

Schedule L Balance Sheets per Books

		(a) Beginning of year		(b) End of year	
	Assets				
1	Permitted investments (see instructions):				
a	Cash flow investments . . .				
b	Qualified reserve assets . . .				
c	Foreclosure property . . .				
2	Qualified mortgages . . .				
3	Other assets (attach statement) . . .				
4	**Total** assets . . .				
	Liabilities and Capital				
5	Current liabilities (attach statement) . . .				
6	Other liabilities (attach statement) . . .				
7	Regular interests in REMIC . . .				
8	Residual interest holders' capital accounts . . .				
9	**Total** liabilities and capital . . .				

Schedule M Reconciliation of Residual Interest Holders' Capital Accounts (Show reconciliation of each residual interest holder's capital account quarterly on Schedule Q (Form 1066), Item F.)

(a) Residual interest holders' capital accounts at beginning of year	(b) Capital contributed during year	(c) Taxable income (or net loss) from Section I, line 15	(d) Nontaxable income	(e) Unallowable deductions	(f) Withdrawals and distributions	(g) Residual interest holders' capital accounts at end of year (combine cols. (a) through (f))
				( )	( )	

Dated: January 16, 2014

....

Robert Garrasi, *Pro Se*
P.O. Box 2591
Glenville, NY 12325
Tel. (518) 412-2030

....

James Hunter, Pro Se
123 Town Square, Ste. 241
Jersey City, NJ 07310
Tel. (718) 530-0738

PRINTING SPECIFICATION STATEMENT

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Superior Court of the State of Washington
for Snohomish County

GEORGE N. BOWDEN
JUDGE

SNOHOMISH COUNTY COURTHOUSE
3000 Rockefeller Avenue, M/S #502
Everett, WA 98201-4060

(425) 388-3532

Abraham K. Lorber
Lane Powell, PC
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101

Scott E. Stafne
Stafne Trumbull, LLC
239 North Olympic Avenue
Arlington, WA 98223

January 30, 2014

Re: Bradburn v. ReconTrust, et al. | No. 11-2-08345-2

Dear Counsel:

Enclosed please find copies of my order denying the defendant's motion for summary judgment, granting plaintiff's cross motion for partial summary judgment on his consumer protection claims, and granting plaintiff's motion for partial summary judgment declaring the foreclosure sale to be void and setting it aside.

I chose not to enter specific findings or conclusions of law, since they are not required. And any appellate court will undoubtedly sort through the record and discuss those salient facts which may be pertinent to its decision on review.

However, I did want to share my reasoning for the decisions I entered.

Obviously, this is yet another convoluted case in the minefield of mortgage foreclosure litigation involving MERS. Most of the facts surrounding the procedural history are not in dispute.

While I recognize that the law is well-settled that a borrower like Mr. Bradburn generally does not have recourse when he's denied a refinance loan, I was troubled by the allegation that he was told that he should stop making his mortgage payments so that he could qualify for refinancing with Bank of America (BANA) and that once he fell behind he not only wasn't approved for that refinance but then found himself unable to bring his mortgage loan current or resolve what he believed was a dispute about how much he was behind. Of course, that's not enough to prevail on a motion for summary judgment. And for purposes of these motions, it was accepted that he was in default on his loan. And there's also no question that the loan documents allowed for the nonjudicial foreclosure sale of his home in the event of default.

App B

I was not concerned with the fact that the sale was ultimately postponed more than 120 days by the trustee, since a new notice of foreclosure sale was had been issued. I could find nothing in the Deed of Trust Act (DTA) or case law which required the lender or trustee to start over by filing another notice of default. The Act forbids a sale less than 120 days after that notice of default. This sale was well beyond that. I also felt that there was ample proof that the required notices were issued and posted, notwithstanding Mr. Bradburn's claims to the contrary. That's not to say that the notices were correct or proper under the DTA.

What seems to have been intended as a fairly simple procedure to avoid the necessity of a judicial foreclosure, namely the DTA, might be made more complicated and confounding than in the case at bar but it is difficult for me to see how. The DTA seems to contemplate a borrower and a lender with an independent trustee having the power to foreclose on the deed of trust in the event of default by the borrower. The lender would normally hold the underlying note and be the beneficiary of it. Here matters have been complicated by the sale of the underlying note from HomeStar Lending to Countrywide, which was later acquired by BANA. Fidelity Title was identified as the trustee but then MERS was characterized as the beneficiary "as the nominee" of the lender and their assigns. At summary judgment it was claimed that the note was "owned" by Fannie Mae although it was "held" by BANA, which was then described as the "servicer" of the note at the behest of Fannie Mae.

There was no evidence that MERS was ever the owner or holder of the note. Hence, under the *Bain* decision, MERS could not have been the beneficiary. *Bain* left open the issue of whether MERS could act as an agent of the lender or trustee, and in support of its motion for summary judgment defendants make that assertion here. More troubling is the role of ReconTrust. It was ReconTrust which issued the notice of default to the borrower. ReconTrust was not the trustee when that notice was issued. It's undisputed that ReconTrust was, at all times, a wholly owned subsidiary of BANA. There's no reason, or at least none that I could see, that would preclude ReconTrust from issuing a notice of default as an agent of BANA. But thereafter MERS named ReconTrust as the trustee. Or perhaps ReconTrust named itself as the trustee, since the signatory "G. Hernandez" was not an employee of MERS but rather was employed by ReconTrust. While the DTA appears to have been amended and arguably might permit a subsidiary to act as a trustee, the statutory requirement remains that the trustee be independent and not beholden to the lender or borrower. Acting as an agent of BANA and being a wholly owned subsidiary of BANA, it seems specious to attempt to argue that ReconTrust was an *independent* trustee.

And under what authority did MERS have the right to name that trustee? As the agent of BANA, having been named as the "nominee" by BANA's predecessors in interest? The evidence either compels or strongly points to the conclusion that MERS was a separately owned corporation and acted independently; it was not owned by BANA, and I do not see where it owed any fiduciary obligation or fealty to BANA (or Fannie Mae for that matter). While there is evidence to support the claim that the defendants were following the servicing guidelines promulgated by Fannie Mae, that's not tantamount to a claim that they were acting at the direction and control of the owner of this note.

Then there are the contradictory statements in the notices that were filed. BANA filed a declaration with ReconTrust which identified Fannie Mae as the owner and beneficiary of the deed of trust, yet ReconTrust later identified BANA as the beneficiary. Was that because of MERS purported assignment of the note in favor of BANA? What rights did MERS have to assign over to BANA the rights which presumably vested with Fannie Mae at that time? And if BANA somehow became the beneficiary, under what authority did ReconTrust, acting as the trustee, accept a credit bid from Fannie Mae at the foreclosure sale? Was that predicated on BANA's assignment of the deed of trust some three weeks after the trustee's sale? A primary reason for the requirement that the trustee have evidence to correctly identify the beneficiary of the deed of trust is so the borrower will know who he needs to contact to try to reinstate or resolve disputes about his loan, something which appears underscored by Mr. Bradburn's stated belief that he had been current with his payments until advised to fall in arrears and his dispute about how far behind his loan had fallen.

The case law has consistently held that the DTA must be strictly followed. Absent a valid waiver of the protections under the DTA, the failure to materially comply with that statute renders a foreclosure sale pursuant to it invalid. While Mr. Bradburn did not avail himself of the ability to seek to enjoin the sale, I felt the failure to strictly follow the requirements of the DTA required setting aside this foreclosure sale, particularly the appointment of a trustee that was not independent. I could not find that Fannie Mae as the claimed owner of the underlying note was a bona fide purchaser for value, even if it was not complicit in the violations of the DTA.

Having found the foreclosure sale to be fatally flawed by defendants' failure to strictly comply with the DTA, it follows *a priori* that plaintiff was "injured". I believe plaintiff met his burden to show that defendants' actions constituted an unfair or deceptive practice, that it occurred in a trade or commerce, and that those practices impacted the public interest. Insofar as plaintiff's home was wrongfully sold, he was "injured". The measure of his damages will need to be proven at trial. If he was in default in his loan and would have faced the loss of his home, he may yet face the same ultimate result. A jury may conclude that his damages are *de* minimus. And if he claims significant monetary damages, it will be up to plaintiff to prove causation, namely that those damages resulted from the wrongful conduct of defendants.

Very truly yours,

George N. Bowden

WOOD RIVER CAPITAL RESOURCES, LLC, et al., Plaintiffs and Appellants, v. STEWART TITLE GUARANTY COMPANY, Defendant and Respondent.

A131736

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE

2013 Cal. App. Unpub. LEXIS 1346

February 21, 2013, Opinion Filed

NOTICE: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. *CALIFORNIA RULES OF COURT, RULE 8.1115(a)*, PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY *RULE 8.1115(b)*. THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF *RULE 8.1115*.

PRIOR HISTORY: [*1]
J.C.C.P. No. 4579, Shasta County Super. Ct. No. 09-168055.

JUDGES: McGuiness, P.J.; Pollak, J., Siggins, J. concurred.

OPINION BY: McGuiness, P.J.

OPINION

This appeal arises out of one of a series of related complaints by investors who purchased ownership interests in senior housing facilities. The appellants in this appeal are investors who purchased ownership interests in Wood River Village, a senior housing facility located in Pennsylvania. Appellants claim they were defrauded and sued various parties associated with the transaction, including defendant and respondent Stewart Title Guaranty Company (Stewart). In its role as title insurer, Stewart allegedly performed certain escrow functions in the individual transactions in which appellants purchased their interests. Although Stewart was not a party to the escrow instructions and had no contact with appellants, appellants nonetheless sued Stewart for breach of fiduciary duty, negligence, fraud, and fraudulent nondisclosure. The trial court entered a judgment of dismissal after granting Stewart's demurrer without leave to amend. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Because this appeal is from an order sustaining a demurrer, we take the facts [*2] from the operative second amended complaint (hereafter, complaint), the allegations of which are deemed true for the limited purpose of determining whether plaintiffs have stated a viable cause of action. (See *Stevenson v. Superior Court (1997) 16 Cal.4th 880, 885.*) We also consider matters that are properly the subject of judicial notice. (*Serrano v. Priest (1971) 5 Cal.3d 584, 591.*)

As set forth in the complaint, James Koenig founded Asset & Real Estate Investment Company (AREI), which promoted senior housing and assisted living facilities to potential investors as secure and profitable investment opportunities. AREI was in operation for about 10 years starting in 1997. Before founding AREI, Koenig had been sentenced to serve two years in prison after suffering a conviction for fraud in a gold-selling scam.

Working through AREI and affiliated companies, Koenig would purchase an assisted living facility and market ownership shares in the property as an investment opportunity. As revealed by an investigation pursued by California's Attorney General, AREI was a criminal operation that purchased and operated properties through Ponzi schemes and other types of investor fraud. In June 2008, [*3] the California Attorney General raided AREI's offices and shut them down. After identifying more than 1,000 victims of AREI with losses totaling

App. C

$200 million, the California Attorney General filed 79 criminal charges against Koenig and others in May 2009.

