 71995-5



**71995-5-I**

**THE COURT OF APPEALS**
**DIVISION I**
**STATE OF WASHINGTON**

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**CHETTIE MCAFEE**

*Appellant,*

v.

**SELECT PORTFOLIO SERVICING, INC., WELLS FARGO BANK, NA, AS TRUSTEE, ON BEHALF OF THE HOLDERS STRUCTURED ASSET MORTGAGE INVESTMENTS II INC. BEAR STEARNS FUNDING TRUST 2007-AR2, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-AR2 AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. A/K/A/ MERSCORP, INC.**

*Appellees/Respondents*

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# RESPONDENTS' BRIEF

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Appellees and Respondents, SELECT PORTFOLIO SERVICING, INC. ("SPS"), WELLS FARGO BANK, NA, AS TRUSTEE, ON BEHALF OF THE HOLDERS STRUCTURED ASSET MORTGAGE INVESTMENTS II INC. BEAR STEARNS FUNDING TRUST 2007-AR2, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-AR2 ("Wells Fargo") and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ("MERS") (collectively "Respondents"), hereby submit the following Respondents' Brief.

## I. INTRODUCTION

Notwithstanding Appellant's rhetoric, the sole issue in this appeal is whether Appellant Chettie McAfee (hereinafter "Appellant") sufficiently pled a claim for relief so as to entitle her Complaint to survive dismissal under Civil Rule ("CR") 12(b)(6). As discussed below, she has failed to do so.

Adding to the deficiencies in her pleadings below, it is notable that Appellant's *Third Amended* Opening Brief ("AOB") is riddled with inaccuracies [*e.g.,* Appellant's claim she was "unable" to get a TRO (AOB, 6), she posted an appeal bond in the Unlawful Detainer proceeding, and that MERS was involved with the Notice of Trustee's Sale (AOB, 23)] and other averments that are unsupported by the record. Indeed, a review of the record all too frequently contradicts her claims (*see* Appellant's Clerk's Papers ("CP"), generally). Even more egregiously Appellant relies upon inapplicable

MERS arguments under *Bain v. Metropolitan Mtg. Grp.* that have been consistently rejected by this Court.

Finally, the AOB impermissibly raises arguments against Respondents that were never raised in the lower court. Similarly, after twice being ordered to refile her opening briefs to remove allegations against parties Appellant had voluntarily dismissed from the litigation, it appears Appellant has, again impermissibly, merely substituted Respondents' names into all her prior references to JPMorgan Chase ("Chase") and Northwest Trustee Services, Inc. ("Northwest") [for example, compare AOB 8 with AOB 25, where she inexpicably switches the entity who supposedly told her to stop making payments from Chase to Wells Fargo] in a desperate bid to create the illusion that this frivolous appeal should survive.

A review of the applicable law and actual facts makes clear that the Superior Court was correct in dismissing all of Appellant's claims against the Respondents, and that decision should be affirmed by this Court.

## II. STATEMENT OF THE CASE

On or about January 3, 2007 Appellant financed the real property known as 6330 52ND STREET AVENUE SOUTH, SEATTLE, WA 98118 (AOB, 7) (the "Property") by executing an Adjustable Rate Note in favor of Bear Stearns Residential Mortgage Corporation ("Bear Stearns") in the principal amount of $920,000.00 ("Note") as secured by a Deed of Trust against the Property ("Deed of Trust") (CP, 375-82). The Deed of Trust was recorded in King County on Jan. 10, 2007 as Instr. No. 20070110001055 (AOB, 7, CP, 176-196). The Note and Deed of Trust are collectively referenced herein as the "Loan."

Wells Fargo was the assignee of the Deed of Trust under a Corporate Assignment of Deed of Trust executed by MERS as nominee for Bear Stearns and its successors and assigns ("Assignment") which was recorded in King County on June 27, 2012 (CP, 198).

Appellant defaulted on her obligations on the Loan, starting with the monthly installment payment due September 1, 2009, and for all subsequent months thereafter (CP, 200-202). A Notice of Default was issued June 28, 2012 (CP, 200-202, 371-73). Appellant failed to cure her default, and a Notice of Trustee's Sale was recorded in King County on Jan. 29, 2013 (CP, 210-16). Appellant filed a Complaint to halt the foreclosure, was granted a TRO contingent upon Appellant tendering monthly payments[1] to the Superior Court (CP, Pages 140-141), and the sale was postponed (CP, 351). Appellant defaulted on the TRO by failing to deposit *even a single monthly payment* with the Court Clerk (CP, 135-148, 350), the TRO thereafter expired, and a non-judicial foreclosure sale was conducted on May 9, 2014 (AOB, Page 11).

Respondents filed a Motion to Dismiss the Complaint under CR

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[1] Appellant falsely claims the TRO was not granted due to her inability to afford a bond (AOB, 11).

12(b)(6) (CP, 347-386); the motion was granted May 21, 2014 (CP, 420-422, 446-447). Appellant timely filed this appeal.

In her appeal, Appellant incorrectly contends that: 1) Wells Fargo and SPS violated the Consumer Protection Act, and committed fraud and misrepresentation in connection with an alleged loan modification and short sale Appellant alleged she negotiated with Chase; 2) Wells Fargo and MERS violated the Deed of Trust Act and Consumer Protection Act, and committed fraud and misrepresentation in an Assignment of Mortgage executed by MERS and the subsequent foreclosure sale; and 3) MERS violated the Deed of Trust Act and Consumer Protection Act, committed fraud and misrepresentation, and breached the contract when it "named itself in the Deed of Trust [and] recorded an assignment" (AOB, 6-7).

## III. ARGUMENTS

### 1. STANDARD OF REVIEW.

When reviewing a motion to dismiss under CR 12(b)(6), the standard of review is de novo. *Gaspar v. Peshastin Hi–Up Growers,* 131 Wash.App. 630, 634 (2006). Under *de novo* review, the Appellate Court "performs the same inquiry as the trial court." *Jones v. Allstate Ins. Co.*, 146 Wash.2d 291, 300, 45 P.3d 1068 (2002). "[D]ismissal is appropriate only if it is beyond doubt that the plaintiff can prove no facts that would justify recovery, considering even hypothetical facts outside the record."*Gaspar* at 635. "[T]he tenet that a court must accept all of the allegations contained in a complaint is inapplicable to legal conclusions," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009).

Moreover, "[t]his court has said many times that, if a judgment of the trial court can be sustained on any theory, such judgment will not be reversed on appeal." *Erickson v. Wahlheim*, 52 Wash.2d 15, 18, 319 P.2d 1102 (1958) (citing *Witzel v. Tena*, 48 Wash.2d 628, 295 P.2d 1115 (1956); *Ferris v. Blumhardt*, 48 Wash.2d 395, 293 P.2d 935 (1956); *Radach v. Prior*, 48 Wash.2d 901, 297 P.2d 605 (1956)).

### 2. APPELLANT CANNOT RAISE ISSUES FOR THE FIRST TIME ON APPEAL.

In her "Issues Pertaining to Assignments of Error" Appellant contends for the first time that Wells Fargo and SPS were responsible for violation of the Consumer Protection Act ("CPA"), plus per se violations for fraud and misrepresentation, for their role in the "loan modification process and short sale process" (AOB, 7, *see also* 14-15, *and* 18, wherein Appellant claims "interaction" between Appellant and Wells Fargo occurred in the loan modification and short sale processes).

The record clearly shows Appellant never raised any such claim against Wells Fargo or SPS in the lower court based on *any* acts arising from a loan modification or short sale; to the contrary, Appellant's Complaint repeatedly merely insisted *only Chase* bore responsibility for these acts (CP, 8 at ¶ 44; *see also*, CP, 3 at ¶¶ 12-13; CP, 5 at ¶ 24; and CP, 6 at ¶¶ 30, 32-34). The Complaint never made any allegations of any "interaction" by Wells Fargo or SPS (*see generally*, CP, 1-12), and even states that Appellant was "in process" of applying for "another loan modification" with SPS when the Complaint was filed (CP, 8 at ¶ 35). Appellant never sought leave to file an amended complaint and does not do so on this appeal. Nor could she truthfully amend her pleading to make such allegations even if she could somehow circumvent the effect of her prior judicial admissions.

Arguments not raised in the trial court, which are raised for the first time on appeal, are generally not considered unless there is a "manifest error affecting a constitutional right." Rules of Appellate Procedure ("RAP"), 2.5(a), *State v. Riley*, 121 Wash.2d 22, 31 (1993). None exists here. Issues surrounding a foreclosure sale are not a constitutional right that would fall within the exceptions created under *State v. Robinson*, 171 Wash.2d 292, 305 (2011) (enumerating a "narrow class of cases" in which four conditions must be met, none of which are applicable here). Instead Appellant is attempting to conduct a "collateral attack upon the decree of foreclosure…" that cannot be raised for the first time upon appeal. *Valentine v. Portland Timber & Land Holding Co.*, 15 Wash.App 124, 132 (1976) (citing *Globe Construction Co. v. Yost*, 169 Wash. 319 (1932)). Accordingly, all of Appellant's loan modification and short sale claims cannot be considered in this appeal.

### 3. APPELLANT'S CLAIMS ARISING FROM THE DEED OF TRUST ARE ALL BARRED BY THE APPLICABLE STATUTES OF LIMITATION.

The majority of Appellant's claims arise from the mere fact MERS was named as a party on the Deed of Trust. As an initial matter, any claims on that basis are time-barred and cannot be heard.

There is a four-year statute of limitations period for claims arising under the Consumer Protection Act. RCW 19.86.120 ("Any action to enforce a claim for damages under RCW 19.86.090 shall be forever barred unless commenced within four years after the cause of action accrues."). Fraud and Misrepresentation have a three-year statute of limitations. RCW 4.16.080(4), *Shepard v. Holmes*, 185 Wash.App 730, 738-39 (2014). Actions arising from a contract in writing have a six-year statute of limitations. RCW 4.16.040(a). Deed of Trust Act claims are considered to be torts under *Jackowski v. Borchelt*, 278 P.3d 1100, 1108 (Wash. 2012); the statute of limitations on a tort claim is three-years. RCW 4.16.080.

An action is deemed to have accrued when there is discovery of the facts that give rise to the claim, and the party can look to the courts for relief. *Shepard* at 739. Discovery occurs when a party could have ascertained the facts giving rise to claims "through the exercise of due diligence." *Id.* A claim is not tolled if the plaintiff knew, or through the exercise of reasonable diligence, should have known all of the facts necessary to establish his or her claim. *Crisman v. Crisman*, 85 Wn.App. 15, 20 (1997). Statute starts to run from the moment facts upon which a plaintiff relies become matters of public record. *Shepard* at 740. The world is put on notice when an instrument involving real property is recorded. *Strong v. Clark*, 56 Wn.2d 230, 232 (1960) (citing *Allen v. Graaf*, 179 Wash. 431 (1934)). The discovery rule does not provide additional time because a Appellant knew, or is deemed to have known, the facts when the Deed of Trust and Assignment were recorded in public record, even if the basis for her legal claims were not realized until later. *See*, *Richardson v. Denend*, 59 Wn. App. 92, 95-96 (1990).

The date of the Deed of Trust, in which MERS' role was clearly stated, is Jan. 3, 2007 (CP, 177-196); Plaintiff executed the Deed of Trust Jan. 5, 2007 (CP, 190), which occurred <u>more than six years</u> before Appellant filed her Complaint (CP, 1). Appellant merely had to review the document to see that MERS was a party to the transaction. Since the CPA claims had a shorter statutory deadline, these claims are also barred.

The MERS Assignment relates back to the Deed of Trust, and does not give rise to an independent cause of action or "re-start" the statute of limitations, therefore Assignment-related claims are similarly barred. *Smith v. Nw. Tr. Serv., Inc.*, 2014 WL 2439791 at *4 (E.D. Wash. May 30, 2014).

**4. <u>THE CONSUMER PROTECTION ACT CLAIMS FAIL.</u>**

Even if they were not time-barred, the CPA claims asserted by Appellant still fail. Appellant alleges: 1) Wells Fargo and SPS violated the CPA due to alleged loan modification and short sale issues; 2) Wells Fargo and MERS violated the CPA from an 'Assignment of Mortgage' executed by MERS; and 3) MERS violated the CPA because it "named itself in the Deed of Trust [and] recorded an assignment" (AOB, 6-7).

"Acts performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law." *Perry v. Island Sav. & Loan Ass'n*, 101 Wn.2d 795, 810, 684 P.2d 1281 (1984).

A. APPELLANT FAILS TO MEET ALL OF THE CONSUMER PROTECTION ACT CLAIM ELEMENTS.

"To successfully bring an action under the CPA, a plaintiff must prove five elements: '(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; [and] (5) causation.'" *Johnson v. Camp Auto., Inc.*, 148 Wn. App. 181, 185 (2009).

If a plaintiff fails to prove each of the elements required under a CPA claim the entire claim fails; "[t]he failure to establish any of the elements is fatal to a CPA claim." *Schnall* at 278 (citing *Holiday Resort Cmty. Ass'n v. Echo Lake Assocs., LLC*, 134 Wn. App. 210, 226 (2006)).

First, Appellant cannot establish the "trade or commerce" prong claim because, in its capacity as an agent for the noteholder, MERS' assignment of the deed of trust is a "ministerial act" that did not occur in trade or commerce. *Bain v Metropolitan Mortg. Group, Inc.*, 2010 WL 891585, *4 n.5 (W.D. Wash. 2010).

Second, Appellant cannot establish the "public interest" prong because the Assignment executed by MERS involves private transactions between Respondents in the normal course of business. Acts impacting only a plaintiff or a limited group do not have the capacity to deceive a substantial portion of the public as a matter of law, "no matter how misleading." *Henery v. Robinson*, 67 Wn. App. 277, 291 (1992), *abrogated on other grounds* (*Klem v. Washington Mut. Bank*, 176 Wash.2d 771 (2013)); *see also Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 744-45 (1997) (dismissing plaintiff's CPA claim because the challenged acts were not directed at the public).

Appellant similarly cannot meet the public interest requirement for the loan modification allegations claimed, for the first time here, against Wells and SPS. *See*, *Ringler v. Bishop White Marshall & Weibel, PS*, No. C13-5020-BHS, 2013 WL 1816265 at *3 (W.D. Wash. Apr. 29, 2013) ("Plaintiffs only allege that Defendants denied their individual requests for a loan modification or short sale. To infer this act had the capacity to deceive a substantial portion of the public is unreasonable."); *McCrorey v. Fannie Mae*, No. 12-1630, 2013 U.S. Dist. LEXIS 25461, at *11-12 n.4 (W.D. Wash. Feb. 25, 2013) ("To the extent plaintiffs are asserting a CPA claim based on Flagstar's breach of promise to modify the loan and Nationstar's unwillingness to honor Flagstar's commitment . . . , there are no facts from which one could infer that this lamentable situation affects the public interest."); *Hewitt v. Wells Fargo Bank*, No. 11-5147, 2011 U.S. Dist. LEXIS 58312, at *5 (W.D. Wash. May 31, 2011) (same).

Third, under *Schmidt v. Cornerstone Invs., Inc.* Appellant cannot show the required causal link between her alleged CPA claim, Respondents, and the injury suffered. 115 Wash.2d 148, 167, 795 P.2d 1143 (1990). In order to meet this standard, Appellant is required to show that "but-for" Respondents' actions, Appellant would not have suffered any injury. *Indoor Billboard v. Integra Telecom*, 162 Wash.2d 59, 84 (2007). "A CPA claim must show there is a causal link between the alleged misrepresentation or deceptive practice and the purported injury. *Hangman* at 793. '[T]he term proximate cause' means a cause which in direct sequence unbroken by any superseding cause, produces the injury [or] event complained of and without which such injury [or] event would not have happened." *Schnall v. AT & T Wireless Servs., Inc.*, 171 Wn.2d 260, 278 (2011) (quoting 6 Washington Practice: Washington Pattern Jury Instructions; Civil 15.01 at 181 (5th ed.2005).Without a demonstration of direct harm a CPA claim fails. *Frias v. Asset Foreclosure Svcs., Inc.*, 957 F.Supp2d 1264, 1270 (W.D.Wash. 2013), See also *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 917 (2001).

Appellant failed to show any act by Respondents was the proximate cause of, or reason for, her failure to tender payments.

> I can't find any but-for causal relationship between what MERS did and didn't do and the harm that wasn't suffered. Because even if the filing of foreclosure actions is an injury, and I don't think the showing has been made that there was any injury here, I'll point out that it's also clear that MERS didn't initiate those foreclosure proceedings, lend money, make representations to plaintiff, send plaintiff any default notice or initiate the foreclosure.... if you can't make the

> showing under prong four injury, its impossible to make the showing under prong five causation.

*Bain v. Metropolitan Mortg. Corp.*, 2013 WL 6193887 at *6 (Wash. Sup. Ct. 2013). See also *Hangman* at 780 (Plaintiffs must demonstrate MERS took an unfair or deceptive act in trade or commerce that caused identifiable injury).

Here, Appellant admits she stopped tendering payments on the Loan (AOB, 5), admits foreclosure proceedings were initiated after she ceased tendering payments (AOB, 5), and Appellant never disputes she has resided in the Property since September 1, 2009, despite not tendering any of the required payments on the Loan (CP, 348).

This failure to tender payments is the sole proximate cause of Plaintiff's injury; foreclosure would be the expected result: "The second prong...is not met as Ms. Helmer was directly liable on the mortgage and her nonpayment of the mortgage led to the foreclosure action." *Western Community Bank v. Helmer*, 48 Wash.App. 694, 700-701 (1987).

In this regard, it is also worth noting that Appellant has not alleged, let alone shown, that she would have or should have been qualified for any loan modification or short sale agreement. Merely applying does not guarantee the result and a lender or servicer is under no duty to offer relief. *See Wilson v. Bank of America,* 2014 WL 841527 at *5 (W.D. Wash. Mar. 4, 2014); *Badgett v. Sec. State Bank.*, 116 Wn.2d 563, 570, 807 P.3d 356 (1991). This is not a situation, as in *Corvello v. Wells Fargo Bank, NA,* 728 F.3d 878 (9th Cir. 2013) where the borrower has entered into *and performed under* a trial payment plan so as to possibly give rise to state law claims. There was no agreement here, just applications (AOB, 5-6).

B. <u>APPELLANT'S LOAN MODIFICATION AND SHORT SALE CLAIMS FAIL.</u>

Even if this Court were to consider Appellant's newly-pled loan modification and short sale arguments, Appellant cannot show any act by <u>Respondents</u> caused her claimed injury (AOB, 5; CP 6 at ¶¶ 32-34).

The Complaint only alleges: (1) <u>Chase</u> violated the CPA by denying "at least nine attempts to apply for a loan modification (CP, 6 at ¶32); (2) <u>Chase</u> acted in bad faith by requesting the same documents over and over again (*Id.*); (3) <u>Chase</u> rejected a short sale offer in an amount that Chase demanded previously (CP, 6 at ¶33); and (4) <u>Chase</u> acted in bad faith in an unfair and deceptive manner throughout the entire short sale process, thus causing the only claimed harm to Appellant (CP, 6 at ¶34).

Moreover, it is black-letter law in Washington that a lender has no <u>duty</u> to modify a loan or agree to a short sale; the lender can simply stand on its rights under the originally agreed-upon contract. *Badgett, supra; Wilson, supra*; *see also*, *Tran v. Bank of Am., N.A.*, No. 12-cv-5341-RBL, 2012 WL 5384929, at *4 (E.D. Wash. Nov. 1, 2012) (collecting cases); *Mills v. Bank of Am., N.A.*, No. 3:14-cv-05238-RBL, 2014 WL 4202465, at *2 (W.D. Wash. Aug. 22, 2014) (no private right of action authorized by HAMP).

Despite these glaring defects, Appellant improperly asks this Court to follow *Corvello, supra*, as a basis to find Respondents violated the CPA (AOB, 15). In *Corvello* a lender/servicer offered a trial payment program along with a promise of a loan modification, but then denied the modification despite the borrower's successful completion of the trial program. The Court there held that the borrower had pled a viable claim for breach of contract. Here, by contrast, Appellant herself shows inapplicability of *Corvello* by admitting in her Opening Brief that she was **never** granted a loan modification (AOB, 5), nor does Appellant claim she was ever offered a trial payment program at any time by any of the Respondents, let alone that she accepted and successfully performed thereunder.

What the record does show is that Appellant intentionally provided false information to obtain a TRO in claiming Chase offered her a "trial payment-loan modification" when Appellant knew she had only been offered a forbearance agreement *by EMC Mortgage* (CP, 61, 68, 70, 137 at ¶¶ 8-9 and 148, see also CP 64-70). A forbearance agreement is not even remotely related to a loan modification or trial payment plan, and the claims fail.

C. THE ASSIGNMENT BY MERS DID NOT VIOLATE THE CONSUMER PROTECTION ACT.

Appellant alleges "fraud," violation of the "Deed of Trust Act" and "breach of contract" to contend MERS' execution of the Corporate Assignment of Mortgage[2] ("Assignment") violated the CPA (AOB, 19-25).

In order to make a per se CPA claim Appellant must show "the alleged act constitutes a per se unfair trade practice." *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 334, 779 P.2d 249 (1989). She must also prove: "(1) the existence of a pertinent statute; (2) its violation; (3) that such violation was the proximate cause of damages sustained; and (4) that they were within the class of people the statute sought to protect." *Dempsey v. Joe Pignataro Chevrolet, Inc.*, 22 Wn.App. 384, 393, 589 P.2d 1265 (1979). Only the Washington Legislature can establish a per se CPA violation, and it can do so only by making a specific legislative declaration to that effect. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 787-791 (1986). ("it has become clear that the Legislature, not this court, is the appropriate body to establish ... a *per se* unfair trade practice").

MERS made no misrepresentations or misstatements to Appellant through the Assignment and, to the contrary, MERS' role as a nominee for the lender was fully described through the very contract documents Appellant signed at origination. MERS did not engage in any unfair, deceptive or misleading conduct. Everything was fully disclosed and agreed to by Appellant. Even if, *arguendo*, the Court ruled that MERS incorrectly concluded that it was a legal beneficiary under the Washington Deeds of Trust Act, MERS fully disclosed its role to Appellant and did not affirmatively misrepresent or knowingly misstate anything to her.

Additionally, Washington law expressly excludes recordation of documents from the definition of transacting business: "The following activities, among others, do not constitute transacting business ... Creating or acquiring evidences of mortgages, or liens on real or personal property, or

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[2] The Assignment is part of the record as CP 35, 198, and 303.

recording same." RCW 26B.15.010(2)(g), *see also*, *Keene Guar. Sav. Bank v. Lawrence*, 32 Wash. 572, 577 (1903). For these reasons, and for the reasons stated below, Court's ruling must be affirmed.

### 1. APPELLANT LACKS STANDING TO CHALLENGE THE ASSIGNMENT.

Appellant lacks standing to challenge the Assignment because she cannot establish a legally protected interest in the Assignment, is not a party to it, is not granted any rights thereunder, and is not a beneficiary thereof. *Lonsdale v. Chesterfield*, 19 Wn.App. 27, 31 (1978); *Brodie v. Northwest Trustee Servs., Inc.*, 579 Fed.Appx. 592, 593 (9th Cir. 2014) (borrower lacked standing to challenge the assignment of the deed of trust because "[s]he is neither a party to nor a beneficiary of the assignment and transfer."); *Ukpoma v. U.S. Bank, N.A.*, 2013 WL 1934172, *4 (E.D. Wash. 2013) ("Plaintiff, as a third party, lacks standing to challenge" the assignment); *Paatalo v. JPMorgan Chase Bank, N.A.*, 2012 WL 2505732, *7 (W.D. Wash. 2012) ("borrower does not have standing to challenge assignments and agreements to which it is not a party."); *Borowski v. BNC Mortgage, Inc.*, No. C12-5867RJB, 2013 WL 4522253, at *5 (W.D.Wash. Aug. 27, 2013) (Borrowers lack standing unless "they are at risk of paying the same debt twice if the assignment stands.").

### 2. MERS COULD EXECUTE THE ASSIGNMENT.

MERS can assign a deed. *See*, *Wilson v. Bank of Am., N.A.*, 2013 WL 275018, at *8 n.9 (W.D. Wash. Jan. 23, 2013); *Myers v. Mortgage Elec.*

*Registration Sys., Inc.*, No. 11-CV-05582 RBL, 2012 WL 678148, at *3 (W.D. Wash. Feb. 24, 2012) *aff'd*, 540 F. App'x 572 (9th Cir. 2013):

> The Deed of Trust Act states that "parties may insert in [a] mortgage any lawful agreement or condition," including the agreement that MERS serve as an agent. Wash. Rev.Code § 61.12.020; *see also Salmon v. Bank of Am. Corp.*, 2011 WL 2174554, at *8 (E.D.Wash.2011) (finding no issue where deed of trust expressly allowed for MERS to serve as nominee); *Klinger v. Wells Fargo Bank, N.A.*, 2010 WL 5138478, at *7 (W.D.Wash. Dec.9, 2010) (dismissing argument that MERS assignment is invalid); *Daddabbo v. Countrywide Home Loans, Inc.*, 2010 WL 2102486 (W.D. Wash.2010 (same); *Yawter,* 707 F.Supp.2d at 1125–26 (same). … "[T]he disclosures in the deed indicate that MERS is acting 'solely as nominee for Lender and Lender's successors and assigns.' ... By signing the deeds of trust, the plaintiffs agreed to the terms and were on notice of the contents." *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034 (9th Cir.2011).

*See also*, *Smith v. Nw. Tr. Serv., Inc.*, 2014 WL 2439791 at *4 (E.D. Wash. 2014) ("The Court can discern no reason why MERS would be prohibited from conveying its interest in the deed of trust back to SunTrust upon the latter's request.").

### 3. THE ASSIGNMENT DID NOT CAUSE APPELLANT'S CLAIMED INJURY.

No injury occurred because the Assignment was not the operative document that commenced foreclosure; "Appellants fail, however, to plausibly allege any injury proximately resulting from the MERS Assignment. The alleged injury … is not plausibly related to the MERS Assignment. The legal threat and the possibility of losing her home could only relate to the Notice of Default, not the MERS Assignment." *In re Brown*, 2013 WL 6511979 at *13 (BAP 9th Cir., 2013). See also, *Knecht v.*

*Fid. Nat. Title Ins. Co.*, No. C12-1575RAJ, 2015 WL 3618358, at *7 (W.D. Wash. June 9, 2015) ("The execution and recording of the MERS Assignment caused no injury to Mr. Knecht. Even if it had, and Mr. Knecht could tie that injury to a statutory or common law right of action, Mr. Knecht suffered no compensable damage as a result of the MERS Assignment."); *Wilson v. Bank of Am., N.A.*, 2013 WL 275018, at *8 n.9 (W.D. Wash. Jan. 23, 2013) (same).

#### 4. MERS COULD BE NAMED AS A NOMINEE OF THE BENEFICIARY ON THE DEED OF TRUST.

Appellant's last contention is that MERS violated the Consumer Protection Act when it "named itself in the Deed of Trust" (AOB, 7).

First, MERS did not "name itself on the Deed of Trust" – that argument does not even make sense because MERS did not draft the Deed of Trust or otherwise act in its execution by Appellant.

Second, MERS is able to be a nominee on the Deed of Trust without affecting the legal significance of the document. A "nominee is one who holds bare legal title to property for the benefit of another." *Fourth Inv. LP v. United States*, 720 F.3d 1058, 1066 (9th Cir. 2013). Washington courts have approved of the role of a nominee for over a century. See, e.g. *Carr v. Cohn*, 44 Wash. 586, 588 (1906), *Andrews v. Kelleher*, 124 Wash. 517, 534-36 (1923) (agent authorized to prosecute foreclosure), *Fid. Trust Co. v. Wash. & Or. Corp.*, 217 F. 588, 596 (W.D.Wash. 1914), *Anderson Buick Co. v. Cook*, 7 Wn.2d 632, 641-42 (1941) (mortgage remains valid even where mortgagee "held bare legal title" for real property in interest).

Third, Appellant's argument that naming MERS on the Deed of Trust constitutes a per se violation of the CPA, without more, has been rejected by the Washington Courts. "*Bain* is clear that there is no automatic cause of action under the CPA simply because MERS acted as an unlawful beneficiary under the Deed of Trust Act." *Mickelson v. Chase Home Finance*, 901 F. Supp. 2d 1286, 1288 (W.D. Wash. 2012), *aff'd*, 579 F. App'x 598 (9th Cir. 2014). See also, *Zalac v. CTX Mortgage Corp.*, No. C12-01474 MJP, 2013 WL 1990728, at *3 (W.D. Wash. May 13, 2013). ("Plaintiff fails to make the specific allegation that he was deceived by the characterization of MERS as a beneficiary on the Deed of Trust. *Bain,* 175 Wash.2d at 120, 285 P.3d 34 ('the mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury'). ... Plaintiff has failed to allege any cognizable deceptive or unfair trade or practice arising out of MERS's involvement....")

Fourth, a transfer of the Note, endorsed, either specially or in blank, and in the possession of the current beneficiary, obviates the fact MERS is named as a beneficiary on the Deed of Trust; the recording of an Assignment is not necessary or sufficient to confer standing and is not required in order to foreclose because the security follows the Note, not the other way around. *Fidelity & Dep. Co. v. Ticor Title Ins.*, 88 Wn.App. 64, 68, 943 P.2d 710 (1997); see also *Carpenter v. Longan*, 83 U.S. 271, 275

(1872). "From these basic principles, it follows that a transfer of the obligation [here, the Note], by assignment, negotiation, transfer, or whatever form of transfer is sufficient to transfer it, should carry the mortgage along with it. This is indeed the universal result in American law." Stoebuck & Weaver, § 18.20 at 340. See also, *Fidelity & Deposit v. Ticor*, 88 Wn.App. 64, 68-69 (1997), *Price v. N. Bond & Mortg. Co.*, 161 Wash. 690, 695 (1931), *Nance v. Woods*, 79 Wash. 188, 191 (1914), *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 90 (1909) ("assignment of the notes ipso facto passes the security"), *Bartlett Estate Co. v. Fairhaven Land Co.*, 49 Wash. 58, 63 (1908) (mortgage "passes to assignee by an assignment of the debt").

SPS filed a declaration, under penalty of perjury, stating SPS was in possession of the Note and had been in possession of it from the date the Loan was transferred to SPS from the prior servicer (CP, 365-366). A copy of the Note, showing it was specially endorsed to Wells Fargo as Trustee, was also filed with Respondents' Motion to Dismiss (CP, 375-380). As such Appellant's claims based on naming MERS in the Deed of Trust fail.

5. MERS DID NOT EXECUTE AN APPOINTMENT OF SUCCESSOR TRUSTEE.

Appellant further claims that MERS fraudulently "executed the Appointment of Successor Trustee" (AOB, 22). This claim was shown to be incorrect in the lower court (CP, 354), and remains incorrect now. Appellant's own record shows it was <u>Wells Fargo</u> that executed the document, not MERS (CP, 36-38).

## 5. APPELLANT'S CLAIMS FOR FRAUD AND MISREPRESENTATION FAIL.

Appellant contends fraud and misrepresentation were committed by: (1) Wells Fargo and SPS from an alleged loan modification and short sale; (2) Wells Fargo and MERS with respect to the Assignment of Mortgage; and 3) MERS committed fraud when it "named itself on the Deed of Trust" and executed an Assignment and Appointment of Successor Trustee. Appellant never identifies the type of misrepresentation, and Respondents presume Appellant meant "negligent misrepresentation."

Appellant's first contention is improperly raised for the first time in this appeal (discussed supra at 5-6); no allegations of any impropriety in any loan modification discussions were made against Respondents in the Complaint (except that she was in the process of applying for a tenth loan modification with SPS (CP, 6 at ¶ 35)). The second contention is also addressed herein at Pages 16 to 18, and shows MERS could execute the Assignment at issue. Appellant's third contention is discussed herein at Pages 21 to 22, and for the sake of brevity will not be reiterated.

FRAUD. The nine elements of fraud are: (1) representation of an existing fact, (2) materiality, (3) falsity, (4) the speaker's knowledge of its falsity, (5) intent of the speaker that it should be acted upon by the plaintiff, (6) plaintiff's ignorance of its falsity, (7) plaintiff's reliance on the truth of the representation, (8) plaintiff's right to rely upon it, and (9) damages plaintiff suffered. *Stiley v. Block*, 130 Wn.2d 486, 505 (1996).

NEGLIGENT MISREPRESENTATION. The six elements of negligent misrepresentation are:

> (1) that a defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in business transactions, (3) the defendant was negligent in obtaining or communicating false information, (4) the plaintiff relied on the false information supplied by the defendant, (5) that the plaintiffs reliance on the false information supplied by the defendant was justified, and (6) the false information was the proximate cause of damages to the plaintiff.

*Borish v. Russell,* 155 Wash.App. 892, 905 n. 7, 230 P.3d 646 (2010).

A. APPELLANT FAILED TO PLEAD HER FRAUD OR MISREPRESENTATION CLAIMS WITH THE REQUIRED PARTICULARITY.

In order to survive a dismissal for inadequacy under CR 9(b), "a Complaint needs to state the time, place, and specific content of the false representations as well as identities of the parties to the misrepresentation." *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004). "[T]he circumstances constituting fraud or mistake shall be stated with particularity." CR 9(b); *Schreiner Farms, Inc. v. Am. Tower, Inc.*, 173 Wn. App. 154, 163 (2013) (same). The Supreme Court held "[p]articularity requires that the pleading apprise the defendant of the facts that give rise to the allegation of fraud." *Adams*, 164 Wn.2d at 662.

The Complaint did not plead the fraud claims with the required level of particularity and/or specificity. This requirement is not one to be "reserved for trial" as Appellant contends (AOB, 24), and she did not support this contention with any legal support. Appellant also appears to confuse "proof" with "pleading" in arguing that her Complaint met the heightened pleading standards (AOB, 21).

More specifically, Appellant completely failed to show: (1) what false information *Respondents* provided (nor why Respondents should have known it was false); (2) how Wells Fargo and SPS were involved with the failed loan modifications, or why she had a right to rely on an expectation that, after nine prior unsuccessful attempts, she would now receive a loan modification or short sale; (3) how she supposedly justifiably relied on any such false representations—for example, neither the Assignment nor the Appointment of Successor Trustee in any way contributed to her failure to tender monthly payments on the Loan; (4) the falsity of MERS being named on the Deed of Trust; and (5) how she was damaged as a result of her claimed reliance.

The only other fraud allegation is a threadbare, speculative claim of possible "robo-signing" which, even if it occurred, Appellant lacks standing to challenge it: "Plaintiff's second argument relates to so-called "robo-signing" of the documents used to initiate foreclosure proceedings. Even assuming for the sake of argument that the assignments in question were fraudulently executed, Plaintiff, as a third party, lacks standing to challenge them. *Upkoma v. U.S. Bank Nat. Ass'n*, 2013 WL 1934172 at *4 (E.D. Wash, May 9, 2013). Appellant must also show more than mere speculation and conclusion (Appellant's claim is apparently made just on "information and belief" [AOB 9 and 23]) and establish that Appellant was harmed by the act of "robo-signing." *Id.* Appellant also fails to show reliance, causation or any injury from robo-signing—it did not change her obligations under the loan, just the identity of the entities entitled to enforce that loan[3] and she clearly admits knowning of the transfer and exploring loan modificaton and short sale options with the new entities. Thus, her argument fails.

### 6. APPELLANT'S DEED OF TRUST ACT CLAIMS AGAINST WELLS FARGO, SPS AND MERS FAIL.

Appellant's Opening Brief states "the trustee" violated the Deeds of Trust Act (AOB, 20); Appellant is referencing Northwest, whom she dismissed from litigation. In reality, the only support for her argument is the statement "Respondents sold Plaintiff's property at a trustee's sale…" (AOB, 19). The "Issues Pertaining to Assignments of Error" further claims Wells Fargo and MERS violated the Deed of Trust Act via the MERS Assignment and a foreclosure sale, and that MERS violated the Deed of Trust Act when it "named itself in the Deed of Trust [and] recorded an assignment" (AOB, 7).

Respondents have already demonstrated that MERS could execute the Assignment at issue supra at Pages 16 to 18, and the "MERS named itself" contention is discussed supra at Pages 21 to 22.

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[3] There is no contention here that anyone other than Respondents has sought to enforce the terms of the loan against her since the Assignment.

Additionally, MERS could not violate the Deed of Trust Act because it had nothing to do with any aspect of the foreclosure after it assigned its interest to Chase on June 4, 2012 (CP, 198). Under RCW 61.24.040(1)(a) the operative document to initiate foreclosure was the Notice of Trustee's Sale recorded on January 29, 2013 (CP, 210-16).

Plaintiff fails to provide proof or a legal basis to show Respondents violated the Deed of Trust Act, and the ruling must be upheld.

### 7. APPELLANT'S BREACH OF CONTRACT CLAIMS FAIL.

Appellant's last claim is violation of implied contractual covenants of good faith and fair dealing which are solely based on the loan modification claims (AOB, 24-26). A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant. *Nw. Indep. Forest Mfrs. V. Dep't of Labor & Indus.*, 78 Wn.App. 707, 712, 899 P.2d 6 (1995).

The duties of good faith and fair dealing "requires only that the parties perform in good faith the obligations imposed by their agreement." *Badgett, supra*, at 569. "As a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms." *Id.* At 570. *See also, Wilson, supra.* Causation requires showing a causal link between the allegedly unfair act and Plaintiff's alleged injury. *Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn. 2d 260, (Wash. 2011).

Appellant's loan modification claims were made **<u>solely</u>** against Chase. Notwithstanding that Appellant is raising a new argument on appeal, she is not legally entitled to a loan modification. The Deed of Trust is the operative contract, and contains no provision stating a loan modification must be given. Judicial modification of Appellant's Loan improperly creates additional obligations contradictory to the contract. *See*, *Yau v. Deutsche Bank Nat. Trust Co. Americas*, 525 F. App'x 606, 608 (9th Cir. 2013); *Wilson, supra.*

There is no basis to extend Chase's liability to Wells Fargo or SPS, and Appellant fails to show one existed. "'We consider several factors before imposing vicarious liability, but the most crucial factor is the right to control the manner, method, and means by which the work and the desired result was to be accomplished.'...to survive summary judgment, [plaintiffs] must raise a genuine issue of material fact regarding Deutsche's right to control AHMSI's loan modification negotiations with [plaintiffs]." *Reisinger v. Deutsche Bank Nat. Trust Co.*, 174 Wash.App. 1060, 2013 WL 1844650 at *5.

## IV. CONCLUSION

Without justification, Appellant has lived in the Subject Property for over six years without tendering a single payment, and continues to use it to generate income. The foreclosure resulted from Appellant's failure to tender payments, a fact she admits in both the record and her Opening Brief, and for no other reason. It is clear the Superior Court properly granted Respondents' Motion to Dismiss and the ruling should be affirmed in entirety.

Dated: September 8, 2015

Respectfully submitted,
**WRIGHT, FINLAY & ZAK, LLP**

By: ______________________________
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Attorneys' for Appellees, SELECT PORTFOLIO SERVICING, INC. and WELLS FARGO BANK, NA, AS TRUSTEE, ON BEHALF OF THE HOLDERS STRUCTURED ASSET MORTGAGE INVEST-MENTS II INC. BEAR STEARNS FUNDING TRUST 2007-AR2, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-AR2 AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

## DECLARATION OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of California that on this 9th day of September 2015, I caused to be served a true and correct copy of the foregoing Respondents' Brief on the parties shown below via-e-mail:

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**71995-5-I**

**THE COURT OF APPEALS**
**DIVISION I**
**STATE OF WASHINGTON**

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**CHETTIE MCAFEE**

*Appellant,*

v.

**SELECT PORTFOLIO SERVICING, INC., WELLS FARGO BANK, NA, AS TRUSTEE, ON BEHALF OF THE HOLDERS STRUCTURED ASSET MORTGAGE INVESTMENTS II INC. BEAR STEARNS FUNDING TRUST 2007-AR2, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-AR2 AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. A/K/A/ MERSCORP, INC.**

*Appellees/Respondents*

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**APPENDIX OF FEDERAL AUTHORITIES IN SUPPORT OF RESPONDENTS' BRIEF**

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Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Seattle.

Kristin BAIN, Plaintiff,
v.
METROPOLITAN MORTGAGE GROUP INC., Indymac Bank, FSB; Mortgage Electronic Registration Systems; Regional Trustee Service; Lender Processing Services; and Doe Defendants 1 through 20, inclusive, Defendants.

No. C09-0149-JCC. | March 11, 2010.

West KeySummary

1 **Mortgages**
⇨ Dealings and Transactions Between Parties
**Mortgages**
⇨ Between Parties to Mortgage or Their Privies

Homeowner failed to allege that lender owed her a fiduciary duty since the lender executed documents at the behest of the foreclosing trustee, not the trustee on the deed of trust. The homeowner believed that the Deed of Trust Act (DTA) created a fiduciary duty from the lender to the homeowner. However, the lender was not the trustee listed on the deed of trust, and the homeowner put forth no evidence that the lender was a trustee such that its actions would be covered by the duties imposed by the DTA. Wash. Rev.Code 61.24.005(13).

Cases that cite this headnote

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**ORDER**

JOHN C. COUGHENOUR, District Judge.

***1** This matter comes before the Court on Defendant Lender Processing Services' Motion for Summary Judgment (Dkt. No. 73), Plaintiff Kristin Bain's Response (Dkt. No. 48), Defendant's original Reply (Dkt. No. 62), Plaintiff's Supplemental Response (Dkt. No. 72), and Defendant LPS' Reply (Dkt. No. 79), as well as all declarations and exhibits. [1] Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motion for the reasons explained herein.

## I. BACKGROUND

Plaintiff, a young woman with "severe ADD," purchased a condominium in Everett, Washington, and then defaulted on her mortgage payments. After the initiation of non-judicial foreclosure proceedings, she filed suit in Washington state court, alleging that Defendants-a group of lending organizations, banks, and foreclosure service providers-committed common-law torts and violations of federal and Washington statutes in connection with their issuance and administration of a deed of trust, and their subsequent foreclosure, on her home. (Compl. (Dkt. No. 2 at 49*et seq.*) Defendants removed the matter to this Court. (Notice of Removal 1-2 (Dkt. No. 1).) [2]

The instant motion for summary judgment concerns only one Defendant: Lender Processing Services ("LPS"). LPS "process[es] the necessary paperwork to pursue non-judicial foreclosure on behalf of its servicer and lender clients."(Allen Decl. (Dkt. No. 74 at 1).) LPS had contracts with Defendants IndyMac Bank (now IndyMac Federal Bank) and Mortgage Electronic Registration Systems ("MERS"). Under the contract with MERS, LPS [3] employees were "appointed as assistant secretaries and vice presidents of [MERS] and, as such, are authorized to ... execute any and all documents necessary to foreclose upon the property securing any mortgage loan registered on the MERS system ... including but not limited to (a) substitution of trustee on Deeds of Trust ..."(*Id.* at 12.)Similarly, LPS had separate contractual authority to execute documents as signing officers of IndyMac. (*Id.* at 19.)LPS maintains that it acted as an agent for these companies, pursuant to express contractual relationships that allowed its employees to sign as executive officers of MERS and IndyMac.

LPS's involvement with the foreclosure process on Plaintiff's home was as follows. Bethany Hood, an LPS employee, signed an "Assignment of Deed of Trust" on behalf of MERS, which transferred MERS's beneficial interest in Plaintiff's loan to IndyMac. (Dkt. No. 51 at 2; Dkt. No. 74 at 7.) Christina Allen, another LPS employee, signed an "Appointment of Successor Trustee" on behalf of IndyMac, which appointed Regional Trustee Service as the successor trustee under the deed of trust. (Dkt. No. 74 at 15; Dkt. No. 51 at 5.) Next to both signatures in both documents, the LPS employees listed "VP" or "AVP" as their titles-which apparently signified vice president of MERS and assistant vice president of IndyMac. (Resp. 5 (Dkt. No. 48).) LPS then sent those documents to Defendant Regional Trustee Service to be recorded. (Mot. 2 (Dkt. No. 73).) Both Bethany Hood and Christina Allen are listed as LPS employees authorized to sign on behalf of IndyMac and MERS. (Dkt. No. 74 at 13, 22.)

***2** Plaintiff alleges that Hood and Allen were "actively participating in fraudulently executing documents in connection with this foreclosure sale by making false representations regarding their employment capacity."(Compl. ¶ 2.6 (Dkt. No. 2 at 54).) She also maintains that no one had the authority to foreclose on her loan. (*Id.* at 6;*see also* Resp. 16 (Dkt. No. 48).) There are only two claims in the original Complaint against LPS. First, Plaintiff asserts that LPS, along with all Defendants, committed the tort of intentional infliction of emotional distress. (Compl. ¶ 3.6 (Dkt. No. 2 at 56).) Plaintiff also appears to assert a breach of fiduciary or quasi-fiduciary duty against LPS. (*Id.* ¶ 3.8, 3.9 (listing LPS in the body of the paragraphs, but not in the header). In her Response, Plaintiff also asserts that she "can prevail on her claims against Defendant LPS for violations of the Washington Consumer Protection Act," ("CPA") although she did not assert a CPA claim against LPS in her complaint. (*Compare* Resp. 20 (Dkt. No. 48)*with* Compl. ¶¶ 3.10, 3 .11 (Dkt. No. 2 at 57) (Consumer Protection Act claims asserted only against Metropolitan Mortgage).)

LPS now moves for summary judgment on all claims against it. First, LPS asserts that, at all material times, it was acting as an agent for other Defendants in this case, and is therefore not liable for actions taken within the scope of its authority. (Resp. 2 (Dkt. No. 73).) LPS also asserts, in the alternative, that Plaintiff cannot withstand summary judgment on her other claims, because she cannot prove their essential elements. (*Id.*)

## II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(c)(2), the Court shall grant summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."Summary judgment is appropriate against a nonmoving party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.*Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). That is, after the movant has carried its burden of demonstrating that there is no genuine issue of material fact, the burden shifts to the nonmovant, who must present a quantum of evidence such "that a reasonable jury could return a verdict" in its favor. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In determining whether summary judgment is appropriate, the Court must view the facts in the light most favorable to the non-moving party and draw reasonable inferences in its favor.*Scheuring v. Traylor Bros., Inc.,* 476 F.3d 781, 784 (9th Cir.2007).

## III. DISCUSSION

### A. Procedural challenges

Plaintiff asserts a few initial procedural challenges, none of which has merit. First, although Plaintiff does not contest that the documents attached as exhibits to declarations in Defendant's Motion were also disclosed to her, she nonetheless complains about the quality of LPS's initial disclosures, and asserts that the redactions in those documents are inappropriate. (Resp. 14 (Dkt. No. 48).) But Plaintiff does not explain how the redacted details would be relevant to the particular challenges brought in this motion. Nor does Plaintiff allege prejudice; nor did she bring a motion to compel at any time; nor did she challenge the redactions before this motion; nor did she, apparently, request *any* supplemental documentary discovery from LPS. (Spoonemore Decl. 2 (Dkt. No. 63).) Plaintiff's discovery challenges are meritless.

***3** Plaintiff also asserts that many of the documents used to support LPS's motion are hearsay. She misunderstands the kind of evidence used at summary judgment in the federal system. The challenged documents are authenticated by Greg Allen, the Assistant Vice President for Customer Support at LPS. He alleges that he has personal knowledge of the facts in his declarations, all of which deal with contracts between LPS and its customers, IndyMac and MERS. (Dkt. No. 64 at 1, Dkt. No, 74 at 1.) His declaration of personal knowledge is all that is required to authenticate a document, particularly at summary judgment, when a party need not produce evidence in a form that would be admissible at trial. FED.R.EVID. 901(b)(1).*Block v. City of Los Angeles,* 253 F.3d 410, 418-19 (9th Cir.2001). Plaintiff's challenges based on alleged evidentiary infirmities are also meritless.

**B. Agency**

Defendant first claims that Plaintiff cannot pursue claims against LPS for actions that were within the scope of its authority as an agent for IndyMac and MERS. (Mot. 2 (Dkt. No. 73).) In support of this contention, Defendant cites *Davis v. Baufus,* 3 Wash.App. 164, 473 P.2d 192, 193 (Wash.Ct.App.1970): "[A] complaint against a known agent, acting within the scope of his authority for a disclosed principal, fails to state a claim upon which relief can be granted against the agent."Plaintiff raises an army of arguments against application of this rule to her case, but she misses a vital point, which the Court would be remiss to ignore. *Davis* was a contract case. The rules of agency apply differently when the matter sounds in tort or remedial statute. In fact, "an agent, when sued for its own tortious act, may not avail itself of the immunities of its principal although it may have been acting at the direction of the principal."*Aungst v. Roberts Constr. Co., Inc.,* 95 Wash.2d 439, 625 P.2d 167, 168 (Wash.1981) (citing RESTATEMENT (SECOND) OF AGENCYY § 347 (1958)). Nor is there such immunity for statutory private rights of action, including the Consumer Protection Act. *Id.* at 169.The complaint alleges violations of common-law tort and statutory principles against LPS. The Court cannot, in fidelity to the law of Washington, hold that LPS's agency status alone grants it immunity.

**C. Intentional Infliction of Emotional Distress**

In Washington, the tort of outrage[4] requires the proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress. *Kloepfel v. Bokor,* 149 Wash.2d 192, 66 P.3d 630, 632 (Wash.2003) (citing cases). The first prong requires that the defendant have engaged in behavior "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."*Id.* (internal punctuation omitted) (citing *Grimsby v. Samson,* 85 Wash.2d 52, 530 P.2d 291 (Wash.1975) and RESTATEMENT (SECOND) OF TORTS § 46 cmt. d).

*4 The Court finds that LPS did not engage in outrageous conduct. Plaintiff conclusorily argues that she "was entitled to have the foreclosure conducted in conformity with the laws of the State of Washington, and not to be forced into a sale of her home by someone or some entity that did not have the legal authority to do so."(Resp. 19 (Dkt. No. 48).) But she neglects to discuss how *LPS,* particularly, caused her harm. LPS employees signed two papers that changed the ownership on her deed of trust. As far as can be discerned from the evidence before the Court, LPS had no direct contact with Plaintiff whatsoever. LPS's conduct in simply assigning the deed of trust and appointing a successor trustee, in reasonable accordance with contracts with IndyMac and MERS, simply does not "go beyond all possible bounds of decency," and cannot be regarded as "atrocious and utterly intolerable in a civilized community."*Kloepfel,* 66 P.3d at 632. Neither can Plaintiff prove the second prong of outrage. The emotional distress complained of must be inflicted intentionally or recklessly. Bad faith or malice is not enough to prove an outrage claim. *Dicomes v. State,* 113 Wash.2d 612, 782 P.2d 1002 (Wash.1989). Plaintiff has proffered no evidence whatsoever that LPS had the requisite intent. The Court finds as a matter of law that LPS is entitled to summary judgment on Plaintiff's claims of intentional infliction of emotional distress.

**D. Fiduciary Duty**

Plaintiff's complaint alleges that "Defendants IndyMac, MERS and [LPS] owed a fiduciary duty or quasi-fiduciary duty to Plaintiff.... Defendant Regional Trustee has a fiduciary duty as an alleged trustee under the [Deed of Trust Act]...." (Compl. ¶ 3.8, 3.9 (Dkt. No. 2 at 56).) Although Plaintiff's Complaint only mentioned the Washington Deed of Trust Act against Regional Trustee *alone,* it is apparent from her Responses to LPS's motion for summary judgment-so far as the Court can parse them-that Plaintiff believes that the Act created a fiduciary relationship between LPS and Plaintiff, too.

It did not. A deed of trust differs from a standard mortgage because it involves not only a lender and a borrower, but a neutral third party called the trustee. *Kezner v. Landover Corp.,* 87 Wash.App. 458, 942 P.2d 1003, 1007 n. 9 (1997).

Under Washington's Deed of Trust Act ("DTA"), a "trustee" is the person designated as the trustee in the deed of trust or appointed under the statute; the trustee holds an interest in the titled to the borrower's property on behalf of the lender. WASH. REV.CODE 61.24.005(13); *Kezner,* 942 P.2d at 1007 n. 9. It is true that the *trustee* bears an "exceedingly high" fiduciary duty towards both the mortgagee and mortgagor. *Cox v. Helenius,* 103 Wash.2d 383, 693 P.2d 683, 686 (Wash.1985). But Plaintiff concedes that Regional Trustee was the trustee on the deed of trust. (Resp. 11 (Dkt. No. 48).) Defendant LPS's employees "execute[d] documents *at the behest* of the foreclosing trustee."(Supp. Resp. 8 (Dkt. No. 66) (emphasis added).) Nowhere in *any* of her pleading papers or any of the documents on file does Plaintiff produce a scintilla of evidence that *LPS* was a trustee, such that its actions would be covered by the duties imposed by the DTA. Plaintiff forgets that, in order to incur a fiduciary duty, the particular party must, first, be a fiduciary. Such duties are not free-floating. Plaintiff has not carried her burden in demonstrating that there is a material issue of fact as to whether LPS had a fiduciary duty toward Plaintiff. [5] *Anderson,* 477 U .S. at 248.

***5** Plaintiff also made no argument to show that LPS was covered by a quasi-fiduciary obligation. She cites no cases for this proposition. The Court finds that, based on the circumstances of this case, LPS and Plaintiff were not in a "relationship [that] involve[d] more trust and confidence than is true of ordinary arm's length dealing."*Tokarz v. Frontier Fed. Sav. and Loan Ass'n,* 456, 33 Wash.App. 456, 656 P.2d 1089 (Wash.Ct.App.1982) (citing *Hutson v. Wenatchee Fed. Sav. & Loan Ass'n,* 22 Wash.App. 91, 588 P.2d 1192 (Wash.Ct.App.1978)).

Plaintiff finally attempts to resist summary judgment by arguing that there is an issue of fact as to the precise nature of the relationship between LPS and the other Defendants. (Resp. 13-19 (Dkt. No. 48).) But Plaintiff neglects to elucidate why this information would be relevant to the fundamental question of *whether LPS was a trustee,* such that a duty toward Plaintiff would arise under the Washington Deed of Trust Act. "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."*Anderson,* 477 U.S. at 248. There is no genuine issue of *material* fact. Defendant carried its burden. Summary judgment is therefore granted as to Plaintiff's DTA claims.

**E. Consumer Protection Act Claims**

For the first time in her Response, Plaintiff asserts Washington Consumer Protection Act ("CPA") claims against LPS. (Resp. 20 (Dkt. No. 48).) Even if the Court were to treat this unpleaded issue as properly presented, Plaintiff could not resist summary judgment by relying on it. The CPA prohibits "unfair or deceptive acts in the conduct of any trade or commerce."WASH. REV.CODE 19.86.020. To prevail in a private CPA action, a plaintiff must establish five distinct elements: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) that impacts the public interest; (4) injury to plaintiff in his or her business or property; and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wash.2d 778, 719 P.2d 531, 533 (Wash.1986).

Plaintiff conclusorily states that "LPS was and is engaged in numerous unfair and deceptive acts in order to increase their profits ... [and] speed along the foreclosure sale and benefit the other defendants to the detriment of Ms. Bain ... rather than acting in conformity with the DTA." [6] (Resp. 21 (Dkt. No. 48).) Reading her brief as liberally as possible, Plaintiff believes that LPS was giving "phony 'officer' titles to employees ... so that they can execute documents on [IndyMac and MERS]'s behalf giving the appearance of actual legal authority when in fact, Defendant LPS' employees are simply pushing paper in order to expedite the foreclosure of an individual's home." (Resp. 8 (Dkt. No. 48).) Whether the conduct constitutes an unfair or deceptive act can be decided by this court as a question of law. *Leingang v. Pierce County Med. Bureau, Inc.,* 131 Wash.2d 133, 930 P.2d 288, 297 (Wash.1997).

***6** The Court cannot find that LPS's use of the titles "vice president" and "assistant vice president" of MERS and IndyMac, pursuant to express contracts, was deceptive within the meaning of the CPA. First, LPS did not commit a "knowing failure to reveal something of material importance," because Plaintiff has not established materiality. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.,* 162 Wash.2d 59, 170 P.3d 10, 18 (Wash.2007). Plaintiff has articulated no theory, and cited no cases, that would demonstrate that letters "VP" or "AVP" next to the signatures were all material to the foreclosure process on Plaintiff's home. Moreover, LPS did not commit an "affirmative misrepresentation of fact," because of the simple fact that, for purposes of signing these papers, LPS misrepresented nothing: Allen and Hood *did* bear the titles that they used. The employees' use of the titles was expressly authorized by contracts with IndyMac [7] and MERS. Plaintiff admits that lists of LPS employees who are granted the power to sign documents on behalf of these entities are "attached to publicly available documents regularly."(Resp. 14 (Dkt. No. 48).) LPS openly and lawfully allows its employees to sign on behalf of its clients, pursuant to contract-which is the essence of ordinary agency action everywhere. There is simply nothing deceptive about using an agent to execute a document, and this practice is commonplace in deed of trust actions. *See, e.g., Russell v. Lundberg,* 120 P.3d 541, 544 (Utah Ct.App.2005) ("[I]t appears to be accepted practice for [deed of trust] trustees to use third parties to perform foreclosure activities"); *Buse,* 2009 WL 1543994, at *2 (citing cases).

**F. Final Observation**

The Court has not yet addressed the heart of Plaintiff's argument, which is that *no one* could initiate a foreclosure of Ms. Bain's loan, because no party has yet demonstrated the location or existence of the promissory note that established the original deed of trust. (*See* Resp. 16 (Dkt. No. 48).) That note was originally held by IndyMac Bank, FSB; after the bank failed, the FDIC assumed all rights, titles, powers, privileges, and operations of the failed institution. (Notice of Removal 2 (Dkt. No. 1).) The FDIC then created a new institution, IndyMac Federal Bank, FSB, to which it transferred "all of the insured deposits and substantially all of the assets of the failed institution."(*Id.*) The FDIC is now operating IndyMac Federal Bank. (*Id.*) Plaintiff apparently argues that, because no one has affirmatively produced evidence that the note is in possession of IndyMac Federal Bank, she was entitled to cease making payments on her mortgage altogether, "no matter how delinquent she might have been on her payments."(Resp. 16 (Dkt. No. 48).)

The Court need not tackle this argument today, because Plaintiff has not alleged any statute or common law principle that would allow her to proceed against *LPS particularly* on this theory. Neither common-law outrage, nor the CPA, nor the DTA-which are the only laws alleged-establish liability for this particular Defendant under these circumstances.

**IV. CONCLUSION**

*7 For the foregoing reasons, LPS's Motion for Summary Judgment (Dkt. No. 73) is GRANTED.

**All Citations**

Not Reported in F.Supp.2d, 2010 WL 891585

Footnotes

1 The Court issued a modified briefing schedule in consideration of ongoing discovery; based on the stipulation of the parties, Plaintiff was given an opportunity to supplement her Response after conducting a relevant deposition. (*See* Dkt. Nos. 55, 56.)Then the Court moved the trial date, struck the noting dates on two pending motions for summary judgment and invited the parties to reopen the motions later, if necessary. (Dkt. No. 71.)Defendant LPS immediately re-filed its motion. (Dkt. No. 73.)It was acceptable for Plaintiff to rest on her previously filed responsive briefing, and the Court assumes she did so.

2 Removal jurisdiction was predicated on the federal questions in the complaint, as well as the fact that IndyMac Bank, FSB, one of the Defendants, went into receivership in 2008 with the Federal Deposit Insurance Corporation ("FDIC") appointed as its receiver and successor in interest. Any civil suit in which the FDIC, in any capacity, is a party is "deemed to arise under the laws of the United States."12 U.S.C. § 1819(b)(2)(A).

3 LPS was formerly a subsidiary of Fidelity National Foreclosure Solutions, Inc., ("FSI"), and is now a spin-off company. (*See*Dkt. No. 21.)FSI is named in the relevant contracts, and was originally named as a party. The Court granted Plaintiff's motion to substitute LPS in place of FSI. (Order (Dkt. No. 29).) Where necessary in this Order, the Court thus simply substitutes LPS for FSI.

4 "Outrage" and "intentional infliction of emotional distress" are synonyms for the same tort. *Kloepfel v. Bokor,* 149 Wash.2d 192, 66 P.3d 630, 631 n. 1 (Wash.2003).

5 Nor did LPS exceed its authorities as an agent for the trustee. An agent may perform "mere ministerial acts" relating to a foreclosure.*Buse v. First Am. Title Co.,* C08-0510-MJP, 2009 WL 1543994, at *3 (W.D.Wash. May 29, 2009) (citing cases). That is precisely what LPS did here in assigning the deed of trust and appointing a successor trustee. Plaintiff did not allege that these actions involved discretion or judgment, and it is apparent from the record that they were simple preparation and dissemination of documents.

6 To the extent that Plaintiff is alleging that a violation of the DTA necessarily shoehorns her complaint into a violation of the CPA, this claim fails because the Court has found that Plaintiff failed to allege that LPS has any fiduciary duty under the DTA.

7 Plaintiff also asserts that, when IndyMac was placed into receivership, and the FDIC created IndyMac Federal Bank, Hood had no authority under the contract to sign for IndyMac, because the *specific named* entity no longer existed. (Resp. 8 (Dkt. No. 48) .)But Plaintiff has not coherently explained why the change in ownership gave Allen's signature "the capacity to deceive a substantial portion of the public."*Indoor Billboard,* 170 P.3d at 19 (Wash.2007). There is no material issue of fact here.

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**End of Document**

2013 WL 4522253
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Tacoma.

Edward C. BOROWSKI, Plaintiff,
v.
BNC MORTGAGE, INC.; Lehman Brothers Holdings, Inc.; Structured Asset Securities Corporation; Structured Asset Investment Loan Trust 2004–2; Bank of America, NA; Jpmorgan Chase Bank, NA; and Mortgage Electronic Registration Systems (Mers); All Persons Claiming By, Through or Under Such Person, all Persons Unknown, Claiming Any Legal or Equitable Title, Estate, Lien or Interest in the Property Described in the Complaint Adverse to Plaintiff's Title Thereto; and Does 1 to 10, inclusive, Defendants.

No. C12–5867 RJB. | Aug. 27, 2013.

**Attorneys and Law Firms**

Edward C. Borowski, Camas, WA, pro se.

Daniel E. Stowe, Michael J. McMahon, Etter McMahon Lamberson Clary Tpoppmann & Oreskovich, Spokane, WA, for Defendants.

## ORDER ON CROSS–MOTIONS FOR SUMMARY JUDGMENT

ROBERT J. BRYAN, District Judge.

***1** This matter comes before the Court on cross-motions for summary judgment. Defendants JPMorgan Chase Bank, NA (Chase) and Mortgage Electronic Registration Systems, Inc. (MERS) move to dismiss Plaintiff's complaint and causes of action in their entirety. Dkt. 22. In filing a response, the Plaintiff has filed a "countermotion" for summary judgment. Dkt. 26. The Court has considered the pleadings in support of and in opposition to the motions and the record herein.

## INTRODUCTION AND BACKGROUND

This is an action brought by Plaintiff Edward C. Borowski for declaratory judgment and to quiet title. Dkt. 1 pp. 1–2. As alleged in Plaintiff's *pro se* Complaint, Plaintiff is the current owner of certain real property located at 23613 Northeast 9th Street–Camas, Washington (Property). Dkt. 1 p. 2. Plaintiff disputes the current mortgage recorded against title to this property, "in that originating mortgage lender, and others alleged to have ownership, have unlawfully sold, assigned and/or transferred their ownership and security interest in a Promissory Note and mortgage related to the Property, and, thus, do not have lawful ownership or a security interest in Plaintiff's home."Dkt. 1 pp. 2. Plaintiff seeks a declaration of interests in the property and for the cancellation of his mortgage. *Id.* Plaintiff's Complaint asserts the following causes of action (1) quiet title, (2) declaratory relief, (3) violation of the Real Estate and Settlement Procedures Act, 12 U.S.C. § 2601, *et seq.,* and (4) violation of the Truth in Lending Act, 15 U.S.C. § 1641(g). Dkt. 1.[1] Within the Complaint, Plaintiff acknowledges that he has a mortgage on the subject property (Dkt. 1 p. 2), that the Defendant Chase is servicing the "underlying promissory note and associated mortgage" (Dkt. 1 pp. 2–3), and that the Defendant MERS is identified as the "Beneficiary under the Mortgage or mortgage associated with Plaintiffs Note" (Dkt 1 p. 10).

In support of the motion for summary judgment, Defendants Chase and MERS have introduced documentary evidence that on November 6, 2003, as part of the original loan documents for the subject property, the Plaintiff executed an "Adjustable Rate Note" promising to pay $185,000.00 and a "Deed of Trust" with the lender BNC Mortgage, Inc. Dkt. 23–1 pp. 2–5; Dkt. 23–1 pp. 7–21. On November 15, 2011, the Plaintiff executed a "Loan Modification Agreement" with CHASE bearing an effective date of December 1, 2011. Dkt. 23–1 pp. 23–28. The 2011 Loan Modification Agreement necessarily makes reference to and, as indicated, modifies the first lien "Security Instrument" and "Note" which were executed by the Plaintiff in 2003. Dkt. 23–1 p. 23. As it relates to MERS and CHASE, respectively, the Loan Modification Agreement provides in paragraphs K and L as follows:

> K. That MERS holds only legal title to the interests granted by the Borrower in the mortgage, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of lender

 

including, but not limited to, releasing and cancelling the mortgage Loan.

> ***2** L. I acknowledge and agree that if the Lender executing this Agreement [CHASE] is not the current holder or owner of the Note and Mortgage, that such party is the authorized servicing agent for such holder or owner, or its successor in interest, and has full power and authority to bind itself and such holder and owner to the terms of this modification.

Dkt. 23–1 p. 26.

The Deed of Trust executed by the Plaintiff in 2003 provides that MERS is acting as a nominee, or agent, for the original lender BNC Mortgage, Inc., and the lender's successors and assigns. Dkt. 23–1 p. 7–8. The Deed of Trust also provides that MERS is the beneficiary under the security instrument. *Id.* The Adjustable Rate Note executed by the Plaintiff in 2003 contains the rights and obligations of the respective parties which include (1) Borrower's Promise to Pay; (2) Borrower's Failure to Pay as Required; (3) Giving of Notices; (4) Obligations of Persons Under this Note"; and (4) Secured Note. Dkt. 23–1 pp. 2–4.

In response to Defendants' motion for summary judgment, and apparently in support of his counter motion for summary judgment, the Plaintiff has filed a multitude of documents, most which appear irrelevant to the claims made in his Complaint. See Dkt. 25–40. Plaintiff "cannot expect the Court to comb the record and make the party's case for it."*Fye v. Oklahoma Corp. Comm'n,* 516 F.3d 1217, 1223 (10th Cir.2008). A review of the record does reveal that many of Plaintiffs allegations appear to be based upon a document entitled "Closed Loan Forensic Loan Securitization Legal Chain of Title and Analysis Report" that Plaintiff obtained from a company called Audit Pros Inc., and the accompanied affidavit of Javier A. Taboas, a purported expert on residential mortgage finance transactions. Dkt. 31–Dkt. 39. Despite the volume of materials, including the analysis of the chain of ownership of the Deed of Trust and Note, Plaintiffs submissions do not support any of Plaintiffs claims.

## SUMMARY JUDGMENT STANDARDS

Summary judgment is appropriate only when the pleadings, depositions, answers to interrogatories, affidavits or declarations, stipulations, admissions, answers to interrogatories, and other materials in the record show that "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law."Fed.R.Civ.P. 56(a). In assessing a motion for summary judgment, the evidence, together with all inferences that can reasonably be drawn there from, must be read in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

The moving party bears the initial burden of informing the court of the basis for its motion, along with evidence showing the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). On those issues for which it bears the burden of proof, the moving party must make a showing that is sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party.*Idema v. Dreamworks, Inc.,* 162 F.Supp.2d 1129, 1141 (C.D.Cal.2001).

***3** To successfully rebut a motion for summary judgment, the non-moving party must point to facts supported by the record which demonstrate a genuine issue of material fact. *Reese v. Jefferson Sch. Dist. No. 14J,* 208 F.3d 736 (9th Cir.2000). A "material fact" is a fact that might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute regarding a material fact is considered genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."*Anderson,* at 248.There must be specific, admissible evidence identifying the basis for the dispute.*S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co., Inc.,* 690 F.2d 1235, 1238 (9th Cir.1980). The mere existence of a scintilla of evidence in support of the party's position is insufficient to establish a genuine dispute; there must be evidence on which a jury could reasonably find for the party. *Anderson.* at 252.

## QUIET TITLE

The portions of Plaintiffs Complaint relating to the quiet title claim allege as follows:

> The basis for Plaintiff seeking of quiet title is that the current mortgage security instrument held against title is invalid in that it lists MERS as a beneficiary of the mortgage. As cited previously, if MERS is a beneficiary

 

> of a security instrument, then that security instrument is invalid.
>
> ...
>
> Plaintiff is entitled to equitable relief and quiet title ... declaring Plaintiff to be the title owner of record of the property as to effective date of said cancellation of any Mortgage recorded against title and quieting Plaintiffs title therein[.] ... Plaintiffs Note has been paid off. All of Plaintiffs Note obligations have been satisfied.

Dkt. 1 pp. 17–18.

Quiet title actions are "designed to resolve competing claims of ownership ... [or] the right to possession of real property."*Kobza v. Tripp,* 105 Wash.App. 90, 95, 18 P.3d 621 (2001). Washington's statute governing quiet title actions recognizes that a deed of trust creates only a secured lien on real property, and does not convey any ownership interest or right to possess the subject property. RCW 7.28.230(1).

The fact that MERS cannot lawfully act as a beneficiary under the Deed of Trust does not void the Deed of Trust. As the Washington Supreme Court stated in *Bain v. Metropolitan Mortg. Group,* 175 Wash.2d 83, 285 P.3d 34 (2012), it had been presented with "no authority ... for the suggestion that listing an ineligible beneficiary on a deed of trust would render the deed void and entitle the borrower to quiet title."*Id.* p. 112, 285 P.3d 34. While declining to address the question, the court stated that it "tend[s] to agree" with MERS' argument that "any violation of the deed of trust act should not result in a void deed of trust, both legally and from a public policy standpoint."*Id.* p. 114, 285 P.3d 34. Plaintiff's claim that the title is void because MERS is designated a beneficiary of the Deed of Trust is without merit.

***4** A quiet title claim against a mortgagee requires an allegation that the mortgagor is the rightful owner of the property, that is, that the mortgagor has paid an outstanding debt secured by the mortgage. If the action is against a purported lender or otherwise involves a deed of trust, a plaintiff must also allege facts demonstrating they have satisfied their obligations under the deed of trust. See *Kelley v. MERS, Inc.,* 642 F.Supp.2d 1048, 1057 (N.D.Cal.2009). Although Plaintiff contends that he has paid the debt owed on the mortgage loan, the evidence is clear that there is an outstanding balance owed by Plaintiff. Plaintiff cannot show the required prerequisite for a quiet title action.

Plaintiff's quiet title claim will be dismissed with prejudice.

## DECLARATORY RELIEF

Plaintiff's Complaint provides the following allegations against the Defendants in the cause of action seeking declaratory relief:

> Plaintiff contends that [CHASE] has no legal right to collect mortgage payment relating to the mortgage recorded against title of Plaintiffs property.
>
> Plaintiff contends that ... MERS cannot validly assign its interests in a mortgage or deed of trust. As such the appointment of MERS renders any mortgage or deed of trust listing MERS as beneficiary as a void instrument.
>
> Plaintiff therefore request[s] a judicial determination of the rights, obligations and interest of the parties with regard to the Property [.]

Dkt. 1 pp. 19.

The Declaratory Judgment Act, 28 U.S.C. § 2201, provides a federal court with discretionary jurisdiction to hear declaratory judgment actions. *Gov't Employees Ins. Co. v. Dizol,* 133 F.3d 1220, 1223 (9th Cir.1998). The Act states that in a case of actual controversy within its jurisdiction any court of the United States may declare the rights and other legal relations of any interested party seeking such declaration. 28 U.S.C. § 2201. This is an incorporation of the Article III constitutional case or controversy requirement. *Principal Life Ins. Co. v. Robinson,* 394 F.3d 665, 669 (9th Cir.2005).

One element of the case-or-controversy requirement is that Plaintiffs must establish that they have standing to sue. *Raines v. Byrd,* 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997). To establish Article III standing, a Plaintiff must establish an invasion of a legally protected interest which must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling."*Monsanto Co. v. Geertson Seed Farms,* —— U.S. ——, 130 S.Ct. 274, 275, 175 L.Ed.2d 134 (2010).

Plaintiff has not alleged an imminent injury traceable to the Defendants, nor is the controversy in this case of sufficient immediacy to warrant declaratory relief. There is no allegation in the Complaint that any of these Defendants have begun or threatened to initiate foreclosure proceedings. Although, at some point, it is possible someone might commence foreclosure proceedings against Plaintiff, there is no evidence that any of the Defendants have done so yet, and there is no allegation showing that foreclosure proceedings are imminent. The claimed threat of numerous foreclosure actions, from entities that may or may not have authority to foreclose, is speculative because they are future events that may never occur. The request that the Court determine the legal rights of the parties in order to preclude anyone from initiating foreclosure proceedings is in actuality a request for an advisory opinion, which the court may not give. Plaintiff's allegations are insufficient to show there exists a substantial controversy of sufficient immediacy to warrant declaratory relief.

***5** The Court need not engage in a lengthy analysis of Plaintiff's underlying theories of recovery. They are not independent causes of action and lack of any legal authority. First, to the extent Plaintiff claims his note is invalid because no Defendant can produce the original notes, a discredited serially advanced theory known as the "show me the note" theory, the Washington Deed of Trust Act does not require that a mortgage servicer or mortgagee produce the original note to the borrower on demand or prior to foreclosure. Rather, Washington law requires that the foreclosing lender demonstrate proof of beneficial ownership of the underlying note to the trustee. RCW 61.24.030(7)(a); *Bain v. Metr. Mortg. Group, Inc.,* 175 Wash.2d 83, 285 P.3d 34 (2012). Second, Plaintiffs' contention that separation of the Note from their Deeds of Trust render the Note unenforceable or excuses payment is contrary to *Cervantes v. Countrywide Home Loans, Inc.,* 656 F.3d 1034, 1044 (9th Cir.2011) (rejecting the "separation of the note" theory). Third, there is no authority which provides that the failure to appoint a successor trustee on the Deed of Trust is a basis for extinguishing the instrument. Indeed, RCW 61.24.010(2) sets out a process for appointing a replacement or successor trustee. Fourth, there is ample authority that borrowers, as third parties to the assignment of their mortgage (and securitization process), cannot mount a challenge to the chain of assignments unless a borrower has a genuine claim that they are at risk of paying the same debt twice if the assignment stands. Finally, the *Bain* decision does not stand for the proposition that naming MERS as a beneficiary on a Deed of Trust voids the deed or invalidates a lender's entitlement to repayment on the loan. The *Bain* Court specifically stated that it "tended to agree" that a violation of the Deed of Trust Act "should not result in a void deed of trust."*Bain,* 175 Wash.2d 83, 113, 285 P.3d 34 (2012). At present Plaintiff has asserted no more than a mere demand that Defendants prove their legal status with respect to the Deed of Trust and Note. This does not suffice to establish a case or controversy.

Plaintiff is not entitled to declaratory judgment and this claim is subject to dismissal.

## REAL ESTATE AND SETTTLEMENT PROCEDURES ACT

Plaintiff's third cause of action alleges violations of the Real Estate Settlement and Procedures Act (RESPA):

> The loans to Plaintiff by Defendants, BNC MORTGAGE, INC. are federally regulated mortgage loans defined in the Real Estate Settlement Procedures Act ("RESPA") ...
>
> Defendants have violated [RESPA] 12 U.S.C. § 2607(a) which provides: that "no person shall give and no person shall accept any fee, kickback or thing of value pursuant to any agreement or understanding, oral or otherwise that business incident to or a part of a real estate settlement service involving a federal related mortgage loan shall be referred to any person."
>
> ***6** Defendants also violated [RESPA], 12 U.S.C. § 2607(b) which provides that "no person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed."

Dkt. 1 p. 20.

Plaintiff makes reference to the Defendants generically and makes no specific reference to Defendants Chase and MERS in the allegations relating to RESPA violations. See Dkt. 1 pp. 20–22. Plaintiff's RESPA claim, to the extent that it is asserted against the moving Defendants, should be dismissed. Plaintiff makes allegations regarding the original loan, but does not dispute that these Defendants were not involved in that transaction. Plaintiff had failed to plead factual allegations which would entitle Plaintiff to relief under RESPA against Defendants Chase or MERS.

The Defendants are entitled to summary judgment and dismissal of the RESPA claim.

 

### TRUTH IN LENDING ACT

Plaintiff's fourth cause of action alleges violations of the Truth in Lending Act (TILA). Plaintiff alleges:

> Plaintiff alleges that each assignment of his/her promissory note/mortgage required the Defendants and each of them to notify him/her within thirty (30) days of when his loan had been transferred. Plaintiff contends that each Defendant violated 15 U.S .C. § 1640, et seq. in that no notice was ever provided to the Plaintiff of the sale of his/her promissory note to each subsequent purchaser of their note.

Dkt. 1 p. 23.

Initially, it appears that Chase is the loan servicer, not "the creditor that is the new owner or assignee of the debt" as set forth in the statute, and therefore, Chase cannot have violated this provision. In addition, the Court acknowledges that the TILA claims may be time-barred based on the relevant statutes of limitation. Plaintiff has not provided evidence as to when these alleged violations were to have occurred. The Court makes no finding as to the timeliness of the TILA claims. Further, the failure to comply with the notice provisions results in civil liability for "any actual damage sustained by such person as a result of the failure [.]"15 U.S.C. § 1640(a)(1). In order to state a TILA claim for actual damages, a plaintiff must demonstrate detrimental reliance upon an inaccurate or incomplete disclosure. *Gold Country Lenders v. Smith,* 289 F.3d 1155, 1157 (9th Cir.2002).

Plaintiff has not alleged any facts demonstrating or supporting the inference that he relied to his detriment on the lack of TILA disclosures nor has Plaintiff alleged any actual damages or finance charges related to Chase or MERS alleged TILA violation.

The TILA claim fails and Defendants are entitled to summary judgment.

### CONCLUSION

Based on the foregoing the defendants Chase and MERS are entitled to summary judgment dismissing Plaintiff's Complaint.

*7 Therefore, it is ORDERED:

1. Defendants JPMorgan Chase Bank, NA and Mortgage Electronic Registration Systems, Inc.'s Motion for Summary Judgment (Dkt.22) is **GRANTED.**

2. Plaintiff's Counter Motion for Summary Judgment (Dkt.26) is **DENIED.**

3. Plaintiff's Complaint and causes of action in their entirety are **DISMISSED WITH PREJUDICE** as to Defendants JPMorgan Chase Bank, NA and Mortgage Electronic Registration Systems, Inc.'s

4. The Clerk is directed to send uncertified copies of this Order to all counsel of record and to Plaintiff, appearing *pro se,* at said party's last known address.

**All Citations**

Slip Copy, 2013 WL 4522253

Footnotes

1 Of the multiple Defendants named in the Complaint, only Chase and MERS have appeared in this action. Dkt. 6 and Dkt. 7. The remaining named Defendants do not appear to have been properly served. See Dkt. 10 and Dkt. 11.

**End of Document**

579 Fed.Appx. 592 (Mem)
This case was not selected for publication in West's Federal Reporter.
Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)
United States Court of Appeals, Ninth Circuit.

Deborah A. BRODIE, Plaintiff–Appellant,
v.
NORTHWEST TRUSTEE SERVICES, INC.; et al., Defendants–Appellees.

No. 13–35023. | Argued and Submitted June 4, 2014. | Filed June 18, 2014.

**Attorneys and Law Firms**

Craig Elkins, Esquire, Magnum Law Group PLLC, Kirkland, WA, for Plaintiff–Appellant.

***593** John Anthony McIntosh, Joshua Schaer, Esquire, Routh Crabtree Olsen, P.S., Bellevue, WA, Frederick B. Burnside, Esquire, Hugh Robert McCullough, Davis Wright Tremaine LLP, Seattle, WA, for Defendants–Appellees.

Appeal from the United States District Court for the Eastern District of Washington, Thomas O. Rice, District Judge, Presiding. D.C. No. 2:12–cv–00469–TOR.

Before: McKEOWN and WATFORD, Circuit Judges, and ROTHSTEIN, Senior District Judge. *

**MEMORANDUM** **

**1.** The district court properly dismissed Deborah Brodie's wrongful foreclosure claim because she failed to allege a plausible claim for relief. Brodie concedes that she defaulted on her loan and cannot dispute that the noteholder would be entitled to foreclose. *See Trujillo v. Nw. Tr. Servs., Inc.,* 326 P.3d 768, 773–76, 2014 WL 2453092, at *5–8 (Wash.Ct.App. June 2, 2014). As evidenced by the documents Brodie herself submitted to the district court, U.S. Bank National Association ("U.S.Bank") holds the note as trustee for the WaMu trust. The fact that U.S. Bank chose to act through its authorized agent, JPMorgan Chase Bank, does not alter its right to foreclose and to appoint a successor trustee under the Washington Deed of Trust Act. *See Bain v. Metro. Mortg. Grp., Inc.,* 175 Wash.2d 83, 285 P.3d 34, 45 (2012) (en banc). Brodie has not alleged any facts that would have prevented Northwest Trustee Services from relying on U.S. Bank's beneficiary declaration. Under these circumstances, the declaration made under penalty of perjury satisfied Revised Code of Washington § 61.24.030(7)(a). *See Trujillo,* 326 P.3d at 780–781, 2014 WL 2453092, at *12–13.

**2.** The district court also correctly concluded that Brodie lacks standing to challenge the transfer and assignment of the note and deed of trust. She is neither a party to nor a beneficiary of the assignment and transfer. Even assuming Brodie has alleged defects in the transfer of the note and deed of trust, she has not alleged facts showing why any of the purported defects would render the assignment void or otherwise affect the noteholder's right to foreclose. *See, e.g., Bavand v. OneWest Bank, F.S.B.,* 176 Wash.App. 475, 309 P.3d 636, 642–44 (2013).

**3.** The district court did not abuse its discretion by denying leave to amend. Brodie had at least two opportunities to substantively amend her complaint. Any further amendment would be futile because U.S. Bank could legally foreclose on her defaulted loan, and Brodie lacks standing to challenge the assignment and transfer of the note and deed of trust. *See Allen v. City of Beverly Hills,* 911 F.2d 367, 373–74 (9th Cir.1990).

**AFFIRMED.**

**All Citations**

579 Fed.Appx. 592 (Mem)

Footnotes

* The Honorable Barbara Jacobs Rothstein, Senior District Judge for the U.S. District Court for the Western District of Washington, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

End of Document

656 F.3d 1034
United States Court of Appeals,
Ninth Circuit.

Olga CERVANTES, an unmarried woman; Carlos Almendarez, a married man; Arturo Maximo, a married man, individually and on behalf of a class of similarly situated individuals, Plaintiffs–Appellants,
v.
COUNTRYWIDE HOME LOANS, INC., a New York corporation; Mortgage Electronic Registration Systems, Inc., a subsidiary of MERSCORP, Inc., a Delaware corporation; MERSCORP, Inc.; Federal Home Loan Mortgage Corporation, a foreign corporation, aka Freddie Mac; Federal National Mortgage Association, a foreign corporation; GMAC Mortgage, LLC, a Delaware corporation; National City Mortgage, a foreign company and a division of National City Bank, a foreign company; J.P. Morgan Chase Bank, N.A., a New York corporation; Citimortgage, Inc., a New York corporation; HSBC Mortgage Corporation, U.S.A., a Delaware corporation; AIG United Guaranty Corporation, a foreign corporation; Wells Fargo Bank, N.A., a California corporation, dba Wells Fargo Home Equity; Bank of America, N.A., a foreign corporation; GE Money Bank, a foreign company; PNC Financial Services Group, Inc., a Pennsylvania corporation; National City Corporation, a subsidiary of PNC Financial Services Group; National City Bank, a subsidiary of National City Corporation; Merrill Lynch & Company, Inc., a subsidiary of Bank of America Corporation; First Franklin Financial Corporation, a subsidiary of Merrill Lynch & Company, Inc.; LaSalle Bank, N.A., a subsidiary of Bank of America; Tiffany & Bosco P.A., an Arizona professional association, Defendants–Appellees.

No. 09–17364. | Argued and Submitted Feb. 16, 2011. | Filed Sept. 7, 2011.

**Synopsis**

**Background:** Mortgagors brought putative class action against mortgagees, trustees under deeds of trust, and others, alleging that defendants engaged in conspiracy to use Mortgage Electronic Registration System (MERS) to commit fraud, and also asserting claims that mortgagees violated Truth in Lending Act (TILA) and Arizona Consumer Fraud Act, and committed tort of intentional infliction of emotional distress by targeting mortgagors for loans they could not repay. Defendants moved to dismiss for failure to state claim. The United States District Court for the District of Arizona, James A. Teilborg, J., 2009 WL 3157160, granted motion and dismissed complaint without leave to amend. Mortgagors appealed.

**Holdings:** The Court of Appeals, Callahan, Circuit Judge, held that:

[1] mortgagors insufficiently alleged fraud by defendants, as required to state claim for conspiracy to commit fraud;

[2] district court acted within its discretion in dismissing complaint without granting mortgagors' oral request for leave to amend to add wrongful foreclosure claim;

[3] trustee under deed of trust had no obligation to consider whether its presumptively legal appointment by MERS, as beneficiary under deed of trust, was invalid, and deed trustee was thus properly dismissed from action;

[4] mortgagors' claims against mortgagees for violation of TILA and Arizona Consumer Fraud Act accrued, and one-year statutes of limitations began to run, when mortgagors executed their loan documents;

[5] one-year limitations period for claims for violation of TILA disclosure requirement was not equitably tolled; and

[6] mortgagors' allegations were insufficient to form basis for equitable estoppel of one-year limitations period for claims for violation of TILA disclosure requirement.

Affirmed.

West Headnotes (22)

**[1]** **Mortgages**
⇐ Under mortgage
**Mortgages**

⇒ Under trust deed

To have the legal power to foreclose mortgage, trustee appointed to initiate foreclosure must have authority to act as holder, or agent of holder, of both the deed of trust or mortgage that transfers legal title in the property as collateral, and the promissory note to repay the loan, because a holder of the note alone is only entitled to repayment, and does not have the right under the deed to use the property as means of satisfying repayment, while a holder of the deed alone does not have right to repayment and, thus, does not have interest in foreclosing on property to satisfy repayment.

68 Cases that cite this headnote

[2] **Federal Courts**
⇒ Pleading

Court of Appeals reviews de novo the district court's dismissal for failure to state a claim. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

19 Cases that cite this headnote

[3] **Federal Courts**
⇒ Pleading

The district court's denial of leave to amend the complaint is reviewed for an abuse of discretion.

83 Cases that cite this headnote

[4] **Federal Civil Procedure**
⇒ Pleading over

Although leave to amend should be given freely, a district court may dismiss for failure to state a claim without leave to amend where a plaintiff's proposed amendments would fail to cure the pleading deficiencies and amendment would be futile. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

86 Cases that cite this headnote

[5] **Evidence**
⇒ Proceedings in other courts

On appeal of dismissal for failure to state claim, without leave to amend, in mortgagors' putative class action alleging that mortgagees engaged in conspiracy to use Mortgage Electronic Registration System (MERS) to commit fraud, Court of Appeals would not take notice of district court orders that dismissed complaints without prejudice in pending multidistrict litigation concerning MERS, because the orders were irrelevant.

5 Cases that cite this headnote

[6] **Conspiracy**
⇒ Pleading

**Mortgages**
⇒ Between parties to mortgage or their privies

Mortgagors insufficiently alleged fraud by mortgagees, deed trustees, and others, as required to state claim under Arizona law that defendants engaged in conspiracy to commit fraud by designating Mortgage Electronic Registration System (MERS) as sham beneficiary under trust deed and by using MERS to facilitate predatory lending practices; mortgagors identified no misrepresentations made to them about MERS, its role as beneficiary, or possibility that mortgages would be resold and tracked through MERS, and mortgagors neither alleged that they relied on misrepresentations about MERS nor that designation of MERS as beneficiary caused them injury.

13 Cases that cite this headnote

[7] **Conspiracy**
⇒ Nature and Elements in General

Under Arizona law, a claim of civil conspiracy must be based on an underlying tort.

4 Cases that cite this headnote

[8] **Fraud**
⇒ Elements of Actual Fraud

Under Arizona law, to show fraud, a plaintiff must identify: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it be acted upon by the recipient in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the right to rely on it; and (9) his consequent and proximate injury.

6 Cases that cite this headnote

[9] **Mortgages**
Signature or subscription

Under Arizona law, by signing deed of trust, grantor agrees to deed's terms and is put on notice of deed's contents.

30 Cases that cite this headnote

[10] **Federal Civil Procedure**
Pleading over

District court acted within its discretion in dismissing mortgagors' complaint against mortgagees and deed trustees without granting mortgagors' oral request for leave to amend to add wrongful foreclosure claim; mortgagors failed to comply with local rule that required submission of proposed amended complaint along with motion for leave to amend, and failed to provide district court with explanation of legal and factual grounds for adding wrongful foreclosure claim. U.S.Dist.Ct.Rules D.Ariz., Rule 15.1.

40 Cases that cite this headnote

[11] **Federal Courts**
Anticipating or predicting state decision

Although a federal court exercising diversity jurisdiction is at liberty to predict the future course of a state's law, plaintiffs choosing the federal forum are not entitled to trailblazing initiatives under state law.

4 Cases that cite this headnote

[12] **Mortgages**
Wrongful Foreclosure

Mortgagors were in default and failed to identify injury resulting from foreclosures, and mortgagees and deed trustees thus had no liability for wrongful foreclosure under Arizona law as predicted by Court of Appeals.

32 Cases that cite this headnote

[13] **Mortgages**
Under trust deed

Even if designation of Mortgage Electronic Registration System (MERS) as beneficiary under deeds of trust was a sham, mortgagees were still entitled to repayment of mortgage loans under Arizona law and were the proper parties to initiate foreclosure in the event of mortgagors' defaults.

26 Cases that cite this headnote

[14] **Mortgages**
Under trust deed

Under Arizona law, designation of Mortgage Electronic Registration System (MERS) as beneficiary under deeds of trust did not irreparably split deeds from promissory note and render mortgage unenforceable by MERS or deed trustees; split only rendered mortgage unenforceable if MERS or deed trustees, as nominal holders of deeds, were not acting as agents of lenders, which held notes and were entitled to repayment thereon.

58 Cases that cite this headnote

[15] **Conspiracy**
Conspiracy to defraud

**Mortgages**
Rights, duties and liabilities of trustee in general

**Mortgages**
Between parties to mortgage or their privies

Under Arizona law, trustee under deed of trust had no obligation to consider whether its presumptively legal appointment by Mortgage Electronic Registration System (MERS), as beneficiary under deed of trust, was invalid because of mortgagee's allegedly sham designation of MERS as beneficiary, and deed trustee was thus properly dismissed from mortgagors' action alleging mortgagee and deed trustee engaged in conspiracy to use MERS to commit fraud; only breach of obligation alleged against trustee was its failure to recognize its appointment was invalid, and trustee would otherwise be bound by any order entered against MERS for actions that trustee took on behalf of MERS. A.R.S. §§ 33–807(E), 33–820(A).

49 Cases that cite this headnote

[16] **Limitation of Actions**
⇒ Motion

A district court may dismiss a claim on limitations grounds if the running of the statute of limitations is apparent on the face of the complaint, but may do so only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled.

30 Cases that cite this headnote

[17] **Limitation of Actions**
⇒ Consumers' remedies

Mortgagors' claims against mortgagees for violation of TILA and Arizona Consumer Fraud Act accrued, and one-year statutes of limitations began to run, when mortgagors executed their loan documents, because mortgagors could have discovered the alleged disclosure violations and discrepancies at that time. Truth in Lending Act, § 130(e), 15 U.S.C.A. § 1640(e); A.R.S. § 12–541(5).

26 Cases that cite this headnote

[18] **Limitation of Actions**
⇒ Suspension or stay in general; equitable tolling

Court will apply equitable tolling of limitations period in situations where, despite all due diligence, the party invoking equitable tolling is unable to obtain vital information bearing on the existence of the claim.

36 Cases that cite this headnote

[19] **Limitation of Actions**
⇒ Suspension or stay in general; equitable tolling

One-year limitations period for mortgagors' claims against mortgagees for violation of TILA disclosure requirement was not equitably tolled, although mortgagors spoke only Spanish but received loan documents written in English, absent circumstances beyond mortgagors' control that prevented them from seeking a translation of the loan documents that they signed and received. Truth in Lending Act, § 130(e), 15 U.S.C.A. § 1640(e).

15 Cases that cite this headnote

[20] **Limitation of Actions**
⇒ Estoppel to rely on limitation

"Equitable estoppel" halts the statute of limitations when there is active conduct by a defendant, above and beyond the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff from suing in time.

8 Cases that cite this headnote

[21] **Consumer Credit**
⇒ Pleading and evidence

**Limitation of Actions**
⇒ Estoppel to rely on limitation

Mortgagors' allegations that mortgagees "fraudulently misrepresented and concealed the true facts related to the items subject to [TILA] disclosure" were insufficient to form basis for equitable estoppel of one-year limitations period for mortgagors' claims against mortgagees for violation of TILA disclosure requirement; mortgagors failed to specify what true facts were at issue, or to establish that the alleged misrepresentation and concealment of facts was above and beyond the wrongdoing that formed the basis for their TILA claims. Truth in Lending Act, § 130(e), 15 U.S.C.A. § 1640(e).

10 Cases that cite this headnote

**[22] Damages**
⇒ Debt collection practices

Mortgagors' allegations, that mortgagees offered them loans that mortgagees knew mortgagors could not repay, insufficiently alleged extreme and outrageous conduct, as required under Arizona law to state claim for intentional infliction of emotional distress.

14 Cases that cite this headnote

**Attorneys and Law Firms**

***1037** William A. Nebeker and Valerie R. Edwards, Koeller Nebeker Carlson & Haluck, LLP, Phoenix, AZ, and Robert Hager and Treva Hearne, Hager & Hearne, Reno, NV, for appellants.

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***1038** Appeal from the United States District Court for the District of Arizona, James A. Teilborg, District Judge, Presiding. D.C. No. 2:09–cv–00517–JAT.

Before: RICHARD C. TALLMAN, JOHNNIE B. RAWLINSON, * and CONSUELO M. CALLAHAN, Circuit Judges.

**OPINION**

CALLAHAN, Circuit Judge:

This is a putative class action challenging origination and foreclosure procedures for home loans maintained within the Mortgage Electronic Registration System (MERS). The plaintiffs appeal from the dismissal of their First Amended Complaint for failure to state a claim. In their complaint, the plaintiffs allege conspiracies by their lenders and others to use MERS to commit fraud. They also allege that their lenders violated the Truth in Lending Act (TILA), 15 U.S.C. § 1601 et seq., and the Arizona Consumer Fraud Act, Ariz.Rev.Stat. § 44–1522, and committed the tort of intentional infliction of emotional distress by targeting the plaintiffs for loans they could not repay. The plaintiffs were denied leave to file their proposed Second Amended Complaint, and to add a new claim for wrongful foreclosure based upon the operation of the MERS system.

On appeal, the plaintiffs stand by the sufficiency of some of their claims, but primarily contend that they could cure any pleading deficiencies with a newly amended complaint, which would include a claim for wrongful foreclosure. We are unpersuaded that the plaintiffs' allegations are sufficient to support their claims. Although the plaintiffs allege that aspects of the MERS system are fraudulent, they cannot establish that they were misinformed about the MERS system, relied on any misinformation in entering into their home loans, or were injured as a result of the misinformation. If anything, the allegations suggest that the plaintiffs were informed of the exact aspects of the MERS system that they now complain about when they agreed to enter into their home loans. Further, although the plaintiffs contend that they can state a claim for wrongful foreclosure, Arizona state law does not currently recognize this cause of action, and their claim is, in any case, without a basis. The plaintiffs' claim depends upon the conclusion that any home loan within the MERS system is unenforceable through a foreclosure sale, but that conclusion is unsupported by the facts and law on which they rely. Because the plaintiffs fail to establish a plausible basis for relief on these and their other claims raised on appeal, we affirm the district court's dismissal of the complaint without leave to amend.

**I.**

The focus of this lawsuit—and many others around the country—is the MERS system.

**1. How MERS works**

MERS is a private electronic database, operated by MERSCORP, Inc., that tracks the transfer of the "beneficial interest" in home loans, as well as any changes in loan servicers. After a borrower takes out a home loan, the original lender may sell all or a portion of its beneficial interest in the loan and change loan servicers. The owner of the beneficial interest is entitled to repayment of the loan. For simplicity, we ***1039** will refer to the owner of the beneficial interest as the "lender." The servicer of the loan collects payments from the borrower, sends payments to the lender, and handles administrative aspects of the loan. Many of the companies that participate in the mortgage industry—by originating loans, buying or investing in the beneficial interest in loans, or servicing loans—are members of MERS and pay a fee to use the tracking system. *See Jackson v. Mortg. Elec. Registration Sys., Inc.,* 770 N.W.2d 487, 490 (Minn.2009).

When a borrower takes out a home loan, the borrower executes two documents in favor of the lender: (1) a promissory note to repay the loan, and (2) a deed of trust, or mortgage, that transfers legal title in the property as collateral to secure the loan in the event of default. State laws require the lender to record the deed in the county in which the property is located. Any subsequent sale or assignment of the deed must be recorded in the county records, as well.

This recording process became cumbersome to the mortgage industry, particularly as the trading of loans increased. *See* Robert E. Dordan, *Mortgage Electronic Registration Systems (MERS), Its Recent Legal Battles, and the Chance for a Peaceful Existence,* 12 Loy. J. Pub. Int. L. 177, 178 (2010). It has become common for original lenders to bundle the beneficial interest in individual loans and sell them to investors as mortgage-backed securities, which may themselves be traded. *See id.* at 180; *Jackson,* 770 N.W.2d at 490. MERS was designed to avoid the need to record multiple transfers of the deed by serving as the nominal record holder of the deed on behalf of the original lender and any subsequent lender. *Jackson,* 770 N.W.2d at 490.

At the origination of the loan, MERS is designated in the deed of trust as a nominee for the lender and the lender's "successors and assigns," and as the deed's "beneficiary" which holds legal title to the security interest conveyed. If the lender sells or assigns the beneficial interest in the loan to another MERS member, the change is recorded only in the MERS database, not in county records, because MERS continues to hold the deed on the new lender's behalf. If the beneficial interest in the loan is sold to a non-MERS member, the transfer of the deed from MERS to the new lender is recorded in county records and the loan is no longer tracked in the MERS system.

**[1]** In the event of a default on the loan, the lender may initiate foreclosure in its own name, or may appoint a trustee to initiate foreclosure on the lender's behalf. However, to have the legal power to foreclose, the trustee must have authority to act as the holder, or agent of the holder, of both the deed and the note together. *See Landmark Nat'l Bank v. Kesler,* 289 Kan. 528, 216 P.3d 158, 167 (2009). The deed and note must be held together because the holder of the note is only entitled to repayment, and does not have the right under the deed to use the property as a means of satisfying repayment. *Id.* Conversely, the holder of the deed alone does not have a right to repayment and, thus, does not have an interest in foreclosing on the property to satisfy repayment. *Id.* One of the main premises of the plaintiffs' lawsuit here is that the MERS system impermissibly "splits" the note and deed by facilitating the transfer of the beneficial interest in the loan among lenders while maintaining MERS as the nominal holder of the deed.

The plaintiffs' lawsuit is also premised on the fact that MERS does not have a financial interest in the loans, which, according to the plaintiffs, renders MERS's status as a beneficiary a sham. MERS is not involved in originating the loan, does ***1040** not have any right to payments on the loan, and does not service the loan. MERS relies on its members to have someone on their own staff become a MERS officer with the authority to sign documents on behalf of MERS. *See* Dordan, 12 Loy. J. Pub. Int. L. at 182; *Jackson,* 770 N.W.2d at 491. As a result, most of the actions taken in MERS's own name are carried out by staff at the companies that sell and buy the beneficial interest in the loans. *Id.*

**2. The named plaintiffs**

The three named plaintiffs in this case, Olga Cervantes, Carlos Almendarez, and Arturo Maximo, obtained home loans or refinanced existing loans in 2006. All three signed promissory notes with their lenders—Cervantes with Countrywide Home Loans, and Almendarez and Maximo with First Franklin. Each executed a deed of trust in favor of his or her lender, naming MERS as the "beneficiary" and as the "nominee" for the lender and lender's "successors and assigns."

All three plaintiffs are Hispanic, and Almendarez and Maximo do not speak or read English. Almendarez and Maximo negotiated the mortgage loans with their lenders in Spanish, but were provided with, and signed, copies of their loan documents written in English.

The plaintiffs subsequently defaulted on their loans. Following Cervantes's default, trustee Recontrust Company initiated non-judicial foreclosure proceedings by recording a notice of a trustee's sale in the county records. The parties have not addressed the status of the noticed sale. Following defaults by Almendarez and Maximo, their lender, First Franklin, appointed LaSalle Bank as its trustee to initiate nonjudicial foreclosure proceedings. MERS recorded documents with the county assigning its beneficial interest in the deeds of trust to LaSalle Bank. Later, Michael Bosco of Tiffany & Bosco was substituted in as First Franklin's trustee. Michael Bosco sold Almendarez's house at public auction in February 2009. The sale of Maximo's property was cancelled in April 2009.

**3. Procedural history**

Cervantes filed suit in March 2009. Almendarez and Maximo joined the lawsuit, and the plaintiffs filed their First Amended Complaint a few days later. The First Amended Complaint names several defendants, including the plaintiffs' lenders, the trustees for the lenders, MERS, and MERS members who are named only as co-conspirators based on their role in using the MERS system. The defendants filed several motions to dismiss, prompting the plaintiffs to file a motion for leave to amend, along with a proposed Second Amended Complaint. The district court held a hearing on the various motions, at which the plaintiffs orally proposed to amend their complaint with a wrongful foreclosure claim. The district court granted the motions to dismiss the First Amended Complaint, and denied the motion for leave to amend on the ground that amendment would be futile. The plaintiffs appeal.

**II.**

**[2]** We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Mendiondo v. Centinela Hosp. Med. Ctr.,* 521 F.3d 1097, 1102 (9th Cir.2008). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal quotation marks omitted). ***1041** Dismissal is proper when the complaint does not make out a cognizable legal theory or does not allege sufficient facts to support a cognizable legal theory. *Mendiondo,* 521 F.3d at 1104. A complaint that alleges only "labels and conclusions" or a "formulaic recitation of the elements of the cause of action" will not survive dismissal. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

**[3]** **[4]** **[5]** The district court's denial of leave to amend the complaint is reviewed for an abuse of discretion. *Gompper v. VISX, Inc.,* 298 F.3d 893, 898 (9th Cir.2002). Although leave to amend should be given freely, a district court may dismiss without leave where a plaintiff's proposed amendments would fail to cure the pleading deficiencies and amendment would be futile. *See Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.,* 911 F.2d 242, 247 (9th Cir.1990) (per curiam). [1]

**III.**

The plaintiffs challenge the dismissal of their complaint without leave to amend but, on appeal, only address the district court's: (1) dismissal of their claim for conspiracy to commit fraud through the MERS system; (2) failure to address their oral request for leave to add a wrongful foreclosure claim; (3) dismissal of trustee Tiffany & Bosco from the suit; (4) denial of leave to amend their pleadings regarding equitable tolling of their TILA and Arizona Consumer Fraud Act claims; and (5) dismissal of their claim for intentional infliction of emotional distress. We address these claims in turn, and do not consider the dismissed claims that are not raised on appeal. *Entm't Research Group v. Genesis Creative Group,* 122 F.3d 1211, 1217 (9th Cir.1997) ("We will not consider any claims that were not actually argued in [appellant's] opening brief.").

**1. Conspiracy to commit fraud through the MERS system**

**[6]** On appeal, the plaintiffs contend that they sufficiently alleged a conspiracy among MERS members to commit fraud. In count seven of the First Amended Complaint, they allege that MERS members conspired to commit fraud by using MERS as a sham beneficiary, promoting and facilitating predatory lending practices through the use of MERS, and making it impossible for borrowers or regulators to track the changes in lenders.

**[7]** **[8]** Under Arizona law, a claim of civil conspiracy must be based on an underlying tort, such as fraud in this instance. *Baker ex rel. Hall Brake Supply, Inc. v. Stewart Title & Trust of Phoenix, Inc.,* 197 Ariz. 535, 5 P.3d 249, 256

(Ariz.Ct.App.2000). To show fraud, a plaintiff must identify "(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it be acted upon by the recipient in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the right to rely on it; [and] (9) his consequent and proximate injury." *Echols v. Beauty Built Homes, Inc.,* 132 Ariz. 498, 647 P.2d 629, 631 (1982).

The plaintiffs' allegations fail to address several of these necessary elements for a fraud claim. The plaintiffs have not identified any representations made to them about the MERS system and its role in ***1042** their home loans that were false and material. None of their allegations indicate that the plaintiffs were misinformed about MERS's role as a beneficiary, or the possibility that their loans would be resold and tracked through the MERS system. Similarly, the plaintiffs have not alleged that they relied on any misrepresentations about MERS in deciding to enter into their home loans, or that they would not have entered into the loans if they had more information about how MERS worked. Finally, the plaintiffs have failed to show that the designation of MERS as a beneficiary caused them any injury by, for example, affecting the terms of their loans, their ability to repay the loans, or their obligations as borrowers. Although the plaintiffs allege that they were "deprived of the right to attempt to modify their toxic loans, as the true identity of the actual beneficial owner was intentionally hidden" from them, they do not support this bare assertion with any explanation as to how the operation of the MERS system actually stymied their efforts to identify and contact the relevant party to modify their loans. Thus, the plaintiffs fail to state a claim for conspiracy to commit fraud through the MERS system, and dismissal of the claim was proper.

**[9]** While the plaintiffs' allegations alone fail to raise a plausible fraud claim, we also note that their claim is undercut by the terms in Cervantes's standard deed of trust, which describe MERS's role in the home loan.[2] For example, the plaintiffs allege they were defrauded because MERS is a "sham" beneficiary without a financial interest in the loan, yet the disclosures in the deed indicate that MERS is acting "solely as a nominee for Lender and Lender's successors and assigns" and holds "only legal title to the interest granted by Borrower in this Security Instrument." Further, while the plaintiffs indicate that MERS was used to hide who owned the loan, the deed states that the loan or a partial interest in it "can be sold one or more times without prior notice to Borrower," but that "[i]f there is a change in Loan Servicer, Borrower will be given written notice of the change" as required by consumer protection laws. Finally, the deed indicates that MERS has "the right to foreclose and sell the property." By signing the deeds of trust, the plaintiffs agreed to the terms and were on notice of the contents. *See Kenly v. Miracle Props.,* 412 F.Supp. 1072, 1075 (D.Ariz.1976) (explaining that a deed of trust is "an essentially private contractual arrangement"). In light of the explicit terms of the standard deed signed by Cervantes, it does not appear that the plaintiffs were misinformed about MERS's role in their home loans.

Moreover, amendment would be futile. In their proposed Second Amended Complaint, the plaintiffs seek to add further detail concerning how MERS works in general and how it has facilitated the trade in mortgage-backed securities. But none of the new allegations cure the First Amended Complaint's deficiencies: the plaintiffs have not shown that they received material misrepresentations about MERS that they detrimentally relied upon. Accordingly, we affirm the district court's dismissal, without leave to amend, of the claim for conspiracy to commit fraud through the MERS system.

**2. Wrongful foreclosure**

**[10]** The plaintiffs contend that the district court abused its discretion by dismissing ***1043** their complaint without leave to add a wrongful foreclosure claim. The only mention of a wrongful foreclosure claim was during the hearing on the plaintiffs' motion for leave to amend and the defendants' motions to dismiss. Although the plaintiffs expressed their intention to add a wrongful foreclosure claim, they failed to include it in their proposed Second Amended Complaint. Moreover, during the hearing, the plaintiffs stated only a general theory of the claim: they posited that any foreclosure on a home loan tracked in the MERS system is "wrongful" because MERS is not a true beneficiary. As the plaintiffs describe it on appeal, their claim is that "the MERS system was used to facilitate wrongful foreclosure based on the naming of MERS as the beneficiary on the deed of trust, which results in the note and deed of trust being split and unenforceable."

**[11]** The plaintiffs' oral request to add a wrongful foreclosure claim was procedurally improper and substantively unsupported. The district court's local rules require the plaintiffs to submit a copy of the proposed amended pleadings along with a motion for leave to amend. *See* D. Ariz. Civ. L.R. 15.1. The plaintiffs failed to do so. Further, they failed to provide the district court with an explanation of the legal and factual grounds for adding the claim. It is particularly notable here that Arizona state courts have not yet recognized a wrongful foreclosure cause of action. Although a federal court exercising diversity jurisdiction is "at liberty to predict the future course of [a state's] law," plaintiffs choosing "the federal forum ... [are] not entitled to trailblazing initiatives under [state law]." *Ed Peters Jewelry Co. v. C & J Jewelry Co., Inc.,* 124 F.3d 252, 262–63 (1st Cir.1997) (affirming dismissal of a wrongful foreclosure claim when no such action existed under state law). Under the circumstances, we conclude that it was not an abuse of discretion for the district court to deny leave to amend without addressing the plaintiffs' proposed claim for wrongful foreclosure. *See Gardner v. Martino (In re Gardner),* 563 F.3d 981, 991 (9th Cir.2009) (concluding that the district court did not abuse its discretion by denying leave to amend where the party seeking leave failed to attach a proposed amended complaint in violation of local rules and failed to articulate a factual and legal basis for amendment).

**[12]** In any event, leave to amend would be futile because the plaintiffs cannot state a plausible basis for relief. Looking to states that have recognized substantive wrongful foreclosure claims, we note that such claims typically are available after foreclosure and are premised on allegations that the borrower was not in default, or on procedural issues that resulted in damages to the borrower. *See, e.g., Ed Peters Jewelry Co.,* 124 F.3d at 263 n. 8 (noting that the Massachusetts Supreme Court recognized a claim for wrongful foreclosure where no default had occurred in *Mechanics Nat'l Bank of Worcester v. Killeen,* 377 Mass. 100, 384 N.E.2d 1231, 1236 (1979)); *Fields v. Millsap & Singer, P.C.,* 295 S.W.3d 567, 571 (Mo.Ct.App.2009) (stating that "a plaintiff seeking damages in a wrongful foreclosure action must plead and prove that when the foreclosure proceeding was begun, there was no default on its part that would give rise to a right to foreclose" (internal alteration and citation omitted)); *Gregorakos v. Wells Fargo Nat'l Ass'n,* 285 Ga.App. 744, 647 S.E.2d 289, 292 (2007) ("In Georgia, a plaintiff asserting a claim of wrongful foreclosure must establish a legal duty owed to it by the foreclosing party, a breach of that duty, a causal connection between the breach of that duty and the injury it sustained, and damages." (internal quotation marks and alteration omitted)); ***1044** *Collins v. Union Fed. Sav. & Loan Ass'n,* 99 Nev. 284, 662 P.2d 610, 623 (1983) ("[T]he material issue of fact in a wrongful foreclosure claim is whether the trustor was in default when the power of sale was exercised."). Similarly, the case that the plaintiffs cite for the availability of a wrongful foreclosure claim under Arizona law, *Herring v. Countrywide Home Loans, Inc.,* No. 06–2622, 2007 WL 2051394, at *6 (D.Ariz. July 13, 2007), recognized such a claim where the borrower was not in default at the time of foreclosure. The plaintiffs have not alleged that Cervantes's or Maximo's homes were sold and, in any event, all are in default and have not identified damages. Thus, under the established theories of wrongful foreclosure, the plaintiffs have failed to state a claim.

**[13]** Instead, the plaintiffs advance a novel theory of wrongful foreclosure. They contend that all transfers of the interests in the home loans within the MERS system are invalid because the designation of MERS as a beneficiary is a sham and the system splits the deed from the note, and, thus, no party is in a position to foreclose.

Even if we were to accept the plaintiffs' premises that MERS is a sham beneficiary and the note is split from the deed, we would reject the plaintiffs' conclusion that, as a necessary consequence, no party has the power to foreclose. The legality of MERS's role as a beneficiary may be at issue where MERS initiates foreclosure in its own name, or where the plaintiffs allege a violation of state recording and foreclosure statutes based on the designation. *See, e.g., Mortgage Elec. Registration Sys. v. Saunders,* 2 A.3d 289, 294–97 (Me.2010) (concluding that MERS cannot foreclose because it does not have an independent interest in the loan because it functions solely as a nominee); *Landmark Nat'l Bank,* 216 P.3d at 165–69 (same); *Hooker v. Northwest Tr. Servs.,* No. 10–3111, 2011 WL 2119103, at *4 (D.Or. May 25, 2011) (concluding that the defendants' failure to register all assignments of the deed of trust violated the Oregon recording laws so as to prevent non-judicial foreclosure). *But see Jackson,* 770 N.W.2d at 501 (concluding that defendants' failure to register assignments of the beneficial interest in the mortgage loan did not violate Minnesota recording laws so as to prevent non-judicial foreclosure). This case does not present either of these circumstances and, thus, we do not consider them.

Here, MERS did not initiate foreclosure: the trustees initiated foreclosure in the name of the lenders. Even if MERS were a sham beneficiary, the lenders would still be entitled to repayment of the loans and would be the proper parties to initiate foreclosure after the plaintiffs defaulted on their loans. The plaintiffs' allegations do not call into question whether the trustees were agents of the lenders. Rather, the foreclosures against Almendarez and Maximo were initiated by the trustee Tiffany & Bosco on behalf of First Franklin, who is the original lender and holder of Almendarez's and

Maximo's promissory notes. Although it is unclear from the pleadings who the current lender is on plaintiff Cervantes's loan, the allegations do not raise any inference that the trustee Recontrust Company lacks the authority to act on behalf of the lender.

**[14]** Further, the notes and deeds are not irreparably split: the split only renders the mortgage unenforceable if MERS or the trustee, as nominal holders of the deeds, are not agents of the lenders. *See Landmark Nat'l Bank,* 216 P.3d at 167. Moreover, the plaintiffs have not alleged violations of Arizona recording and foreclosure statutes related to the purported splitting of the notes and deeds.

Accordingly, the plaintiffs have not raised a plausible claim for wrongful foreclosure, and we conclude that dismissal of ***1045** the complaint without leave to add such a claim was not an abuse of discretion.

### 3. Injunctive relief against Tiffany & Bosco

**[15]** The plaintiffs contend that the district court improperly dismissed the trustee Tiffany & Bosco from this suit under Arizona Revised Statute 33–807(E). Section 33–807(E) provides that a "trustee is entitled to be immediately dismissed" from any action other than one "pertaining to a breach of the trustee's obligations," because the trustee is otherwise bound by an order entered against a beneficiary for actions that the trustee took on its behalf. The only breach that the plaintiffs allege against Tiffany & Bosco is that it failed to recognize that its appointment was invalid. According to the plaintiffs, the appointment was invalid because MERS is a sham beneficiary and lacks power to "appoint" a trustee. However, a trustee such as Tiffany & Bosco has the "absolute right" under Arizona law "to rely upon any written direction or information furnished to him by the beneficiary." Ariz.Rev.Stat. § 33–820(A). Thus, Tiffany & Bosco did not have an obligation to consider whether its presumptively legal appointment as trustee, which was recorded in the county records, was invalid based on the original designation of MERS as a beneficiary. Accordingly, Tiffany & Bosco was properly dismissed.

### 4. Equitable Tolling and Estoppel

**[16]** The plaintiffs contend that the district court failed to address the equitable tolling of their claims under TILA and the Arizona Consumer Fraud Act and, in any event, abused its discretion by denying the plaintiffs leave to amend their allegations in support of equitable tolling and estoppel. A district court may dismiss a claim "[i]f the running of the statute is apparent on the face of the complaint." *Jablon v. Dean Witter & Co.,* 614 F.2d 677, 682 (9th Cir.1980). However, a district court may do so "only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." *Id.*

**[17]** The plaintiffs' claims under TILA and the Arizona Consumer Fraud Act are subject to one-year statutes of limitations. 15 U.S.C. § 1640(e); Ariz.Rev.Stat. § 12–541(5). Both limitations periods began to run when the plaintiffs executed their loan documents, because they could have discovered the alleged disclosure violations and discrepancies at that time. *See* 15 U.S.C. § 1640(e) (the one-year limitations period for a TILA claim begins when the violation occurred); *Alaface v. Nat'l Inv. Co.,* 181 Ariz. 586, 892 P.2d 1375, 1379 (Ariz.Ct.App.1994) (a cause of action for consumer fraud under Arizona law accrues " 'when the defrauded party discovers or with reasonable diligence could have discovered the fraud' "). The running of the limitations periods on both claims is apparent on the face of the complaint because the plaintiffs obtained their loans in 2006, but commenced their action in 2009.

**[18]** **[19]** The plaintiffs have not demonstrated a basis for equitable tolling of their claims. "We will apply equitable tolling in situations where, despite all due diligence, the party invoking equitable tolling is unable to obtain vital information bearing on the existence of the claim." *Socop–Gonzalez v. I.N.S.,* 272 F.3d 1176, 1193 (9th Cir.2001) (internal quotation marks and alterations omitted). The plaintiffs suggest that their TILA claim should have been tolled because Almendarez and Maximo speak only Spanish, but received loan documents written in English. However, the plaintiffs have not alleged circumstances beyond their control that prevented them from seeking a translation of the loan documents that they signed and received. Thus, the plaintiffs have not stated a basis ***1046** for equitable tolling. *See Hubbard v. Fidelity Fed. Bank,* 91 F.3d 75, 79 (9th Cir.1996) (per curiam) (declining to toll TILA's statute of limitations when "nothing prevented [the mortgagor] from comparing the loan contract, [the lender's] initial disclosures, and TILA's statutory and regulatory requirements").

**[20]** **[21]** In addition, the plaintiffs have not demonstrated a basis for equitable estoppel. Equitable estoppel "halts the statute of limitations when there is active conduct by a defendant, above and beyond the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff from suing in time." *See Guerrero v. Gates,* 442 F.3d 697, 706 (9th Cir.2006) (internal quotation marks omitted). The First Amended Complaint alleges only that the defendants "fraudulently misrepresented and concealed the true facts related to the items subject to disclosure." The plaintiffs, however, have failed to specify what true facts are at issue, or to establish that the alleged misrepresentation and concealment of facts is "above and beyond the wrongdoing" that forms the basis for their TILA and Arizona Consumer Fraud Act claims. *Guerrero,* 442 F.3d at 706.

The district court therefore properly dismissed the plaintiffs' claims under both TILA and the Arizona Consumer Fraud Act as barred by a one-year statute of limitations. The plaintiffs did not add any new facts to the proposed Second Amended Complaint, and do not suggest any on appeal, that would support applying either equitable tolling or equitable estoppel to their claims. Thus, the district court also did not abuse its discretion by denying leave to amend.

**5. Intentional Infliction of Emotional Distress**

The plaintiffs contend that they sufficiently stated a claim for intentional infliction of emotional distress. When ruling on a motion to dismiss such a claim under Arizona law, a district court may determine whether the alleged conduct rises to the level of "extreme and outrageous." *See Cluff v. Farmers Ins. Exch.,* 10 Ariz.App. 560, 460 P.2d 666, 668 (1969), *overruled on other grounds by Godbehere v. Phoenix Newspapers, Inc.,* 162 Ariz. 335, 783 P.2d 781 (1989).

**[22]** Here, the plaintiffs fail to meet that threshold. They allege that the lenders' "actions in targeting Plaintiffs for a loan, misrepresenting the terms and conditions of the loan, negotiating the loan, and closing the loan" were "extreme and outrageous because of the Plaintiffs' vulnerability" and "because the subject of the loan was each Plaintiff's primary residence." This conduct, though arguably offensive if true, is not so outrageous as to go "beyond all possible bounds of decency." *Lucchesi v. Frederic N. Stimmell, M.D., Ltd.,* 149 Ariz. 76, 716 P.2d 1013, 1015 (1986) (en banc). The plaintiffs essentially allege that the lenders offered them loans that the lenders knew they could not repay; this is not inherently "extreme and outrageous." Moreover, the plaintiffs do not allege any additional support for their claim in their proposed Second Amended Complaint. Accordingly, the district court properly dismissed, without leave to amend, the plaintiffs' claim for intentional infliction of emotional distress.

**IV.**

The district court properly dismissed the plaintiffs' First Amended Complaint without leave to amend. The plaintiffs' claims that focus on the operation of the MERS system ultimately fail because the plaintiffs have not shown that the alleged illegalities associated with the MERS system injured them or violated state law. As part of their fraud claim, the plaintiffs have not shown that they detrimentally ***1047** relied upon any misrepresentations about MERS's role in their loans. Further, even if we were to accept the plaintiffs' contention that MERS is a sham beneficiary and the note is split from the deed in the MERS system, it does not follow that any attempt to foreclose after the plaintiffs defaulted on their loans is necessarily "wrongful." The plaintiffs' claims against their original lenders fail because they have not stated a basis for equitable tolling or estoppel of the statutes of limitations on their TILA and Arizona Consumer Fraud Act claims, and have not identified extreme and outrageous conduct in support of their claim for intentional infliction of emotional distress.

Thus, we **AFFIRM** the decision of the district court.

**All Citations**

656 F.3d 1034, 11 Cal. Daily Op. Serv. 11,531, 2011 Daily Journal D.A.R. 13,682

Footnotes

* Due to the death of the Honorable David R. Thompson, the Honorable Johnnie B. Rawlinson, United States Circuit Judge for the Ninth Circuit, has been drawn to replace him on this panel. Judge Rawlinson has read the briefs, reviewed the record, and listened to the audio recording of oral argument held on February 16, 2011.

1 The plaintiffs have requested that we take judicial notice of orders of the United States District Court for the District of Arizona dismissing complaints without prejudice in pending multidistrict litigation concerning MERS. The plaintiffs imply that it was inconsistent for the same district court to deny leave to amend here. We deny the requests because the orders are not relevant.

 

2 Cervantes's deed of trust, attached to MERSCORP's reply in support of its motion to dismiss, may be considered at the pleadings stage because the complaint references and relies on the deed, and its authenticity is unquestioned. *See Swartz v. KPMG LLP,* 476 F.3d 756, 763 (9th Cir.2007) (per curiam).

**End of Document**

728 F.3d 878
United States Court of Appeals,
Ninth Circuit.

Phillip R. CORVELLO, Plaintiff–Appellant,
v.
WELLS FARGO BANK, NA, DBA America's Servicing Company, dba Wells Fargo Home Mortgage, Inc., Defendant–Appellee.
Karen Lucia; Jeffrey Lucia, on behalf of themselves and all others similarly situated, Plaintiffs–Appellants,
v.
Wells Fargo Bank, NA, aka Wells Fargo Home Mortgage, Inc., Defendant–Appellee.

Nos. 11–16234, 11–16242. | Argued and Submitted March 20, 2013. | Filed Aug. 8, 2013. | As Amended on Rehearing in Part Sept. 23, 2013.

**Synopsis**

**Background:** Borrowers brought related actions against bank, which participated in Home Affordable Mortgage Program (HAMP), for claims arising out of failed modifications of their home mortgage loans. The United States District Court for the Northern District of California, Jeffrey S. White, J., granted bank's motion to dismiss. Borrowers appealed.

**Holdings:** The Court of Appeals held that:

[1] bank was obligated to offer borrowers permanent mortgage modification after they complied with program's trial period plan (TPP), and

[2] bank was engaged in debt collection under California's Rosenthal Fair Debt Collection Practices Act.

Reversed and remanded.

West Headnotes (5)

**[1]** **Mortgages**

⇒ Change in time or mode of payment

Bank participating in Home Affordable Mortgage Program (HAMP) was contractually obligated under California law to offer borrowers permanent mortgage modification after they complied with program's trial period plan (TPP) requirements by submitting accurate documentation and making trial payments, even though bank did not send borrowers a signed modification agreement in compliance with TPP provision stating that loan would not be modified unless the borrower received such a document; under fair reading of TPP, bank had to send signed agreement offering to modify the loan once borrowers met their end of the bargain, and bank could not unilaterally and without justification refuse to send the offer. Emergency Economic Stabilization Act of 2008, § 124(1, 2), Div. A, Title I, § 109, 12 U.S.C.A. §§ 1715z–23, 5219.

50 Cases that cite this headnote

**[2]** **Mortgages**

⇒ Between parties to mortgage or their privies

**Mortgages**

⇒ Change in time or mode of payment

Where borrowers seeking permanent mortgage modifications under Home Affordable Mortgage Program (HAMP) allege, and court must assume, that they have fulfilled all of their obligations under the program's trial period plan (TPP), and the loan servicer has failed to offer a permanent modification, the borrowers have valid claims for breach of the TPP agreement under California law. Emergency Economic Stabilization Act of 2008, § 124(1, 2), Div. A, Title I, § 109, 12 U.S.C.A. §§ 1715z–23, 5219.

79 Cases that cite this headnote

**[3]** **Frauds, Statute Of**

⇒ Contracts Completely Performed

Despite bank's assertion of statute of frauds under California law as a defense to breach of contract claim of borrowers who dealt with bank by telephone in seeking permanent mortgage modifications under Home Affordable Mortgage

Program (HAMP), borrowers could enforce the remaining promises, where borrowers alleged that they complied with program's trial period plan (TPP) requirements by submitting accurate documentation and making trial payments. Emergency Economic Stabilization Act of 2008, § 124(1, 2), Div. A, Title I, § 109, 12 U.S.C.A. §§ 1715z–23, 5219; West's Ann.Cal.Civ.Code § 1624.

10 Cases that cite this headnote

[4] **Antitrust and Trade Regulation**
Persons and transactions covered

Bank that participated in Home Affordable Mortgage Program (HAMP), through which borrowers could obtain permanent mortgage modification after they complied with program's trial period plan (TPP) requirements by submitting accurate documentation and making trial payments, was engaged in debt collection under California's Rosenthal Fair Debt Collection Practices Act; the TPP was more than an informational circulation. Emergency Economic Stabilization Act of 2008, § 124(1, 2), Div. A, Title I, § 109, 12 U.S.C.A. §§ 1715z–23, 5219; West's Ann.Cal.Civ.Code § 1788.17.

9 Cases that cite this headnote

[5] **Federal Courts**
Questions Considered

In borrowers' action against bank for failing to offer them permanent mortgage modification after they complied with requirements of Home Affordable Mortgage Program's (HAMP) trial period plan (TPP), bank's assertion that it followed applicable guidelines in choosing not to offer them permanent modifications, made at oral argument on borrowers' appeal of judgment granting bank's motion to dismiss, presented an issue of fact that court of appeals could not consider at that stage of the proceedings. Emergency Economic Stabilization Act of 2008, § 124(1, 2), Div. A, Title I, § 109, 12 U.S.C.A. §§ 1715z–23, 5219; West's Ann.Cal.Civ.Code § 1624; Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

25 Cases that cite this headnote

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Matthew G. Ball, K & L Gates LLP, San Francisco, CA; Irene C. Freidel (argued) and David D. Christensen, K & L Gates LLP, Boston, MA, for Defendant–Appellee.

***880** Appeal from the United States District Court for the Northern District of California, Jeffrey S. White, District Judge, Presiding. D.C. Nos. 3:10–cv–05072–JSW, 3:10–cv–04749–JSW.

Before: MARY M. SCHROEDER, JOHN T. NOONAN, and MARY H. MURGUIA, Circuit Judges.

## OPINION

PER CURIAM:

## INTRODUCTION

The U.S. Department of the Treasury, acting under the direction of Congress, launched the Home Affordable Modification Program ("HAMP") in 2009 to help distressed homeowners with delinquent mortgages, but the program seems to have created more litigation than it has happy homeowners. The issue we must decide is whether a bank was contractually required to offer the plaintiffs a permanent mortgage modification after they complied with the requirements of a trial period plan ("TPP"). The district court held the bank was not, and we reverse.

Similar issues have arisen in both state and federal courts. We now follow the Seventh Circuit's leading federal appellate decision, which came down after the district court's ruling in this case, to hold that the bank was required to offer the modification. *See Wigod v. Wells Fargo Bank, N.A.,* 673 F.3d 547 (7th Cir.2012). The district court should not have dismissed the plaintiffs' complaints when the record before it showed that the bank had accepted and retained the payments demanded by the TPP, but neither offered a permanent modification, nor notified plaintiffs they were not entitled to one, as required by the terms of the TPP.

## BACKGROUND

In response to the unfolding financial crisis of 2008, Congress passed the Emergency Economic Stabilization Act, Pub.L. No. 110–343, 122 Stat. 3765. This law included the Troubled Asset Relief Program ("TARP"), "which required the Secretary of the Treasury, among many other duties and powers, to 'implement a plan that seeks to maximize assistance for homeowners and ... encourage the servicers of the underlying mortgages ... to take advantage of ... available programs to minimize foreclosures.' " *Wigod,* 673 F.3d at 556 (quoting 12 U.S.C. § 5219(a)). Pursuant to this instruction, the Treasury Department in 2009 started the HAMP program to incentivize banks to refinance mortgages of distressed homeowners so they could stay in their homes. Home loan servicers, including Defendant–Appellee Wells Fargo Bank, N.A. ("Wells Fargo"), signed Servicer Participation Agreements with Treasury that entitled them to $1,000 for each permanent modification they made, but required them to follow Treasury guidelines and procedures.

The process of applying for and receiving a permanent modification plays out in several steps, as set forth in Treasury Supplemental Directive 09–01 ("SD 09–01"), the controlling Treasury guideline during the events leading to this suit. First, borrowers supply information about their finances and their inability to pay their current mortgage to the servicer, and the servicer must evaluate whether the borrowers qualify for a loan modification. SD 09–01. The servicer computes modified mortgage payments on the basis of the borrowers' information. *Id.*

For borrowers who appear eligible to participate in HAMP, the servicer then prepares a TPP. The TPP requires borrowers to submit documentation to confirm the accuracy of their initial financial representations, ***881** and to make trial payments of the modified amount to the servicer. The servicer must use the documentation to "confirm that the borrower[s]" meet the eligibility criteria for a permanent modification. *Id.*

In the step most critical to this litigation, the servicer then must report to the borrowers the results of the eligibility determinations. *Id.* If a borrower does not qualify for the HAMP program, the servicer must not only alert the borrower, but must consider alternatives. The servicer should "promptly communicate that [ineligibility] determination to the borrower in writing and consider the borrower for another foreclosure prevention alternative." *Id.* For borrowers who have made all their payments and whose representations remain accurate, the servicer must offer a permanent home loan modification. *Id.*

Wells Fargo never offered plaintiffs Phillip Corvello and Karen and Jeffrey Lucia a modification. They filed separate actions against Wells Fargo, and their cases were consolidated. Their situations differ factually in that Corvello's dealings with Wells Fargo were in writing, while the Lucias dealt with the bank by phone. They both contend that they reached agreements with Wells Fargo whereby Wells Fargo was required to offer them permanent mortgage modifications if they complied with the requirements of their trial plans, including proving their eligibility for the permanent modification and making the trial payments. If they did not qualify for the modification, their agreements required Wells Fargo to alert them immediately and end the period of trial payments. They allege that they complied with their trial plans and made the required payments, and should have been offered permanent modifications.

The district court dismissed both actions under Rule 12(b)(6), so we accept the allegations of the complaints as true. *Kahle v. Gonzales,* 487 F.3d 697, 699 (9th Cir.2007). According to Corvello's complaint, he provided Wells Fargo with his financial information via a financial worksheet in June of 2009. Wells Fargo then sent him a TPP. The TPP stated in the first line that if Corvello's representations were accurate and he complied with the terms of the trial plan, he would receive a modification offer. The TPP also, and on the same page, assured him, as it was required to do by the applicable Treasury Directive, that the bank would tell him one way or another on his eligibility for a modification. It read:

> If I am in compliance with this Loan Trial Period and my representations in Section 1 continue to be true in all material respects, then the Lender will

> provide me with a Loan Modification Agreement, as set forth in Section 3, that would amend and supplement (1) the Mortgage on the Property, and (2) the Note secured by the Mortgage.... I understand that after I sign and return two copies of this Plan to the Lender, the Lender will send me a signed copy of this Plan if I qualify for the Offer or will send me written notice that I do not qualify for the Offer.

Paragraph 2F of the TPP alerted the borrower to the obligations of the parties before there could be a permanent modification. It required, in addition to the borrower making the payments and maintaining the accuracy of the representations, that the servicer provide an executed copy of the TPP and Modification Agreement to the borrower. It stated as follows:

> If prior to the Modification Effective Date, (i) the Lender does not provide me a fully executed copy of this Plan and the Modification Agreement; (ii) I have not made the Trial Period payments required under Section 2 of this Plan; or ***882** (iii) the Lender determines that my representations in Section 1 are no longer true and correct, the Loan Documents will not be modified and this Plan will terminate.

Paragraph 2G of the TPP stated that no modification would take effect until the borrower received a signed copy of the Modification Agreement. It read as follows:

> I understand that the Plan is not a modification of the Loan Documents and that the Loan Documents will not be modified unless and until (i) I meet all of the conditions required for modification, (ii) I receive a fully executed copy of a Modification Agreement, and (iii) the Modification Effective Date has passed....

After Corvello signed and returned the TPP, and despite the notification representation on the first page of the TPP, Wells Fargo, according to the complaint, never told Corvello whether he qualified for a modification. Corvello alleges he complied with the TPP's terms, and made all three payments on time. Wells Fargo still never offered him a permanent modification, nor did it notify him that he did not qualify. He seeks the permanent modification offer allegedly due him under the TPP agreement, and damages for the payments he made to Wells Fargo.

The Lucias' interaction with Wells Fargo was materially similar to Corvello's experience. They allege that Wells Fargo offered them a trial plan, with the promise of a permanent modification if they fully complied. They made all of the required payments and submitted the documents requested by Wells Fargo. Despite performance of their obligations under the TPP, they, like Corvello, claim Wells Fargo neither offered them a permanent modification, nor alerted them that they were ineligible for a modification. Instead, Wells Fargo foreclosed on their home and sold it. Their complaint seeks rescission of the foreclosure, an offer of permanent modification, and damages.

The plaintiffs filed their complaints in United States District Court for the Northern District of California, invoking that court's diversity jurisdiction and seeking to apply California law. Their complaints alleged that because they complied with the obligations of their TPPs by submitting accurate documentation and making trial payments, there was an enforceable contract that bound the servicer, Wells Fargo, to offer permanent modifications.

The district court concluded that accepting the plaintiffs' allegations as true, the language of the TPP could not support a contract for a permanent loan modification. The court relied on Paragraph 2G of the TPP, which stated that the loan would not be modified "unless and until" the borrower received a "fully executed copy of a Modification Agreement." It concluded that under that provision, the bank's promise to offer a permanent modification was conditioned on the bank's sending the plaintiffs a signed Modification Agreement. Because the bank did not send the plaintiffs a signed Modification Agreement, the district court ruled that the bank was not required to offer a permanent modification, and dismissed the claims for breach of contract.

Plaintiffs also alleged claims of promissory estoppel, breaches of the covenant of good faith and fair dealing, and violations of California's Unfair Competition Law, Cal. Bus. & Prof.Code §§ 17200, *et seq.*, and the Lucias further alleged a violation of the Rosenthal Fair Debt Collection Practices

Act, Cal. Civ.Code § 1788.17. Because all these claims depended on a promise by the bank to offer a permanent modification if the plaintiffs met the conditions ***883** of the TPP, the district court dismissed them as well, and without leave to amend. Both Corvello and the Lucias appeal the dismissal of all the claims.

## DISCUSSION

The issue we must decide is whether the bank was contractually obligated under the terms of the TPP to offer a permanent modification to borrowers who complied with the TPP by submitting accurate documentation and making trial payments. State and federal courts have dealt with similar issues, in similar factual circumstances, in a number of cases. *See Sutcliffe v. Wells Fargo Bank, N.A.,* 283 F.R.D. 533, 549–50 (N.D.Cal.2012) (collecting cases).

The leading case on the contractual obligations of banks under TPP agreements is the Seventh Circuit's decision in *Wigod v. Wells Fargo Bank, N.A.,* 673 F.3d 547 (7th Cir.2012). That court held that banks were required to offer permanent modifications to borrowers who completed their obligations under the TPPs, unless the banks timely notified those borrowers that they did not qualify for a HAMP modification. *Id.* at 562–63. Other courts have since followed the reasoning of *Wigod. See, e.g., Young v. Wells Fargo Bank, N.A.,* 717 F.3d 224, 233–34 (1st Cir.2013); *Sutcliffe,* 283 F.R.D. at 549–52; *West v. JPMorgan Chase Bank, N.A.,* 214 Cal.App.4th 780, 154 Cal.Rptr.3d 285, 299 (2013).

**[1]** The Seventh Circuit in *Wigod* rejected the very proposition that Wells Fargo asserts here, and which the district court accepted when it concluded that there was no contract. Wells Fargo contends, as it did in *Wigod,* that Paragraph 2G of the TPP means there can be no contract unless the servicer sends the borrower a signed Modification Agreement. It points to the language in 2G stating that "the Loan Documents will not be modified unless and until ... (ii) [the borrower] receive[s] a fully executed copy of a Modification Agreement."

The Seventh Circuit rejected Wells Fargo's position because it made the existence of any obligation conditional solely on action of the bank, and conflicted with other provisions of the TPP, including the bank's promise to send the borrower a Modification Agreement if the borrower complied with the obligations under the TPP and the borrower's representations continued to be true. *Wigod,* 673 F.3d at 563. Wells Fargo's interpretation of the TPP was suspect because it allowed banks to avoid their obligations to borrowers merely by choosing not to send a signed Modification Agreement, even though the borrowers made both accurate representations and the required payments. As the Seventh Circuit put it, Wells Fargo's interpretation would allow it to "simply refuse to send the Modification Agreement for any reason whatsoever —interest rates went up, the economy soured, it just didn't like [the Borrower]—and there would still be no breach ... turn[ing] an otherwise straightforward offer into an illusion." *Id.*

We believe the reasoning in *Wigod* is sound. Paragraph 2G cannot convert a purported agreement setting forth clear obligations into a decision left to the unfettered discretion of the loan servicer. The more natural and fair interpretation of the TPP is that the servicer must send a signed Modification Agreement offering to modify the loan once borrowers meet their end of the bargain. Under Paragraph 2G of the TPP, there could be no actual mortgage modification until all the requirements were met, but the servicer could not unilaterally and without justification refuse to send the offer. As the Seventh Circuit stated in *Wigod,* the modification was not complete until all of the conditions were ***884** met, "but under paragraph 1 and section 3 of the TPP, Wells Fargo still had an obligation to *offer* [the borrower] a permanent modification once [the borrower] satisfied all [ ] obligations under the agreement." *Id.* (emphasis in original). This interpretation of the TPP avoids the injustice that would result were Wells Fargo's position accepted and Wells Fargo allowed to keep borrowers' trial payments without fulfilling any obligations in return. The TPP does not contemplate such an unfair result.

The Seventh Circuit in *Wigod* was applying Illinois contract law, and we deal with California law. There is now no material difference. In *West,* 154 Cal.Rptr.3d at 299, the California Court of Appeal expressly adopted the reasoning of *Wigod* and concluded that the trial plan agreement in that case authorized banks, before offering a modification, to evaluate only whether borrowers had complied with the agreement's terms and whether their representations remained true. Once the bank determined that a borrower had complied and the representations were still true, then the bank was required by the agreement to offer a permanent modification. *Id.*

**[2]** Wells Fargo contends, however, that *West* is not controlling because it is not a California Supreme Court decision and there is a conflict in the California Courts of Appeal. Wells Fargo cites *Nungaray v. Litton Loan Servicing, LP,* 200 Cal.App.4th 1499, 135 Cal.Rptr.3d 442 (2011), as proof of this conflict, but *Nungaray* does not apply because the borrowers there had failed to submit the documents required by the TPP. *Id.* at 447 (the bank never "receive[d] the Nungarays' complete financial information, despite sending the Nungarays' counsel three letters requesting the information and returning one of the Nungarays' payments for lack of accompanying financial information."). Where, as here, borrowers allege, and we must assume, that they have fulfilled all of their obligations under the TPP, and the loan servicer has failed to offer a permanent modification, the borrowers have valid claims for breach of the TPP agreement. *West,* 154 Cal.Rptr.3d at 299 ("Applying *Wigod* to this case, '[a]lthough [Chase Bank] may have had some limited discretion to set the precise terms of an offered permanent modification, it was certainly required to offer *some* sort of good-faith permanent modification to [West] consistent with HAMP guidelines. It has offered none.' " (quoting *Wigod,* 673 F.3d at 565)).

Wells Fargo also contends that *Wigod* is materially distinguishable, pointing to Paragraph 2F in the TPPs which states, among other things, that the trial plan will end if the borrower does not receive a signed copy of the TPP. In *Wigod* the bank actually sent the plaintiffs a signed copy of the TPP.

*Wigod's* holding, however, does not turn on that fact, but instead on the bank's failure to tell the borrowers that they did not qualify. The TPP gives the bank a chance, after borrowers submit the completed TPP, to notify them if they do not qualify. "Under the terms of the TPP Agreement, then, that moment [when Wells Fargo received the borrower's TPP] was Wells Fargo's opportunity to determine whether [the borrower] qualified. If [the borrower] did not, it could have and should have denied [the borrower] a modification on that basis." *Wigod,* 673 F.3d at 562. This notification obligation is also set out in the applicable Treasury Directive. If after receiving the TPP the bank determines that a borrower is not eligible for a modification, the bank should "promptly communicate that determination to the borrower in writing and consider the borrower for another foreclosure prevention ***885** alternative." SD 09–01. Wells Fargo's own failure to fulfill the notification obligation does not deprive plaintiffs of the benefits of their agreement.

**[3]** Wells Fargo separately contends that the Lucias' breach of contract claim cannot survive the statute of frauds because it is an oral agreement to modify a mortgage. The Lucias, however, have alleged full performance of their obligations under the contract. They therefore may enforce the remaining promises. *See Secrest v. Sec. Nat'l Mortg. Loan Trust 2002–2,* 167 Cal.App.4th 544, 84 Cal.Rptr.3d 275, 284–85 (2008).

**[4]** The Lucias' complaint also contains a claim for violation of California's Rosenthal Act, Cal. Civ.Code § 1788.17, the state's version of the federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692e, 1692f. Wells Fargo concedes it is a debt collector under the meaning of the Rosenthal Act. Wells Fargo contends, however, that it was not engaged in debt collection activities when it offered the TPP with its concomitant demand for trial payments. The district court, while dismissing the claim on other grounds, correctly recognized that Wells Fargo was engaged in debt collection. The TPP was more than an informational circulation. This is the same conclusion reached by other district courts. *See In re Bank of Am. Home Affordable Modification Program (HAMP) Contract Litig.,* No. 10–MD–02193–RWZ, 2011 WL 2637222, at *6 (D.Mass. July 6, 2011); *cf. Reyes v. Wells Fargo Bank, N.A.,* No. C–10–01667JCS, 2011 WL 30759, at *20 (N.D.Cal. Jan. 3, 2011).

**[5]** As a final matter, we must reiterate that the district court granted Wells Fargo's motion to dismiss the complaints under Rule 12(b)(6), so we therefore must accept the allegations of the complaints. In oral argument, Wells Fargo indicated that it did in fact determine that the plaintiffs were not qualified, and thus followed Treasury guidelines in choosing not to offer them permanent modifications. SD 09–01. We are unable to consider any such factual assertion on this record and at this stage of the proceedings. We are in the same position as the Seventh Circuit when it posited that Wells Fargo would offer this sort of defense, and similarly concluded that such a defense "presents a factual dispute that cannot be resolved [at the motion to dismiss stage]." *Wigod,* 673 F.3d at 579. We therefore must reverse the judgment and remand the case for further proceedings.

## CONCLUSION

The district court's judgment granting Wells Fargo's motion to dismiss is **REVERSED** and **REMANDED.**

**All Citations**

728 F.3d 878, 13 Cal. Daily Op. Serv. 8639, 2013 Daily Journal D.A.R. 10,628

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2010 WL 2102485
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Seattle.

Cesare DADDABBO, et al., Plaintiffs,
v.
COUNTRYWIDE HOME LOANS, INC., et al., Defendants.

No. C09–1417RAJ. | May 20, 2010.

**ORDER**

RICHARD A. JONES, District Judge.

**I. INTRODUCTION**

*1 This matter comes before the court on a motion (Dkt.# 20) from five Defendants to dismiss Plaintiffs' claims. No party requested oral argument. For the reasons stated herein, the court GRANTS the motion in part and DENIES it in part.

**II. BACKGROUND**

Plaintiffs Cesare and Amy Daddabbo live in Ferndale, Washington. In January 2007, Mr. Daddabbo searched for a lender to refinance their home mortgage. He was initially referred to Defendant Pacific Mortgage Loans, Inc. ("Pacific"), a California mortgage brokerage. ¶ 4. [1] Pacific, in conjunction with a non-party, issued him documents in late January 2007 promising him a loan with an interest rate and closing costs that he found desirable. ¶ 5. Those documents included a loan application, a federal Truth–in–Lending Act ("TILA") disclosure, and a good faith estimate ("GFE") of the terms of the loan. *Id.* Ms. Daddabbo was not named on any of the documents. ¶ 4.

On February 2, 2007, Mr. Daddabbo received documents from Defendant Decision One Mortgage Company ("Decision One"), including a new GFE. ¶ 7. He did not receive a new TILA disclosure. *Id.* The new documents described a loan on less favorable terms, and included no explanation of why those terms had changed from the loan he was promised in late January. *Id.* The loan was set to close on February 8, 2007.

On February 8, 2007, Mr. Daddabbo received a new set of documents, including a TILA disclosure. ¶ 8. The terms of the loan differed unfavorably in almost every respect from the loan promised in late January. *Id.* Again Mr. Daddabbo received no explanation for the changed terms. *Id.* He nonetheless closed the loan the following day. Documents were faxed to a notary public who came to the Daddabbo home to conduct the closing. ¶ 9. At the closing, Ms. Daddabbo signed a quitclaim deed transferring her interest in the home to Mr. Daddabbo. ¶ 10, Ex. P 1. The deed erroneously stated the situs of the property as "County of Whatcom, State of California," and the notary's acknowledgment indicated that the documents were signed in California. *Id.* The recorded deed is not attached to Plaintiffs' complaint, but Defendants provided a copy of the deed as it was recorded in Whatcom County on February 23, 2007. Defs.' Req. for Judicial Notice ("RJN"), Ex. B. The recorded deed has a proper legal description of the property attached to it. *Id.* It also has a handwritten notation from the notary correcting the erroneous reference to California in her acknowledgment. *Id.*

At the closing, Mr. Daddabbo received four TILA notices informing him of his right to rescind the mortgage. ¶ 14, Exs. P2–P5. Three of them were dated February 8; one was dated February 9. *Id.* On February 13, an employee of a non-party contacted Mr. Daddabbo to have him sign a backdated TILA notice of his right to rescind. ¶ 15. Plaintiffs attached an unsigned version of the backdated TILA notice to their complaint. ¶ 15, Ex. P7. Defendants included the signed version in their request for judicial notice. RJN, Ex. A. Plaintiffs have not disputed the authenticity of the latter version.

*2 At some point after the events described above, Defendant Countrywide Home Loans, Inc. ("Countrywide") became the servicer of the mortgage. Plaintiffs were apparently aware of Countrywide's role as a servicer, because they sent Countrywide a qualified written request in accordance with the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 to § 2617. The qualified written request apparently sought information on their mortgage. 12 U.S.C. § 2605(e) (authorizing qualified written request and requiring response). The qualified written request is not part of the record, and Plaintiffs' complaint is silent as to when they made the request. ¶ 16. Countrywide's response to the request stated that Wells Fargo owned the mortgage note in trust on behalf of Morgan Stanley.[2] ¶ 16.

Countrywide allegedly directed Defendant Recontrust Co., N.A. ("Recontrust"), to foreclose on Plaintiffs mortgage on behalf of Defendant Mortgage Electronic Registration Systems, Inc. ("MERS"). ¶ 17. The complaint provides no other information on the foreclosure proceedings, including when they began and whether the property has been sold or a sale date has been set.

On October 1, 2008, Plaintiffs sent Countrywide a TILA rescission notice. ¶ 18. They contend that this notice operated to cancel the mortgage and renders the mortgage note an unsecured debt. *Id.* Countrywide declined to cancel the mortgage. *Id.*

Plaintiffs sued in Whatcom County Superior court on June 26, 2009, filing a complaint raising four causes of action. They seek a declaratory judgment canceling their mortgage and rendering the mortgage note an unsecured debt. They invoke TILA to request cancellation of the mortgage as well as statutory and other damages. They ask the court to "block[ ] and cancel[ ] the foreclosure sale" on their property. ¶ 25. Finally, they allege that Defendants' conduct violates the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 to § 1691f, and they elect to pursue that violation as a violation of the Washington Consumer Protection Act ("CPA").[3] Plaintiffs' complaint does not expressly state a RESPA claim, although a single paragraph in their complaint suggests that they were dissatisfied with Countrywide's response to their qualified written request. ¶ 16. Plaintiffs clarified their RESPA claim only in their opposition to the motion to dismiss, stating that Countrywide did not timely respond to the request. For purposes of this motion, the court considers Plaintiffs' belated explanation as if it were included in their complaint.

Plaintiffs apparently assert all of their causes of action against all Defendants. In this motion to dismiss, five Defendants have banded together: Countrywide, Wells Fargo, Morgan Stanley, Recontrust, and MERS. They contend that Plaintiffs fail to state a claim against them. Defendants Pacific and Decision One have not joined in the motion.

## III. ANALYSIS

The moving Defendants invoke Federal Rule of Civil Procedure 12(b)(6), contending that Plaintiffs have not stated a claim against them. The court must therefore assume the truth of all the factual allegations of Plaintiffs' complaint, and credit all reasonable inferences arising from their allegations. *Sanders v. Brown,* 504 F.3d 903, 910 (9th Cir.2007). Plaintiffs must point to factual allegations that "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 568 (2007). If they do so, their complaint survives dismissal as long as there is "any set of facts consistent with the allegations in the complaint" that would entitle them to relief. *Id.* at 563; *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1950 (2009) ("When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."). The court typically cannot consider evidence or allegations beyond the four corners of the complaint, although it may rely on a document to which the complaint refers as long as the document is central to the party's claims or defenses and its authenticity is not in question. *Marder v. Lopez,* 450 F.3d 445, 448 (9th Cir.2006). The court may also consider evidence subject to judicial notice. *United States v. Ritchie,* 342 F.3d 903, 908 (9th Cir.2003).

### A. TILA Claims

***3** To the extent Plaintiffs invoke TILA for relief arising out of the January and February 2007 transactions, their claims fail as a matter of law. TILA has a one-year statute of limitations. 15 U.S.C. § 1640(e). The original refinance transactions were complete by the end of February 2007; Plaintiffs sued more than two years later in June 2009. TILA provides them no relief for the 2007 transactions.[4]

TILA also, however, provides a mortgage obligor with the right to rescind his mortgage more than one year after a refinancing transaction in certain circumstances. 15 U.S.C. § 1635(a). Ordinarily, the rescission right expires at midnight on the third business day following the transaction. *Id.* It is extended, however, where the creditor either fails to make required disclosures or omits material information from the disclosures. *Id* . ("[T]he obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later"); *see also* 12 C.F.R. § 226.23(a)(3). Where an obligor timely requests rescission, a creditor's refusal to honor the request is itself a TILA violation. 15 U.S.C. § 1635(b). In this case, Plaintiffs claim that Countrywide failed to honor a rescission notice they sent in October 2008. ¶ 18. They sued less than a year later, making their suit timely to the extent it seeks to enforce their right to rescind. [5]

Although timely, Plaintiffs' claim based on their TILA right of rescission fails as a matter of law because their right to rescind expired in February 2007, not three years later. As to Mr. Daddabbo, he received a TILA rescission disclosure on February 9, 2007, and that disclosure required him to invoke his rescission right by midnight on February 13. RJN, Ex. A. Mr. Daddabbo does not contest that he signed this document on February 9, 2007. February 9, 2007 was a Friday, and thus the third business day thereafter was February 13, 2007. 12 C.F.R. § 226.2(a)(6) (noting that for purposes of rescission, business days exclude only Sundays and certain public holidays). Thus, the notice properly informed him of his rescission rights, and he failed to exercise those rights within the three-business-day limitation period.

Plaintiffs also assert that Defendants violated TILA by failing to give Ms. Daddabbo notice of her right to rescind. Although TILA typically limits rescission liability for assignees to liability arising out of facial errors in disclosure forms, 15 U.S.C. § 1641(a) & (e), it permits an obligor to pursue a rescission claim against any assignee. 15 U.S.C. § 1641(c). Thus, if the original creditors had an obligation to give Ms. Daddabbo notice of her right to rescind, she may invoke her right to rescind. 226.23(a)(4) ("When more than one consumer in a transaction has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers.").

*4 Plaintiffs' contention that Ms. Daddabbo has a rescission right depends on their claim that she did not validly quitclaim her interest in their home to her husband in conjunction with the refinancing. The court thus turns to that claim.

There is no dispute that prior to Ms. Daddabbo's execution of the quitclaim deed, the real estate on which she and her husband lived was their community property. Typically, both spouses must execute a conveyance of real property that serves as a primary residence:

> The homestead of a spouse or domestic partner cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both spouses or both domestic partners, except that either spouse or both or either domestic partner or both jointly may make and execute powers of attorney for the conveyance or encumbrance of the homestead.

RCW 6.13.060. A conveyance made by only one spouse is nonetheless valid if the spouse makes the conveyance voluntarily and then accepts the benefits of the conveyance. *Snohomish County v. Hawkins,* 89 P.3d 713, 715–16 (Wash.Ct.App.2004) ("A party ratifies an otherwise voidable contract if, after discovering facts that warrant rescission, she remains silent or continues to accept the contract's benefits."). In this case, Plaintiffs' allegations establish that Ms. Daddabbo executed the quitclaim deed voluntarily so that her husband could execute the refinancing transaction. She accepted the benefits of that transaction (the refinancing), and only now seeks to invalidate the quitclaim deed. She cannot do so.

Plaintiffs' alternative basis for invalidating the deed is that it erroneously stated that the subject real estate was in Whatcom County, California, with a similar error in the notary's acknowledgement of the quitclaim deed. There is no dispute that the deed as recorded attached a correct legal description of the property. RJN, Ex. B. The error in the notary's acknowledgment was corrected by hand and initialed by the notary. [6] The only "error" remaining on the deed as it was recorded was the statement that the subject property was "in the County of Whatcom, State of California." *Id.* A person reviewing the recorded deed would know immediately from the attached (and correct) legal description that the error was immaterial. Even if the court were to find that the error was material, such errors do not invalidate a deed where it can be readily ascertained what property the deed intended to transfer. *E.g., Thompson v. Stack,* 150 P.2d 387, 390–91 (Wash.1944); *Bacon v. Gardner,* 229 P.2d 523, 528 (Wash.1951). In this case, the court finds no basis to deem the deed invalid merely because of the obviously erroneous reference to California property.

Plaintiffs' also argue that the deed is invalid because the legal description was not attached when Ms. Daddabbo signed it, even though there is no dispute that the legal description is accurate. The deed Ms. Daddabbo signed explained that the legal description would be appended later. RJN, Ex. B ("COMPLETE LEGAL DESCRIPTION TO

BE PROVIDED"). Plaintiffs present no authority for the notion that the post-signature attachment of an accurate legal description to a deed somehow invalidates it. The sole case Plaintiffs cite, *Berg v. Ting,* 886 P.2d 564 (Wash.1995), is readily distinguishable. The *Berg* court merely held that a deed transferring an easement was invalid where the deed contained no legal description, and referred to a non-existent document as the basis for the legal description. *Id.* at 567–69. In this case, by contrast, the document was not non-existent, it was merely not physically attached to the deed at the time Ms. Daddabbo signed it.