Wood River Village (Wood River), a senior housing facility located in Pennsylvania, was one of the properties AREI marketed to potential investors. The plaintiffs in the action below (appellants herein) were investors in Wood River. AREI circulated a Private Placement Memorandum (PPM) in November 2004 in which it sought investors to purchase $8.235 million in tenant-in-common (TIC) interests to purchase the Wood River property. The balance of the purchase price was to be financed by a $15.7 million loan from defendant CapitalSource Finance, LLC (CapSource). In January 2005, AREI circulated a First Supplement to the PPM in which it represented that Wood River would be purchased with a maximum of $12,250,00 in equity and a loan of $12 million.[1] AREI also circulated an Addendum to the PPM soliciting a maximum of $12,250,000 in TIC interests and membership interests in Wood River Capital Resources, LLC, a limited liability company that [*4] was formed to allow investors to purchase interests in Wood River.

1 Unless otherwise indicated, the PPM, the First Supplement, and the Addendum are collectively referred to in this opinion as the PPM.

Appellants relied on the PPM to purchase TIC interests in Wood River or membership interests in Wood River Capital Resources, LLC. According to the complaint, the PPM failed to disclose a number of material facts, including the fact that AREI's founder, James Koenig, was a convicted felon.

Appellants entered into a term loan agreement with CapSource in February 2005. At around the same time, defendant Meecorp Capital Markets, LLC (Meecorp) provided an additional $3.2 million loan to fund the purchase of Wood River and took a preferred equity position in Wood River Capital Resources, LLC. Appellants allege the Meecorp loan was not disclosed to them. There are no allegations the Meecorp loan was secured by Wood River or that it was recorded.

From March through October 2005, AREI and CapSource entered into a series of unauthorized joinder agreements on behalf of subsequent investors in order to make them borrowers under the term loan agreement. The execution of the joinder agreements resulted [*5] in the oversubscription of the offering by more than $3.2 million and the dilution of appellants' ownership interests in Wood River.

According to the complaint, Koenig and AREI failed to service the CapSource loan or maintain the Wood River property. Instead, Koenig embezzled the loan proceeds, investor capital, and revenue from Wood River for his own personal use or to fund other projects. As a result, the CapSource loan went into default and Wood River fell into disrepair.

The PPM contemplated that investors would acquire their interests in Wood River by means of a series of agreements entitled, "Purchase Agreement and Escrow Instructions" (hereafter, escrow instructions), by and among each appellant, as buyer, Wood River Capital Resources, LLC, as seller, and Placer Title Company (Placer), as escrow agent. Attached to the complaint is a standard set of form escrow instructions that omits the name of the buyer, the purchase price, and the percentage interest in Wood River that the buyer was purchasing. The form escrow instructions designate Placer as escrow agent *and* title company, although seller Wood River Capital Resources, LLC, in its sole discretion, could select any other qualified [*6] title insurance company. Under the terms of the escrow instructions, Placer was responsible for performing the title search, preparing and issuing one or more preliminary reports, and issuing title insurance policies. The escrow instructions also required that Placer, as escrow agent, deliver at the close of escrow copies of unrecorded documents received by it to the person or payee acquiring rights under the document.

Notably, the escrow instructions do not mention Stewart. Appellants have not identified any other escrow instructions applicable to the Wood River transaction. The escrow instructions did not expressly contemplate that the named escrow agent, Placer, would prepare deeds for the transactions. Instead, the escrow instructions anticipated that the seller--plaintiff and appellant Wood River Capital Resources, LLC--would "execute, acknowledge (where appropriate) and deposit into Escrow . . . a grant deed . . . in the appropriate form conveying the Interest to Buyer and . . . any other document required by Escrow Agent." Further, nothing in the escrow instructions explicitly required Placer (or Stewart) to confirm that the deeds conveyed the correct percentage interests in Wood [*7] River, to monitor the transaction for compliance with the PPM, or to alert appellants to the possibility of fraud.

Appellants filed suit against Koenig, AREI, CapSource, Meecorp, and numerous other individuals and entities associated with the Wood River transaction, including both Placer and Stewart. Appellants allege that defendants oversold the investment in Wood River and purchased the property with not one, but two loans, including a disclosed $12 million loan from CapSource and an undisclosed $3.2 million loan from Meecorp. Appellants further allege that undisclosed fees were charged at closing without their knowledge and at their expense.

Appellants assert four causes of action against Stewart, including the sixth cause of action for fraud (conspiracy), the tenth cause of action for fraudulent nondisclosure, the eleventh cause of action for breach of fiduciary duty, and the eighteenth cause of action for negligence. Reduced to their essence, the allegations against Stewart are as follows: (1) Stewart assumed fiduciary duties to appellants as a "joint escrow" or "co-escrow" with Placer; and (2) Stewart breached those fiduciary duties by (a) failing to timely deliver copies of one [*8] or more preliminary reports and a title policy; and (b) failing to disclose material information to appellants, such as the Meecorp loan, the additional closing fees, Meecorp's preferred equity position in the Wood River investment, Koenig's status as a convicted felon, that Wood River was oversold, that appellants' ownership interests had been diluted, and that material changes had been made to the loan documents and loan terms. The allegations against Stewart hinge upon appellants' characterization of Stewart as a "joint escrow holder" and fiduciary.

The complaint seeks to cast Stewart as an escrow holder in two ways. First, appellants suggest that Stewart assumed fiduciary duties pursuant to the escrow instructions, alleging that Stewart, "in addition to insuring the title of the Wood River Property, acted through its office in Pennsylvania as a joint escrow company with Placer Title Company pursuant to the Purchase Agreement and Escrow Instructions governing the Wood River purchase." Bearing in mind that the escrow instructions do not mention Stewart, appellants also allege the escrow instructions "required co-escrow companies Placer Title Company and Stewart Title Guaranty Company [*9] to provide the preliminary report and title insurance policy to the Investors."

Appellants also allege that Stewart assumed the role of "co-escrow" by performing certain escrow functions. According to the complaint: "On information and belief, Stewart Title was responsible for preparing the Wood River deeds. Stewart Title also recorded the mortgage and deeds and used escrowed funds to pay property and transfer taxes in connection with the transaction, and processed documents tendered by the selling party in Pennsylvania. After recording, the recorder returned the deeds to Stewart Title, who then forwarded them to AREI; Stewart Title was identified as the 'customer' for purposes of the recording." Thus, in essence, appellants contend Stewart became an escrow holder by virtue of processing documents, preparing and recording deeds, and paying property and transfer taxes from its office in Pennsylvania.

Stewart demurred to the complaint on the following grounds, among others: (1) appellants failed to allege the existence of an escrow relationship with Stewart--and the escrow instructions affirmatively disproved the existence of such a relationship; (2) appellants failed to allege Stewart [*10] breached the escrow instructions or any fiduciary duty that might have been owed to appellants; (3) appellants failed to allege Stewart owed them any duty of disclosure, even assuming Stewart was an escrow holder; and (4) appellants failed to allege Stewart knew or should have known any of the information it allegedly had a duty to disclose. Stewart sought judicial notice of one set of escrow instructions associated with the purchase of an interest in Wood River by appellant AREI Wood River 2, LLC. The completed set of escrow instructions proffered by Stewart was consistent with the form escrow instructions attached to the complaint, except that the buyer was identified and the purchase price and percentage ownership interest was indicated in the instructions.

In their opposition to the demurrer, appellants reiterated the allegation from their complaint that Stewart prepared the Wood River deeds, although they added a new wrinkle to their claim. Specifically, in addition to claiming Stewart assumed a fiduciary duty to appellants by undertaking to prepare the deeds for the Wood River transaction, appellants argued--for the first time--that Stewart breached that duty by understating appellants' [*11] ownership interests in the deeds it prepared. As support for their claim, appellants pointed out that a First Supplement to the PPM contemplated that investors would pay $242,500 for each undivided one percent (1%) interest in the Wood River property.[2] Appellants sought judicial notice of 20 recorded deeds reflecting that 20 of 29 investors in the Wood River property were deeded a lower percentage ownership interest than that contemplated by the First Supplement to the PPM. For example, in one case, an investor-appellant had an investment (equity plus debt) in the Wood River property totaling $618,066.35, which should have represented a 2.5487 percent interest in the property based upon a calculation of a one percent ownership interest for each $242,500 invested. Instead, the deed allegedly prepared by Stewart reflected that the investor-appellant's investment amounted to a 2.4096 percent interest in the property, or 0.1391 percent less than the interest the investor should have received according to the First Supplement to the PPM. Of the 20 investors in Wood River who were allegedly deeded a lower percentage ownership interest than contemplated by the First Supplement to the PPM, [*12] the deficiencies ranged from 0.0013 percent to 0.3519 percent, according to appellants. Notably, appellants did not seek judicial notice of the escrow instructions associated with any of the 20 transactions in which the recorded deeds allegedly understated the individual appellant's ownership interest. The only escrow instructions before the court were the form instructions attached to the complaint and a set of instructions proffered by Stewart relating to a transaction that was not among the 20 in which the ownership interest was allegedly understated on the deed.

2 The original PPM as well as the form escrow instructions attached to the complaint contemplated a one percent ownership interest for each $239,350 invested.

The trial court sustained Stewart's demurrer without leave to amend and took judicial notice of the set of escrow instructions and the recorded deeds proffered by the parties.[3] The court also considered the new allegations set forth in appellants' opposition, including the allegation that the deeds prepared by Stewart reflected ownership percentages lower than those contemplated by the First Supplement to the PPM.

3 The court also took judicial notice of papers filed in [*13] a similar, companion action involving another investment property marketed by AREI in which a different trial court judge had sustained Stewart's demurrer without leave to amend. The ruling in the companion action is the subject of an appeal in A131734, *AREI Colonnade 1, LLC v. Stewart Title Guaranty Co.*

In its order sustaining the demurrer, the trial court concluded that Stewart did not owe any fiduciary duties to appellants because it was not a party to the escrow instructions and was merely acting as a sub-escrow on behalf of the escrow agent, Placer. Even assuming Stewart had a fiduciary duty to appellants, the trial court concluded appellants had failed to allege facts establishing that Stewart had breached its duty, which is generally limited to strict compliance with the escrow instructions. Thus, the court reasoned that the complaint failed to state facts constituting a cause of action for breach of fiduciary duty. The court likewise concluded the complaint failed to state facts supporting causes of action for conspiracy, fraudulent nondisclosure, and negligence. Because it did not appear reasonably probable appellants could amend their complaint to state valid causes of action, [*14] the court sustained the demurrers without leave to amend. After the trial court entered a judgment of dismissal as to Stewart, appellants filed a timely appeal.

DISCUSSION

1.*Standard of Review*

On review of an order sustaining a demurrer without leave to amend, we exercise independent judgment in assessing whether the complaint states a cause of action as a matter of law. (*Walgreen Co. v. City and County of San Francisco (2010) 185 Cal.App.4th 424, 433.*) ""'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.]'" (*Zelig v. County of Los Angeles (2002) 27 Cal.4th 1112, 1126.*) "We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated a cause of action under any possible legal theory. [Citations.] We are not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale. [Citation.]" (*Mendoza v. Town of Ross (2005) 128 Cal.App.4th 625, 631.*) When a demurrer is sustained without leave to amend, we reverse if there is a reasonable [*15] possibility an amendment could cure the defect. (*City of Dinuba v. County of Tulare (2007) 41 Cal.4th 859, 865.*)

2.*Breach of Fiduciary Duty*

Appellants assert a cause of action against Stewart for breach of fiduciary duty, alleging that Stewart assumed--and then breached--fiduciary duties to appellants as either a "co-escrow" or "joint escrow" along with Placer, the escrow agent named in the escrow instructions. "The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) the breach of that duty; and (3) damage proximately caused by that breach. [Citation.]" (*Mosier v. Southern California Physicians Ins. Exchange (1998) 63 Cal.App.4th 1022, 1044.*) The absence of any element is fatal to the cause of action. (*LaMonte v. Sanwa Bank California (1996) 45 Cal.App.4th 509, 517.*)

Appellants concede that Stewart was not a party to the escrow instructions. Appellants also concede that they did not have any direct contact with Stewart and did not submit any oral or written escrow instructions to Stewart. Nevertheless, appellants claim it is enough for purposes of the breach of fiduciary duty cause of action to allege that Placer retained Stewart to [*16] perform tasks Placer had contracted to perform in the escrow instructions, such as handling documents, payments, and the preparation of the deeds. Appellants argue that Stewart was a "co-escrow in the transaction" by virtue of performing tasks set forth in the escrow instructions.