***5** For all of these reasons, the court concludes that neither Mr. Daddabbo nor Ms. Daddabbo could invoke TILA to rescind the mortgage in October 2008. For that reason, none of the Defendants violated TILA by declining to honor Plaintiffs' late rescission request. Plaintiffs therefore have no timely TILA claims against the moving Defendants.

**B. CPA and ECOA claims**

Plaintiffs point to only two CPA violations in their complaint. One is a violation of ECOA; the other is Defendants' failure to honor Plaintiffs' rescission notice. Plaintiffs claim that someone raised the interest rate on the loan between the January and February 2007 loan documents, thereby violating ECOA. There is no allegation that any of the moving Defendants were responsible for this act. Plaintiffs make no effort to offer authority establishing that an ECOA violation made in mortgage process becomes the responsibility of a subsequent purchaser of the mortgage. The court is aware of no such authority. Any CPA claim based on failure to honor Plaintiffs' TILA rescission notices fails for reasons mentioned in subpart A above. The court therefore dismisses Plaintiffs' CPA claims. [7]

**C. RESPA claims**

The only RESPA violation that Plaintiffs attribute to the moving Defendants is that Countrywide violated RESPA by not timely responding to their qualified written request. 12 U.S.C. § 2605(e) (2) (establishing timely for response to a qualified written request). This allegation appears nowhere in the complaint, it appears only in Plaintiffs' opposition to their motion to dismiss. The complaint does not state when Plaintiffs made their qualified written request, nor when Countrywide responded. No one has provided a copy of the request or Countrywide's response.

Countrywide contends that a claim based on the qualified written request is untimely. Countrywide is mistaken. RESPA has a three-year statute of limitations for violations of 12 U.S.C. § 2605. 12 U.S.C. § 2614. At the soonest, Plaintiffs made their qualified written request in early 2007, making their claim against Countrywide timely.

In all other respects, however, Plaintiffs have failed to state a RESPA claim against the moving Defendants. They make no effort to explain how any other Defendant violated RESPA. The court therefore concludes that Plaintiffs' RESPA claim survives dismissal solely to the extent that it states a claim against Countrywide based on its failure to timely respond to Plaintiffs' qualified written request.

**D. Declaratory Judgment Preventing the Foreclosure Sale.**

On the record before the court, there is no basis to prevent any foreclosure sale of Plaintiffs' property. The court notes that Plaintiffs provide virtually no information about the foreclosure sale. The court is aware only that Recontrust has initiated a foreclosure action on behalf of MERS. ¶ 17. Plaintiffs' sole basis for blocking the foreclosure (other than the bases rejected above) is their contention that MERS has no beneficial interest in the note that the deed of trust secures, and that Recontrust therefore has no power as MERS's designee to initiate a foreclosure action. This assertion is baffling. The deed of trust, of which the court takes judicial notice, explicitly names MERS as a beneficiary. RJN, Ex. C. (Definitions ¶ (E)). The deed of trust grants MERS not only legal title to the interests created in the trust, but the authorization of the lender and any of its successors to take any action to protect those interest, including the "right to foreclose and sell the Property." RJN, Ex. C. Plaintiffs attempt to counter this unambiguous grant of power by introducing a prospectus for the trust that holds the deed of trust. Plaintiffs do not explain how the court can properly consider this document on a motion to dismiss. The court considers it nonetheless, because nothing in it remotely supports Plaintiffs' assertion that MERS somehow has been stripped of the power that the deed of trust grants. Plaintiffs have raised no valid basis to stop any foreclosure sale.

## IV. CONCLUSION

***6** For the reasons stated above, the court GRANTS Defendants' motion (Dkt. # 20) in part and DENIES it in part. The court dismisses all claims against Wells Fargo, Morgan Stanley, Recontrust, and MERS. The clerk shall terminate each of these Defendants as parties to this action. The court dismisses all claims against Countrywide except a RESPA claim based on its alleged failure to timely respond to Plaintiffs' qualified written request.

Plaintiffs request leave to file an amended complaint. They do not attempt to explain, however, how they would amend their complaint to state valid claims against the moving Defendants. Nothing in the record before the court suggests that Plaintiffs have a valid basis to amend their complaint. *See Bonin v. Calderon,* 59 F.3d 815, 845 (9th Cir.1995) ("[A] district court does not abuse its discretion in denying a motion to amend where the movant ... provides no satisfactory explanation for his failure to fully develop his contentions originally."). On this record, the court can only conclude that any amendment would be futile. [8] *Mt. Hood Polaris, Inc. v. Martino (In re Gardner),* 563 F.3d 981,990 (9th Cir.2009) ("A district court does not err in denying leave to amend where the amendment would be futile.").

**All Citations**

Not Reported in F.Supp.2d, 2010 WL 2102485

Footnotes

1 All citations using bare "¶ " symbols are to Plaintiffs' complaint. Dkt. # 2.

2 The actual names of the Wells Fargo and Morgan Stanley entities are, respectively, Wells Fargo & Deutche National Trust Company, and Morgan Stanley ABS Capital I Inc. Trust 2006–HE6, Mortgage Pass–Through Certificates, Series 2006–HE6.

3 Plaintiffs' complaint offers little detail about their ECOA and CPA claims, but the court notes that the Washington Mortgage Broker Practices Act ("MBPA") makes violations of ECOA a violation of state law. RCW 19.146.0201(10) (making violation of ECOA by a "loan originator or mortgage broker" unlawful). MBPA violations are CPA violations. RCW 19.146.100. ECOA contains an election-of-remedies clause that requires a Plaintiff to choose between it and comparable state law remedies. 15 U.S.C. § 1691d (e).

4 The court's disposition today makes it unnecessary to address Defendants' contention that they had no TILA disclosure obligations because they had no involvement in the early 2007 transactions. *See* 15 U.S.C. § 1635(a) (imposing obligation to disclose TILA rescission right on "creditor"); 15 U.S.C. § 1641(d)(1) (limiting liability of mortgage assignees).

5 The court's disposition today makes it unnecessary to address Defendants contention that Plaintiffs could not invoke their rescission right because they could not tender back the proceeds of the refinance transaction.

6 Plaintiffs contend that the notary corrected the acknowledgment only after Ms. Daddabbo signed it. Even if the court accepts the truth of this allegation, Plaintiffs provide no authority for the proposition that an accurate post-signature modification to a notary's acknowledgment somehow invalidates that acknowledgment.

7 Plaintiffs' opposition to the motion to dismiss asserts that "this loan is rife with CPA violations." Pltfs.' Opp'n at 13. They make no effort to describe any violation except those the court has noted.

8 Plaintiffs' counsel does not help his clients' cause by comparing Defendants to Auschwitz guards, despite his disclaimer that he does so only for "vivid Socratic purposes." Pltfs.' Opp'n at 12. Such invective is beneath the standards of advocacy this court expects from counsel.

**End of Document**

356 F.3d 1058
United States Court of Appeals,
Ninth Circuit.

Priscilla EDWARDS, Plaintiff–Appellant,
v.
MARIN PARK, INC., a California Corporation; Marin Mobilehome Park; Doris Bertram, individually and as personal representative of George Bertram, deceased; Carole Holley; John Kidd; Connie Kidd, Defendants–Appellees.

No. 02–16820. | Argued and Submitted Dec. 5, 2003. | Filed Jan. 26, 2004.

**Synopsis**

**Background:** Mobile home park resident brought claims against mobile home park alleging violations of the Fair Housing Act (FHA) and Racketeer Influenced and Corrupt Organizations Act (RICO). The United States District Court for the Northern District of California, Saundra Brown Armstrong, J., dismissed claims, and resident appealed.

**Holdings:** The Court of Appeals, Berzon, Circuit Judge, held that:

[1] resident stated a claim of retaliation under the FHA;

[2] resident's decision to forego amending RICO claim was not improper, and thus the RICO claim was not subject to dismissal as a sanction for disobedience;

[3] resident failed to state a claim under RICO; and

[4] mobile home park's alleged conduct was not sufficiently outrageous to support claim of intentional infliction of emotional distress.

Affirmed in part, reversed in part, and remanded.

West Headnotes (8)

**[1] Federal Courts**
⇒ Pleading

An appellate court reviews de novo a district court's grant of a motion to dismiss for failure to state a claim. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

66 Cases that cite this headnote

**[2] Civil Rights**
⇒ Property and housing

Federal notice pleading standard, which required a plaintiff to give the defendant only fair notice of what the plaintiff's claim was and the grounds upon which it rested, applied with respect to retaliation claims brought under the Fair Housing Act (FHA). Fed.Rules Civ.Proc.Rules 8(a), 12(b)(6), 28 U.S.C.A.

89 Cases that cite this headnote

**[3] Civil Rights**
⇒ Interference, coercion, or intimidation; retaliation

Mobile home park resident stated a claim of retaliation under the Fair Housing Act (FHA) against mobile home park by alleging that all other tenants in her section of the park were offered long-term leases at the time she was denied one, that is, that the park took action directed specifically towards her, hoping to coerce her into ceasing her activism on behalf of women tenants claiming sex discrimination. Civil Rights Act of 1968, §§ 804(b), 818, as amended, 42 U.S.C.A. §§ 3604(b), 3617; Fed.Rules Civ.Proc.Rules 8(a), 12(b)(6), 28 U.S.C.A.

6 Cases that cite this headnote

**[4] Federal Civil Procedure**
⇒ Grounds in General

Mobile home park resident's decision to forego amending her Racketeer Influenced and Corrupt Organizations Act (RICO) claim against mobile home park, as instructed by the district court, was not improper, and thus the RICO claim was not subject to dismissal as a sanction for disobedience, where the resident, rather than doing nothing, made an affirmative choice to stand on her pleadings and clearly communicated that choice to the court. 18 U.S.C.A. § 1961; Fed.Rules Civ.Proc.Rules 12(b)(6), 41(b), 28 U.S.C.A.

72 Cases that cite this headnote

[5] **Federal Civil Procedure**
⇒ Fraud, mistake and condition of mind

Mobile home park resident failed to state a claim with requisite particularity under Racketeer Influenced and Corrupt Organizations Act (RICO) against mobile home park; although resident properly alleged the time and place that the park's purportedly fraudulent legal notices were delivered and names the parties involved, the complaint failed to allege the notices' specific contents, and the resident failed to attach the notices to her complaint or to any other filing. 18 U.S.C.A. § 1961; Fed.Rules Civ.Proc.Rules 9(b), 12(b)(6), 28 U.S.C.A.

206 Cases that cite this headnote

[6] **Federal Courts**
⇒ Failure to mention or inadequacy of treatment of error in appellate briefs

**Federal Courts**
⇒ Lack or inadequacy of citations to record

In assessing whether an issue is sufficiently argued to avoid waiver, an appellate court looks at whether the opening brief contains the appellant's contentions as well as citations to authorities and the record. F.R.A.P.Rule 28(a)(9)(A), 28 U.S.C.A.

2 Cases that cite this headnote

[7] **Federal Courts**
⇒ Specification of errors; points and arguments

Although appellate brief submitted by mobile home resident challenging dismissal of state-law emotional distress claims against mobile home park may have been inadequate to preserve issue for appeal, mobile home park would not suffer prejudice from appellate review of the issue given that the park addressed the issue in its reply brief. F.R.A.P.Rule 28(a)(9)(A), 28 U.S.C.A.

6 Cases that cite this headnote

[8] **Damages**
⇒ Particular cases

Under California law, mobile home park's alleged conduct of having conducted building inspections and having sent resident several allegedly fraudulent documents and a lease renewal offer that, although shorter than she had wanted, complied with California law was not sufficiently objectively outrageous to support resident's claim of intentional infliction of emotional distress. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

4 Cases that cite this headnote

**Attorneys and Law Firms**

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Thomas A. Moore, Law Office of Thomas A. Moore, San Francisco, CA, Jack V. Valinoti, Leland, Parachini, Steinberg, Matzger & Melnick, LLP, San Francisco, CA, for the plaintiff-appellant.

Appeal from the United States District Court for the Northern District of California; Saundra B. Armstrong, District Judge, Presiding. D.C. No. CV–01–04294–SBA.

Before: HAWKINS, PAEZ, and BERZON, Circuit Judges.

**Opinion**

BERZON, Circuit Judge:

In this appeal we consider whether a plaintiff may be sanctioned for declining the opportunity to amend her complaint. We answer in the negative. We also address the pleading standard for discrimination claims under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* [1]

## I. BACKGROUND

Since 1992, Priscilla Edwards has lived in a mobile home [2] in the Marin Park ***1060** development in Greenbrae, California. *See generally Hacienda Valley Mobile Estates v. City of Morgan Hill,* 353 F.3d 651 (9th Cir.2003) (describing relationship of a mobile home park to a tenant-homeowner). Edwards alleges—accurately, we assume at this stage of the litigation—that the management of the park sent her unjustified, harassing pre-eviction notices in order to drive her from her tenancy. The notices, which the parties call "7 Day Legal Notices," were first sent on January 27 and January 30, 1999. These missives apparently notified Edwards that her home was not in compliance with various provisions of California's Mobilehome Residency Law, Cal. Civil Code ch. 2.5. [3] On February 2 and April 2, 1999, Edwards wrote the Park's management, describing the two notices as "fraudulent, malicious, oppressive, willful and negligent," while apparently failing to explain in what respect either notice was in fact any of those things. Edwards's second letter explained that the Park's notices had caused her to suffer various medical and psychological ailments.

Further notices followed, abating once Edwards sued Marin Park, pro se, in California Superior Court on July 5, 2000. Edwards dropped her complaint in April 2001. As she puts it, the "peace and quiet" she had enjoyed during the pendency of the suit led her to believe no adjudication would be necessary. Harassing inspections and notices from Marin Park allegedly resumed the day the suit was dismissed.

In July 2001, Edwards wrote to the California Department of Housing and Community Development and several California elected officials complaining of unsafe conditions at the park and of management's attempts to enforce minor building standards violations against three female tenants while the more grave safety problems went unrepaired. Days later, [4] Edwards was offered a month-to-month or one-year renewal of her lease, rather than, as she had expected and previously enjoyed, a lease for a longer term.

Edwards sued again, this time in federal court. Her amended, pro se complaint claimed (1) that under the federal Fair Housing Act (FHA), 42 U.S.C. § 3601 *et seq.,* Marin Park had illegally retaliated against Edwards for her tenant activism; (2) that the "7 Day Legal Notices" amounted to mail fraud actionable under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.;* (3) that Marin Park's reprisals and harassment violated Edwards's rights under the First and Fourteenth Amendments; (4) that the disrepair of the park's roads constituted a common-law nuisance; and (5) that the defendants had intentionally inflicted emotional distress, actionable under state law.

The defendants moved to dismiss all claims under Federal Rule of Civil Procedure 12(b)(6), "failure to state a claim upon which relief can be granted." Edwards then retained counsel and obtained extra time in which to file a response. The district court, in an order filed July 25, 2002, dismissed the FHA retaliation claim without leave to amend because Edwards "failed to allege that she engaged in any 'protected activity' " under the FHA. In so ruling, the district court held that protesting dangerous conditions on residential premises is not, as such, a protected activity. ***1061** The RICO claim was dismissed with leave for Edwards to amend so as to plead the alleged fraud with the specificity demanded by Federal Rule of Civil Procedure 9(b). [5] The constitutional claims were dismissed, as none of the defendants is a state actor, but Edwards was given leave to amend with analogous state constitutional claims that might be viable against private parties. The nuisance and emotional distress claims were dismissed with prejudice, the former for failure to comply with a statutory notice requirement, *see* Cal. Civil Code § 798.84, the latter because the conduct as alleged was insufficiently outrageous, as a matter of law, to state a claim.

The court's dismissal of the RICO claim granted leave to amend by August 2, 2002, only one week after the initial dismissal order. "Failure to file an amended pleading by August 2, 2002," the court warned, "will result in the dismissal of this action, with prejudice." On August 2, rather than file an amended complaint or motion seeking more time, Edwards filed an "Election to Stand Upon the Sufficiency of Amended Complaint Pleadings" indicating her desire to "expedite an appeal" to this court. The district court disapproved of Edwards's stance, "counstru[ing] this curious pleading as a deliberate refusal to amend the complaint." Stating that it had considered the five factors set forth in *Ferdik v. Bonzelet,* 963 F.2d 1258, 1260 (9th Cir.1992), the court dismissed the complaint with prejudice under Federal Rule of Civil Procedure 41(b)—providing for dismissal "[f]or failure of the plaintiff ... to comply with ... any order of court"—and entered judgment for defendants with prejudice.

Edwards appeals from the dismissal of the FHA and RICO claims. For the reasons given below, we reverse as to the

 

FHA claim but affirm the Rule 12(b)(6) dismissal of the RICO claim. We briefly address her state-law claims as well.

## II. DISCUSSION

### A. Edwards's FHA Claim

**[1]** We review de novo the district court's grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim. *Stone v. Travelers Corp.,* 58 F.3d 434, 436–37 (9th Cir.1995). A motion under Rule 12(b)(6) should be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), construing the complaint in the light most favorable to the plaintiff, *Geraci v. Homestreet Bank,* 347 F.3d 749, 751 (9th Cir.2003).

*Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), instructs us that the standards for pleading discrimination claims are no higher than the relaxed notice pleading standard of Federal Rule of Civil Procedure 8(a), *viz.,* a "short and plain statement of the claim showing that the pleader is entitled to relief." *Swierkiewicz* overruled the Second Circuit's practice of imposing, at the dismissal stage, the prima facie case framework of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *Swierkiewicz,* 534 U.S. at 510–11, 122 S.Ct. 992. Rather than adduce a prima facie claim in the complaint itself—before discovery, often necessary to uncover a trail of evidence regarding the defendants' intent in undertaking allegedly discriminatory action, has taken place—a plaintiff need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." ***1062** *Swierkiewicz,* 534 U.S. at 512, 122 S.Ct. 992 (quoting *Conley,* 355 U.S. at 47, 78 S.Ct. 99). The prima facie case is "an evidentiary standard, not a pleading requirement." *Id.* at 510, 122 S.Ct. 992. Failure to adduce it may result in a later loss at summary judgment, but failure to *plead* it does not support dismissal at the outset. *Id.* at 510, 514, 122 S.Ct. 992.

**[2]** While *Swierkiewicz* arose in the context of employment discrimination, its reasoning applies to any claim to which the *McDonnell Douglas* framework is applicable, and courts have readily applied *Swierkiewicz* to FHA claims. *See, e.g., Hamad v. Woodcrest Condo. Ass'n,* 328 F.3d 224, 232–33 (6th Cir.2003); *Nat'l Fair Housing Alliance, Inc. v. Prudential Ins. Co.,* 208 F.Supp.2d 46, 51–52 (D.D.C.2002); *Burrell v. State Farm & Cas. Co.,* 226 F.Supp.2d 427, 434 (S.D.N.Y.2002). Moreover, *Swierkiewicz's* liberal reading of Rule 8(a) applies with equal force to discrimination and retaliation claims, so it must similarly apply to FHA retaliation claims. *See Walker v. Thompson,* 288 F.3d 1005, 1011 (7th Cir.2002) (applying *Swierkiewicz* to prisoner retaliation claim); *Castillo v. Norton,* 219 F.R.D. 155, 160–62 (D.Ariz.2003) (applying *Swierkiewicz* to employment discrimination and retaliation claims). Edwards's FHA claim thus need only satisfy the Rule 8(a) notice pleading standard reaffirmed in *Swierkiewicz* to survive a Rule 12(b)(6) dismissal.

The most germane paragraphs of Edwards's amended complaint read:

> Defendants ... retaliated against plaintiff for engaging in protected acts ... in order to ensure fair housing conditions, *including a disproportionate number of women seemingly targeted by Defendants* ... who met together to speak *about having noticed the disproportionate figure.*
>
> ... The purpose of Defendants ... was to squelch any such speech or association and to have a chilling impact on the desire of other tenants (including a disproportionate number of women *complaining of feeling targeted as women* ), to speak out ... in protection of their FHA rights.

(First emphasis in original, other emphasis added). Attached to the complaint was also Edwards's letter to California elected officials, asserting that Marin Park's agent, Inspector Bellavia, was "[un]evenly enforc[ing]" housing code provisions, demanding trivial changes to one woman's mobile home while serious safety problems with the roads and other homes went unaddressed. *See Hal Roach Studios, Inc. v. Richard Feiner & Co.,* 896 F.2d 1542, 1555 n. 19 (9th Cir.1990) (noting that attachments to a complaint are to be considered part of the complaint in deciding a Rule 12(b)(6) motion).

The district court recited the factors of a prima facie FHA retaliation claim, *see Walker v. City of Lakewood,* 272 F.3d 1114, 1128 (9th Cir.2001), and held that the claim should be dismissed because Edwards failed to allege with adequate specificity her engagement in a protected activity, one prong of the prima facie case. In dismissing the claim premised on the above-quoted paragraphs for failure to state an FHA cause of action, the district court demanded more than fair notice of the claim. *See Swierkiewicz,* 534 U.S. at 512, 122 S.Ct. 992.

**[3]** Applying instead the proper Rule 8(a) standard, we conclude that Edwards's FHA allegations are sufficient, albeit barely, to survive a motion to dismiss. The FHA protects against discrimination "in the terms, conditions, or privileges of sale or rental of a dwelling ... because of race, color, religion, sex, familial status, or national origin," 42 U.S.C. § 3604(b), and renders it unlawful "to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account ***1063** of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by [§ 3604]," *id.* § 3617. These latter requirements are the "protected activities" that form part of a § 3617 case. *Walker,* 272 F.3d at 1128. Edwards seeks relief only for retaliation, under § 3617, not for discrimination, under § 3604. The district court found Edwards's "vague and conclusory allegations concerning her gender and that defendants' actions had a disproportionate effect on women" "wholly irrelevant" to her retaliation claim. But Edwards has, albeit a bit opaquely, made out a colorable claim that Marin Park sought to intimidate her to stop her from working with other women tenants to secure the enjoyment of their tenancies free from sex discrimination.

On a fair reading, Edwards has put Marin Park on notice that she believes it attempted to "intimidate, threaten, or interfere with" her "on account of [her] having aided or encouraged" women tenants to complain about discrimination "in the terms, conditions, or privileges of sale or rental of a dwelling ... because of ... sex."[6] She alleges that all other tenants in her section of the park were offered long-term leases at the time she was denied one—that is, that Marin Park took action directed specifically towards her, hoping to coerce her into ceasing her activism on behalf of women tenants claiming sex discrimination. Edwards has, therefore, stated a claim under the FHA, not because tenant activism about dangerous conditions as such is protected activity, which the district court took to be the dispositive issue, but because Edwards has adequately stated a claim for retaliation based on activism against sex discrimination. The complaint adequately sets forth the gravamen of Edwards's § 3617 claim, and that is enough to survive a Rule 12(b)(6) dismissal here.

Dismissal of Edwards's FHA claim under Rule 12(b)(6) was therefore improper.

### B. Edwards's RICO Claim

We are faced with two questions regarding the RICO claim. The first is whether the district court abused its discretion in dismissing it under Rule 41(b) as a sanction for Edwards's failure to follow the court's instruction that she amend the complaint. *See Yourish v. California Amplifier,* 191 F.3d 983, 986 (9th Cir.1999). If so, we review de novo whether the Rule 12(b)(6) dismissal was proper. *See Stone,* 58 F.3d at 436–37.

#### *1. The Rule 41(b) Dismissal*

Dismissal under Rule 41(b) is a sanction, to be imposed only in "extreme circumstances." *Dahl v. City of Huntington Beach,* 84 F.3d 363, 366 (9th Cir.1996) (quoting *Thompson v. Housing Auth. of Los Angeles,* 782 F.2d 829, 831 (9th Cir.1986) (per curiam)). The district court was clearly aggravated by Edwards's choice not to amend the RICO claim when given the chance. But Edwards's considered decision to forego amending her complaint was perfectly proper, and was not sanctionable.

**[4]** Under *WMX Technologies, Inc. v. Miller,* 104 F.3d 1133, 1136 (9th Cir.1997) (en banc), Edwards was unable to appeal the dismissal of any of her claims for which leave to amend was denied until the district court entered a final judgment dismissing them. *See also Webb v. Ada County,* 285 F.3d 829, 836 (9th Cir.2002) ***1064** (explaining the need for a separate document constituting a final judgment before appeal may be taken). She apparently felt that prompt appeal of six of her claims was more important than revising the seventh and attempting to add state constitutional causes of action, and so chose to take her chances that we would find the RICO claim viable as pled. Edwards's choice was all the more understandable in light of the district court's admonition that any amended RICO claim would be scrutinized under Rule 11.

In *WMX Technologies,* we specifically noted that a plaintiff may obtain an appealable final judgment by "fil[ing] in writing a notice of intent not to file an amended complaint." 104 F.3d at 1135 (quoting *Lopez v. City of Needles,* 95 F.3d 20, 22 (9th Cir.1996)). Faced with the district court's initial order dismissing most of her claims and granting leave to amend the RICO claim, Edwards did just what we indicated in *WMX Technologies* she should do: She made a reasonable choice to expedite the rest of the case and test her belief that the RICO claim was adequately pled. Her Election to Stand Upon the Sufficiency of Amended Complaint Pleadings was a proper means to put that choice in the record and did not merit a sanction. On the contrary, the district court should have taken the election not to amend at face value, entered a final judgment dismissing all claims with prejudice, and allowed the case to come to us on appeal in that posture.

The court's order of dismissal, perhaps understandably, read *Yourish* as precluding this course and instead *necessitating* a Rule 41(b) dismissal under the present circumstances. *Yourish,* however, carefully read, does not mandate that a 12(b)(6) dismissal with leave to amend be converted into a Rule 41(b) dismissal-as-sanction when a plaintiff chooses not to amend although given the chance to do so and so informs the court.

The district court in *Yourish* had notified the parties of its tentative ruling to grant a dismissal. The parties agreed the plaintiff could amend within sixty days, and the district court entered a minute order dismissing the initial complaint and granting the sixty days to amend. An amended complaint was never filed. Upon the defendant's motion, filed long after the running of the sixty days, the court entered a Rule 41(b) dismissal for failure to obey the minute order. 191 F.3d at 986.

In *Yourish,* we upheld the Rule 41(b) dismissal, stating that, "[u]nder Ninth Circuit precedent, when a plaintiff fails to amend his complaint after the district court dismisses the complaint with leave to amend, the dismissal is typically considered a dismissal for failing to comply with a court order rather than for failure to prosecute a claim." *Id.* At the same time, we noted that "[t]his approach is somewhat problematic because a plaintiff's failure to amend a complaint is not easily described as disobeying a court order [,] because the plaintiff has the right simply to allow the complaint to be dismissed." *Id.* n. 4.

The precedent on which *Yourish* relied, *Ferdik v. Bonzelet,* 963 F.2d 1258, 1260 (9th Cir.1992), upheld a district court's Rule 41(b) dismissal after a pro se habeas petitioner failed timely to make an extremely minor amendment to his petition. *Ferdik* analyzed the district court's application of five factors for Rule 41(b) dismissal set forth in our earlier cases and determined that the court did not abuse its discretion in issuing its dismissal. *Id.* at 1260–61.

*WMX Technologies,* an en banc opinion, was filed after *Ferdik* but before *Yourish. Yourish,* although expressing discontent with the *Ferdik* approach, failed to cite ***1065** *WMX Technologies* or to note the apparent tension between *Ferdik,* read broadly, and *WMX Technologies.* It is our obligation, nonetheless, to reconcile *Yourish* and *WMX,* if possible, so as to avoid an intracircuit conflict necessitating en banc consideration. *See In re Exxon Valdez,* 270 F.3d 1215, 1235–36 & n. 83 (9th Cir.2001) (describing this court's approach to intracircuit conflicts).

We believe that *Yourish* (and *Ferdik* ) can be understood as limited to circumstances in which the plaintiff did *not,* as *WMX Technologies* recommends, give the court "notice of intent not to file an amended complaint," 104 F.3d at 1135, but instead simply failed to take any action. *Yourish* and *Ferdik* both arose when plaintiffs, given the opportunity to amend or be dismissed, did *nothing.* In that situation, resources continue to be consumed by a case sitting idly on the court's docket. The failure of the plaintiff eventually to respond to the court's ultimatum—either by amending the complaint or by indicating to the court that it will not do so—is properly met with the sanction of a Rule 41(b) dismissal. Where, however, the plaintiff makes an affirmative *choice* not to amend, and clearly communicates that choice to the court, there has been no disobedience to a court's order to amend; as *Yourish* itself noted, the plaintiff has the right to stand on the pleading. *Yourish,* 191 F.3d at 986 n. 4. Hence we understand the *Ferdik–Yourish* rule to require a threatened Rule 12(b)(6) dismissal to ferment into a Rule 41(b) dismissal only upon a plaintiff's *inaction.* When the plaintiff timely responds with a formal notice of his intent not to amend, the threatened dismissal merely ripens into a final, appealable judgment. *See WMX Technologies,* 104 F.3d at 1135. And that is just what should have happened here.

The difference between a dismissal under Rule 12(b)(6) and one under Rule 41(b) is not merely formal. For one thing, a Rule 41(b) dismissal is deemed a sanction for disobedience, while a Rule 12(b)(6) dismissal carries no such stigma. But more important is the different posture in which the two sorts of dismissal reach this court. We review a Rule 41(b) dismissal only for abuse of discretion in applying the five factors set forth in *Ferdik,* 963 F.2d at 1260, which pertain to the propriety of the sanction, not to the merits of the underlying question (such as whether a complaint states a claim). *See Yourish,* 191 F.3d at 986. Yet we review a Rule 12(b)(6) dismissal de novo, reviewing directly the question whether the plaintiff has stated a claim upon which relief could be granted. *See Stone,* 58 F.3d at 436–37. An overbroad reading of *Yourish,* demanding conversion of a 12(b)(6) dismissal into one under Rule 41(b) even when the plaintiff has informed the court of her decision not to amend, would not only create an unnecessary conflict with the en banc opinion in *WMX Technologies.* It would also unjustly deny plaintiffs, like Edwards, who exercise their right to stand on a complaint their right to an appeal on the merits of the question whether the complaint is adequate as a matter of law.

The district court therefore erred in converting its original Rule 12(b)(6) dismissal of the RICO claim into a Rule 41(b) sanction.

*2. The Rule 12(b)(6) Dismissal*

We therefore turn to the court's initial dismissal of the RICO claim for failure to state a claim. Like the dismissal of the FHA claim, the district court's initial order dismissing the RICO claim under Rule 12(b)(6) is properly before us by virtue of the final judgment dismissing all claims. *See WMX Technologies,* 104 F.3d at 1136.

**[5]** Rule 9(b)'s requirement that "[i]n all averments of fraud or mistake, the ***1066** circumstances constituting fraud or mistake shall be stated with particularity" applies to civil RICO fraud claims. *Alan Neuman Prods., Inc. v. Albright,* 862 F.2d 1388, 1392 (9th Cir.1989). To avoid dismissal for inadequacy under Rule 9(b), Edwards's complaint would need to "state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Id.* at 1393 (quoting *Schreiber Distrib. Co. v. Serv–Well Furniture Co.,* 806 F.2d 1393, 1401 (9th Cir.1986)). While the complaint makes out the time and place Marin Park's purportedly fraudulent "7 Day Legal Notices" were delivered and names the parties involved, it contains not a word of the notices' specific contents. Nor did Edwards attach the notices to her complaint or to any other filing in this case. Edwards's RICO claim therefore fails to satisfy Rule 9(b).

Accordingly, we affirm the dismissal of Edwards's RICO claim for failure to state a claim upon which relief could be granted. No further leave to amend need be granted, since Edwards has already had that chance and declined to exercise it.

### C. Edwards's State Law Claims

At oral argument, the parties addressed Edwards's state-law emotional distress and nuisance claims on the merits. "[W]e ordinarily will not consider matters on appeal that are not specifically and distinctly argued in an appellant's opening brief." *Paladin Assocs., Inc. v. Montana Power Co.,* 328 F.3d 1145, 1164 (9th Cir.2003) (citing *Kim v. Kang,* 154 F.3d 996, 1000 (9th Cir.1998)). Edwards's brief contains no discussion at all of her nuisance claim, and the defendants did not address it in their brief, so we decline to reconsider the viability of that claim on appeal.

**[6]** **[7]** As to the emotional distress claim, "[i]n assessing whether an issue is sufficiently argued to avoid waiver, we look at whether the opening brief contains the appellant's contentions as well as citations to authorities and the record." *Williams v. Woodford,* 306 F.3d 665, 684 n. 5 (9th Cir.2002) (citing Fed. R.App. P. 28(a)(9)(A)). Though Edward's emotional distress argument is "more than the summary mention of an issue in a footnote, without reasoning in support," *Hilao v. Estate of Marcos,* 103 F.3d 767, 778 n. 4 (9th Cir.1996), her argument, without citation to the standard for evaluating a claim on intentional infliction of emotional distress or an assertion of why the district court erred in evaluating the claim as pled, likely falls short of the waiver standard. *See id.* However, Marin Park addressed the issue in its reply brief, so we cannot say it would suffer prejudice from our addressing it. *See Koerner v. Grigas,* 328 F.3d 1039, 1048 (9th Cir.2003). Hence, we exercise our discretion to consider the district court's Rule 12(b)(6) dismissal of the intentional infliction claim.

**[8]** On de novo review, we readily affirm the district court. Edwards alleges substantial physical and psychological ailments brought on by Marin Park's conduct. The conduct claimed to have inflicted the distress, however, is limited to Marin Park's having conducted building inspections and having sent Edwards several allegedly fraudulent documents and a lease renewal offer that, although shorter than she had wanted, complied with California law. *See* Cal. Civil Code § 768. As the district court properly noted, one necessary element of the California emotional distress tort is "outrageous conduct by the defendant," *Pitman v. City of Oakland,* 197 Cal.App.3d 1037, 1046–47, 243 Cal.Rptr. 306 (1988), *i.e.,* conduct "so extreme as to exceed all bounds of that usually tolerated in a civilized community," ***1067** *Davidson v. City of Westminster,* 32 Cal.3d 197, 209, 185 Cal.Rptr. 252, 649 P.2d 894 (1982). Taking all her allegations as true, the conduct Edwards describes simply is not objectively outrageous in the sense required for it to sound in intentional infliction of emotional distress. Hence we affirm the district court's dismissal of the emotional distress claim.[7]

## III. CONCLUSION

Edwards has met the pleading standard for her FHA claim but not for her RICO claim. We reverse the dismissal of the former, affirm the dismissal of the latter under Rule 12(b)(6) rather than Rule 41(b), affirm dismissal of the emotional distress claim, and remand for further proceedings. All parties shall bear their own costs on appeal.

**REVERSED in part, AFFIRMED in part, and REMANDED.**

**All Citations**

356 F.3d 1058, 57 Fed.R.Serv.3d 812, RICO Bus.Disp.Guide 10,610, 04 Cal. Daily Op. Serv. 646, 2004 Daily Journal D.A.R. 830

Footnotes

1 In a separate memorandum disposition, we resolve Marin Park's cross-appeal of the district court's denial of its motion for attorney fees.

2 Although the California Mobilehome Residency Law of 1978, Cal. Civil Code ch. 2.5, uses "mobilehome" as a single word, we adopt the practice of the California courts, which use "mobile home" except where citing the statute's title or provisions directly. *See, e.g., Robinson v. City of Yucaipa,* 28 Cal.App.4th 1506, 34 Cal.Rptr.2d 291 (1994).

3 The notices themselves are absent from the record, and the vague moniker the parties use gives no clue as to their content.

4 Edwards's letter to Governor Gray Davis and several state legislators was dated July 18, 2001. Marin Park's lease offer was apparently erroneously dated August 1, 2001, as it was postmarked July 21, 2001.

5 Rule 9(b) provides, in pertinent part: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

6 A plot leased for siting of a mobile home is a "dwelling" under the FHA. 42 U.S.C. § 3602(b).

7 Edwards also claims that the district court erred in dismissing her state-law claims *with prejudice* when the initial district court order "clearly stated that plaintiff's failure to amend would result in a dismissal *without* prejudice to her state claims." Edwards appears to have misunderstood the district court.

The first dismissal order noted, in a footnote, that were Edwards to fail to amend her RICO claim, there would be no surviving federal claims, and the case would have to be dismissed for lack of subject-matter jurisdiction under 28 U.S.C. § 1367(c)(3). The court then said that "any *remaining* state law causes of action will be subject to dismissal without prejudice to bringing said claims in state court" (emphasis added). In that very same order, the court unambiguously dismissed, without leave to amend, all the state-law claims in Edwards's then-extant amended complaint, though it granted leave to add state constitutional claims. In context, the court was only accurately stating the effect of § 1367 by explaining that the dismissal of the action for lack of federal subject matter would be without prejudice to any *other,* "remaining" state-law causes of action which Edwards might later add, such as the state constitutional claims.

**End of Document**

217 F. 588
District Court, W.D. Washington, Southern Division.

FIDELITY TRUST CO.
v.
WASHINGTON-OREGON CORPORATION
et al. (KIERNAN et al., Interveners).

No. 15. | October 29, 1914.

Suit by the Fidelity Trust Company, as trustee, against the Washington-Oregon Corporation and others, with John Kiernan and others as interveners. On complainant's motion to dismiss the complaint in intervention, or, in the alternative, to strike certain portions of the intervening complaint. Motion to strike granted in part.

West Headnotes (18)

[1] **Corporations and Business Organizations**
Waiver or release of liability

Provisions of a corporate deed of trust securing bonds held to waive the right of bondholders to have recourse to the stockholders on account of unpaid stock liability.

1 Cases that cite this headnote

[2] **Corporations and Business Organizations**
Rights and Remedies of Holders

That corporate bondholders constituted a bondholders' committee, and depositing bondholders under an agreement for the foreclosure of the underlying mortgage were also the holders of unpaid stock in the corporation, did not authorize the setting off of the stock indebtedness against the bonds.

Cases that cite this headnote

[3] **Corporations and Business Organizations**
Construction and operation in general

A corporate deed of trust securing a bond issue construed, and held that one provision as to the sale of the corporate property referred only to sales or the taking of minor portions of the property, and that the taking of minor portions of the property, and an entire system or plant by a city by eminent domain was covered by a subsequent subdivision.

Cases that cite this headnote

[4] **Corporations and Business Organizations**
Rights, duties, and liabilities of mortgagees and trustees

A bondholders' agreement for reorganization, providing that the depositary should be bound to exercise reasonable care for the safe-keeping of the deposited bonds, did not affect depositary's duties as trustee under the deed of trust.

Cases that cite this headnote

[5] **Corporations and Business Organizations**
Rights, duties, and liabilities of mortgagees and trustees

A bondholders' agreement, providing that a committee appointed to foreclose and reorganize assumed no obligation to bondholders who did not deposit their bonds under the agreement, held only to mean that no new obligations were assumed by the men constituting the committee to nondepositing bondholders.

Cases that cite this headnote

[6] **Corporations and Business Organizations**
Indenture trustee

The rule that a trustee may not delegate his authority does not forbid a majority of corporate bondholders from delegating to a committee power to give necessary instructions to the trustee with reference to foreclosure, etc.

Cases that cite this headnote

[7] **Corporations and Business Organizations**
Rights, duties, and liabilities of mortgagees and trustees

A provision in a bondholders' agreement preliminary to a foreclosure of a deed of trust on the corporation's property held not to obligate the trustee, on its consent to act as a depositary of the bonds, to follow the directions of the bondholders' committee as to the sale of the mortgaged property.

Cases that cite this headnote

[8] **Corporations and Business Organizations**
⇒ Rights, duties, and liabilities of mortgagees and trustees

Where it was doubtful which of two provisions of a deed of trust securing corporate bonds was applicable to a taking of a portion of the property by eminent domain and application of the proceeds, the trustee was not disqualified by a mistake not gross, in the absence of fraud, in acting under the provision which afforded the bondholders the most protection.

Cases that cite this headnote

[9] **Corporations and Business Organizations**
⇒ Rights, duties, and liabilities of mortgagees and trustees

An allegation that a trustee under a corporate deed of trust securing bonds used the proceeds of a disposition of property to purchase bonds from the corporation's trustees, instead of in the open market, or for betterments or extensions of the plants, held not to show disqualifying misconduct.

Cases that cite this headnote

[10] **Corporations and Business Organizations**
⇒ Rights, duties, and liabilities of mortgagees and trustees

Where a trustee under a corporate deed of trust securing bonds was also depositary under a bondholder's foreclosure agreement, a certificate issued to depositing bondholders, held only to bind the trustee for the safe-keeping of the deposited bonds while in its custody, and to bind the trustee to deal with them as directed by the bondholders' committee under the terms of the agreement.

Cases that cite this headnote

[11] **Corporations and Business Organizations**
⇒ Rights, duties, and liabilities of mortgagees and trustees

Where a trustee under a corporate deed of trust securing bonds was also appointed depositary under a bondholder's agreement looking to foreclosure, and the legal title to the bonds deposited passed to the bondholders' committee, the trustee as depositary was only bound to exercise ordinary care to keep the bonds and deal with them according to the directions of the committee.

Cases that cite this headnote

[12] **Corporations and Business Organizations**
⇒ Rights, duties, and liabilities of mortgagees and trustees

A bondholders' agreement, appointing the trustee under the corporation's deed of trust depositary of bonds looking to foreclosure proceedings, providing that the trust company should deal with the deposited bonds in accordance with the directions of the bondholders' committee, did not broaden the duties of the trust company under the trust deed.

1 Cases that cite this headnote

[13] **Corporations and Business Organizations**
⇒ Persons entitled to sue; standing

A trustee under a deed of trust securing corporate bonds held not disqualified to act in foreclosure proceedings because it had consented to act with certain bondholders, conceded to represent a majority of the outstanding bonds in such proceedings, and as a depositary of the bonds under a bondholders' reorganization agreement.

1 Cases that cite this headnote

[14] **Corporations and Business Organizations**
⇒ Foreclosure by Action

An averment that bonds held by a bondholders' committee and other majority bondholders were issued without consideration held insufficient to justify a stay of foreclosure proceedings until the amount and validity of the outstanding bonds was determined.

Cases that cite this headnote

[15] **Corporations and Business Organizations**
⇒ Rights, duties, and liabilities of mortgagees and trustees

In a suit by a trustee under a corporate deed of trust to foreclose the deed, allegations by intervener that the trustee's solicitor also represented numerous other interests held not to show disqualifying misconduct on the part of the trustee.

Cases that cite this headnote

[16] **Corporations and Business Organizations**
⇒ Sale or disposition of proceeds

An averment that the books of a mortgagor corporation had been and were kept outside the state held not to support an allegation that certain of the corporation's directors and bondholders had conspired to have the property sold for a sum insufficient to pay the intervening bondholders in full or to pay anything to the general creditors.

Cases that cite this headnote

[17] **Corporations and Business Organizations**
⇒ Compliance with requirements in general

A foreign corporation, named as trustee in a deed of trust on corporate property in Oregon held not disqualified because of a failure to comply with Laws Or.1913, p. 730, § 24, in the absence of any claim that it had accepted deposits or received money from citizens in Oregon in trust for deposit or investment.

Cases that cite this headnote

[18] **Corporations and Business Organizations**
⇒ Designation of agent for service of process

Where a corporate deed of trust was executed in 1911 to complainant, a Pennsylvania corporation, as trustee, complainant was not disqualified to sue as trustee to foreclose because of failure to appoint an agent for service of process, as required by Laws Or.1913, p. 730, § 24.

Cases that cite this headnote

**Attorneys and Law Firms**

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Charles H. Carey and James B. Kerr, both of Portland, Or., for interveners.

**Opinion**

CUSHMAN, District Judge.

This suit is one to foreclose a mortgage, and the matter is now before the court upon complainant's motion to dismiss the complaint in intervention of certain bondholders under the mortgage. In the alternative, motion is made to strike certain portions of the complaint in intervention. Objection is also made to the interrogatories filed by the interveners.

The defendant Washington-Oregon Corporation, mortgagor, is a Washington corporation owning and heretofore operating certain electric, gas, and water plants in Washington and Oregon. Complainant is a Pennsylvania corporation. The mortgage was given to secure $5,000,000, par value, of bonds, $1,700,000 of which have been certified by the trust company, to the Washington-Oregon Corporation, all of which have been negotiated, save $5,500, face value, and of those negotiated $131,000, face value, have been retired, leaving outstanding $1,563,500, face value.

Certain property has been acquired by the Washington-Oregon Corporation, since the execution of the mortgage, which is claimed to be covered by it, and certain other property has been sold by the mortgagor and released from the mortgage. The mortgagor defaulted in the payment of interest on the bonds secured by the mortgage April 1, 1914. A majority of the bondholders elected to consider the whole debt due, and requested complainant to begin foreclosure of the mortgage. Suit for that purpose was begun July 31, 1914, and a receiver appointed for the property.

The bill in intervention asks the removal of complainant, as trustee under the mortgage, alleging unfitness upon its part to further act as such, and sets forth grounds claimed to entitle the intervening bondholders to special relief against certain majority bondholders, at whose request the trustee began foreclosure proceedings.

[1] The bill in intervention charges that the trustee is disqualified because it has failed to appoint an agent for the service of process, as required by chapter 354, Laws of Oregon for 1913. The mortgage herein sought to be foreclosed was executed in 1911. The Oregon act referred to provides:

'No foreign copartnership, firm, joint-stock company, association or corporation shall hold real or personal property in trust in this state, nor act in ***593** any trust or fiduciary capacity therein, unless it shall have complied with all the provisions of this act: Provided, that a corporation qualified to act as a trust company in the state of its domicile may act as trustee for an issue of bonds, debentures or notes issued under the terms of a mortgage or deed of trust duly recorded in some county in this state; and provided further, that such foreign trust company shall have appointed and shall maintain an agent or attorney in this state, upon whom or upon which legal notice or process may be served; and provided further, that this act shall not apply to any foreign copartnership, firm, joint stock company, association or corporation engaged in the business of loaning money on mortgage security, which does not accept deposits or receive from citizens or residents of the state of Oregon property or money in trust, or deposit, or for investment. In case any foreign copartnership, firm, joint stock company, association or corporation whose name contains the word 'trust,' or whose articles of incorporation empower it to do a trust business, desires to engage in the business of loaning money on mortgage security in this state, it shall file in addition to its articles of incorporation or association, a resolution of its governing board, duly attested by its president and secretary, expressly stating that it will not receive deposits in the state of Oregon, or accept from citizens or residents of the state of Oregon, property or money, in trust for investment.' General Laws of Oregon, c. 354, Sec. 24, p. 730.

Nothing appears in the act to show an intention that it should be retroactive, and, in the absence of such a purpose clearly shown, it will be held prospective only. Chicago Title & Trust Co. v. Bashford, 120 Wis. 281, 97 N.W. 940; Richardson v. U.S. Mtg. & T. Co., 194 Ill. 259, 62 N.E. 606; Keystone Mtg. Co. v. Howe, 89 Minn. 256, 94 N.W. 723; Commonwealth v. Danville, 207 Pa. 302, 56 Atl. 873; 13 Am. & Eng. Encyc. Law, 881, Sec. 14. In the case of Farmers' Loan & Trust Co. v. Lake Street Elevated Railway Co., 173 Ill. 439, 51 N.E. 55, the trustee was held not eligible and subject to removal when, subsequent to the passage of an Illinois statute providing for the deposit of bonds to a certain amount to the state, it accepted a deed of trust to property in that state without complying with such act.

[2] It is not alleged that the complainant has accepted deposits or received, from citizens or residents of the state of Oregon, property or money in trust, or deposit, or for investment, without which conditions the act, by its terms, would be inapplicable.

[3] It is contended that the trustee is disqualified by reason of the fact that it has consented to act with certain bondholders, conceded to represent over $1,000,000, par value, of the outstanding bonds, in the foreclosure proceedings and contemplated reorganization of the mortgagor and its property. The bill alleges that a bondholders' committee has been selected by such majority, composed of four men, two of whom are trustees of the mortgagor and stockholders therein. The bondholders' agreement contains, among others, the following provisions:

'The company has made default in the payment of the interest on the bonds. The depositors are accordingly desirous of co-operating for mutual protection. This can most effectually be done by so depositing their bonds with the committee that the title thereto shall pass to the committee as trustees for the depositors, with the powers and subject to the restrictions hereinafter stated.

'The depositors, each for himself, but not for others, or any of them, agree with each other and with the committee as follows: * * *

'The committee may limit the time within which, and fix the conditions upon which, deposits may be made hereunder, and may extend the time so limited, and modify the conditions so fixed, and, either generally or in special ***594** instances, may, in its discretion and upon such conditions as it may prescribe, accept deposits after the time limited for the deposit of bonds has expired.

'For each such deposit there shall be issued by or on behalf of the depositary to each depositor a certificate of deposit representing the bonds and coupons so deposited. The form of said certificates shall be substantially as is set forth in Schedule A. The deposit of bonds and the acceptance of a certificate of deposit therefor shall have the same force and effect as though the depositor had in fact subscribed his name to this agreement. Pending the preparation of forms of certificates of deposit, temporary certificates of deposit may be issued in such form as the committee may approve. Every certificate of deposit shall show whether or not the coupon or coupons maturing April 1, 1914, were deposited with the bond or bonds for which it was issued. * * *

'Second. The committee, by virtue of the deposit of any bond under the terms hereof, shall be irrevocably invested as trustees with the legal title thereto. The powers of the committee as such trustees shall include all the powers of owners, subject to the restrictions herein expressed. An enumeration of specific powers is contained in a schedule hereto annexed, made a part of this agreement, and marked 'Schedule B.' Such enumeration of specific powers shall not be deemed to limit the generality of the powers hereinbefore granted.'

'The committee shall have authority to instruct the trustee or trustees under any mortgage under which any such bonds have been issued, from time to time, to sell, or refrain from selling, any of the property covered by any of such mortgages; * * * to give such directions to trustees or others, execute such papers, and do such acts, whether under the mortgage or any other instrument, or otherwise, as the committee may deem advisable in order most effectually to secure or promote the benefit of, or conserve the security for the payment of, the bonds, or to collect and enforce the payment of principal and interest of the deposited bonds. * * *

'The committee assumes no obligation, legal or equitable, expressed or implied, to any holder of bonds who shall not, within the periods limited by the committee, deposit his bonds hereunder, or to any other person whomsoever than the holders of certificates of deposit issued in accordance with the terms of this agreement.'

'The depositary shall be bound to exercise only reasonable care in the safekeeping of the deposited bonds or other securities or property deposited with it hereunder, and to deal therewith in accordance with the directions of the committee; and the directions of the committee shall be a complete justification of any action or omission to act of the depositary.'

The form of certificate agreed to contained the following provision:

'The holder hereof assents to and is bound by the provisions of said agreement by receiving this certificate, and is entitled to receive all the securities, benefits, and advantages to which the depositor of such bond is or may become entitled pursuant to the provisions of said agreement.'

The interveners complain that complainant, by accepting the deposits of bonds and issuing the certificates provided for in the bondholders' agreement to the depositing bondholders, has disqualified itself as trustee under the mortgage; that thereby it has assumed duties inconsistent with those obligations which it undertook to all of the bondholders under the mortgage. The mortgage itself provides:

Article VII: '* * * In case such default shall continue for three (3) months, then and in any such case, if the holders of a majority in value of the outstanding bonds hereby secured shall so elect and notify in writing Washington-Oregon Corporation, its successors or assigns, and trustee, the whole principal of all the bonds hereby secured shall thereupon be declared in writing by trustee to be, and shall immediately become, due and payable, and it shall be the duty of trustee, upon request in writing, signed by the holders of a majority in value of said bonds then outstanding, and upon being ***595** indemnified to its satisfaction, to institute proper proceedings at law or in equity to enforce the lien hereby created.

'The principal of the bonds secured hereby having become due at maturity, or as in this article provided, it shall be lawful for trustee, after entry as in article V above provided, or without entry, to proceed to sell at public auction unto the highest bidder all and singular the property and franchises hereby mortgaged that shall then be subject to the lien, operation, and effect of this indenture, with the appurtenances, and all benefit and equity of redemption of Washington-Oregon Corporation, its successors or assigns, therein. * * * '

Article VIII: ' * * * And it is expressly understood and agreed that every right of action, whether at law or in equity, upon the said bonds or coupons thereto attached, as well as under this mortgage, shall be vested exclusively in trustee, and that no suit or proceeding for the foreclosure of this mortgage shall be instituted or prosecuted by the holder or holders of any bonds or coupons of the issue secured hereby until after trustee shall have been requested in writing by the holders of a majority of said bonds then outstanding to take such action and an offer of reasonable indemnity shall have been made to trustee, and it shall have refused or failed to comply with such request within thirty (30) days after the same shall have been made, nor shall any action of trustee, or of the bondholders hereunder, or both, in waiving any default, extend to or be taken to affect any subsequent default or to impair any rights arising thereunder, as herein provided.'

Article IX: 'At any sale or sales of the aforesaid property hereby mortgaged, or any part thereof, whether made by virtue of any power herein granted or by judicial authority, trustee may, and upon a written request from the holders of a majority of the bonds hereby secured and then outstanding trustee shall, bid for and purchase, or cause to be bid for and purchased, the same for and in behalf of all the holders of the bonds hereby secured and then outstanding, in the proportion of the respective interests of such bondholders, at a price not exceeding the whole amount then secured by said mortgage and the expenses of such sale or sales.'

It is not made to appear that the trustee, by so becoming the depositary of bonds of those entering into the bondholders' agreement, has any further surrendered itself and the control of its discretion to the majority bondholders than it had already done under the mortgage. It does not appear that the trustee has been guilty of, or is threatening, any breach of duty owed by it to the bondholders.

[4] [5] The provision that the depositary, under the bondholders' agreement, 'shall be bound to exercise only reasonable care in the safekeeping of the deposited bonds' does not touch the trustee in any of its duties under the mortgage. The provision:

'The committee assumes no obligation, legal or equitable, expressed or implied, to any holder of bonds who shall not, within the periods limited by the committee, deposit his bonds hereunder, or to any other person whomsoever than the holders of certificates of deposit issued in accordance with the terms of this agreement'

- contemplates only that, by the bondholders' agreement no new obligations were 'assumed' or cast upon the men composing the committee to any bondholders not depositing their bonds. It cannot be said that, by this provision, it was meant to free the members of the committee of the bond depositors, or the trust company, of any obligation under the mortgage, or growing out of it.

[6] Concerning the power given the committee to instruct the trustee by the provisions of the bondholders' agreement quoted above, when it is considered how unwieldly would be a body composed of a majority ***596** of the bondholders under such a mortgage, how unsatisfactory and prolonged would be the transaction of any business, the separate steps of which must be submitted to and approved by the individuals of such majority, it is clear that the rule forbidding the delegation of authority by a trustee, who is, at least in part, selected on account of the greater facility to be accomplished in the dispatch of any business, should not be extended to forbid the majority of bondholders delegating to a committee the power to give necessary instructions to the trustee. To warrant such a holding, it would have to be made to appear that such was the intention, by unequivocal, positive, and convincing terms, and not by implication.

By the bondholders' agreement, title to the bonds was vested in the committee. The committee became the bondholders, and so far as the bondholders not parties to that agreement are concerned it is doubtful whether it can properly be called a delegation of power. It is not contended that, by merely becoming a depositary of the bonds, the trustee would be disqualified; yet it is not clear how fewer obligations could have been imposed upon the trustee than by this agreement. The bondholders' agreement is simply a plan by which the majority bondholders propose to carry through the foreclosure of the mortgage and effect a reorganization of the company.

[7] In the enumeration of the powers conferred upon the committee, in the bondholders' agreement, the following are included:

'To consent to the payment of interest upon any bonds, notes, securities, or other obligations of, or claims against, the company, or of or against any allied corporation; to instruct the trustee or trustees under any mortgage under which any such bonds have been issued, from time to time, to sell or refrain from selling any of the property covered by any of such mortgages.'

It is contended that, by consenting to act as depositary and giving the certificates provided for to the depositors of bonds, the trust company consented to submit to the direction of the committee as to the sale of the property covered by the mortgage, and thereby disqualified itself. This is not the effect of the foregoing provision. The bondholders' agreement provided for many things besides the deposit of the bonds, and the foregoing provision does not touch the trust company in a duty devolving upon it as a depositary under the agreement, but is rather the delegation to the committee by the depositing bondholders of the power to consent and instruct for them.

There is nothing to justify the contention that, in so far as instructions to sell the property covered by the mortgage are concerned, the trustee was obligating itself to follow such instructions. Rather is such a construction negatived by the provision in the agreement that the depositary should be bound only to reasonable care in safe-keeping the deposited bonds and to dealing therewith in accordance with the directions of the committee. The sale of the property cannot fairly be said to be included in any dealings, as depositary, with the deposited bonds.

[8] It is averred by the bill in intervention that, under the mortgage, the proceeds of any property sold by the Washington-Oregon Corporation should be applied, by the trustee, in the betterment or extension of the plant and property, or else applied towards the purchase, in ***597** the open market, of the bonds secured by the mortgage; that the trustee under the mortgage, instead of paying over the proceeds of the sale of certain property covered by the mortgage to the Washington-Oregon Corporation for betterments or extensions, or else in the purchase of bonds in the open market, induced by the trustees of the Washington-Oregon Corporation and others, used such proceeds in the purchase, not in the open market, of bonds held by the trustees of the company and others associated with them.

If the duty of the trustee under the mortgage was clearly such as is claimed by interveners, and the trustee used such proceeds in the purchase of bonds from trustees of the mortgagor, at a price substantially in advance of the market price, there would be a grave question but that the complainant had not made such a gross mistake as to show its unfitness. The provisions of the mortgage covering the disposition of the proceeds realized from the property covered by the mortgage are:

'2. Washington-Oregon Corporation shall have the further right at all times, provided no default has been made as aforesaid, to convey or exchange freed from the incumbrances and trusts hereof all or any of the real estate now held, or which shall hereafter be acquired, by it, which shall no longer be either useful or necessary in the proper and judicious management and maintenance of its business or of the property hereby conveyed, or shall no longer be necessary or expedient to be retained in connection with the business of Washington-Oregon Corporation (except such as is set out in subdivision 3 hereof). * * * But any property so taken in exchange, if such there be, shall forthwith become and be liable under this mortgage as if the same had been originally included herein; and the net proceeds of such real estate so released (if sold) shall be paid over and assigned by Washington-Oregon Corporation to trustee, and shall be applied by trustee with all convenient speed at the election of Washington-Oregon Corporation, as follows: Such proceeds (except the proceeds of sale of such property as is hereinafter designated in subdivision 3 hereof) and the proceeds of all property subject to this indenture taken by the exercise of the power of eminent domain, shall either (a) be turned over to Washington-Oregon Corporation, for application by it to the betterment or extension of the plants and property owned by it, upon presentation by Washington-Oregon Corporation of a copy of a resolution by its board of trustees, duly certified by its secretary, requesting the payment to it of such proceeds and specifying the nature of the betterments or extensions of the plants and property above mentioned, and certifying that the value of such betterments or extensions is or will be more than the amount of such proceeds, so that the security of this mortgage shall not thereby be diminished; or else (b) shall be applied by trustee towards the purchase in open market, from time to time, and at such prices as trustee shall deem proper, and as shall be approved by Washington-Oregon Corporation of one or more of the bonds hereby secured; and all bonds so purchased and the coupons thereto appertaining shall be immediately canceled, and shall cease to be entitled to the benefit of the security hereby provided. It shall be no part of the duty of trustee to see to the application by Washington-Oregon Corporation of the proceeds of any property released by trustee as herein provided, or to determine whether the title to any property taken by Washington-Oregon Corporation in exchange for property released from the lien of this mortgage is a good title, or to determine whether the said property is subject to any liens, incumbrances, or other charges prior to this mortgage.

'3. Washington-Oregon Corporation shall have the further right at all times, provided no default has been made, as aforesaid, to convey, freed from the incumbrances and trusts hereof, any of its plants or systems for the generation of gas or electricity, and the distributing system appurtenant thereto, or any of its plants or systems for the supply and distribution of water, or any of its urban or interurban railway systems, and to assign the franchises ***598** appertaining thereto, and the trustee is hereby expressly authorized to release, under its seal, from the operation and effect of this mortgage any property so sold or assigned in the same manner as set out in subdivision 2 of this article. The proceeds of such sale shall be applied only to the purchase or redemption and cancellation of outstanding bonds secured hereby: Provided, however, that there shall be purchased or redeemed and canceled at least such proportion of the outstanding bonds secured hereby as the net earnings from operation of such plant and system so sold for the fiscal year preceding such sale shall bear to the total net earnings from the operation of said Washington-Oregon Corporation for such year: Provided, however, trustee may require, before executing such release, the certificate of a chartered accountant to be selected by trustee, exhibiting and certifying as correct the net earnings of the plant or system, the sale whereof is contemplated, and the net earnings of Washington-Oregon Corporation for such fiscal year: Provided, also, that before executing such release trustee may require the certificate of a competent engineer to be selected by trustee, showing that the price for which it is purposed to sell such plant or system is fair and adequate.'

The money invested by the trustee in the bonds was realized from the sale of a water plant at Centralia and a gas plant at Vancouver. The investment of the proceeds from such sales would, therefore, rather be controlled by section 3 than section 2, above quoted, which latter (section 2) contains the provision claimed by interveners to have been violated by the trustee.

Though it is conceded that this would, ordinarily, be true, yet it is contended that section 2, despite the character of the property, applies, so far as the sale of the water plant at Centralia is concerned, because that sale grew out of condemnation proceedings in the exercise of the power of eminent domain by the city of Centralia, for its acquisition. Section 2, describing such proceeds as are covered by its provisions, reads:

'And the proceeds of all property subject to this indenture taken by the exercise of the power of eminent domain.'

And it excepts from its application property described in section 3. It is true that, after the express recital of such exception, the provision for the disposal of the proceeds of the property taken in the exercise of the power of eminent domain is inserted; but this fact alone, in the absence of any apparent or suggested reason to deny the effect of the exception in the latter class of property, will not justify a holding that the exception was not meant to apply to all property enumerated in section 2.

No reason appears for making a different disposition of the proceeds realized from the Centralia water plant, if it was sold to the city as the result, simply, of negotiations, than where such proceeds were obtained by reason of the plant being 'taken' by the city in the exercise of its power of eminent domain. It rather appears, as the eminent domain provision is associated with those proceeds derived from the sale of real estate 'which shall no longer be either useful or necessary in the proper and judicious management and maintenance of its business or of the property hereby conveyed, or shall no longer be necessary or expedient to be retained in connection with the business of Washington-Oregon Corporation,' that some minor taking of property- the taking of some part of a plant, or system, as might often occur- ***599** rather was in contemplation than the taking of an entire water plant or system.

[9] In this manner can both provisions be given harmonious and reasonable effect. Even were this not the correct construction of the contract, in view of the fact that, at most, it is doubtful which provision would be applicable, the trustee will not be held to be disqualified for such mistake- not gross, and where fraud is not shown- especially where, as here, the trustee acted under the section apparently affording the bondholders the greatest protection, in that it provides that:

'There shall be purchased or redeemed and canceled at least such proportion of the outstanding bonds secured hereby as the net earnings from operation of such plant and system so sold for the fiscal year preceding such sale shall bear to the total net earnings from the operation of said Washington-Oregon Corporation for such year.'

[10] The bill in intervention has not alleged that such bonds could have been obtained upon the open market, or that an excessive price was paid for them, or that any request was made to the trustee for the proceeds by the mortgagor, to be used in betterments or extensions.

[11] By the certificate provided for, the trust company certifies that the certificate holder is the individual, bound by the terms of, and entitled to the advantages accruing to, the depositors of certain described bonds under the agreement. It is, in effect, an identification of the individual affected by the agreement, and not an undertaking that such individual shall receive the benefits of that agreement beyond the safe-keeping by the trustee of the deposited bonds and the dealing with them, while so kept by it, as directed by the bondholders' committee, under the terms of the agreement.

The main and controlling purpose of the bondholders' agreement is to confer such power upon the committee by the bondholders as to authorize it to act effectually and to protect the committee and those dealing with it against the claims of bondholders signing the agreement. To that end it is provided that the direction of the committee to act shall be complete justification.

[12] The legal title to the bonds had passed to the Committee. As long as the depositary used ordinary care to keep the

bonds and deal with them as the committee- the legal owner-directed, it was not liable.

[13] The agreement that the trust company should deal with the deposited bonds in accordance with the directions of the committee cannot be said to fairly contemplate any broadening of the duties of the depositary trust company. This agreement provides for a registration of the certificates to be issued by the trust company to the depositing bondholders, in order to facilitate the transfer of such certificates, subject to terms of the bondholders' agreement, and necessarily implies, by such deposit, the ultimate surrender of the bonds and their production when necessary.

This provision of the agreement, fairly construed, only contemplates that, in dealing as such depositary, if the trust company deals according to the direction of the committee, its duty is performed, and not that it is bound to make such use of these bonds as the committee directs, ***600** without regard to the duties specifically devolving on it, as depositary, under the bondholders' agreement, and in violation of its duties as trustee under the mortgage.

Trusts are always capable of being fraudulently exercised; but, by reason of that fact alone, fraud will not be presumed in the exercise of trust powers. Fraud is not to be inferred in the discharge of the trust under the bondholders' agreement any sooner than in the exercise of the trust powers under the mortgage. No analogy exists between such a situation as the foregoing and that found in any of the cases cited by interveners.

In Savage v. Gould, 60 How.Prac.(N.Y.) 234, the trustee had delegated the management of the trust estate to his law partner, who manipulated it for his own benefit. A number of cases are cited where the trustee under one mortgage is held to be disqualified by accepting duties as trustee under a second mortgage. In Investment Registry v. Chicago & M. Elec. R. Co. (D.C.) 213 Fed. 492, a mortgage trustee also held a number of bonds secured by the mortgage, as security for collateral notes. In American Tube & Iron Co. v. Kentucky Southern Oil & Gas Co. (C.C.) 51 Fed. 826, the mortgage trustee accepted a deed of general assignment of the mortgagor's property for the benefit of all of his creditors, which included the mortgaged property.

In such cases as the foregoing the duties devolving upon the trustee were inconsistent, and were not in contemplation at the time the trust was created. But in the instant case the predominance of the majority of the bondholders was provided for in the mortgage itself, and, beyond such powers given to the majority, their interest and that of the minority are the same.

No sufficient showing has been made to warrant the removal of the trustee or a stay of foreclosure proceedings while the interveners prosecute an independent suit seeking the removal of the trustee. Land Title & Trust Co. v. Asphalt Co. of America, 127 Fed. 1, 62 C.C.A. 23; Continental & Commercial T. & S. Bank v. Allis-Chalmers Co (D.C.) 200 Fed. 600; Bowling Green Trust Co. v. Virginia P. & P. Co. (C.C.) 132 Fed. 921; McPherson v. Cox, 96 U.S. 404, 24 L.Ed. 746; Central Trust Co. v. Cincinnati, H. & D. Co. (C.C.) 169 Fed. 466, 471; March v. Romare, 116 Fed. 355, 53 C.C.A. 575; Land Title & Trust Co. v. Tatnall, 132 Fed. 305, 65 C.C.A. 671; Trust Co. v. Norfolk, etc. (C.C.) 174 Fed. 269.

In the situations that hereafter arise in the course of this proceeding- many of which may not now be foreseen- if it becomes apparent that the trustee has assumed obligations growing out of the bondholders' agreement, inconsistent with those devolving upon it under the mortgage, or that it is making fraudulent use of the powers intrusted to it, it will then be time to consider whether this proceeding is one in which to determine whether the trustee should be removed, or whether those complaining of the trustee will be relegated to an independent suit.

[14] The interveners' bill alleges that members of the bondholders' committee and depositing bondholders are holders of unpaid stock in the mortgagor company. A prayer is made that the amounts so due ***601** for unpaid stock be set off against the bonds held by such delinquent holders of stock. It was held by this court in Mississippi Valley Trust Co. v. Washington N.R. Co. (D.C.) 212 Fed. 776, that:

'Where the proceeds of corporate mortgage bonds were misappropriated or wrongfully diverted, a subsequent mortgagee could not rely on the misappropriation or wrongful diversion as a payment (or offset), unless the mortgagors had asked that the diversion or misappropriation should be applied as a payment.'

The same general principle is applicable in the present case. If there is a liability, as alleged, for unpaid stock, the Washington-Oregon Corporation, mortgagor, is the party interested who is entitled to recover it. The general creditors are likewise interested in the application of any amounts recovered on such account. One bondholder will not be allowed, in this way, to better the security for his claim, already preferred, over the general creditors. Land Title & Trust Co. v. Asphalt Co. of America, 127 Fed. 1, 13, 62 C.C.A. 23; Land Title & Trust Co. v. Tatnall, 132 Fed. 305, 65 C.C.A. 671; Continental & Commercial T. & S. Bank v. Allis-Chalmers Co. (D.C.) 200 Fed. 600; Cook on Corporations (6th Ed.) Sec. 848 et seq.

[15] The following provisions are found in the mortgage:

'No recourse shall be had for the payment of the principal or interest of this bond to stockholders, officers, or trustees of said Washington-Oregon Corporation, either directly or indirectly, by virtue of any statute or by enforcement of any assessment or otherwise, and any and all personal liability of the stockholders, officers, or trustees of said Washington-Oregon Corporation in respect to said bonds is hereby expressly waived and released by every holder hereof.'

'For the debt and bonds secured hereby Washington-Oregon Corporation is liable in personam, and any deficiency, after exhausting the mortgage security, may be enforced against Washington-Oregon Corporation, but not against its officers, trustees, or stockholders individually; and it is expressly agreed between the parties hereto, and by every person who shall take or hold any bond or bonds issued hereunder, that no persons who are now, or who may hereafter become officers, trustees, or stockholders of Washington-Oregon Corporation, shall in any wise be held liable for the payment of either the principal or interest of the bonds secured hereby.'

By the foregoing provisions, the right of the bondholders to have recourse to the stockholders, on account of their liability for unpaid stock, was waived. Grady v. Graham, 64 Wash. 436, 116 Pac. 1098, 36 L.R.A.(N.S.) 177; U.S. v. Stanford, 70 Fed. 346, 17 C.C.A. 143; Brown v. Eastern Slate Co., 134 Mass. 590. While the Washington decision might not be controlling as to rights to property in Oregon, yet the reasoning of these authorities alone warrants the holding.

The laws of Oregon provide:

'All sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder or person from whom the same is purchased, and subject such purchaser to the payment of any unpaid balance due, or to become due, on such stock.' Lord's Oregon Laws, Sec. 6696.

And its Constitution provides:

'The stockholders of all corporations and joint-stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more.' Const. art. 11, Sec. 3.

***602** It is not apparent that these provisions would in any way affect a waiver by contract of the bondholders' right to resort to such stock liability.

[16] The interveners' bill avers that bonds held by members of the bondholders' committee and other majority bondholders were issued without consideration and are invalid. The interveners contend:

'The authorities which have already been cited hold, among other things, that although, because of the rule of convenience, bondholders will be considered to be represented by a trustee when their interests are common, yet when a controversy exists between the bondholders, this rule of convenience must give way, and the real parties in interest must be admitted to wage their controversy before the court.'

Such allegations are not sufficient to warrant the staying of foreclosure proceedings until the amount and validity of the outstanding bonds have been determined. Land Title & Trust Co. v. Tatnall, 132 Fed. 305, 65 C.C.A. 671; Merc. Trust Co. v. U.S. Shipbuilding Co. et al. (C.C.) 130 Fed. 725; Central Trust Co. v. Cincinnati, etc., Ry. Co. (C.C.) 169 Fed. 466; Trust Co. v. Norfolk, etc., R.R. Co., 174 Fed. 269; Central Trust Co. v. C., H. & D. Ry. Co. (C.C.) 169 Fed. 470. In Central Trust Co. of New York v. California, etc., R.R. (C.C.) 110 Fed. 70, at page 76, opinion by Judge Morrow- in which case intervention was allowed- it is said:

'This need not, however, delay the entering of a decree of foreclosure. It is not necessary at this stage of the proceedings to determine as a finality the ownership of the bonds in question. It is only necessary that there shall appear that there has been a default in their payment, and the amount of that default.'

In the last case referred to, and in Farmers' Loan & Trust Co. v. San Diego Street Car Co. (C.C.) 45 Fed. 518, opinion by Judge Ross, also in Richardson's Executor v. Green, 133 U.S. 30, 33 L.Ed. 516, [1] intervention appears to have been permitted prior to decree, but it does not appear to have been opposed.

The mortgage contains the following provisions:

 

The property shall be held in trust 'for the equal pro rata benefit and security of each and every the persons or corporations who may be or become the holders of said bonds, without preference, priority, or distinction, as to lien or otherwise, of any over or from the other, so that each and all of said bonds issued or to be issued in accordance with the terms hereof shall have the same right, lien, and privileges under this Indenture of Mortgage, and shall be equally secured hereby, with the same effect as if the same had all been made, issued, and negotiated simultaneously on the date hereof.'

Having concluded that the question of the right of interveners to litigate the question of the invalidity of certain bonds secured should not be allowed prior to the decree of foreclosure, it is not now necessary to determine whether the interveners are barred by the foregoing provisions of the mortgage from asserting such claim.
[17] The bill in intervention avers that the solicitor for the complainant, upon whose application a receiver was appointed, was not merely the representative of complainant, but also undertook to represent, and held written authority to represent, the mortgagor, a copartnership, one of whose members was a member of a committee of bondholders under a second mortgage; also authority to represent the ***603** trustee under the second mortgage and the committee of consolidated mortgage bondholders under the first mortgage, and of holders of stock in the mortgagor, and the committee of second mortgage bondholders and of certain general creditors of the mortgagor. These allegations merely show that the trustee is acting in conjunction with other interested parties, and it does not show that the object of such concerted action is the injury of the interveners. In the absence of acts hostile to interveners, it is more reasonable to presume that the saving of expense in litigation and prevention of deterioration of the property, consequent upon an extended controversy in the courts, was alone the object sought.

[18] The bill in intervention alleges that the trustees of the mortgagor and others, including members of a partnership to which certain of the majority bondholders belong, have conspired to cause the mortgaged property to be sold, free and clear of the claims of the intervening bondholders and other creditors, for a sum much less than its actual value, and for a sum insufficient to pay in full the claims of the intervening bondholders, and insufficient to pay any sum whatever on the claims of general creditors. In support of this allegation, it is averred that the books of the Washington-Oregon Corporation, in violation of the state statute, have been and are kept outside of the state.

While this might be a sufficient allegation to warrant a stay of proceedings until such time as the books are returned to the state, or until interveners had an opportunity to advise themselves of the exact nature of the dealings had between the trustee, majority bondholders, and the mortgagor, as disclosed by such books, yet the allegations as to fraud and conspiracy are too vague, general, and indefinite to warrant intervention on behalf of these bondholders.

As the terms of sale and distribution of the fund realized are, in practice, fixed by the foreclosure decree, and the interveners have, subject to the foregoing reservation, the ultimate right, before distribution, to attack the validity of such bonds as they assert were issued without consideration, it is held that the bill in intervention be not dismissed, but that it be considered in support of interveners' right to be heard at the time of the settlement of the decree.

In the case of Mercantile Trust Co. v. United States Shipbuilding Co. (C.C.) 130 Fed. 725, where intervention was denied- relying on Dickerman v. Northern Trust Co., 176 U.S. 181, 20 Sup.Ct. 311, 44 L.Ed. 423- a different situation appeared than in the present case. In denying the intervention, the court said:

'The foreclosure case has progressed to the point where, in the usual course of procedure, a decree for the sale of the mortgaged premises should be made. A draft of such decree was submitted to the court with the petition. * * * The decree of sale now presented to the court has been carefully framed so as to secure to her the fullest opportunity to contest, at the proper time, the rights of any other bondholder. This is not the proper time for instituting such a contest, and the petition must be denied.' 130 Fed.at pages 725, 726.

All of the prayer to the complaint of the intervening bondholders will be stricken, except the first unnumbered paragraph. All of the interrogatories are likewise stricken.

**All Citations**

217 F. 588

Footnotes

1 10 Sup.Ct. 280.

**End of Document**

720 F.3d 1058
United States Court of Appeals,
Ninth Circuit.

FOURTH INVESTMENT LP, a California limited partnership, Plaintiff–Appellant,
v.
UNITED STATES of America, Defendant–Appellee.
Leeds, LP, a California limited partnership, Plaintiff–Appellant,
v.
United States of America, Defendant–Appellee.

Nos. 11–56997, 11–57009. | Argued and Submitted April 12, 2013. | Filed June 13, 2013.

**Synopsis**
**Background:** Transferees of real property brought quiet-title actions against federal government to remove federal tax liens on real property, which had been transferred by married taxpayers against whom federal tax liens had been assessed. The United States District Court for the Southern District of California, Barry T. Moskowitz, J., granted judgment for government after bench trial. Transferees appealed.

**Holdings:** The Court of Appeals, M. Smith, Circuit Judge, held that:

[1] Court of Appeals had to predict how California Supreme Court would decide what factors were relevant to determining whether person or entity held title as nominee;

[2] California Supreme Court likely would find federal court cases evaluating nominee ownership with regard to federal tax lien to be highly persuasive;

[3] inadequacy of consideration that taxpayers received for transfer of real property weighed in favor of finding that transferees held property as nominees;

[4] taxpayers' control over transferred real property weighed strongly in favor finding that transferees held real property as nominees;

[5] closeness in relationship between taxpayers and transferees of real property weighed strongly in favor finding that transferees held property as nominees;

[6] factor regarding recording of conveyance was only marginally helpful to taxpayers;

[7] taxpayers' retention of benefit and possession of real property weighed in favor finding that transferees held property as nominees; and

[8] shell entities involved in taxpayers' complex tax avoidance scheme did not have to be joined as necessary parties.

Affirmed.

West Headnotes (15)

[1] **Federal Courts**
State or local law in general

The Court of Appeals reviews de novo a district court's interpretation of state law.

1 Cases that cite this headnote

[2] **Federal Courts**
Questions of Law in General

**Federal Courts**
"Clearly erroneous" standard of review in general

The Court of Appeals reviews a district court's findings of fact for clear error, and its conclusions of law de novo.