The trial court concluded that the facts as pleaded allowed an inference that Stewart was acting only as a "sub-escrow" on behalf of Placer, in that Stewart was acting only as directed and instructed by Placer. The court then observed that appellants had failed to present any authority holding that a sub-escrow, as opposed to an escrow agent or escrow holder, owes a fiduciary duty to parties to the escrow instructions. Even assuming Stewart owed a fiduciary duty to appellants, the trial court concluded that appellants failed to allege facts establishing a breach of that duty.

a.*Existence of Fiduciary Duty*

Our first task is to assess whether the facts as pleaded establish that Stewart owed a fiduciary duty to appellants. It is not helpful to label Stewart a "joint escrow" or a "co-escrow," because those labels are essentially an attempt to plead in a conclusory fashion that Stewart owed a fiduciary duty to appellants [*17] as an escrow holder. The existence of a fiduciary duty is a question of law. (*David Welch Co. v. Erskine & Tulley (1988) 203 Cal.App.3d 884, 890.*) "The allegation of a fiduciary relationship must be supported by either a contract, or a relationship that imposes it as a matter of law. [Citation.]" (*Berryman v. Merit Property Management, Inc. (2007) 152 Cal.App.4th 1544, 1558.*) A mere allegation that a party assumed fiduciary duties to another party is a legal conclusion, not a well-pleaded fact. (*Ibid.*) Thus, we will disregard the labels applied by the parties, such as co-escrow, joint escrow, and sub-escrow, and instead focus on whether the facts as pleaded give rise to a fiduciary relationship as a matter of law.

"'An escrow involves the deposit of documents and/or money with a third party to be delivered on the occurrence of some condition.' [Citations.] An escrow holder is an agent and fiduciary of the parties to the escrow. [Citations.] The agency created by the escrow is limited--limited to the obligation of the escrow holder to carry out the instructions of each of the parties to the escrow. [Citations.]" (*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co. (2002) 27 Cal.4th 705, 711* [*18] (*Summit*).)

Under California law, an agent may delegate its powers to a subagent when it is commonplace to designate such powers. (See *Civ. Code, ß 2349, subd. (3).*) To the extent an agent's powers are lawfully delegated, a subagent "represents the principal in like manner with the original agent." (*Civ. Code, ß 2351.*) "Because 'the subagent owes the same duties to the principal as does the agent' [citation], it follows that the relationship between subagent and principal is a fiduciary one." (*Mendoza v. Continental Sales Co. (2006) 140 Cal.App.4th 1395, 1405.*)

Here, the allegations in the complaint support the conclusion that Placer was an escrow holder with fiduciary duties to the parties to the escrow, including appellants. The complaint further establishes that Stewart performed escrow functions otherwise required of the escrow holder, Placer, thus supporting an inference that Stewart was acting as Placer's subagent. Moreover, insofar as Placer had a limited agency to carry out the escrow instructions, Stewart as a subagent of Placer likewise had a limited obligation to the parties to carry out any escrow instructions it was delegated to perform by Placer. Thus, the allegations in [*19] the complaint arguably support the legal conclusion that Stewart owed a fiduciary duty to appellants to comply with the escrow instructions it was delegated to perform, assuming Stewart was an authorized subagent.

Stewart contends it is improper to rely on general agency principles--including rules applicable to subagents--because escrow holders are dual agents with duties to parties on both sides of a transaction. We agree with the proposition that an escrow does not create a *general* agency, because the interests of the parties to an escrow are conflicting. (See *Blackburn v. McCoy (1934) 1 Cal.App.2d 648, 654-655.*) However, we do not agree that subagency principles are always inapplicable in the escrow context. As noted above, an escrow creates a *limited* agency as to each party to the escrow in which the escrow holder's agency is restricted to the obligation to carry out the escrow instructions. (*Ibid.; Summit, supra, 27 Cal.4th at p. 711.*) Stewart has cited no authority suggesting that a limited agent, such as an escrow holder, cannot lawfully delegate powers to a subagent. The scope of a subagency created by an escrow holder is necessarily limited to carrying out the escrow instructions [*20] the escrow holder has lawfully delegated to the subagent.

Stewart also argues that a subagency theory fails because appellants did not allege facts demonstrating that Stewart was an *authorized* subagent. This contention has some merit. An agent cannot lawfully delegate its powers to a subagent unless one or more of the conditions in *Civil Code section 2349* is satisfied.[4] An unauthorized subagent owes no duties to the principal. (See *Civ. Code, ß 2022* ["[a] mere agent of an agent is not responsible as such to the principal of the latter"].) Here, in their opening brief on appeal, appellants contend the subagency was authorized because it is commonplace to designate certain escrow functions to a subagent. (See *Civ. Code, ß 2349, subd. (3).*) They contend it "[i]s certainly reasonable and commonplace for Placer, located in California, to employ a title company in Pennsylvania, such as Stewart, to assist with an escrow on property in Pennsylvania." This allegation, however, does not appear in the complaint. According to Stewart, absent an allegation that it is commonplace for escrow holders to delegate to a subagent the types of escrow functions it performed, Stewart was an unauthorized subagent [*21] that owed no duties to appellants as a matter of law.

4 *Civil Code section 2349* provides as follows: "An agent, unless specifically forbidden by his principal to do so, can delegate his powers to another person in any of the following cases, and in no others: [∂] 1. When the act to be done is purely mechanical; [∂] 2. When it is such as the agent cannot himself, and the sub-agent can lawfully perform; [∂] 3. When it is the usage of the place

to delegate such powers; or [∂] 4. When such delegation is specially authorized by the principal."

As a practical matter, appellants could quickly cure the deficiency in their complaint by adding a simple allegation on information and belief that it is commonplace for escrow holders to delegate certain escrow functions to subagents. Further, Stewart effectively concedes the point in its respondent's brief when it states, "escrow holders routinely delegate rudimentary escrow functions, such as recording documents and paying out funds, to title insurers." Although appellants' complaint is technically deficient because it does not plead facts establishing that Stewart's subagency is authorized, we will assume that appellants could easily overcome this [*22] pleading deficiency with a simple amendment. Accordingly, we will proceed to consider the remaining arguments concerning the existence of a fiduciary duty.

Stewart contends that the Supreme Court's decision in *Summit, supra, 27 Cal.4th 705*, is controlling and establishes that it owed no duty to appellants as a matter of law. We disagree. In *Summit,* the Supreme Court held that an escrow holder does not owe a fiduciary duty to a nonparty to the escrow, even when the escrow holder is aware of the nonparty's interest in the transaction. (*Summit, supra, 27 Cal.4th at pp. 712-715.*) According to Stewart, because appellants were not parties to any "subescrow" between Placer and Stewart, it did not owe any fiduciary duty to appellants.

Stewart's argument is unpersuasive because it rests on the unsupported factual assumption that Placer established *separate* escrows with Stewart--which it refers to as "sub-escrows"--"for the purpose of preparing and recording deeds, using escrowed funds to pay property and transfer taxes and processing documents tendered by the Seller." However, the complaint contains no such factual allegation. Instead, appellants allege that Stewart insured title and performed [*23] certain escrow functions. The precise nature of the relationship between Placer and Stewart is unclear. We do not know whether Placer and Stewart had a written agreement governing their relationship, whether they set up a separate escrow with respect to each set of investors, or whether Stewart simply agreed to perform some of the obligations contained in the escrow instructions to which appellants were parties. Although the facts as pleaded may support an inference that Placer set up separate escrows with Stewart, an equally plausible inference is that Stewart acted as Placer's subagent in carrying out the escrow instructions Placer was obligated to perform. Therefore, because we must indulge all inferences in favor of appellants (*Perez v. Golden Empire Transit Dist. (2012) 209 Cal.App.4th 1228, 1238)*, we cannot assume Placer set up separate escrows with Stewart or that appellants were not parties to any separate escrow involving Placer and Stewart. Thus, *Summit* is inapposite.

Stewart also relies on *Markowitz v. Fidelity National Title Co. (2006) 142 Cal.App.4th 508* (*Markowitz*), for the proposition that it did not assume fiduciary duties to appellants by virtue of preparing deeds. [*24] In *Markowitz,* a bank agreed to extend a line of credit to a homeowner whose home was encumbered by a deed of trust securing a promissory note. To complete the transaction for the line of credit, the bank required that the promissory note be repaid in full and that the existing deed of trust be reconveyed. The bank retained Fidelity National Title Company (Fidelity) "to provide a policy of title insurance" and to "act as a sub-escrow to hold and exchange money and documents." (*Id. at pp. 512-513.*) Fidelity paid the promissory note in full but failed to record the reconveyance of the existing deed of trust. Nevertheless, the new line of credit was made available to the homeowner and a new deed of trust was recorded in the bank's favor. Even though the promissory note had been fully satisfied, the holders of the promissory note subsequently caused a notice of default to be recorded and sought to foreclose on the deed of trust that Fidelity had failed to reconvey. (*Id. at pp. 514-515.*) The homeowner sued Fidelity, alleging that he had sustained damages by having to defend multiple wrongful foreclosure actions as a result of Fidelity's failure to properly reconvey the deed of trust. The [*25] homeowner alleged that a fiduciary relationship was formed between himself and Fidelity because Fidelity had agreed to assume certain duties as sub-escrow. (*Id. at p. 515.*)

The appellate court in *Markowitz* affirmed a nonsuit in favor of Fidelity and against the homeowner. (*Markowitz, supra, 142 Cal.App.4th at p. 512.*) Although the court concluded that an escrow existed, with Fidelity functioning as a sub-escrow holder, the court also concluded that the homeowner was not a party to the separate escrow instructions between the bank and Fidelity. The homeowner did not submit any instructions to Fidelity or have any contact with Fidelity. (*Id. at p. 526.*) The objective of the escrow instructions to which the bank and Fidelity were parties was to complete the refinance transaction, with the intent to serve the bank's interest and secure a policy of title insurance to protect the bank from the existence of defects in title. (*Id. at p. 527.*) Although the homeowner would have benefitted from the performance of the instructions, he was no more than "an incidental beneficiary of the [escrow] instruction[s]" between the bank and Fidelity. Thus, "[t]here were no instructions submitted by [the homeowner], [*26] or to which he was a signatory, with which Fidelity was obligated to comply . . . ." (*Id. at p. 528.*) Accordingly, Fidelity owed no duty to the homeowner.