2 Cases that cite this headnote

[3] **Internal Revenue**
What law governs

The federal tax lien statute itself does not create any property rights but merely attaches consequences, federally defined, to rights created under state law; consequently, in making nominee determinations in a tax lien context, a court must look initially to state law to determine what rights the taxpayer has in the property the government seeks to reach, and then look to federal law to determine whether the taxpayer's state-delineated rights qualify as "property" or "rights to property" within the compass of the federal tax lien legislation. 26 U.S.C.A. § 6321.

6 Cases that cite this headnote

**[4] Internal Revenue**
What law governs

State law, rather than federal law, provided substantive rules of nominee doctrine which allowed for possibility that true owner of a parcel of land might be someone other than record owner, although doctrine was being applied under federal tax lien statute. 26 U.S.C.A. § 6321.

Cases that cite this headnote

**[5] Internal Revenue**
Taxpayer's interest in general

Questions of nominee status require a fact-specific state-law inquiry prior to determining whether a nominee lien may lawfully be enforced as a matter of federal law. 26 U.S.C.A. § 6321.

Cases that cite this headnote

**[6] Internal Revenue**
Taxpayer's interest in general

Court of Appeals had to predict how California Supreme Court would decide what factors were relevant to determining whether person or entity held title as nominee using intermediate appellate court decisions, statutes, and decisions from other jurisdictions as interpretive aids, in quiet-title action brought by transferees of real property against federal government to remove federal tax liens on real property which had been transferred by married taxpayers against whom federal tax liens had been assessed, since California courts had not yet specified factors relevant to issue despite California's longstanding recognition of nominee ownership. 26 U.S.C.A. § 6321.

4 Cases that cite this headnote

**[7] Internal Revenue**
Taxpayer's interest in general

The factors relevant to a nominee analysis with regard to a federal tax lien are: (1) whether inadequate or no consideration was paid by the nominee; (2) whether the property was placed in the nominee's name in anticipation of a lawsuit or other liability while the transferor remains in control of the property; (3) whether there is a close relationship between the nominee and the transferor; (4) whether they failed to record the conveyance; (5) whether the transferor retained possession; and (6) whether the transferor continues to enjoy the benefits of the transferred property. 26 U.S.C.A. § 6321.

6 Cases that cite this headnote

**[8] Courts**
Decisions of United States Courts as Authority in State Courts

California Supreme Court likely would find federal court cases evaluating nominee ownership with regard to federal tax lien to be highly persuasive, as predicted by federal appellate court, since federal decisions reflected almost universal consensus regarding the factors relevant to nominee analysis and those factors had been adopted by federal courts in California. 26 U.S.C.A. § 6321.

3 Cases that cite this headnote

**[9] Internal Revenue**
Taxpayer's interest in general

Courts focus on the totality of the circumstances when evaluating nominee ownership with regard to a federal tax lien, and no single factor is dispositive; rather, the overarching consideration is whether the taxpayer exercised active or substantial control over the property. 26 U.S.C.A. § 6321.

3 Cases that cite this headnote

**[10] Internal Revenue**
Taxpayer's interest in general

Inadequacy of consideration that married taxpayers received for transfer of real property weighed in favor of finding that transferees held property as taxpayers' nominees under California law as predicted by federal court, and that property thus was encumbered by federal tax liens against taxpayers; although property was initially exchanged for partnership units in transferees, which were limited partnerships, taxpayers subsequently sold partnership interests to entity controlled by their children's trusts, and improperly reduced sale price by face value of unsecured, defaulted promissory notes assumed by entity, many of which taxpayers had no obligation to pay. 26 U.S.C.A. §§ 6321, 6322, 6323(a), (h)(6).

Cases that cite this headnote

[11] **Internal Revenue**

⇒ Taxpayer's interest in general

Married taxpayers' control over transferred real property weighed strongly in favor finding that transferees held real property as taxpayers' nominees under California law as predicted by federal court, and that property thus was encumbered by federal tax liens against taxpayers; taxpayers transferred property through series of transactions between various trusts and corporate entities that were controlled directly or indirectly by taxpayers. 26 U.S.C.A. §§ 6321, 6322, 6323(a), (h)(6).

2 Cases that cite this headnote

[12] **Internal Revenue**

⇒ Taxpayer's interest in general

Closeness in relationship between married taxpayers and transferees of real property weighed strongly in favor finding that transferees held property as taxpayers' nominees under California law as predicted by federal court, and that property thus was encumbered by federal tax liens against taxpayers; all entities involved in transfers of subject property were owned and controlled by taxpayers, their children, their children's trusts, or taxpayer-wife's brother, and taxpayers stood at both ends of virtually every transaction relevant to property's transfer. 26 U.S.C.A. §§ 6321, 6322, 6323(a), (h)(6).

Cases that cite this headnote

[13] **Internal Revenue**

⇒ Taxpayer's interest in general

Factor regarding recording of conveyance was only marginally helpful to married taxpayers, in analysis of whether transferees held property as taxpayers' nominees under California law as predicted by federal court, and thus whether property was encumbered by federal tax lien against taxpayers; although conveyances of title were ultimately recorded, conveyances were not recorded promptly and there was basis for inference of backdating. 26 U.S.C.A. §§ 6321, 6322, 6323(a), (h)(6).

Cases that cite this headnote

[14] **Internal Revenue**

⇒ Taxpayer's interest in general

Married taxpayers' retention of benefit and possession of real property weighed in favor finding that transferees held property as taxpayers' nominees under California law as predicted by federal court, and that property thus was encumbered by federal tax lien against taxpayers; taxpayers continued to live in residential property without adhering to terms of lease with transferee, and taxpayers effectively retained the power to alter how commercial property's income stream was assigned after transfer through taxpayers' control of trusts and corporate entities that owned property. 26 U.S.C.A. §§ 6321, 6322, 6323(a), (h)(6).

4 Cases that cite this headnote

[15] **Federal Civil Procedure**

⇒ Particular, Necessary or Indispensable Parties

Shell entities involved in taxpayers' complex tax avoidance scheme did not have to be joined as necessary parties in quiet-title action brought by transferees of real property against federal government to remove federal tax liens on real property which had been transferred by married taxpayers against whom federal tax liens had been assessed; court adjudicated only whether transferees held title in properties at issue as nominees of taxpayers when relevant tax liens attached to those properties. 26 U.S.C.A. § 6321; Fed.Rules Civ.Proc.Rule 19(a)(1), 28 U.S.C.A.

Cases that cite this headnote

**Attorneys and Law Firms**

***1061** Wendy C. Lascher (argued), Ferguson Case Orr Paterson LLP, Ventura, CA, for Plaintiffs–Appellants.

Thomas J. Clark (argued), Supervising Attorney, and Bethany B. Hauser, United States Department of Justice, Tax Division, Washington, D.C., for Defendant–Appellee.

Appeal from the United States District Court for the Southern District of California, Barry T. Moskowitz, District Judge, Presiding. D.C. Nos. 3:08–cv–00110–BTM–BLM, 3:08–cv–00100–BTM–BLM.

Before: MILAN D. SMITH, JR. and MARY H. MURGUIA, Circuit Judges, and JACK ZOUHARY, District Judge. *

**OPINION**

M. SMITH, Circuit Judge:

Plaintiffs–Appellants Leeds, LP (Leeds) and Fourth Investment, LP (Fourth Investment) (sometimes collectively, Appellants) brought quiet title actions challenging tax liens filed by the Internal Revenue Service (IRS) against certain commercial and residential properties located in San Diego, California, to which Appellants hold legal title. The tax liens arose from assessments against taxpayers Susanne and Don Ballantyne, based on the IRS's claim that Appellants held the relevant properties as nominees of the Ballantynes on the assessment dates. After a thirteen-day bench trial, the district court denied Appellants' quiet title claims and upheld the validity of the tax liens.

Appellants appeal, contending that California does not recognize nominee ownership. We reject this argument because California cases have unambiguously recognized the existence of nominee ownership. Although California courts have not precisely specified the factors relevant to performing a nominee analysis, we predict that the California Supreme Court would evaluate nominee status in light of the criteria set forth in relevant federal cases. Applying those criteria, the district court properly concluded that Appellants held legal title to the San Diego properties as nominees of the Ballantynes. We also reject Appellants' assertion that the district court's judgment should be vacated for failure to join the numerous shell entities utilized by the Ballantynes as part of their complex tax evasion scheme. We affirm the decision of the district court.

**FACTUAL AND PROCEDURAL BACKGROUND**

**1. The Ballantynes' federal tax liabilities**

Susanne (Susanne) and Don (Don) Ballantyne owe the IRS substantial federal income taxes for tax years 1985, 1986, 1990, and 1997. In July 1994, the Ballantynes sought relief before the United States Tax Court, challenging income tax deficiencies claimed by the IRS for tax years 1985 and 1986, in the amounts of $388,937 and $931,970, respectively (totaling $1,320,907, collectively). The tax court conducted a trial in May 1995, and in October 1996, confirmed the deficiencies claimed by the IRS. The decision of the ***1062** tax court was later affirmed on appeal by our court, *see Ballantyne v. Comm'r,* 211 F.3d 1272 (9th Cir.1999), and in June 1997, the IRS imposed an assessment of $1,320,907.

The Ballantynes' tax issues were not limited to those tried in the tax court. In January 1995, the IRS imposed an assessment of $25,164 for alleged income tax deficiencies for tax year 1990. In October 1998, the IRS imposed an assessment of $11,515 based on alleged deficiencies for tax year 1987. As a result of the referenced assessments, plus applicable interest and penalties, the IRS recorded liens in the amount of $5,212,494.62 on two properties in San Diego, California: a home located at 3207 McCall Street (the McCall property), and a commercial building located at 1280 Fourth Avenue (the Fourth property). On the dates of the second and third assessments, fee title to the McCall property was vested in Leeds, and fee title to the Fourth property was vested in Fourth Investment. The referenced tax lien identified Leeds and Fourth Investment as nominees of the Ballantynes.

**2. Transfer of the McCall and Fourth properties to Leeds and Fourth Investment**

 

With the specter of their tax trial looming in 1995, Susanne caused the Ballantyne Trust to transfer legal title to the McCall and Fourth properties to Leeds and Fourth Investment, and later to her and Don's children's trusts, through a series of complex transactions involving shell entities created and controlled by the Ballantynes.

**A. The McCall Property**

The McCall property is a single family residence, built by Susanne's parents. At some point in time, fee title to the McCall property was vested in a trust created by Susanne's mother, styled the Susan T. Cramer Trust (the Cramer Trust). In 1979, after the death of Susanne's mother, and after Susanne's brother, Ed, had received the distributions from the Cramer Trust to which he was entitled, Susanne became the Cramer Trust's sole beneficiary and trustee. In 1987, Susanne created the Susanne C. Ballantyne Trust (the Ballantyne Trust), a revocable inter vivos trust, into which she placed substantially all of her assets, including the corpus of the Cramer Trust (which included the McCall property).

In June 1995, shortly after the Ballantynes' tax court trial, the Cramer Trust conveyed the McCall property to Leeds, a newly created limited partnership, in exchange for a 99% limited partnership interest in Leeds. (The title transfer documents in this transaction were not recorded until July 1997, more than two years after the transfer.) The Cramer Trust immediately transferred its 99% interest in Leeds to the Ballantyne Trust, with Susanne executing all relevant documents on behalf of both trusts. The remaining 1% interest in Leeds was owned by a newly created entity, styled the Rhodes Investment Corporation, which was wholly owned by the Ballantyne Trust. After these transactions concluded, Susanne became the indirect owner of both the buyer and the seller of the McCall property. Specifically, after the transfers, the Ballantyne Trust owned a 99% limited partnership interest in Leeds; and Rhodes, which was owned by the Ballantyne Trust, owned a 1% general partnership interest in Leeds. No evidence was introduced at trial indicating that Leeds was created for any purpose other than to hold nominal title to the McCall property.

After the transfer to Leeds, the Ballantynes continued to maintain possession of the McCall property, purportedly as tenants of Leeds. A lease agreement was ***1063** signed by Susanne on behalf of Leeds, and by Don on behalf of the Ballantynes. The Ballantynes did not begin paying rent to Leeds until nearly a year after the lease was signed. When rent was paid, it was almost never paid on time, and was rarely paid in full. In fact, it appears that the "rent" Leeds received was not rent at all, but rather payments made by the Ballantynes to cover various property expenses as they arose. Despite the Ballantynes' failure to pay rent on a timely basis or in the correct amount, Leeds never demanded full payment or charged the $100 late fee required in the lease agreement.

**B. The Fourth property**

The Fourth property is a commercial property in which Susanne originally owned a 12.5% undivided interest, and from which she derived rental income under a triple net lease. In 1988, Susanne quitclaimed her undivided 12.5% interest in the Fourth property to the Ballantyne Trust. In June 1995, shortly after the Ballantynes' tax court trial, the Ballantyne Trust conveyed the Fourth property to Fourth Investment, a newly created limited partnership, in exchange for a 99% limited partnership interest in Fourth Investment. (The grant deed was not recorded until October 1995, more than three months later.) The remaining 1% interest in Fourth Investment was owned by its general partner, Rhodes, which in turn was owned by the Ballantyne Trust.

Susanne indirectly owned and controlled both the buyer and the seller in the Fourth property transfer. Specifically, Fourth Investment's 99% limited partner was the Ballantyne Trust, and its 1% general partner was Rhodes (owned by the Ballantyne Trust). No evidence was introduced at trial showing that Fourth Investment ever served any function other than nominally holding title to the Fourth property.

Susanne retained control over the Fourth property's income stream after the transfer of her interest to Fourth Investment because, pursuant to Susanne's instructions, the rental income derived from the Fourth property continued to be paid to Susanne's brother, Ed, to whom Susanne owed a debt. Tenant rent payments were not made to Fourth Investment until Susanne notified her tenant to do so months after the Ballantyne Trust conveyed the Fourth property to Fourth Investment. The record does not reflect whether the tenant of the Fourth property was ever advised that the property's ownership (and, therefore, the tenant's landlord) had changed.

**3. Encumbrances on the McCall and Fourth properties**

Four days before the commencement of their tax court trial, the Ballantynes entered into another dizzying series of transactions which made their assets (including the McCall and Fourth properties) appear to be encumbered and nearly worthless. Specifically, in May 1995, Susanne caused the

Ballantyne Trust to file a UCC–1 Financing Statement purporting to show that the Ballantyne Trust and its non real estate assets were encumbered by a personal property lien as security for a $1.1 million debt that had allegedly been incurred in November 1991, more than three years earlier. The $1.1 million debt was owed to an entity named Eastman Investment, which in turn had procured loans totaling $1.1 million from two banks. Eastman Investment was yet another family-created entity, owned 20% by the Ballantyne Trust and 80% by another company, Cramer Investments. Cramer Investments, in turn, was owned in equal parts by Susanne and her brother, Ed.

In June 1995, shortly after the conclusion of their tax court trial, Susanne ***1064** caused the Ballantyne Trust to record deeds of trust that purported to specifically encumber the McCall and Fourth properties as further security for the Eastman Investment debt. Although the McCall and Fourth properties appeared to have been encumbered in connection with the Eastman Investment transaction, the Ballantynes' own valuation of Leeds and Fourth Investment (which then held title to the McCall and Fourth properties) did not show that Leeds, Fourth Investment, or the real properties they owned, were encumbered by the liens of the referenced deeds of trust.

Subsequently, in July 1995, the Ballantyne Trust granted Eastman Investment a first security interest in Rhodes (the general partner of Leeds and Fourth Investment), and TPH Investments, LP (TPH), another newly formed limited partnership, which was also owned and controlled by the Ballantyne Trust. Susanne executed this transaction on behalf of both Eastman Investment and the Ballantyne Trust, but the Ballantyne Trust received no consideration for its granting of these additional security interests.

### 4. Transfer of the McCall and Fourth properties to the Children's Trusts

The Ballantynes next created a plethora of new entities for the purpose of transferring the McCall and Fourth properties to their children without realizing any taxable gain. [1] The principal vehicle used to effectuate these transfers was a limited partnership styled Hemet C, which acquired the Ballantyne Trust's 99% limited partnership interest in Leeds and Fourth Investment in a series of transactions that occurred between January 1996 and February 1997. Hemet C was structured such that a group of trusts owned by the Ballantynes' children (the Children's Trusts) owned a 99% limited partnership interest, and a company styled Snow Valley Holdings, Inc., whose shares were owned by the Children's Trusts, was its 1% general partner. The Ballantynes and their children served as Snow Valley's officers and directors. The Ballantyne Trust exchanged its limited partnership interest in Leeds (valued by the Ballantynes at $323,070) for a $248,000 promissory note and an agreement by Hemet C to assume a $75,000 unsecured debt that Don owed to a relative. Susanne signed on behalf of the Ballantyne Trust, and Don signed on behalf of Hemet C. Don testified that the Ballantyne Trust had previously assumed his familial debt, but he conceded that the assumption of debt was undocumented and not supported by consideration.

The Leeds promissory note was immediately assigned to TPH. Shortly thereafter, the Ballantyne Trust deducted $176,638.32 from the $248,000 principal on the Leeds note (a nearly 80 percent reduction) to credit Hemet C for accrued interest on various notes held by the Children's Trusts. The notes, which were all in default, had purportedly been made several years earlier by companies owned by the Ballantynes that had subsequently gone out of business. Don testified that the defaulted notes had been guaranteed by the Ballantyne Trust when made, but there is no record of any guarantee, and at least four of the purported loans were made before the Ballantyne Trust even purchased the companies.

The Ballantyne Trust exchanged its limited partnership interest in Fourth Investment (valued by the Ballantynes at ***1065** $317,000) for a $251,000 promissory note and an agreement by Hemet C to assume $66,000 in unsecured promissory notes owed to various Ballantyne-owned companies and the Children's Trusts. Nearly two-thirds of the $66,000 in assumed notes arose from circular transfers of funds between the Ballantyne Trust and the Children's Trusts. Specifically, the Ballantyne Trust transferred $40,000 to the Children's Trusts in December 1993, and borrowed $40,000 from the Children's Trusts contemporaneously.

Like the Leeds note, the Fourth Investment note was immediately assigned to TPH, and was thereafter reduced by $66,000 due to an alleged accounting error by Susanne. The note was subsequently reduced by another $21,675.76 to give Hemet C credit for accrued interest on the assumed debts, despite the fact that Hemet C had made no interest payments. The reduction of the promissory note was not supported by consideration.

Hemet C apparently made some payments on the unsecured promissory notes, but, at most, only $500 was distributed on the Leeds note and $11,000 on the Fourth Investment note, before Hemet C re-acquired its own notes from TPH in the transaction described below.

**5. Foreclosure**

In October 1997, the Ballantynes figuratively, but intentionally, toppled the house of cards they had created by causing a foreclosure on secured debt involving several entities within their control, for the purpose of transferring the McCall and Fourth properties to their children without consideration. To effectuate the foreclosure, the Ballantyne Trust ceased making payments on the $1.1 million Eastman Investment debt, and Eastman Investment (which was effectively controlled by Susanne [2]) made no effort to collect. The Ballantyne Trust then gave partnership interests in Investment Associates, LP, a limited partnership owned by the Children's Trusts and controlled by Don, to a newly created entity, Fulton 162, also owned by the Children's Trusts and controlled by Don. In exchange, Fulton 162 agreed to make payments on the Eastman Investment note. But Fulton 162 made no payments. In a purported attempt to protect itself from an impending default, Eastman Investment then sold the Eastman Investment note to New Horizon Lighting, LC (yet another Ballantyne-created entity owned by other Ballantyne-created entities and controlled by the Children's Trusts). In exchange for the note, Eastman Investment received an identical note, thereby rendering the transfer wholly without substance.

New Horizon subsequently foreclosed on its security interests to satisfy the Eastman Investment note. As a result, Hemet C (controlled by the Children's Trusts) acquired the Ballantyne Trust's interests in TPH, including the limited partnership interests in Leeds and Fourth. The Children's Trusts also acquired the Ballantyne Trust's interest in Rhodes, the general partner of Leeds and Fourth. The foreclosure had no effect on the Ballantynes as a practical matter, however, because New Horizon chose not to foreclose on the McCall and Fourth properties, or to take any of the Ballantynes' personal property ***1066** that it had acquired as a result of the foreclosure.

**6. Present action**

In January 2008, Appellants filed these now-consolidated quiet title actions seeking to remove the federal tax liens encumbering the McCall and Fourth properties. The district court concluded that Appellants held bare legal title to the properties as nominees of the Ballantynes. The district court looked to federal case law to supply the standards for evaluating the nominee doctrine under California law. The court's determination was based on findings that: (1) the initial transfer of the properties to Appellants in exchange for partnership units was undertaken as part of a larger scheme to transfer the properties to the Children's Trusts without adequate consideration; (2) the Ballantynes failed to show that the multiple transfers between and amongst the shell entities were effectuated for any purpose other than to evade substantial tax liabilities; (3) the Ballantynes continued to maintain possession and control over the McCall property throughout the relevant time period, and retained the power to direct the distribution of income from the Fourth property; and (4) few, if any, of the transactions discussed at trial were conducted at arms length. Appellants timely appealed the judgment. We have jurisdiction under 28 U.S.C. § 1291.

## STANDARD OF REVIEW

**[1]** **[2]** We review de novo the district court's interpretation of state law. *Salve Regina Coll. v. Russell,* 499 U.S. 225, 231, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991). We review the district court's findings of fact for clear error, and its conclusions of law de novo. *Red Lion Hotels Franchising, Inc. v. MAK, LLC,* 663 F.3d 1080, 1087 (9th Cir.2011).

## DISCUSSION

The IRS has broad powers to impose federal tax liens under 26 U.S.C. § 6321. Section 6321 provides that a lien may be imposed "upon all property and rights to property ... belonging to" a taxpayer who has failed to pay taxes owed after assessment and demand. The Supreme Court has interpreted section 6321 to apply to all property of a taxpayer, including property that is held by a third party as the taxpayer's nominee or alter ego. *G.M. Leasing Corp. v. United States,* 429 U.S. 338, 350–51, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977).

**[3]** "A nominee is one who holds bare legal title to property for the benefit of another." [3] *Scoville v. United States,* 250 F.3d 1198, 1202 (8th Cir.2001) (citations omitted). Although the Supreme Court has clearly indicated that the IRS may impose nominee tax liens, *see G.M. Leasing Corp.,* 429 U.S. at 350–51, 97 S.Ct. 619, it has provided only limited guidance

***1067** concerning how such nominee determinations are to be made. However, the Court has explained that application of the federal tax lien statutes involves questions of both state and federal law. *See Drye v. United States,* 528 U.S. 49, 58, 120 S.Ct. 474, 145 L.Ed.2d 466 (1999); *see also United States v. Craft,* 535 U.S. 274, 278, 122 S.Ct. 1414, 152 L.Ed.2d 437 (2002). "The federal tax lien statute itself 'creates no property rights but merely attaches consequences, federally defined, to rights created under state law.' " *Craft,* 535 U.S. at 278, 122 S.Ct. 1414 (quoting *United States v. Bess,* 357 U.S. 51, 55, 78 S.Ct. 1054, 2 L.Ed.2d 1135 (1958)). Consequently, in making nominee determinations in a tax lien context, we must "look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach[.]" *Drye,* 528 U.S. at 58, 120 S.Ct. 474; *see also United States v. Nat'l Bank of Commerce,* 472 U.S. 713, 722, 105 S.Ct. 2919, 86 L.Ed.2d 565 (1985) (noting that "state law controls in determining the nature of the legal interest which the taxpayer had in the property" (citations and internal quotations omitted)). After determining that the taxpayer has a property interest under state law, we "then [look] to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of the federal tax lien legislation." *Drye,* 528 U.S. at 58, 120 S.Ct. 474.

**[4]** The Government contends that nominee doctrine should be governed by federal common law rather than state law. We reject this position, just as it has been uniformly rejected by our sister circuits and by nearly every federal court that has examined the issue. [4], [5]

The government correctly notes that under *Drye,* "the Code and interpretive case law place under federal, not state, control the ultimate issue whether a taxpayer has a beneficial interest in any property subject to levy for unpaid federal taxes." *Drye,* 528 U.S. at 57, 120 S.Ct. 474. Nevertheless, in reaching that ultimate issue, *Drye* requires that we "look initially to state law" to determine the taxpayer's ownership interest in the property. *Id.* at 58, 120 S.Ct. 474; *see also* Mark A. Segal, *IRS Attacks Asset Transfers Designed to Thwart Tax Collections,* 80 Practical Tax Strategies 78, 79 (2008) (noting that "[s]tate law generally holds significance to the determination of whether a party is a nominee" due to "the long-standing recognition of the role of state law in determining property rights").

***1068** The government further urges that the federal common law must govern nominee determinations because the ability to collect taxes is a vital federal interest. The government's position is predicated on a fear that state courts will construe their own nominee doctrines in such a way as to "frustrate specific objectives of the federal" government. *United States v. Kimbell Foods, Inc.,* 440 U.S. 715, 728, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979). To date, however, this concern has proven to be unfounded, because state law nominee doctrine is typically "so similar" to its federal common law counterpart "that the distinction is of little moment." *Shades Ridge Holding Co., Inc. v. United States,* 888 F.2d 725, 728 (11th Cir.1989). The government's concern that diverging state law nominee doctrines will undermine a "nationally uniform body of law," *Kimbell Foods,* 440 U.S. at 728, 99 S.Ct. 1448, is similarly misplaced because courts across many jurisdictions "[a]lmost universally" utilize the same criteria in evaluating nominee relationships. *Dalton,* 682 F.3d at 158.

Moreover, should a state ever adopt an interpretation of the nominee doctrine that frustrates federal objectives, or disrupts commercial relationships, recourse may be sought through the legislative or federal regulatory processes. *See* Robert T. Danforth, *The Role of Federalism in Administering a National System of Taxation,* 57 Tax Law. 625, 659 (2004) (suggesting that "[i]n cases involving the federal tax lien, federal courts should respect state definitions of property and rights to property" and that "[i]f this approach leads to abuse or raises other tax policy concerns, the remedies should come from Congress, not the courts"); *see also* Teresa Dondlinger Trissell, *A Uniform Standard for Alter Ego and Nominee Tax Litigation,* 58 Fed. Law. 38, 40 (2011) (advocating that Congress or the IRS, through federal regulations, establish a uniform standard for nominee determinations). Because the state law abuses conjured by the government are merely theoretical at this point in time, we decline the government's invitation to ignore state law in evaluating the validity of a tax lien in the nominee context.

**[5]** Accordingly, we adopt the interpretation of *Drye* advanced by the reasoning of our sister circuits and hold that questions of nominee status require a "fact-specific state-law inquiry" prior to determining whether a nominee lien may lawfully be enforced as a matter of federal law. *Holman,* 505 F.3d at 1068; *see also Spotts,* 429 F.3d at 251 ("[B]efore determining what, if any, federal tax consequences attach, we must first address the pertinent questions of state property law.").

**1. California law and nominee doctrine**

 

**[6]** Appellants assert that California does not recognize a nominee lien theory of ownership. They are mistaken. California cases unambiguously confirm the existence of nominee ownership. *See Lewis v. Hankins,* 214 Cal.App.3d 195, 262 Cal.Rptr. 532, 536 (1989) (determining that "the parcels were beneficially owned by defendant because such entities were mere agents *or nominees* of defendant" (emphasis added)); *see also Parkmerced Co. v. City & Cnty. of S.F.,* 149 Cal.App.3d 1091, 197 Cal.Rptr. 401, 403 (1983); *Baldassari v. United States,* 79 Cal.App.3d 267, 144 Cal.Rptr. 741, 744 (1978); *Baumann v. Harrison,* 46 Cal.App.2d 84, 115 P.2d 530, 535 (Dist.Ct.App.1941). Despite California's longstanding recognition of nominee ownership, however, California courts have not yet specified the factors relevant to determining whether a person or entity holds title as a nominee. Given " 'the absence of a controlling California Supreme Court decision' " dictating the criteria relevant to a nominee analysis, we " 'must ***1069** predict how the California Supreme Court would decide the issue, using intermediate appellate court decisions, statutes, and decisions from other jurisdictions as interpretive aids.' " *Kairy v. SuperShuttle Int'l,* 660 F.3d 1146, 1150 (9th Cir.2011) (quoting *Gravquick A/S v. Trimble Navigation Int'l Ltd.,* 323 F.3d 1219, 1222 (9th Cir.2003)).

**[7]** **[8]** When California courts encounter a dearth of California appellate decisions on a particular legal question, they "often look to decisions of California federal courts and out-of-state cases in resolving" the issue. *August Entm't, Inc. v. Phila. Indem. Ins. Co.,* 146 Cal.App.4th 565, 52 Cal.Rptr.3d 908, 916 (2007). The California Supreme Court specifically gives " 'great weight' " to federal court decisions "when they reflect a consensus." *Coral Constr., Inc. v. City & Cnty. of S.F.,* 50 Cal.4th 315, 113 Cal.Rptr.3d 279, 235 P.3d 947, 958 (2010) (quoting *Barrett v. Rosenthal,* 40 Cal.4th 33, 51 Cal.Rptr.3d 55, 146 P.3d 510, 526 (2006)). Applying these principles here, we predict that the California Supreme Court would likely find the federal court cases evaluating nominee ownership to be highly persuasive, for at least two reasons. First, the federal decisions reflect an "almost universal[ ]" consensus regarding the factors relevant to a nominee analysis. *Dalton,* 682 F.3d at 158. Second, those factors have been adopted by federal courts in California. [6] *See, e.g., United States v. Bell,* 27 F.Supp.2d 1191, 1195 (E.D.Cal.1998).

The practice of grafting federal nominee doctrine onto an amorphous state law scheme is quite common. *See* Stephanie Hoffer, *et al., To Pay or Delay: The Nominee's Dilemma under Collection Due Process,* 82 Tul. L. Rev. 781, 809 (2008) (explaining that "[d]ue to the nonstatutory nature of nominee theory, courts have been faced with a dearth of state precedent" and are thus frequently forced to canvass the law of other jurisdictions). Indeed, federal courts evaluating "ill-defined" nominee doctrines in Alabama, Maine, Montana, Nebraska, New Jersey, and Virginia, have looked to "federal law to supply standards for evaluating" that state's nominee doctrine. *May v. A Parcel of Land,* 458 F.Supp.2d 1324, 1337–38 (S.D.Ala.2006); *see also Dalton,* 682 F.3d at 157; *Cody v. United States,* 348 F.Supp.2d 682, 694 (E.D.Va.2004); *Baum Hydraulics Corp. v. United States,* 280 F.Supp.2d 910, 916 (D.Neb.2003); *LiButti v. United States,* 968 F.Supp. 71, 75 (N.D.N.Y.1997); *Towe Antique Ford Found. v. I.R.S., Dep't of Treasury, U.S.,* 791 F.Supp. 1450, 1454 (D.Mont.1992).

We thus confirm that California law recognizes a nominee theory of property ownership. We also predict that if the California Supreme Court had occasion to evaluate the factors relevant to determining nominee ownership under California law, it would adopt the uniform set of factors generally recognized by federal courts. *See, e.g., Spotts,* 429 F.3d at 253 n. 2.

**2. Application of the nominee theory of ownership**

Appellants assert that even if California recognizes nominee ownership, the district court erred in concluding that Appellants ***1070** hold title to the McCall and Fourth properties as nominees of the Ballantynes.

**[9]** The district court properly evaluated Appellants' nominee status in light of the six-factor test set forth in *Spotts* and other federal cases. Those factors are:

(1) whether inadequate or no consideration was paid by the nominees;

(2) whether the properties were placed in the nominees' names in anticipation of a lawsuit or other liability while the transferor remains in control of the property;

(3) whether there is a close relationship between the nominees and the transferor;

(4) failure to record the conveyances;

(5) whether the transferor retained possession; and

(6) whether the transferor continues to enjoy the benefits of the transferred property.

*Id.* "Virtually without exception, courts focus on the totality of the circumstances," and no single factor is dispositive. *Dalton,* 682 F.3d at 158. Rather, the overarching consideration is "whether the taxpayer exercised active or substantial control over the property." *In re Richards,* 231 B.R. 571, 579 (E.D.Pa.1999).

**[10]** The federal tax liens properly attached to the McCall and Fourth properties only if one or both of the Ballantynes individually held title to the properties (or held title to the properties through a revocable inter-vivos trust in which Susanne was the sole trustee and beneficiary), or if Appellants are found to have been nominees of the Ballantynes as of the dates of the various tax assessments. *See* 26 U.S.C. §§ 6321, 6322. The assessments at issue in this case were made on January 2, 1995, June 30, 1997, and November 16, 1998. The first assessment occurred before Susanne caused the Ballantyne Trust to transfer the McCall and Fourth properties to Appellants. If Appellants are adjudged to be independent third-party purchasers who paid "adequate and full consideration" for the properties, then the federal tax lien related to the initial assessment would not attach to the properties. *See* 26 U.S.C. § 6323(a), (h)(6). The tax lien related to the January 1995 assessment will attach, however, if Appellants are found to have been nominees of the Ballantynes at the time of the initial transfer.

We agree with the district court that an evaluation of the totality of the circumstances in this case strongly indicates that Appellants were nominees of the Ballantynes as of June 1995, the date of the initial transfer of the properties, and on the dates of the subsequent assessments. Nearly every factor supports the existence of a nominee relationship.

The first factor, which considers whether inadequate or no consideration was paid by the nominee, strongly favors the government. Although the Fourth and McCall properties were initially transferred for adequate consideration, consisting of partnership interests in Leeds and Fourth Investment, those interests were subsequently transferred to Hemet C in exchange for promissory notes that were improperly reduced in value, and the assumption of various unsecured "debts" owed to family members or family-owned entities (many of which were already in default). The district court properly found that these reduced notes and unsecured debts of dubious value rendered consideration inadequate. Appellants nevertheless assert that any inadequacy of consideration relating to the Hemet C transfer cannot affect their ownership interests with regard to the first transfer, which was supported by adequate consideration. Appellants fail to recognize, however, that we evaluate the nominee issue in light of the totality of the circumstances, and that ***1071** in this case, among other factors, Don acknowledged that the transfers were all part of a larger scheme to convey the properties to the Children's Trusts.

**[11]** The second factor, whether the properties were transferred to the nominees in anticipation of a lawsuit while the transferor remained in control of the property, similarly supports the existence of a nominee relationship. The record demonstrates that the Ballantynes transferred the properties only weeks after their tax court trial. Moreover, Don acknowledged that the transfers were effectuated to protect against "future liabilities." After the transfers, the Ballantynes maintained possession of the McCall residence, directed the income stream of the Fourth property, and controlled both properties through their ownership and control of Leeds and Fourth Investment. *See Berkshire Bank,* 708 F.3d at 253. Indeed, the Ballantynes continued to exert the same type of control over the properties that an owner would. For example, they funded the property expenses of the McCall residence instead of paying the monthly rent required in the lease, and they failed to notify the tenants of the Fourth property regarding a change in the ownership of the property. Although Susanne resigned from her positions at Rhodes (the 1% general partner of Leeds and Fourth Investment) prior to the third assessment, it is undisputed that she continued to perform services for the limited partnerships exactly as she had before her resignation, by, for example, signing checks for Leeds and Fourth Investment through 1999, and acting as bookkeeper through at least 2004. Though Appellants contend that Susanne performed these managerial functions after her resignation as an employee of Ocean Business Services LLC, we agree with the district court that Ocean Business (yet another Ballantyne-owned entity) was simply another vehicle utilized by the Ballantynes to obscure their continued control of Leeds and Fourth Investment.

**[12]** The third factor, which evaluates the closeness in relationship between the nominees and the transferor, also persuasively indicates the existence of a nominee relationship. The government established that Appellants (along with every other entity involved in the Ballantynes' complex scheme) were wholly owned and controlled by one or more of the Ballantynes or their children at the time of the initial transfer and subsequent assessments.

**[13]** The fourth factor alone partially favors Appellants, because the conveyances of title between the Ballantynes and Appellants were ultimately recorded. However, this factor is not particularly persuasive because none of the conveyances was recorded promptly. Indeed, the district court suspected that the Ballantynes had backdated several of the documents produced at trial because so many of them had not been recorded until months or even years after their alleged execution. The fact that the recording of the property conveyances was similarly delayed (by more than three months in the case of the Fourth property, and by more than two years in the case of the McCall property) further strengthens this inference of backdating. Thus, we agree with the district court that, on balance, the fourth factor is only marginally helpful to the Ballantynes.

**[14]** Finally, the fifth and sixth factors, which consider whether the transferor continued to retain possession and enjoy the benefits of the transferred property, strongly favor the government. After the transfers, the Ballantynes continued to maintain possession of the McCall property and enjoy it as their primary residence exactly as they had before the transfer. They benefitted from a leasehold relationship ***1072** in which they could ignore key terms of the lease, such as rent payment, without consequence. The Ballantynes also continued to enjoy the benefits of the Fourth property after the transfer by continuing to control the distribution of rental income. As the district court found, the Ballantynes additionally retained the benefit of transferring the Fourth property to their children in a way they believed would avoid the realization of any taxable gain.

Because these factors inescapably affirm the existence of a nominee relationship when viewed in light of the totality of the circumstances, the district court properly determined that Appellants held the McCall and Fourth properties as nominees of the Ballantynes.

**3. Required Joinder**

**[15]** For the first time on appeal, Appellants assert that the district court's judgment should be vacated because the more than thirteen shell entities involved in the Ballantynes' complex tax avoidance scheme were not joined in the action. Appellants' claim is unavailing.

Federal Rule of Civil Procedure 19(a) provides in relevant part that a person "must be joined as a party if that person claims an interest relating to the subject of the action and ... disposing of the action in the person's absence may as a practical matter impair or impede the person's ability to protect the interest." Fed.R.Civ.P. 19(a)(1). Appellants fail to identify the specific entities they contend must be joined or explain how the interests of those entities will be impaired by the judgment in this case absent joinder. Moreover, none of these entities ever attempted to join this litigation —and Appellants never moved to join them—despite the fact that the entities were both owned and controlled by the Ballantynes, who were considerably involved in the district court trial.

In any event, the district court made no findings of fact regarding the validity of any third party's interest in the properties; instead, it adjudicated only whether Leeds and Fourth Investment held title in the McCall and Fourth properties as nominees of the Ballantynes when the relevant tax liens attached to those properties. Appellants cite no authority requiring third party joinder in a situation such as this one, where the district court has neither quieted title nor determined whether the federal tax liens are effective against third parties. "[W]hen the judgment appealed from does not in a practical sense prejudicially affect the interests of the absent parties, and those who are parties have failed to object to non joinder in the trial court, [we] will not dismiss an otherwise valid judgment." *Sierra Club v. Hathaway,* 579 F.2d 1162, 1166 (9th Cir.1978) (citations omitted). Accordingly, Appellants have not established that the absent entities were necessary parties under Rule 19(a), and the district court properly resolved Appellants' ownership interests in the McCall and Fourth properties in their absence. *See Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship & Training Comm.,* 662 F.2d 534, 537 (9th Cir.1981).

**CONCLUSION**

For the foregoing reasons, the district court's judgment is affirmed.

**AFFIRMED.**

**All Citations**

720 F.3d 1058, 111 A.F.T.R.2d 2013-2340, 2013-1 USTC P 50,382, 13 Cal. Daily Op. Serv. 5958, 2013 Daily Journal D.A.R. 7544

Footnotes

* The Honorable Jack Zouhary, District Judge for the U.S. District Court for the Northern District of Ohio, sitting by designation.

1 The Byzantine series of entities created by the Ballantynes, and the extraordinarily complex scheme in which they operated, brings to mind Sir Walter Scott's observation: "Oh, what a tangled web we weave, When first we practice to deceive!" Sir Walter Scott, *Marmion,* Canto vi, Stanza 17 (1808).

2 Although Susanne's brother Ed owned a 50% interest in a company that in turn owned an 80% interest in Eastman Investment, Susanne appears to have had effective control over Eastman Investment at all times. Specifically, she executed virtually every document involved in the Eastman Investment loan, and there is no indication that Ed ever sought to protect his interest in Eastman Investment despite the complete failure of Ballantyne-owned entities to make any payments on the Eastman Investment note.

3 As aptly described by one scholar,

> Typical nominee ... scenarios start with people falling behind on their taxes. Facing the loss of their homes or businesses to the federal government some taxpayers take steps to try to separate themselves from their valuable assets. The taxpayer's house may be deeded to a friend, although the taxpayer continues to reside there. Or perhaps all the taxpayer's cash disappears, yet the taxpayer's personal bills are being paid by a closely-held and controlled corporation. The factual scenarios are as creative and varied as are taxpayers themselves. However, the tax collector's reaction is usually consistent: upon discovering that a third party is being used to thwart the IRS's collection efforts, the government will file a notice of a federal tax lien identifying the third-party target as the taxpayer's nominee or alter ego and will attempt to satisfy the tax liability from assets held by the third party.

Teresa Dondlinger Trissell, *A Uniform Standard for Alter Ego and Nominee Tax Litigation,* 58 Fed. Law. 38, 38 (2011).

4 *See Berkshire Bank v. Town of Ludlow,* 708 F.3d 249, 252 (1st Cir.2013) (clarifying that state law, rather than federal law, provides the "substantive rules" of nominee doctrine) (quoting *Dalton v. Comm'r of Internal Revenue,* 682 F.3d 149, 157 (1st Cir.2012)); *see also Holman v. United States,* 505 F.3d 1060, 1067–68 (10th Cir.2007) (rejecting the government's argument that a "uniform federal rule should ... govern whether the nominee theory is to apply," and remanding for application of Utah law); *Spotts v. United States,* 429 F.3d 248, 253 (6th Cir.2005) ( "Because there is no indication that the district court applied [state] law before determining the scope of the federal tax lien we must reverse."); *cf. Old W. Annuity & Life Ins. Co. v. Apollo Grp.,* 605 F.3d 856, 861 (11th Cir.2010) (in a case involving alter ego theory, rejecting under *Drye* the government's argument that federal common law, rather than state law, governs for purposes of determining the taxpayer's interest in the property).

5 We have not previously provided precedential guidance on this issue, and two of our unpublished dispositions appear to be inconsistent with one another. *Compare Adam v. United States,* 400 Fed.Appx. 175, 176 (9th Cir.2010) (the district court must look to state law in evaluating nominee status); *with United States v. Wheeler,* 403 Fed.Appx. 301, 302 (9th Cir.2010) (affirming the application of federal law to determine nominee relationship without reference to state's nominee doctrine).

6 Those factors are: "(1) whether inadequate or no consideration was paid by the nominee; (2) whether the property was placed in the nominee's name in anticipation of a lawsuit or other liability while the transferor remains in control of the property; (3) whether there is a close relationship between the nominee and the transferor; (4) whether they failed to record the conveyance; (5) whether the transferor retained possession; and (6) whether the transferor continues to enjoy the benefits of the transferred property." *Spotts,* 429 F.3d at 253 n. 2 (internal quotation marks omitted).

**End of Document**

957 F.Supp.2d 1264
United States District Court,
W.D. Washington,
at Seattle.

Florence R. FRIAS, Plaintiff,
v.
ASSET FORECLOSURES SERVICES, INC.,
LSI Title Agency, Inc., U.S. Bank, N.A.,
Mortgage Electronic Registration Systems,
Inc., and Doe Defendants 1–20, Defendants.

Case No. C13–760 MJP. | July 26, 2013.

**Synopsis**
**Background:** Homeowner brought state court action against lender and related defendants for claims arising out of two foreclosure proceedings initiated on her residence. Action was removed on basis of diversity jurisdiction. Homeowner moved to certify questions to state Supreme Court and to stay, and defendants moved to dismiss.

**Holdings:** The District Court, Marsha J. Pechman, C.J., held that:

[1] it was not appropriate to certify questions to state Supreme Court;

[2] issuance of preliminary injunction was precluded;

[3] homeowner's claims alleging violation of Washington's Consumer Protection Act (CPA) were precluded; and

[4] homeowner's claims alleging violation of Washington's Deed of Trust Act were precluded.

Defendants' motion granted.

West Headnotes (13)

**[1]** **Federal Courts**
Withholding Decision; Certifying Questions

The process of certifying questions to a state court is intended to build a cooperative judicial federalism and serve the interests of judicial efficiency and comity.

Cases that cite this headnote

**[2]** **Federal Courts**
Withholding Decision; Certifying Questions

While certification may be useful where there are untested questions of state law, there is a presumption against certifying a question to a state supreme court after the federal district court has issued a decision, as a party should not be allowed a second chance at victory through certification by the appeals court after an adverse district court ruling.

Cases that cite this headnote

**[3]** **Federal Courts**
Particular questions

It was not appropriate to certify questions to Washington Supreme Court regarding whether plaintiff alleging abuses of home mortgage foreclosure process could state a claim for damages under Washington law in absence of trustee's sale, as there were several opinions in federal district holding homeowner facing foreclosure could not state such a claim.

Cases that cite this headnote

**[4]** **Mortgages**
Restraining exercise of power

Fact that there was no pending or imminent trustee's sale in connection with homeowner's property precluded issuance of preliminary injunction to forbid the initiation of any future sale; any such request was unripe and would not be considered, as doing so would result in an impermissible advisory opinion.

1 Cases that cite this headnote

**[5]** **Antitrust and Trade Regulation**
Practices prohibited or required in general

Fact that homeowner's property was not actually sold by trustee and homeowner paid no fees initially charged by trustee precluded homeowner's claims alleging violation of Washington's Consumer Protection Act (CPA); although homeowner was in default of her mortgage, property was not sold, and she did not pay any fees or become deprived of use of her home. West's RCWA 19.86.090.

Cases that cite this headnote

[6] **Antitrust and Trade Regulation**
⇒ Nature and Elements

The elements of a claim under Washington's Consumer Protection Act (CPA) are: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) impacting the public interest; (4) causing injury to the plaintiff's business or property; and (5) the injury is causally linked to the unfair or deceptive act. West's RCWA 19.86.090.

1 Cases that cite this headnote

[7] **Mortgages**
⇒ Wrongful Foreclosure

Fact there was no foreclosure sale of homeowner's residence precluded its claims alleging trustee and default servicing company violated Washington's Deed of Trust Act, as homeowner defaulted under mortgage loan, a valid basis for initiating foreclosure proceedings, yet no foreclosure sale occurred or was pending. West's RCWA 61.24.005 et seq.

Cases that cite this headnote

[8] **Mortgages**
⇒ Statutory provisions

Three goals of the Washington Deed of Trust Act (WDTA) are: (1) the nonjudicial foreclosure process should be efficient and inexpensive; (2) the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and (3) the process should promote stability of land titles. West's RCWA 61.24.005 et seq.

Cases that cite this headnote

[9] **Mortgages**
⇒ Wrongful Foreclosure

There can be no claim under the Washington Deed of Trust Act (WDTA) for the wrongful initiation of a trustee's sale where no trustee's sale actually occurs. West's RCWA 61.24.005 et seq.

Cases that cite this headnote

[10] **Fraud**
⇒ Nature and form of remedy

Under Washington law, a claim of intentional misrepresentation is a claim in fraud.

Cases that cite this headnote

[11] **Fraud**
⇒ Elements of Actual Fraud

Under Washington law, the nine elements of fraud are: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff.

Cases that cite this headnote

[12] **Fraud**
⇒ Statements recklessly made; negligent misrepresentation

Under Washington law, negligent misrepresentation occurs when a person in the course of a transaction, supplies false information for the guidance of others and is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Cases that cite this headnote

 

[13] **Fraud**

Injury and causation

Under Washington law, a claim for negligent misrepresentation is premature and subject to dismissal if brought before the plaintiff incurs damages.

Cases that cite this headnote

**Attorneys and Law Firms**

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## *1266 ORDER DENYING MOTION TO CERTIFY, DENYING MOTION TO CONTINUE, AND GRANTING MOTIONS TO DISMISS

MARSHA J. PECHMAN, Chief Judge.

This matter comes before the Court on several motions. Defendant LSI Title Agency brings a motion to dismiss all claims against them pursuant to Fed.R.Civ.P. 12(b)(6). (Dkt. No. 10.) Defendant Asset Foreclosure Services joins the motion to dismiss. (Dkt. No. 11.) Defendants U.S. Bank and Mortgage Electronic Registrations Systems, Inc. also join with respect to the motion to dismiss the first cause of action, preliminary injunction. (Dkt. No. 12.)

Plaintiff brings a motion to certify questions to the Washington Supreme Court. (Dkt. No. 23.) She also brings a motion to stay the case pending the motion to certify questions. (Dkt. No. 22.) The Court considered all motions, responsive pleadings and related documents and GRANTS the motions to dismiss, DENIES the motion to certify questions and DENIES as MOOT the motion to stay.

### *Background*

Plaintiff Florence Ruth Frias brings this case against Defendants Asset Foreclosure Services, Inc. ("ASF"), LSI Title Agency, Inc. ("LSI"), U.S. Bank, NA. ("U.S. Bank"), Mortgage Foreclosure Electronic Registration Systems, Inc. ("MERS"), and "Doe Defendants 1–20" for claims arising out of two foreclosure proceedings initiated on her residence located at 14523 South Lake Crabapple Road, Marysville, WA, in 2010 and 2011. (Dkt. No. 1 at 1.) Frias brought this case in Snohomish County Superior Court, and Defendants removed the case to this Court on grounds of diversity jurisdiction. (*Id.*) Frias asks in her Complaint for a temporary restraining order and preliminary injunction, and damages under the Foreclosure Fairness Act, the Consumer Protection Act, the Deed of Trust Act, and under the theory of intentional misrepresentation. (*Id.* at 8.)

Frias entered into a mortgage loan agreement with Defendant U.S. Bank in September of 2008. (Dkt. No. 1 at 11.) She signed a promissory note and Deed of Trust identifying U.S. Bank as the lender, and Defendant MERS as the beneficiary and nominee for the lender. (*Id.* at 11–12.) Before taking out the mortgage loan, Frias had knee surgery and was in physical therapy, but she discovered more knee surgeries would be necessary. (*Id.* at 11.) Frias began falling behind on her mortgage loan in August 2009. (*Id.* at 12.) She was approved for disability coverage in March 2010, by which time she had depleted her savings. (*Id.*)

When she began falling behind, Frias claims she contacted representatives at U.S. Bank to apply for a loan modification program which would allow her to keep her home, but nothing resulted from these contacts. (Dkt. No. 1 at 12.) Frias alleges she received a Notice of Default on or about April 14, 2010, and a Notice of Trustee's Sale ("NOTS") on or about May 17, 2010 indicating her home was being foreclosed by Defendant MERS and the foreclosing trustee was LSI. (*Id.*) Frias alleges LSI was not appointed foreclosing trustee by the holder of the promissory note, LSI cannot be a foreclosing trustee under Washington state law, and Asset Foreclosure was the true foreclosing trustee. (*Id.* at 12–13.)

Asset Foreclosure recorded the NOTS in Snohomish County on May 19, 2010, but recorded a Discontinuance of Trustee's Sale on May 12, 2011. (Dkt. No. 1 at 13.) Frias continued to attempt to modify her loan, and in July of 2011 obtained a loan modification from U.S. Bank. (*Id.*) Frias alleges U.S. Bank informed her at this time she was not eligible for a Home Affordable Modification Program ("HAMP") ***1267** loan because she filed for bankruptcy protection in 2010 and had received a discharge, a claim Frias argues is false. (*Id.*)

Frias received a second NOTS in May of 2011. (Dkt. No. 1 at 14.) The NOTS was recorded in Snohomish County listing U.S. Bank as the initiating beneficiary and returnable to Asset Foreclosure. (*Id.*) The NOTS included an itemization of amounts being charged to Frias to prevent the sale, which Frias alleges included several improper charges. (*Id.*) Before the NOTS was recorded, an Assignment of the Deed of Trust was recorded. (*Id.*) An agent for MERS signed the Assignment, which assigned MERS's interest in the Deed of Trust to U.S. Bank. (*Id.*)

After receiving the second NOTS, Frias contacted a housing counselor at Parkview Services and requested to participate in the Washington foreclosure mediation program created by the Foreclosure Fairness Act ("FFA"), RCW 61.24. (*Id.* at 16.) Frias was appointed a mediator on August 5, 2011. Frias alleges LSI wrongfully continued the foreclosure sale while the mediation was in progress, in violation of the FFA, and Asset Foreclosure and LSI were forced to "unwind" the sale. (*Id.*) However, Frias says she received a 1099–A form from U.S. Bank at the end of 2011 indicating it acquired the property on September 23, 2011 and the "Balance of Principal Outstanding" was $211,131.13. (*Id.* at 17.) While Frias understands this information to be untrue, she is uncertain it has been corrected with the IRS. (*Id.*) Frias claims U.S. Bank did not provide required documentation during the mediation proceedings and did not participate in good faith. (*Id.*) She claims the mediator also made a finding that U.S. Bank did not participate in the mediation in good faith, and this is a per se violation of the Washington Consumer Protection Act, RCW 19.86, et seq. (*Id.*) Frias claims she is currently uncertain of her status regarding the ownership of her home, and this causes her distress. (*Id.*)

On May 5, 2013, Defendant LSI moved to dismiss all claims against them pursuant to Fed.R.Civ.P. 12(b)(6). (Dkt. No. 10.) LSI argues in this motion Frias's claims are based on a foreclosure sale that never occurred, and LSI is no longer serving as foreclosure trustee under the mortgage encumbering Plaintiff's property. (*Id.* at 1.) Defendant Asset Foreclosure joined the motion to dismiss. (Dkt. No. 11.) Defendants U.S. Bank and MERS also joined the motion to dismiss with respect to the request for a preliminary injunction, and otherwise support the motion to dismiss. (Dkt. No. 12 at 2.) Frias responded to the motion to dismiss (Dkt. Nos. 14, 15 and 16) and also submitted a motion to certify question to the Washington Supreme Court (Dkt. No. 23) and a motion to stay pending certification (Dkt. No. 22). In the motion to certify, Plaintiff asked this Court to certify questions regarding Washington law on causes of action where a foreclosure sale was initiated, but never completed. (Dkt. No. 23 at 1.) All of the pending motions are addressed below.

### *Discussion/Analysis*

### I. Motion to Certify Questions

Plaintiff asks the Court to certify question to the Washington Supreme Court "regarding whether a plaintiff alleging abuses of the home mortgage foreclosure process may state a claim for damages under Washington law in the absence of a trustee's sale. (Dkt. No. 23 at 1.) Plaintiff argues no published Washington authority speaks to this issue and only one known unpublished opinion, *Krienke v. Chase Home Fin., LLC,* 2007 WL 2713737, 2007 Wash.App. LEXIS 2668 (Wash.App. Sept. 18, 2007). (*Id.* at 3.) Plaintiff acknowledges there are several opinions in this District holding "a homeowner facing foreclosure cannot state a claim for damages in ***1268** the absence of a trustee's sale." (*Id.*) Defendants oppose the motion to certify by arguing the issue is well settled in this District. (Dkt. No. 27 at 3.)

**[1]** **[2]** A question may be certified to the Washington Supreme Court when "in the opinion of any federal court before whom a proceeding is pending, it is necessary to ascertain the local law of this state ... and the local law has not been clearly determined[.]" RCW 2.60.020. The certification process is intended to "build a cooperative judicial federalism" and serve the interests of judicial efficiency and comity. *Lehman Bros. v. Schein,* 416 U.S. 386, 391, 94 S.Ct. 1741, 40 L.Ed.2d 215 (1974). While certification may be useful where there are untested questions of state law, "[t]there is a presumption against certifying a question to a state supreme court after the federal district court has issued a decision. A party should not be allowed a 'second chance at victory' through certification by the appeals court after an adverse district court ruling." *Thompson v. Paul,* 547 F.3d 1055, 1065 (9th Cir.2008).

**[3]** This Court faced the question of whether to certify very similar questions before and concluded certification was not appropriate. *Robertson v. GMAC Mortgage LLC,* Case No. C12–2017–MJP, Order Denying Motion to Certify, 2013 WL 2351725 (W.D.Wash., May 30, 2013). Likewise, certification is not appropriate here. As noted in *Robertson,* "[t]he Washington State Supreme Court does not operate as a court of appeals for the decisions of this Court." *Id.* at 2, *citing Hann v. Metropolitan Cas. Ins. Co.,* No. 12–5031 RJB, 2012 WL 3098711, *2 (W.D.Wash. July 30, 2012). Plaintiff acknowledges the courts in this District have ruled several times on the issue of whether a Plaintiff has a cause of action for an initiated but not completed trustee's sale. (Dkt. No. 23 at 3.) Certification is not appropriate under such circumstances.

Plaintiff argues changes in the law justify certification. First, Plaintiff says the Washington Supreme Court recognized claims for damages without acknowledging that a trustee's sale need occur in *Bain v. Metropolitan Mortg. Group, Inc.,* 175 Wash.2d 83, 285 P.3d 34 (Wash.2012). This over extends the effect of *Bain* and asks this Court to assume the Washington Court made a significant change in the law by implication. This Court already addressed and rejected the argument that *Bain* changes whether there is a cause of action for an initiated but not completed trustee's sale. *Trehuba v. Am. Home Mortgage Servicing, Inc.,* 2013 WL 1225381, *1, 2013 U.S. Dist. LEXIS 4819, *2 (W.D.Wash. Jan. 11, 2013).

Plaintiff's argument that Washington laws suggest Washington recognizes a cause of action for damages in the absence of a trustee's sale also fails. Plaintiff says Washington Revised Code section 61.24.127 implies recognition of rights in the absence of a trustee's sale by stating "[t]he failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale ... may not be deemed a waiver of a claim for damages" for specific claims. Wash. Rev.Code § 61.24.127(1). Cases in this District have recently held there is no cause of action for damages in the absence of a trustee's sale, so there is no amendment to this section that alters the fact this District has settled law in this area. *See, Zalac v. CTX Mortg. Corp.,* 2013 WL 1990728, 2013 U.S. Dist. LEXIS 20269 (W.D.Wash. Feb. 14, 2013). Further, Plaintiff asks the court to make a strained and unsupported implication from the language of this statute, which does not address the question of pre-trustee's sale rights.

***1269** Because the courts in this District have already answered the questions Plaintiff seeks to certify to the Washington Supreme Court, the motion to certify is DENIED.

**II. Motion to Stay**

Plaintiff asks the Court to stay its decision on Defendants' motion to dismiss pending the resolution of Plaintiff's motion to certify questions to the Washington Supreme Court. (Dkt. No. 22.) Defendants oppose the motion to stay. (Dkt. Nos. 25 and 26.) Because the motion to certify is DENIED, the motion to stay is DENIED as MOOT.

**III. Motion to Dismiss**

Defendant LSI asks the Court to dismiss for failure to state a claim all causes of action pending against them because the claims are based on a foreclosure sale that never occurred, and because LSI is no longer the foreclosure trustee under the mortgage encumbering Plaintiff's property. (Dkt. No. 10 at 1.) Defendant Asset Foreclosure Services joined the motion to dismiss, also arguing the claims are based on a foreclosure sale that never occurred and they are no longer acting as foreclosure trustee. (Dkt. No. 11 at 1–2.) Defendants U.S. Bank and MERS joined the motion to dismiss with regard to the first cause of action of preliminary injunction, proposing the law and argument put forth by LSI applies equally to them. (Dkt. No. 12 at 2.) They do not otherwise oppose LSI's motion to dismiss. (*Id.* at 1.)

**A. Standard for Motion to Dismiss**

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the conduct alleged." *Iqbal,* 556 U.S. at 678, 129 S.Ct. 1937 (citing *Twombly,* 550 U.S. at 545, 127 S.Ct. 1955) (further noting that plausibility lies somewhere between allegations that are "merely consistent" with liability and a "probability requirement"); *see also Moss v. United States Secret Serv.,* 572 F.3d 962, 969 (9th Cir.2009) ("In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.") (citing *Iqbal* at 1949). The Court must accept plaintiffs' factual allegations as true, but need not accord the same deference to legal conclusions. *Id.* at 1949–50 (citing *Twombly* at 555, 127 S.Ct. 1955). Courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal,* at 678, 129 S.Ct. 1937 (citation omitted).

**B. Preliminary Injunction**

All defendants move for dismissal of Plaintiff's preliminary injunction claim against them. (Dkt. No. 10 at 5, Dkt.

No. 11 at 1, Dkt. No. 12 at 2.) They argue both trustee sales originally initiated were discontinued, and there is no foreclosure pending with respect to Plaintiff's property. (Dkt. No. 10 at 5.) With no pending foreclosure, there is no sale to restrain or enjoin. (*Id.*) Plaintiff does not mention the preliminary injunction in her response to LSI's motion to dismiss (Dkt. No. 14) but in her response to U.S. Bank and MERS's joinder of that motion, Frias acknowledges there is no pending non-judicial foreclosure sale to enjoin. (Dkt. No. 15 at 11.) She claims, however, the cause of action is still appropriate because a new sale might be initiated at any time. (*Id.*)

***1270** **[4]** Where there is no pending or imminent action to restrain, a request for a preliminary injunction is unripe and will not be considered because doing so would result in an impermissible advisory opinion. *Brotherson v. Prof'l Basketball Club, L.L.C.,* 2008 U.S. Dist. LEXIS 118029, *8 (W.D.Wash. Apr. 14, 2008). Plaintiff essentially asks for an advisory opinion, arguing a new trustee's sale may at some point be initiated. (Dkt. No. 15 at 11.) Federal courts established pursuant to Article III of the Constitution do not render advisory opinions. *United Public Workers v. Mitchell,* 330 U.S. 75, 89, 67 S.Ct. 556, 91 L.Ed. 754 (1947). Because there is no pending or imminent action to restrain, Plaintiffs request for a preliminary injunction is DISMISSED as to all parties.

**C. Consumer Protection Act**

**[5]** Defendant LSI asks the Court to dismiss Plaintiff's Consumer Protection Act, RCW 19.86.090 "(CPA") claim against it arguing LSI did not misrepresent the basis for initiating either foreclosure attempt where Plaintiff admits she was in default of her mortgage, and Plaintiff suffered no actual harm where the foreclosure sales never happened and Plaintiff never paid any fees LSI initially charged. (Dkt. No. 10 at 6–7.) Defendant Asset Foreclosure Services also asks for this claim to be dismissed against it under the same theory. (Dkt. No. 11.) Plaintiff argues LSI and Asset Foreclosure Services did not have legal authority to act as foreclosing trustee under Washington law and did cause harm by causing Plaintiff's property to be sold (although the sale was ultimately reversed) while Plaintiff was in foreclosure mediation, in violation of the CPA. (Dkt. No. 14 at 4.)

**[6]** Where Plaintiff's property was not actually sold and Plaintiff did not pay any foreclosure fees, there is no CPA claim. The elements of a CPA claim are (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) impacting the public interest, (4) causing injury to the plaintiff's business or property and (5) the injury is causally linked to the unfair or deceptive act. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wash.2d 778, 780, 719 P.2d 531 (1986). A failure to meet any one prong is fatal to the CPA claim, and harm must be established. *Besel v. Viking Ins. Co.,* 105 Wash.App. 463, 483, 21 P.3d 293 (2001). Plaintiff does not argue she actually paid any fees or was deprived use or her home. She does note Defendants actually caused an auction of her property, but in her Complaint she acknowledges Defendants were required to "unwind" that sale. (Dkt. No. 1 at 16.) Without a demonstration of harm, Plaintiff's CPA claim fails against Defendants LSI and Asset Foreclosure Services and this claim is DISMISSED as to these Defendants.

**D. Deed of Trust Act**

**[7]** Defendant LSI asks for Plaintiff's claim under the Deed of Trust Act to be dismissed against it because Plaintiff's undisputed default under the mortgage loan in question was a valid basis for initiating foreclosure proceedings against Plaintiff, and because no foreclosure sale occurred or is pending. (Dkt. No. 10 at 8–9.) Plaintiff argues Defendants LSI and Asset Foreclosure engaged in executing false documents because MERS falsely claimed to be the beneficiary and initiated the first foreclosure, and LSI and Asset Foreclosure caused false and misleading documents to be filed in the records of King County, Washington. (Dkt. No. 14 at 5, Dkt. No. 16 at 6.)

**[8]** **[9]** Because there was no foreclosure sale, Plaintiff cannot bring a claim for violation of the DTA against LSI or Asset Foreclosure. *Vawter v. Quality Loan* ***1271** *Serv. Corp.,* 707 F.Supp.2d 1115, 1123 (W.D.Wash.2010). "Three goals of the Washington deed of trust act are: (1) that the nonjudicial foreclosure process should be efficient and inexpensive, (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure, and (3) that the process should promote stability of land titles." *Plein v. Lackey,* 149 Wash.2d 214, 225, 67 P.3d 1061 (2003). Courts in this District have consistently found there can be no claim under the DTA for the wrongful initiation of a trustee's sale where no trustee's sale actually occurs. *Zalac v. CTX Mortg. Corp.,* 2013 WL 1990728, *2, 2013 U.S. Dist. LEXIS 20269, *5 (W.D.Wash.). Plaintiff admits there was no successful trustee's sale of her property. (Dkt. No. 15 at 7.) Plaintiff's claims under the Deed of Trust Act against Defendants LSI and Asset Foreclosure are DISMISSED.

 

**E. Intentional Misrepresentation/Fraud**

Defendants LSI and Asset Foreclosure ask the Court to dismiss Plaintiff's intentional misrepresentation, or fraud, claim for failure to plead facts with the required heightened degree of specificity. (Dkt. No. 10 at 13.) In her response, Plaintiff says she "has pled her claims with sufficient particularity to meet the fraud pleading standard under CR 9, even though she did not plead a fraud claim." (Dkt. No. 14 at 3.) In her complaint, Plaintiff has a cause of action labeled "Intentional and/or Negligent Misrepresentations against All of the Defendants." (Dkt. No. 1 at 23.) Under this headline she alleges all Defendants made "numerous misrepresentations" in the foreclosure and mediation process. (*Id.*) Specifically, she notes "These Defendants have intentionally misrepresented the legal requirements for a loan modification under FHA's rules and the ability to foreclose on Ms. Frias's home." (*Id.*) In her responses, Frias has a section that states "Defendants are liable for the intentional and negligent misrepresentations made to Ms. Frias" but within this section she discusses only negligent misrepresentation. (Dkt. No. 16 at 12–13, Dkt. No. 14 at 12–13.)

**[10]** **[11]** A claim of intentional misrepresentation is a claim in fraud. *W. Coast, Inc. v. Snohomish County,* 112 Wash.App. 200, 206, 48 P.3d 997 (2002). A claim of intentional misrepresentation, or fraud, is subject to a heightened pleading standard where a plaintiff must plead both the elements and circumstances of the fraud with particularity by alleging specific fraudulent acts. Fed.R.Civ.P. 9(b). The nine elements of fraud are: (1) representation of an existing fact, (2) materiality, (3) falsity, (4) the speaker's knowledge of its falsity, (5) intent of the speaker that it should be acted upon by the plaintiff, (6) plaintiff's ignorance of its falsity, (7) plaintiff's reliance on the truth of the representation, (8) plaintiff's right to rely upon it, and (9) damages suffered by the plaintiff. *Stiley v. Block,* 130 Wash.2d 486, 505, 925 P.2d 194 (1996).

Plaintiff does not adequately plead a claim for intentional misrepresentation. First, it is unclear if Plaintiff even intends to plead a claim for intentional misrepresentation where her reply to Defendants' motion to dismiss specifically says she is not making a fraud claim. (Dkt. No. 14 at 3.) Second, as noted above, there was no successful trustee's sale of Plaintiff's property and Plaintiff does not argue she ever paid any fees charged by LSI or Asset Foreclosure, and therefore Plaintiff does not plead reliance or damages. Plaintiff's claim for intentional misrepresentation is DISMISSED against LSI and Asset Foreclosure.

***1272 F. Negligent Misrepresentation**

Defendants LSI and Asset Foreclosure ask the Court to dismiss Plaintiff's negligent misrepresentation claim because Plaintiff has shown no detrimental reliance on any statement made by either Defendant. (Dkt. No. 10 at 11.) In her response, Plaintiff does not address damages or harm. Instead, she notes that "numerous misrepresentation have been made to Ms. Frias in the course of this foreclosure process" and cites the definition of negligent misrepresentation. (Dkt. No. 14 at 12–13, Dkt. No. 16 at 12–13.)

**[12]** **[13]** Negligent misrepresentation occurs when a person in the course of a transaction, "supplies false information for the guidance of others [and] is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." *ESCA Corp. v. KPMG Peat Marwick,* 135 Wash.2d 820, 826, 959 P.2d 651 (1998). A claim for misrepresentation is premature and subject to dismissal if brought before the plaintiff incurs damages. *Keil v. Scholten,* 2002 WL 988562, *2, 2002 Wash.App. LEXIS 196, *6 (Feb. 4, 2002).

As discussed above, Plaintiff has failed to show "pecuniary loss caused ... by [her] justifiable reliance." *ESCA Corp.,* 135 Wash.2d at 826, 959 P.2d 651. Plaintiff does not allege she lost her home and she does not allege she paid any of the fees charged by LSI or Asset Foreclosure. Plaintiff's mere contention that false statements were made by LSI and Asset Foreclosure is not enough to plead a claim for negligent misrepresentation where she does not allege any actual harm. Plaintiff's claim for negligent representation against LSI and Asset Foreclosure is DISMISSED.

***Conclusion***

Because the law is settled in this District on the issue of whether a plaintiff has claims for damages stemming from a foreclosure sale when the sale never occurred, the Court DENIES Plaintiff's motion to certify questions. (Dkt. No. 23.) Because the Court considered this motion contemporaneously with Defendant's motion to dismiss, Plaintiff's motion to stay the case pending resolution of the motion to certify is

DENIED as MOOT. (Dkt. No. 22.) Because Plaintiff fails to state claims upon which relief can be granted as discussed above, Defendant LSI's motion to dismiss is GRANTED. (Dkt. No. 10.) The joinders to the motion to dismiss by Asset Foreclosure (Dkt. No. 11) and U.S. Bank/MERS (Dkt. No. 12) are also GRANTED.

The clerk is ordered to provide copies of this order to all counsel.

**All Citations**

957 F.Supp.2d 1264

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United States District Court, W.D. Washington,
at Tacoma.

Henry HEWITT and Nancy Hewitt, Plaintiffs,
v.
WELLS FARGO BANK, et al., Defendants.

No. C11–5147BHS. | May 31, 2011.

**Attorneys and Law Firms**

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**ORDER GRANTING IN PART, RESERVING RULING IN PART, AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT**

BENJAMIN H. SETTLE, District Judge.

***1** This matter comes before the Court on Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint (Dkt.7). The Court has reviewed the briefs filed in support of and in opposition to the motion and the remainder of the file and hereby grants in part, reserves ruling in part, and denies in part the motion for the reasons stated herein.

## I. PROCEDURAL HISTORY

On January 26, 2011, Plaintiffs Henry Hewitt and Nancy Hewitt ("Hewitts") filed a complaint in the Superior Court for the State of Washington in and for the County of Pierce. Dkt. 1, Exh. A at 5–35. On February 4, 2011, the Hewitts filed a First Amended Complaint ("FAC") against Defendants Wells Fargo Bank, Old Republic Title Ltd. ("Old Republic"), Stewart Title, Mortgage Electronic Registration Systems, Inc. ("MERS"), OCWEN, Barclays Bank PLC, and John Does 1–5 (collectively "Defendants"). *Id.* at 35–55. The Hewitts assert claims against Defendants for violations of Washington's Deed of Trust Act, RCW 61.24.005–146, violations of Washington's Consumer Protection Act ("CPA"), RCW 19.86.010–920, quiet title, and fraud. *Id.* The Hewitts request that the Court vacate the foreclosure of their home, enter an order of quiet title, and award monetary damages. *Id.*

On March 31, 2011, Defendants filed a motion to dismiss the FAC. Dkt. 7. On April 22, 2011, the Hewitts responded. Dkt. 9. On May 6, 2011, Defendants replied. Dkt. 9.

## II. FACTUAL BACKGROUND

On September 13, 2005, the Hewitts obtained a mortgage loan and executed a Deed of Trust in favor of Fremont Investment & Loan in the amount of $647,989.00. Dkt. 8, Exh. 1 ("Deed of Trust"). On December 1, 2008, the Hewitts defaulted on the loan, and a Notice of Default was issued on April 6, 2009. FAC, ¶ 10. On May 11, 2009, Old Republic Default Management Service, a division of Old Republic National Title Insurance Company, issued a Notice of Trustee's Sale scheduling a trustee's sale for August 14, 2009. Dkt. 8, Exh. 2. The Hewitts allege that Old Republic was not the recorded trustee of their Deed of Trust until the next day, May 12, 2009. FAC, ¶ 53.

On August 12, 2009, the Hewitts made a payment to reinstate their loan and work on a loan modification package. *Id.,* ¶ 64. On February 9, 2010, Old Republic Default Management Service issued a second Notice of Trustee's Sale scheduling a trustee's sale for May 14, 2010. Dkt. 8, Exh. 3. The sale was postponed a second time to June 18, 2010. FAC ¶ 68. The June sale was also postponed. *Id.* On July 23, 2010, the Hewitts' home was sold at a foreclosure sale. Dkt. 8, Exh. 4.

## III. DISCUSSION

### A. Legal Standard

Fed.R.Civ.P. 12(b)(6) motions to dismiss may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Department,* 901 F.2d 696, 699 (9th Cir.1990). Material allegations are taken as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts,* 717 F.2d 1295 (9th Cir.1983). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 1964–65, 167 L.Ed.2d 929 (2007) (internal citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 1965. Plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974.

**B. Defendants' Motion**

*2 Defendants move to dismiss all of the Hewitts' claims. *See* Dkt. 7 at 4–17. The Hewitts only responded to the portion of Defendants' motion regarding violations of the Deed of Trust Act. *See* Dkt. 9. Although this failure to respond may be considered an admission that Defendants' motion has merit as to the unanswered portions, the Court will briefly address each of Defendants' arguments based on the allegations in the FAC.

**1. Washington CPA**

To prevail on a CPA claim, a plaintiff must show: (1) an unfair or deceptive act or practice; (2) that occurs in trade or commerce; (3) a public interest; (4) injury in their business or property; and (5) a causal link between the unfair or deceptive act and the injury suffered. *Indoor Billboard Washington, Inc. v. Integra Telecom of Washington, Inc.,* 162 Wash.2d 59, 74, 170 P.3d 10 (2007). Failure to satisfy even one of the elements is fatal to a CPA claim. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wash.2d 778, 793, 719 P.2d 531 (1986).

In this case, the Hewitts allege that Defendants violated the CPA by "allowing the Trustee to conduct a Trustee sale while it (or another Defendant) was reviewing the loan modification ...." FAC ¶ 82. Defendant moves to dismiss this claim because the Hewitts have failed to allege all elements of the claim. Dkt. 7 at 12. Specifically, Defendants argue that the Hewitts have failed to allege facts that Defendants' practices affected the public interest. Dkt. 7 at 12–13. The Court agrees and finds that the Hewitts have failed to allege sufficient facts to support this claim. *Twombly,* 127 S.Ct. at 1974. Therefore, the Court grants Defendants' motion and dismisses the Hewitts' claim for a violation of the CPA.

**2. Fraud**

In Washington, the nine elements of fraud are: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff. *Stiley v. Block,* 130 Wash.2d 486, 505, 925 P.2d 194 (1996).

In this case, the Hewitts do not explicitly set forth a claim for fraud. They do, however, allege that Defendants' actions in violating the Deed of Trust Act may have been fraudulent. FAC ¶ 81. Defendants argue that, "to the extent that [a fraud] claim is stated in the FAC, it is not pled with the requisite particularity." Dkt. 7 at 15. The Court agrees and finds that the Hewitts have failed to allege sufficient facts to support this claim. *Twombly,* 127 S.Ct. at 1974. Therefore, the Court grants Defendants' motion and dismisses the Hewitts' claim for fraud.

**3. Fiduciary Duty**

In this case, the Hewitts do not explicitly set forth a separate claim for breach of fiduciary duty and they do not use the term fiduciary in the FAC. Therefore, the Court finds that it is unnecessary to address Defendants' motion on this issue.

**4. Deed of Trust Act**

*3 The Hewitts assert a claim under the Deed of Trust Act alleging that MERS was an improper beneficiary and that Defendants committed various timing and filing violations.

**a. MERS**

The Hewitts allege that "MERS did not meet the definition of the beneficiary either, i.e. 'the holder of the instrument or document evidencing the obligations secured by the Deed of Trust.' " FAC ¶ 27; *see also id.* ¶¶ 18, 26–28, 51, & 59. The Hewitts also allege that, "whoever the beneficiary was ... the Trustee is not entitled to rely on the beneficiary's declaration as evidence of proof because they had violated their duty of good faith to us." *Id.* ¶ 28; *see also id.* ¶¶ 55, 62, & 66.

The Hewitts signed a Deed of Trust that acknowledged that MERS was a beneficiary under the deed and that MERS had the right to foreclose and sell the property covered by the deed. *See* Dkt. 7 at 4. Moreover, the argument that MERS is not a proper beneficiary because MERS only tracks deeds instead of actually holding the deed has been consistently rejected by this court. *See, e.g., Vawter v. Quality Loan Service Corp. of Washington,* 707 F.Supp.2d 1115, 1125–26 (W.D.Wash.2010); *Daddabbo v. Countrywide Home Loans, Inc.,* No. C09–1417–RAJ, 2010 WL 2102485 (W.D.Wash. May 20, 2010); *Moon v. GMAC Mortgage Corp.,* No. C08–969Z, 2008 WL 4741492 (W.D.Wash. Oct.24, 2008). The Hewitts have failed to allege facts or advance an argument that distinguishes their case from these recent cases. Therefore, the Court is inclined to grant Defendants' motion on this issue.

This court, however, has recently stayed adjudication of an action based on this question being certified to the Washington Supreme Court. *See Bain v. One West Bank, F.S.B.,* No. C09–0149JCC (W.D.Wash. March 15, 2011). Therefore, the Court will reserve ruling on this issue because of the possibility of the state court decision and because, as set forth below, the Hewitts have sufficiently pled one violation of the Deed of Trust Act.

**b. Notice of Default**

The Deed of Trust Act requires that a Notice of Default include "a statement that the beneficiary has declared the borrower or grantor to be in default, and a concise statement of the default alleged." RCW 61.24.030(8)(c). The Hewitts allege that the Notice of Default they received is invalid because the statement that they were in default was delivered by the agent for the beneficiary and not the beneficiary. FAC ¶¶ 51 & 52; *see also* Dkt. 9 at 2. This argument is without merit because the notice must only contain a statement that the beneficiary declares the Hewitts in default, which was included in the Hewitts' Notice of Default.

The Hewitts also argue that the Notice of Default is invalid because it was executed by Old Republic, as agent for the beneficiary, even though the appointment of Old Republic as successor trustee was not recorded until after the Notice of Default was issued. Dkt. 9 at 2–3. The Notice of Default, however, was executed by Old Republic, as agent for the beneficiary, which is permissible under RCW 61.24.031(1)(a).

*4 Therefore, the Hewitts' arguments are without merit and the Hewitts have failed to plead a plausible claim for relief under RCW 61.24.030(8)(c).

**c. Notices of Sale**

The Deed of Trust Act requires that "the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust." RCW 61.24.030(7)(a). The act also imposes on the trustee or successor trustee "a duty of good faith to the borrower, beneficiary, and grantor." RCW 61.24.010(4).

The Hewitts allege that MERS was not a proper beneficiary under the deed and, therefore, Old Republic did not have proof that MERS was the owner of the note. FAC ¶ 55. The Hewitts also claim that Old Republic breached its duty of good faith by proceeding with the foreclosure without proof that MERS was the owner of the note. *Id.* ¶¶ 54–57. These allegations are directly tied to the issue of whether MERS was a proper beneficiary under the note. Therefore, the Court will also reserve ruling on this issue.

**d. Assignment from MERS to Wells Fargo**

The Hewitts allege that the assignment of the beneficial interest in the note from MERS to Wells Fargo is invalid because it was not recorded until after the foreclosure sale. FAC ¶ 66. The Hewitts, however, fail to articulate how this violates the Deed of Trust Act and, therefore, fail to assert a plausible claim for relief. Even if this was a plausible claim for relief, the Hewitts have failed to allege that they were prejudiced by the delay in recording the assignment. *See Vawter,* 707 F.Supp.2d at 1127.

**e. Notice of Postponed Sale**

The Deed of Trust Act requires that, if a trustee postpones a scheduled trustee's sale, the trustee must give notice of the new time and place of the sale. RCW 61.24.040(6).

In this case, the Hewitts allege that the trustee's sale was originally scheduled for May 14, 2010, and that the sale was postponed to June 18, 2010. FAC ¶ 68. They also allege that the June date was postponed and that they were not informed of the new sale date of July 23, 2010. *Id.* ¶¶ 68 & 70.

Defendants argue that phone records between the loan servicer and the Hewitts "indicate that [the servicer's] representative advised [the Hewitts] of the continued sale date on three separate telephone conversations." Dkt. 10 at 9. Defendants request that the Court take judicial notice of the phone records and, apparently, Defendants' allegations regarding the content of the conversations of those phone calls. *Id.; see also* Dkt. 8. These facts are well beyond the scope of judicial notice. *See* Fed.R.Evid. 203 ("A judicially notice fact must be one not subject to reasonable dispute ....")

Therefore, the Court denies Defendants' motion to dismiss this claim because the Hewitts have alleged allegations sufficient to support a claim for relief under RCW 61.24.040(6).

**5. Quiet Title**

Defendants argue that the Hewitts' quiet title claim must fail because all of the Hewitts' underlying claims fail. Dkt. 7 at 14. The Hewitts, however, have sufficiently pled a claim for a violation of the Deed of Trust Act. Its unclear whether quiet title is an appropriate remedy if the Hewitts are successful on their remaining claim. Therefore, the Court denies Defendants' motion without prejudice.

**IV. ORDER**

***5** Therefore, it is hereby **ORDERED** that Defendants' Motion to Dismiss Plaintiff's First Amended Complaint (Dkt.7) is **GRANTED in part, RESERVED in part,** and **DENIED in part** as follows:

1. The Hewitts' claims for a violation of the Washington CPA and fraud are **DISMISSED;**

2. The Court **RESERVES ruling** on the Hewitts' claim for a violation of the Deed of Trust Act based on MERS being an improper beneficiary; and

3. The remainder of the motion is **DENIED.**

**All Citations**

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NOT FOR PUBLICATION
United States Bankruptcy Appellate Panel
of the Ninth Circuit.

In re Loretta J. BROWN, Debtor.
Loretta J. Brown; Michael B. McCarty,
Chapter 7 Trustee, Appellants,
v.
Bank of America, N.A., successor by merger to
BAC Home Loans Servicing, LP; Recontrust
Company, N.A.; Mortgage Electronic
Registration Systems, Inc., Appellees.

BAP No. WW–12–1534–TaKuD. | Bankruptcy No. 10–22724–TWD. | Adversary No. 11–01056–TWD. | Argued and Submitted Oct. 17, 2013. | Filed Dec. 12, 2013.

Appeal from the United States Bankruptcy Court for the Western District of Washington, Honorable Timothy W. Dore, Bankruptcy Judge, Presiding.

**Attorneys and Law Firms**

Richard Llewelyn Jones, Esq. for Appellants.

Loretta J. Brown and Michael B. McCarty, Chapter 7 Trustee; Steven Andrew Ellis, Esq. of Goodwin Procter LLP for Appellees Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP, ReconTrust Company, N.A., and Mortgage Electronic Registration Systems, Inc.

Before TAYLOR, KURTZ, and DUNN, Bankruptcy Judges.

## MEMORANDUM [*]

## I. INTRODUCTION

*1 Debtor Loretta Brown ("Debtor") and her chapter 7 [1] trustee Michael McCarty ("McCarty") appeal from multiple adverse rulings that disposed of the adversary proceeding they filed against Debtor's mortgage lender, its servicer and agents, and MERS. The bankruptcy court entered a final order that specifically encompassed two prior dismissal orders, denial of a motion to reconsider one of the dismissal orders, and its grant of summary judgment—resolving all claims in favor of all of the defendants.

After evaluating all issues properly reviewable in this appeal, [2] we AFFIRM.

## II. PROCEDURAL AND FACTUAL BACKGROUND [3]

### A. Pre-bankruptcy events

In 2007, Debtor borrowed money from and executed a promissory note ("Note") and a deed of trust ("Trust Deed") in favor of Countrywide Home Loans, Inc. ("Countrywide"), as lender. The Trust Deed encumbered Debtor's real property in Bellevue, Washington (the "Property") and identified LandSafe Title of Washington ("LandSafe") as trustee and MERS as beneficiary. Later in 2007, the Federal National Mortgage Association ("FannieMae") acquired an ownership interest in the Note.

In documents dated October 14, 2010: MERS purported to assign the Trust Deed and Note to BAC Home Loans Servicing, LP ("BAC"), fka Countrywide Home Loans Servicing (the "MERS Assignment"); and BAC appointed ReconTrust Company, N.A. ("ReconTrust") as successor trustee under the Trust Deed (the "Successor Trustee Appointment"). Promptly thereafter, Debtor received a Notice of Default ("Notice of Default") executed on behalf of ReconTrust as the duly authorized agent for BAC. The Notice of Default identified BAC as "Owner of Note" and "Servicer" and provided notice, among other things, that Debtor must submit a cure payment of $11,677.09 to avoid foreclosure.

### B. Initial bankruptcy events

On October 22, 2010, Debtor filed a voluntary bankruptcy petition under chapter 7 and scheduled "BAC Home Loans" as a creditor with debt secured by first and second deeds of trust against the Property. Within a month of Debtor's petition, BAC sought relief from the automatic stay to allow it to foreclose. Debtor did not oppose the motion. Instead, Debtor filed a complaint initiating adversary proceeding no. 11–01056 (the "Adversary Proceeding").

Debtor filed the Adversary Proceeding against Countrywide, LandSafe, ReconTrust, BAC, and MERS and sought a temporary restraining order and permanent injunction, quiet title, and damages under various legal theories, including wrongful foreclosure, the Consumer Protection Act ("CPA"), the Fair Debt Collection Practices Act ("FDCPA"), and malicious prosecution. Before any responsive pleadings were filed, Debtor and McCarty together filed an amended complaint.

**C. First Amended Complaint and Motion to Dismiss**

In the amended complaint ("FAC"), McCarty joined as a party plaintiff. Otherwise, the FAC substantially mirrors the initially filed complaint. [4] In general, Debtor and McCarty ("Appellants") alleged that BAC and ReconTrust violated the CPA by promulgating, recording, and relying on documents they should have known were false, in particular: the MERS Assignment, the Successor Trustee Appointment, and the Notice of Default. Appellants also alleged that ReconTrust's issuance and use of the Notice of Default violated the FDCPA and that ReconTrust's attempts to dispossess Debtor of her property constituted malicious prosecution.

***2** As to the claim for wrongful foreclosure ("Wrongful Foreclosure Claim"), Appellants alleged that the defendants [5] violated the Washington Deed of Trust Act [6] ("Trust Deed Act") when they designated MERS as a beneficiary in the Trust Deed and MERS subsequently executed the MERS Assignment. Appellants contended that BAC's authority to execute the Successor Trustee Appointment and ReconTrust's authority to execute the Notice of Default derived solely from the invalid MERS Assignment, invalidating both documents. They alleged that these transactions constituted a "sham" and, therefore, invalid transactions under the Trust Deed Act. [7] Appellants similarly based their action to quiet title ("Quiet Title Action") on their argument that the defendants' allegedly invalid transactions irreparably severed the Note from the Trust Deed.

Defendants Countrywide, ReconTrust, BAC, and MERS brought a motion to dismiss the FAC pursuant to Civil Rule 12(b)(6) ("First Dismissal Motion"). Simply stated, the movants argued that: (a) Appellants could not state a claim for wrongful foreclosure because Appellants did not and could not allege that a foreclosure had been noticed or conducted; (b) the FDCPA did not apply to them, and they were not "collecting a debt" for purposes of the FDCPA; (c) Appellants could not satisfy the required elements to establish a CPA claim; (d) initiation of a non-judicial foreclosure is not an "action for damages," and, thus, no malicious prosecution claim could be pled; and (e) the Quiet Title Action failed, as ownership was not in question and Debtor did not satisfy her loan obligation.

The bankruptcy court granted the First Dismissal Motion by order entered on January 10, 2012 (the "First Dismissal Order"). [8] The bankruptcy court dismissed the Wrongful Foreclosure Claim "with prejudice to the extent that it seeks monetary damages or a permanent injunction against the Defendants."Adv. dkt. # 42 at 2:3–14. It dismissed all other claims without prejudice. [9]

Appellants sought reconsideration of the First Dismissal Order under Civil Rule 59, requesting that they be allowed to amend the Wrongful Foreclosure Claim. The bankruptcy court denied the requested relief. In its order, the bankruptcy court stated that the "Plaintiffs already have the relief they seek."Adv. dkt. # 47 at 2:18. The dismissal with prejudice only applied to the extent Appellants sought monetary damages or a permanent injunction, as the bankruptcy court held that neither form of relief was allowed under the relevant statutes, RCW 61.24.130 and RCW 7.40.020; however, Appellants were free to seek a temporary injunction and could amend their complaint accordingly.

**D. Second Amended Complaint and Motion to Dismiss**

Appellants filed a second amended complaint ("SAC") naming only ReconTrust, BAC, and MERS as defendants. The SAC contained three identified claims: abuse of process/ wrongful civil proceedings, violation of the FDCPA, and violation of the CPA; and sought an injunction and damages. The factual allegations are substantially similar to those alleged in the FAC. Appellants again alleged that the MERS Assignment, the Successor Trustee Appointment, and the Notice of Default supported the asserted claims. In addition, the Appellants alleged that in response to a request for information in December 2010, [10] BAC identified FannieMae as the "holder of the loan" and "current owner" of the Note and itself as the servicer of the loan. Appellants assert that these statements directly contradict the statement of ownership of the Note by BAC contained in the Notice of Default and, thus, support Appellants' allegations that neither MERS nor BAC were ever the legal holder or owner of the obligation.

***3** ReconTrust, Bank of America, N.A., as successor by merger to BAC ("BofA"), and MERS jointly brought a motion to dismiss the SAC pursuant to Civil Rule 12(b)(6) ("Second Dismissal Motion"). The movants argued that Appellants again failed to adequately plead the identified claims and, in addition, that Appellants should be collaterally estopped from contending that BofA could not initiate foreclosure proceedings, based on the order entered by the bankruptcy court on the uncontested relief from stay motion.

The bankruptcy court denied the Second Dismissal Motion in part, and granted it in part.[11] By order entered April 6, 2012 (the "Second Dismissal Order"), the bankruptcy court dismissed all claims in the SAC, with prejudice, except for the FDCPA claims against BofA and ReconTrust. The bankruptcy court also denied the Appellants' request for leave to further amend the complaint.

**E. Summary Judgment Motion**

The Second Dismissal Order allowed the Appellants' FDCPA claims to go forward against BofA and ReconTrust. After close of discovery, BofA and ReconTrust ("SJ Movants") filed a joint motion for summary judgment ("SJ Motion").[12] The SJ Movants supported the SJ Motion with the declaration of Joe Peloso, a Mortgage Resolution Specialist employed by BofA. Peloso's Declaration authenticated: (a) a copy of the Note that included an endorsement in blank from Countrywide; (b) a copy of a certified Certificate of Filing by BAC dated April 21, 2009, changing the name of Countrywide Home Loans Servicing LP to BAC; (c) a copy of Announcement 08–12 dated May 23, 2008 on FannieMae letterhead, amending its Servicing Guidelines regarding "Note Holder Status for Legal Proceedings Conducted in the Servicer's Name"[13]; and (d) a copy of a letter dated June 24, 2011, from the Comptroller of the Currency addressed to BofA and titled "Conditional Approval # 1003 July 2011," that documented the merger of BAC into BofA.

Peloso's Declaration provided evidence that from loan origination, ReconTrust, a wholly-owned subsidiary and agent of BofA (and its predecessors in interest), maintained custody of the endorsed-in-blank Note. Further, he testified that the investor in the loan, FannieMae, authorized BAC, and subsequently BofA, to enforce the Note on its behalf. Thus, the SJ Movants argued that they are not "debt collectors" within the meaning of the FDCPA, having obtained an interest in the loan long before it went into default. They also argued that they did not make false or misleading representations and employed no unfair practices (as required to support an FDCPA claim), as they were entitled to issue the Notice of Default based on Debtor's payment defaults, the power of sale in the Trust Deed, and their authority as servicer (and servicer's agent) and as holder of the Note.

In written response to the SJ Motion, Appellants objected to Peloso's Declaration on the grounds that Mr. Peloso was not competent or qualified to testify and merely presented inadmissible hearsay. Substantively, Appellants argued that Appellants' claims were valid and all arose from the fact that MERS was not a beneficiary under the Trust Deed. Appellants cited the then recently issued opinion by the Washington State Supreme Court, *Bain v. Metro. Mortg. Grp., Inc.*[14] Appellants further argued that all actions of which Appellants complained proceeded from the invalid MERS Assignment and gave rise to "collateral claims" such as those arising under the FDCPA and the CPA. Finally, Appellants argued that the *Bain* opinion supported Appellants' contention that the initiation of a non-judicial foreclosure without the authority of the "true and lawful holder and owner" of the Note and Trust Deed violated the FDCPA. Adv. dkt. # 72 at 12:19–21.

*4 Appellants further argued that BofA was a debt collector under the FDCPA because it purchased a debt in default, relying on their contention that BofA acquired its interest on October 14, 2010 via the MERS Assignment and shortly before the Notice of Default issued. They argued that the SJ Movants failed to present any evidence that FannieMae ever declared a default or that FannieMae owned any interest in the Note, other than the unreliable testimony in Peloso's Declaration.

The evidence presented by Appellants in response to the SJ Motion consisted of the SAC and its attached documents, the Declaration of Adam Greenhalgh that Appellants filed in support of their opposition to the First Dismissal Motion;[15] Appellants' counsel's declaration regarding his review of documents at Defendants' counsel's office described as the "collateral wallet"; and Debtor's verification of the SAC.

After oral argument and additional briefing, the bankruptcy court overruled the Appellants' objections to Peloso's Declaration, granted the SJ Motion, and entered its order (the "Final Judgment").

**F. Civil Rule 60(b) motion for relief from Second Dismissal Order**

On August 29, 2012, and after the SJ Motion was filed, Appellants filed a Motion for Relief from Judgement/Order of April 6, 2012 pursuant to Civil Rule 60(b) (the "Civil Rule 60(b) Motion"). Appellants brought the Civil Rule 60(b) Motion solely on the grounds that the *Bain* opinion rendered

August 16, 2012 undercut the reasoning underlying the bankruptcy court's Second Dismissal Order and repudiated the case law argued in support of the Second Dismissal Motion. Appellants requested that the bankruptcy court permit them to further amend their complaint "to assert additional claims based upon the *Bain* decision."Adv. dkt. # 68 at 7:6–8.

The bankruptcy court heard oral argument on the Civil Rule 60(b) Motion and later stated its ruling orally on the record when it also ruled on the SJ Motion. The bankruptcy court denied the Civil Rule 60(b) Motion, as ordered in the Final Judgment.

Appellants filed their notice of appeal from the Final Judgment on October 18, 2012 along with a motion seeking an extension of the time for filing the notice of appeal. The bankruptcy court granted the extension of the deadline to October 18, 2012, by order entered December 31, 2012. Therefore, the notice of appeal is timely.

## III. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(1) and (b)(2)(O).

We have jurisdiction under 28 U.S.C. § 158(a) and (b) to hear appeals from final judgments, orders, and decrees; and with leave of the Panel, from interlocutory orders and decrees of bankruptcy judges. The burden of demonstrating jurisdiction lies with the party asserting it. *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 379–80, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). Here, Appellants merely state that we have appellate jurisdiction pursuant to 28 U.S.C. § 158.

***5** Appellants explicitly appeal from the Final Judgment. The Final Judgment provides that "entry of this Order together with the prior dismissal orders [Docket Nos. 42 and 58] result in all causes of action in this adversary proceeding being resolved in favor of the Defendants."Adv. dkt. # 79 at 2.

Docket No. 42 is the First Dismissal Order, by which the bankruptcy court dismissed Appellants' Wrongful Foreclosure Claim with prejudice "to the extent that it seeks monetary damages or a permanent injunction against the Defendants"; and dismissed all remaining claims without prejudice. Adv. dkt. # 42 at 2. As the First Dismissal Order dismissed most of the FAC without prejudice, the First Dismissal Order was an interlocutory order. *See WMX Techs., Inc. v. Miller,* 104 F.3d 1133, 1136 (9th Cir.1997). When the bankruptcy court entered the Final Judgment, however, the First Dismissal Order became final and appealable. *See Munoz v. Small Bus. Admin.,* 644 F.2d 1361, 1364 (9th Cir.1981) ("an appeal from the final judgment draws in question all earlier non-final orders and all rulings which produced the judgment"). Arguably, two of Appellants' stated issues on appeal [16] implicate the First Dismissal Order, as does their argument that the bankruptcy court should not have dismissed the Quiet Title Action. "[T]he rule is well settled that a mistake in designating the judgment appealed from should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake."*Id.* at 1363.Here, we may infer Appellants' intent to appeal from the dismissal of the Wrongful Foreclosure Claim and the Quiet Title Action in the First Dismissal Order from their Statement of Issues and arguments presented on appeal, and Appellees were not misled by the alleged mistake. The Appellees fully briefed the dismissal of both claims. [17] The propriety of the dismissal of these claims, therefore, is properly before this Panel.

Docket No. 58, referred to in the Final Judgment, is the Second Dismissal Order. The Second Dismissal Order pertained to the Appellants' SAC and resulted in dismissal of two of the three claims therein—the Abuse of Process and CPA claims—against all Defendants and the FDCPA claims against MERS. The bankruptcy court specifically did not dismiss the FDCPA claims alleged against BofA and ReconTrust. Because the Second Dismissal Order did not dispose of all claims among all the parties, it, too, was an interlocutory order until entry of the Final Judgment, at which time it became final and appealable. *See Nascimento v. Dummer,* 508 F.3d 905, 908 (9th Cir .2007); and *Munoz,* 644 F.2d at 1364. Appellants' stated Issue No. 5 implicates the Second Dismissal Order as Appellants claim the bankruptcy court erred by "dismissing Appellants' claims for violation of the Washington Consumer Protection Act" which were dismissed in the Second Dismissal Order. [18] Appellants' Opening Brief at 1. Therefore, we conclude that the propriety of the dismissal of the CPA claims is also before this Panel in this appeal . [19]

## IV. ISSUES

*6 1. Whether the bankruptcy court erred when it granted summary judgment in favor of BofA and ReconTrust on the FDCPA claims.

2. Whether the bankruptcy court erred when it dismissed all other claims against BofA and ReconTrust.

3. Whether the bankruptcy court erred when it dismissed all claims against MERS.

4. Whether the bankruptcy court abused its discretion when it denied the Civil Rule 60(b) Motion.

### V. STANDARDS OF REVIEW

We review de novo the bankruptcy court's decision to grant summary judgment.*Boyajian v. New Falls Corp. (In re Boyajian),* 564 F.3d 1088, 1090 (9th Cir.2009); *Lopez v. Emergency Serv. Restoration, Inc. (In re Lopez),* 367 B.R. 99, 103 (9th Cir.BAP2007). Viewing the evidence in the light most favorable to the non-moving party (i.e., Appellants), we determine whether the bankruptcy court correctly found that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.*Jesinger v. Nev. Fed. Credit Union,* 24 F.3d 1127, 1130 (9th Cir.1994); *Gertsch v. Johnson & Johnson Fin. Corp. (In re Gertsch),* 237 B.R. 160, 165 (9th Cir.BAP1999).

We also review de novo the bankruptcy court's grant of a Civil Rule 12(b)(6) motion to dismiss. *Movsesian v. Victoria Versicherung AG,* 629 F.3d 901, 905 (9th Cir.2010). When reviewing a Civil Rule 12(b)(6) dismissal, we generally limit our consideration to the complaint. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.,* 416 F.3d 940, 946 (9th Cir.2005). We view the complaint in the light most favorable to the plaintiff, accepting all well-pled factual allegations as true, as well as any reasonable inferences drawn from them. *Johnson v. Riverside Healthcare Sys.,* 534 F.3d 1116, 1122 (9th Cir.2008). We may affirm on any basis in the record. *See Caviata Attached Homes, LLC v. U.S. Bank, N.A. (In re Caviata Attached Homes, LLC),* 481 B.R. 34, 44 (9th Cir.BAP2012).

We review the bankruptcy court's denial of the Civil Rule 60(b) Motion for abuse of discretion. *Arrow Elecs., Inc. v. Justus (In re Kaypro),* 218 F.3d 1070, 1073 (9th Cir.2000); *Sewell v. MGF Funding, Inc. (In re Sewell),* 345 B.R. 174, 178 (9th Cir.BAP2006). We apply a two-part test to determine objectively whether the bankruptcy court abused its discretion. *United States v. Hinkson,* 585 F.3d 1247, 1261–62 (9th Cir.2009) (en banc). First, we "determine de novo whether the bankruptcy court identified the correct legal rule to apply to the relief requested."*Id.* De novo means review is independent, with no deference given to the trial court's decision. *See First Ave. W. Bldg., LLC v. James (In re Onecast Media, Inc.),* 439 F.3d 558, 561 (9th Cir.2006). Second, we examine the bankruptcy court's factual findings under the clearly erroneous standard. *Hinkson,* 585 F.3d at 1262 & n. 20. We must affirm the bankruptcy court's factual findings unless those findings are "(1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.' " *Id.*

### VI. DISCUSSION

#### A. Claims alleged against BofA [20] and ReconTrust

**1. The FDCPA claims**

*7 The bankruptcy court dismissed Appellants' FDCPA claims against BofA and ReconTrust when it determined that Appellants failed to identify a genuine issue of disputed fact and the SJ Movants were entitled to judgment as a matter of law on their SJ Motion. [21] Appellants argue the bankruptcy court erred. We disagree.

**a. Standards**

Federal Rule of Civil Procedure 56(c) (incorporated into the Bankruptcy Rules under Bankruptcy Rule 7056) provides that a party may move for summary judgment when there is no genuine issue as to a material fact and the moving party is entitled to a judgment as a matter of law. Any "genuine issue" is one where, based on the evidence presented, a fair-minded jury could return a verdict in favor of the nonmoving party on the issue in question. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Lang v. Retirement Living Pub. Co.,* 949 F.2d 576, 580 (2d Cir.1991). A "material fact" is one the resolution of which could affect the outcome of the case. *Anthes v. Transworld Sys., Inc.,* 765 F.Supp. 162, 165 (D.Del.1991).

All justifiable inferences must be drawn in favor of the non-moving party.*Anderson,* 477 U.S. at 255. Likewise, all evidence must be viewed in the light most favorable to the non-moving party. *Lake Nacimiento Ranch Co. v. Cnty. of San Luis Obispo,* 841 F.2d 872, 875 (9th Cir.1987). A party responding to a summary judgment motion may not rest upon mere allegations or denials in its pleadings. Rather the party must present admissible evidence showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e)."Legal memoranda and oral argument are not evidence, and they cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion."*British Airways Bd. v. Boeing Co.,* 585 F.2d 946, 952 (9th Cir.1978).

If the non-moving party bears the ultimate burden of proof on an element at trial, as do the Appellants here, that party must make a showing sufficient to create a genuine issue with respect to that element in order to survive a motion for summary judgment. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

**b. Debt collectors**

The FDCPA provides that: "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt."15 U.S.C. § 1692e. Here, the bankruptcy court found that on the record before it, the admissible evidence was insufficient to create a genuine issue that BAC was a debt collector under the FDCPA. Likewise, the bankruptcy court was unable to conclude from the admissible evidence that ReconTrust was a debt collector.

Several months after the bankruptcy court ruled on the SJ Motion, the Ninth Circuit published its opinion in *Schlegel v. Wells Fargo Bank, N.A. (In re Schlegel),* 720 F.3d 1204 (9th Cir.2013). In *In re Schlegel,* the Ninth Circuit makes clear that a "debt collector" under the FDCPA must have debt collection as the principal purpose of its business. 720 F.3d at 1209. Neither side here presented evidence regarding the defendants' principal businesses. Appellees argued that they are not debt collectors under the FDCPA and presented evidence that they merely acted as a servicer and its agent under the authority of the FannieMae Guidelines. The ultimate burden of proof on this critical element, however, rested with the Appellants. As such, in response to the SJ Motion, Appellants were required to come forward with a showing sufficient to create a genuine issue of fact as to that element in order to survive the SJ Motion. *See Celotex Corp.,* 477 U.S. at 322–23. They did not.

***8** In effect, the bankruptcy court shifted the burden of proof on this element to the Appellees. As the bankruptcy court nonetheless granted summary judgment on other grounds, we conclude that the error is harmless. *See, e.g.,*Fed.R.Civ.P. 61 (incorporated into bankruptcy proceedings by Rule 9005).

**c. False or misleading representations/unfair practices**

The bankruptcy court granted the SJ Motion on the admissible evidence contained in Peloso's Declaration and self-authenticating documents, establishing that:

> [BofA], through its own agent, ReconTrust, had possession of the [Note] and the authority of its principal, [and] it was the holder of the [Note] and was an authorized beneficiary under RCW 61.24.005(2). Hr'g Tr. (Sept. 28, 2012) at 17:10–15.
>
> Because [BofA] was an authorized beneficiary it could properly appoint ReconTrust as successor trustee and direct ReconTrust to issue [the Notice of Default] pursuant to RCW 61.24.030. *Id.* at 17:16–19.
>
> RCW 61.24.031 provides that an authorized agent may issue a notice of default under RCW 61.24.010(8).*Id.* at 17:20–22.

The bankruptcy court found that "because the issuance of the appointment of successor trustee and the notice of default were authorized and proper, there are no false or misleading representations under [ ] 15 U.S.C. § 1692e or unfair practices under 15 U.S.C. 1692f."Hr'g Tr. (Sept. 28, 2012) at 19:1–5. Therefore, the bankruptcy court granted the SJ Motion. We find no error in either the bankruptcy court's legal conclusions or its determination that Appellants failed to show the existence of disputed facts that would require trial.

Appellants failed below to present admissible evidence of a genuine issue of material fact in dispute, and, on appeal, they do not argue any specific error made by the bankruptcy court. In defense of the SJ Motion, Appellants argued the plausibility of their claims, rather than submitting evidence to support the elements of the claims on which they bore the ultimate burden of proof. Therefore, we conclude that the bankruptcy court did not err when it granted the SJ Motion.

The undisputed facts determined in connection with the SJ Motion and our conclusion that the bankruptcy court committed no error necessarily inform our analysis of the Civil Rule 12(b)(6) dismissals of the Appellants' other claims alleged against BofA and ReconTrust.

**2. CPA claims**

The bankruptcy court dismissed the CPA claims alleged against BofA and ReconTrust pursuant to the Second Dismissal Order.

A motion to dismiss under Civil Rule 12(b)(6) challenges the sufficiency of the allegations set forth in the complaint. The court's review is limited to the allegations of material facts set forth in the complaint, which must be read in the light most favorable to the non-moving party, and together with all reasonable inferences therefrom, must be taken to be true. *Pareto v. FDIC,* 139 F.3d 696, 699 (9th Cir.1998). Thus, a court generally may not consider any material beyond the pleadings; however, material that is properly submitted as part of the complaint may be considered. *Hal Roach Studios,* 896 F.2d at 1555.

***9** A complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citation omitted). The plaintiff must provide grounds for her entitlement to relief, which requires more than labels and conclusions; and the actions must be based on legally cognizable claims.*Twombly,* 550 U.S. at 555. The court, thus, need not accept as true mere recitals of a claim's elements, supported by conclusory statements; and the plausibility of a claim is context-specific on review of which the court may draw on its experience and common sense. *See Ashcroft v. Iqbal,* 556 U.S. 662, 678–79, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009).

Under Washington law, private CPA claims require that the plaintiff establish five elements:

> (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) affecting the public interest; (4) injury to a person's business or property; and (5) causation.

*Panag v. Farmers Ins. Co. of Wash.,* 166 Wash.2d 27, 37, 204 P.3d 885 (2009) (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wash.2d 778, 780, 719 P.2d 531 (1986)).

In the SAC, Appellants alleged that actions taken by BAC and ReconTrust violated the Trust Deed Act and that such violations constituted per se violations of the CPA. As the bankruptcy court noted, the Trust Deed Act "contains a list of per se violations of the CPA at RCW 61.24.135, [22] which does not include any of the alleged acts in this case."Hr'g Tr. (April 6, 2012) at 11:8–11. Appellants made the same per se argument in connection with alleged violations of the FDCPA, however, they do not cite any applicable statutory provision, and we know of none.

The first two elements of a private CPA claim "may be established by a showing that (1) an act or practice which has a capacity to deceive a substantial portion of the public (2) has occurred in the conduct of any trade or commerce."*Hangman Ridge Training Stables, Inc.,* 105 Wash.2d at 785–86, 719 P.2d 531. Appellants alleged that BAC and ReconTrust issued documents without the requisite authority in connection with Debtor's loan and the initiation of foreclosure. Appellants supported this assertion by alleging that FannieMae represented itself to be the holder, owner, or assignee of the loan, which could be determined to contradict the authority required of BAC and ReconTrust.

The bankruptcy court dismissed the CPA claims because it determined that even though Appellants adequately pled the first elements, they did not and could not allege the causation elements. In light of the undisputed facts subsequently established in connection with the SJ Motion on the FDCPA claims, we need not review the adequacy of the Appellants' causation allegations because they cannot plausibly plead deceptive acts by BofA and ReconTrust. As discussed earlier, the undisputed evidence established that BofA, as holder of the Note, was an authorized beneficiary under the Deed of Trust Act; BofA could properly appoint ReconTrust as successor trustee; and the Notice of Default was issued by the duly appointed and authorized agent of BofA. Because the Appointment of Successor Trustee and Notice of Default were authorized and proper, the bankruptcy court found at summary judgment that there were no false or misleading representations or practices. [23] Therefore, the record in connection with the bankruptcy court's findings for BofA and ReconTrust on the FDCPA claims, equally supports dismissal of the CPA claims. Thus, even if we were to conclude that the bankruptcy court erred in its causation analysis, such error would be harmless. *See Shanks v. Dressel,* 540 F.3d 1082, 1086 (9th Cir.2008) (appellate court may affirm on any basis supported by the record).

### 3. Wrongful Foreclosure Claim [24]

***10** In the FAC, Appellants asserted that based on the invalidity of the MERS Assignment, the documents signed and actions taken by BofA and ReconTrust were not authorized and, thus, violated the Trust Deed Act. Notably, however, they did not plead that a trustee sale was noticed or a foreclosure sale completed; nor do they plead any facts to indicate that the Notice of Default, which was the only enforcement action allegedly taken under the Trust Deed, was improperly issued. [25]

Appellants sought a permanent injunction against all of the defendants and generally prayed for a judgment for damages, alleging simply that Debtor lost time while pursuing her actions. The bankruptcy court held that the Trust Deed Act provided no support for either a permanent injunction or damages, and dismissed the Wrongful Foreclosure Claim with prejudice accordingly. On appeal, Appellants argue that the *Bain* opinion establishes that they adequately pled the Wrongful Foreclosure Claim in all respects, and that the bankruptcy court erred by relying on case law that is "no longer good authority" after *Bain.*

**a. Permanent injunctive relief**

Initially we note that none of the questions addressed in *Bain* [26] pertained to injunctive relief under the Trust Deed Act, although the court extensively discussed the Trust Deed Act generally. [27] The Trust Deed Act allows restraint of a foreclosure sale on any "proper legal or equitable ground." Wash. Rev.Code § 61.24.130. Appellants did not allege that a sale was noticed and they did not merely seek to restrain a sale, if one were noticed. Instead, Appellants sought a permanent injunction. [28] *Bain* provides no support for such relief, Appellants cited no other legal authority for such relief, and we located none. The bankruptcy court did not err when it dismissed the Wrongful Foreclosure Claim to the extent Appellants sought a permanent injunction.

**b. Monetary damages for wrongful initiation of foreclosure**

In January 2011, when the bankruptcy court dismissed the Wrongful Foreclosure Claim to the extent Appellants sought damages, it did so based on well-established legal authority, both federal and state. The bankruptcy court referred to and specifically agreed with the then-recent decision by Judge Overstreet in *Reinke v. Northwest Trustee Services,* and the cases cited therein, which held that the Trust Deed Act does not authorize a civil action for damages for wrongful initiation of foreclosure. *See, e.g. Vawter v. Quality Loan Serv. Corp.,* 707 F.Supp.2d 1115, 1123 (W.D.Wash.2010); and *Brown v. Household Realty Corp.,* 146 Wash.App. 157, 189 P.3d 233, 240 (2008).

On appeal Appellants argue, primarily based on *Bain,* that the case law relied upon by the bankruptcy court is no longer good law on the efficacy of a wrongful initiation of foreclosure damages claim. *Bain,* however, does not speak to the issue at all. We reviewed the posture of the Washington federal and state courts on this issue and concluded that currently the courts are not of one mind. [29] In point of fact, at least one district court recently abstained from ruling on the question of whether "a plaintiff can recover damages under the [Trust Deed Act] for an initiated but uncompleted trustee sale."*See Zhong v. Quality Loan Service Corp.,* 2013 U.S. Dist. LEXIS 145916 *11, 2013 WL 5530583 (W.D.Wash. Oct. 7, 2013). In *Zhong,* the district court acknowledged that the issue was submitted by an Order Certifying Question to the Washington Supreme Court in *Frias v. Asset Foreclosure Servs., Inc.,* No. 13–cv–0760 (W.D.Wash. Sept. 25, 2013). [30]

***11** We need not decide this issue here because even if we were to determine that the bankruptcy court erred at the Civil Rule 12(b)(6) level, such error would be harmless in light of the record and determinations made by the bankruptcy court later in connection with the SJ Motion on the FDCPA claims. *See Shanks v. Dressel,* 540 F.3d at 1086 (appellate court may affirm on any basis supported by the record). Appellants based their FDCPA claims on the same allegedly false and misleading acts and documents on which they based their Wrongful Foreclosure Claim.

As discussed earlier, the undisputed facts established that the Notice of Default was issued by the duly appointed and authorized agent of BofA: ReconTrust. *See*Wash. Rev.Code 61.24.031 (an authorized agent may issue a notice of default under RCW 61.24.010(8)). And, FannieMae's servicer, BofA, was an authorized beneficiary under the Deed of Trust Act as holder of the endorsed-in-blank Note (in the custody of BofA's agent ReconTrust). Therefore, the record in connection with the bankruptcy court's findings for BofA and ReconTrust on the FDCPA claims, equally supports a decision for them on the Wrongful Foreclosure Claim.

**4. Quiet Title Action**

The bankruptcy court dismissed the Quiet Title Action without prejudice. Appellants did not re-plead a claim for quiet title in the SAC. Appellants, therefore, waived any claim for quiet title. *See Lacey,* 693 F.3d at 928 (a plaintiff waives claims alleged in a dismissed complaint by not re-pleading such claims in an amended complaint when dismissal is without prejudice).

And if the merits are considered, we also determine that the bankruptcy court did not err. On appeal, Appellants do not allege that they were barred from re-pleading a quiet title action. Rather, they merely repeat the arguments made to the bankruptcy court. They argue that MERS could assign neither the Trust Deed nor the Note—but they also argue inconsistently that by assigning the Trust Deed without assigning the Note, MERS caused the irreparable severance of the Note from the Trust Deed. Appellants' argument is internally inconsistent and incorrect as a matter of law, because the security follows the obligation secured. *See In re Jacobson,* 402 B.R. 359, 367 (Bankr.W.D.Wash.2009)."This principle is neither new nor unique to Washington: '[T]ransfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter.' " *Id.* (quoting *Carpenter v. Longan,* 16 Wall. 271, 83 U.S. 271, 275, 21 L.Ed. 313 (1872)).

A quiet title action is equitable and designed to resolve competing claims of ownership. *Kobza v. Tripp,* 105 Wash.App. 90, 95, 18 P.3d 621 (2001). Where such an action is against a purported lender or otherwise involves a deed of trust, a plaintiff must also allege facts demonstrating they satisfied their obligations under the deed of trust. *Elene–Arp v. Federal Home Finance Agency,* 2013 WL 1898218 at *4 (W.D.Wash.2013). Here, the Quiet Title Action did not involve either title to or ownership of property. Instead, Appellants sought to extinguish the lien of the Trust Deed, but failed to allege any facts regarding the status of their obligations under the Trust Deed or Note. Therefore, Appellants failed to allege sufficient facts in the FAC to plausibly allege a claim for quiet title and, thus, the bankruptcy court did not err when it dismissed the Quiet Title Action.

**5. Abuse of Process**

***12** The bankruptcy court also dismissed the Abuse of Process Claim pursuant to the Second Dismissal Motion. Appellants based their Abuse of Process claim in the SAC on virtually the same, although re-phrased, allegations on which they based their Wrongful Foreclosure Claim in the FAC. To the "abuse of the foreclosure process" and "improper initiation of foreclosure proceedings" allegations, Appellants added allegations that ReconTrust breached the duty of good faith it owed, as successor trustee, to Debtor and that ReconTrust and BofA violated the statutory prohibition against the same entity serving as trustee and beneficiary under the same deed of trust, based on their common corporate direction and control. None of such allegations, taken as true for purposes of the Civil Rule 12(b)(6) evaluation, meet the pleading requirements for an abuse of process claim.

In evaluating an abuse of process claim, "the crucial inquiry is whether the judicial system's process, made available to insure the presence of the defendant or his property in court, has been misused to achieve another, inappropriate end."*Sea–Pac Co. v. United Food and Comm'l Workers Local Union 44,* 103 Wash.2d 800, 805, 699 P.2d 217 (1985) (citation omitted). The elements of an abuse of process claim, are,

> (1) existence of an ulterior purpose—to accomplish an object not within the proper scope of the process,—and (2) an act in the use of legal process not proper in the regular prosecution of the proceedings.

*Id.* (citation omitted). And of particular import here, the defendant must have employed some process in the technical sense, meaning process issued by the Washington courts. *Id.* at 806–07, 699 P.2d 217.

Appellants did not allege any ulterior purpose—they alleged that the actions violated the Trust Deed Act. And, critically, they do not allege any use of the judicial process in the allegedly improper initiation of non-judicial foreclosure. Therefore, the Abuse of Process Claim fails as a matter of law and was properly dismissed. The bankruptcy court did not commit error.

**B. Dismissal of claims against MERS**

**1. Dismissal of the FDCPA claims against MERS**

The bankruptcy court dismissed the FDCPA claims against MERS in response to the Second Dismissal Motion because Appellants failed to allege any action by MERS that could potentially give rise to liability under the FDCPA. Appellants alleged only that MERS executed the MERS Assignment. The MERS Assignment solely purported to transfer MERS's interest in the Trust Deed and the Note to BofA. As such, it was not an attempt to collect a debt and, therefore, could not violate any provision under the FDCPA, as a matter of law.[31] We find no error in the bankruptcy court's decision on this point.

**2. Dismissal of the CPA claims against MERS**

The bankruptcy court also dismissed the CPA claims against MERS in the Second Dismissal Order. On appeal, Appellants rely heavily on *Bain* as authority to establish that MERS may be held liable for violations of the CPA—but Appellants seek to prove too much through *Bain.*

***13** In *Bain,* the court held that the mere listing of MERS on a deed of trust is not itself an actionable injury under the CPA. 175 Wash.2d at 120, 285 P.3d 34. While the *Bain* court was unwilling to find that characterizing MERS as a beneficiary was per se deceptive, it held that MERS's purported action as a beneficiary presumptively meets the first element of a CPA violation[32]; however, ultimately a homeowner must produce evidence on each element required to prove a CPA claim. *Id.*

Whether a practice is unfair or deceptive is a question of law for the court to decide—if the parties do not dispute their conduct. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.,* 162 Wash.2d 59, 74, 170 P.3d 10, (2007). In the SAC, Appellants lump together their allegations of "unfair and deceptive acts" taken by BofA, ReconTrust, and MERS, as a group. Review of these allegations, in light of the subsequently determined undisputed facts, results in our conclusion that Appellants failed to adequately plead an unfair or deceptive act by MERS.

Appellants alleged: (a) misrepresentation as to the true holder of the obligations; (b) unlawful and unauthorized declaration of default; (c) unlawful assignment of the Note from MERS to BofA; (d) use of "robo-signers"[33]; (e) unlawful appointment of unqualified successor trustee; (f) unlawful initiation of non-judicial foreclosure proceedings; and (g) "other misrepresentations." Among these alleged actions, conceivably only (c) is plausibly applicable to MERS —as MERS executed the MERS Assignment;[34] and under *Bain,* MERS is not a lawful beneficiary under the Trust Deed Act. Appellants fail, however, to plausibly allege any injury proximately resulting from the MERS Assignment. The alleged injury, consisting of Debtor's loss of time for business and personal matters while she consulted legal counsel to address legal threats and loss of her home, is not plausibly related to the MERS Assignment. The legal threat and the possibility of losing her home could only relate to the Notice of Default, not the MERS Assignment. Appellants pled no direct causal link between the MERS Assignment and the alleged injuries. Therefore, Appellants fail to adequately plead a claim against MERS under the CPA, and dismissal was not error.

**3. Wrongful Foreclosure Claim, Quiet Title Action, and Abuse of Process Claim**

Appellants included the Wrongful Foreclosure Claim and the Quiet Title Action in their FAC, and the bankruptcy court dismissed both pursuant to the First Dismissal Order. The FAC lacks any allegation that MERS took any action that impacted Debtor's right to the Property, and contains only conclusory allegations that MERS caused Debtor injury. And, by failing to plead the Quiet Title Action in the SAC, Appellants waived the claim.

As to the Abuse of Process Claim, contained in the SAC and dismissed by the Second Dismissal Order, we apply the same reasoning discussed above as to BofA and ReconTrust. The bankruptcy court committed no error by dismissing the Abuse of Process Claim as Appellants failed to adequately plead such a claim as to any defendant.

**C. Denial of Civil Rule 60(b) Motion**

***14** Appellants stated the issue challenging the bankruptcy court's denial of their Civil Rule 60(b) Motion as follows:

> Did the trial court err in denying Appellants' Motion for Relief from the trial court's Orders of April 6, 2012 and October 2, 2012, dismissing Appellant's claims for wrongful foreclosure procedures set forth in RCW 61.24, et seq.?

Appellants' Opening Brief at 1.

In addition to factual problems with the issue statement itself,[35] Appellants fail to present any argument as to how the bankruptcy court abused its discretion in denying Civil Rule 60(b) relief. Therefore, this issue has been waived. *See City of Emeryville v. Robinson,* 621 F.3d at 1261.[36]

**VII. CONCLUSION**

Based on the foregoing, we AFFIRM.

**All Citations**

Slip Copy, 2013 WL 6511979

Footnotes

36 Even if the Panel were to review the bankruptcy court's denial of the requested relief under Civil Rule 60(b), which was brought on the alleged grounds that the intervening opinion by the Washington Supreme Court in *Bain* "vitiated" the case authority and reasoning on which the bankruptcy court based its denial, we would affirm. The bankruptcy court correctly identified the applicable legal standard, citing *Phelps v. Alameida,* 569 F.3d 1120 (9th Cir.2009); and the record supports the logical and reasonable conclusion that the bankruptcy court "did not rely on any cases that would have been partially overruled by *Bain,* and [ ] did not make any determinations that would be changed following *Bain.*"Hr'g Tr. (Sept. 28, 2012) 5:22–25, 6:1. In *Bain,* the Washington Supreme Court answered three certified questions. First, it concluded that "if MERS does not hold the note, it is not a lawful beneficiary."175 Wash.2d at 89, 285 P.3d 34. It was unable to determine the " 'legal effect' of MERS not being a lawful beneficiary" on "the record and argument before" it. *Id.* And finally, it concluded that a homeowner "may" have a CPA claim "based upon MERS representing that it is a beneficiary," but such a determination would "turn on the specific facts of each case."*Id.* Here, on the First Dismissal Motion, the bankruptcy court "dismissed the abuse of process claim because the plaintiffs did not allege the existence of an ulterior purpose or an act that uses the judicial process" [Hr'g Tr. (Sept. 28, 2012) at 6:10–13]; "dismissed the FDCPA claim against MERS because the plaintiffs did not allege an action by MERS that could give rise to liability under the FDCPA"(*Id.* at 6:14–16, 285 P.3d 34); and "dismissed the Consumer Protection Act claim because the plaintiffs had not pled any act of the defendants which was causally linked to the injury of the plaintiffs"(*Id.* at 6:17–20, 285 P.3d 34). Thus, even on the merits, we conclude that the bankruptcy court did not abuse its discretion by denying the Civil Rule 60(b) Motion.

* This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (*see*Fed. R.App. P. 32.1), it has no precedential value. *See* 9th Cir. BAP Rule 8013–1.

1 Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001–9037, and all "Civil Rule" references are to the Federal Rules of Civil Procedure.

2 In addition, the first of the two dismissal orders is the subject of a Civil Rule 60(b) motion filed by Appellants on March 8, 2013, after Appellants filed the Notice of Appeal as to the Final Judgment that initiated this appeal. The bankruptcy court denied the motion by order entered on March 29, 2013, based on lack of jurisdiction, and Appellants appealed, thus initiating BAP No. 13–1170 (the "Related Appeal"). We address the Related Appeal in a separate Memorandum.

3 We exercised our discretion to review documents on the bankruptcy court's electronic docket to assist us in ascertaining the relevant procedural history. *O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.),* 887 F.2d 955, 958 (9th Cir.1989).

4 As in the initially filed complaint, the caption of the FAC lists not only the claims for relief contained therein, but also breach of contract, libel/defamation of title, and violation of the Real Estate Settlement Procedures Act, U.S.C. § 2601, claims never pled or even discussed in the FAC.

5 Generally, both the FAC and the subsequently filed version of the complaint suffer from lumping of "defendants," inexact references to other parts of the pleadings that lead nowhere (especially as to alleged "injury," as discussed later herein), and conclusory allegations—all of which tend to blur together the elements of the various claims asserted therein.

6 Washington Revised Code § 61.24 et seq.

7 Appellants also contended that the MERS Assignment and the Successor Trustee Appointment were invalid due to "robo-signing" and improper notarization.

8 The bankruptcy court stated its reasons for granting the First Dismissal Motion orally on the record on December 22, 2011 (erroneously cited in the Hearing Transcript as December 14, 2011). During its oral ruling, the bankruptcy court stated that the Appellants withdrew their claim for malicious prosecution, requiring the bankruptcy court to rule only as to the remaining four claims for relief.

9 In documents filed both in the Adversary Proceeding and this appeal, Appellants frequently use the term "cause of action." As both the Rules and Civil Rules discuss "claims" and not "causes of action," we do so as well herein.

10 Notably, Appellants thus conceded in the SAC (filed in January 2012) that they had notice in December 2010 and prior to Debtor's initiation of the Adversary Proceeding in January 2011, of FannieMae's ownership of the Debtor's loan and BAC's role as servicer.

 

11 On April 6, 2012, the bankruptcy court held a hearing specifically to orally state its reasons for granting the Second Dismissal Motion. The hearing transcript erroneously shows March 9, 2012, as the date of the oral ruling, whereas, oral argument occurred on March 9, 2012 and the oral ruling was issued on April 6, 2012.

12 By order entered May 11, 2012, the bankruptcy court required that all discovery be completed by August 17, 2012. The SJ Movants filed the SJ Motion on the discovery cutoff date. Nonetheless, Appellants argued for a continuance of the hearing on the SJ Motion pursuant to Civil Rule 56(d) and lack of discovery. The bankruptcy court denied the unsupported request. Appellants do not appeal from the denial of their request for continuance, and the issue, thus, is waived.

13 The SJ Movants also pointed out that the FannieMae Guidelines are available at "https://w ww.efanniemae.com/sf/guides/ssg/2008annlenlrt.jsp."

14 175 Wash.2d 83, 285 P.3d 34 (2012).

15 The bankruptcy court appropriately did not review the Declaration of Adam Greenhalgh offered by Appellants in connection with its consideration of the First Dismissal Motion. *See Hal Roach Studios, Inc. v. Richard Feiner & Co.,* 896 F.2d 1542, 1555 (9th Cir.1989) (generally a court may not consider any material beyond the pleadings in its evaluation of a Civil Rule 12(b)(6) motion).

16 Appellants' stated Issue No. 1 claims the bankruptcy court erred by dismissing Appellants' claims for wrongful foreclosure and "irregularities in the proceedings," although Appellants inaccurately attribute the dismissal as accomplished by the Second Dismissal Order and the Final Judgment, rather than the First Dismissal Order. Their Issue No. 2 claims that the bankruptcy court erred by dismissing Appellants' "claims for injunctive relief"—again attributing the dismissal to the Second Dismissal Order and Final Judgment, rather than the First Dismissal Order. Both stated issues also confusingly refer to the bankruptcy court's denial of the Civil Rule 60(b) Motion, which was entered October 2, 2012.

17 Appellees initially argue that Appellants waived appeal from the dismissal of the Wrongful Foreclosure Claim and the Quiet Title Action by failing to include such claims in the SAC. Appellees nonetheless addressed the merits of dismissal of both claims on appeal.

18 Appellants confusingly frame the issue, however, as error made in connection with the bankruptcy court's Final Judgment and ruling contained therein that denied relief from the Second Dismissal Order.

19 Appellants include another issue in their Statement of Issues on Appeal, claiming that the bankruptcy court erred by dismissing Appellants' claim for breach of contract. We note that the caption page of the FAC included "Breach of Contract," however, Appellants failed to plead a claim for breach of contract in the FAC. Nor do Appellants present any argument on appeal with respect to breach of contract. Therefore, this issue has been waived. *City of Emeryville v. Robinson,* 621 F.3d 1251, 1261 (9th Cir.2010) (appellate courts in this Circuit "will not review issues which are not argued specifically and distinctly in a party's opening brief.").

20 For simplicity we refer to BofA in lieu of BAC hereinafter.

21 In the bankruptcy court, Appellants objected to Peloso's Declaration based on hearsay and lack of qualification to testify and objected to the documents submitted with Peloso's Declaration based on lack of authentication. They also argued that they had not been allowed to do discovery and sought a continuance to allow them more time. The bankruptcy court determined that the testimony and documents offered by Mr. Peloso "would be admissible at trial." Hr'g Tr. (Sept. 28, 2013) at 7:21–22. The bankruptcy court found that Mr. Peloso had personal knowledge based on business records and also "would qualify as an expert to testify about his review of BofA's documents and records under FRE 702."*Id.* at 8:5–7.It further found that most of the documents were self-authenticating, even if not business records. *Id.* at 8:8–13.As to the request for more time for discovery, the bankruptcy court denied the request. Appellants had from April 22, 2012 to the August 17, 2012 discovery cutoff to conduct discovery and failed to support a request for continuance. *Id.* at 9:8–14.Appellants did not raise any issue on appeal with respect to any of these rulings, and we consider them waived.

22 Revised Code of Washington § 61.24.135 provides that:

> (1) It is an unfair or deceptive act or practice under the consumer protection act, chapter 19.86 RCW, for any person, acting alone or in concert with others, to offer, or offer to accept or accept from another, any consideration of any type not to bid, or to reduce a bid, at a sale of property conducted pursuant to a power of sale in a deed of trust. The trustee may decline to complete a sale or deliver the trustee's deed and refund the purchase price, if it appears that the bidding has been collusive or defective, or that the sale might have been void. However, it is not an unfair or deceptive act or practice for any person, including a trustee, to state that a property subject to a recorded notice of trustee's sale or subject to a sale conducted pursuant to this chapter is being sold in an "as-is" condition, or for the beneficiary to arrange to provide financing for a particular bidder or to reach any good faith agreement with the borrower, grantor, any guarantor, or any junior lienholder.

(2) It is an unfair or deceptive act in trade or commerce and an unfair method of competition in violation of the consumer protection act, chapter 19.86 RCW, for any person or entity to: (a) violate the duty of good faith under RCW 61.24.163; (b) fail to comply with the requirements of RCW 61.24.174 [deposits into foreclosure fairness account]; or (c) fail to initiate contact with a borrower and exercise due diligence as required under RCW 61.24.031.

23 In oral argument, and indirectly in the appellate brief, counsel for Appellants argued that the representation in the Notice of Default that BofA was both owner and servicer constitutes a misleading statement actionable by Appellants. Appellants did not so allege in their various forms of the complaint; the bankruptcy court appropriately found no material issues of disputed fact as to the validity of the Notice of Default; and we conclude that the discrepancy is not material nor could Appellants plausibly plead otherwise. *See Donohue v. Quick Collect, Inc.,* 592 F.3d 1027, 1033 (9th Cir.2010) ("[I]mmaterial statements, by definition, do not affect a consumer's ability to make intelligent decisions."). We recognize *Donohue* discussed materiality in the context of the FDCPA, but conclude that the reasoning is appropriate to our analysis here. Washington law makes clear that the distinction between an owner of the Note and a beneficiary who is a holder of the relevant note is not significant. *See*Wash. Rev.Code § 61.24.030(7) (requiring, prior to foreclosure of residential real estate, that the trustee have proof that the beneficiary owns the note, but also providing that a statement that the beneficiary is a note holder suffices). Indeed, at least for purposes of RCW 61.24.030, BofA was the owner.

24 Appellants subsequently did not include a wrongful foreclosure claim in the SAC. Appellees on appeal argue that Appellants thus abandoned the claim, citing *Forsyth v. Humana, Inc.,* 114 F.3d 1467, 1474 (9th Cir.1997) ("It is the law of this circuit that a plaintiff waives all claims alleged in a dismissed complaint which are not realleged in an amended complaint."). This "Forsyth rule" was overruled, in part, by the Ninth Circuit in *Lacey v. Maricopa Cnty.,* 693 F.3d 896, 928 (9th Cir.2012), specifically as to claims dismissed with prejudice and without leave to amend. Here, the bankruptcy court dismissed the Wrongful Foreclosure Claim with prejudice to the extent Appellants sought damages or permanent injunction.

25 Appellants did not allege that BAC was not the holder of the Note at the time the Notice of Default was issued. *See*Wash. Rev.Code 61.24.031; and *Reinke v. Northwest Trustee Services, Inc*., 2011 Bankr.LEXIS 4142 at *32, 2011 WL 5079561 (Bankr.W.D.Wash.2011). Nor did Appellants allege that Debtor was not in default.

26 We also note that *Bain* solely addressed questions regarding MERS and its participation in a foreclosure context. We address Appellants' alleged claims against MERS separately below.

27 The two cases that generated the certified questions to the Washington Supreme Court in *Bain* both involved requests for injunctions to stop foreclosures initiated by MERS and damages under the CPA, among other things. *Bain,* 175 Wash.2d at 90, 285 P.3d 34. Nonetheless, the merits of the underlying cases were not before the Washington Supreme Court, and the opinion contains no discussion or analysis pertaining to the injunctive relief requested therein.

28 In its oral ruling, after determining that a permanent injunction would not be appropriate, the bankruptcy court analyzed whether the FAC supported a request for any restraint of the foreclosure sale. The bankruptcy court found the FAC deficient as it contained no allegations that would indicate the Notice of Default was issued incorrectly.

29 By way of example: In *Stafford v. Sunset Mortg., Inc.,* 2013 WL 1855743 at *2 (W.D.Wash. Apr.29, 2013), the district court noted that "[a]s this Court has repeatedly ruled, Washington law does not recognize a claim for wrongful initiation of a non-judicial foreclosure when no sale occurs."Whereas, in *Walker v. Quality Loan Service Corp.,* 176 Wash.App. 294, 308 P.3d 716, 724 (2013), the state court disagreed with *Vawter* and held that "a borrower has an actionable claim against a trustee who, by acting without lawful authority or in material violation of the DTA, injures the borrower, even if no foreclosure sale occurred."

30 The matter was assigned Supreme Court No. 89343–8 on September 30, 2013, and the briefing schedule set.

31 Appellants did not identify the bankruptcy court's denial of leave to amend as an issue in this appeal, nor did they include any legal argument regarding leave to amend. We therefore consider the Appellants to have waived review on this point.

32 In *Bain,* MERS, acting as beneficiary, purported to appoint successor trustees who initiated foreclosure proceedings. *Bain,* 175 Wash.2d at 89, 285 P.3d 34. Here, the only foreclosure action taken consisted of the Notice of Default issued by ReconTrust, which was duly appointed by BofA, not MERS; and BofA was the duly authorized servicer for the holder of the Note.

33 Appellants cite no legal authority that such signatures render the documents void; courts reject "robo-signing" as a cognizable legal theory; and there is nothing deceptive about using an agent to execute a document. *See Bain v. Metro Mortg. Grp., Inc.,* 2010 U.S. Dist. LEXIS 22690, 2010 WL 891585, at *6 (W.D.Wash.2010).

34 Execution of the MERS Assignment is the only action taken by MERS specifically alleged anywhere in the SAC.

35 The issue statement misstates the effect of the orders to which it refers. The April 6, 2012 order (relating to the SAC) did not dismiss the Wrongful Foreclosure Claim. The Wrongful Foreclosure Claim was dismissed by the January 10, 2012

 

order (relating to the FAC). The October 2, 2012 disposition is the Final Judgment that is on appeal. Appellants did not seek relief from the Final Judgment, other than by filing the Notice of Appeal.

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2010 WL 5138478
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United States District Court, W.D. Washington,
at Tacoma.

Steven L. KLINGER, Jr. and
Sheila J. Klinger, Plaintiffs,
v.
WELLS FARGO BANK, NA, Defendant.

No. 3:10–cv–05546–RJB. | Dec. 9, 2010.

**Attorneys and Law Firms**

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**ORDER GRANTING DEFENDANT WELLS FARGO BANK, N.A.'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING CLAIMS AGAINST WELLS FARGO BANK, N.A.**

ROBERT J. BRYAN, District Judge.

***1** This matter comes before the Court on Defendant Wells Fargo Bank, N.A.'s motion for summary judgment. Dkt. 23. The Court has considered the motion and the relevant record herein.

## I. *PROCEDURAL AND FACTUAL HISTORY*

On April 30, 2008, Plaintiffs Steven L. Klinger and Sheila J. Klinger ("Plaintiffs"), in order to secure payment of a promissory note (the "Note") in the amount of $243,676.00, granted to Mortgage Electronic Registrations Systems, Inc. ("MERS") as nominee for Lender Pierce Commercial Bank, its successors and assigns ("Lender") a deed of trust (the "Deed of Trust"). Dkt. 23–3. The Deed of Trust encumbers the real property commonly known as 8503 163rd Street Court East, Puyallup, Washington 98375 (the "Property").*Id.* The Deed of Trust was recorded with the Pierce County Auditor on April 30, 2008. *Id.*

On December 8, 2009, MERS executed an assignment of deed of trust (the "Assignment of Deed of Trust") whereby it assigned its interest under the Deed of Trust to Wells Fargo Bank, N.A. ("Wells Fargo"). Dkt. 23–4. The Assignment Deed of Trust was recorded on December 9, 2009. *Id.* On December 8, 2009, Wells Fargo instructed Northwest Trustees Service ("NWTS") to transmit a Notice of Default to Plaintiffs on behalf of Wells Fargo. Dkt. 24, at 2.

On December 9, 2009, Wells Fargo recorded an appointment of successor trustee (the "Appointment of Successor Trustee") naming NWTS the successor trustee. Dkt. 23–5. On December 15, 2009, Plaintiffs recorded a document entitled "Constructive Legal Notice of Lawful Debt Validation Demand" (the "Recorded Demand") with the Pierce County Auditor. Dkt. 23–6. The Recorded Demand states that Plaintiffs "dispute the alleged mortgage debt in it's [sic] entirety for being inaccurate."*Id* at 1.

On August 5, 2010, Plaintiffs filed with the Court (1) an application to proceed *in forma pauperis,* (2) a proposed Petition, (3) a proposed Petition for Restraining Order, (4) a memorandum in support of the proposed Petition for Restraining Order, and (5) a proposed Petition for Temporary Injunction. Dkt 1. Plaintiffs filed a Return of Service stating their Original Petition and motions for temporary restraining order were served on Defendants via U.S. Mail on August 5, 2010. Dkt. 3.

On August 6, 2010, the Property was sold at a trustee's sale to Wells Fargo as the highest bidder. Dkt. 23–1. A Trustee's Deed was delivered and recorded on August 17, 2010. *Id.*

On August 11, 2010, the Court issued an order denying Plaintiffs' application to proceed *in forma pauperis.*Dkt. 2. On August 16, 2010, Plaintiffs paid the necessary filing fee. On September 1, 2010, the Court issued an order denying Plaintiffs' motion for temporary restraining order. Dkt. 12.

On October 12, 2010, Wells Fargo filed this motion for summary judgment. Dkt. 23. In the motion for summary judgment, Wells Fargo argues that any claim against it should be dismissed because (1) Plaintiffs failed to exercise their pre-sale remedies under RCW 61.24.130, and (2) Plaintiffs fail to make any factual allegations as to Wells Fargo in support of any of Plaintiffs' claims.*Id.*

***2** On October 27, 2010, Plaintiffs filed a motion requesting leave to file an amended complaint. Dkt. 28. On October 28, 2010, the Court issued an order denying Plaintiffs' motion and directing Plaintiffs to file any arguments or evidence that they sought to include in an amended complaint in their response to Wells Fargo's motion for summary judgment. Dkt. 29.

On November 21, 2010, Plaintiffs filed a response. Dkt. 33. In their response, Plaintiffs argue (1) that Pierce Commercial Bank failed to make sufficient disclosures to Plaintiffs and should be added as a party to this case, (2) the Assignment of Deed of Trust is "false," (3) the Declaration of Jennifer Robinson (Dkt.24) is illegitimate, and (4) Wells Fargo did not adhere to the requirements of RCW 61.24 when "Wells Fargo Home Mortgage" and "Wells Fargo Bank, NA" both apparently interacted with Plaintiffs. *Id.*

On November 24, 2010, Wells Fargo filed a reply. Dkt. 34.

## II. *SUMMARY JUDGMENT STANDARD*

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt.").*See also*Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 253, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association,* 809 F.2d 626, 630 (9th Cir.1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson,* 477 U.S. at 254, *T.W. Elect. Service Inc.,* 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.,* 809 F.2d at 630 (relying on *Anderson, supra).* Conclusory, non specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation,* 497 U.S. 871, 888–89, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).

## III. *DISCUSSION*

### A. *Claims in Plaintiffs' Complaint (Dkt.5)*

***3** Plaintiffs' complaint, totaling twenty-fives pages, contains rambling, inarticulate accusations against the banking industry in general. However, because Plaintiffs filed this complaint *pro se,* the Court has construed the pleadings liberally and has afforded Plaintiffs the benefit of any doubt. *See Karim–Panahi v. Los Angeles Police Dep't,* 839 F.2d 621, 623 (9th Cir.1988).

Plaintiffs' complaint can be fairly summarized to allege eight claims: (1) violation of the Truth in Lending Act, 15 U.S.C. § 1601*et seq;* (2) breach of fiduciary duty; (3) negligence; (4) fraud; (5) breach of an implied covenant of good faith and fair dealing; (6) intentional infliction of emotional distress; (7) unjust enrichment; and (8) deceptive advertising and business practices in violation of 15 U.S.C. § 45. Dkt. 5. Wells Fargo seeks dismissal of all claims alleged against it. Dkt. 23.

As a preliminary matter, the complaint does not mention Wells Fargo in any section of the complaint other than (1) the pleadings' caption (Dkt. 5, at 1), (2) a paragraph on the first page identifying the parties (*Id.*), and (3) a passing reference to the bank in a history of the financial system (Dkt. 5, at 3). Instead, the allegations in Plaintiffs' complaint are generally targeted towards the "Lender" and the "Defendants." Nevertheless, the Court will examine each of the claims alleged in the complaint to determine if any case has been made out against Wells Fargo.

*Claims under the Truth in Lending Act.*Plaintiffs claim that the conduct of Defendants is in violation of the Truth in Lending Act (TILA), 15 U.S.C. § 1601, *et seq.* Dkt. 5, at 22.

Wells Fargo argues that any TILA claim against it is time barred. Dkt. 23, at 10.

A claim for monetary damages under TILA "may be brought ... within one year from the date of the occurrence of the violation."15 U.S.C. § 1640(e). A TILA violation occurs at the time the loan documents are signed. *See Meyer v. Ameriquest Mortgage Co.,* 342 F.3d 899, 902 (9th Cir.2003); *see also Vatomanyuk v. Quality Loan Service Corp. of Washington,* 699 F.Supp.2d 1242, 1244 (W.D.Wash.2010).

Here, the evidence shows that the loan in question was closed in April 2008 (Dkt.23–2) and that Plaintiffs filed their claims under TILA in August 2010 (Dkt.5). Plaintiffs' claims for monetary damages under TILA were therefore brought outside the limitations period.

Plaintiffs also apparently argue that the limitations period for TILA should be equitably tolled. Dkt. 5, at 14. For a TILA claim, equitable tolling "suspend[s] the limitations period until the borrower discovers or had reasonable opportunity to discover the fraud or nondisclosures that form the basis of the ... action."*King v. State of Cal.,* 784 F.2d 910, 915 (9th Cir.1986). However, "[w]here equitable tolling may be applicable to a federal claim, the 'claim accrues ... upon awareness of the actual injury, not upon awareness that this injury constitutes a legal wrong.'"*Lukovsky v. San Francisco,* 535 F.3d 1044, 1049 (9th Cir.2008). Here, Plaintiffs have not provided evidence to show that they only discovered the alleged TILA violations outside the limitations period or that they did not have a reasonable opportunity to discover the alleged fraud or non-disclosures within the limitations period. Accordingly, because equitable tolling of the TILA statute of limitations is not appropriate for this claim, the claim should be dismissed.

*4 *Breach of fiduciary duty.*Plaintiffs allege that "Defendants ... owed [Plaintiffs] a fiduciary duty of care with respect to the mortgage loan transactions and related title activities involving the Trust Property."Dkt. 5, at 19. Although the "Trust Property" is not identified in the complaint, Plaintiffs presumably refer to the real property that is the focus of this dispute. Wells Fargo argues that because it acquired its beneficial interest more than eighteen months after the origination of the loan, it owes no fiduciary duty to Plaintiffs on which Plaintiffs can be entitled to relief. Dkt. 23, at 9.

Breach of a fiduciary duty imposes liability in tort. *Tedvest Agrinomics VI v. Tedman Properties V,* 49 Wash.App. 605, 607, 744 P.2d 648 (1987). In order to prevail, Plaintiffs "must establish: (1) the existence of a duty [owed to them]; (2) a breach of that duty; (3) a resulting injury; and (4) that the claimed breach was the proximate cause of the injury."*Hansen v. Friend,* 118 Wash.2d 476, 479, 824 P.2d 483 (1992). Whether a legal duty exists is a question of law. *Id.*

Here, Plaintiffs have alleged no facts nor provided any evidence to show that Wells Fargo owes Plaintiffs a fiduciary duty. Wells Fargo acquired its beneficial interest in December 2009, nearly two years after the alleged conduct during the marketing and origination of their loan that Plaintiffs apparently claim to be a breach of a fiduciary duty. Plaintiffs have provided no indication that Wells Fargo was involved in the allegedly inappropriate conduct that they describe. Accordingly, because there was no existence of a duty owed to Plaintiffs from Wells Fargo, this claim should be dismissed as a matter of law.

*Negligence.* Plaintiffs claim that Defendants owed to Plaintiffs "a general duty of care ... to properly perform due diligence as to the loans and related transactional issues."Dkt. 5, at 20. Wells Fargo argues that because it is a successor trustee appointed over eighteen months after the origination of the loan, any claim of negligence fails as a matter of law. Dkt. 23, at 8–9.

"In an action for negligence a plaintiff must prove four basic elements: (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause."*Ranger Ins. Co. v. Pierce County,* 164 Wash.2d 545, 552–53, 192 P.3d 886 (2008) (*quoting Degel v. Majestic Mobile Manor, Inc.,* 129 Wash.2d 43, 48, 914 P.2d 728 (1996)). If any of these elements cannot be met as a matter of law, summary judgment for Wells Fargo is proper.

Here, Plaintiffs have not established that Wells Fargo owed them a duty of care. While Plaintiffs' allegations relate to the origination of their mortgage, the evidence presented by Wells Fargo shows that Wells Fargo only became involved with this loan many months after the conduct described by Plaintiffs took place. Because there are no genuine issues of material fact, Plaintiffs' negligence claim should be dismissed.

 

*Fraud.* Plaintiffs bring a claim of common law fraud, arguing that Wells Fargo promulgated false misrepresentations to cause Plaintiffs to enter in to their mortgage "without knowledge or understanding of the terms thereof."Dkt. 5, at 21.

***5** Under Washington law, a claim for fraud has the following nine elements: "(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff."*Stiley v. Block,* 130 Wash.2d 486, 505, 925 P.2d 194 (1996).

To survive a motion to dismiss, a complaint must plead allegations of fraud with particularity. Fed.R.Civ.P. 9(b). The complaint must include "an account of the 'time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.' " *Swartz v. KPMG LLP,* 476 F.3d 756, 764 (9th Cir.2007) (quoting *Edwards v. Marin Park, Inc.,* 356 F.3d 1058, 1066 (9th Cir.2004)). Moreover, "Rule 9(b) does not allow a complaint to merely lump multiple defendants together but requires plaintiffs to differentiate their allegations when suing more than one defendant and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." *Id.* at 764–65 (internal quotation and edits omitted). Thus, where, as here, a fraud suit involves multiple defendants, "a plaintiff must, at a minimum, identify the role of each defendant in the alleged fraudulent scheme." *Id.* at 765 (internal quotation and edits omitted).

Rather than identifying the specific circumstances of Wells Fargo's allegedly fraudulent conduct, Plaintiffs make broad allegations that "Defendants" made non-specified negligent misrepresentations to Plaintiffs. Plaintiffs have failed to identify what role Wells Fargo played in any alleged fraud. Furthermore, Plaintiffs did not produce any evidence regarding any of the elements of fraud to rebut Wells Fargo's motion for summary judgment. Accordingly, this claim should be dismissed.

*Breach of an implied covenant of good faith and fair dealing.*Plaintiffs argue that Defendants breached the implied covenant of good faith and fair dealing when Defendants (1) failed to provide all proper disclosures and (2) failed to perform valid or properly documented substitutions and assignments "so that Plaintiffs could ascertain their rights and duties."Dkt. 5, at 22.

There is in every contract an implied duty of good faith and fair dealing.*Badgett v. Security State Bank,* 116 Wash.2d 563, 569, 807 P.2d 356 (1991). This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. *Id*.

Here, Plaintiffs have not shown how Wells Fargo's alleged failure to disclose prevented Plaintiffs from receiving the benefits of the loan agreement. Plaintiffs' rights and duties were established by the original mortgage documents and any assignment of the Note did not change Plaintiffs' rights and duties. This claim should be dismissed.

***6** *Intentional infliction of emotional distress.*Plaintiffs claim that Defendants were liable for the tort of intentional infliction of emotional distress, also known as outrage. Dkt. 5, at 23.

"The tort of outrage requires the proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress."*Kloepfel v. Bokor,* 149 Wash.2d 192, 195, 66 P.3d 630 (2003)."The question of whether certain conduct is sufficiently outrageous is ordinarily for the jury, but it is initially for the court to determine if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability."*Dicomes v. State,* 113 Wash.2d 612, 630, 782 P.2d 1002 (1989); *see Robel v. Roundup Corp.,* 148 Wash.2d 35, 59 P.3d 611 (2002)."The first element requires proof that the conduct was 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'"*Robel,* 148 Wash.2d at 51, 59 P.3d 611 (quoting *Dicomes,* 113 Wash.2d at 630, 782 P.2d 1002).

Here, Wells Fargo's alleged conduct does not exceed all bounds usually tolerated by decent society. Plaintiffs' conclusory statement that Defendants' conduct was extreme and outrageous, without alleging facts or producing evidence to support this legal conclusion, is insufficient as a matter of law. Moreover, Plaintiffs assert that they suffered severe emotional distress, but do not allege any facts in support of this assertion. Because Plaintiffs have not met their burden to establish a genuine issue of material fact, this claim should be dismissed.

*Unjust enrichment.*Plaintiffs appear to allege that Wells Fargo was unjustly enriched as a result of various "spurious fees and charges." Dkt. 5, at 18. Under Washington law, unjust enrichment is composed of three elements: "(1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment."*Young v. Young,* 164 Wash.2d 477, 484–485, 191 P.3d 1258 (2008).

A party may not bring an unjust enrichment claim where an express contract governs the relationship between the parties. *MacDonald v. Hayner,* 43 Wash.App. 81, 85–86, 715 P.2d 519 (1986)."A party to an 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 subject matter, in contravention of the express contract."*Id.* Here, notwithstanding the fact that Wells Fargo became involved with this mortgage more than eighteen months after the origination of the loan, Plaintiffs' express contract with their lender bars them from bringing an unjust enrichment claim relating to the loan contract. *See Guketlov v. Homekey Mortg., LLC,* 2009 WL 3785575 (W.D.Wash.2009). Accordingly, this claim should be dismissed.

***7** *Deceptive advertising and unfair business practices in violation of 15 U.S.C. § 45.*

Plaintiffs allege that Defendants have engaged in a variety of unfair and unlawful business practices in violation of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.* This section of the United States Code, however, does not provide for any private cause of action. *See, e.g., Holloway v. Bristol–Myers Corp.,* 485 F.2d 986, 988 (D.C.Cir.1973). Therefore, this claim should be dismissed.

**B.** ***Additional Claims in Plaintiffs' Response (Dkt.33)***

As demonstrated above, Plaintiffs' response does not provide sufficient evidence to meet their burden to defeat Wells Fargo's motion for summary judgment on the claims presented in Plaintiffs' complaint. However, Plaintiffs' response does raise new claims that were not presented in Plaintiffs' complaint. While the Court would ordinarily not consider new claims presented in a response to a motion for summary judgment, in the interest of fairness the Court will liberally construe the pleading for the benefit of Plaintiffs. Furthermore, because Wells Fargo responded to each of the new claims presented by Plaintiffs, these new claims have been fully briefed to the Court.

*False Assignment of Deed of Trust.*Plaintiffs argue that Wells Fargo "caused to be recorded in the county record false filings," specifically the Assignment of Deed of Trust (Dkt.23–4). Dkt. 33, at 3–5. According to Plaintiffs, the Assignment of Deed of Trust is "false" and assigned nothing to Wells Fargo because it was "executed by a party Mortgage Electronic Registration Systems (MERS), which has [no] beneficial interest in the underlying Debt Obligation at all."Dkt. 33, at 3. In its reply, Wells Fargo argues this claim is without merit because MERS is authorized to serve as a beneficiary under the Washington Deed of Trust Act and because an assignment by MERS was authorized and in accordance with Washington law. Dkt. 34.

Plaintiffs' claim regarding MERS' role under the Washington Deed of Trust Act is similar to other claims that have been rejected in past cases brought in this district. *See, e.g., Daddabbo v. Countrywide Home Loans, Inc.,* 2010 WL 2102485 (W.D.Wash. May 20, 2010); *Vawter v. Quality Loan Service Corp. of Washington,* 707 F .Supp.2d 1115, 1125–1126 (W.D.Wash.2010). The Court concurs with the analysis regarding this issue in those well reasoned cases. As a result, summary judgment on this issue in favor of Wells Fargo is appropriate because there exist no genuine issues of material fact.

*Challenge to legitimacy of Robinson Declaration (Dkt.24).* Plaintiffs appear to challenge the reliability of the Declaration of Jennifer Robinson in Support of Defendant Wells Fargo's Motion for Summary Judgment (Dkt.24). Dkt. 33, at 6. Wells Fargo contends that Plaintiffs' claim is speculation and without supporting evidence.

Plaintiffs' claim is meritless. In support of their allegation, Plaintiffs filed a deposition from an unrelated state court case that they argue shows the unreliability of the declaration. Dkt. 33–2. This evidence does not support Plaintiffs' contention and does not raise a genuine issue of material fact as to any claim against Wells Fargo. Accordingly, Wells Fargo is entitled to summary judgment on this issue.