The facts of *Markowitz* bear some obvious similarities to the facts alleged here. Among other things, like the homeowner in *Markowitz* who had no contact with the title insurer that acted as a sub-escrow, appellants had no contact with Stewart and did not submit any instructions directly to Stewart. Nevertheless, *Markowitz* is distinguishable. The homeowner in *Markowitz* was not a party to the escrow instructions. Rather, the bank retained Fidelity to act as its escrow holder for purposes of completing the refinance transaction and issuing a policy of title insurance with the bank as beneficiary. The *Markowitz* court held that the duty Fidelity allegedly breached was owed to the bank, not the homeowner. (*Markowitz, supra, 142 Cal.App.4th at p. 527.*) Here, by contrast, appellants were parties to the escrow instructions, which Stewart is alleged to have carried out on Placer's behalf. To the extent Stewart may have failed to comply with escrow instructions delegated to it by Placer, any duty allegedly breached was owed to the parties to [*27] the escrow instructions, including appellants. Further, as mentioned above, there is no allegation that Placer created a series of separate sub-escrows for different investor groups, similar to the separate sub-escrow created by the bank and Fidelity in *Markowitz.*

Appellants and Stewart each cite and attempt to distinguish *Siegel v. Fidelity Nat. Title Ins. Co. (1996) 46 Cal.App.4th 1181* (*Siegel*). There, the court reversed a judgment in favor of property owners who had sued a title insurance company for providing a preliminary title report that failed to disclose a lien recorded against the property. (*Id. at pp. 1185, 1196.*) The court held the fact the title insurance company agreed with the escrow company to serve as sub-escrow and undertake rudimentary escrow functions, such as paying out funds and recording documents, did not transform it into a "fiduciary of the purchasers for purposes of searching the records or transmitting information regarding title." (*Id. at p. 1194.*) According to the court, because "the agency and fiduciary responsibilities owed by [the escrow holder] to [the property owners] were limited by the terms of the escrow instructions, the responsibilities of [the [*28] title insurance company] acting as sub-escrow were even more limited. [Citation.]" (*Ibid.*) Appellants claim that *Siegel* is distinguishable because in this case Stewart did more than just perform rudimentary escrow functions--they take the position that preparing deeds is more than a rudimentary escrow function. Stewart disputes the significance of *Siegel,* arguing that the case cannot be construed to suggest that anyone who prepares or reviews documents in connection with an escrowed transaction automatically assumes fiduciary duties to the parties to the escrow.

We do not suggest that anyone who prepares or reviews documents associated with an escrowed transaction necessarily has a fiduciary relationship with the parties to the escrow. However, if the person or entity who prepares or reviews documents is an authorized subagent of the escrow holder, who has lawfully delegated the performance of those escrow functions to the subagent, then the subagent owes a limited duty to the parties to the escrow to carry out the escrow functions lawfully delegated to it.[5] (See *Mendoza v. Continental Sales Co., supra, 140 Cal.App.4th at p. 1405.*)

5 Although Stewart acknowledges it is common for title [*29] insurance companies to act as sub-escrows by performing certain escrow functions, it also argues that these sub-escrow arrangements "do not transform the title insurer into an escrow holder with fiduciary duties to the parties to the escrow." The problem with Stewart's argument is that there is no established and fixed legal definition of the term "sub-escrow," which appears to encompass various types of functions and relationships. In *Markowitz,* the court described a sub-escrow arrangement in which there was a separate escrow with separate instructions to which the property owner was not a party. (*Markowitz, supra, 142 Cal.App.4th at pp. 526-527.*) By contrast, in *Siegel,* the court described an arrangement as a sub-escrow in which the title insurance company simply performed certain rudimentary escrow functions at the direction of the escrow holder, without any indication there was a separate escrow or separate set of instructions. (*Siegel, supra, 46 Cal.App.4th at pp. 1193-1194.*) In other words, simply because someone is acting as a "sub-escrow" does not necessarily mean that person owes no duties to the parties to the escrow. Whether the sub-escrow may owe certain limited duties [*30] to the parties to the escrow depends upon the structure of the transaction and the actual relationship among the parties. In *Siegel* and *Markowitz,* unlike here, the court had a full trial record from which to make that factual and legal determination.

This conclusion is consistent with the analysis and outcome in *Siegel.* In *Siegel,* the court did not hold that the title insurance company owed no fiduciary duty to the property owners by virtue of performing certain escrow functions. Rather, it held that any fiduciary responsibilities to the property owners were "even more limited" than those owed by the escrow holder and did not extend to searching records or transmitting information regarding title. (*Siegel, supra, 46 Cal.App.4th at p. 1194.*) Thus, the court seemed to accept that the title insurance company may have had some limited duty to the property owners. However, that limited duty did not extend to searching records for the benefit of the property owners. As the evidence in *Siegel* established, the title insurance company was not given a copy of the written escrow instructions but was instead given oral directions by the escrow holder to hold the loan proceeds, pay them at the escrow [*31] holder's command, and ensure the deeds were recorded. (*Id. at p. 1193.*) The title insurance company properly carried out the instructions it was directed to perform. (*Ibid.*) By doing so it did not become a fiduciary of the property owners for purposes beyond the limited tasks it carried out.

We conclude appellants could, if given the opportunity to add allegations demonstrating that Stewart was an authorized subagent of Placer, allege facts sufficient to establish that Stewart owed at least limited fiduciary responsibilities to appellants as a consequence of performing certain escrow functions as a subagent for Placer.

b.*Breach of Fiduciary Duty*

In assessing whether Stewart breached fiduciary duties owed to appellants, we begin by recognizing the limitations on the duties an escrow holder owes to the parties to the escrow. "'[A]n escrow holder must comply strictly with the instructions of the parties. [Citations.]' [Citation.] On the other hand, an escrow holder 'has no general duty to police the affairs of its depositors'; rather, an escrow holder's obligations are 'limited to faithful compliance with [the depositors'] instructions.' [Citations.] *Absent clear evidence of fraud, an escrow* [*32] *holder's obligations are limited to compliance with the parties' instructions.* [Citations.]" (*Summit, supra, 27 Cal.4th at p. 711*, italics added.)

In their opening brief on appeal, appellants' contention that they adequately alleged a breach of fiduciary duties is focused almost exclusively on the allegation that Stewart failed to properly prepare the deeds. Appellants claim that Stewart "took on the role of preparing deeds" and failed to prepare those deeds consistent with the escrow instructions. More specifically, their contention is that 20 of the 29 investors were deeded a lower percentage ownership interest in the Wood River property than that contemplated by the First Supplement to the PPM, which specified that an investor would receive a one percent interest for each $242,500 invested. The deficiencies ranged from 0.0013 to 0.3519 percent lower than that contemplated by the First Supplement to the PPM.

As Stewart correctly points out, while the complaint contains an allegation that Stewart prepared the deeds, it does not include an allegation that Stewart prepared any of the deeds incorrectly. Although we are empowered to disregard allegations not contained in the complaint (*Melikian v. Truck Ins. Exch. (1955) 133 Cal.App.2d 113, 114)*, [*33] it would be shortsighted to do so under the circumstances presented here. If we were to disregard the allegation, we would simply delay, rather than avoid, a resolution of the issue because appellants could amend their complaint to include the allegation. Further, the allegation has already been presented to and considered by the trial court, albeit not as a properly pleaded allegation in the complaint. Therefore, we will proceed to consider appellants' allegation that Stewart incorrectly prepared the deeds.

The fundamental problem with the allegation is that appellants have failed to identify a single escrow instruction that Stewart is alleged to have breached, bearing in mind that an escrow holder generally "'incurs no liability for failing to do something not required by the terms of the escrow . . . .'" (*Summit, supra, 27 Cal.4th at p. 715.*) The escrow instructions do not require Placer, the escrow holder--much less Stewart, its purported subagent--to prepare the deeds.

Even assuming Stewart had a duty to prepare the deeds in accordance with the escrow instructions, appellants still have failed to explain which instruction Stewart breached. The escrow instructions state the total amount [*34] of the buyer's investment (including both equity and assumed debt) and specify the buyer's "undivided tenant in common interest" as a percentage. The escrow instructions further include in parentheses a formula that purportedly yielded the percentage interest being purchased.[6] However, that formula does not appear on the face of the deed. Rather, the deed reflects the total amount of the buyer's investment and the buyer's undivided interest in the property expressed as a percentage. A party charged with preparing the deeds simply had to record the total value of the investment and the percentage ownership interest as reflected in the escrow instructions. The escrow instructions do not require the party preparing the deed to confirm the calculation or to compare the ownership formula in the escrow instructions to the ownership formula reflected in the First Supplement to the PPM. The escrow instructions also do not require the escrow holder to confirm that the transaction complies with the PPM or any other transactional documents. For that matter, there is no indication in the escrow instructions that the escrow holder was even provided with a copy of the PPM, much less that the escrow [*35] holder was required to ensure compliance with its terms. Therefore, a general allegation that certain deeds understate the proper ownership percentage as contemplated by the First Supplement to the PPM does not establish that Stewart failed to comply with the escrow instructions.

6 In the one set of completed escrow instructions provided to the court (as opposed to the

blank form of escrow instructions attached to the complaint), the relevant section of the instructions provides as follows: "In consideration of the covenants herein contained, Seller hereby agrees to sell, and Buyer hereby agrees to purchase, a **3.2653%** undivided tenant in common interest in the Property (the "Interest") at a purchase price ("Purchase Price") equal to **$791,836**, of which **$400,000** shall be Cash paid into Escrow and **$391,836** shall be assumption of the Loan on a joint and several basis (based on a total Purchase Price of $239,350.00, being $82,350.00 of equity and $157,000 of assumed debt for each one percent (1%) undivided interest in the Property to be acquired) above." Notably, the formula contained in the escrow instructions does not correspond with the percentage interest conveyed. If each $239,350.00 [*36] invested purchased a one percent interest, then an investment of $791,836 would yield an ownership interest of 3.3083 percent, not 3.2653 percent. The actual ownership interest conveyed is based on the formula contained in the First Supplement to the PPM--i.e., a $242,500 investment represents a one percent ownership interest. Under appellants' view, Stewart would apparently have had an obligation to point out this discrepancy to the parties to the escrow (even though any error favored the buyer). In our view, Stewart had no such duty, absent an instruction requiring it to confirm that the buyer's interest was properly calculated under the formula provided in the instructions.

Appellants further allege in their complaint that Stewart breached a fiduciary duty by failing to provide them with a copy of the preliminary report and a title insurance policy. In their opening brief on appeal, appellants do not address the allegation or challenge the trial court's conclusion that any such requirement "was an express obligation of Placer Title, as set forth in the . . . escrow instructions, and Stewart Title Guaranty was not a party to that document." Because appellants did not raise the issue [*37] in their opening brief, they are deemed to have waived it.[7] (*Tiernan v. Trustees of Cal. State University & Colleges (1982) 33 Cal.3d 211, 216, fn. 4*; *Julian v. Hartford Underwriters Ins. Co. (2005) 35 Cal.4th 747, 761, fn. 4.*)

7 In any event, the allegation that Stewart failed to supply a preliminary report and policy of title insurance fails to support a cause of action for breach of fiduciary duty. There is no allegation that a preliminary report or policy of title insurance contained--or should have contained--information that would have alerted appellants to the possibility of a fraud. It is therefore unclear what injury appellants suffered as a consequence of a purported failure to receive a preliminary report and a title insurance policy. Put another way, the complaint does not support a conclusion that appellants would have declined to purchase an interest in Wood River if they had timely received either a preliminary report or a policy of title insurance.