***8** *Non-adherence to RCW 61.24 regarding "Wells Fargo Home Mortgage."*Plaintiffs allege that Wells Fargo failed to adhere to the requirements of RCW 61.24 "to complete a lawful foreclosure" because interactions between Plaintiffs and Wells Fargo apparently involved both "Wells Fargo

Home Mortgage" and "Wells Fargo Bank, NA." Dkt. 33, at 6–7. Wells Fargo argues that both "Wells Fargo Home Mortgage" and "Wells Fargo Bank, N.A." are "one and the same" because Wells Fargo Home Mortgage merged into Wells Fargo Bank, N.A. in 2004. Dkt. 34, at 11.

This claim is also without merit. In response to Plaintiffs' debt validation requests, Wells Fargo responded to Plaintiffs via a letter dated February 11, 2010. Dkt. 13–9. In this letter, Wells Fargo makes clear that Wells Fargo Home Mortgage is a division of Wells Fargo Bank, NA. *Id.* Plaintiffs present no legitimate basis to challenge the fact that they were previously notified as to the relationship between the entities. Because there are no genuine issues of material fact regarding this claim, Wells Fargo is entitled to summary judgment on this issue.

*Claims against Pierce Commercial Bank.* Plaintiffs claim that Pierce Commercial Bank failed to provide sufficient disclosures during the origination of their loan. Dkt. 33, at 2. Pierce Commercial Bank is not a party to this case. Because Plaintiffs' allegations against Pierce Commercial Bank do not involve Wells Fargo to any extent, Wells Fargo should not be forced to expend additional resources as a result of this new claim. Accordingly, this new claim should not stand in the way of granting summary judgment in favor of Wells Fargo. Furthermore, Plaintiffs are not precluded from pursuing claims against other parties in a new case.

### IV. *ORDER*

Therefore it is hereby **ORDERED** that Defendant Wells Fargo's motion for summary judgment (Dkt.23) is **GRANTED.** All claims against Defendant Wells Fargo Bank, N.A. are **DISMISSED** and this case is **DISMISSED.**

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party's last known address.

**All Citations**

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United States District Court, W.D. Washington, at Seattle.

John D. KNECHT, Plaintiff,
v.
FIDELITY NATIONAL TITLE INSURANCE COMPANY, et al., Defendants.

No. C12–1575RAJ. | Signed June 9, 2015.

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## FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING BENCH TRIAL

RICHARD A. JONES, District Judge.

### I. INTRODUCTION

*1 The court heard this matter in a bench trial that commenced on March 16, 2015 and concluded on March 18, 2015. What remained for trial following orders on motions to dismiss and motions for summary judgment were Plaintiff John Knecht's claims that Defendants were liable via the Washington Consumer Protection Act (RCW Ch. 19.86, "CPA") for violations of the Washington Deed of Trust Act (RCW Ch. 61.24).[1] Mr. Knecht also sought declaratory and injunctive relief.

The court summarizes its ruling: Mr. Knecht prevailed on none of his claims. The court concludes that since at least August 2006, Defendant Deutsche Bank National Trust Company ("DB"), has been the beneficiary of the deed of trust securing the note that Mr. Knecht executed when he refinanced his home in April 2006. DB had authority to appoint Defendant Fidelity National Title Insurance Company ("Fidelity") as the trustee of that deed of trust, and it did so. It did so because Mr. Knecht had defaulted on his loan. On three occasions from 2010 to 2012, Fidelity set dates for a trustee's sale of Mr. Knecht's property, although it abandoned all three sales, and Mr. Knecht remains the owner of his home for now. Fidelity committed a single violation of the Deed of Trust Act in connection with those foreclosure proceedings, and that violation did not injure Mr. Knecht. The third Defendant, Mortgage Electronic Registration Systems, Inc. ("MERS"), had a limited role in the foreclosure proceedings. In April 2010, it executed an Assignment that purported to convey certain interests to DB. After that, it had no role at all. The evidence demonstrated that the MERS Assignment did not injure Mr. Knecht. Mr. Knecht is not entitled to declaratory or injunctive relief.

The court now enters findings of fact and conclusions of law to support those rulings. For the sake of clarity, the court has included some subsidiary conclusions of law with its findings of fact, and vice versa.

To lend context to the court's findings and conclusions, the court summarizes the deed of trust as it is used in Washington to secure residential property. A deed of trust is a three-party transaction in which a borrower (the grantor of the deed of trust) conveys title to her property to a trustee, who holds the title in trust for the lender, who is the beneficiary of the deed of trust.*Bain v. Metro. Mortgage Group, Inc.,* 175 Wash.2d 83, 285 P.3d 34, 38 (Wash.2012). The deed of trust grants the beneficiary a power of sale that it can invoke if the borrower defaults, in which case the trustee is empowered to sell the property at a trustee's sale. *Id.* Washington's Deed of Trust Act places non-waivable restrictions on the power of sale and the means by which the trustee can conduct a sale. *Id.* ("The legislature has set forth in great detail how nonjudicial foreclosures may proceed. We find no indication that the legislature intended to allow the parties to vary those procedures by contract.") Provided the trustee and beneficiary comply with the Deed of Trust Act, the trustee can sell the property without judicial oversight.

### II. FINDINGS OF FACT

*2 1) On April 1, 2006, Mr. Knecht executed a note evidencing a loan of $315,000 from American Brokers Conduit ("ABC"). On the same date, he executed a deed of trust encumbering his residential property in North

Bend, Washington, as security for the note. The deed of trust named ABC as the lender and Fidelity National Title Company of Washington (not the Fidelity Defendant in this case) as trustee. It also designated MERS as the beneficiary of the deed of trust, but "solely as a nominee for Lender and Lender's Successors and assigns."

2) Within a few weeks of Mr. Knecht's execution of the note, DB took possession of it.

3) When DB took possession of the note, it bore an indorsement in blank from ABC. That indorsement stated as follows:

WITHOUT RECOURSE

BY: AMERICAN BROKERS CONDUIT

CESAR COBOS

ASST. SECRETARY

A line above Mr. Cobos's name bore his signature. At trial, DB produced the original note with the indorsement above. DB proved to the court's satisfaction that it has been in continuous possession of the original note since at least August 2006.

4) At some time in 2006, DB became the trustee of GSR Mortgage Loan Trust 2006–0A1 ("GSR Trust"). The GSR Trust, established by an arm of the Goldman Sachs investment titan, is a depository for about 7,000 mortgages,[2] of which Mr. Knecht's mortgage was just one. The GSR Trust was an entity designed to facilitate various third-party investments in either the stream of income from those mortgages or in investment vehicles for which that stream of income served as security.

5) In August 2006, the GSR Trust "closed," and DB (in its capacity as trustee) became the entity with the authority to enforce the Knecht note and the entity entitled to receive payments from that note.

6) The GSR Trust was governed by a Master Servicing and Trust Agreement as well as a supplement of "Standard Terms" to that Agreement. Exs. 103, 104. Those documents explained the obligations of the Goldman Sachs entity that was the depositor of the Trust corpus, the servicer of the loans in the Trust, and DB as both the trustee and custodian of the Trust's corpus.

7) At some point prior to 2010, American Home Mortgage Servicing, Inc. ("AHMSI") became the servicer for loans in the Trust. It is unnecessary to enumerate all of its obligations and rights as servicer; it suffices to observe that it was responsible for managing payments owed via the loans in the trust.

8) In 2009, DB executed a power of attorney (Ex. 137) that granted AHMSI a host of powers as the servicer of mortgages in several dozen trusts for which DB served as trustee. The GSR Trust was among them. Among other things, AHMSI had power to take all steps necessary to conduct a non-judicial foreclosure of a deed of trust securing a note held by the GSR Trust.

9) AHMSI underwent several corporate transitions, and is now known as "Ocwen." Those transitions are irrelevant in this case, except as they bear on changes in recordkeeping systems. The court thus refers to the servicer as "AHMSI" regardless of which name it was using.

***3** 10) By the beginning of 2010, Mr. Knecht had defaulted on his note. He has remained in default. At no time from the beginning of 2010 until the time of trial did Mr. Knecht have the resources to cure his default.

11) In January and February 2010, AHMSI attempted to contact Mr. Knecht by telephone regarding his default more than 60 times. Mr. Knecht ignored virtually all of those calls. AHMSI also sent Mr. Knecht a letter on January 21, 2010. Ex. 118. That letter offered him a variety of options for addressing his default, including HUD financial counseling, temporary forbearance, a loan modification, Washington governmental resources, legal resources, and others. The letter made clear that foreclosure was among AHMSI's options. Mr. Knecht did not respond to the letter.

12) In March 2010, Mr. Knecht filed a Chapter 7 bankruptcy petition. DB sought relief from the automatic stay and obtained that relief on May 11, 2010. Mr. Knecht received a discharge of his personal liabilities on June 16, 2010. His home remained secured by the deed of trust.

13) In May 2010, AHMSI resumed efforts to contact Mr. Knecht about his default. It sent another letter on May

14, 2010 that was essentially identical to the January 21, 2010 letter. Mr. Knecht again did not respond.

14) In September 2010, foreclosure proceedings began. AHMSI sent a "foreclosure referral" on September 8 which reached Fidelity via the Lender Processing Services ("LPS") computer network. Ex. 127. Although no one introduced evidence of Fidelity's appointment as trustee of Mr. Knecht's deed of trust, the court takes judicial notice of an "appointment of successor trustee" executed by DB on September 14, 2010 and recorded in King County on September 16, 2010. Putting aside Mr. Knecht's assertion that DB had no authority to appoint Fidelity, an assertion the court will reject in its later conclusions of law, there was no dispute at trial that Fidelity acted as the trustee for Mr. Knecht's deed of trust beginning in September 2010.

15) Fidelity's appointment as trustee marked the beginning of two parallel efforts to address Mr. Knecht's default. AHMSI continued in its efforts to obtain payments from Mr. Knecht, efforts that included offering him many alternatives, including but not limited to loan modifications and forbearance. At AHMSI's direction, Fidelity three times instituted and three times abandoned foreclosure proceedings. The court refers to those proceedings as the first foreclosure proceeding, the second foreclosure proceeding, and the third foreclosure proceeding. The court focuses on the foreclosure proceedings, as they are the focus of Mr. Knecht's claims. The court finds, however, that AHMSI continued its efforts to offer Mr. Knecht alternatives to foreclosure throughout those foreclosure proceedings. Mr. Knecht either ignored those offers or was unable to take advantage of them.

16) On September 8, 2010, Fidelity received an undated declaration from Silena Rivera. Ex. 135. The document, like many that Fidelity received from representatives of either DB or AHMSI, is difficult to decipher. Testimony at trial established that Fidelity received it from AHMSI via the LPS system. It refers to "Chapter 61.24 RCW (SB 5810)." It declares as follows:

*4 The beneficiary or beneficiary's authorized agent has exercised due diligence to contact the borrower as required in section 2(5) of the act and, after waiting 14 days after the requirements in section 2 of this act were satisfied, the beneficiary or the beneficiary's authorized agent sent to the borrower(s), by certified mail, return receipt requested, the letter required under section 2 of the act.

The court takes notice that Washington Senate Bill 5810, which became law in 2009, made changes to the Washington Deed of Trust Act, including the addition of RCW 61.24.031, which required "a trustee, beneficiary, or authorized agent" to take certain steps before issuing a notice of default, and also required certain disclosures in a notice of default. RCW 61.24.031 has since been amended, as the court will later discuss.

17) Fidelity issued Mr. Knecht a Notice of Default on September 17, 2010. Ex. 124.

18) On October 4, 2010, Fidelity received a beneficiary declaration from AHMSI dated September 24, 2010. Ex. 2. The declaration identified Mr. Knecht, his loan number, and his property address. It stated that the "undersigned beneficiary or authorized agent for the beneficiary hereby represents and declares under the penalty of perjury that the beneficiary is the owner of the Promissory Note or other obligation secured by the Deed of Trust."An AHMSI representative signed the declaration. Other information in the LPS system allowed Fidelity to verify that DB was the beneficiary associated with the note and that AHMSI was DB's servicer for that note.

19) Fidelity issued Mr. Knecht a Notice of Trustee's Sale on October 21, 2010, setting a sale date of January 28, 2011. Ex. 129. Fidelity recorded the document in King County.

20) At AHMSI's request, Fidelity discontinued the foreclosure process before the January 28, 2011 trustee's sale. AHMSI did so because discussions with Mr. Knecht (mostly via his girlfriend, Joni Allen, who obtained authorization to deal with AHMSI on his behalf) indicated that a loan modification or repayment plan might be feasible.

21) In late January 2011, Mr. Knecht and AHMSI reached agreement on a repayment schedule. Ex. 114.

22) Mr. Knecht made several payments according to the schedule in early 2011, but those payments stopped in June 2011. AHMSI notified Fidelity on August 26,

2011 that it should resume foreclosure efforts. Ex. 177.

23) On September 12, 2011, Fidelity issued a Notice of Trustee's Sale setting a sale date of December 16, 2011. Ex. 131. Fidelity recorded the document in King County. This Notice of Trustee's sale, like its predecessor, referred to the September 2010 notice of default. There is no evidence that a new notice of default was issued.

24) Also on September 12, 2011, Fidelity issued a Notice of Discontinuance of Trustee's Sale, discontinuing the foreclosure process related to the October 21, 2010 Notice of Trustee's Sale. Ex. 130. Fidelity also recorded that document in King County. It is not clear why Fidelity issued that notice, as the January 28, 2011 trustee's sale date had long passed, as had the expiration of the 120–day period that RCW 61.24.040(6) provides for continuing that sale. No witness offered a persuasive explanation of the reason for this notice. There is no basis, however, to find that the Notice of Discontinuance had any material impact on Mr. Knecht, directly or indirectly.

***5** 25) Fidelity declined to follow through on the December 16, 2011 sale. Someone at AHMSI determined that the Notice of Default preceding the Notice of Trustee's sale was missing language required by Senate Bill 5810. Ex. 178. It is not clear whether the AHMSI representative was referring to the Notice of Default issued in September 2010 or a later notice of default that was not part of the record at trial.

26) In late September or early October 2011, AHMSI likely sent a letter whose content (if not its timing) complied with RCW 61.24.031. Trial testimony along with AHMSI's records established that a "Washington Initial Contact Letter" was sent around those dates. Trial testimony established that AHMSI could not obtain the letter because it resided on legacy recordkeeping systems that it could no longer access.

27) On April 16, 2012, Fidelity received a declaration bearing the same date from AHMSI. It bore Mr. Knecht's name, his loan number, and the address of his property. An AHMSI representative declared that "[t]he beneficiary or beneficiary's authorized agent has exercised due diligence to contact the borrower as required in RCW 61.24.031(5)."

28) Fidelity issued Mr. Knecht a Notice of Default on April 17, 2012. Ex. 183.

29) On May 15, 2012, Fidelity received from AHMSI a beneficiary declaration substantially identical to the one it received on October 10, 2010. Ex. 3. It declared that the "undersigned beneficiary or authorized agent for the beneficiary hereby represents and declares under the penalty of perjury that the beneficiary is the owner of the Promissory Note or other obligation secured by the Deed of Trust."This declaration was also signed by an AHMSI representative. It appears on its face to have been executed on May 14, 2014. Testimony at trial established that Fidelity received the document on May 15, 2012. The court thus finds that despite its appearance, AHMSI executed the declaration prior to May 15, 2012, most likely on May 14, 2012. The apparent reference to the year 2014 was either dreadful handwriting or a scrivener's error.

30) Fidelity issued a Notice of Trustee's Sale on June 5, 2012. Ex. 133. It set a sale date of September 7, 2012. Fidelity recorded the document in King County.

31) Also on June 5, 2012, Fidelity executed a Notice of Discontinuance of Trustee's Sale (Ex. 132), discontinuing the sale date set in the September 12, 2011 Notice of Trustee's Sale. It recorded that Notice in King County. As was the case with the earlier Notice of Discontinuance, it is not clear why Fidelity issued that notice, as the December 16, 2011 trustee's sale date had long passed, as had the expiration of the 120–day period that RCW 61.24.040(6) provides for continuing that sale. No witness offered a persuasive explanation of the reason for this notice. There is no basis, however, to find that the Notice of Discontinuance had any material impact on Mr. Knecht or the foreclosure proceedings.

***6** 32) No trustee's sale of Mr. Knecht's property occurred on September 7, 2012. Mr. Knecht testified that he went to the location of the trustee's sale to deliver what he described as a "stay on the auction," and that a sale did not occur. The court takes judicial notice of the docket in this action, which indicates that before Defendants removed it from King County Superior Court, Mr. Knecht moved for a temporary restraining order. That court issued a temporary restraining order on September 5, 2012, barring the trustee's sale set for two days later. The temporary restraining order does not explain the state court's reasons for entering it. Defendants have not since attempted to conduct a trustee's sale.

33) Although the court will not recount the evidence in detail, trial exhibits and testimony established to the court's satisfaction that Fidelity or its designees ensured that all notices of default, notices of trustee's sale, and other documents essential to the foreclosure process were delivered to Mr. Knecht in the manner the law requires.

34) On April 1, 2010, a MERS representative executed an "Assignment of Deed of Trust" ("MERS Assignment"). It stated as follows:

For value received, the undersigned corporation hereby grants, assigns, and transfers to [DB], as Trustee for [the GSR Trust], all beneficial interest under that certain Deed of Trust dated 04/01/2006 executed by John D. Knecht....

Together with the Promissory Note secured by said Deed of Trust and also all rights accrued or to accrue under said Deed of Trust.

The MERS Assignment was signed by Michelle Halyard, an AHMSI employee who also had signatory authority on behalf of MERS. She signed the declaration as a representative of MERS "as nominee for [ABC]." Someone acting at the direction of MERS or AHMSI recorded the assignment in King County.

35) There was no direct evidence as to why Ms. Halyard executed the MERS Assignment. There was some evidence from a Fidelity representative that, in general, assignments like these facilitate obtaining title insurance after a trustee's sale.

36) MERS's counsel offered an interpretation of the MERS Assignment in closing argument. That interpretation is not evidence, and it does not overcome the language of the MERS Assignment, which suggests that MERS was assigning a promissory note and deed of trust that it did not have, and that it did so as a nominee of ABC, an entity that had long ago disposed of any interest in that note and deed of trust.

37) The MERS Assignment is, so far as the court can ascertain, a legal nullity. The court need not reach that conclusion, however, in light of two findings:

a. Mr. Knecht was in no way deceived or otherwise directly impacted by the MERS Assignment. He did not see it until well after this litigation commenced.

b. There is no evidence that Fidelity, DB, or AHMSI relied on the MERS Assignment in any way that is material to this action. Mr. Knecht's foreclosure proceedings would have been conducted just as they were regardless of the MERS Assignment.

*7 38) Mr. Knecht spent substantial time and money attempting to address the possible loss of his home. Much of that time and money, however, was expended in efforts to address his default, as opposed to directly resisting foreclosure efforts. To the extent that Mr. Knecht incurred any injury resisting foreclosure efforts, the court finds that Mr. Knecht would have made the same efforts regardless of the timing of the foreclosure proceedings.

## III. CONCLUSIONS OF LAW

### A. MERS Is Not Liable to Mr. Knecht.

1) The only act of MERS's to which Mr. Knecht has pointed as a basis for liability is the execution and recording of the MERS Assignment.

2) The execution and recording of the MERS Assignment caused no injury to Mr. Knecht. Even if it had, and Mr. Knecht could tie that injury to a statutory or common law right of action, Mr. Knecht suffered no compensable damage as a result of the MERS Assignment.

3) Mr. Knecht asked the court to order MERS to expunge the MERS Assignment from the records of the King County Recorder. Mr. Knecht has pointed to no authority that allows recorded documents to be expunged. Mr. Knecht is welcome to record this order, which declares among other things that MERS had no interests in Mr. Knecht's deed of trust or his note at the time it recorded the MERS Assignment, and neither did ABC.

**B. DB Has Been the Beneficiary of Mr. Knecht's Deed of Trust Since August 2006.**

4) The Knecht note, from its inception, has been a negotiable instrument within the meaning of RCW 62A.3–104.

5) Although the Knecht note was payable to ABC, it became payable to its bearer by virtue of ABC's indorsement in blank of the note.RCW 62A.3–109(c) ("An instrument payable to an identified person may become payable to bearer if it is indorsed in blank pursuant to RCW 62A.3–205(b)."); RCW 62A.3–205(b) ("When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.").

6) As the possessor of the Knecht note beginning no later than August 2006, DB became the note's holder. RCW 62A.1–201(21)(A) (defining holder as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession").

7) Although it is ultimately immaterial, the court concludes that DB was also the owner of the Knecht note. *See Trujillo v. NW Trustee Servs., Inc.,* 181 Wash.App. 484, 326 P.3d 768, 774–76 (Wash.Ct.App.2014) (explaining that the "owner" of a note is the person or entity entitled to the note's economic benefits whereas the "holder" of a note is the person or entity entitled to enforce it). A person or entity can be both the holder and owner of a note, or a note can have an owner and a separate holder. *Id.* at 775–76.

8) As the holder of the Knecht note, DB was the entity entitled to enforce the note within the meaning of RCW 62A.3–301.

9) No one other than DB had any direct interest in the Knecht note, had any direct claim to payments on the note, or had any right to enforce the deed of trust securing that note. Mr. Knecht's suggestion at trial that investors in the GSR Trust had rights arising under the deed of trust were unsupported by evidence or valid legal argument.

***8** 10) DB was the beneficiary of Mr. Knecht's deed of trust within the meaning of the Deed of Trust Act. The Act defines a "beneficiary" as "the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding such person holding the same as security for a different obligation."RCW 61.24.005(2); *see also Bain,* 285 P.3d at 43 ("[T]he legislature meant to define 'beneficiary' to mean the actual holder of the promissory note or other debt instrument."). The court has already concluded that DB was the holder of the Knecht note. There was no evidence that DB held the Knecht note (or any other note) as security for another obligation. Although RCW 61.24.030(7)(a) does not require a beneficiary to also be the owner of a note, *Trujillo,* 326 P.3d at 776, the court has already concluded that DB was the note's owner.

11) No formal transfer of Mr. Knecht's deed of trust was necessary, because the deed of trust, as a security instrument, follows the obligation that it secures. *E.g., Am. Savings Bank & Trust Co. v. Helgesen,* 64 Wash. 54, 61, 116 P. 837 (Wash.1911), *Bain,* 285 P.3d at 44 ("Washington's deed of trust act contemplates that the security instrument will follow the note, not the other way around.").

12) Mr. Knecht's deed of trust vested DB, as beneficiary, with a power of sale that it could exercise in the event that Mr. Knecht defaulted on his obligation to repay the note. DB lawfully delegated that power to AHMSI as its agent.

13) Mr. Knecht has been in default on his obligation to pay the note since at least June 2010.

**C. Fidelity Had Sufficient Proof that DB Was the Beneficiary Throughout Its Foreclosure Efforts.**

14) DB lawfully appointed Fidelity the trustee of Mr. Knecht's deed of trust in mid-September 2010. *See*RCW 61.24.010(2) (granting beneficiary authority to appoint a successor trustee). Fidelity remained the trustee at least through the time of trial.

15) RCW 61.24.030(7)(a) states as follows:

[F]or residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.

16) As to each of the notices of trustee's sale that Fidelity issued, Fidelity had proof that DB was the owner of the Knecht note. The court reaches that conclusion even without relying on the beneficiary declarations Fidelity received from AHMSI October 2010 and May 2012.

17) In the alternative, the court rules that the two beneficiary declarations that Fidelity received from AHMSI as DB's agent were "sufficient proof" satisfying the requisites of RCW 61.24.030(7).

**D. Fidelity Complied with RCW 61.24.031 as to the First and Third Foreclosure Proceedings, but Not as to the Second.**

***9** 18) RCW 61.24.031, enacted in 2009, required certain acts in advance of issuing a notice of default on an obligation secured by a deed of trust. As originally enacted, the statute required a "trustee, beneficiary, or authorized agent" to wait at least 30 days after either contacting the borrower regarding default or exercising due diligence to do so. RCW 61.24.031(1)(a) (2009). The court uses the phrase "foreclosure agent" as a shorthand for "trustee, beneficiary, or authorized agent." The statute required the foreclosure agent to contact the borrower by telephone and with a letter with specified content.RCW 61.24.031(1)(b) (2009).

19) There is ample evidence that AHMSI made telephone contact with Mr. Knecht as the statute required, or that it exercised due diligence to do so. Trial established that AHMSI worked extensively with Mr. Knecht or Ms. Allen (or attempted to do so) from at least January 2010 until Mr. Knecht filed this lawsuit in 2012. AHMSI extended many options for Mr. Knecht to avoid or cure his default, and he was unwilling or unable to take advantage of any of them.

20) No one was able to produce the letter that AHMSI sent to Mr. Knecht in 2010 to comply with RCW 61.24.031. Testimony from Mr. Knecht established that he did not keep reliable records of the foreclosure proceedings, so the fact that he did not have the letter does not convince the court that he did not receive it. The September 8, 2010, declaration of Silena Rivera convinces the court, on a more-probable-than-not basis, that AHMSI timely sent a letter in compliance with the statute.

21) As to Fidelity's second notice of trustee's sale, issued in September 2011, the letter in compliance with RCW 61.24.031 is not in evidence. If AHMSI sent a letter at all, it sent it in late September or early October 2011, which is too late to satisfy any version of RCW 61.24.031. Because any right to conduct a trustee's sale based on the September 2010 notice of default had long expired, the letter AHMSI sent in 2010 did not constitute compliance with RCW 61.24.031 as to the second foreclosure proceeding.

22) In April 2011, Washington enacted changes to RCW 61.24.031 that gave more protection to borrowers. Among other things, a borrower who responded to the letter that the statute required could delay a notice of default by an additional 60 days. RCW 61.24.031(1)(a)(ii) (2011).

23) Although no one produced a letter that complied with RCW 61.24.031, the April 2012 declaration establishes, on a more-probable-than-not basis, that AHMSI complied with RCW 61.24.031 as to the third foreclosure proceedings by making the required contact with Mr. Knecht by letter and telephone.

**E. Mr. Knecht Suffered No Injury as a Result of Fidelity's Single Violation of the Deed of Trust Act.**

24) The only legal violation proven at trial was that Fidelity failed to send (or verify that AHMSI had sent) the letter that RCW 61.24.031 required as part of the second foreclosure proceeding.

***10** 25) Mr. Knecht can recover for Fidelity's violation of the Deed of Trust Act only via the CPA.*Frias,* 334 P.3d at 539 (holding that the Deed of Trust Act does not provide standalone cause of action for violations of deed of trust act in absence of completed foreclosure sale). To prevail on a CPA claim, Mr. Knecht was obligated to prove "(1) [an] unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact, (4) [an] injury to plaintiff in his or her business or property, [and] (5) causation."*Hangman Ridge Training Stables, Inc. v. Safeco Title Ins.*, 719 P.2d 531, 523 (Wash.1986).

26) Fidelity's failure to send the RCW 61.24.031 letter did not cause Mr. Knecht an injury. As the court has already found, much of the time and effort Mr. Knecht expended was in an effort to modify his loan, obtain forbearance, or otherwise cure or avoid his default. To the extent he expended time or money directly responding to foreclosure efforts, the court concludes that Mr. Knecht would have made the same efforts with respect to saving his home from foreclosure regardless of the receipt of an additional RCW 61.24.031 letter.

27) Mr. Knecht is not entitled to damages, and he is not entitled to declaratory or injunctive relief. To the extent it remained in effect previously, the temporary restraining order that the King County Superior Court issued in this case before its removal is not in effect as of today.

## IV. CONCLUSION

For the reasons previously stated, the court finds in favor of Defendants on all claims. The clerk shall enter judgment for Defendants.

**All Citations**

Slip Copy, 2015 WL 3618358

Footnotes

1 The court's August 14, 2014 order on the parties' summary judgment motions allowed claims for damages invoking the Deed of Trust Act, independently of the CPA, to proceed to trial. Since then, the Washington Supreme Court issued its decision in *Frias v. Asset Foreclosure Services, Inc.*, 181 Wash.2d 412, 334 P.3d 529, 539 (Wash.2014), which held that "Washington does not recognize an independent cause of action under the [Deed of Trust Act] seeking monetary damages for alleged [Deed of Trust Act] violations absent a completed foreclosure sale."No foreclosure sale occurred in this case, and Mr. Knecht does not contest that *Frias* is dispositive of his standalone Deed of Trust Act damage claims.

2 The court uses the term "mortgage" to mean a loan secured by real property. In Washington, a mortgage consists of a note and a deed of trust. Other states structure mortgages differently.

**End of Document**

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United States District Court, W.D. Washington,
at Seattle.

Jonelle McCROREY, et al., Plaintiffs,
v.
FEDERAL NATIONAL MORTGAGE
ASSOCIATION, et al., Defendants.

No. C12–1630RSL. | Feb. 25, 2013.

**Attorneys and Law Firms**

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**ORDER GRANTING CERTAIN DEFENDANTS' MOTION TO DISMISS**

ROBERT S. LASNIK, District Judge.

***1** This matter comes before the Court on certain defendants' "Revised Motion to Dismiss Plaintiffs' Complaint" (Dkt.# 18) and "Defendant Flagstar Bank FSB's Motion to Dismiss Plaintiffs' Complaint" (Dkt.# 20) pursuant to Fed.R.Civ.P. 12(b)(6). Having reviewed the memoranda, declarations, and exhibits submitted by the parties, the Court finds as follows:

**BACKGROUND**

In September 2007, plaintiffs executed a promissory note for $413,250.00, payable to the order of Simply Mortgage, Inc. Dkt. # 3, Ex. A. [1] The note was secured by a deed of trust on real property located at 1820 Creswell Rd., Snohomish, Washington. Dkt. # 3, Ex. B. The deed of trust lists Simply Mortgage as the lender, Joan H. Anderson (on behalf of defendant Flagstar Bank, F.S.B.) as the trustee, and Mortgage Electronic Registration Systems, Inc. ("MERS") as both the beneficiary of the trust and the "nominee" for the lender. *Id.*

Plaintiffs began having trouble making their mortgage payments toward the end of 2008. On January 26, 2009, MERS purportedly assigned its interests as beneficiary of the deed of trust to Flagstar Bank, which promised to modify plaintiffs' loan if they successfully made three consecutive loan payments of $3,500 each (almost $400 more per month than plaintiffs were originally paying). Plaintiffs made the three payments, but were advised that they had to make a fourth $3,500 payment in order to receive the modification. Shortly after that payment was made, plaintiffs learned that Flagstar Bank had sold their loan to Nationstar and that they had to restart the loan modification discussions with the new servicer/owner.

When plaintiffs applied for a loan modification from Nationstar, they were told that their collective income was too high to receive a modification. When plaintiff Jeff McCrorey was laid off in late 2010, they became eligible for a modification. Unfortunately, the terms offered by Nationstar included monthly payments of $5,700, nearly $2,600 more per month than their original payment amount.

On August 24, 2010, MERS, this time acting as the nominee for Simply Mortgage, Inc., assigned the lender's beneficial interest in the deed of trust to Nationstar. Dkt. # 3, Ex. D. Nationstar subsequently appointed Quality Loan Service Corporation of Washington as successor trustee. Dkt. # 3, Ex. E. Quality Loan, acting as Nationstar's attorney in fact, assigned Nationstar's beneficial interest in the deed of trust to defendant Federal National Mortgage Association ("Fannie Mae") on September 14, 2010. Nevertheless, on December 30, 2010, Quality Loan accepted Nationstar's declaration under penalty of perjury stating that Nationstar was the beneficiary of the deed of trust and the actual holder of the underlying promissory note. The September 20160 assignment to Fannie Mae was not recorded in the Snohomish County property records until June 24, 2011.

In mid-June 2011, plaintiffs' house was foreclosed upon and sold at a trustee's sale to Fannie Mae. The trustee generated a deed of sale identifying Fannie Mae as both the foreclosing beneficiary and the grantee. That deed was recorded on June 24, 2011. Dkt. # 19–3.

***2** Plaintiffs filed this action in state court more than a year after the foreclosure sale. They allege that MERS' involvement in the original deed of trust has created defects in assignments that made later attempts to foreclose the property under the Washington Deed of Trust Act ("DTA") invalid and violated the Washington Consumer Protection Act ("CPA"). The DTA and CPA claims are asserted against all defendants.

Plaintiffs also allege that Flagstar Bank breached its promise to modify plaintiffs' loan and that Nationstar breached the covenant of good faith and fair dealing while bargaining regarding a loan modification. Defendants seek dismissal of plaintiffs' claims under Rule 12(b)(6).

## DISCUSSION

### A. Standard for Motion to Dismiss

In the context of a motion to dismiss under Fed.R.Civ.P. 12(b) (6), the allegations of the complaint are accepted as true and construed in the light most favorable to plaintiff. *In re Syntex Corp. Sec. Litig.,* 95 F.3d 922, 925–26 (9th Cir.1996); *LSO, Ltd. v. Stroh,* 205 F.3d 1146, 1150 n. 2 (9th Cir.2000). The question for the Court is whether the well-pled facts in the complaint and judicially-noticed documents sufficiently state a "plausible" ground for relief. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Although a complaint need not provide detailed factual allegations, it must offer "more than labels and conclusions" and contain more than a "formulaic recitation of the elements of a cause of action." *Twombly,* 550 U.S. at 555. If the complaint fails to state a cognizable legal theory or fails to provide sufficient facts to support a claim, dismissal is appropriate. *Robertson v. Dean Witter Reynolds, Inc.,* 749 F.2d 530, 534 (9th Cir.1984).

### B. Deed of Trust Act Claim Against All Defendants

Washington courts have held that a borrower or grantor of a deed of trust who fails employ the procedures of the Deeds of Trust Act ("DTA") to enjoin a trustee's sale waives the right to contest the underlying debt or the foreclosure process. *Plein v. Lackey,* 149 Wash.2d 214, 67 P.3d 1061 (2003); *Brown v. Household Realty Corp.,* 146 Wash.App. 157, 189 P.3d 233 (2008); *CHD, Inc. v. Boyles,* 138 Wash.App. 131, 157 P.3d 415 (2007). These decisions are based on the following three goals of the DTA: (i) to promote an efficient and inexpensive nonjudicial foreclosure process; (ii) to ensure an adequate opportunity for interested parties to prevent wrongful foreclosure; and (iii) to secure the stability of land titles. *Brown,* 146 Wash.App. at 169, 189 P.3d 233.

After these cases were decided, however, the legislature modified the waiver doctrine to exempt claims for common law fraud or misrepresentation, violations of Washington's Consumer Protection Act ("CPA"), failure by a trustee to comply with the DTA, and violations of RCW 61.24.026. Thus, these types of claims may be brought even when the borrower or grantor failed to enjoin the foreclosure sale. RCW 61.24.127(1). Although these claims can be fled post-foreclosure, they will not affect the validity or finality of the foreclosure sale or operate to encumber or cloud the title to the property. RCW 61.24.127(2)(c) and (e).

***3** The only type of DTA claim that may be asserted post-foreclosure is a claim against the trustee for failing to materially comply with the provisions of the DTA. RCW 61.24.127(1)(c). Plaintiffs have not alleged any wrongdoing on the part of the successor trustee, Quality Loan Service Corporation. In fact, the complaint is virtually silent regarding the initiation and pursuit of the nonjudicial foreclosure that ultimately ended in the trustee's sale. [2] Any wrongdoing alleged on behalf of Flagstar Bank, the original trustee under the deed of trust, relates to its conduct as servicer of plaintiffs' mortgage rather than its role as trustee under the DTA. [3] Plaintiffs have not, therefore, alleged facts giving rise to a plausible claim for relief under the one type of DTA claim preserved by RCW 61.24.127(1)(c).

### C. Consumer Protection Act Claim Against All Defendants

The CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. A private cause of action exists under the CPA if (1) the conduct is unfair or deceptive, (2) occurs in trade or commerce, (3) affects the public interest, and (4) causes injury (5) to plaintiff's business or property. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wash.2d 778, 780, 719 P.2d 531 (1986). The purpose of the CPA is to protect consumers from harmful practices, which is why plaintiff must allege an actual or potential impact on the general public, not merely a private wrong. *Lightfoot v. Macdonald,* 86 Wash.2d 331, 333, 544 P.2d 88 (1976). Claims under the CPA are not waived simply because the foreclosure sale has already occurred. RCW 61.24.127(1)(b).

The CPA does not define "unfair or deceptive" for purposes of the first element. Whether an act is unfair or deceptive is a question of law. *Leingang v. Pierce County Med. Bureau, Inc.,* 131 Wash.2d 133, 150, 930 P.2d 288 (1997). Washington courts have held that a deceptive act must have the capacity to deceive a substantial portion of the population (*Sing v. John L. Scott, Inc.,* 134 Wash.2d 24, 30, 948 P.2d 816 (1997)) and "misleads or misrepresents something of material importance" (*Holiday Resort Cmty. Ass'n v. Echo Lake Assocs.*, LLC, 134 Wash.App. 210, 226, 135 P.3d 499 (2006)). In *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wash.2d 83, 117, 285 P.3d 34 (2012), the Washington State Supreme Court found that characterizing a non-holder (in that case, MERS) as the beneficiary in the deed of trust when it knew or should have known that it must have actual possession of the note to be the beneficiary under Washington law has the capacity to deceive for purposes of a CPA claim. The Supreme Court also found that the third element, public interest, was presumptively met because MERS "is involved with an enormous number of mortgages in the country (and our state), perhaps as many as half nationwide." Bain, 175 Wash.2d at 118, 285 P.3d 34. Defendants offer no facts or analysis that could support a contrary finding in this case.

***4** The issue, then, is whether plaintiff can show injury caused by deceptive representations regarding MERS' status as beneficiary and the effect of subsequent transfers and authorizations to act. "Personal injuries, as opposed to injuries to 'business or property,' are not compensable and do not satisfy the injury requirement." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wash.2d 27, 57, 204 P.3d 885 (2009). Plaintiffs may not, therefore, recover for any emotional distress caused by defendants' deceptive acts. With regard to any claimed damages, "plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." *Indoor/Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wash.2d 59, 84, 170 P.3d 10 (2007).

Plaintiffs allege that "defendants' actions have caused the plaintiffs to face threats of eviction and destruction of their credit." Dkt. # 1 at 15. Threats of eviction, without more, are more akin to an emotional harm and are not compensable under the CPA. Even if the Court assumes plaintiff is asserting the default, the related impact on their credit, and the foreclosure as their injuries, these harms cannot be laid at MERS' door. MERS' identification as the beneficiary on the deed of trust and its subsequent assignment of whatever interest it may or may not have had did not cause the loss of plaintiffs' home or the impairment of their credit. Plaintiffs began having trouble making their mortgage payments in late 2008: it was the failure to meet their debt obligations that led to a default, the destruction of credit, and the foreclosure. Although the misidentification of a party as the beneficiary may give rise to compensable damages (if, for example, the borrower's attempts to negotiate a modification fail because he is bargaining with the wrong entity or the borrower incurs costs while trying to locate the actual holder of the original promissory note), the misidentification itself does not cause the type of injuries alleged in the complaint. [4] Plaintiffs have not, therefore, asserted a viable cause of action under the CPA.

**D. Breach of Contract Against Flagstar**

Plaintiffs allege that Flagstar promised that if plaintiffs made three trial payments of $3,500 each, plaintiffs would receive a modification of the terms of their loan. Complaint (Dkt.# 1) at ¶ 69. Plaintiffs also allege that Flagstar breached that promise, causing them harm. Complaint (Dkt.# 1) at ¶ 70–72.

Flagstar argues that plaintiffs failed to satisfy a condition precedent and are therefore barred from asserting a breach of contract claim. Plaintiffs' contract claim is not, however, based on the deed of trust they signed in September 2007. The notice-and-cure provision contained therein is therefore irrelevant.

To the extent Flagstar argues that plaintiffs' breach of contract claim is preempted, it does so in a conclusory fashion. Whether a state law claim against a federal savings association is preempted involves a multi-step analysis.

> ***5** [T]he first step will be to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted. If the law is not covered by paragraph (b), the next question is whether the law affects lending. If it does, then, in accordance with paragraph (a), the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c). For these purposes, paragraph (c) is intended to be interpreted narrowly. Any doubt should be resolved in favor of preemption.

61 Fed.Reg. at 50,966–67. Simply declaring that all of plaintiffs' state law claims fall within the scope of 12 C.F.R. § 560.2(b) without any attempt to evaluate the specific law or claim at issue and its effect, if any, on lending, is unhelpful. Flagstar offers no authority for the extraordinary proposition that federal savings associations may breach their contractual

obligations with impunity because their promises cannot be enforced under state contract principles. Unlike the cases cited by defendant, plaintiffs' contract claim is based on allegations of an express promise and its breach, not simply on Flagstar's unwillingness to enter into a loan modification or other variants on a tort cause of action.

Based on the facts alleged and the documents presented by the parties, the Court finds that plaintiffs have adequately stated a breach of contract claim. Plaintiffs allege that they were promised a loan modification,[5] that they made four payments in excess of their original monthly payment amount in reliance on the promise, and that Flagstar breached the agreement(s). While plaintiffs will, of course, have to prove that such a promise was made, their allegations survive a motion to dismiss.

**E. Breach of Covenant of Good Faith and Fair Dealing Claim Against Nationstar**

Plaintiffs allege that Nationstar failed to negotiate regarding the requested loan modification in good faith. Plaintiffs do not allege that they had a contract with Nationstar, however. The implied covenant of good faith and fair dealing "obligates the parties to cooperate with one another so that each may obtain the full benefit of performance." *Badgett v. Sec. State Bank,* 116 Wash.2d 563, 569, 807 P.2d 356 (1991). The duty relates only to performance of the terms of an existing contract: there is no "free-floating" duty of good faith that attaches during negotiations or that injects new substantive obligations into the contract. *Id.* at 569–70, 807 P.2d 356. Plaintiffs' claims all relate to the negotiation of a contract, not its performance. The breach of the covenant of good faith and fair dealing therefore fails as a matter of law.

**F. Leave to Amend**

Although all claims against Fannie Mae, Nationstar, and MERS will be dismissed, this action continues as to Flagstar. In this context, leave to amend will not be blindly granted. If plaintiffs believe they can, consistent with their Rule 11 obligations, amend the complaint to remedy the pleading and legal deficiencies identified above, they may file a motion to amend and attach a proposed pleading for the Court's consideration.

***6** For all of the foregoing reasons, the motion to dismiss filed by Fannie Mae, Nationstar, and MERS (Dkt.# 18) is GRANTED. Flagstar's motion to dismiss (Dkt.# 20) is DENIED.

**All Citations**

Not Reported in F.Supp.2d, 2013 WL 681208

Footnotes

1 At some unknown point in time, the note was endorsed over to defendant Flagstar Bank, F.S.B. Dkt. # 19–1. The Court has taken judicial notice of the documents submitted with the parties' memoranda.

2 The trustee's obligations under the DTA are fairly limited: it must act in good faith toward the parties to the loan (RCW 61.24.010(4)), and it must assure itself that the beneficiary is the owner of the promissory note before issuing a notice of trustee's sale (RCW 61.24.030(7)(a)). Although there are documents suggesting that Quality Loan could not reasonably have relied on the December 30, 2010, beneficiary declaration of ownership, plaintiffs have not alleged bad faith or otherwise alleged that Quality Loan failed to materially comply with the requirements of the DTA.

3 Because Flagstar has no potential liability under the DTA, the Court need not consider its preemption argument in the context of this claim. See Dkt. # 20 at 7. The Court notes, however, that if Flagstar were correct and federal law preempted the DTA, there would be no authority or procedures by which to conduct nonjudicial foreclosures in the first place

4 In their opposition memorandum, plaintiffs suggest that they were injured when they unknowingly attempted to obtain a loan modification from two entities who did not, in fact, hold the original promissory note. Dkt. # 21 at 11. This injury is not alleged in the complaint. Nor are there any facts suggesting that Flagstar or Nationstar were not the appropriate entities with which to negotiate a modification. While the allegations of the complaint are scarce, it appears that they were the servicers and recipients of payments during the relevant time periods. There is no requirement that a servicer have physical possession of the original promissory note unless and until it initiates the nonjudicial foreclosure process set forth in the DTA.

To the extent plaintiffs are asserting a CPA claim based on Flagstar's breach of promise to modify the loan and Nationstar's unwillingness to honor Flagstar's commitment (Dkt. # 21 at 11), there are no facts from which one could infer that this lamentable situation affects the public interest.

5 Contrary to Flagstar's assumption, the promise or promises upon which plaintiffs' claim rests appear to have been oral. The allegations of the complaint do not refer to the July 15, 2009, letter submitted by Flagstar, and plaintiffs argue that the fourth $3,500 payment was induced by an explicit promise that a loan modification would follow. Flagstar has not identified any writing regarding the fourth payment.

**End of Document**

901 F.Supp.2d 1286
United States District Court,
W.D. Washington,
at Seattle.

Travis MICKELSON and
Danielle H. Mickelson, Plaintiffs,
v.
CHASE HOME FINANCE LLC, et al., Defendants.

Case No. C11–1445 MJP. | Oct. 31, 2012.

**Synopsis**
**Background:** Property owners brought action against various defendants, alleging various improper and illegal acts related to foreclosure on their home. After the District Court, Marsha J. Pechman, C.J., dismissed action, 2012 WL 1301251 and 901 F.Supp.2d 1286, 2012 WL 5377905, property owners moved to vacate prior orders due to new state decisional law.

**[Holding:]** The District Court, Marsha J. Pechman, Chief Judge, held that reconsideration of prior owners was not appropriate.

Motion denied.

West Headnotes (2)

[1] **Antitrust and Trade Regulation**
Nature and Elements

In order to prevail on a claim alleging violation of Washington's Consumer Protection Act (CPA), the plaintiff must show: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to the plaintiff in his or her business or property; and (5) causation. West's RCWA 19.86.090.

Cases that cite this headnote

[2] **Antitrust and Trade Regulation**
Verdict, findings, and judgment

It was not appropriate to reconsider dismissal of property owners' claims against various defendants, alleging violation of Washington's Consumer Protection Act (CPA), based on newly decided Washington decisional law, since even if deception element of CPA was met by owners, they could not show injury, as was required under CPA. Fed.Rules Civ.Proc.Rule 60(b)(6), 28 U.S.C.A.; West's RCWA 19.86.090.

1 Cases that cite this headnote

**Attorneys and Law Firms**

***1286** Jocelynne Rose Fallgatter, Fallgatter Law Group, Sultan, WA, Scott E. Stafne, Stafne Law Firm, Arlington, WA, for Plaintiffs.

Heidi E. Buck, Joshua Schaer, Routh Crabtree Olsen, Bellevue, WA, Fred B. Burnside, Rebecca J. Francis, Davis Wright Tremaine, Seattle, WA, for Defendants.

**ORDER DENYING MOTION TO VACATE**

MARSHA J. PECHMAN, Chief Judge.

THIS MATTER comes before the Court on Plaintiffs' consolidated motion to vacate previous orders of this Court. (Dkt. No. 94.) Plaintiffs ask the Court to vacate previous orders due to new law from the ***1287** Washington Supreme Court decision *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wash.2d 83, 285 P.3d 34 (2012). The Court finds *Bain* does not alter the outcome of the previous orders in question, and DENIES the Motion.

***Background***

Plaintiffs Travis and Danielle Mickelson filed suit against several Defendants alleging various improper and illegal acts related to the foreclosure on their home in Island County. Plaintiffs obtained a loan from MHL Funding Corp. on November 22, 2005, to purchase the home. (Amended Complaint ("AC") ¶ 3.3.) The deed of trust securing the loan named Mortgage Electronic Registration Systems, Inc. ("MERS") as the beneficiary and Chicago Title Insurance Company ("Chicago") as the trustee. (Dkt. No. 29–1 at 7.)

 

Roughly three years later on September 19, 2008, Chase Home Finance ("Chase") recorded an assignment of the deed of trust from MERS to Chase. (*Id.* at 27.) The document is signed by Vonnie McElligot as "Vice President" for MERS, though she is alleged to be an employee of Northwest Trustee Services, Inc. ("Northwest"). (*Id.*) The same day, Northwest recorded an appointment of successor trustee on behalf of Chase, which appointed Northwest the successor trustee. (*Id.* at 29.) This document is signed by Jeff Stenman. (*Id.*) Northwest had recorded a document entitled "Limited Power of Attorney" on October 28, 2005, which gave several individuals, including Vonnie McElligott and Jeff Stenman, authority to make substitutions and appointments of trustees on behalf of Chase. (Dkt. No. 29–1 at 24.)

Starting in the August of 2008, Plaintiffs fell behind on their mortgage payments and were threatened with foreclosure by Chase and Northwest's employee Vonnie McElligott. (AC ¶ 3.23.) Although Plaintiffs tried to enter into a loan modification program, their home was ultimately sold in a non judicial foreclosure sale on March 25, 2011. (AC ¶¶ 3.25–3.28.) Part of Plaintiffs' allegations against the Defendants involved claims under the Deed of Trust Act and the Consumer Protection Act alleging that Chase never had the authority to foreclose on their home because MERS was not a proper beneficiary under the Deed of Trust Act, and Chicago Title, the original trustee, was still the trustee. (*Id.*) They claimed Chicago should have investigated potential fraud in the transfer of the note and stopped the foreclosure. (*Id.*)

Some earlier dismissals have been granted at least in part on the grounds that MERS can be a proper beneficiary. The recently decided *Bain* holds MERS is not a proper beneficiary under the Deed of Trust Act. Because of this, Plaintiffs' ask for reconsideration of prior orders. 175 Wash.2d 83, 285 P.3d 34 (2012).

## *Analysis*

This motion asks for the previous orders dismissing with prejudice the claims against all Defendants to be vacated on the grounds that new law in *Bain* undercuts the decisions. 175 Wash.2d 83, 285 P.3d 34 (2012). Many of the orders Plaintiffs ask the Court to reconsider have nothing to do with the new law or would so clearly be unaffected by *Bain* that they need not be addressed here. (Dkt. Nos. 35, 86, 88.) The dismissed claims that may arguably be impacted by the decision in *Bain* include (1) an order dismissing claims under the Consumer Protection Act (CPA), RCW 19.85, against Chase, MERS, JPMorgan and Freddie Mac (Dkt. No. 58); and (2) an order dismissing the claims under the CPA against Chicago, (Dkt. No. 93). Other claims dismissed in these orders are unrelated to changes in the law created by *Bain*. While *Bain* does undercut some of the articulated reasoning behind at least one of these CPA claim dismissals, reconsideration is not warranted.

### ***1288** ***A. Standard***

Motions for reconsideration are disfavored in this District. Local Rule CR 7(h)(1) states that "[t]he court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence." Although the Plaintiffs fail to properly reference it, they seek relief under Federal Rule of Civil Procedure 60(b)(6), which provides for relief from a final judgment, order or proceeding. While a change in the underlying law upon which the order is based may require that order to be vacated under this Rule, a court need not reconsider a prior order when the change in decisional law does not undercut its basis. *Cross v. Benedetti,* 2012 WL 3252863, *3, 2012 U.S. Dist. LEXIS 110117, *9 (D.Nev.2012).

**[1]** Both of the orders possibly impacted by the new law in *Bain* are on CPA claims. In order to prevail on a CPA claim, the plaintiff must show "(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to the plaintiff in his or her business or property; (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wash.2d 778, 780, 719 P.2d 531 (1986). This rule remains unchanged.

### ***B. Impact of Bain***

*Bain* held that MERS is ineligible as a "beneficiary" under the Deed of Trust Act if it never held a promissory note or other debt instrument secured by the deed of trust. 175 Wash.2d 83, 110, 285 P.3d 34 (2012). Because of this, characterizing MERS as a beneficiary meets the deception element of the CPA claim. *Id.* at 117, 285 P.3d 34. However, *Bain* is clear that there is no automatic cause of action under the CPA simply because MERS acted as an unlawful beneficiary under the Deed of Trust Act. Plaintiffs must still prove all five elements of the CPA claim.

In *Bain,* the Washington Court addressed three certified questions:

> "(1) Is Mortgage Electronic Registration Systems, Inc., a lawful 'beneficiary' within the terms of Washington's Deed of Trust Act ... if it does not hold the promissory note? [Short answer: no]. (2) If so what is the legal effect of [MERS] acting as an unlawful beneficiary under the terms of the [Deed of Trust Act]? [Short answer: We decline to answer based on what is before us.] (3) Does a homeowner possess a cause of action under Washington's Consumer Protection Act against Mortgage Electronic Registration Systems, Inc., if MERS acts and an unlawful beneficiary under the terms of Washington's Deed of Trust Act? [Short answer: The homeowners may have a CPA action but each homeowner will have to establish the elements based upon the facts of that homeowner's case.]" *Id.* at 91, 285 P.3d 34.

*Bain* does not hold that the presence of MERS in a mortgage creates a presumptive CPA claim. In fact, the Supreme Court clearly states that "[d]epending on the facts of a particular case, a borrower may or may not have been injured by the disposition of the note, the servicing contract, or many other things, and MERS may or may not have a causal role." *Id.* at 119, 285 P.3d 34.

### *C. Application*

**[2]** Even if the deception element of the CPA is met, the Plaintiffs cannot make a claim under the CPA because they cannot show injury. Lack of injury is only articulated as a cause for dismissal in the first order dismissing MERS, Chase, JPMorgan and Freddie Mac (Dkt. No. 58), ***1289** but it is an implicit reason for dismissal in the order dismissing Chicago Title (Dkt. No. 93).

The reasoning articulated in the order dismissing Chicago Title was that "the key to Plaintiffs' claim against Chicago is the allegation that MERS cannot be a beneficiary under the Deed of Trust Act and that Chicago's act of naming it as a beneficiary is an unfair and deceptive act" (Dkt. No. 93 at 3). The Court rejected the theory that MERS could never be a beneficiary, so there was no deception. (*Id.*) The holding in *Bain* does undercut this articulated reasoning in the order dismissing Chicago.

However, the language in the order dismissing Chicago only addresses the deception element of the CPA and the issue of MERS as a beneficiary because it is the only point raised by the Plaintiffs in their CPA claim. In the Plaintiffs' response brief to Chicago's motion to dismiss the CPA claim, Plaintiffs make not a single reference to harms suffered by Chicago's allegedly deceptive acts. (Dkt. No. 87.) Thus, although the original order did not address any element other than deception, Plaintiffs still fail to make out a claim under the CPA, which requires injury and causation.

Even if Plaintiffs' failure to plead injury is overlooked, injury could not be found if the Court were to go independently looking for it. Chicago did not initiate foreclosure proceedings, or have any part in those proceedings. Chicago was merely the initial trustee, and this Court has already held that Chicago did not violate duty or act unreasonably in not investigating apparently valid transfers of title for possible fraud. (Dkt. No. 35 at 5.) This Court specifically distinguished *Bain* (at that point in the District Court), because unlike in *Bain,* Chicago is not alleged to have engaged in or caused foreclosure proceedings. (Id.) Therefore, any harm the Plaintiffs may have suffered as a result of their home being foreclosed upon is not the result of Chicago's actions.

### *Conclusion*

*Bain* does not touch the basis of most of the Court's previous orders. (Dkt. Nos. 35, 86, 88.) These orders will not be reconsidered. Because Plaintiffs do not make a plausible claim for injury, *Bain* does not change the outcome of the previous orders on CPA claims. (Dkt. Nos. 58 and 93.) Because *Bain* does not undercut the outcome of any previous order, the Court DENIES the motion to vacate.

The clerk is ordered to provide copies of this order to all counsel.

### All Citations

901 F.Supp.2d 1286

**End of Document**

2014 WL 4202465
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Tacoma.

Scott C. MILLS, Plaintiff,
v.
BANK OF AMERICA, N.A. et. al, Defendants.

No. 3:14–cv–05238–RBL. | Dkt. No. 13. | Signed Aug. 22, 2014.

**Attorneys and Law Firms**

Scott C. Mills, Shelton, WA, pro se.

Steven Joseph Dixson, Christopher G. Varallo, Witherspoon Kelley, Spokane, WA, for Defendants.

**ORDER GRANTING MOTION TO DISMISS**

RONALD B. LEIGHTON, District Judge.

***1** THIS MATTER comes before the Court on Defendant Bank of America, N.A.'s (BANA) Motion to Dismiss [Dkt. # 13].*Pro Se* Plaintiff Scott C. Mills defaulted on his home loan in December of 2009, and BANA initiated the foreclosure process in 2012 through their successor trustee, Bishop, White, Marshall & Weibel (BWMW). [1] Despite having a pending loan modification application in process with BANA, BWMW sold the home at auction in February 2014. Mills sued BANA and BWMW asserting several federal and state law claims that they wrongfully foreclosed his home, and is seeking the reversal of the foreclosure and damages. In response, BANA filed a Motion to Dismiss arguing that (1) Mills failed to state a claim, (2) Mills lacked standing to bring a claim, (3) this Court lacks subject matter jurisdiction, and (4) the Reply to the Motion to Dismiss was tardy. [2]

**I. BACKGROUND**

In July 1999, Mills executed a deed of trust to secure a $204,000 loan on property at 2609 358th Street Court South, Roy, WA 98580 in Pierce County ("Property"). The Deed of Trust was eventually transferred to BANA in 2008. Sometime after Mills became delinquent starting in December 2009, Mills claims BANA advised that he apply with it for a loan modification using the Making Home Affordable (MHA) program. [3] Mills applied in December 2013, and BANA confirmed that it received a completed application by February 2014. An "FAQ" on BANA's website indicated that his loan would not go into foreclosure sale while BANA reviewed his loan's eligibility.

While Mills was in default, BANA appointed BWMW as the successor trustee in September 2012. That same month, BWMW initiated the foreclosure process, sending a Notice of Default to Mills and posting it to Mills' addresses on record. [4] In August 2013, the Notice of Trustee's Sale indicating that the property would be sold on December 20, 2013 was sent to Mills and posted on the Property. The Property sold at public auction on Friday, February 28, 2014, completing the foreclosure sale. As of February 2014, Mills' MHA application with BANA was still pending. Prior to the sale, no legal action was filed regarding the Property.

**II. DISCUSSION**

Mills argues that BANA did not properly comply with the DTA procedures during the foreclosure process, and BANA broke its contract and promises to him that it would not foreclose on his home while his MHA loan application was under review. Based on these arguments, he makes claims for: (1) breach of third party contract based on BANA's participation in the MHA loan program; (2) violation of the Washington Deed of Trust Act (DTA); (3) breach of contract based on the MHA application (4) equitable estoppel; (5) violation of the Washington Consumer Protection Act (CPA); (6) promissory estoppel; (7) quiet title; (8) restitution for violation of the CPA; and (9) intentional infliction of emotional distress. He requests that the Court: (1) rescind the foreclosure; (2) quiet title; (3) complete the loan modification application; (4) enjoin BANA and BWMW from taking further action on the Property; and (5) provide monetary damages.

***2** BANA seeks dismissal of these claims under multiple theories. First, BANA argues that the claims should be dismissed under Federal Rule of Civil Procedure 12(b)(6), contending that he provided insufficient facts to state a claim for relief. BANA also argues that the claims for breach of third party contract, breach of contract, equitable estoppel, promissory estoppel, quiet title, and intentional infliction of emotional distress are waived; under Washington Law, he cannot enjoin the sale of a foreclosed home after the foreclosure sale. Additionally, BANA argues that relief cannot be granted for the breach of third party contract because Mills lacks standing to bring a private right of action against BANA to complete the MHA loan modification application. Second, BANA maintains the parties are non-diverse and the court lacks subject matter jurisdiction under Rule 12(b)(1). [5]

When a *pro se* petitioner is facing dismissal, the court will construe his or her pleadings liberally. *See Balistreri v. Pacifica Police Dept.,* 901 F.2d 696, 699 (9th Cir.1990); *Bretz v. Kelman,* 773 F.2d 1026, 1027 n. 1 (9th Cir.1985) ("[W]e have an obligation where the petitioner is *pro se*... to construe the pleadings liberally and to afford the petitioner the benefit of any doubt."). Although the Court holds the pleadings of *pro se* plaintiffs to "less stringent standards than those of licensed attorneys,"*Haines v. Kerner,* 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), "those pleadings nonetheless must meet some minimum threshold in providing a defendant with notice of what it is that it allegedly did wrong."*Brazil v. U.S. Dept. of Navy,* 66 F.3d 193, 198–99 (1995). The Court should not "supply essential elements of the claim that were not initially pled."*Bruns v. National Credit Union Admin.,* 122 F.3d 1251, 1257 (9th Cir.1997).

**A. Federal Claims for Breach of Third Party Contract**

Mills asserts only one claim involving federal law. He claims that his MHA loan application should have halted the foreclosure process until BANA completed its review of the application. The MHA program is part of a larger federal loan modification program, the Home Affordable Modification Program (HAMP). HAMP was established under the Troubled Asset Relief Program (TARP). Mills asserts that because BANA received TARP funds and because he is an intended third party contract beneficiary under HAMP and TARP, he has a private right of action to require BANA's compliance with these programs. BANA argues that his TARP/HAMP claims are not permitted because neither program authorizes a private right of action-he lacks standing to sue BANA to enforce its compliance.

Mills' TARP/HAMP claims fail because neither program authorizes a private right of action; neither permits borrowers to sue their lenders. TARP provides a private right of action to homeowners against the Treasury Secretary if they have been injured by the Secretary's actions. 12 U.S.C. § 5229. However, TARP does not authorize plaintiffs to bring actions against lenders or other private defendants, and the courts have declined to extend this right. *See Pantoja v. Countrywide Home Loans, Inc.,* 640 F.Supp.2d 1177, 1185 (N.D.Cal.2009). Similarly, HAMP does not authorize a similar private right of action, and the courts have declined to extend this right. *Tran v. Bank of America, N.A.,* 2012 WL 5384929, at *4 (W.D.Wash.2012). Because Mills lacks a private right of action, he states a claim for relief which cannot be granted. BANA's Motion to Dismiss these federal claims is GRANTED, and these are DISMISSED with prejudice.

**B. State Law Claims**

***3** Mills' remaining claims are Washington state law-based claims that BANA challenges under Rule 12(b)(6). Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir.1990). A complaint must allege facts to state a claim for relief that is plausible on its face. *See Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). A claim has "facial plausibility" when the party seeking relief "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."*Id.* Although the Court must accept as true a complaint's well-pled facts, conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper Rule 12(b)(6) motion. *Vasquez v. L .A. County,* 487 F.3d 1246, 1249 (9th Cir.2007); *Sprewell v. Golden State Warriors,* 266 F.3d 979, 988 (9th Cir.2001)."[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level."*Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citations and footnote omitted). This requires a plaintiff to plead "more than an unadorned, the-defendant-unlawfully-harmed-me accusation."*Iqbal,* 129 S.Ct. at 1949 (citing *Twombly* ).

On a 12(b)(6) motion, "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts."*Cook, Perkiss & Liehe v. N. Cal. Collection Serv.,* 911 F.2d 242, 247 (9th Cir.1990). However, where the facts are not in dispute, and the sole issue is whether there is liability as a matter of substantive law, the court may deny leave to amend. *Albrecht v. Lund,* 845 F.2d 193, 195–96 (9th Cir.1988).

**1. *Washington Deed of Trust Act***

Mills disputes whether BANA (through BWMW) complied with the DTA procedures. Mills claims that he did not receive the proper notices required by the DTA prior to the foreclosure sale. BANA argues that it complied with the DTA procedures and its compliance foreclosed all remedies Mills could seek under the DTA.

The DTA describes, among other things, the procedures and remedies for a non judicial foreclosure. RCW 61.24 *et. seq.* A trustee sale for a non judicial foreclosure requires strict compliance with the DTA. *See Knecht v. Fidelity Nat. Title Ins. Co.* ., 2013 WL 7326111 at *3 (W.D.Wash.2013). The DTA requires the trustee to issue to the borrower a Notice of Default and a Notice of Trustee's Sale and lists the procedures for doing so. RCW 61.24.030(8); RCW 61.23.040(1)(b) (respectfully).RCW 61.24.130 provides the only procedures by which a borrower can enjoin the foreclosure sale, and the procedures describe how to bring a lawsuit to restrain the sale *prior to the sale. See Brown v. Household Realty Corp.,* 146 Wash.App. 157, 163, 189 P.3d 233 (2008), *review denied,* 165 Wash.2d 1023, 202 P.3d 308 (2009). Failure to follow these procedures for enjoining the sale waives a claim to enjoin the sale. *Id.* at 163, 189 P.3d 233.

*4 A borrower who does not bring an action to challenge the foreclosure sale limits future claims against the trustee. Failure to bring an action to enjoin the sale does not waive a claim for damages asserting: "(a) Common law fraud or misrepresentation; (b) A violation of Title 19 RCW; (c) Failure of the trustee to materially comply with the provisions of [RCW 64.21 et. seq.]; or (d) A violation of RCW 61.24.026."RCW 64.21.127(1). However, a post-sale claim is subject several limitations, as the claim: can only seek actual monetary damages; if brought under the CPA, is restricted to certain types of damages; and cannot affect the finality of the foreclosure sale, the recording a lis pendens or similar document, or encumbering or clouding title.RCW 64.21.127(2).

BANA's compliance with the DTA rendered the sale of the foreclosed home final. While Mills asserts he did not receive the Notice of Default or a Notice of Trustee's Sale, BANA and BWMW's exhibits demonstrate they complied with the requirements for a non judicial foreclosure-they provided the Notice of Default and a Notice of Trustee's Sale in a manner prescribed by the DTA. Mills' reply continues to offer bare assertions that he did not receive the proper notice, despite the exhibits.

Even though the initial Notice of Default may list an incorrect address on the verification of the posting on the Property, BANA posted a copy to another address provided by Mills. Additionally, Mills does not provide evidence showing he tried to enjoin the sale of his house before it was sold at auction. Because Mills did not challenge the foreclosure and pending sale of the Property before it was sold, he cannot attempt to recover the Property. Mills has not (and cannot) plausibly assert that BANA has violated the DTA. BANA's Motion to Dismiss Mills' DTA claims GRANTED these claims are DISMISSED with prejudice and without leave to amend.

**2. *Breach of Contract***

Mills claims that he and BANA formed a contract when he submitted the MHA loan application-and the terms of this contract, specifically BANA's website "FAQ," precluded BANA from foreclosing on the home while the MHA loan application was being reviewed. BANA argues that the application does not and cannot form an actionable contract.

Alternatively, it argues that the loan modification application did not modify the existing loan contract because no consideration was received. Even if the loan application created a new contract or modified the existing loan contract, BANA contends that the contract did not include the promise to not foreclose on the Property while the application was being reviewed. BANA also adds that the Deed of Trust permitted the foreclosure.

A contract is formed when there is an offer, an acceptance, and consideration. *E.g. FDIC v. Uribe,* 171 Wash.App. 683, 697, 287 P.3d 694 (2012) (quoting *Bulman v. Safeway,* 144 Wash.2d 335, 351, 27 P.3d 1172 (2000)). For a breach of contract claim, there must be (1) a duty imposed by the contract, (2) a breach of duty, and (3) damages. *C 1031 Properties, Inc. v. First American Title Ins. Co.,* 175 Wash.App. 27, 33, 301 P.3d 500 (2013)."There must be consideration separate from that of the original contract for a valid contract modification."*Dragt v. Dragt/DeTray,* 139 Wash.App. 560, 571, 161 P.3d 473 (2007).

*5 Mills has not plausibly alleged (and cannot, consistent with the facts already alleged) that a new contract was formed, the existing loan contract was modified, or that the FAQ was incorporated into a contract. Mills has not provided any facts which show a contract was formed. Even if a contract was formed and reviewing the situation in the best possible light-

BANA extending the MHA program to Mills was an offer and his submission of the application was an acceptance-there was no consideration was exchanged for the application. Similarly, assuming the application could be a modification to the contract for the loan, this modification would not be part of the contract because there was no consideration. Even if Mills could prove a contract was created or modified, his novel claim of the FAQ being incorporated as part of the contract is not supported by any law or fact asserted is the case. In addition, the terms of the Deed of Trust permitted BANA to continue to foreclose the Property even as the MHA loan modification was being processed. Mills' assertions, without more, does not show that a contract was formed or violated when he submitted the MHA loan application or that BANA violated a contract. BANA's Motion to Dismiss Mills' contract claim is GRANTED, and this is DISMISSED with prejudice.

**3. *Equitable Estoppel***

Mills claims that BANA breached its representations that his loan would not be foreclosed while he was in consideration for the MHA loan modification. To sufficiently assert a claim for equitable estoppel, Mills must still be able to enjoin BANA from foreclosing on the property. Because RCW 61.24.127 prevents Mills from enjoining BANA, he states a claim for relief which cannot be granted. BANA's Motion to Dismiss this claim is GRANTED, and this is DISMISSED with prejudice.

**4. *Consumer Protection Act***

Mills claims that BANA's conduct while his MHA application was being considered was an unfair and deceptive practice. As evidence, he claims that BANA violated the 14 day mediation request required under RCW 61.24.31(c), thus violating the DTA. BANA argues that Mills has not sufficiently alleged that the foreclosure process was unfair or deceptive, or had an impact on the public interest.

In order to prevail on a private CPA claim, Mills must prove: (1) an unfair or deceptive act or practice; (2) that occurs in trade or commerce; (3) an impact on the public interest; (4) injury to the plaintiff in his or her business or property; and (5) a causal link between the unfair or deceptive act and the injury suffered. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wash.2d 778, 785, 719 P.2d 531 (1986). The failure to establish even one of these elements is fatal to a plaintiff's claim. *Id.* at 793, 719 P.2d 531.

An unfair or deceptive act or practice requires the plaintiff to prove that the act "had the capacity to deceive a substantial portion of the public."*Id.* at 785, 719 P.2d 531. The first two elements of a CPA claim may be satisfied by establishing that the alleged act constitutes a *per se* unfair act or practice, which exists when a statutory violation has been "declared by the Legislature to constitute an unfair or deceptive act in trade or commerce."*Id.* at 785–86, 719 P.2d 531. A *per se* unfair trade practice requires the legislature to " 'specifically define[ ] the exact relationship between a statute and the CPA.' " *Anderson v. Valley Quality Homes, Inc.,* 84 Wash.App. 511, 516, 928 P.2d 1143 (1997) (quoting *Hangman Ridge,* 105 Wash.2d at 787, 719 P.2d 531). Such *per se* unfair practices are limited to specific legislative declarations that violation of the underlying statute constitutes an unfair or deceptive act or practice. *See id.* at 518–19, 719 P.2d 531. RCW 61.24.135 describes per se violations within the DTA; one of the violations is a failure to mediate in good faith. *See*RCW 61.24.135(2)(a); RCW 61.24.163(7)(a)(iii).

***6** To establish that a defendant's actions injures the public interest, the plaintiff must establish that the actions: "(1) Violates [a statute within the CPA]; (2) Violates a statute that contains a specific legislative declaration of public interest impact; or (3)(a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons."RCW 19.86.093. Mills's Complaint does not satisfy the first and third elements. Mills fails to assert that BANA's actions were unfair or deceptive. The FAQ statements were not promises or implicit guarantees, and Mills had ample notice (for more than a year) that, despite the FAQ, his own foreclosure was going forward. Mills received all of the required notices prior to the foreclosure sale in compliance with the DTA. BANA acted within its authority as described in the Deed of Trust when the property was sold. Additionally, Mills asserts that BANA violated the 14 day mediation request, but he did not offer anything else beyond this assertion to establish the *per se* violation. Mills has not sufficiently alleged that BANA's actions were a violation of the DTA or were unfair or deceptive.

Nor can Mills plausibly allege that BANA's actions affect the public interest. His Complaint does not show that BANA actions violate the CPA, violate a specific legislative declaration of public interest impact, or that they could have or did cause injury to other people. Mills' CPA claim fails because he cannot plausibly claim that BANA's FAQ or actions were a deceptive or unfair promise or guarantee, or that BANA's actions impact the public interest. BANA's

Motion to Dismiss this claim is GRANTED, and it is DISMISSED with prejudice.

**5. *Promissory Estoppel***

Mills claims that BANA's (website) promise not to foreclose while his MHA loan application was in process led him to not seeking alternatives and resulted in the completion of the foreclosure sale. BANA argues that Mills has not and cannot plausibly allege that any promise was made to him that he would be approved for a loan modification, and that any claimed reliance on such a promise was not justifiable or equitable as a matter of law.

To sufficiently assert a promissory estoppel claim, Mills must establish the following elements:

> (1) A promise which (2) the promisor should reasonably expect to cause the promisee to change his position and (3) which 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.

*Corbit v. J.I. Case Co.,* 70 Wash.2d 522, 539, 424 P.2d 290 (1967).

Here, Mills was already delinquent and in foreclosure at the time he submitted the MHA application. His position did not change, and he did not assert any additional opportunities he had to go forgo once he submitted the MHA application. Also, the sale of the property cannot be altered because RCW 61.24.127, discussed earlier, prevents non-monetary remedies post-sale. Because Mills could not change his position or forgo opportunities based on the MHA loan application and RCW 61.24.127 precludes non-monetary remedies, his claim for relief cannot be granted. BANA's Motion to Dismiss this claim is GRANTED, and this is DISMISSED with prejudice.

**6. *Quiet Title***

*7 Mills claims that he is allowed to quiet title against those who assert a hostile right to his property. As discussed earlier, RCW 61.27.127 post-sale claims are limited to monetary damages and he states a claim for relief which cannot be granted. BANA's Motion to Dismiss this claim is GRANTED, and this is DISMISSED with prejudice.

**7. *Restitution for Violation of the Consumer Protection Act***

Mills claims that BANA engaged in unfair and deceptive practices, which included violating RCW 61.24.040(5)-this requires the Trustee sale to occur on a Friday, unless Friday is a legal holiday-by selling the Property on February 28, 2014. February 28, 2014, was a Friday. BANA's Motion to Dismiss this claim is GRANTED, and this is DISMISSED with prejudice.

**8. *Intentional Infliction of Emotional Distress***

Mills claims that the sale of the property caused the intentional infliction of emotional distress to him. A claim for the intentional infliction of emotional distress includes a requirement that the conduct was "beyond all possible bounds of decency ... [and] utterly intolerable in a civilized community."*Kloepfel v. Bokor,* 149 Wash.2d 192, 195, 66 P.3d 630 (2003). Mills does not provide any assertions that the sale was beyond the bounds of decency and utterly intolerable, and he has not pled any facts to state a claim for relief. BANA's Motion to Dismiss this claim is GRANTED, and it is DISMISSED with prejudice.

## III. CONCLUSION

Defendant BANA's Motion to Dismiss Mills' claims is GRANTED and all of his claims are DISMISSED. Because he cannot plausibly amend these claims to cure their fatal defects, leave to amend is DENIED and the claims are dismissed with prejudice.

**All Citations**

Slip Copy, 2014 WL 4202465

Footnotes

1 While BWMW's current business name is now Bishop, Marshall & Weibel, this order will use BWMW since both Mills and BANA refer to it as BWMW. BWMW has already been dismissed from the case.

2 Mills is pro se, and his Reply was four days late. The court will consider it in the absence of prejudice to BANA.

3 Mills also claims that BANA told him to stop paying his loan, but he does not indicate when BANA advised him to stop paying.

4 The Declaration of Posting in exhibit 1 appears to have a typo for the address of the Property; however, the posting was still done at one of the listed addresses for Mills in the Affidavit of Mailing included with the Notice of Default.

5 *See* footnote 1 about BANA's claim for Mills' tardy Reply to the Motion to Dismiss.

**End of Document**

2012 WL 678148
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Tacoma.

Gregory A. MYERS, Plaintiff,
v.
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Joan H. Anderson, EVP, on behalf of Flagstar Bank, Flagstar Bank, FSB, and MTC Financial, d/b/a Trustee Corps, Defendants.

No. 11–cv–05582 RBL. | Dkts. Nos. 8, 9. | Feb. 24, 2012.

**Attorneys and Law Firms**

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**ORDER GRANTING MOTIONS TO DISMISS**

RONALD B. LEIGHTON, District Judge.

***1** In 2009, Plaintiff Gregory A. Myers defaulted on a promissory note owned by Defendant Flagstar Bank, leading the bank to foreclose his residential property as security for repayment of the note. Mr. Myers challenges the foreclosure, asserting claims for wrongful foreclosure, fraud, breach of good faith and fair dealing, violations of the Washington Consumer Protection Act and Washington Deed of Trust Act, and tortious gross negligence. Because the Complaint lacks factual support under any theory, the Court **GRANTS** the motions and **DISMISSES** the case with prejudice.

## I. FACTUAL BACKGROUND

### A. Plaintiff's Loan and Default

In July 2007, Plaintiff borrowed $417,000 from Accel Mortgage to buy the residential property in dispute here.[1] Decl. of Catherine Gossett, Ex. A. In the process, Plaintiff signed both a promissory note ("Note") and deed of trust ("Deed"), the latter of which grants the Note-holder the power to foreclose if Mr. Myers defaults.[2] *Id.,* Ex. F ¶ 22. The Deed lists Accel Mortgage as the lender, Mr. Myers as the borrower, Mortgage Electronic Systems, Inc. ("MERS") as the nominee for the lender and its successors and assigns, and Joan H. Anderson, of Flagstar Bank, as trustee. *Id.* at 1–2.Accel subsequently sold the Note to Flagstar Bank. *Id.,* Ex. A at 3 (showing endorsement of Note to Flagstar); Ex. D.

In 2009, Mr. Myers defaulted. Decl. of Rande Johnsen, Ex. A at 2. Mr. Myers does not dispute signing the Note and Deed and does not dispute the default. *See* Pl.'s Resp. at 2.

On May 6, 2010, MERS assigned the Deed to Flagstar, which simultaneously appointed MTC as the new trustee. Decl. of Robert Stoudemire, Exs. B & C ("Assignment of the Deed of Trust" and "Appointment of Successor Trustee").

### B. Plaintiff's Claims.

Mr. Myers alleges that the Defendants were not "properly authorized under the Deed of Trust Act to execute a Notice of Default, a Notice of Trustee's Sale, or a Notice of Foreclosure."Compl. ¶ 2.16. Further, Mr. Myers asserts that the Defendants have not provided "any **bona fide,** tangible evidence into the records that ANY of them are in FACT the bona fide holder in due course ... of the promissory note/loan in question ...."*Id.* ¶ 2.18.

Mr. Myers also bases his claims on MERS's role in the foreclosure: "MERS was never in a position to assign Flagstar as the beneficiary because MERS is not the lender, has given nothing of value, is not the beneficiary, and Plaintiff owes nothing to MERS."Pl.'s Resp. at 2. In sum, the Complaint rests its claims on the premise that MERS's role was improper and thus tainted the entire foreclosure process.