Stewart also supposedly breached a fiduciary duty by failing to disclose (1) the Meecorp loan and associated fees, and (2) the oversubscription of the offering and the corresponding dilution of appellants' ownership interests. [*38] Appellants' theory fails as a matter of law. As a limited agent, "an escrow holder 'has no general duty to police the affairs of its depositors'" (*Summit, supra, 27 Cal.4th at p. 711*) or advise them of the business risks or propriety of their transactions. (Cf. *Hannon v. Western Title Ins. Co. (1989) 211 Cal.App.3d 1122, 1128-1129.*) Likewise, an escrow holder has no duty to "go beyond the escrow instructions and to notify each party to the escrow of any suspicious fact or circumstance which has come to his attention before or during the life of the escrow which could conceivably affect such party even though the fact or circumstance is not related to his specific escrow instructions." (*Lee v. Title Ins. & Trust Co. (1968) 264 Cal.App.2d 160, 162.*) An escrow holder's obligation is limited to compliance with the escrow instructions, "[a]bsent clear evidence of fraud." (*Summit, supra, 27 Cal.4th at p. 711.*)

The escrow instructions required the escrow holder to disclose recorded encumbrances and provide the buyer with copies of all recorded documents described in the preliminary report. Because there is no allegation the Meecorp loan was recorded against, or otherwise secured by, the Wood [*39] River property, Stewart had no duty to disclose it. Further, appellants have failed to explain how the existence of the Meecorp loan and any associated fees constituted clear evidence of fraud triggering a duty to disclose.

As for the contention that Stewart had a duty to disclose the oversubscription of the offering, the claim fails because it presupposes Stewart had a duty to police the overall transaction. Appellants contend the "deeds themselves" constitute evidence of a fraud triggering a duty to disclose under *Summit.* We disagree. The deeds themselves establish nothing without copies of the PPM and its addenda and supplements. Stewart had no duty to evaluate the entire transaction for compliance with the PPM and other transactional documents.

Moreover, Stewart had no duty to report information gleaned from successive escrows. "An escrow holder does not have a duty to disclose to a principal of an escrow any information that the escrow holder acquired in another escrow where that principal was not a party." (3 Miller & Starr, Cal. Real Estate (3d ed. 2012) ß 6:13, p. 6-45, fns. omitted.) Thus, Stewart had no duty to monitor a series of separate escrows to ensure that AREI did not [*40] convey more than 100 percent of the property or exceed the limits on the offering. In *Lee v. Title Ins. & Trust Co., supra, 264 Cal.App.2d at p. 163*, the court explained why an escrow holder generally has no duty to disclose merely suspicious circumstances to the parties to the escrow: "[U]nder [the appellants'] proposed rule, once an escrow holder received information (from whatever source) he would be forced to decide independently whether to believe the information and disclose it or disbelieve it and conceal his knowledge. If he concealed his knowledge he would risk suit. If he discloses and the information is inaccurate, he may be sued by all parties to the escrow for interfering with their contract. Establishing a rule which would create such a dilemma and subject the escrow holder to a high risk of litigation would damage a valuable business procedure." (Fn. omitted.)

The circumstances that supposedly triggered a duty to disclose by Stewart do not constitute clear evidence of fraud. At most, the circumstances may be considered suspicious when considered together. Public policy considerations dictate that Stewart had no fiduciary duty to disclose such merely suspicious circumstances. [*41] (*Lee v. Title Ins. & Trust Co., supra, 264 Cal.App.2d at p. 163.*)

In sum, appellants have failed to allege that Stewart breached a specific escrow instruction or that there was clear evidence of fraud sufficient to impose a duty of disclosure upon Stewart. Accordingly, we conclude appellants' breach of fiduciary duty cause of action fails as a matter of law.

3.*Negligence*

The eighteenth cause of action in the complaint is one for negligence against Stewart and Placer. The allegations supporting the cause of action for negligence are effectively the same as those supporting the breach of fiduciary duty cause of action.[8]

8 In the negligence cause of action, appellants allege that Stewart and Placer had duties "as co-escrow companies handling the Wood River escrow" to use due care in discharging their obligations. Among other things, appellants contend that Placer and Stewart did or failed to do the following: (1) "failed to notify [appellants] of material changes to their loan and to their title"; (2) did not notify appellants of the additional Meecorp loan, the Meecorp preferred equity position in Wood River Capital Resources, or the additional fees and costs associated with the Meecorp loan; [*42] (3) failed to timely provide appellants with either the preliminary report or their title insurance policies; (4) failed to disclose that the Wood River investment was oversold; and (5) failed "to strictly and faithfully perform the [escrow] instructions . . . ."

"A complaint in an action for negligence must allege (1) the defendant's legal duty of care towards the plaintiff, (2) the defendant's breach of that duty, (3) injury to the plaintiff as a proximate result of the breach, and (4) damage to the plaintiff. [Citation.] A complaint which lacks facts to show that a duty of care was owed is fatally defective. [Citation.]" (*Jones v. Grewe (1987) 189 Cal.App.3d 950, 954.*) "[T]he threshold question in an action for negligence is whether the defendant owed the plaintiff a duty to use care [citation], and the '[r]ecognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law' [citation]." (*Summit, supra, 27 Cal.4th at p. 715.*) "Whether a duty of care exists is a question of law for the court. [Citations.]" (*Jones v. Grewe, supra, at p. 954.*)

Appellant's negligence cause [*43] of action is deficient for the same reason the breach of fiduciary duty claim fails to state a cause of action. Even if Stewart owed a duty of due care to appellants by virtue of undertaking escrow functions, that duty was necessarily limited to the duty an escrow holder owes to the parties to the escrow--i.e., compliance with specific escrow instructions, absent clear evidence of fraud. (See *Summit, supra, 27 Cal.4th at p. 711.*) For us to conclude that Stewart owed a greater duty of due care to appellants under a negligence theory than under a breach of fiduciary duty theory would render meaningless the limitations on the scope of an escrow holder's duties to the parties to the escrow. An escrow holder's fiduciary duties to the parties to the escrow are limited, in part, because the escrow holder is a dual agent that represents parties with competing interests on opposite sides of a transaction. (See *Lee v. Title Ins. & Trust Co., supra, 264 Cal.App.2d at pp. 162-163.*) A party cannot circumvent the limitations on the scope of an escrow holder's duty by pleading a negligence theory instead of a breach of fiduciary duty theory, at least in the absence of facts suggesting that the duties [*44] arise from something other than simply a party's status as an escrow holder or the performance of escrow functions.

Appellants' reliance on *Biakanja v. Irving (1958) 49 Cal.2d 647* (*Biakanja*) is unavailing. There, the Supreme Court set forth factors to balance in determining whether to impose liability for negligence on a defendant who is not in privity of contract with the injured party. (*Id. at p.*

650.) The factors include: "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm. [Citations.]" (*Ibid.*)

Biakanja and its progeny cannot be read to expand an escrow holder's duty to the parties to the escrow beyond the requirement of complying with specific escrow instructions, absent clear evidence of fraud. In *Summit,* the Supreme Court was faced with a claim that an escrow holder owed a duty of due care to a third party who was allegedly injured by the escrow holder's negligent conduct. (*Summit, supra, 27 Cal.4th at p. 715.*) [*45] The court concluded that application of the *Biakanja* test did not justify departing "from 'the general rule that an escrow holder incurs no liability for failing to do something not required by the terms of the escrow or for a loss caused by following the escrow instructions.' [Citation.]" (*Ibid.*) Here, likewise, application of the *Biakanja* factors does not expand the limited scope of the duty owed by an escrow holder to the parties to the escrow. Although the escrow transaction was intended to affect appellants, Stewart could not have foreseen that the interests conveyed by the deeds it was alleged to have prepared would be inconsistent with appellants' expectations, barring an investigation and detailed analysis that Stewart was not required to perform. Moreover, the connection between Stewart's conduct and appellants' claimed injury is tenuous, at best. Appellants were harmed by AREI, not Stewart. As the court acknowledged in *Summit,* an escrow holder is not morally blameworthy as a result of following the escrow instructions. (*Summit, supra, 27 Cal.4th at p. 716.*) Finally, the policy of preventing future harm does not support imposing a more expansive tort duty upon escrow holders [*46] with limited fiduciary obligations to the parties to the escrow--doing so would subject "an escrow holder to conflicting obligations, [and] undermine a valuable business procedure . . . ." (*Ibid.*)

Even assuming Stewart owed appellants a limited duty of care, appellants failed to allege Stewart breached that limited duty for the same reason appellants failed to allege a breach of fiduciary duty. As discussed above, there is no allegation that Stewart failed to comply with specific escrow instructions or to inform appellants of facts constituting clear evidence of fraud. Accordingly, as a matter of law, appellants cannot establish a breach of any duty of due care owed to appellants.

4.Fraudulent Nondisclosure/Concealment

In their tenth cause of action, appellants allege a cause of action for fraudulent nondisclosure against Placer and Stewart. They assert that Stewart, as a "co-escrow agent[]," had superior knowledge of material facts neither known by nor readily accessible to appellants. They further contend that Stewart had a duty--by virtue of the fiduciary relationship with appellants--to disclose these material facts, including the existence of the Meecorp loan, Meecorp's preferred equity [*47] ownership position, that excessive fees were being paid to Meecorp, that Koenig was a convicted felon, that the investment in Wood River was oversold, that appellants' ownership interest was diluted by the excess investment, and that material changes had been made to the loan terms and documents.

The elements of fraud are well established: "(1) a misrepresentation, which includes a concealment or nondisclosure; (2) knowledge of the falsity of the misrepresentation, i.e., scienter; (3) intent to induce reliance on the misrepresentation; (4) justifiable reliance; and (5) resulting damages. [Citation.]" (*Cadlo v. Owens-Illinois, Inc. (2004) 125 Cal.App.4th 513, 519.*) When concealment is the basis for the claim, the plaintiff must establish the defendant had a duty to disclose the concealed fact.[9] "'In California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations].'" (*Small v. Fritz Companies, Inc. (2003) 30 Cal.4th 167, 184.*) Because "[c]oncealment is a species of fraud . . . , [it] must be pleaded with specificity." (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC (2008) 162 Cal.App.4th 858, 878.*)

9 It is unclear whether appellants intend to [*48] state a cause of action for fraudulent nondisclosure, fraudulent concealment, or both. Although their cause of action is nominally one for fraudulent nondisclosure, they rely on case law addressing fraudulent concealment. "The elements of a cause of action for damages for fraud based on mere nondisclosure and involving no confidential relationship" are: "(1) Nondisclosure by the defendant of facts materially affecting the value or desirability of the property; (2) Defendant's knowledge of such facts and of their being unknown to or beyond the reach of the plaintiff; (3) Defendant's intention to induce action by the plaintiff; (4) Inducement of the plaintiff to act by reason of the nondisclosure and (5) Resulting damages. [Citations.]" (*Lingsch v. Savage (1963) 213 Cal.App.2d 729, 738.*) A cause of action for fraudulent concealment requires an allegation that the defendant owed a duty to disclose the concealed fact. (*Levine v. Blue Shield of California (2010) 189 Cal.App.4th 1117, 1126-1127.*) Our analysis does not turn on whether appellants intended to state a cause of action for fraudulent nondisclosure or fraudulent concealment. As we

explain, under either theory, they have failed [*49] to state a viable cause of action.

The cause of action for fraudulent nondisclosure or concealment fails at the threshold because there is no viable allegation that Stewart owed a duty to disclose. The purported duty to disclose is based entirely on Stewart's fiduciary relationship with appellants as a consequence of its role as a "co-escrow." As previously discussed, an escrow holder has no duty to disclose suspicious facts absent clear evidence of fraud or a specific escrow instruction requiring such a disclosure. We have already concluded that any limited fiduciary obligations Stewart owed to appellants did not trigger a duty to disclose under the circumstances described in the complaint. That same conclusion applies with equal force to the fraud claims.

Appellants have also failed to plead the scienter requirement with specificity, i.e., that Stewart had actual knowledge of the facts it was supposedly concealing from appellants. Because appellants do not discuss their contention that Stewart had a duty to disclose Koenig's status as a convicted felon, we will consider that claim abandoned. With regard to the remaining allegations that Stewart concealed or failed to disclose material [*50] information--such as the Meecorp loan and fees, the oversubscription of the investment, and the dilution of appellants' ownership interests--the complaint does not contain specific allegations establishing Stewart's knowledge of the concealed facts. Appellants take the position that we can infer the scienter component as a consequence of Stewart's knowledge of the escrow instructions and the overall structure of the Wood River transaction. We are not persuaded.

Even if Stewart did prepare the deeds and comply with certain escrow instructions, there is no allegation that Stewart was given or had access to the PPM and other transactional documents. Therefore, the specific allegations of the complaint do not support an inference that Stewart was aware of the overall structure of the transaction. Further, any alleged errors in the deeds would not automatically give rise to an inference of scienter. The mere preparation of a deed would not alert an escrow holder to the possibility of fraud, particularly in the absence of any opportunity or obligation to evaluate the transaction for compliance with the PPM and other transactional documents.

In essence, appellants' theory presupposes that Stewart [*51] (1) received and reviewed copies of the escrow instructions for each successive escrow, (2) scrutinized each individual deed for compliance with the overall structure of the transaction, (3) examined all the deeds, in the aggregate, to determine whether they suggested a suspicious pattern, (4) identified a suspicious pattern and investigated further, (5) evaluated the entire transaction for compliance with the PPM and other transactional documents, and (6) discovered the Meecorp loan and oversubscription of the offering. Appellants do not even attempt to explain why Stewart would undertake such an extensive investigation, particularly in the absence of any escrow instruction directing Stewart to do so. Further, appellants cannot credibly contend Stewart was faced with clear evidence of fraud when a comprehensive--and entirely nonobligatory--investigation would have been necessary to uncover the alleged fraud.

We conclude appellants have not alleged that Stewart had actual or constructive knowledge of any facts or circumstances constituting clear evidence of fraud and giving rise to a duty to disclose. The cause of action for fraudulent nondisclosure or concealment therefore fails as a [*52] matter of law.

5.*Fraud and Conspiracy*

In the sixth cause of action, appellants allege a cause of action for fraud and conspiracy against AREI, Koenig, Meecorp, and over 30 other defendants, including Stewart. Conspiracy is not a separate cause of action, but instead is a doctrine that imposes liability on persons who participate in a conspiracy with tortfeasors. (See *Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal.4th 503, 510-511.*) Appellants concede they have not adequately pleaded that Stewart was involved in a conspiracy with any other defendant to defraud appellants. Nonetheless, appellants contend the trial court erred in sustaining the demurrer to their fraud and conspiracy cause of action because it failed to consider whether appellants stated a cause of action for fraud independent of the conspiracy allegations.

Appellants' argument lacks merit because the cause of action for fraud and conspiracy as it relates to Stewart adds nothing that is not already contained in the cause of action for fraudulent nondisclosure. The cause of action for fraud and conspiracy devotes a single paragraph to Placer and Stewart's allegedly fraudulent actions. The same paragraph is [*53] repeated nearly verbatim in the cause of action for fraudulent nondisclosure. Thus, the fraud and conspiracy cause of action provides no basis for imposing liability against Stewart beyond that contained in the fraudulent disclosure cause of action. Because we have already concluded that the cause of action for fraudulent nondisclosure fails to state a claim against Stewart, we likewise conclude that the cause of action for fraud and conspiracy against Stewart is insufficient as a matter of law.

6.*Leave to Amend*

TIMOTHY ALGAIER, and DEBRA EDDY, Plaintiffs, v. CMG MORTGAGE INC, a California Corporation doing business in Washington State; BANK OF AMERICA NA, a national bank doing business in Washington State; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC., a corporation doing business in Washington State; PACIFIC NORTHWEST TITLE COMPANY, a Trustee doing business in Washington state; FIRST AMERICAN TITLE COMPANY, successor in interest to Pacific Northwest Title Company, a Trustee, doing business in Washington state; DOES 1-100, inclusively and all persons unknown claiming any legal or equitable right, title, estate, lien or interest in the property described in the complaint adverse to Plaintiffs' title or any cloud on plaintiffs' title thereto, Defendants.

NO: 13-CV-0380-TOR

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

2014 U.S. Dist. LEXIS 4784

January 14, 2014, Decided
January 14, 2014, Filed

COUNSEL: [*1] Timothy Algaier, Plaintiff, Pro se, Otis Orchards, WA.

Debra Eddy, Plaintiff, Pro se, Otis Orchards, WA.

For Bank of America NA, a national bank doing business in Washington state, Mortgage Electronic Registration Systems Inc, a corporation doing business in Washington state, also known as MERS, Defendants: Christopher G Varallo, LEAD ATTORNEY, Witherspoon Kelley, Spokane, WA; Steven Joseph Dixson, LEAD ATTORNEY, Witherspoon, Kelley, Davenport & Toole, PS, Spokane, WA.

For Northwest Trustee Services Inc, a trustee doing business in Washington state, Defendant: Faamomoi P Masaniai, Jr, RCO Legal PS, Bellevue, WA.

JUDGES: THOMAS O. RICE, United States District Judge.

OPINION BY: THOMAS O. RICE

OPINION

ORDER RE DEFENDANTS' MOTION TO DISMISS AND PLAINTIFFS' MOTION TO REMAND

BEFORE THE COURT are Defendants Bank of American, N.A., and Mortgage Electronic Registration Systems, Inc.'s Motion to Dismiss Plaintiffs' Complaint (ECF No. 8); Plaintiffs' Motion to Remand (ECF No. 12); and Plaintiffs' Motion to Expedite Hearing on Motion to Remand (ECF No. 11). This matter was submitted for consideration without oral argument. The Court has reviewed the briefing and the record and files herein, and is fully informed.

BACKGROUND

This [*2] case concerns a threatened nonjudicial foreclosure.

FACTS [1]

1 These facts are taken from Plaintiffs' complaint and accepted as true for the purposes of the motion to dismiss.

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because Plaintiffs have been living rent-free on the property; (7) and that Plaintiffs cannot seek to quiet title because they have not alleged that they are able to pay the amount due and owing on their loan. [*11] ECF No. 8 at 3-4.[2]

2 Plaintiffs did not respond to Defendants' motion, but filed their motion to remand after this motion was filed and requested it to be heard on an expedited basis, while commenting on the motion to dismiss in their motion to remand.

1. Legal Standard

A motion to dismiss for failure to state a claim tests the legal sufficiency of the plaintiff's claims. *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*. To withstand dismissal, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "Naked assertion[s]," "labels and conclusions," or "formulaic recitation[s] of the elements of a cause of action will not do." *Id. at 555, 557*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. While a plaintiff need not establish a probability of success on the merits, he or she must demonstrate "more than a sheer possibility that a defendant has acted unlawfully." *Id.*

A complaint must also contain a "short and plain [*12] statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. This standard "does not require detailed factual allegations, but it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 555*). In assessing whether *Rule 8(a)(2)* has been satisfied, a court must first identify the elements of the plaintiff's claim(s) and then determine whether those elements could be proven on the facts pled. The court should generally draw all reasonable inferences in the plaintiff's favor, *see Sheppard v. David Evans and Assoc., 694 F.3d 1045, 1051 (9th Cir. 2012)*, but it need not accept "naked assertions devoid of further factual enhancement." *Iqbal, 556 U.S. at 678* (internal quotations and citation omitted).

In ruling upon a motion to dismiss, a court must accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the party opposing the motion. *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)*. The court may disregard allegations that are contradicted by matters properly subject to judicial notice or by exhibit. *Id.* [*13] The court may also disregard conclusory allegations and arguments which are not supported by reasonable deductions and inferences. *Id.*

2. Whether MERS Should Be Dismissed as a Defendant

Defendants argue that Defendant MERS should be dismissed from this action because the complaint fails to raise any allegations against or concerning MERS. ECF No. 8 at 8. Defendants offer no legal basis for their demand that MERS be dismissed, however. The Court notes that though MERS is not mentioned specifically in the factual allegations of the complaint, Plaintiffs generally allege that they "contest[] the ownership of the note," whose ownership is "yet a mystery and unknown." ECF No. 1-1 at 2. Defendants are collectively alleged to be "banks, lending institutions, loan originators, trustees and their assignee, transferees and successors in interest of purported instruments of rights including those inherent in a promissory note and deed of trust associated with the subject property." *Id.* Thus, Plaintiffs' inclusion of defendant MERS appears to be part of that collective alleged to have some stake in the promissory note and deed of trust.

3. Whether Plaintiffs' Negligence Claim Should Be Dismissed

Plaintiffs [*14] claim that the foreclosing defendants had a "duty under business custom and usage and common business practices, state banking regulations, and federal requirements...to exercise reasonable care and skill to maintain proper and accurate loan records and to discharge and fulfill the other incidents attendant to the maintenance, accounting and servicing of loan records, including, but not limited [to] accurate crediting of payments made by Plaintiff to avoid errors in accounting causing foreclosure..." ECF No. 1-1 at 6.

"The economic loss rule applies to hold parties to their contract remedies when a loss potentially implicates both tort and contract relief" *Alejandre v. Bull, 159 Wash.2d 674, 681, 153 P.3d 864 (2007)*. "Tort law has traditionally redressed injuries properly classified as physical harm." *Stuart v. Coldwell Banker Commercial Group, Inc., 109 Wash.2d 406, 420, 745 P.2d 1284 (1987)*. It "is concerned with the obligations imposed by law rather than by bargain," and carries out a "safety-insurance policy" that requires that products and property that are sold do not "unreasonably endanger the safety and health of the public." *Id. at 421, 420*. Contract law, on the other hand, carries out an "expectation-bargain [*15] protection policy" which "provides an appropriate set of rules when an individual bargains for a product of particular quality or for a particular use." *Id. at 420-421*. "Where economic losses occur, recovery is confined to contract 'to ensure that the allocation of risk and the determination of future liability is based on what the parties bargained for in the contract....'" *Alejandre, 159 Wash.2d at 682-83.*

> If the economic loss rule applies, the party will be held to contract remedies regardless of how the plaintiff characterizes the claims. Washington law consistently follows these principles. The key inquiry is the nature of the loss and the manner in which it occurs, i.e., are the losses economic losses with economic losses distinguished from personal injury or injury to other property. If the claimed loss is an economic loss, and no exception applies to the economic loss rule, then the parties will be limited to contractual remedies.

Alejandre, 159 Wash.2d at 683-684.

Here, Plaintiffs claim no injury to themselves or their property other than financial injury arising out of the alleged breach of contract. Their allegations of negligence relate to Defendant's alleged duty to maintain [*16] their loan records, which is a creature of their contractual relationship. *See* ECF No. 1-1 at 6 ("Foreclosing Defendants all of which are allegedly acting as Plaintiff's lender and loan servicer, had a duty under business custom and usage and common business practices...to exercise reasonable care and skill to maintain proper and accurate loan records..."). As such, the economic loss rule applies and the parties are held to contract remedies. Accordingly, the Court grants Defendants' motion to dismiss Plaintiffs' negligence claim.