Based on these allegations, Mr. Myers presents six claims, each addressed below.

## II. DISCUSSION

Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir.1990). A complaint must allege facts to state a claim for relief that is plausible on its face. *See Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009).

A claim has "facial plausibility" when the party seeking relief "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."*Id.* Although the Court must accept as true a complaint's well-pled facts, conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper Rule 12(b)(6) motion. *Vasquez v. L.A. County,* 487 F.3d 1246, 1249 (9th Cir.2007); *Sprewell v. Golden State Warriors,* 266 F.3d 979, 988 (9th Cir.2001)."[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level."*Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citations and footnote omitted). This requires a plaintiff to plead "more than an unadorned, the-defendant-unlawfully-harmed-me accusation."*Iqbal,* 129 S.Ct. at 1949 (citing *Twombly* ).

***2** Here, the Complaint fails to state facts sufficient to sustain a claim under any legal theory, and thus, Mr. Myers' claims fail as a matter of law.

**A. Plaintiff's Claims for Wrongful Foreclosure and Violation of the Deed of Trust Act.**

Mr. Myers requests damages resulting from the "wrongful foreclosure" of his property. Compl. at 6–7. He asserts that "Defendants are misrepresenting their right to enforce a debt and foreclose," that MERS violated the Deed of Trust Act by "attempt[ing] to assign the Deed," and that Flagstar violated the Deed of Trust Act by "attempt[ing] to appoint MTC Financial, Inc. as successor trustee."*Id.* at 7. In response, Defendants argue there "is no claim for wrongful foreclosure absent a foreclosure," that Washington law does not permit a party to recover damages for wrongful foreclosure initiation, and that in any event, Defendants did not violate the Deed of Trust Act. Flagstar's Mot. to Dismiss at 12–13.

**1. Availability of Pre–Foreclosure Damages Under the Washington Deed of Trust Act.**

The Washington Deed of Trust Act, RCW 61.24 *et seq.,* governs the foreclosure process and furthers three objectives: (1) to ensure that nonjudicial foreclosure remains "efficient and inexpensive"; (2) to provide an "adequate opportunity for interested parties to prevent wrongful foreclosure"; and (3) to "promote the stability of land titles."*Cox v. Helenius,* 10 Wn.2d 383, 387 (1985) (citing *Peoples Nat'l Bank v. Ostrander,* 6 Wash.App. 28, 491 P.2d 1058 (1971)). In pursuit of those goals, the Act prescribes a borrower's remedies before and after foreclosure.

The Washington Supreme Court has held that § 61.24.130 "sets forth ***the only*** means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure."*Cox,* 10 Wash.2d at 388, 116 P.2d 756 (emphasis added). The statute allows a grantor to restrain a sale "on any proper legal or equitable ground."Wash. Rev.Code § 61.24.130(1). A court must, however, "require as a condition of granting the restraining order or injunction that the applicant pay to the clerk of court the sums that would be due on the obligation ...." *Id.*Indeed, the legislature was sufficiently concerned by the prospect of frivolous injunction requests that it allowed a court to "condition granting the restraining order or injunction upon the giving of security by the applicant ... for the payment of such costs and damages, including attorneys' fees, as may be later found by the court to have been incurred or suffered by any party by reason of the restraining order or injunction." *Id.* § 61.24.130(1)(b).

Nowhere does the Deed of Trust Act provide damages if a plaintiff successfully restrains a foreclosure sale, and courts have refused to read damages into the Act.[3] *See Vawter v. Quality Loan Serv. Corp. of Wash.,* 707 F.Supp.2d 1115, 1123 (W.D.Wash.2010) ("to the extent the legislature intended to permit a cause of action for damages, it could have said so") (citing *Pfau v. Wash. Mutual, Inc.,* 2009 WL 484448, at *12 (E.D.Wash. Feb.24, 2009); *Krienke v. Chase Home Fin., LLC,* 140 Wash.App. 1032 (2007)). To do so would "potentially upset the balance struck by the legislature" in creating the Deed of Trust Act's nonjudicial foreclosure process and "undermine the legislature's goal that the nonjudicial foreclosure process remain[ ] efficient and inexpensive."*Id.* at 1123–24.

***3** The remedies change once a trustee completes a foreclosure. After foreclosure, a borrower may bring suit only for damages, and may do so only for fraud or misrepresentation, violations of the Washington Consumer Protection Act, or a failure of the trustee to "materially comply" with the Deed of Trust Act. Wash. Rev.Code § 61.24.127(1)(a)-(c); .127(2)(b).

In this case, Mr. Myers seeks damages for wrongful foreclosure. Am. Compl. ¶ 3.6. As discussed above, no foreclosure has occurred, and thus, no damages are available. Although not framed as such, Mr. Myers' claim is, in fact, a claim for violations of the Deed of Trust Act based on MERS's allegedly improper role. *See id*. ¶¶ 3.4–3.5.

**2. Defendants' Compliance with the Washington Deed of Trust Act.**

Mr. Myers asserts that MERS's involvement taints the foreclosure process, and thus, Defendants have violated the Deed of Trust Act. Courts routinely reject these claims.

First, Mr. Myers agreed that MERS would serve as "the nominee for Lender and Lender's successors and assigns."Gossett Decl., Ex. F. The Deed of Trust Act states that "parties may insert in [a] mortgage any lawful agreement or condition," including the agreement that MERS serve as an agent. Wash. Rev.Code § 61.12.020; *see also Salmon v. Bank of Am. Corp.,* 2011 WL 2174554, at *8 (E.D.Wash.2011) (finding no issue where deed of trust expressly allowed for MERS to serve as nominee); *Klinger v. Wells Fargo Bank, N.A.,* 2010 WL 5138478, at *7 (W.D.Wash. Dec.9, 2010) (dismissing argument that MERS assignment is invalid); *Daddabbo v. Countrywide Home Loans, Inc.,* 2010 WL 2102486 (W.D. Wash.2010 (same); *Yawter,* 707 F.Supp.2d at 1125–26 (same). The Ninth Circuit too has expressly rejected Mr. Myers' assertion: "[T]he disclosures in the deed indicate that MERS is acting 'solely as nominee for Lender and Lender's successors and assigns.'...By signing the deeds of trust, the plaintiffs agreed to the terms and were on notice of the contents."*Cervantes v. Countrywide Home Loans, Inc.,* 656 F.3d 1034 (9th Cir.2011).

Second, Mr. Myers fails to allege that MERS took any action in regards to him. He does not allege that MERS initiated or participated in the foreclosure process in any way. The Complaint thus fails to allege facts sufficient to state a claim for relief.

Once the MERS-related arguments are dispatched, little remains of the Complaint. Mr. Myers's assertion that Flagstar improperly appointed MTC fails, as it was predicated on an improper assignment from MERS. *See* Am. Compl. ¶ 3.5; *see also* Pl.'s Resp. at 20 ("Flagstar cannot be the beneficiary as the transfer of the deed of trust was defective."). Even if MERS had improperly assigned the Deed, Flagstar is empowered as the beneficiary to appoint the trustee because it holds Mr. Myers's Note, not because of the assignment. Under Washington law, a beneficiary is, by definition, the party holding the note: " 'Beneficiary' means the holder of the instrument or document evidencing the obligations secured by the deed of trust."Wash. Rev.Code § 61.24.005(2). The statute merely codifies the longstanding common law rule that the deed follows the debt: "Transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter."*In re Jacobsen,* 402 B.R. 359, 367 (noting that "this principle is neither new nor unique to Washington") (quoting *Carpenter v. Longan,* 16 Wall. 271, 83 U.S. 271, 275, 21 L.Ed. 313 (1872)); *see also Fidelity & Deposit Co. of Maryland v. Ticor Title Ins. Co.,* 88 Wash.App. 64, 68–69, 943 P.2d 710 (1997) (noting "the maxim that the mortgage follows the debt"). Flagstar, as the Note-holder and beneficiary, properly appointed MTC.

*4 Next, Mr. Myers faults Flagstar executive vice president Joan Anderson for serving as the initial trustee. Ms. Anderson took no action as trustee, and Flagstar appointed MTC as soon as MERS assigned the Deed. The Complaint thus asserts no viable claim related to Ms. Anderson.

Mr. Myers also claims that MTC lacked a street address where service could be made, in violation of Wash. Rev.Code § 61.24.030(6). Mr. Myers does not allege that MTC WA, the subsidiary of MTC Financial that serves as trustee, lacks a street address or any other information, and the claim therefore fails.

In sum, the Complaint fails to allege any facts supporting a violation of the Deed of Trust Act, Wash. Rev.Code § 61.24 *et seq* ., and thus, the Court must dismiss the claim.

**B. Plaintiff's Claim for Fraud.**

To state a claim for common law fraud, a plaintiff must allege nine elements: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by plaintiffs; (6) plaintiffs' ignorance of its falsity; (7) reliance on the representation; (8) plaintiffs' right to rely upon it; and (9) actual harm. *Stiley v. Block,* 130 Wash.2d 486, 506, 925 P.2d 194 (1996). These facts must be pled with particularity. Fed.R.Civ.P. 9(b). In other words, a plaintiff must identify the representations, that they were false when made, the speaker, when and where the statements were made, and how the representations were false or misleading. *In re GlenFed, Inc. Sec. Litig.,* 42 F.3d 1541, 1547 n. 7 (9th Cir.1994).

Mr. Myers's fraud claim is entirely derivative of his already-dismissed claims above. *See* Am. Compl. ¶¶ 4.1–4.5. The Complaint contains no facts suggesting fraud.

**C. Plaintiff's Claim for Breach of Good Faith and Fair Dealing .**

Mr. Myers asserts that Defendants violated a "duty to report truthful and complete information on documents that they recorded in the records of Clark County," and provide Mr. Myers with "fair and honest disclosure of all facts that might be presumed to influence him in regards to his actions ...." Am. Compl. ¶¶ 5.4–5.5.

Washington courts "have consistently held there is no 'free-floating' duty of good faith and fair dealing that is unattached to an existing contract."*Keystone Land & Dev. Co. v. Xerox Corp.,* 152 Wash.2d 171, 177, 94 P.3d 945 (2004) (citing *Badgett v. Security State Bank,* 116 Wash.2d 563, 807 P.2d 356 (1991)). Thus, the duty "arises only in connection with terms agreed to by the parties."*Badgett,* 116 Wash.2d at 360, 804 P.2d 621.

Here, Mr. Myers cites no contract term that Defendants have failed to abide in good faith. Instead, the claim appears again predicated on Mr. Myers's earlier claims relating to improper assignment and improper appointment of successor trustee, both meritless.

To the extent a statutory duty of good faith applies to the trustee, Wash. Rev.Code § 61.24.010(4), Mr. Myers identifies no inappropriate conduct.

**D. Plaintiff's Claim for Violation of the Washington Consumer Protection Act, Wash. Rev.Code § 19.86 et seq.**

***5** To state a claim under the CPA, a plaintiff must allege (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) that impacts the public interest; (4) causes injury to the plaintiff's business or property; and (5) that injury is causally linked to the unfair or deceptive act.*Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wash.2d 778, 780, 719 P.2d 531 (1986).

Mr. Myers's CPA claim is entirely derivative of his previous meritless claims. He alleges no unfair or deceptive act, an impact on the public interest. The Court therefore dismissed the claim.

**E. Plaintiff's Claim for Gross Negligence.**

Mr. Myers asserts that "Defendants' actions fell below the standard of care required to be exercised in the mortgage lending industry," and therefore seeks tort damages as a result. Am. Compl. ¶ 7.3.

As the Washington Supreme Court has held, "[a]n injury is remediable in tort if it traces back to [a] breach of a tort duty arising independently of the terms of the contract."*Eastwood v. Horse Harbor Found., Inc.,* 170 Wash.2d 380, 389, 241 P.3d 1256 (2010). Mr. Myers identifies no independent tort duty on which to base his claim. Indeed, the parties' relationship is governed by contract, and the attendant risks are allocated by that contract.

**F. Leave to Amend.**

Leave to amend shall be freely given when justice so requires. Fed.R.Civ.P. 15(a)."If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits."*Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). On a 12(b) (6) motion, "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts."*Cook, Perkiss & Liehe v. N. Cal. Collection Serv.,* 911 F.2d 242, 247 (9th Cir.1990). However, where the facts are not in dispute, and the sole issue is whether there is liability as a matter of substantive law, the court may deny leave to amend. *Albrecht v. Lund,* 845 F.2d 193, 195–96 (9th Cir.1988).

The facts are not in dispute in this case; thus, the Court denies leave to amend.

## III. CONCLUSION

For the reasons stated above, the Court hereby **GRANTS** the motions to dismiss [Dkts. # 8, 9], and **DISMISSES** the case with prejudice.

**All Citations**

Not Reported in F.Supp.2d, 2012 WL 678148

Footnotes

1 Although Plaintiff and his then-wife borrowed the funds, neither party contests that Mr. Myers is now solely responsible for the property since the dissolution of the marriage. Thus, the Court will refer only to Mr. Myers.

2 The court may properly consider the Note, Deed of Trust, Assignment of the Deed of Trust, Notice of Trustee's Sale, and other exhibits because they are referenced in the Complaint, integral to the proceedings, and their authenticity undisputed. *Dent v. Cox Comm. Las Vegas, Inc.,* 502 F.3d 1141, 1143 (9th Cir.2007) (expressly permitting district court to consider an integral and authentic document outside the pleadings) (citing *Parrino v. FHP, Inc.,* 146 F.3d 699, 705–06 (9th Cir.1998) ("[A] district court ruling on a motion to dismiss may consider a document the authenticity of which is not contested, and upon which the plaintiffs complaint necessarily relies."*Id, superseded by statute on other grounds as noted in Abrego v. The Dow Chem. Co.,* 443 F.3d 676, 681 (9th Cir.2006)).

3 To be clear, a plaintiff might recover damages on independent grounds related to restraining a foreclosure. For example, if a plaintiff brought two claims to restrain a foreclosure—first, for violations of the Deed of Trust Act, and second, for fraud—the plaintiff may not recover damages for the former, but may recover damages for the latter.

**End of Document**

2012 WL 2505742
Only the Westlaw citation is currently available.
United States District Court, D. Montana,
Billings Division.

William J. PAATALO, Plaintiff,
v.
J.P. MORGAN CHASE BANK, N.A.; Bank of America, N.A.; MacKoff Kellogg Law Firm; LPS Field Services, Inc.; and Lender Processing Services, INC., Defendants.

No. CV 10–119–BLG–CSO. | June 28, 2012.

**Attorneys and Law Firms**

William J. Paatalo, Nye, MT, pro se.

Bryant Tchida, Elizabeth Kramer, Leonard Street & Deinard, Minneapolis, MN, Charles K. Smith, Poore Roth & Robinson, Butte, MT, for Defendants.

**ORDER**

CAROLYN S. OSTBY, United States Magistrate Judge.

***1** Pending before the Court are the following motions:

(1) Plaintiff William Paatalo's (hereafter "Paatalo") Motion for Partial Summary Judgment (*Court Doc.* 137),

(2) Chase's Motion for Summary Judgment (*Court Doc.* 186), and

(3) Paatalo's Motion to Re–Open Discovery (*Court Doc.* 212). The remaining defendant, Bank of American N.A. ("BANA"), joins Chase's Motion for Summary Judgment in its entirety. *Court Doc. 193.*Having reviewed these motions and authorities presented thereon, the Court rules as follows.

**I. *BACKGROUND***

The following facts are taken primarily from the documents presented with Chase's motion for summary judgment. Other than as set forth below, Paatalo does not challenge the authenticity of these documents. As noted below, he did not file a Statement of Genuine Issues, as required by the Local Rules. The Court includes here only those facts relevant to resolving the pending motions.

On January 30, 2007, Paatalo purchased residential property in Nye, Montana. He owned two other homes at the time. *Court Doc.* 188–1 at 80–81. He had worked in the mortgage industry about seven years, doing a large percentage of his work with Washington Mutual. *Id.* at 34, 42, 52.

To finance his purchase, he borrowed $294,000 from Washington Mutual Bank FA, executing an Adjustable Rate Note ("Note") (*Court Doc.* 188–5) and a Deed of Trust (*Court Doc.* 188–6). Although Paatalo has refused to testify that he signed the documents, he has not denied that he did so. *Court Doc.* 188–1 at 140 (testifying that the signatures "could be" his). He has acknowledged that he did sign an adjustable rate note and a deed of trust on January 31, 2007, and that he then borrowed $294,400 from Washington Mutual Bank, FA. He attached an unexecuted copy of the Deed of Trust as Exhibit 4 to his Complaint and affirmatively alleged in his Complaint that he is the owner in the Deed of Trust. *Court Doc.* 2 at 5, ¶ 20 *and Exh.* 4. He acknowledges that the signatures on the executed documents appear to be his, as do the initials. *Court Doc.* 188–1 at 141–43.

In the Note, Paatalo promises to repay the principal sum in monthly payments, with interest. *Court Doc.* 188–5 at 1. He acknowledges in the Note that the Lender may transfer it and that a transferee would thereafter be the "Note Holder." *Id.* In the event of Paatalo's default, the Note gives the Note Holder the right to accelerate the principal balance due and to collect late charges, fees and expenses in enforcing the Note. *Id.* at 4. The Note reflects a blank indorsement signed by Cynthia Riley, a Vice President of Washington Mutual Bank FA. *Id.* at 6.

The Deed of Trust is identified as a "Trust Indenture Under the Small Tract Financing Act of Montana."*Court Doc.* 188–6 at 1. It identifies the lender as Washington Mutual Bank, FA, and Stillwater Abstract & Title as the Trustee.*Id.* at 1–2.The Deed of Trust gave notice to Paatalo that the Lender could sell its interest in the Note:

> ***2** The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects

> Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law.

*Id.* at 12.The Deed of Trust also allows the Lender to remove the trustee and to appoint a successor trustee, who "shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law."*Id.* at 13–14.

Washington Mutual sold Paatalo's mortgage loan to WAMU Asset Acceptance Corporation on May 27, 2007, pursuant to a Mortgage Loan Purchase and Sale Agreement and Term Sheet between said companies. *Court Docs.* 190 at 2 *(Barbara Campbell Aff.),* 188–8 *(Mortgage Loan Purchase and Sale Agreement),* and 188–9 *(Term Sheet).* WaMu then deposited the mortgage loan into the WaMu Mortgage Pass–Through Certificates Series 2007–OA3 Trust ("Trust"), pursuant to a Pooling & Servicing Agreement. Court Docs. 188–10, 188–11 at 22. According to these documents, the 207–OA3 Trust then owned Paatalo's Note. LaSalle Bank National Association was the initial Trustee of the Trust (*Court Doc.* 188–10 at 2) and in October 2009 Bank of America became Trustee of the Trust. *Court Doc.* 188–12.

On September 25, 2008, the United States Office of Thrift Supervision seized Washington Mutual Bank and placed it into an FDIC receivership. Court Doc. 188–14. Chase then purchased the assets of the failed Washington Mutual Bank from the FDIC. *Court Doc.* 188–15 at 13. Chase specifically did not assume any liabilities of Washington Mutual. *Id.* Chase took possession of Washington Mutual's mortgage files, including Paatalo's original Note and Deed of Trust. *Court Doc.* 191 at 2.

Paatalo missed several mortgage payments in late 2008 and early 2009. *Court Doc.* 188–1 at 153–54. He again stopped making payments in September 2009.*Id.* On January 21, 2010, Chase filed an Assignment of Trust Indenture (from Chase to LaSalle Bank), Substitution of Trustee (LaSalle Bank substituting Charles Peterson as Successor Trustee in Paatalo's Deed of Trust), and Notice of Trustee's Sale on June 1, 2010. Court Docs. 188–17, 188–18, 188–20. On April 21, 2010, Charles Peterson, as Successor Trustee, cancelled the sale. *See* Court Doc. 188–1 at 171–72; *Court Doc.* 2, Exh. 12.

Paatalo has made no payments since October 2011. *Court Doc. 201 at 3, ¶ 11.*As of February 7, 2012, Paatalo's unpaid principal balance on the loan was $307,422.59.

Additional facts as pertinent to each count are recited below.

## II. *DISCUSSION*

### A. *Summary Judgment Standard*

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."Fed.R.Civ.P. 56(a)."[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact."*Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable fact-finder to return a verdict for the nonmoving party. *Id.*

***3** Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."*Celotex Corp.,* 477 U.S. at 322."A moving party without the ultimate burden of persuasion at trial—usually, but not always, a defendant—has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment."*Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.,* 210 F.3d 1099, 1102 (9th Cir.2000)."In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial."*Id.*

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of his contention that the dispute exists. Fed.R.Civ.P. 56(c); *Matsushita,* 475 U.S. at 586, n. 11.Again, the opposing party must demonstrate that the fact in contention is material, *i.e.,* a fact that might affect the outcome of the suit under the governing law, *Anderson,* 477 U.S. at 248; *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F .2d 626, 630 (9th Cir.1987), and that the dispute is genuine, *i.e.,* the evidence is such that a reasonable jury could return a verdict for the nonmoving party, *Anderson,* 477 U.S. at 248 ("summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party").

To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial."*T.W. Elec. Serv.,* 809 F.2d at 631.Thus, the "purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial."*Matsushita,* 475 U.S. at 587 (quotation omitted).

In resolving a summary judgment motion, the Court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Fed.R.Civ.P. 56(c). The evidence of the opposing party is to be believed, *Anderson,* 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the Court must be drawn in favor of the opposing party, *Matsushita,* 475 U.S. at 587 (citation omitted).

*4 Finally, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita,* 475 U.S. at 587 (citation omitted).

### B. *CHASE'S MOTION FOR SUMMARY JUDGMENT*

#### (1) *Initial Findings*

The Court has repeatedly reminded Paatalo that pro se litigants are bound by the Local Rules. *See, e.g., Court Docs.* 34 at 42, 45; 76 at 5, 199 at 1. As Chase notes in its Reply Brief, Paatalo's response opposing Chase's motion for summary judgment violates several Local Rules. *Court Doc.* 206 at 5–6. Most importantly, Paatalo failed to follow Local Rule 56.1(b), which requires that a party opposing a motion for summary judgment must file a Statement of Genuine Issues, and that the Statement must:

> (1) set forth in serial form each fact on which the party relies to oppose the motion;
>
> (2) cite a specific pleading, deposition, answer to interrogatory, admission or affidavit before the Court to support each fact; and
>
> (3) be filed separately from the ... brief.

The law is clear that by failing to file a Statement of Genuine Issues, Paatalo is deemed "not to raise a triable issue of material fact as to the claims on which the moving party seeks summary judgment."*Peterson v. Time Ins. Co.,* 2012 WL 1755166 (D.Mont.2012) (citing *Deirmenjian v. Deutsche Bank, A.G.,* 2010 WL 3034060 at *7 (C.D.Cal. July 30, 2010)). Summary judgment may properly be entered for Chase and BANA on this basis alone. *Id.*

The motion is also properly granted if the Court considers the arguments presented by Paatalo in his brief opposing Chase's motion. *Court Doc.* 220. Paatalo's brief fails to meaningfully address the arguments and authorities that Chase presents in its Motion (*Court Doc.* 186), Supporting Brief (*Court Doc.* 187), and Statement of Undisputed Facts (*Court Doc.* 192). Paatalo presents several frivolous arguments that clearly lack any merit, such as (1) Paatalo's contention that the Defendants lack standing where the Defendants have asserted no claims, and (2) his contention that the Deed of Trust is unenforceable because "there is no case and controversy so the court lacks jurisdiction over the subject matter."*Court Doc.* 200 at 20, 22.

Paatalo also presents many other arguments for which he cites no authority. The Court is not required to do Paatalo's legal research for him or comb the record on his behalf for factual support for his claims, and it would not be proper for the Court to do so. *See Western Radio Services Co. v. Qwest Corp.,* 678 F.3d 970 (9th Cir.2012)."Arguments made in passing and not supported by citations to the record or to case authority are generally deemed waived."*United States v. Graf,* 610 F.3d 1148, 1166 (9th Cir.2010). Paatalo's arguments that are not supported by citation to legal authority or to the record are rejected.

*5 Arguments that Paatalo presents addressing issues arguably pertinent to Chase's motion are discussed below.

**(2) *Chase's Right to Foreclose on the Note/Deed***
The fundamental premise of most of Paatalo's claims is his contention that Defendants had no legal right to initiate a non-judicial foreclosure. Paatalo contends that Chase is not a holder in due course of the Note and was not otherwise entitled to initiate non-judicial foreclosure proceedings under the Note and Deed of Trust. *See Court Doc.* 2 at 5–6.

In its summary judgment brief, Chase contends, *inter alia,* that it is the holder of the Note and is entitled to enforce it pursuant to the Uniform Commercial Code, MCA § 30–3–204. This statute provides that if an indorsement is made to an identified person, it is a "special indorsement." But if an indorsement is not a special indorsement, it is a "blank indorsement." MCA § 30–3–204(2)."When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed."*Id.*

Chase contends that because it is in possession of Paatalo's Note, which contains a blank indorsement, it is a "holder" within the UCC's definition (*see*MCA § 30–1–201(2)(v)(i)) and may enforce it. *See*MCA § 30–3–301 (a holder of an instrument is a "person entitled to enforce" it). Chase cites numerous recent decisions holding that, despite securitization of a note, a holder of a note is entitled to enforce it. *See, e.g., Horvath v. Bank of New York, N.A.,* 641 F.3d 617, 621 (4th Cir.2011) (holding, under Virginia law, that whoever possesses a note endorsed in blank has full power to enforce it and the deed of trust executed contemporaneously with it); *Edwards v. Ocwen Loan Servicing, LLC,* 2012 WL 844396 at * 5 (E.D.Tex.2012); *Corales v. Flagstar Bank, FSB,* 822 F.Supp.2d 1102, 1107–08 (W.D.Wa.2011).

Paatalo's response does not discuss these authorities cited by Chase. *See Court Doc.* 200 at 10–12. Instead, he contends that Chase has the burden of establishing the validity of his signature and that they have not done so. *Court Doc.* 200 at 10. Although he mistakenly cites the UCC 3–308, the Court presumes that Paatalo is relying on MCA § 30–3–307, which provides in pertinent part:

> In an action with respect to an instrument, the authenticity of and authority to make each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature.

Paatalo's reliance on this statute does not raise a genuine issue of material fact that precludes summary judgment. He does not state in which "pleading" he "specifically denied" the validity of his signature. In his only pleading in this action, his Complaint (*see Fed.R. Civ.P. 7(a)),* he does not specifically deny signing the Note and Deed of Trust. His Complaint instead alleges that he did enter into a loan agreement with Washington Mutual Bank, N.A., on January 30, 2007, and that he "relied upon the due diligence of the apparent 'Lender' (i.e., actually the Loan Seller) in executing and accepting the closing documents."*Court Doc.* 2 at 5 ¶ 15, and at 9 ¶ 32. His somewhat conflicting allegation, made only on information and belief, that the Note was not executed by him "or if it was executed, has long since been lost or intentionally destroyed, or paid in full, or assigned to a third party...." (*Court Doc.* 2 at 5, ¶ 18) is not a specific denial. The Official Comment to this UCC section states that "[i]n the absence of such specific denial the signature stands admitted, and is not in issue."

***6** Although Paatalo raises questions about how his signature appears on the Note and Deed of Trust (*see, e.g., Court Doc. 200 at 5, 19–20),* these questions were not raised in a timely manner, as this Court noted in a prior Order. *Court Doc.* 203 at 6. Furthermore, he has not stated how the allegedly altered documents differ in content from the documents he signed and thus does not raise genuine issues of material fact on this issue.

In addition, Paatalo's allegation that the deed of trust is fatally defective because the notarial seal lacks an execution date also fails. It is true that MCA § 1–5–609 requires that a notarial act be evidenced by, inter alia, the date on which the act was performed. But the Court concludes that the lack of the date on the notarial seal here does not render the deed of trust invalid for several reasons. First, Paatalo did not raise this claim in a timely manner. Second, he has cited no authority supporting his position that absence of the date of the notarial act renders the notarized document invalid. Third, as noted above, Paatalo already has acknowledged that did sign a deed of trust on January 31, 2007, when he borrowed $294,400 from Washington Mutual Bank, FA. As discussed above, he affirmatively alleged in his Complaint that he is the owner in the Deed of Trust. *Court Doc.* 2 at 5, ¶ 20 and Exh. 4. He acknowledges that the signature on the deed of trust appears to be his, as do the initials. *Court Doc.* 188–1 at 141–43. And fourth, the deed of trust bears the notation on its first page that it was recorded in Stillwater County, Montana, on January 31, 2007. Because Paatalo acknowledges that he signed a deed of trust on January 31, 2007, and because it was recorded that same day, it can be ascertained that the notarial act also occurred on that day. For all these reasons, there is no basis to conclude that the deed of trust is invalid merely because the notary public did not indicate the date of the notarial act. Although there appears to be no Montana authority on this question, other courts addressing the issue are in accord. *See, e.g., Lasalle Bank N.A. v. Zapata,* 2009–Ohio–3200, 921 N.E.2d 1072 (Ohio Ct.App. 6th Dist. Ottawa County 2009) (mortgage was valid and enforceable by mortgagee's assignee, even if it had been defectively executed by being signed by mortgagor outside the presence of a notary, absent any allegation that it had been obtained by fraud); *Valeriano–Cruz v. Neth,* 14 Neb.App. 855, 716 N.W.2d 765 (2006) (failure of notary public to endorse his commission's expiration date on arresting officer's sworn report containing the recitations required by implied consent statute did not invalidate the report); *Levitt v. 1317 Wilkins Corp.,* 58 N.Y.S.2d 507 (1945, Sup) (the fact that an acknowledgment bore the date of January 14, 1926, whereas the deed was dated January 14, 1927, and was recorded January 15, 1927, was held in, in effect, not to render the acknowledgment ineffective, the owner whose chain of title included such deed being held entitled to specific performance on the part of a purchaser of the property); *Spero v. Bove,* 116 Vt 70, 70 A.2d 562 (1950) (the operative effect of a deed was held not to be defeated because the acknowledgment was undated); *Hasley v. Bunte,* 176 Okla. 457, 56 P.2d 119 (1936) (held that instrument was not vitiated even though neither deed nor acknowledgment of it was dated); *Barouh v. Israel,* 46 Wash.2d 327, 281 P.2d 238 (1955) (supporting rule that omission of date in acknowledgment is not a fatal defect).

*7 To the extent that Paatalo argues that the security interest is unenforceable because of securitization of the Note, or because of split ownership of the Note and Deed of Trust, these arguments have recently been rejected by this Court in *Heffner v. Bank of America,* 2012 WL 1636815 (D.Mont.2012), and the same reasoning is adopted here.

To the extent that Paatalo challenges the validity of the various assignments, purchase agreements, and pooling or servicing agreements, this Court concludes, as many courts have previously held, that a borrower does not have standing to challenge assignments and agreements to which it is not a party. *See, e.g., Edwards v. Ocwen Loan Servicing, LLC, supra; Bank of New York Mellon v. Sakala,* 2012 WL 1424665 (D.Haw.2012) (holding that the borrower lacked standing to raise a violation of a pooling and servicing agreement). Furthermore, the Montana Supreme Court long ago rejected arguments that a note holder needed to establish title to the note and mortgage by written assignments, holding:

> The note for which the mortgage was given as security ... shows an indorsement in blank. This was sufficient evidence of title to establish prima facie ownership. It is generally held that possession of a negotiable note payable to order and indorsed is prima facie evidence of ownership ... and the same rule applies to nonnegotiable notes.....

*Ingebrightsen v. Hatcher,* 288 P. 1023, 1024 (1930) (*citations omitted* ).

The state continues to recognize the transferability of notes indorsed in blank by adopting the UCC provisions cited above.

Accordingly, the Court concludes that there is no genuine issue of material fact with respect to Chase's authority to enforce the Note and Deed of Trust at issue. With these conclusions as a foundation, the Court turns to the specific claims in Paatalo's complaint.

### (3) *Count I: Violation of the Real Estate Settlement Procedures Act*

In Count I, Paatalo alleges that Chase violated the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2605, 2607, by accepting charges for rendering of real estate services "which were in fact charges for services other than those actually performed" and for "willful non-compliance by intentionally ignoring Plaintiff's 'Qualified Written Requests' and not responding within the 20–day, and 60–day statutory requirements."*Court Doc.* 2 at 25.

Chase argues (1) that it cannot be held liable for any RESPA violations occurring before it took over as servicer of the loan on September 25, 2008, (2) that it cannot be held liable for any RESPA violation because Chase is the holder of Paatalo's Note with authority to enforce it, and (3) that it cannot be held liable for failure to respond to Paatalo's "qualified written request" (QWR) under RESPA, because Paatalo has not identified any damages he suffered as a result of the violation (*citing Court Doc.* 188–23 at 14–15). Chase admits that it did in fact fail to respond to Paatalo's QWR dated July 22, 2010.

***8** Paatalo's response brief did not address Chase's arguments on his RESPA claim. Courts have held that a plaintiff must prove actual damages to recover on a RESPA claim. *See, e.g., Zander v. ACE Mortg. Funding LLC,* 2012 WL 601896 (C.D.Cal.2012); *Hensley v. Bank of New York Mellon,* 2011 WL 4084253 at *4 (E.D.Cal.2011). In addition, a single failure to respond to a QWR does not constitute a "pattern or practice" for purposes of RESPA. *Laporta v. Bank of America,* 2012 WL 938716 at *2.

In response to Chase's motion, Paatalo did not raise a genuine issue of material fact as to his alleged damages. Accordingly, the Court will grant summary judgment to Chase on Count I.

**(4) *Count II: Fraudulent Misrepresentation***

Count II alleges fraudulent misrepresentation claims arising from conduct that occurred before and at the loan closing on January 30, 2007. *Court Doc.* 2 at 26. Chase argues that it did not make any such misrepresentations and that it is not liable for any representations made by Washington Mutual. Chase did not become involved with this loan until it purchased the assets of Washington Mutual more than one year later, without assumption of Washington Mutual's liabilities. Paatalo presents no contrary evidence to raise an issue of fact. For this reason, the Court concludes that Chase is entitled to summary judgment on Count II.

**(5) *Count III: Breach of Fiduciary Duty***

Count III also is based on conduct occurring before or at the loan closing. Paatalo alleges that defendants breached fiduciaries duties to him by fraudulently inducing him to enter into the mortgage transaction. *Court Doc.* 2 at 26. As noted above, Chase was not a party to the loan transaction until 2008.

Additionally, a bank does not owe a fiduciary duty unless special circumstances exist where the bank acts as an advisor or asserts influence in a customer's business. *First Security Bank v. Abel,* 184 P.3d 318, 323–24 (Mont.2008). There is no allegation or contention here regarding such a special relationship.

For the above reasons, Chase is entitled to summary judgment on Count III.

**(6) *Count IV: Unjust Enrichment***

Paatalo's unjust enrichment claim is based on fees he paid to obtain credit and in settlement of the loan. *See Court Doc.* 2 at 27. Again, Chase was not at that time involved with this loan.

Additionally, the Court has concluded above that Chase, as a holder of the Note, does have the authority to enforce it. Accordingly, any contention that Chase is unjustly enriched by virtue of enforcing its rights as a holder, must fail. Chase is entitled to summary judgment on Count IV.

**(7) *Counts V, VI: Civil Conspiracy, Civil RICO***

Chase argues that, to the extent that Paatalo's claims are based on his allegation that Chase did not have legitimate authority to enforce his Note, they fail. *Court Doc.* 187 at 25. Chase also argues: (1) that Paatalo has no related damages and that there is no genuine dispute that he has not suffered concrete damage as a result of the alleged conspiracy or RICO, (2) that Paatalo cannot prove any unlawful or predicate acts; (3) that Paatalo cannot prove that Chase engaged in a pattern of racketeering activity; and (4) that foreclosing on a home does not support a RICO violation.

***9** Paatalo's response brief does not mention his RICO claim. Other courts have held that activities leading up to and including a foreclosure are "nothing more than conduct undertaken in the ordinary course of business or litigation and cannot be fairly characterized as extortion that is independently wrongful under RICO ."*Zander,* 2012 *WL* 601896 at *3*(citing Book v. Mortg. Elec. Registration Sys.,* 608 F.Supp.2d 277, 282 (D.Conn.2009)) *and Dost v. Northwest Trustee Servs., Inc.,* 2011 WL 6794028 at * 12 (D.Or.2011).

With regard to his civil conspiracy claim, Paatalo only states that defendants should not be permitted to collect payments from him or enforce his loan documents because of their "egregious violations in contravention of the [Pooling

& Servicing Agreement] and [Mortgage Loan Purchase Agreement]."*Court Doc.* 200 at 26. Because the Court has previously concluded that Chase may enforce the Note, and that Paatalo has no standing to challenge agreements to which he is not a party, this contention fails.

For these reasons, the Court concludes that Chase is entitled to summary judgment on Counts V and VI.

**(8)** ***Counts VIII, XII: Quiet Title, Slander of Title***

In Count VIII, Paatalo alleges that he is the owner and/or entitled to possession of the subject property and that Defendants have no legal or equitable right, claim or interest in said property. He seeks a declaration from the Court that the title to the subject property is vested in him alone. *Court Doc.* 2 at 29–30. But Paatalo has not shown that the debt has been satisfied or that it is unenforceable as a matter of law, as he must to be entitled to a quiet title decree. *See Montana Valley Land Co. v. Bestul,* 253 P.2d 325, 328 (Mont.1953). Given the Court's findings above with respect to Chase's authority to enforce the Note, summary judgment on this Court must be granted to Chase.

Similarly, Count XII alleges that defendants falsely disparaged Paatalo's title to the property. *Court Doc.* 2 at 32. Based on the above findings, this claim against Chase also fails.

**(9)** ***Count IX: Violation of MUTPA***

The MUTPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce[.]"§ 30–14–103, MCA. The Montana Supreme Court has defined an unfair act or practice as "one which offends established public policy and which is either immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."*Rohrer v. Knudson,* 203 P.3d 759, 764 (Mont.2009). The Montana Legislature enacted these provisions "to protect the public from unfair or deceptive practices."*Tripp v. Jeld–Wen, Inc.,* 112 P.3d 1018, 1026 (Mont.2005); see also MCA § 30–14–201.

Paatalo's Count IX does not explain what Chase allegedly did that violated the MUTPA. *Court Doc.* 2 at 30. Chase contends that it is entitled to summary judgment on Count IX because it had authority to cause foreclosure proceedings to be commenced when Paatalo defaulted on his Note. Chase further contends that the MUTPA claim against it fails because Paatalo has no ascertainable damage from the non-judicial foreclosure or other action by Chase. *Court Doc.* 187 at 34–35.

***10** Paatalo's response fails to raise a genuine issue of material fact on Count IX. Accordingly, summary judgment on this claim must issue.

**(10)** ***Count XI: Violation of the FDCPA***

Chase contends that Count XI also fails because Chase has established that it has the right to enforce the Note and Deed of Trust. Paatalo's only response is an otherwise unexplained statement that this claim has been "colored." *Court Doc.* 200 at 26. Again, Paatalo fails to point to any issues of fact that preclude summary judgment to Chase as a matter of law.

**(11)** ***Count XIII: Trespassing***

In Count XIII, Paatalo claims that the defendants, including Chase, illegally trespassed on his property on or about March 4, 2010, and that he suffered damages as a result. *Court Doc.* 2 at 32–33.

Chase does not dispute that its agents entered the subject property on March 4, 2010. But Chase contends that it is entitled to summary judgment on this claim because the Deed of Trust authorized Chase to enter the property "if it suspects it has been abandoned."*Court Doc.* 187 at 37. Chase states that no one had been living at the property since January 2010, Plaintiff was behind on his mortgage payments, and an inspector found shutoff notices from the electric company at the property. *Id.* at 37–38.

Paatalo denies that the property had been abandoned. *Court Doc* . 200 at 25–26. In an affidavit, he states that although the electricity was off, the propane gas tank "was sufficiently full to keep the gas heat functioning in the house" and that his neighbor had agreed to keep an eye on the property while he was away. *Court Doc.* 201 at 5. He states that the property was safely secured "with all my worldly possessions inside."*Id.* Paatalo also relies on paragraph 7 of the Deed of Trust which requires a Lender to give a borrower notice prior to making an interior inspection. Paatalo states that he was not given any notice that Chase or its agents intended to enter the property.

In its reply, Chase contends that paragraph 9 of the Deed of Trust applies, rather than paragraph 7 as Paatalo contends. Paragraph 9 provides in pertinent part:

 

> If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument ... or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including ... securing and/or repairing the Property..... Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks .... and have utilities turned on or off.

*Court Doc.* 188–6 at 8. This section does not require notice to the Borrower. There is no dispute that, as of March 2010, Paatalo had failed to perform his agreement to make the periodic payments required by the Note and Deed of Trust. Because he was in default, paragraph 9 of the Deed of Trust, quoted above, gave Chase the right to access the property.

***11** Because it had a right to enter the property, it cannot be held liable for trespass under the facts alleged. Accordingly, summary judgment must issue on Count XIII.

**(12)** ***Count XIV: Theft***

By its terms, Count XIV is stated only against Defendant LPS Field Services Inc. Chase argues that it is entitled to summary judgment because Count XIV is not directed to Chase, because Paatalo has settled with LPS, and because Paatalo has produced no evidence that Chase authorized or ratified a theft of his items. *Court Doc* . 187 at 43–44. Chase points out that, at his deposition, Paatalo was unable to support his assertion that Chase was responsible for the theft. *See Court Doc.* 188–1 at 86–87. Paatalo does not respond to these arguments. Summary judgment is appropriate.

**C.** ***BANA'S MOTION FOR SUMMARY JUDGMENT***

BANA filed a joinder in Chase's motion for summary judgment. *Court Doc.* 193. Paatalo did not respond to BANA's joinder. The Court previously dismissed all counts against BANA except Counts I (RESPA), IV (unjust enrichment), VIII (quiet title), IX (MUTPA), XI (FDCPA), XII (slander of title), and XIII (trespass).

With respect to Count I, BANA argues that a Qualified Written Request must be sent to the servicer of a loan, citing HUD's Reg. X § 3500.21(e) and *Castaneda v. Saxon Mortg. Services, Inc.,* 687 F.Supp.2d 1191, 1199 (E.D.Cal.2009). In *Casteneda,* the court held that the plaintiff's claims must be dismissed because they had not alleged that the defendant was a "loan servicer" under RESPA. Paatalo does not respond to this argument. Summary judgment for BANA on Count I must be granted.

With respect to Counts IV, VIII, IX, and XII, again Paatalo fails to address BANA's summary judgment joinder. For the same reasons that summary judgment must issue for Chase, the Court will grant summary judgment to BANA.

With respect to Count XI, BANA makes the additional argument that Paatalo cannot show that BANA is a debt collector, because a lender or a trustee is not a "debt collector" as defined by 15 U.S.C. § 1692a(6).*Court Doc.* 193 at 3. Paatalo does not respond to this argument. Summary judgment will be granted to BANA on Count XI.

Finally, on Count XIII, the Court notes that Paatalo has not alleged that BANA was involved in the alleged trespassing. Their liability instead is predicated on their interest in the Deed of Trust. *See Court Doc.* 34 at 40–41. Because the Court has concluded that Paatalo was in violation of his agreements in the Deed of Trust, and that the Lender and its agents therefore had a right to enter the property, summary judgment to BANA will issue on Count XIII.

**D.** ***PAATALO'S MOTION FOR PARTIAL SUMMARY JUDGMENT***

Paatalo's moves for partial summary judgment on Count VIII, his quiet title claim. His arguments are difficult to follow. First, he apparently contends that actions by Mackoff Kellogg should be binding on the remaining Defendants, Chase and BANA. *Court Doc.* 137 at 4–7. This argument fails because there is no basis set forth by which the acts of Mackoff Kellogg bind Chase or BANA, in the absence of actual or ostensible authority. *See Bellanger v. American Music Co.,* 104 P.3d 1075, 1079 (Mont.2004).

***12** Paatalo also argues that the 207–OA3 Trust has no equitable claim to title to the property once the trustee (Mackoff Kellogg) has settled. But this argument apparently is based on Paatalo's mistaken identification of Mackoff Kellogg as trustee for the 207–OA3 Trust as opposed to

Paatalo's Deed of Trust. The settlement with Mackoff Kellogg does not entitle Paatalo to a judgment quieting title in his favor. His motion must be denied, and summary judgment granted to Chase, as set forth above.

### E. *PAATALO'S MOTION TO RE–OPEN DISCOVERY*

Paatalo moves to re-open discovery to obtain additional information regarding the September 25, 2008 Purchase and Assumption Agreement ("PAA") between Chase and the FDIC. The motion violates the Local Rules in various respects, most significantly because it was filed after the motions deadline and comes too late. In any event, given the rulings stated above, this motion is moot. The Court's rulings, stated above, do not rely upon the PAA. Plaintiff has not shown that anything in the "unabridged" PAA would change the controlling law and facts set forth above.

## III. *CONCLUSION*

For the reasons set forth above, IT IS HEREBY ORDERED that Chase's Motion for Summary Judgment (*Court Doc.* 186) is GRANTED, and Plaintiff's Motion for Partial Summary Judgment (*Court Doc.* 137) and his Motion to Re–Open Discovery (*Court Doc.* 212) are DENIED.

IT IS FURTHER ORDERED that Bank of America's Joinder in the Motion for Summary Judgment is GRANTED.

The Clerk of Court is directed to enter Judgment accordingly and to close this file.

### All Citations

Not Reported in F.Supp.2d, 2012 WL 2505742

**End of Document**

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United States District Court, W.D. Washington,
at Tacoma.

David RINGLER, et al., Plaintiffs,
v.
BISHOP WHITE MARSHALL AND
WEIBEL, PS, et al., Defendants.

No. C13–5020BHS. | April 29, 2013.

**Attorneys and Law Firms**

Jill J. Smith, Natural Resource Law Group, PLLC, Seattle, WA, for Plaintiffs.

Adam G. Hughes, David A. Weibel, Bishop White Marshall & Weibel, PS, Fred B. Burnside, Matthew S. Sullivan, Davis Wright Tremaine, Seattle, WA, for Defendants.

## ORDER GRANTING DEFENDANTS' MOTION TO DISMISS WITH LEAVE TO AMEND

BENJAMIN H. SETTLE, District Judge.

***1** This matter comes before the Court on Defendants JPMorgan Chase Bank ("Chase"), Mortgage Electronic Registration Systems, Inc. ("MERS"), and Federal Home Loan Mortgage Corporation's ("Freddie Mac") (collectively, "Defendants") motion to dismiss (Dkt.10). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion for the reasons stated herein.

## I. PROCEDURAL HISTORY

On December 11, 2012, Plaintiffs David Ringler and Melvin Patterson filed a complaint in Pierce County Superior Court against the entities who have serviced their loan, held the note, or were otherwise involved with their mortgage. Defendants timely removed the case to this Court on January 10, 2013. Dkt. 1 at 1. Plaintiffs assert claims for: (1) slander of title; (2) breach of the covenant of good faith and fair dealing; and (3) violation of the Washington Consumer Protection Act ("CPA"). Dkt. 4 at 11–13. Defendants move for dismissal of each of these claims. Dkt. 10. Plaintiffs responded on March 29, 2013. Dkt. 13. Defendants replied on April 5, 2013. Dkt. 14.

## II. FACTUAL BACKGROUND

This dispute involves a non judicial foreclosure of Plaintiffs' rental properties identified by the common addresses of 7302 & 7304 104th Street East, Puyallup, Washington 98371 ("Properties"). Dkt. 10 at 31. On March 06, 2008, Plaintiffs borrowed $360,000 for the purchase of the Properties. *Id.* at 25.The executed promissory note lists First Horizon Home Loans, a division of First Tennessee Bank N.A as the lender. *Id.* The note was secured by a Deed of Trust, which was filed with Pierce County on March 12, 2008, and lists MERS as the beneficiary. *Id.* at 30.The servicer of the obligation secured by the Deed of Trust was Chase. *Id.* at 52.The Deed of Trust explains that the note and corresponding Deed of Trust may be sold at any time without prior notice to Plaintiffs. *Id.* at 40, ¶ 20.Subsequently, the note was sold into a public security managed by Freddie Mac, but Chase remained servicer of the loan.*Id.* at 52.

In July 2012, MERS assigned its right as beneficiary under the Deed of Trust to Chase. Dkt. 10 at 30. Chase then appointed Bishop White Marshall & Weibel, P.S. ("Bishop") as successor trustee. *Id.* at 66.Bishop, acting as Chase's agent, sent Plaintiffs a notice of default on July 27, 2012 stating that Plaintiffs had failed to make payment since June 1, 2011. *Id.* at 50.On October 9, 2012, Bishop executed a notice of trustee's sale, and scheduled the sale of Plaintiffs' property for January 11, 2013. *Id.* at 68.

## III. DISCUSSION

As a threshold matter, Plaintiffs assert that the Washington Civil Rules apply in conjunction with the Federal Rules of Civil Procedure. Dkt. 13 at 8. This is clearly wrong, and with minimal diligence, Plaintiffs' counsel could have discovered that Fed.R.Civ.P. 81(c) mandates that the Federal Rules of Civil Procedure "apply to a civil action after it is removed from a state court."Therefore, the Court declines Plaintiffs' invitation to apply the Washington Civil Rules, and instead will apply the Federal Rules of Civil Procedure as required under Fed.R.Civ.P. 81(c).

***2** A motion to dismiss filed pursuant to Rule 12(b)(6) tests the sufficiency of the complaint. *Conley v. Gibson,* 355 U.S.

41, 45, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). On a motion to dismiss, the Court must accept the material allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868. 679 (2009)."To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Id.* at 662 (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 554, 570 (2007)). The plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555.

**A. Slander of Title Claim**

Plaintiffs assert a claim for slander of title in connection with the Notice of Default and Notice of Trustee's Sale. Dkt. 4 at 11. Slander of title requires: (1) a false statement, (2) made with malice, (3) about appending property sale or purchase, (4) that defeats plaintiff's title, and (5) causes pecuniary loss. *Brown v. Safeway Stores, Inc.,* 94 Wash.2d 359, 375, 617 P.2d 704 (1980).

First, the Court notes that no foreclosure sale has actually taken place with regard to Plaintiffs' property and furthermore that there is no pending sale since the date of the sale set forth in the Notice of Trustee's Sale has passed. Accordingly, Plaintiffs have failed to allege facts showing there is a "pending sale" for purposes of bringing their slander of title claim. Moreover, even if the Court found that Plaintiffs alleged falsity with respect to the Notice of Default and Notice of Trustee's Sale, the Court finds that Plaintiffs cannot meet the element of malicious publication. *Id.* ("Malice is not present where the allegedly slanderous statements were made in good faith and were prompted by a reasonable belief in their veracity"). Accordingly, the Court concludes that Plaintiffs' slander of title claim must be dismissed.

**B. Breach of the Covenant of Good Faith and Fair Dealing Claim**

Although Plaintiffs term their second cause of action as a "Breach of Contract," Plaintiffs fail to allege facts suggesting Defendants breached any contract term. In fact, Plaintiffs do not contend that any express term in the loan agreement requires Defendants to consider their loan modification requests. Nor do they argue that Defendants were under any obligation to modify the agreement. Rather, Plaintiffs' "breach of contract" claim alleges Chase failed to negotiate with Plaintiffs in good faith while their loan modification and short sale applications were pending. Dkt. 4 at 12. The covenant of good faith and fair dealing is not as broad as Plaintiffs suggest.

Under Washington law, "in nearly every contract there is an implied covenant of good faith and fair dealing" which "requires mutual cooperation so that each party may enjoy the full benefit of performance."*Edmonson v. Popchoi,* 155 Wash.App. 376, 228 P.3d 780 (2010). The duty of good faith and fair dealing does not extend to obligate a party to accept a material change in the terms of its contract. *Betchard–Clayton, Inc. v. King,* 41 Wash.App. 887, 890, 707 P.2d 1361,*review denied,*104 Wash.2d 1027 (1985). Nor does it "inject substantive terms into the parties' contract."*Badgett v. Security State Bank,* 116 Wash.2d 563, 569, 807 P.2d 356 (1991). Rather, it requires only that the parties perform in good faith the obligations imposed by their agreement.*Barrett v. Weyerhaeuser Co. Severance Pay Plan,* 40 Wash.App. 630, 635 n. 6, 700 P.2d 338 (1985). Thus, the duty arises only in connection with terms agreed to by the parties. *Badgett,* 116 Wash.2d at 569, 807 P.2d 356. Because Plaintiffs fail to allege that Defendants were bound by a specific contract term that obligates Defendants to affirmatively cooperate in Plaintiffs' efforts to restructure the loan agreement, the Court must grant Defendants' motion to dismiss this claim.

**C. CPA Claim**

***3** Plaintiffs allege that Defendants engaged in a deceptive act in violation of the CPA, RCW 19.86, *et. seq.,* when they denied Plaintiffs' requests for a loan modification or short sale. Dkt. 4 at 14. The elements of a CPA claim are: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) that impacts the public interest, (4) causes injury to the plaintiff's business or property, and (5) that injury is causally linked to the unfair or deceptive practice. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wash.2d 778, 780, 719 P.2d 531 (1986).

Whether the undisputed conduct constitutes an unfair or deceptive act can be decided by this court as a question of law. *Indoor Billboard Wash., Inc. v. Integra Telecom of Wash.,* 162 Wash.2d 59, 74, 170 P.3d 10 (2007). Plaintiffs can establish this element in two ways. They may show either that an act or practice "has a capacity to deceive a substantial portion of the public," or that "the alleged act constitutes a per se unfair trade practice."*Saunders v. Lloyd's of London,* 113 Wash.2d 330, 344, 779 P.2d 249 (1989). Plaintiffs have failed to allege a per se unfair trade practice because such an allegation requires a showing of conduct in violation of a statute. *See Moritz v. Daniel N. Gordon, P.C.,* 895 F.Supp.2d 1097, 1112. Similarly, Plaintiffs have failed to allege facts that would show Defendants' act or practice has the capacity to deceive a substantial portion of the public. Rather, Plaintiffs only allege that Defendants denied their individual requests for a loan modification or short sale. To infer this act had the capacity to deceive a substantial portion of the public is unreasonable. Because Plaintiffs have failed to allege a prima facie CPA claim, the Court grants Defendants' motion to dismiss that claim.

**D. Remedies**

When a court dismisses a complaint under 12(b)(6), it must then decide whether to grant leave to amend. The Ninth Circuit has "repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts."*Lopez v. Smith,* 203 F.3d 1122, 1130 (9th Cir.2000) (citations and internal quotation marks omitted).

While Defendants' opening brief failed to request dismissal with prejudice, they do assert in their reply brief that any amendment would be futile (Dkt. 15 at 12) and therefore should be dismissed with prejudice. However, to dismiss the claims with prejudice would violate due process because Plaintiffs did not have the opportunity to address Defendants' argument. Therefore, Plaintiffs are granted leave to amend their complaint because the Court is unable to conclude that any amendment would be futile. Plaintiffs may only add factual allegations to support existing claims. The Court may strike, sua sponte, any additional claims or factual matter in the amended complaint.

**IV. ORDER**

***4** Therefore, it is hereby **ORDERED** that Defendants' motion to dismiss is **GRANTED** with leave to amend. Plaintiffs may file an amended complaint no later than May 13, 2013.

**All Citations**

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**End of Document**

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United States District Court,
E.D. Washington.

Samuel SALMON and Roxy Salmon, Plaintiff,
v.
BANK OF AMERICA CORPORATION,
Recontrust, M.E.R.S., Merscorp, Inc., Defendants.

No. CV–10–446–RMP. | May 25, 2011.

**Attorneys and Law Firms**

Samuel Salmon, Colville, WA, pro se.

Roxy Salmon, Colville, WA, pro se.

Abraham K. Lorber, John S. Devlin, III, Lane Powell PC, Seattle, WA, for Defendants.

## ORDER RESOLVING MOTION TO STRIKE, MOTION TO REMAND, AND MOTION TO DISMISS

ROSANNA MALOUF PETERSON, Chief Judge.

***1** This matter comes before the Court on the motion to dismiss, **ECF No. 4,** by Defendants Bank of America Corporation ("Bank of America"), ReconTrust Company, N.A. ("ReconTrust"), Mortgage Electronic Registration Systems, Inc. ("MERS"), and MERSCORP, Inc. ("MERSCORP") [1], the motion to remand and strike, **ECF No. 11,** by *pro se* Plaintiffs Samuel Salmon and Roxy Salmon (the "Salmons"), and the motion to disqualify counsel, **ECF No. 22,** also by the Salmons.

The Salmons took out a deed of trust mortgage that was secured by their property. The Salmons defaulted on their mortgage, and the Defendants foreclosed on the property. The Salmons filed the present lawsuit disputing the Defendants' standing or authority to foreclose.

In making its determination in this matter, the Court reviewed Defendants' motion, ECF No. 4, and supporting memorandum, ECF No. 5, and declaration and exhibits, ECF No. 6, Plaintiffs' response, ECF No. 19, and declaration and exhibits in opposition to the motion, ECF No. 20, and Defendants' reply, ECF No. 27; Plaintiffs' motion to remand and strike, ECF No. 11, and supporting affidavit, ECF No. 12, Defendants' response, ECF No. 30, and Plaintiffs' reply, ECF No. 31; and Plaintiffs' motion to disqualify counsel, ECF No. 22, and supporting memorandum, ECF No. 23, and Defendants' response, ECF No. 28.

## BACKGROUND

The Salmons executed [2] a note ("First Note") on October 19, 2007, in favor of Countrywide Bank, FSB ("Countrywide Bank") evidencing the right of Countrywide Bank to payment from the Salmons for a $417,000.00 home loan. ECF No. 2–3 at 77. The First Note was secured by a deed of trust ("First Deed of Trust") for the real property commonly known as 917 A Philpott Rd., Colville, WA 99114–8278 (the "Property"). ECF No. 2–3 at 43–45. The First Deed of Trust was recorded on October 26, 2007, in the Stevens County property records under recording number 20070012467. ECF No. 2–3 at 43.

The First Deed of Trust named Countrywide Bank as the lender and Landsafe Title of Washington ("Landsafe Title") as the trustee. ECF No. 2–3 at 43–44. The First Deed of Trust further named MERS as the beneficiary and provided, in relevant part:

> (E) "MERS" is Mortgage Electronic Registration Systems, Inc.
>
> MERS is a separate corporation that is acting solely as nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument.
>
> * * *
>
> TRANSFER OF RIGHTS IN THE PROPERTY
>
> The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS.
>
> * * *
>
> Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender[.]

***2** ECF No. 2–3 at 44.

The Salmons executed [3] a second deed of trust ("Second Deed of Trust") on October 19, 2007, that secured a second note ("Second Note"), executed by the Salmons on October 19, 2007, in favor of Countrywide Bank for a $89,250.00 home equity line of credit loan. ECF No. 2–3 at 55–56. The Second Note is referred to in the Second Deed of Trust but is not itself included in the record before the Court. The Second Deed of Trust was recorded on October 26, 2007, in the Stevens County property records under recording number 20070012468. ECF No. 2–3 at 55. The Second Deed of Trust identifies Countrywide Bank as the lender, Landsafe Title of Washington as the trustee, and MERS as the beneficiary. ECF No. 2–3 at 55–56.

On September 1, 2010, BAC Home Loans Servicing, LP, F/K/A Countrywide Home Loans Servicing LP ("BAC Home Loans") and ReconTrust issued a notice of default (the "Notice of Default"), received by mail by the Salmons. ECF No. 2–3 at 61–66; *see also* ECF No. 2–3 at 20.

On September 17, 2010, MERS executed a Corporation Assignment of Deed of Trust (the "Assignment of Deed of Trust") assigning all beneficial interest in the First Deed of Trust to BAC Home Loans. ECF No. 2–3 at 67. The Assignment of Deed of Trust was recorded on September 23, 2010, under recording number 20100007023. ECF No. 2–3 at 67.

On September 17, 2010, BAC Home Loans, as beneficiary, executed an Appointment of Successor Trustee (the "Appointment of Successor Trustee") causing resignation of Landsafe Title as trustee and naming ReconTrust as successor trustee under the First Deed of Trust. ECF No. 2–3 at 68. The Appointment of Successor was recorded on September 23, 2010, under recording number 20100007024. ECF No. 2–3 at 68.

On October 2, 2010, ReconTrust executed a Notice of Trustee's Sale (the "Notice of Trustee's Sale") indicating that the Property would be sold pursuant to the Deed of Trust. ECF Nos. 2–3 at 72; 6–1 at 7. The Notice of Trustee's Sale was recorded on October 22, 2010, under Stevens County recording number 20100007922. ECF No. 6–1 at 7. The Notice of Trustee's Sale states that, at the time it was issued, the Salmons were $47,633.64 in arrears on their monthly payments under the First Note and First Deed of Trust. ECF Nos. 2–3 at 72; 6–1 at 7. The Salmons do not dispute this amount or the fact that they are in default.

On November 17, 2010, the Salmons filed a complaint in Stevens County Superior Court against Defendants Bank of America, ReconTrust, MERS, and MERSCORP, as well as against individual Defendants "Brian Thomas Moynihan, Bank of America CEO since Jan 2010" and "Kenneth D. Lewis, Bank of America CEO from April 2001 to Jan 2010."ECF No. 2–3 at 13–16. Plaintiffs' complaint seeks a temporary restraining order, a preliminary injunction, a permanent injunction, for "any and all claims the Defendants are pursuing" against the Plaintiffs and/or their property and remuneration. ECF No. 2–3 at 39. The Salmons also indicated that if the Defendants did not produce the original First Note within 30 days, the Salmons would "press forgery charges pursuant to RCW 9A.60.020[,]" [4] and seek "remuneration of fraudulently collected monies paid to illegally represented lenders Bank of America FKA Countrywide, and interest at 6.75% with the total amount of $87,756.26 + case fees[.]" ECF No. 2–3 at 40.

***3** On or about November 20, 2010, the Salmons served ReconTrust by mail. ECF No. 2–7 at 89. There is no indication that they have served any of the other Defendants. On November 29, 2010, the Salmons moved for a temporary restraining order and preliminary injunction restraining the trustee from carrying out the foreclosure sale. ECF No. 2–4 at 80–81.

On December 3, 2010, the Salmons filed a Notice of Lis Pendens in the Stevens County action, attaching a lis pendens filed in the Stevens County property records. ECF Nos. 2–5 at 83–84; 29–1.

On December 6, 2010, the Stevens County Superior Court found that it was "unable to issue a Temporary Restraining Order" because the Plaintiffs' motion did not support the motion with a sworn and signed affidavit or declaration or comply with the requirements of RCW 61.24.130(1) or (2). On December 9, 2010, Mr. Salmon submitted a sworn affidavit of fact. ECF No. 25–3. On December 14, 2010, the Stevens County Superior Court denied Plaintiffs' motion for a temporary restraining order and preliminary injunction. ECF No. 25–5 at 2.

Based on the diversity of citizenship of the parties, ReconTrust removed the case from Stevens County to federal court in the Eastern District of Washington on December 20,

2010. ECF No. 1. On January 5, 2011, Defense counsel sent the Salmons a letter demanding withdrawal of the lis pendens. ECF No. 23–1 at 2–3. That letter provides in part:

> Because the [present action to enjoin the trustee's sale] does not affect title to real property, we request that you stipulate to the cancellation of the Lis Pendens by executing the enclosed Stipulation and Order and returning it to us. Please sign and date the Stipulation and sign the Order.
>
> If you do not sign and return the Stipulation and Order to us by January 14, 2010[sic], Bank of America will be forced to bring a motion to cancel the Lis Pendens. Please be advised that if Bank of America prevails on such a motion, it will be entitled to a mandatory award of its reasonable attorney fees incurred in canceling the lis pendens [sic] under RCW 4.28.328(2).

ECF No. 23–1 at 2.

## ANALYSIS

This Court exercises jurisdiction over this matter pursuant to 28 U.S.C. § 1332 and, therefore, applies Washington State substantive law. *Erie R.R. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

As a preliminary matter, the Court addresses the Salmons' motions to remand and strike, ECF No. 11, and to disqualify counsel, ECF No. 22.

### *A. Motion to Strike and Remand*

The Salmons move to remand on the basis that there is not complete diversity of citizenship in this matter to satisfy the requirements of 28 U.S.C. § 1332 and 28 U.S.C. § 1441 because, the Salmons argue: (1) Defendants Bank of America, ReconTrust, and MERS are Washington citizens on the basis that they registered with the Washington Secretary of State; and (2) Defendants are being sued "under their corporations' fictitious names." ECF No. 22 at 3. The Salmons filed their motion to remand on January 24, 2011. ECF No. 22.

***4** Diversity jurisdiction exists only when the parties are in complete diversity and the amount in controversy exceeds $75,000. 28 U.S.C. § 1332(a). This Court applies state law regarding fictitious-named defendants to complaints originally filed in state court. *Cabrales v. The County of Los Angeles,* 864 F.2d 1454, 1463–1464 (9th Cir.1988), *vacated on other grounds,*490 U.S. 1087, 109 S.Ct. 2425, 104 L.Ed.2d 982 (1989), *opinion reinstated by*886 F.2d 235, 236 (9th Cir.1989). The phrase "fictitious names" refers to a defendant whose identity is unknown to plaintiff at the time he or she files the lawsuit, so plaintiff refers to the defendant using the fictitious name of "John Doe" or "Jane Doe." *See, e.g., Bresina v. Ace Paving Co.,* 89 Wash.App. 277, 948 P.2d 870 (Wash.App. Div. 2 1997); 3A Wash. Prac., Rules Practice CR 3 (5th Ed.2008). All of the Defendants in this action are named; their identities were not unknown to Plaintiffs at the time of filing the suit. Their corporation names do not qualify as "fictitious names." Therefore, this Court considers the corporations' legal citizenships for purposes of assessing the propriety of jurisdiction on the basis of 28 U.S.C. § 1332.

A corporation is "a citizen of any State by which it has been incorporated and of the State where it has its principal place of business[.]"28 U.S.C. § 1332(c)(1). Bank of America is a Delaware corporation with its principal place of business in North Carolina. ECF No. 2 at 2–3. MERS and MERSCORPS are Delaware corporations that maintain their principal places of business in Virginia. ECF No. 2 at 3. ReconTrust is a national banking association. For diversity purposes, a national bank is a citizen of the state designated in its articles of association as locus of its main office; a national bank is not a citizen of every state where it has branch offices. *Wachovia Bank v. Schmidt,* 546 U.S. 303, 126 S.Ct. 941, 163 L.Ed.2d 797 (2006); 28 U.S.C. § 1348. According to this rule, ReconTrust is a citizen of California. ECF No. 2 at 3. The individual defendants are citizens of Massachusetts and North Carolina, respectively. ECF No. 2 at 3. Given that the Salmons are citizens of Washington, complete diversity exists, and this matter was properly removed to this Court under 28 U.S.C. § 1441.

The Salmons further move to strike, pursuant to Fed.R.Civ.P. 12(f), all pleadings submitted by the corporate Defendants' counsel in this matter on the basis that the Salmons have not received proof that counsel is legally authorized to represent Defendants in this matter.

Defense counsel entered a notice of appearance on behalf of Bank of America in Stevens County Superior Court on December 10, 2010. ECF No. 25–4 at 17. That same counsel, John Devlin, has filed numerous pleadings on behalf of Defendants Bank of America, ReconTrust, MERS, and MERSCORP in this Court since removing the case to the Eastern District of Washington. *See, e.g.,* ECF Nos. 4; 25.The Local Rules in place in this District provide that "the filing of any document shall constitute an appearance by the attorney who signs it."LR 83.2(d). The corporate Defendants' counsel has clearly indicated that he represents those Defendants for purposes of this action. Therefore, the Court denies the Salmons' motion to remand the case to state court and to strike documents submitted by Defendants' counsel.

***B. Motion to Disqualify***

***5** The Salmons also move to disqualify Bank of America's counsel in this matter on the basis of a letter sent by Bank of America through its counsel that the Salmons perceived as threatening and coercive and that the Salmons allege are in violation of sections (c), (d), and (e) of Washington's Rule of Professional Conduct ("RPC") 8.4, defining professional misconduct.

> RPC 8.4 provides that it is professional misconduct for an attorney to:
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice; [or]
>
> (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law[.]

The corporate Defendants refer the Court to RCW 4.28.328 and Washington case law, *Bramall v. Wales,* 29 Wash.App. 390, 628 P.2d 511 (Wash.App.1981) (per curiam), to support that the letter, quoted above, was written in good faith and within the bounds of the RPCs. The Court finds that counsel's statements in the letter at issue here were truthful and accurate reflections of Washington law as supported by RCW 4.28.328, which authorizes attorneys' fees for a party who prevails on a motion to cancel a lis pendens in an action such as this, and *Bramall,* 29 Wn.App. 290, which holds that a lis pendens is properly filed only in an action affecting the title to real property.

The Court, therefore, finds no violation of the Rules of Professional Conduct and denies Plaintiffs' motion to disqualify Defendants' counsel.

***C. Motion to Dismiss***

***Motion to Dismiss Standard***

A motion to dismiss under Federal Rule of Civil Procedure 12(b) (6) tests the legal sufficiency of the pleadings. *Navarro v. Bloc* k, 250 F.3d 729, 732 (9th Cir.2001). In ruling on a motion under Rule 12(b)(6), a court must construe the pleadings in the light most favorable to the plaintiff and accept all material factual allegations in the complaint, as well as any reasonable inferences drawn therefrom. *Broam v. Bogan,* 320 F.3d 1023, 1028 (9th Cir.2003).

A complaint may be dismissed for failure to state a claim where the factual allegations do not raise the right to relief above the speculative level.*Ashcroft v. Iqbal,* — U.S. ——, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); *Bell Atl. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)."[F]or a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief."*Moss v. U.S. Secret Service,* 572 F.3d 962, 969 (9th Cir.2009) (quoting *Iqbal,* 129 S.Ct. at 1949).

***Claim for Restraint Against Trustee's Sale under Washington's Deeds of Trust Act, Chapter 61.24 RCW***

The Salmons' lawsuit raises numerous challenges to whether the property at 917 A Philpott Rd. may legally be sold under Washington's Deeds of Trust Act, Chapter 61.24 RCW. The Deeds of Trust Act requires a beneficiary or trustee to follow certain procedures to carry out a nonjudicial foreclosure of a debt secured by a deed of trust. *CHD, Inc. v. Boyles,* 138 Wash.App. 131, 136, 157 P.3d 415 (Wash.App. Div. 3, 1997). To enjoin the foreclosure and sale of real property by the trustee or a successor trustee, the Salmons, as grantors, must: (1) give five days' notice to the trustee and the beneficiary of the time and place of the hearing on the injunction; (2) show a proper ground to restrain the sale [5]; and (3) in the event that the Court grants a temporary restraining order or injunction, must bring their obligation under the deed of trust current by making payments to the Court during the pendency of the injunction. RCW 61.24.130(1) and (2); *see also In re Marriage of Kaseburg,* 126 Wash.App. 546, 558, 108 P.3d 1278 (Wash.App. Div. 2, 2005) ("The [Deeds of Trust] Act provides the sole method to contest and enjoin a foreclosure sale under RCW 61.24.130(1)").

***6** To support that there is a "proper ground" to restrain the trustee's sale of the 917 A Philpott Rd. property, the Salmons' allege numerous deficiencies by one or more of the corporate Defendants in the Salmons' complaint and their opposition to the motion to dismiss.

The Court addresses each allegation of deficiency in turn.

***Real Parties in Interest***

The Salmons maintain that the failure of Bank of America, and of the other corporate Defendants, to produce to the Salmons proof of ownership of the First Note, which is secured by the First Deed of Trust that is the subject of the foreclosure action, provides the Salmons with a defense against foreclosure. However, the Deeds of Trust Act does not require that the trustee or beneficiary provide the grantor/debtor with proof of ownership of the promissory note as one of the "requisites to [the] trustee's sale." RCW 61.24.030(7). Accordingly, courts "have routinely held that [Plaintiffs'] 'show me the note' argument lacks merit." *Freeston v. Bishop, White & Marshall, P.S.,* 2010 WL 1186276, *2 (W.D.Wash.2010) (quoting *Diessner v. Mortgage Electronic Registration Systems,* 618 F.Supp.2d 1184, 1187 (D.Ariz.2009) (collecting cases)). The Court finds that with regard to this argument the Plaintiffs do not state a plausible claim for relief.

***MERS as a "Ghost Beneficiary" with No Standing***

The Plaintiffs restate the argument discussed above as an argument that the foreclosure cannot proceed because MERS has not proven itself to be the original beneficiary of the First Deed of Trust because it has not produced evidence to show that it is the holder of the First Note. The Salmons rely on RCW 61.24.005(2), which defines "beneficiary" as "the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation."However, as stated above, a "show me the note" argument is not a basis to avoid dismissal of Plaintiffs' claims. *See Diessner,* 618 F.Supp.2d at 1187;*see also Warren v. Sierra Pacific Mortg. Services Inc.,* 2011 WL 1526957, *5 (D.Ariz., Apr.22, 2011). Therefore, the Court finds that with regard to this argument that Plaintiffs do not state a plausible claim for relief.

***Breach of "Fiduciary Duty"***

The Salmons maintain that Landsafe Title of Washington and its successor trustee ReconTrust violated a prohibition under RCW 61.24.010 against the trustee having a fiduciary obligation to the grantor. The Salmons also contend that Landsafe Title of Washington and Recontrust violated RCW 61.24.020, which provides that "no person, corporation, or association may be both trustee and beneficiary under the same deed of trust."These arguments are based on the assertion that Landsafe Title is a subsidiary of Countrywide and that Recontrust is a subsidiary of Bank of America. However, a subsidiary or a person or entity otherwise acting as agent for the beneficiary may serve as trustee under the Deeds of Trust Act. *See Cox v. Helenius,* 103 Wash.2d 383, 390, 693 P.2d 683 (Wash.1985). Therefore, the Court finds that with regard to this argument the Plaintiffs do not state a plausible claim for relief.

***"Fake" Notarization on Assignment of Deed of Trust***

*7 The Salmons assert that the notarization of the Assignment of Deed of Trust and the Appointment of Successor Trustee are invalid because those notarization stamps are dated three days after the date those documents were purportedly signed. Washington State law requires that a notary "determine and certify, either from personal knowledge or from satisfactory evidence, that the person appearing before the notary public and making the acknowledgement is the person whose true signature is on the document."RCW 42.44.080(1), (3). The notary's signature and seal or stamp "are prima facie evidence that the signature of the notary is genuine and that the person is a notary public."RCW 42.44.080(8). Finding no requirement that the date of the notarization match the date of the execution of the document, the Court concludes that the Plaintiffs do not state a plausible claim for relief on the basis of this argument.

***"Late" recording of the Appointment of Successor Trustee and Assignment of Deed of Trust***

The Salmons argue repeatedly throughout their complaint, *see* ECF No. 2–3 at 6–11, that it was improper for MERS to assign BAC Home Loans the beneficial interest of the First Deed of Trust and for BAC Home Loans to appoint ReconTrust as successor trustee for the First Deed of Trust *after* BAC Home Loans and ReconTrust issued the Notice of Default to the Salmons on September 1, 2010.

The Court must construe the Deeds of Trust Act to further three basic objectives: "First, the nonjudicial foreclosure process should remain efficient and inexpensive. Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, the process should promote stability of land titles."*Cox,* 103 Wash.2d at 387, 693 P.2d 683 (internal citation omitted).

The section of the Deeds of Trust Act that sets out the necessary procedures for a trustee's sale requires:

> That at least thirty days before notice of sale shall be recorded, transmitted or served, written notice of default shall be transmitted **by the beneficiary or trustee** to the borrower and grantor at their last known addresses by both first-class and either registered or certified mail, return receipt requested, and the beneficiary or trustee shall cause to be posted in a conspicuous place on the premises, a copy of the notice, or personally served on the borrower and grantor. This notice shall contain the following information: [reciting 12 separate requisite items for inclusion in the notice].

RCW 61.24.030(8) (emphasis added).

The section of the Deeds of Trust Act setting out the process for appointing a successor trustee provides:

> The trustee may resign at its own election or be replaced by the beneficiary. The trustee shall give prompt written notice of its resignation to the beneficiary. The resignation of the trustee shall become effective upon the recording of the notice of resignation in each county in which the deed of trust is recorded. If a trustee is not appointed in the deed of trust, or upon the resignation, incapacity, disability, absence, or death of the trustee, or the election of the beneficiary to replace the trustee, the beneficiary shall appoint a trustee or a successor trustee. **Only upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee.**

***8** RCW 61.24.010(2) (emphasis added).

Defendants represent that "BAC Home Loans (as beneficiary under the Deed of Trust) appointed ReconTrust as Successor Trustee and recorded the appointment on January 25, 2010."ECF No. 5 at 8. However, that recording date appears to be mistaken because the Appointment of Successor Trustee attached to the Plaintiffs' complaint, and cited correctly in Defendants' "Facts" section of the memorandum supporting the motion to dismiss, ECF No. 5 at 3–4, indicates that the Appointment of Successor Trustee was executed by BAC Home Loans on September 17, 2010, and recorded on September 23, 2010. ECF No. 2–3 at 68. Therefore, ReconTrust was not yet the successor trustee of the Salmons' First Deed of Trust.

Although the Deeds of Trust Act defines the moment when a successor trustee is vested with the powers of the original trustee, that Act is silent with respect to the process for appointing a successor beneficiary. Rather, the assignment of the beneficial interest in a deed of trust is controlled by the language of the First Deed of Trust itself and by RCW 64.04.020, which addresses the requirements for conveyance or assignment of a deed, and RCW 65.08.070, which addresses the recording of real property conveyances.

The First Deed of Trust provides that MERS, as the named beneficiary in that deed, had the right not only to foreclose and sell the subject property, but also to assign the deed to another beneficiary. ECF No. 2–3 at 45. Moreover, RCW 65.08.070 provides that when a conveyance is not recorded, or not *promptly* recorded, as the Salmons assert happened here, the rights of the party to whom the beneficial interest is assigned or granted are affected with respect to the rights of good faith purchasers. However, there is no basis for the Court to find that the Salmons' rights under the First Deed of Trust were affected by the recording of the Corporation of Assignment of Deed on September 23, 2010.