4. Whether Plaintiffs' Fraud Claim Should Be Dismissed

a. Whether Plaintiffs' Fraud Claim is Time Barred

Defendants first argue that Plaintiffs' fraud claim is in part time-barred because the statute of limitations is three years and the alleged misrepresentation of loan terms occurred in 2009. ECF No. 8 at 10.

Under *RCW ß 4.16.080*, actions for fraud must be commenced within three years. However, the cause of action does not accrue "until the discovery by the aggrieved party of the facts constituting the fraud." *RCW ß 4.16.080(4).*

Defendants argue that "to the extent [the fraud claim] is premised on loan origination allegations, the claim is time-barred and cannot [*17] be asserted against BANA or MERS, who were not Plaintiffs' original lender." ECF No. 8 at 10. They cite paragraph 40 of Plaintiffs' complaint. However, paragraph 40 refers specifically to the statements of Anna Lopez in December 2011. ECF No. 1-1 at 7-8. Accordingly, Plaintiffs' fraud claim does not appear to be time-barred, as the three-year time limit on fraud actions would not expire until December 2014.

b. Whether Plaintiffs' Fraud Claim is Sufficiently Pleaded

Defendants next argue that the fraud claim is insufficiently pleaded because the purportedly false statements concern a future act, and because Plaintiffs cannot plead justifiable reliance. ECF No. 8 at 10.

"In order to prove fraud, the plaintiff must establish each of the following elements by clear, cogent, and convincing evidence: (1) A representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom it is made; (7) the latter's reliance on the truth of the representation; (8) his right to rely upon it; (9) [*18] his consequent damage." *Kirkham v. Smith, 106 Wash. App. 177, 183, 23 P.3d 10, 13 (2001).* "In alleging fraud...a party must state with particularity the circumstances constituting fraud...." *Fed. R. Civ. P. 9(b).*

Here, drawing all inferences in the Plaintiffs' favor, the Court finds that the fraud allegations are sufficiently pleaded. Defendants first claim that Plaintiffs' loan modification allegations cannot support a fraud claim because the purported false statements were not concerning an existing fact but rather a future act that Plaintiffs would be guaranteed a modification if they defaulted, ECF No. 8 at 11, the Court notes that the complaint states that Defendant BANA's agent knew the statement to be untrue at the time she made it. Defendants cite *Hoptowit v. Brown, 115 Wash. 661, 667, 198 P. 370 (1921)*, for the proposition that such a statement of future event cannot constitute the basis for a fraud claim. But *Hoptowit* explains:

> **Nor is it the rule that all fraudulent misrepresentations of future events**, or all fraudulent misrepresentations of law, where a person is deceived thereby to his injury, **are nonactionable**. They are generally held so because they are in their nature matters of opinion, [*19] of which the one party is presumably as well informed as the other; but the exceptions are as well defined as the rule itself, and circumstances such as are here shown are generally held to constitute an exception.

Hoptowit, 115 Wash. at 667 (emphasis added). Defendants do not argue that the statement was an opinion; the Court will not dismiss the claim only on the grounds that it pertains to a future act.

Defendants next claim that Plaintiffs cannot claim justifiable reliance on any purported promise insofar as they were obligated to make contractually obligated payments on their loan. ECF No. 8 at 12. But Plaintiffs' claim is that the BANA agent "guaranteed" that they could alter the loan agreement; thus, the very basis of the fraud argument is that their belief in her alleged misrepresentation was justified.

Accordingly, Defendants' motion to dismiss this claim is denied.

5. Whether Plaintiffs' Foreclosure Fairness Act Claim Should Be Dismissed

Defendants argue that Plaintiffs' claim under *RCW 61.24.163* fails because the statute relates to borrowers' entitlement to request mediation prior to foreclosure and does not include a private cause of action for damages. ECF No. 8 at 12.

Defendants [*20] argue that *RCW 61.24.163* provides no private cause of action. However, the Court notes that *RCW 61.24.135* provides that violations of the duty of good faith under *RCW 61.24.163* constitute an unfair or deceptive act for purposes of the Consumer Protection Act. Plaintiffs generally mention Washington's consumer protection acts as protecting against the foreclosure actions they allege. Thus, Plaintiffs' claim does not fail for lack of a private cause of action.

Under the standard of the motion to dismiss, the Court must take the Complaint at face value. Defendants cite a declaration for the fact that Plaintiffs received notice of their right to request mediation in the Notice of Trustee's Sale. ECF no. 8 at 12 (citing Varallo Declaration). However, Plaintiffs claim that the "right to mediation was not properly noticed at any time prior to the issuance of the [Notice of Default] in violation of the Wa. Stats." ECF No. 1-1 at 5. They also allege that the Notice of Default was "issued prematurely and illegally making the portent of foreclosure void as a matter of law." *Id.* (emphasis in original). Thus, this argument fails.

However, Defendants rightly note that *RCW 61.24.163* relates to the [*21] foreclosure mediation process. Plaintiffs have not alleged facts giving rise to a finding that Defendants violated their duty to mediate in good faith as required under the section. For example, they do not argue that Defendants "failed to timely participate in mediation without good cause" or failed to "provide documentation required before mediation or pursuant to the mediator's instructions." *RCW 61.24.163(10)*. Thus, Defendant's request that Plaintiffs' claim under *RCW 61.24.163* be dismissed is granted. However, this does not preclude recovery under the other statutes generally cited as "Wash. State's consumer protection acts specifically protecting against illegal foreclosure actions." ECF No. 1-1 at ∂ 11.

6. Whether Plaintiffs Are Entitled to an Accounting

Defendants allege that Plaintiffs have not demonstrated entitlement to an accounting because they have not demonstrated that Defendants owe them any duty, nor have they shown that the account is so complicated that the fiduciary duty requirement be waived. ECF No. 8 at 13.

Actions for partnership accounting are now covered under statute in Washington; actions for common-law accounting arise under case law. The requisites for an [*22] accounting action are set forth in *Corbin v. Madison, 12 Wash. App. 318, 327, 529 P.2d 1145 (1974)*, quoting with approval language from *Seattle Nat'l Bank v. School Dist. 40, 20 Wash. 368, 55 P. 317 (1898)*:

> In general, a complaint for an accounting must show by specific averments that there is a fiduciary relation existing between the parties, or that the account is so complicated that it cannot conveniently be taken in an action at law. And it must allege that the plaintiff has demanded an accounting from the defendant, and the latter's refusal to render it, in order to state a cause of action.

Corbin, 12 Wash. App. at 327 (quoting *Seattle Nat'l Bank, 20 Wash. 368, 55 P. 317*).

A fiduciary relationship arises as a matter of law between an attorney and client, or a doctor and patient, for example. *Liebergesell v. Evans, 93 Wash.2d 881, 890, 613 P.2d 1170 (1980)*. However, a fiduciary relationship can also arise in fact regardless of the legal relationship between the parties. *Id.* In some circumstances a fiduciary relationship which allows an individual to relax his guard and repose his trust in another may develop. *Id. at 889*. Such a fiduciary relationship is one in which one party "occupies such a relation to the other party as to justify [*23] the latter in expecting that his interests will be cared for. . . ." *Id. at 889-90* (quoting Restatement Contracts ß 472(1)(c)) (sufficient evidence of fiduciary relationship to overcome summary judgment where businessman induced a widowed school teacher to lend him money at 20 percent interest rate, even though he knew that rate was illegal). "'The facts and circumstances must indicate that the one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party.'" *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc., 86 Wash. App. 732, 742, 935 P.2d 628 (1997)* (quoting *Burwell v. South Carolina Nat'l Bank, 288 S.C. 34, 340 S.E.2d 786, 790 (1986))*. In other words, the plaintiff must show some dependency on his or her part and some undertaking by the defendant to advise, counsel and protect the weaker party. *Id.* In *Goodyear*, the court found that counterclaim plaintiff had not created an issue of fact sufficient to avoid summary judgment where, though tire dealer was vulnerable, tire manufacturer was clearly interested in promoting itself as demonstrated by its reservation of right to compete. *Id. at 743* ("the [*24] existence of conflicting profit incentives between a manufacturer and dealer is at odds with a fiduciary relationship").

Plaintiffs' complaint does not allege any relationship between BANA and/or MERS and Plaintiffs that could give rise to a fiduciary relationship. An independent trustee in a nonjudicial foreclosure may owe a fiduciary duty to act impartially to fairly respect the interests of both the lender and debtor. *See Klem v. Washington Mutual Bank, 176 Wash.2d 771, 790, 295 P.3d 1179 (2013)*. But Plaintiff has not alleged that either BANA or MERS are trustees meeting this requirement. Accordingly, Plaintiffs' claim for an equitable accounting is dismissed. However, the Court grants Plaintiffs leave to amend their complaint, as explained below.

7. Whether Plaintiffs' Breach of Contract Claim Should Be Dismissed

Defendants argue that Plaintiffs' breach of contract claim should be dismissed because Plaintiffs do not allege facts demonstrating the relevant terms of the two purported contracts, nor do they allege facts demonstrating how Defendants breached any provision or any resulting damages. ECF No. 8 at

Generally, a plaintiff in a contract action must prove (1) a valid contract between the parties, [*25] (2) breach, and (3) resulting damage. *Lehrer v. State, Dep't of Soc. & Health Servs., 101 Wash. App. 509, 516, 5 P.3d 722, 727 (2000)*. Defendant cites *RCW 64.04.010* for the proposition that the statute of frauds requires that agreements relating to an interest in real property, including mortgages, be in writing and signed by the party to be charged. ECF No. 8 at 15.

> Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed: PROVIDED, That when real estate, or any interest therein, is held in trust, the terms and conditions of which trust are of record, and the instrument creating such trust authorizes the issuance of certificates or written evidence of any interest in said real estate under said trust, and authorizes the transfer of such certificates or evidence of interest by assignment by the holder thereof by a simple writing or by endorsement on the back of such certificate or evidence of interest or delivery thereof to the vendee, such transfer shall be valid, and all such assignments or transfers hereby authorized and heretofore made in accordance with the provisions of this section are [*26] hereby declared to be legal and valid.

RCW ß 64.04.010. Washington's statute of frauds also provides that

> In the following cases, specified in this section, any agreement, contract, and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him or her lawfully authorized, that is to say: (1) Every agreement that by its terms is not to be performed in one year from the making thereof...

RCWß 19.36.010.

Here, Plaintiffs have not alleged facts indicating that the alleged loan modification "guaranteed" by BANA's agent Lopez was made in writing. Plaintiffs indicate that Lopez made statements to them, but the complaint does not specify whether those statements were verbal or in writing, and there is no indication that any party signed such a modification. Plaintiffs do allege that the "offer was accepted by reason of the cashing of the December 2011 payment cashed by defendant acknowledging the new contract and superseding the existing former Note and modifying same." ECF No. 1-1 at 5. However, Plaintiffs offer no explanation of why a check cashing [*27] constituted an acknowledgment of the new contract, nor what the specific terms of the new contract might be. Accordingly, based on their statute of frauds argument, Defendants' motion to dismiss Plaintiffs' breach of contract claim is granted.

8. Whether Plaintiffs' Unjust Enrichment and Promissory Estoppel Claims Should Be Dismissed

Defendants argue that Plaintiffs' claims for unjust enrichment and promissory estoppel fail because they cannot be asserted when there is an express contract. ECF No. 8 at 16. They also argue that Plaintiffs' do not allege to have made a single modified payment to Defendants since January 2012, yet allege that Defendants "misapplied" payments. Id.

Quasi contracts, or contracts implied by law, are founded on the equitable principle of unjust enrichment that one should not be "unjustly enriched at the expense of another." *Lynch v. Deaconess Med. Ctr., 113 Wash.2d 162, 165, 776 P.2d 681 (1989)* (quoting *Milone & Tucci, Inc. v. Bona Fide Builders, Inc., 49 Wash.2d 363, 367, 301 P.2d 759 (1956))*. A person has been unjustly enriched when he has profited or enriched himself at the expense of another contrary to equity. *Farwest Steel Corp. v. Mainline Metal Works, Inc., 48 Wash.App. 719, 731-32, 741 P.2d 58 (1987)*. [*28] Under Washington law, "[a] party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract." *U.S. for Use and Benefit of Walton Technology, Inc. v. Weststar Engineering, Inc., 290 F.3d 1199, 1204 (9th Cir. 2002)* (dismissing unjust enrichment claim where Plaintiff had affirmed the validity of the contract).

Here, because Plaintiffs entered an express contract with Defendant BANA with respect to their loan agreement and allege that they had modified that agreement via a verbal agreement with a loan agent, Plaintiffs' quasi contract claim fails.

A party seeking recovery under a theory of promissory estoppel must prove five prerequisites: (1) a promise that (2) the promisor should reasonably expect to cause the promisee to change his position and (3) that does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise. *Kim v. Dean, 133 Wash. App. 338, 348, 135 P.3d 978 (2006)*. Defendant cites *Hein v. Chrysler Corporation, 45 Wn.2d 586, 277 P.2d 708 (1954)* [*29] for the proposition that implied contract theories cannot be asserted when there is an express contract. However, the Court cannot find express support for the claim with respect to promissory estoppel.

Defendants also claim that Plaintiffs do not allege to have made a single modified payment to Defendants since January 2012, "yet appear to allege that Defendants 'misapplied' the very payments they did not make." ECF No. 8 at 16. However, Plaintiffs claim that they "gave notice to defendants that a dispute existed regarding the rejection of their tendered payments under a second [modified] agreement to pay a lesser amount under the note." ECF No. 1-1 at 4. This statement implies that Plaintiffs "tendered payments" that were then rejected.

Defendants next argue that Plaintiffs concede that they intentionally defaulted on their loan, and claim that they cannot allege that BANA has acted inequitably by enforcing its security interest under the deed of trust. But Plaintiffs alleged reason for defaulting is that Defendants' agent orally modified the loan agreement they relied on that oral modification in changing the amount of money they paid or ceasing to pay altogether.

Accordingly, Plaintiffs' [*30] claim for promissory estoppel survives Defendants' motion to dismiss.

9. Whether Plaintiffs' Claim for Quiet Title Should Be Dismissed

Here, Defendant cites an unpublished district court opinion, *Evans v. BAC Home Loans Servicing, L.P., 2010 U.S. Dist. LEXIS 136282, 2010 WL 5138394 (W.D. Wash. 2010)*, for the proposition that the "law is clear that to maintain a quiet title action regarding a mortgagee, a plaintiff must first pay the outstanding debt on which the mortgage is based." ECF No. 8 at 17. Defendants allege that Plaintiffs have not alleged that they have paid the amounts due under their loan, nor that they have the ability to pay.

Washington law indicates that Plaintiff may not maintain an action to quiet title where purchaser at no time offered to pay balance of purchase price and to satisfy mortgage debts on land. *Littlejohn v. Miller, 5 Wash. 399, 404, 31 P. 758 (1892)* ("However this may be, their indebtedness for the said portion of the purchase price was concluded by this judgment, and they are in no position to question the validity thereof; and they not having at any time offered to pay the balance of said purchase price, and to satisfy said mortgage debts, the judgment rendered in their favor in the court below [*31] must be reversed, and the cause is remanded with instructions to the lower court to dismiss it.").

Here, Plaintiffs' complaint only alleges that they made payments and then stopped making payments. There is no suggestion that Plaintiffs have paid off their mortgage or offered to do so. Accordingly, their action for quiet title is dismissed.

10. Leave to Amend

The standard for granting leave to amend is generous. *See Fed. R. Civ. P. 15(a)(2)* ("The court should freely give leave when justice so requires."). "Dismissal of a pro se complaint without leave to amend is proper only if it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." *Schucker v. Rockwood, 846 F.2d 1202, 1203-04 (9th Cir. 1988)* (internal quotation marks and citations omitted). The court considers five factors in assessing the propriety of leave to amend: bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint. *United States v. Corinthian Colleges, 655 F.3d 984, 995 (9th Cir. 2011)*.

The Court finds no indication of bad faith, undue delay, or significant prejudice to the opposing party; nor have Plaintiffs [*32] previously amended their Complaint. The only factor remaining for the Court to weigh is whether an amendment would be futile. Futility is established only if the complaint "could not be saved by any amendment." *Id.* (internal citations omitted); *see also Balistreri v. Pacifica Police Dept., 901 F.2d 696, 701 (9th Cir. 1990)* (as amended) (leave to amend may be granted when the court can "conceive of facts" that would render the plaintiff's claim viable). Here, the Court can conceive of facts that would render Plaintiffs' claims viable. Accordingly, it grants leave to amend.

Plaintiffs' amended complaint shall consist of a **short** and **plain** statements showing they are entitled to relief. Pursuant to *Federal Rule of Civil Procedure 8(a)*, Plaintiffs shall allege with specificity the following:

> 1) a short and plain statement of the statute that gives this court jurisdiction over the case,
>
> 2) a short and plain statement of the law or legal theory and facts supporting each claim against each defendant which would entitle Plaintiffs to relief, and
>
> 3) the relief requested from each defendant.

Plaintiffs must name all intended Defendants in the caption of their complaint (an amended complaint supersedes [*33] the initial complaint). *See Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992)*. Failing to name all Defendants in the caption of their complaint denies the Court jurisdiction over the unnamed Defendants. *Fed. R. Civ. P. 10(a), accord United States of America v. Tucson Mechanical Contracting Inc., 921 F.2d 911, 914 (9th Cir. 1990)*. Plaintiffs must be careful to list only those Defendants in the caption of their complaint who are the subject of their claims. The use of "Doe" Defendants is not favored in the Ninth Circuit. *See Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980)*. For Plaintiffs to properly name "John Doe" Defendants, they must provide all of the information they would normally provide if they already knew each of the defendants' names. Plaintiff should identify "John Does" by their function, their actions, the dates these actions occurred and most importantly, a short and plain statement of the law or legal theory and facts supporting each claim against each defendant which would entitle Plaintiffs to relief.

Furthermore, Plaintiffs shall again set forth their factual allegations in separate numbered paragraphs. THIS AMENDED COMPLAINT WILL OPERATE AS A COMPLETE [*34] SUBSTITUTE FOR (RATHER THAN A MERE SUPPLEMENT TO) THE PRESENT COMPLAINT. The amended complaint must be legibly rewritten or retyped in its entirety, should be an original and not a copy, may not incorporate any part of the original complaint by reference, and

MUST BE CLEARLY LABELED THE "FIRST AMENDED COMPLAINT," with case number 13-CV-0380-TOR written in the caption.

PLAINTIFFS ARE CAUTIONED IF THEY FAIL TO AMEND WITHIN 30 DAYS AS DIRECTED, THE COURT WILL PROCEED ONLY WITH THE ORIGINAL COMPLAINT, BUT WITHOUT THE CAUSES OF ACTION THAT HAVE BEEN DISMISSED BY THIS ORDER.

3. Plaintiffs' Motion to Expedite

Plaintiffs seek to expedite their motion to remand. They appear to request that the motion be heard before the motion to dismiss. The Court grants this motion and has addressed the claims in Plaintiffs' motion.

They also appear to move the court for an extension of time to respond to Defendants' motion to dismiss. Plaintiffs refer to it as a "stay or continuance of a pending motion," but the title states that it is a motion to "extend time to respond to a pending motion to dismiss." The court interprets this as a request for an extension of time to file a response. Plaintiffs offer no good [*35] cause for not having the response within the 30 days established by *Local Rule 7.1(b)(2)(A)*, arguing that they did not receive the motion until November 17, 2013. However, they did not file the motion to dismiss or the motion to expedite until December 24, 2013. Despite this, the Court's rulings on the motion to dismiss are not fatal to their complaint, as Plaintiffs will be granted leave to file an amended complaint.

IT IS HEREBY ORDERED:

> 1. Plaintiffs' Motion to Remand (ECF No. 12) is **DENIED**.
>
> 2. Defendants' Motion to Dismiss (ECF No. 8) is **DENIED** in part and **GRANTED** in part.

a. Defendants' motion to dismiss MERS as a defendant is DENIED.

b. Plaintiffs' negligence claim is DISMISSED.

c. Defendants' motion to dismiss Plaintiffs' fraud claim is DENIED.

d. Plaintiffs' Foreclosure Fairness Act claim is DISMISSED, though the Court notes that this does not resolve or preclude claims under the other consumer protection statutes Plaintiffs reference in the complaint.

e. Plaintiffs' claim for an accounting is DISMISSED.

f. Plaintiffs' breach of contract claim is DISMISSED.

g. Plaintiffs' unjust enrichment claim is DISMISSED; Plaintiffs' claim for promissory estoppel survives.

h. Plaintiffs' quiet title [*36] cause of action is DISMISSED.

3. Plaintiffs are granted leave to amend their complaint. An amended complaint, if any, shall be filed within 30 days of the filing of this order.

4. Plaintiffs' Motion to Expedite (ECF No. 11) is **GRANTED** in part. Their motion to expedite is granted. Plaintiffs' request to stay or continuance on motion to dismiss is **DENIED**. However, as stated above, Plaintiffs are granted leave to amend their complaint.

The District Court Executive is hereby directed to enter this Order and provide copies to the parties.

DATED January 14, 2013.

/s/ Thomas O. Rice

THOMAS O. RICE

United States District Judge

CERTIFICATE OF SERVICE

I, Netti M. Bryson hereby certify that a copy of the foregoing documents have been filed in the Court of Appeals of the State of Washington, Division I and mailed via USPS Certified in a sealed envelope on or about this 12th day of May , 2014 to the following recipients:

Attorneys for STEWART TITLE GUARANTY CO.,
Charles D. Sirianni
Sirianni, Youtz Spoonemore Hamburger
999Third Avenue, Suite 3650
Seattle, WA 98104
206.223.0303
206.223.0246 fax
csirianni@sylaw.com Certified Mail # 7011 2000 0001 2395 8287

Attorneys for JPMORGAN CHASE BANK, N.A.,
Fred B. Burnside, WSBA #32491
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.757.8016
206.757.7016 fax
fredburnside@dwt.com Certified Mail # 7012 3460 0000 8753 6839

Attorneys for NORTHWEST TRUSTEE SERVICES, INC.
John A. MacIntosh, WSBA #43113
RCO Legal, P.S.
13555 SE 36th St., Suite 300
Bellevue, WA 98006
425.247.2092
425.623.1853 fax Certified Mail # 7010 1670 0000 6654 7347

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 12th day of May . 2014 at Skagit County,Washington.

Netti M Bryson

Netti M. Bryson