In sum, the Deeds of Trust Act provides that either the trustee or the beneficiary must notify the grantor that he or she is in default. RCW 61.24.030(8). ReconTrust sent the Salmons the Notice of Default as agent for the beneficiary, BAC Home Loans. ECF No. 2–3 at 62. The Assignment of Deed of Trust that formally assigned BAC Home Loans the beneficial interest in the First Deed of Trust was also executed on September 17, 2010, and recorded on September 23, 2010.

 

ECF No. 2–3 at 67. Even though the conveyance was recorded after the date of the Notice of Default, MERS appears, by the Salmons' own account, to have transferred its beneficial interest in the First Deed of Trust to BAC Home Loans, as servicer for Bank of America, prior to September 1, 2010. *See, e.g.,* ECF No. 2–3 at 20 (Section of Complaint alleging that Bank of America began collecting mortgage payments from the Salmons around April 1, 2009). Therefore, the Court finds no plausible claim that the requisite trustee's sale procedures were violated here.

***9** The Salmons have not stated a claim for relief on the basis of any "proper ground" to restrain the trustee's sale under RCW 61.24.130(1). Therefore, the Court grants the Defendants' motion to dismiss. *See Moss,* 572 F.3d at 969.

Accordingly, **IT IS HEREBY ORDERED:**

1. Plaintiffs' Motion to Remand and Strike, **ECF No. 11,** is **DENIED;**

2. Plaintiffs' Motion to Disqualify Counsel, **ECF No. 22,** is **DENIED;** and

3. Defendants' Motion to Dismiss, **ECF No. 4,** is **GRANTED** pursuant to Fed.R.Civ.P. 12(b)(6).

4. This action is **DISMISSED WITH PREJUDICE** and **without costs** as to any party.

5. Any other pending motions are **DENIED AS MOOT.**

6. Any court hearings are hereby **STRICKEN.**

The District Court Executive is directed to enter this Order, provide copies to Plaintiffs and counsel, enter judgment, and **close the file.**The District Court Executive is **further directed** to amend the caption in this matter to reflect that: (1) "ReconTrust Company, N.A." is a Defendant herein, rather than "ReconTrust"; and (2) "Mortgage Electronic Registration Systems, Inc." is a Defendant herein, rather than "M.E.R.S."

**IT IS SO ORDERED.**

**All Citations**

Not Reported in F.Supp.2d, 2011 WL 2174554

Footnotes

1 The Court notes that ReconTrust is the only Defendant to have been served with a Summons and Complaint, but despite the lack of service, that all of the Defendants jointly move to dismiss.

2 Roxy Salmon signed the First Deed of Trust as "Non Borrowing Spouse." ECF No. 2–3 at 52.

3 Roxy Salmon signed the Second Deed of Trust as "Non Borrowing Spouse." ECF No. 2–3 at 59.

4 The Salmons indicate in ECF No. 19 that they voluntarily dismiss their claim of forgery from this civil suit. ECF No. 19 at 9.

5 The Court finds no indication in the record that the Salmons provided the five days' notice required by RCW 61.24.130(2).

**End of Document**

2014 WL 2439791
Only the Westlaw citation is currently available.
United States District Court,
E.D. Washington.

Daniel SMITH, an individual, and
Danette Smith, an individual, Plaintiffs,
v.
NORTHWEST TRUSTEE SERVICES, INC.,
a corporation; Federal National Mortagage
Association, a corporation; Mortgage Electronic
Registration Systems (MERS), a corporation; and
Sunset Mortgage, Inc ., a corporation, Defendants.

No. CV–13–3124–RMP. | Signed May 30, 2014.

**Attorneys and Law Firms**

Daniel Smith, Yakima, WA, pro se.

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## ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

ROSANNA MALOUF PETERSON, Chief Judge.

***1** Defendants SunTrust Mortgage, Inc. ("SunTrust"), Federal National Mortgage Association ("Fannie Mae"), and Mortgage Electronic Registration Systems, Inc. ("MERS") move for summary judgment and dismissal with prejudice of Plaintiffs Daniel and Danette Smith's Complaint against them. ECF No. 14. Defendant Northwest Trustee Services ("NWTS") filed a declaration in support of the motion for summary judgment. ECF No. 21. Plaintiffs, who are pro se, have not filed a response. *See* ECF No. 23.

## BACKGROUND

Plaintiffs borrowed $153,000 from SunTrust to purchase real estate in Yakima, Washington. ECF No. 16 at 3. Plaintiffs executed a promissory note dated August 14, 2008, payable on the order of SunTrust for the principal amount of the loan. ECF No. 16–1.

To secure their obligation due under the note, Plaintiffs granted a deed of trust to the trustee Washington Administrative Services, Inc., identifying MERS as the beneficiary, "acting solely as a nominee for Lender and Lender's successors and assigns."ECF Nos. 16 at 4; 16–2 at 1.

Before discussing the remaining facts, the Court briefly summarizes relevant background on deeds of trust and MERS. A deed of trust is a form of a three-party mortgage. 18 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: TRANSACTIONS § 20.1 (2d ed.2004). A borrower takes on a debt to a beneficiary, "and, as security for that obligation, the 'grantor' conveys an estate in land to a third-party 'trustee.' "*Id.* The trustee has the power to foreclose by nonjudicial sale if the borrower defaults. *Id.* The beneficiary may replace the trustee. RCW 61.24.010(2).

The MERS system places a fourth party into the deed of trust arrangement.*Bain v. Metro. Mortgage Grp., Inc.,* 175 Wash.2d 83, 96–7, 285 P.3d 34 (2012). In addition to the lender (who traditionally is the beneficiary of the deed of trust), the borrower, and the trustee, MERS steps in as a nominee for the lender. *Id.* at 88, 96–97, 285 P.3d 34. MERS maintains an electronic registry that tracks mortgage rights. *Id.* at 95, 285 P.3d 34. "This was intended to reduce the costs, increase the efficiency, and facilitate the securitization of mortgages and thus increase liquidity."*Id.*

In this case, beginning in January 2010 Plaintiffs defaulted on their loan by failing to make monthly payments. ECF No. 16 at 5. After Plaintiffs defaulted, SunTrust caused MERS, acting as SunTrust's nominee, to assign its interest in the deed of trust to SunTrust. ECF Nos. 16 at 5; 16–3. Acting as the beneficiary of the deed of trust, SunTrust then appointed NWTS to serve as successor trustee. ECF Nos. 16 at 5; 16–4.

Plaintiffs did not cure the default in their loan payments. ECF No. 16 at 5. On or after October 19, 2011, NWTS provided SunTrust with notice of a trustee's sale scheduled for January 20, 2012. ECF No. 16 at 5. NWTS issued the same notice to Plaintiffs. *See* ECF Nos. 1–1 at 5; 16 at 5. The trustee's sale was canceled because Plaintiffs filed for bankruptcy. ECF No. 16 at 6. However, a second trustee's sale was scheduled for July 26, 2013. ECF No. 16 at 6. NWTS issued Plaintiffs a second notice of trustee's sale. ECF No. 16 at 6. Shortly after July 26, 2013, NWTS informed SunTrust that the property was sold to Fannie Mae at the trustee's sale for $206,631.80

and that NWTS had issued its trustee's deed to Fannie Mae. ECF No. 16 at 6.

***2** SunTrust asserts in an affidavit that it attempted to work with Plaintiffs to modify their mortgage loan so that they could keep their home, but that Plaintiffs did not comply with loan modification requirements. ECF No. 16 at 6.

Plaintiffs have not responded to the motion for summary judgment. *See* ECF No. 23. In their complaint, Plaintiffs allege that MERS unlawfully assigned the deed of trust to SunTrust and that SunTrust unlawfully appointed NWTS as the successor trustee under the deed of trust. ECF No. 1–1 at 5. Plaintiffs also claim that the notice of trustee's sale was deficient and that Defendants neglected to offer mediation or discuss other options for avoiding foreclosure. ECF No. 1–1 at 6.

Plaintiffs seek to set aside the trustee's sale of the property, to cancel the trustee's deed acquired through the sale, and to obtain damages for wrongful foreclosure. ECF No. 1–1 at 7–9. Defendants SunTrust, Fannie Mae, and MERS move for summary judgment. ECF No. 14. The Court assumes that Defendant NWTS joins the motion because it filed a declaration in support of summary judgment, ECF No. 21.

## ANALYSIS

Before turning to the summary judgment issues, the Court considers Defendants' request for judicial notice of certain facts. ECF No. 17. To be eligible for judicial notice, a fact must be one not subject to reasonable dispute because it is generally known or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."Fed.R.Evid. 201(b). A court "must take judicial notice if a party requests it and the court is supplied with the necessary information."Fed.R.Evid. 201(c)(2).

Defendants' request for the Court to take judicial notice is unexpected. Defendants explain in their briefing that a court may take judicial notice of facts without converting a motion for dismissal into one for summary judgment. ECF No. 17 at 3. However, Defendants' motion *is* a motion for summary judgment, so Defendants had the opportunity to support their request with admissible evidence. *See*Fed.R.Civ.P. 56(c). Actually, multiple facts discussed in the request for judicial notice are also supported by evidence submitted with the motion for summary judgment. *See* ECF Nos. 16 at 3–4, 16–1; ECF Nos. 16 at 6, 16–7; ECF No. 16 at 6–7. Nevertheless, due to Defendants' request and the requirement for the Court to take judicial notice of facts when properly supported and requested by a party, *see*Fed.R.Evid. 201(c)(2), the Court briefly considers Defendants' request.

The Court takes judicial notice of only fact five, to the extent that the copy of the Yakima County Court docket shows that Plaintiffs did not file a lawsuit against Defendants until September 10, 2013. *See* ECF No. 17–1 at 16.

The Court declines to take judicial notice of the remaining factual assertions because Defendants have not shown that the facts are beyond reasonable dispute. These facts include the details of Plaintiffs' real estate purchase, the fact that the first trustee's sale was discontinued, the assertion that notice of the second trustee's sale was recorded and issued to Plaintiffs, and the fact that SunTrust is exempted from Washington's Foreclosure Fairness Act. ECF No. 17 at 4–7. Defendants support these facts with various publically available documents. ECF No. 17–1.

***3** Defendants correctly state that courts may take judicial notice of public documents, but such notice is limited to the existence and authenticity of the documents rather than allowing notice of the truth of their contents. *See Lee v. City of Los Angeles,* 250 F.3d 668, 690 (9th Cir.2001) ("[W]hen a court takes judicial notice of another court's opinion, it may do so 'not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity.'") (quoting *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd.,* 181 F.3d 410, 426–27 (3rd Cir.1999)); *Cactus Corner, LLC v. U.S. Dep't of Agric.,* 346 F.Supp.2d 1075, 1099 (E.D.Cal.2004)*aff'd,*450 F.3d 428 (9th Cir.2006) ("The existence and authenticity of a document which is a matter of public record is judicially noticeable such as the authenticity and existence of a particular order, pleading, public proceeding, or census report, which are matters of public record, but the veracity and validity of their contents (the underlying arguments made by the parties, disputed facts, and conclusions of fact) are not.").

Aside from fact five, Defendants' asserted facts are not appropriate for judicial notice. Moreover, Defendants have offered evidence of the remaining facts in support of their motion for summary judgment. *See* ECF Nos. 16 at 3–4, 16–1; ECF Nos. 16 at 6, 16–7; ECF No. 16 at 6–7. Judicial notice of facts one through four is unnecessary.

Having resolved the request for judicial notice, the Court turns to Defendants' motion for summary judgment. Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). A "material" fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. *T.W. Elec. Serv. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The party asserting the existence of a material fact must show " 'sufficient evidence supporting the claimed factual dispute ... to require a jury or judge to resolve the parties' differing versions of the truth at trial.' " *T.W. Elec. Serv.,* 809 F.2d at 630 (quoting *First Nat'l Bank v. Cities Serv. Co.,* 391 U.S. 253, 288–89, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968)). The nonmoving party "may not rely on denials in the pleadings, but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists." *Bhan v. NME Hosps., Inc.,* 929 F.2d 1404, 1409 (9th Cir.1991).

Here, Plaintiffs' failure to respond to the motion for summary judgment justifies granting judgment against them. Pursuant to the Local Rules, Plaintiffs' response was due 30 days after the motion for summary judgment was mailed on March 5, 2014. LR 7. 1(b)(2) (A); ECF No. 14 at 16. A party's failure to comply with the requirements of LR 7.1(b) "may be deemed consent to the entry of an Order adverse to the party who violate[d] [the rule]." LR 7.1(d). The Clerk of Court warned Plaintiffs of this result, advising them that "[a] failure to file a timely response is considered consent to the moving party's summary-judgment motion, and the Court could then enter summary judgment in the moving party's favor and close this case without a trial."ECF No. 20 at 2. Plaintiffs' failure to respond is alone a sufficient basis to grant the motion for summary judgment.

***4** However, the motion for summary judgment succeeds on its merits as well.

Plaintiffs object that MERS unlawfully assigned the deed of trust to SunTrust. ECF No. 1–1 at 5. The Court can discern no reason why MERS would be prohibited from conveying its interest in the deed of trust back to SunTrust upon the latter's request. In fact, the Washington State Supreme Court recently concluded that "only the actual holder of the promissory note [i.e., not MERS] ... may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property," although the court declined to decide the legal effect of MERS acting as a beneficiary without legal authority. *Bain,* 175 Wash.2d at 89, 114, 285 P.3d 34. SunTrust apparently avoided this issue by reacquiring its full status as a beneficiary before appointing a successor trustee. Also, contrary to Plaintiffs' assertion in the complaint, ECF No. 1–1 at 5, SunTrust was authorized to appoint NWTS as a successor trustee because SunTrust was the beneficiary to the deed of trust. *See*RCW 61.24.010(2).

According to the complaint, Defendants failed to comply with statutory requirements to provide notice of default and to offer mediation. ECF No 1–1 at 6 (citing RCW 61.24.030(8); RCW 61.24.160). However, Defendants filed a declaration stating that notice of default was issued on or about January 29, 2013. ECF No. 21 at 3. The attached notice of default advises that mediation may be available and that the borrower should contact a housing counselor or an attorney. ECF No. 21 at 5.

Moreover, a federally insured depository institution that is not a beneficiary of deeds of trust in more than 250 trustee sales of residential property in a year is exempt from the foreclosure mediation program for the following year.RCW 61.24.166. SunTrust states in an affidavit that it was exempt from the mediation requirement in 2013. ECF No. 16 at 6–7.

Plaintiffs also claim that Defendants did not provide adequate notice required by the deed of trust, that Defendants failed to discuss alternatives to foreclosure, that Plaintiffs were not informed of their appeal rights, and that the notice of trustee's sale was materially defective. ECF No. 1–1 at 7–9. However, without any evidentiary support to rebut Defendants' contrary evidence, the Court must find that there are no genuine issues of material fact and grant summary judgment for the Defendants.

## CONCLUSION

Defendants are entitled to summary judgment. Plaintiffs did not respond to the motion for summary judgment, exposing them to adverse judgment under the terms of the Local Rules and failing to raise any genuine issues of material fact. In addition, summary judgment is appropriate for the previously stated substantive reasons.

Accordingly, **IT IS HEREBY ORDERED** that Defendants SunTrust, Fannie Mae, and MERS' Motion for Summary Judgment, **ECF No. 14,** is **GRANTED.**

The District Court Clerk is hereby directed to enter this Order, enter Judgment **with prejudice,** provide copies of this Order to counsel and to pro se Plaintiffs, and **close** this case.

**All Citations**

Slip Copy, 2014 WL 2439791

**End of Document**

2012 WL 5384929
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Tacoma.

Nhan Phong Vu TRAN, and
Stephanie T. Au, Plaintiffs,
v.
BANK OF AMERICA, N.A., et al., Defendants.

No. 12–cv–5341–RBL. | Nov. 1, 2012.

**Attorneys and Law Firms**

Timothy T. Tran, Tran Law Firm, Vicente Omar Barraza, Barraza Law PLLC, Seattle, WA, for Plaintiffs.

Abraham K. Lorber, John S. Devlin, III, Lane Powell PC, Seattle, WA, Heidi E. Buck, Routh Crabtree Olsen, Bellevue, WA, for Defendants.

**ORDER**

RONALD B. LEIGHTON, District Judge.

***1** Plaintiffs have filed suit in response to the foreclosure and sale of their home, alleging breaches of contract, the Washington Deed of Trust Act, the Washington Consumer Protection Act, and other causes of action. Defendants Bank of America, N.A., BAC Home Loans Servicing, L.P., and Mortgage Electronic Systems Inc. ("MERS") have moved to dismiss. Further, Plaintiffs have requested leave to amend their Complaint.

**I. BACKGROUND**

In 2005, Plaintiffs borrowed $300,219 from America's Whole Sale Lender to purchase residential property in Clark County. (Am.Compl.¶ 3.3.) Plaintiffs executed a promissory note and deed of trust in the process, listing First American Title as trustee and MERS as the nominee for the beneficiary. (*Id.* ¶ 3.3.)In July 2009, Plaintiffs defaulted, and Recontrust (the successor trustee) initiated non judicial foreclosure. (*Id.* ¶ 3.5.)By that point, it appears that ownership of Plaintiffs' note had transferred, and Bank of America had become the servicer. Bank of America halted the foreclosure and agreed to a "Trial Period Plan" under the Home Affordable Modification Program ("HAMP"), allowing Plaintiffs a reduced monthly payment while the bank determined whether Plaintiffs were eligible for a permanent loan modification. (*Id.* ¶¶ 3.07–3.13.)Bank of America suspended the trustee's sale scheduled for October 2009, although Plaintiffs acknowledge that the Bank was entitled to terminate the trial plan and "move forward with non judicial foreclosure actions."(*Id.* ¶ 3.9–3.10.)Plaintiffs began making trial payments in November 2009.

Plaintiffs continued to make timely payments through 2009 and 2010. On July 30, 2010, MERS assigned its interest in the deed of trust to BAC Home Loans Servicing, L.P., which was later merged into Bank of America. (Def.'s Mot. to Dismiss at 3, Dkt. # 9.)

In January 2011, Bank of America requested documents from Plaintiffs to determine if they were eligible for a permanent modification. (Am.Compl.¶ 3.13.) Approximately a month later, the bank notified Plaintiffs that "the amount they were paying ... was not sufficient," and "Plaintiffs did not meet the requirements for the HAMP permanent loan modification because the Plaintiffs failed to provide requested documentation."(*Id.* ¶ 3.14). Plaintiffs state that they "complied will all of [Bank of America's] document requests...."(*Id.* ¶ 3.13.)

On July 21, 2011, Bank of America re-initiated the foreclosure process by sending Plaintiffs a notice of default. (Am.Compl.¶ 3.19.) The bank then appointed Northwest Trustee Services, Inc., as trustee. Northwest Trustee scheduled a sale for November 28, 2011.

Plaintiffs continued to make timely payments throughout this period. (Am.Compl.¶ 3.22.) Further, Plaintiffs allege that Bank of America informed them that the foreclosure would be postponed while their application for a permanent loan modification was being processed. (*Id.* ¶ 3.23.)That processing, however, appears to have continued through the actual sale of the property. Plaintiffs state that the bank requested additional documents eleven days before the scheduled sale—November 17, 2011. (*Id.* ¶ 3.23.)Plaintiffs provided that documentation on November 20th. (*Id.* ¶ 3.23.)According to the Complaint, Plaintiffs were not informed that the sale would be proceeding and were told of the sale when checking on the status of their loan modification.(*Id.* ¶ 3.24.)

***2** Plaintiffs state that, despite the sale, Bank of America accepted Plaintiffs' December 2011 mortgage payment. (*Id.* ¶ 3.27.)

Bank of America has moved to dismiss the claims (Dkt.# 9), and Plaintiffs seek to amend their Complaint (Dkt.# 14). The proposed Amended Complaint appears largely identical to the first with claims added under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.*, and the Truth in Lending Act, 15 U.S.C. § 1601*et seq.*

In total, Plaintiffs assert the following claims:

- Wrongful Foreclosure by Bank of America and Northwest Trustee;
- Breach of Contract by Bank of America;
- Breach of the Duty of Good Faith by Northwest Trustee;
- Breach of HAMP Agreement;
- Negligence;
- Negligent Misrepresentation;
- Violation of the Washington Consumer Protection Act, Wash. Rev.Code § 19.86;
- Equitable Estoppel;
- Unjust Enrichment;
- Tortious Interference with Contract or Expectancy;
- Quantum Meruit;
- Declaratory Judgment;
- Slander of Title;
- Violation of RESPA and TILA.

(*See generally* Am. Compl., Dkt. # 20.) [1]

Bank of America argues that most of these claims are waived because Plaintiffs failed to bring suit before the sale of the property and that the remaining claims fail as a matter of law.

## II. DISCUSSION

Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir.1990). A complaint must allege facts to state a claim for relief that is plausible on its face. *See Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). A claim has "facial plausibility" when the party seeking relief "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."*Id.* Although the Court must accept as true a complaint's well-pled facts, conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper Rule 12(b)(6) motion. *Vasquez v. L.A. County,* 487 F.3d 1246, 1249 (9th Cir.2007); *Sprewell v. Golden State Warriors,* 266 F.3d 979, 988 (9th Cir.2001)."[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level."*Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citations and footnote omitted). This requires a plaintiff to plead "more than an unadorned, the-defendant-unlawfully-harmed-me accusation."*Iqbal,* 129 S.Ct. at 1949 (citing *Twombly* ).

### A. Amendment of the Complaint

Because the proposed Amended Complaint adds only two causes of action—to which Defendants have responded in substance—the Court sees no prejudice in considering the Amended Complaint on the merits here. Plaintiffs' motion to amend is granted.

### B. Waiver

***3** Bank of America argues that Plaintiffs failed to enjoin the foreclosure sale and therefore waived most of their claims. Wash. Rev.Code § 61.24.130 lays out the procedure by which a borrower may enjoin a foreclosure sale, and it is the "only means a grantor may preclude a sale once foreclosure has begun ...." *Brown v. Household Realty Corp.,* 146 Wash.App. 157, 163, 189 P.3d 233 (2008) (quoting *Cox v. Helenius,* 103 Wash.2d 383, 388, 693 P.2d 683 (1985)). A party waives post-sale challenges where that party: "(1) received notice of the right to enjoin the sale; (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale; and (3) failed to bring an action ...." *Albice v. Premier Mortgage Servs. of Wash., Inc.,* 174 Wash.2d 560, 570, 276 P.3d 1277

(2012). Waiver is "an equitable principle" that applies "where it serves the goals" of the Washington Deed of Trust Act —efficiency, ensuring an adequate opportunity to prevent wrongful foreclosure, and promoting the stability of land titles. *Id.* at 567, 569, 276 P.3d 1277.

The Court must conclude that waiver is not equitable in this case. Plaintiff alleges that the bank requested additional loan documents from Plaintiffs only a week before the scheduled foreclosure and assured Plaintiffs that the property would not be sold while the application was reviewed. (Am.Compl.¶ 3.23.) A reasonable borrower would assume that Bank of America was in contact with Northwest Trustee and ensuring that the property would not be sold. Thus, Plaintiffs did not fail to bring an action to enjoin the sale; rather, Bank of America allegedly led them to believe that the sale would be postponed. Bank of America's response —that Plaintiffs received all proper notices—ignores the representations alleged by Plaintiffs and is insufficient to support waiver.

The fact that Plaintiffs did not waive their claims does not, however, provide substance to them.

**C. Wrongful Foreclosure**

Plaintiffs argue that Bank of America breached the terms of the note and deed by:

- "Failing to properly assign and record the beneficiary's interest including assignment issues involving [MERS]";
- Failing to offer mediation;
- Failing to properly identify the beneficiary;
- Misleading Plaintiffs to believe that a forbearance agreement stayed the trustee's sale;
- "Inducing" Plaintiffs to make a "futile" attempt to modify their loan;
- Failing to account for payments tendered by Plaintiffs;
- Failing to send proper notices required by the Deed of Trust Act;
- Improperly initiating foreclosure through Recontrust;
- Failing to re-initiate the foreclosure process after originally discontinuing;
- Charging improper fees and costs.

(*See* Am. Comp. at 8–9, Dkt. # 20.) The Complaint, however, lacks facts to support any of these claims—indeed, some of Plaintiffs' claims are contradicted by their own allegations. First, Plaintiffs' claims regarding MERS are meritless. They present no facts whatsoever regarding the company or the assignment. Second, Plaintiffs cite no law requiring Bank of America to offer mediation. Third, Plaintiffs fail to explain why the beneficiary of the deed was not "properly identified," especially given that Plaintiffs made payments to Bank of America and negotiated a trial modification with the bank. Fourth, Plaintiffs have not alleged a forbearance agreement or any facts suggesting how Bank of America misled them with regard to such an agreement. Fifth, Plaintiffs do not specify what notices they failed to receive. Sixth, the Complaint contains no explanation for why foreclosure was improperly initiated by Recontrust. Seventh, although Plaintiffs allege that Bank of America failed to re-initiate the foreclosure process, they simultaneously allege that the bank renewed the foreclosure process by sending a new notice of default on July 21, 2011. (Am.Compl.¶ 3.18.) Lastly, Plaintiffs do not address what fees and charges the bank improperly charged.

***4** There appear to be only two substantial allegations of misconduct: (1) that the bank misled Plaintiffs to believe that the foreclosure sale was postponed; and (2) that the bank accepted and kept the December 2011 payment *after* selling the property. But those facts alone, if true, do not support a claim that Bank of America wrongfully foreclosed. Indeed, Plaintiffs admit default, acknowledge that Defendants were entitled to deny a loan modification and proceed with foreclosure, and fail to suggest facts supporting a cause of action for wrongful foreclosure.

**D. Breach of Contract by Bank of America**

Plaintiffs allege that Bank of America breached the terms of the deed and the "HAMP trial plan," which they allege constituted a contract. The Complaint, however, identifies no terms that were breached; rather, Plaintiffs argue that the "written assurances" of their agents were breached. These allegations are so vague that neither the Court nor Defendants can be expected to reply, and they are thus dismissed.

Plaintiffs further state that Bank of America "breached its express contracts with the Plaintiff [sic] by illegally commencing foreclosure with its captive agent, Recontrust."(Am. Compl. ¶ 8 .3.) Again, the Complaint contains no explanation of how the contract was breached.

Plaintiffs also suggest that "[t]he loan servicer's acceptance of payments from the Plaintiff without crediting them against the default or loan balance breached the implied covenant of good faith and fair dealing."(Am.Comp.¶ 8.7.) The Complaint contains, however, no facts relating to a failure to credit payments. The sole fact this *could* relate to is Bank of America's alleged acceptance of a December 2011 payment, although it is not suggested that this was not credited. The facts here are too vague and insufficient to state a claim.

**E. Breach of the Duty of Good Faith and Fair Dealing**

Plaintiffs argue that Northwest Trustee violated its statutory duty of good faith and fair dealing under Wash. Rev.Code § 61.24.010(4).[2] Northwest Trustee did this, apparently, by "failing to act impartially." (Am.Compl.¶ 11.4.) The allegation is woefully inadequate to sustain a claim and is dismissed.

**F. Breach of Alleged HAMP Agreement**

Plaintiffs allege that they "constitute third party beneficiaries of the federal government's Home Affordable Modification Program (HAMP)." (Am.Compl.¶ 9.2.) According to the Complaint, Bank of America "violated the contractual agreement with the federal government through HAMP" by failing "to stop the foreclosure process as it agreed to when it agreed to accepted [sic] the HAMP agreement with the federal government."(*Id.* ¶ 9.5, 276 P.3d 1277.)

HAMP provides lenders federal funds to offer loan modifications to prevent a foreclosure sale. *See Yongbae Kim v. Bank of Am., N.A.,* No. 11–cv–296, 2011 WL 3563325 (W.D.Wash. Aug.11, 2011); 12 U.S.C. § 5219. There is no private right of action by a homeowner to enforce the provisions of HAMP. *Id.; see also Mirzoyan v. Wells Fargo Bank, N.A.,* No. 11–cv–023, 2012 WL 1259079 (W.D.Wash. Apr.13, 2012); *Lucia v. Wells Fargo Bank, N.A.,* 798 F.Supp.2d 1059, 1066 (N.D.Cal.2011)."Neither the Emergency Economic Stabilization Act, which created HAMP, nor HAMP's guidelines create 'a property interest in loan modifications for mortgages in default.'"*Lucia,* 798 F.Supp.2d at 1066 (citing *Williams v. Geithner,* 2009 WL 3757380, at *6 (D.Minn. Nov.9, 2009); *see also Hoffman v. Bank of America, N.A.,* 2010 WL 2635773, at *3 (N.D.Cal. June 30, 2010) (holding that because lenders are not required to make loan modifications for borrowers that qualify under HAMP and the servicer's agreement does not confer an enforceable right on the borrower, there is no private right to enforce HAMP)). In short, there is no private right of action created under HAMP, and the claim is dismissed.

**G. Negligence and Negligent Misrepresentation**

***5** Plaintiffs allege that Northwest Trustee was negligent in selling the property despite the representations from Bank of America to Plaintiffs.(*Id.* ¶ 14.2.)Further, Plaintiffs allege that Bank of America negligently misrepresented that the foreclosure sale would be postponed while the bank reviewed their loan modification application, thereby depriving Plaintiffs of the opportunity to cure their default. (Am.Compl.¶ 10.2.)

As an initial matter, Plaintiffs fail to suggest how Northwest Trustee is responsible for the alleged representations made by Bank of America to Plaintiffs. There is simply no link, and the negligence claim against Northwest Trustee is dismissed.

Defendants do not address the negligent misrepresentation claim directly, relying instead on their already-rejected waiver argument. It is not clear that Plaintiffs' negligent misrepresentation claim fails as a matter of law, and the Court therefore denies the motion to dismiss the negligent misrepresentation claim against Bank of America.

**H. Violation of the Washington Consumer Protection Act**

Plaintiffs assert that Bank of America's alleged negligent misrepresentation constitutes an unfair and deceptive act within the meaning of Wash. Rev.Code § 19.86. In response, Bank of America argues that Plaintiffs "offer no specifics as to when, how or by whom the representation was made."(Def.'s Mot. to Dismiss at 13, Dkt. # 9.) Plaintiffs state, however, that Bank of America's loan-modification representatives made these statements in numerous interactions between July and November 2011. And Plaintiffs cite a letter sent by Bank of America requesting further loan modification documents just eleven days before the sale. (Am.Compl.¶ 3.23, Dkt.# 20.) While it is not entirely clear what damages Plaintiffs have suffered by the unfair statement—indeed, they have not alleged that they would have cured the default and prevented the sale—dismissal is premature.

**I. Equitable Estoppel**

Plaintiffs argue, in essence, that Bank of America should be estopped from foreclosing because it "made promises and statements that the foreclosure would be postponed and that the Plaintiffs were going to receive a permanent loan modification."(Am.Compl.¶ 18.2.) The doctrine of equitable estoppel precludes a party who "causes another to change his position ... to such person's detriment" from "asserting the conduct ... of the other party to his own advantage."*Dickson v. U.S. Fidelity & Guaranty Co.,* 77 Wash.2d 785, 788, 466 P.2d 515 (1970) (citing *Kessinger v. Anderson,* 31 Wash.2d 157, 196 P.2d 289 (1948)). Because equitable estoppel is "not a favored doctrine," the party asserting estoppel "must prove its elements by clear, cogent, and convincing evidence."*Dombrosky v. Farmers Ins. Co. of Wash.,* 84 Wash.App. 245, 256, 928 P.2d 1127 (1996).

It is unclear that Plaintiffs understand the proper use of the equitable estoppel doctrine. The Court cannot "estop" a foreclosure sale (particularly one that has already happened). The claim is dismissed.

**J. Unjust Enrichment**

***6** Plaintiffs argue that Defendants have been unjustly enriched by the wrongful foreclosure. (Am.Compl.¶ 17.2.) In Washington, "unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it."*Young v. Young,* 164 Wash.2d 477, 484, 191 P.3d 1258 (2008). But, "[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."*Chandler v. Wash. Toll Bridge Auth.,* 17 Wash.2d 591, 604, 137 P.2d 97 (1943). Here, Plaintiffs allege multiple contracts and may not therefore disregard the terms of those contracts and seek damages on an implied contract relating to the same matter—the foreclosure. The claim is dismissed.

**K. Tortious Interference**

Plaintiffs argue that Bank of America and Northwest Trustee knew there was a second mortgage on the property, and they acted "exclusively for their own benefit by foreclosing."(Am.Compl.¶ 13.3.) The foreclosure "interfered with the relationship and expectancy that [Plaintiffs] had with junior lienholder [sic]."(*Id.*)Plaintiffs are unclear as to what "expectancy" they held under their second mortgage. In any event, the Complaint demonstrates that Defendant properly initiated foreclosure proceedings. The two substantive allegations of misconduct listed above cannot support a claim for tortious interference, and the claim is dismissed.

**L. Quantum Meruit**

Plaintiffs suggest that they are "due the reasonable value of their performance under the Trial Modification Plan proffered by the loan servicer's agent, in an amount to be determined at trial."(Am.Compl.¶ 16.2.) "Quantum meruit ... is the method of recovering the reasonable value of services provided under a contract implied in fact."*Young v. Young,* 164 Wash.2d 477, 485, 191 P.3d 1258 (2008). Here, there is no contract "implied in fact"; there is an express contract. Further, Plaintiffs applied for a loan modification; they did not "provide service." The claim is frivolous and dismissed.

**M. Declaratory Judgment**

Plaintiffs seek a declaratory judgment declaring the trustee's sale void and restoring their note and deed of trust—i.e., granting their requested relief. (Am.Compl.¶ 20.2.) Under the Washington Uniform Declaratory Judgment Act, "[a] person interested in a deed ... may have determined any question of construction or validity arising under the instrument."Wash. Rev.Code § 7.24.020. It is unclear what "question of construction or validity" Plaintiffs seek to address. Rather, Plaintiffs request only that the Court "declare" the relief sought, and as such, the claim is dismissed.

**N. Slander of Title**

Plaintiffs allege that MERS slandered title to their property. The Complaint, however, contains no allegations that MERS took any action in regards to the property whatsoever. The claim is dismissed.

***7** Plaintiffs also allege that Bank of America and Northwest Trustee slandered title to their property. To succeed on a slander of title claim, a plaintiff must show (1) false words; (2) maliciously published; (3) referencing a pending sale or purchase of property; (4) which go to defeat plaintiff's title; and (5) result in pecuniary loss to plaintiff. *Rorvig v. Douglas,* 123 Wash.2d 854, 859–60, 873 P.2d 492 (1994). Here, Plaintiffs fail to allege any of these elements, and the claim is dismissed.

**O. Violation of RESPA and TILA**

In their Amended Complaint, Plaintiffs allege that "Lender"—apparently meaning Bank of America

 

—"improperly calculated the amounts due by Plaintiff and wrongfully instructed the Trustee to foreclose ... without adhering to MHA and RESPA relative to timely application of payments and failing to provide an accurate accounting when clearly requested by Plaintiff."(Am.Compl.¶ 21.3.) The Complaint also states that "Lender ... accepted payments and failed to tell Plaintiff that he was still in default or how those payments would be applied, if ever."(*Id.* ¶ 21.5, 873 P.2d 492.) The Complaint contains no facts, however, relating to the "timely application of payments" or a failure to "provide an accurate accounting." Plaintiffs do allege that Bank of America accepted a payment *after* the property was foreclosed, but this would not seem to sustain the allegations. Further, the HAMP documents supplied by Plaintiffs belie their own arguments. The documents state that "all terms and provisions of the Loan Documents remain in full force and effect; nothing in this Plan shall be understood or construed to be a satisfaction or release."(Decl. of Nhan Tran at 3, Dkt. 13–1.) In other words, the amounts owed under the original note remain in effect despite the trial plan payments.

Plaintiffs further argue that "Servicer failed to apply payments in accordance with the terms of the Deed of Trust and other loan documents and in relation to TILA protections...." (Am.Compl.¶ 21.15.) The Complaint explains that portions of the trial payments were applied to principal and this "entitled Plaintiff to reasonable reliance [sic] in their belief that he [sic] was current on his mortgage obligations or at the very least sufficient interest payments were being made to and acceptable to Servicer."(*Id.* ¶ 21.16, 873 P.2d 492.) Plaintiffs request punitive damages in the amount of $5 million. The Court, however, is entirely unclear as to the connection. The HAMP trial plan documents clearly state that Plaintiffs were not released from the terms of their note and deed of trust; yet, Plaintiffs request $5 million based on their "entitlement" to believe that their loan was current.

Next, Plaintiffs argue that they were damaged under RESPA by negative credit reports. The Complaint fails to cite any law suggesting this is a valid cause of action.

Finally, the Complaint makes various, scattered references to "QWR," without any explanation. The Court declines to piece together the jigsaw puzzle.

***8** To the extent that the Complaint contains other vague, scattershot allegations, the Court must conclude they cannot sustain a claim. (*See, e.g.,* Am. Compl. ¶ 21.24 (alleging that "Lender's Board Members, Officers and Management all failed to provide necessary oversight ... ); ¶ 21.23 (asserting that "there was no statement provided by Lender indicating whether or not the consumer is entitled to a rebate of any finance charge" without any explanation as to who, what, where, when or why anyone would)).

## III. CONCLUSION

Plaintiffs' motion to amend (Dkt.# 14) is **GRANTED.**Defendants' motion to dismiss (Dkt.# 9) is **GRANTED IN PART** and **DENIED IN PART.**Plaintiffs' claims for negligent misrepresentation and violation of the Consumer Protection Act, Wash. Rev.Code § 19.86, survive, based on the allegations that Bank of America informed Plaintiffs that it would postpone the trustee's sale, but did not. To the extent that Plaintiffs have alleged that Bank of America accepted a monthly mortgage payment after the property was sold, Plaintiffs may amend their Complaint to attempt to properly state a claim based on that allegation if they so choose. Defendants may renew their motion to dismiss at that time.

Further, Plaintiffs are reminded that Fed.R.Civ.P. 11 requires counsel to conduct an "inquiry reasonable under the circumstances" and certify that the "claims ... and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending" existing law. Plaintiffs' claims for quantum meruit and tortious interference, as well as a number of their vague factual allegations, come dangerously close to sanctionable conduct.

**All Citations**

Not Reported in F.Supp.2d, 2012 WL 5384929

Footnotes

1 Plaintiffs have also included "Rescission" and "Injunction" as causes of action (Am.Compl.¶ 7.1, ¶ 19.1.) Neither are causes of action.*Kwai Ling Chan v. Chase Home Loans, Inc.*, No. 12–cv–273, 2012 WL 1252649 at *3–4 (W.D.Wash.

Apr.13, 2012) (dismissing claims for "rescission" and "injunction" and collecting supporting case law). The "claims" for rescission and injunction are therefore dismissed.

2 The Amended Complaint incorrectly cites subsection (3).

**End of Document**

2013 WL 1934172
Only the Westlaw citation is currently available.
United States District Court,
E.D. Washington.

Angela UKPOMA, Plaintiff,
v.
U.S. BANK NATIONAL ASSOCIATION, et al., Defendants.

No. 12–CV–0184–TOR. | May 9, 2013.

**Attorneys and Law Firms**

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## ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

THOMAS O. RICE, District Judge.

***1** BEFORE THE COURT are cross-motions for summary judgment (ECF Nos. 34, 37 and 46 [1]). These matters were heard with telephonic oral argument on May 8, 2013. L akisha M. Morris appeared on behalf of the Plaintiff. John E. Glowney appeared on behalf of Defendants U.S. Bank National Association, Mortgage Electronic Registration Systems, Inc. and Select Portfolio Servicing, Inc. Mary Stearns appeared on behalf of Defendant Quality Loan Service Corp. of Washington. The Court has reviewed the briefing and the record and files herein, and is fully informed.

## BACKGROUND

Plaintiff asserts a variety of claims stemming from Defendants' efforts to foreclose on her home. Plaintiff's main contention is that Defendants no longer have an enforceable security interest i n her home given that her loan was sold into a securitized trust. She also alleges that Defendants violated various state and federal statutes by attempting to foreclose upon an invalid security interest. For the reasons discussed below, the Court finds that Defendants are entitled to summary judgment on all of Plaintiff's claims.

## FACTS

Plaintiff, Angela Ukpoma ("Plaintiff") purchased a home in Kettle Falls, Washington in December of 2006. To finance the purchase, Plaintiff borrowed $252,000 from Credit Suisse Financial Corporation ("Credit Suisse"). Plaintiff's obligation to repay the loan was memorialized i n an adjustable rate note dated December 13, 2006. ECF No. 35–1. The loan was secured by a deed of trust in favor of Credit Suisse, with Defendant Mortgage Electronic Registration Systems, Inc. ("MERS") listed as the beneficiary. ECF No. 35–4. The deed of trust was recorded in the Stevens County Auditor's Office on December 21, 2006.

In May of 2007, Credit Suisse indorsed the note i n blank by way of an allonge executed by its attorney-in-fact, Lydian Data Services, thereby rendering the note a bearer instrument. ECF No. 35–2. Shortly thereafter, the note was transferred to Defendant U.S. Bank National Association ("U.S.Bank"). U.S. Bank asserts that "MERS assisted in this transaction in an agency capacity to effectuate the transfer."ECF No. 38–1. Plaintiff's loan was ultimately transferred into a securitized trust known as the Adjustable Rate Mortgage–Backed Pass–Through Certificates, Series 2007–2.

Plaintiff defaulted on her loan in late 2007. U.S. Bank subsequently appointed Defendant Quality Loan Service Corp. ("Quality") as successor trustee on February 1, 2008. ECF No. 40–1, Exhibit A. On that same date, Quality mailed Plaintiff a notice of default and arranged for the same to be posted on Plaintiff's residence. ECF No. 40–1, Exhibit B. On March 3, 2008, Quality executed a notice of trustee's sale, which was recorded in the Stevens County Auditor's Office two days later. ECF No. 40–1, Exhibit C. On March 18, 2008, MERS executed a corporate assignment of deed of trust which purported to transfer beneficial interest i n the deed of trust to U.S. Bank. ECF No. 47–4. For reasons that are not clear from the record, Quality did not proceed with the trustee's sale.

***2** Quality resumed its efforts to foreclose on the property in 2010. Upon learning of these efforts, Plaintiff sued the servicer of her loan, Defendant Select Portfolio Services, Inc. ("SPS"), in U.S. District Court for the Eastern District of Washington. *See*Case No. 10–CV–0420–LRS.One week later, Plaintiff filed a Chapter 7 bankruptcy petition.

*See*Case No. 10–6815–PCW7.Plaintiff's civil complaint was subsequently dismissed on the ground the claims belonged to Plaintiff's bankruptcy estate rather than Plaintiff herself. Plaintiff's bankruptcy was eventually discharged in early 2011.

Quality resumed its efforts to foreclose on the property by filing a new notice of trustee's sale on August 22, 2011. Plaintiff responded by filing the instant lawsuit in Stevens County Superior Court, which was subsequently removed to this Court. To date, no sale of Plaintiff's property has occurred.

## DISCUSSION

Summary judgment may be granted upon a showing by the moving party "that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law."Fed.R.Civ.P. 56(a). The moving party bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The burden then shifts to the non-moving party to identify specific genuine issues of material fact which must be decided by a jury. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)."The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."*Id.* at 252.

For purposes of summary judgment, a fact is "material" if it might affect the outcome of the suit under the governing law. *Id.* at 248.A dispute concerning any such fact is "genuine" only where the evidence is such that a reasonable jury could find in favor of the non-moving party. *Id.* In ruling on a summary judgment motion, a court must construe the facts, as well as al l rational inferences therefrom, in the light most favorable to the non-moving party. *Scott v. Harris,* 550 U.S. 372, 378, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). Finally, the court may only consider admissible evidence. *Orr v. Bank of America, NT & SA,* 285 F.3d 764 (9th Cir.2002).

### A. Breach of Contract Claim

Plaintiff's breach of contract claim is grounded in an alleged breach of the deed of trust. According to Plaintiff, U.S. Bank and others breached the terms of the contract by failing to reconvey the property to her unencumbered following the sale of her mortgage into the securitized trust. In Plaintiff's view, the sale of the note into the securitized trust extinguished any security interest evidenced by the deed of trust because the original owner(s) of the note "received full consideration for their interest in the note" when it was securitized. Pl.'s Compl., ECF No. 1–1, at ¶ 39. As a result, Plaintiff argues, "Defendants and others claiming an interest in the note no longer have a secured interest in Plaintiff's home."Pl.'s Compl., ECF No. 1–1, at ¶ 41.

***3** Contrary to Plaintiff's assertions, securitization of the note through the M ERS system did not extinguish the security interest evidenced by the deed of trust. *See McCarty v. U.S. Bank, N.A.,* 2012 WL 1751791 at *2 (W.D.Wash.2012) (unpublished); *Van Kirk v. Bank of America Corp.,* 2012 WL 3544735 at * 7 (D.Idaho 2012) (unpublished) (collecting cases); *Cervantes v. Countrywide Home Loans, Inc.,* 656 F.3d 1034, 1044 (9th Cir.2011) (holding that securitization of note through M ERS system did not deprive lender of right to foreclose). The note remained secured by the deed of trust despite the fact that the former was securitized. *Tripoli v. Branch Banking & Trust Corp.,* 2012 WL 2685090 at *3 (D.Utah 2012) (unpublished) ("Thus, even if BB & T or MERS had attempted to separate the Note from the Trust Deed, the security was paired, as a matter of fact, with the Note at al l times, regardless of any purported attempt to separate the two."). Accordingly, Defendants are entitled to summary judgment on this claim.

### B. Wrongful Foreclosure Claim

Plaintiff's wrongful foreclosure claim rests on the theory that MERS cannot act as a "beneficiary" of a deed of trust under Washington law, and that, as a result, any assignments of the deed of trust by M ERS to other entities were void. Citing to the Washington Supreme Court's decision in *Bain v. Metropolitan Mortgage Group, Inc.,* 175 Wash.2d 83, 110, 285 P.3d 34 (2012), Plaintiff argues that, upon the execution of the corporate assignment of successor trustee by MERS, "U.S. Bank became an unsecured creditor, with absolutely no right to foreclose."Pl.'s Compl., ECF No. 1–1, at ¶ 61. Plaintiff further suggests that the note has been "separated" from the deed of trust, thereby invalidating the security interest i n her home.

Contrary to Plaintiff's assertions, the fact that M ERS is listed as a beneficiary of the deed of trust is not relevant to the outcome of this case. U.S. Bank is currently in possession of the original note and deed of trust. The note is indorsed in blank, making it payable to the "bearer" (that is to say, anyone in physical possession) rather than to a specific payee. *See generally*RCW 62A.3–205(b) ("If an indorsement is made by the holder of an instrument and it is not a special indorsement [as defined by RCW 62A.3–205(a) ], it is a 'blank indorsement.' When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.").[2] Thus, by virtue of being in possession of the note, U.S. Bank is the lawful owner. Its right to receive payment on the note does not depend upon any assignment of the note from MERS.

Nor have the note and deed of trust been forever "separated." Indeed, Plaintiff's own authorities compel the opposite conclusion. As Plaintiff correctly observes, the assignment of a deed of trust without a transfer of the underlying debt obligation is a legal nullity. *See* Pl.'s Compl., ECF No. 1–1, at ¶ 60 (citing *Carpenter v. Longan,* 16 Wall. 271, 83 U.S. 271, 274, 21 L.Ed. 313 (1872)). The logical corollary of this rule is that "[t] he transfer of [a] note carries with it the security, without any formal assignment or delivery, or even mention of the latter."*Carpenter,* 83 U.S. at 275. Here, the transfer of the note from Credit Suisse to U.S. Bank automatically carried with it the security interest evidenced by the deed of trust. *Id.; see also Tripoli,* 2012 WL 2685090 at *3 (D.Utah 2012) (unpublished) ("[T]he security was paired, as a matter of fact, with the Note at al l times, regardless of any purported attempt to separate the two."). Accordingly, any subsequent transfers of the deed of trust by M ERS to other entities are irrelevant. Because the note remains secured by the deed of trust, Defendants are entitled to summary judgment on this claim.

***4** Finally, the Court must address Plaintiff's request for leave to amend her wrongful foreclosure claim to state a cause of action for individual violations of the Washington Deed of Trust Act, RCW Chapter 61.24. ECF No. 53 at 12–13. Based upon the rulings above, the Court finds that any such amendment would be futile. U.S. Bank and its appointed successor trustee(s) have authority to foreclose on the deed of trust. To the extent that U.S. Bank or any other Defendant violated one or more provisions of the Deed of Trust Act i n their prior attempts to foreclose on Plaintiff's property, Plaintiff cannot establish that she was injured by the violation. Given that no foreclosure has taken place, Plaintiff could not have been injured. Thus, Plaintiff's request for leave to amend is denied.

### C. Quiet Title Claim

Plaintiff's quiet title claim is based upon the theory that Defendants' security interest i n her home was extinguished by the securitization of her loan. For the reasons discussed above, this theory lacks merit. Defendants are entitled to summary judgment on this claim.

### D. Slander of Title Claim

In Washington, "the initiation of foreclosure proceedings cannot form the basis of a slander of title claim."*Beaton v. JPMorgan Chase Bank N.A.,* 2012 WL 909768 at *3 (W.D.Wash.2012) (unpublished) (citing *Krienke v. Chase Home Finance, LLC,* 140 Wash. A pp. 1032, 140 Wash.App. 1032, 2007 WL 2713737 at * 5 (Wash.App.2007)); *see also Tuttle v. Bank of New York Mellon,* 2012 WL 726969 at *6 (W.D.Wash.2012) (unpublished) (holding that the filing of a Notice of Trustee's Sale cannot give rise to a slander of title claim because "Washington law requires a trustee to record such a notice following a borrower's default.") (citing RCW 61.24.030); *Buddle–Vlasyuk v. Bank of New York Mellon,* 2012 WL 254096 at *5 (W.D.Wash.2012) (unpublished) (same); *Oliveros v. Deutsche Bank Nat. Trust Co., N.A.,* 2012 WL 113493 at *5 (W.D.Wash.2012) (unpublished) (same). Defendants are entitled to summary judgment on this claim.

### E. Fraud, Misrepresentation and Aiding and Abetting Fraud Claims

Plaintiff's claims for fraud, misrepresentation and aiding and abetting fraud are grounded i n allegations that Defendants attempted to foreclose on her property (1) with knowledge that they lacked legal authority to do so; and (2) by relying upon fraudulently executed documents. The first of these arguments is derivative of the arguments addressed above concerning U.S. Bank's ownership of the note and attached security interest. For the reasons previously stated, this argument is not persuasive. U.S. Bank was entitled to initiate foreclosure proceedings by virtue of being the lawful owner of the note and the deed of trust.

Plaintiff's second argument relates to so-called "robo-signing" of the documents used to initiate foreclosure proceedings. Even assuming for the sake of argument that the assignments in question were fraudulently executed, Plaintiff, as a third party, lacks standing to challenge them. *See Bateman v. Countrywide Home Loans,* 2012 WL 5593228 at *4 (D.Hawai'i 2012) (unpublished) ("The reason debtors generally lack standing to challenge assignments of their loan documents is that they have no interest i n those assignments, and the arguments they make do not go to whether the assignments are void *ab initio,* but instead to whether the various assignments are voidable. Debtors lack standing to challenge voidable assignments; only the parties to the assignments may seek to avoid such assignments.") (citing *Williston on Contracts* § 74:50 (4th ed.)); *In re MERS Litigation,* 2012 WL 932625 at * 3 (D.Ariz.2012) (unpublished) (holding that allegations of robo-signing failed to state a claim because plaintiff lacked standing to challenge assignment); *Kuc v. Bank of Am., NA,* 2012 WL 1268126 at *2 (D.Ariz.2012) (unpublished) ("[P]laintiff, as a third-party borrower, does not have standing to challenge the validity of any allegedly 'robosigned' recorded assignments."); *Javaheri v. JPMorgan Chase Bank N.A.,* 2012 WL 3426278 at *6 (C.D.Cal.2012) (unpublished) (accepting allegations of robo-signi ng as true, but holding that plaintiff lacked standing to challenge substitution of trustee agreement). Defendants are entitled to summary judgment on these claims.

**F. "Violations of Trustee's Duties" Claim**

***5** Plaintiff asserts that Quality violated its duties as a trustee under the Washington Deed of Trust Act by, *inter alia,* failing to provide adequate notice of default, providing deficient notice of the trustee's sale, failing to validate that U.S. Bank actually owned the promissory note, and acting in bad faith. *See* Pl.'s Compl., ECF No. 1–1, at ¶¶ 114–124. These claims fail as a matter of law because Plaintiff has not been injured by the alleged violations. Given that Defendants discontinued both prior attempts to foreclose on Plaintiff's property, there is no injury fairly traceable to the alleged violations. If Defendants wish to foreclose on Plaintiff's property, presumably they will start the notification process anew. Thus, Defendants are entitled to summary judgment on this claim.

**G. FDCPA Claim**

Plaintiff alleges that Defendant SPS violated Practices Act by falsely representing the amount owed on her loan and making unlawful communications. This claim fails as a matter of law because "the activity of foreclosing on [a] property pursuant to a deed of trust is not the collection of a debt within the meaning of the FDCPA."*Hulse v. Ocwen Fed. Bank, FSB,* 195 F.Supp.2d 1188, 1204 (D.Or.2002); *see also Van Kirk,* 2012 WL 3544735 at *4 (unpublished) (holding that "lenders and mortgage companies are not 'debt collectors' within the meaning of the FDCPA"). Defendants are entitled to summary judgment on this claim.

**H. CPA Claim**

To prevail on a claim for a violation of Washington's Consumer Protection Act ("CPA"), a plaintiff must demonstrate: (1) an unfair or deceptive act or practice; (2) occurring i n the conduct of trade or commerce; (3) which impacts the public interest; (4) an injury to business or property; and (5) a causal link between the injury and the deceptive act or practice. *Columbia Physical Therapy, Inc., P.S. v. Benton Franklin Orthopedic Assoc., P.L.L. C.,* 168 Wash.2d 421, 442, 228 P.3d 1260 (2010). Here, Plaintiff has asserted CPA claims against MERS, Quality and U.S. Bank. Her claims against Quality and U.S. Bank are derivative of the claims addressed abovespecifically that neither Defendant had legal authority to initiate foreclosure proceedings. For the reasons discussed above, this argument is not persuasive.

Plaintiff's CPA claim against MERS is based upon the theory that "MERS is claiming to have authority to assign the deed of trust and note, when it does not."Pl.'s Compl., ECF No. 1–1, at ¶ 139. While it is true that listing MERS as a beneficiary of a deed of trust is "presumptively" an unfair or deceptive act or practice for purposes of a CPA claim, *see Bain,* 175 Wash.2d at 117, 285 P.3d 34, a plaintiff asserting such a claim must also demonstrate that he or she was injured as a result of the act or practice, *see id.* at 119, 285 P.3d 34 ("Depending upon the facts of a particular case, a borrower may or may not be injured by the disposition of the note, the servicing contract, or many other things, and MERS may or may not have a causal role."). Here, Plaintiff's only alleged injury is that she had difficulty determining who actually owned her loan. ECF N o. 46 at 39. She fails to adequately explain how this difficulty resulted in an actual injury to her business or property. At bottom, Plaintiff simply has not been injured by MERS's involvement with her loan. Defendants are entitled to summary judgment on this claim.

**I. Claims for Declaratory and Injunctive Relief**

***6** Plaintiff's claims for declaratory and injunctive relief are entirely derivative of claims which have been dismissed above. Accordingly, Plaintiff is not entitled to declaratory or injunctive relief. Defendants are entitled to summary judgment on these claims.

**IT IS HEREBY ORDERED:**

1. The Motion for Summary Judgment filed by Defendants U.S. Bank National Association, Mortgage

Electronic Registration Systems, Inc. and Select Portfolio Servicing, Inc. (EC F N o. 34) is **GRANTED.**

2. The Motion for Summary Judgment filed by Defendant Quality Loan Service Corporation (ECF No. 37) is **GRANTED.**

3. Plaintiff's Amended Motion for Summary Judgment (ECF Nos. 42 and 46) is **DENIED.**

The District Court Executive is hereby directed to enter this Order, provide copies to counsel, enter judgment in favor of all Defendants, and **CLOSE** the file.

**All Citations**

Not Reported in F.Supp.2d, 2013 WL 1934172

Footnotes

1 Plaintiff has made several amendments and corrections to her motion for summary judgment. The operative motion is filed at ECF No. 46.

2 Plaintiff suggests that the indorsement is invalid because (1) it was made on an al longe rather than on the note itself, and (2) the allonge is not physically attached to the note. Neither argument is persuasive. Under RCW 62A.3–204, "[a]n indorsement on an allonge is valid even though there is sufficient space on the instrument for an indorsement.").RCW 62A.3–204, UCC Comment 1. Further, the allonge in this case specifically identifies the note to which it became permanently "affixed." *See* ECF No. 35–2. Given that there are no competing claims to payment on the note, there is no need to strictly construe the "affixation" requirement to mean "permanent physical attachment." The fact that both documents were two-hole punched and bound together with other documents in the same folder is sufficient.

**End of Document**

2014 WL 841527
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Seattle.

David M. WILSON, et al., Plaintiffs,
v.
BANK OF AMERICA, N.A., et al., Defendants.

No. C13–1567RSL. | Signed March 4, 2014.

**Attorneys and Law Firms**

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Jody M. McCormick, Steven Joseph Dixson, Witherspoon Kelley, Spokane, WA, for Defendants.

**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS**

ROBERT S. LASNIK, District Judge.

***1** This matter comes before the Court on "Defendants' Motion to Dismiss," dkt. # 5. Defendants Bank of America, N.A. ("BANA"), [1] Specialized Loan Servicing, LLC ("SLS"), and Deutsche Bank National Trust Company, as trustee for holders of the GSR Mortgage Loan Trust 2007–OA1 ("Deutsche Bank") (collectively "Defendants"), seek dismissal of all of Plaintiffs' claims under Fed.R.Civ.P. 12(b)(5) and Fed.R.Civ.P. 12(b)(6). Having reviewed all papers filed in support of and in opposition to Defendants' motion, the Court finds the following:

## I. BACKGROUND [2]

In February 2007, Plaintiffs executed a promissory note for $216,000.00, payable to the order of Countrywide Bank, N.A. ("Countrywide"). Dkt. # 1 at 22; Dkt. # 6–2 at 24–28. The promissory note was secured by a Deed of Trust on real property located at 11327 30th Avenue SE, Everett, Washington. Dkt. # 6–2 at 31–41. The Deed of Trust lists Countrywide as "lender," Commonwealth Land Title as "trustee," and Mortgage Electronic Registration Systems, Inc. ("MERS") as both "beneficiary" and "nominee." *Id.* at 31–32. Plaintiffs defaulted on the loan in October 2011. Dkt. # 1 at 26. On May 11, 2012, MERS assigned its beneficial interest under the Deed of Trust to Deutsche Bank. *Id.* at 22.Plaintiffs contend that this assignment was "blatant fraud" designed to coerce them into resuming payments and to allow Defendants to foreclose on the property if Plaintiffs did not begin making payments on the loan. *Id.* at 9. On May 9, 2013, SLS, the loan servicer at the time, mailed Plaintiffs a Notice of Default and Notice of Intent to Foreclose. *Id.* at 26–27.

In their complaint, Plaintiffs allege that their loan has been transferred a number of times, their loan servicer has changed several times, and they have not received notice of these changes. *Id.* at 4–11.Plaintiffs contend that Countrywide Home Loans Servicing LP ("CWHLS") was the loan servicer from April 2007 through April 2009; BANA was the servicer from May 2009 through October 2012; and SLS became the servicer in November 2012 and remains the current servicer. *Id.* at 6–7, 9–10.Plaintiffs allege that these servicers, at various times, misrepresented that Wells Fargo was the holder of the promissory note and incorrectly told them they could not refinance without paying a "Pre–Payment Penalty." *Id.*

This is the third lawsuit filed by Plaintiffs related to this loan. On November 30, 2011, Plaintiffs filed a complaint against "Bank of America N.A. Trust GSR2007–OA1" in Snohomish County Superior Court seeking to quiet title and alleging breach of the duty of good faith and fair dealing. *Wilson v. Bank of America N.A. Trust GSR2007–OA1,* C11–2146MJP (Dkt.# 6–1). After the defendant removed the case to federal district court, Plaintiffs' claims were dismissed without prejudice for failure to state a claim. Dkt. # 6–3. Six months later, Plaintiffs filed a complaint against Bank of America N.A., Wells Fargo Bank, N.A., Deutsche Bank National Trust Company, and Trust GSR2007–OA1, alleging fraud. *Wilson v. Bank of America, N.A.,* C12–1532JLR (Dkt.# 6–2). On January 12, 2013, Plaintiffs' second complaint was dismissed without prejudice, this time for lack of standing. Dkt. # 6–4.

***2** Plaintiffs filed the complaint in the above-captioned matter on August 30, 2013. Dkt. # 1. They assert claims of fraud, misrepresentation, and breach of the duty of good faith and fair dealing. Defendants seek dismissal of the complaint on the grounds that Plaintiffs' claims are barred by res judicata, Defendants have not been properly served pursuant to Rule 4 of the Federal Rules of Civil Procedure

("Rule 4"), and the complaint fails to state a claim upon which relief may be granted.

## II. DISCUSSION

### A. Res Judicata

As a preliminary matter, Defendants contend that Plaintiffs' claims are barred by the doctrine of res judicata. Dkt. # 5 at 6–7. Since federal jurisdiction in this case is based upon diversity of citizenship, this Court must apply the substantive law of the forum state, which includes the law of res judicata.*Jacobs v. CBS Broadcasting, Inc.,* 291 F.3d 1173, 1177 (9th Cir.2002)."The doctrine of res judicata rests upon the ground that a matter which has been litigated, or in which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again."*Ensley v. Pitcher,* 152 Wash.App. 891, 899, 222 P.3d 99 (2009). Res judicata requires "identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) causes of action, (3) subject matter, and (4) the quality of persons for or against whom the claim is made ."*Karlberg v. Otten,* 167 Wash.App. 522, 536, 280 P.3d 1123 (2012). Res judicata requires a final judgment on the merits. *Id.*

Under Washington law, a dismissal without prejudice is not a final judgment on the merits for the purposes of res judicata. *Rose ex rel. Estate of Rose v. Fritz,* 104 Wash.App. 116, 121, 15 P.3d 1062 (2001). Because Plaintiffs' prior two complaints were dismissed without prejudice and there have been no final decisions on the merits, the present action is not barred by res judicata.

### B. Rule 12(b)(5)

"When a defendant moves to dismiss based upon insufficient service of process, the plaintiff has the initial burden [of] making a prima facie showing of proper service."*Witt v. Port of Olympia,* 126 Wash.App. 752, 757, 109 P.3d 489 (2005) (internal quotation marks and citation omitted)."A plaintiff may make this showing by producing an affidavit of service that on its face shows that service was properly carried out."*Id.* If the plaintiff makes this showing, "the burden shifts to the defendant who must prove by clear and convincing evidence that service was improper."*Id.*

Rule 4(h) provides two methods for proper service on a corporate defendant. First, a plaintiff may serve a corporation pursuant to state law by serving a summons in a state court action where the district court is located or where service is made. Fed.R.Civ.P. 4(h)(1)(A). To properly serve a corporate defendant under Washington law, a plaintiff must delivering a copy of the summons "to the president or other head of the company or corporation, the registered agent, secretary, cashier or managing agent thereof or to the secretary, stenographer or office assistant of the president or other head of the company or corporation, registered agent, secretary, cashier or managing agent."RCW 4.28.080(9). Second, Rule 4(h) allows a plaintiff to serve a corporation "by delivering a copy of the summons and complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and—if the agent is one authorized by statute and the statute so requires—by also mailing a copy of each to the defendant."Fed.R.Civ.P. 4(h)(1)(B).

***3** Under Washington law, service of the summons and complaint by mail is limited to the circumstances enumerated in RCW 4.28.100, which justify service by publication. Additionally, service by mail constitutes proper service only after the serving party files an affidavit "stating facts from which the court determines that service by mail is just as likely to give actual notice as service by publication" and the court issues an order for service to be completed by mail. CR 4(d)(3)-(4). Neither Washington state law nor Rule 4(h) provides for service by certified mail, absent an order by the court. Here, Plaintiffs mailed a copy of the summons and complaint to all three Defendants via certified mail with return receipt. Dkt. # 7 at 2. They do not dispute that they have failed to complete personal service on the corporate agents or any other specified corporate representative as required by Rule 4. *Id.* at 2–3, 109 P.3d 489. They request, however, that the Court provide additional time to allow them to serve Defendants properly. *Id.* at 3, 109 P.3d 489.

Rule 4(m) requires a court to dismiss an action or order service to be completed within a specified time, unless the plaintiff shows good cause for failing to properly serve a defendant within 120 days after the complaint is filed. Fed.R.Civ.P. 4(m). If good cause is shown, "the court must extend the time for service for an appropriate period."*Id.* Good cause may be demonstrated by establishing, at a minimum, excusable neglect. *Boudette v. Barnette,* 923 F.2d 754, 756 (9th Cir.1991). Under Ninth Circuit law, however, even absent a showing of good cause, a district court has "broad discretion" to extend the time for service. *Efaw v. Williams,* 473 F.3d 1038, 1041 (9th Cir.2007). In determining whether to grant additional time for service under Rule 4(m), "a district court may consider factors like a statute of limitations bar, prejudice to the defendant, actual notice of a lawsuit, and eventual service."*Id.*

Plaintiffs based their request for additional time for service on their contention that Defendants received actual notice of the lawsuit. Dkt. # 7 at 2–3. Defendants filed a notice of appearance and a motion to dismiss. Thus, there can be no dispute that Defendants received actual notice of Plaintiffs' complaint. In addition, Defendants not argue that they have suffered prejudice as a result of Plaintiffs' failure to perfect proper service within 120 days. Considering the factors above, the Court would normally be inclined to grant an extension of time for service under Rule 4. However, because the Court finds dismissal without leave to amend appropriate under Rule 12(b)(6), the Court DENIES Defendants' request for additional time to complete service.

### C. Rule 12(b)(6)

Although a complaint challenged by a Rule 12(b)(6) motion to dismiss need not provide detailed factual allegations, it must offer "more than labels and conclusions" and contain more than a "formulaic recitation of the elements of a cause of action."*Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The complaint must indicate more than mere speculation of a right to relief. *Id.* When a complaint fails to adequately state a claim, such deficiency should be "exposed at the point of minimum expenditure of time and money by the parties and the court."*Id.* at 558.A complaint may be lacking for one of two reasons: (I) absence of a cognizable legal theory or (ii) insufficient facts under a cognizable legal claim.*Robertson v. Dean Witter Reynolds, Inc.,* 749 F.2d 530, 534 (9th Cir.1984). In ruling on a motion to dismiss, the Court must assume the truth of the plaintiff's allegations and draw all reasonable inferences in the plaintiff's favor. *Usher v. City of Los Angeles,* 828 F.2d 556, 561 (9th Cir.1987). The question for the Court is whether the facts in the complaint sufficiently state a "plausible" ground for relief. *Twombly,* 550 U.S. at 570.

#### 1. Fraud and Intentional Misrepresentation

*4 Rule 9 requires a plaintiff asserting a fraud claim to "state with particularity the circumstances constituting the fraud."Fed.R.Civ.P. 9(b). To satisfy Rule 9(b)'s pleading standard, "a pleading must identify 'the who, what, when, where, and how of the misconduct charged,' as well as 'what is false or misleading about [the purportedly fraudulent] statement, and why it is false.'"*Cafasso, United States ex rel. v. Gen. Dynamics C4, Sys., Inc.,* 637 F.3d 1047, 1055 (9th Cir.2011) (quoting *Ebeid ex rel. United States v. Lungwitz,* 616 F.3d 993, 998 (9th Cir.2010)). Plaintiffs have not met this heightened standard.

Under Washington law, a fraud claim requires proof of "(1) a representation of existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity, (5) the speaker's intent that it be acted upon by the person to whom it is made, (6) ignorance of its falsity on the part of the person to whom the representation is addressed, (7) the latter's reliance on the truth of the representation, (8) the right to rely upon it, and (9) consequent damage."*Elcon Const., Inc. v. E. Wash. Univ.,* 174 Wash.2d 157, 166, 273 P.3d 965 (2012). Plaintiffs' complaint asserts a variety of legal conclusions, but it fails to allege specific facts supporting a claim of fraud. Throughout their complaint, Plaintiffs express frustration and disappointment that they were not permitted to refinance, dkt. # 1 at 8, and that their loan documents were not allegedly transferred to Deutsche Bank in a timely manner, *id.* at 8, 273 P.3d 965. However, these conclusory assertions and general complaints do not provide the who, what, when, where, and how of a properly pleaded fraud claim.

Plaintiffs' allegations regarding the loan servicers' alleged misrepresentations also fail to state a claim for relief. Plaintiffs claim that CWHLS, BANA, and SLS falsely represented that Wells Fargo was the owner of their loan. Dkt. # 1 at 6–11. While the allegations regarding Defendants' false statements and the assignment of the Deed of Trust may meet the particularity requirements of Rule 9(b), Plaintiffs have not alleged that they relied on these misrepresentations or that they suffered any damages as a result of the misrepresentations. On the contrary, Plaintiffs allege that they did not trust these representations. *Id.* at 8, 273 P.3d 965. Plaintiffs not only did not rely on these representations; they knew these particular statements were false and actively tried to correct Defendants. *Id.* ("Plaintiffs' (sic) sent BANA a copy of the letter they received from Wells Fargo, however, BANA continued to insist that Wells Fargo was their lender."). Finally, Plaintiffs do not allege that Defendants knew these statements were false at the time they were made.

With respect to Plaintiffs' claim that the assignment of the Deed of Trust was fraudulent, Plaintiffs have not identified a particular false representation set forth in the assignment. Moreover, Plaintiffs fail to allege that they relied on this fraudulent transfer or that they have suffered any harm as a result. As with Defendants' alleged misrepresentations regarding Wells Fargo, Plaintiffs allegations suggest that they were not misled because they did not trust the contents of the document. *Id.* at 8–12, 273 P.3d 965.

***5** Because negligent misrepresentation, like fraud, requires proof that a plaintiff justifiably relied on a misrepresentation, Plaintiffs also fail to state a claim for negligent misrepresentation. *Ross v. Kirner,* 162 Wash.2d 493, 499, 172 P.3d 701 (2007) (setting forth the elements of a negligent misrepresentation claim).

**2. Breach of Duty of Good Faith and Fair Dealing**

Although not a model of clarity, Plaintiffs' claim that Defendants breached the implied duty of good faith and fair dealing appears premised on their allegation that Defendants had a duty to help Plaintiffs refinance and modify the terms of their loan. Dkt. # 1 at 7, 11. Defendants move to dismiss this claim as insufficiently pled. Dkt. # 5 at 11–12.

The Court agrees with Defendants that Plaintiffs have failed to plead a claim of breach of the duty of good faith that is plausible on its face. "There is in every contract an implied duty of good faith and fair dealing ... that obligates the parties to cooperate with each other so that each may obtain the full benefit of performance."*Badgett v. Sec. State Bank,* 116 Wash.2d 563, 569, 807 P.2d 356 (1991). This duty, however, does not "inject substantive terms into the parties' contract," but rather, "requires only that the parties perform in good faith the obligations imposed by their agreement."*Id.* (quotation marks and citation omitted). Accordingly, the duty is not "free-floating," but "exists only in relation to performance of a specific contract term."*Id.* at 570, 807 P.2d 356.

Here, Plaintiffs do not allege that Defendants performed any specific contract term in bad faith and there is no dispute that Plaintiffs received the benefit of their bargain when they received the proceeds from their loan. *Id.* (citing the fact that the plaintiffs received the full benefit of the contract in dismissing breach of duty claim). Instead, Plaintiffs acknowledge that "CWHLS did not have a duty to disclose [its] ability to waive the Pre–Payment Penalty associated with refinancing Plaintiffs['] loan within the first three years." Dkt. # 7 at 10. Nonetheless, Plaintiffs contend that "a reasonable person truly invested in Plaintiffs['] loan" would have waived the fee and modified the terms of Plaintiffs' loan. *Id.* This allegation is insufficient to state a claim for breach of the duty of good faith and fair dealing as it is not based on a contractual obligation. *Johnson v. Yousoofian,* 84 Wash.App. 755, 762, 930 P.2d 921 (1996) ("If there is no contractual duty, there is nothing that must be performed in good faith.").

**D. Leave to Amend**

Courts "should freely give leave [to amend] when justice so requires."Fed.R.Civ.P. 15(a)(2). There is a "strong policy in favor of allowing amendment" after "considering four factors: bad faith, undue delay, prejudice to the opposing party, and the futility of amendment."*Kaplan v. Rose,* 49 F.3d 1363, 1370 (9th Cir.1994). The Ninth Circuit also takes into consideration whether a plaintiff has previously amended the complaint. *Nunes v. Ashcroft,* 375 F.3d 805, 808 (9th Cir.2004). The underlying purpose of Rule 15 is "to facilitate decision on the merits, rather than on the pleadings or technicalities."*Lopez v. Smith,* 203 F.3d 1122, 1127 (9th Cir.2000). However, if the proposed amendment would be futile, there is no reason to put a defendant through the unnecessary expense and delay of responding to the amendment. *Nordyke v. King,* 644 F.3d 776, 787 **n.** 12 (9th Cir.2011).

***6** The claims asserted in this litigation are nearly identical to those presented in *Wilson v. Bank of America, N.A.,* C12–1532JLR (and very similar to those alleged in Plaintiffs' first complaint in *Wilson v. Bank of America N.A. Trust GSR2007–OA1,* C11–2146MJP). After their second lawsuit was dismissed, Plaintiffs filed another version of the same complaint in this action (the only significant changes being the addition of claims for misrepresentation and breach of the duty of good faith and fair dealing). As discussed above, Plaintiffs' underlying theory of the case fails as a matter of law and there is no indication that any additional facts or claims could be pled if Plaintiffs were given another chance to revise their complaint. *See In re Vantive Corp. Sec. Litig.,* 283 F.3d 1079, 1098 (9th Cir.2002), abrogation on other grounds recognized by *South Ferry LP, No. 2 v. Killinger,* 542 F.3d 776, 784 (9th Cir.2008). Because Plaintiffs' claims are based on defective theories and the record suggests continuing futility, leave to amend will not be given.

## III. CONCLUSION

For all of the foregoing reasons, Defendants' motion to dismiss (Dkt.# 5) is GRANTED. The Clerk of Court is directed to enter judgment against Plaintiffs and in favor of Defendants.

**All Citations**

Slip Copy, 2014 WL 841527

Footnotes

1 Plaintiffs named "Bank of America, N.A. FKA Countrywide Home Loans Servicing, LP" and "Deutsche Bank National Trust Company; Trust GSR2007–OAL") as Defendants in their complaint. Dkt. # 1. Defendants contend that the proper corporate entities are "Bank of America, N.A." and "Deutsche Bank National Trust Company, as trustee for holders of the GSR Mortgage Loan Trust 2007–OAL."Dkt. # 5 at 1. Plaintiffs do not dispute these contentions and the Court has not determined which entities are the proper defendants as those issues do not alter the outcome of the instant matter.

2 The Court considers the Deed of Trust and related documents even though they are not attached to the complaint. In the context of a motion to dismiss, the Court's review is generally limited to the contents of the complaint. *Campanelli v. Bockrath,* 100 F.3d 1476, 1479 (9th Cir.1996). However, Ninth Circuit authority allows the Court to consider documents referenced extensively in the complaint, documents that form the basis of a plaintiff's claim, and matters of public record when determining whether the allegations of the complaint state a claim upon which relief can be granted under Fed.R.Civ.P. 12(b)(6).*United States v. Ritchie,* 342 F.3d 903, 908–09 (9th Cir.2003). Because the loan documents and court records attached to the declaration of Jacob M. Downs, dkt. # 6–1; dkt. # 6–2; dkt. # 6–3; dkt. # 6–4, fall within one or more of these categories, the Court takes judicial notice of these documents and the contents of those records will be accepted as true for purposes of this motion and construed in the light most favorable to plaintiff. *Reyn's Pasta Bella, LLC v. Visa USA, Inc.,* 442 F.3d 741, 746 n. 6 (9th Cir.2006) (taking judicial notice of court filings and other matters of public record); *LSO, Ltd. v. Stroh,* 205 F.3d 1146, 1150 n. 2 (9th Cir.2000).

**End of Document**

525 Fed.Appx. 606
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)
United States Court of Appeals, Ninth Circuit.

Eddie YAU; Joanne Anderson; Angela Brown; Richard Apostolos; Steve Burke, on behalf of themselves and all others similarly situated, Plaintiffs–Appellants,
v.
DEUTSCHE BANK NATIONAL TRUST COMPANY AMERICAS, Defendant,
and
Aurora Loan Services, LLC, Inclusive, Defendant–Appellee.

No. 11–57209. | Argued and Submitted May 6, 2013. | Filed May 24, 2013.

**Synopsis**

**Background:** Financially distressed home mortgagors brought action alleging that mortgage servicer offered them illusory relief of loan modification. The United States District Court for the Central District of California, James V. Selna, J., 2011 WL 5402393, dismissed complaint, and mortgagors appealed.

**Holdings:** The Court of Appeals held that:

[1] mortgagors' failure to include one plaintiff in notice of appeal barred Court of Appeals' ability to exercise jurisdiction over him;

[2] mortgagors abandoned claim that servicer breached contracts contained in their temporary payment plan agreements;

[3] servicer did not breach contractual duty contained in mortgagors' deeds of trust by failing to permit them to obtain loan modifications; and

[4] dismissal of mortgagors' negligence claims was not warranted.

Affirmed in part, reversed in part, and remanded.

Murguia, Circuit Judge, dissented in part and filed opinion.

West Headnotes (4)

[1] **Federal Courts**
Requisites and sufficiency; defects
Plaintiffs' failure to include one plaintiff in timely notice of appeal was fatal to Court of Appeals' ability to exercise jurisdiction over that plaintiff.

Cases that cite this headnote

[2] **Mortgages**
Between parties to mortgage or their privies
Mortgagors abandoned claim that mortgage servicer breached contracts contained in their temporary payment plan agreements in favor of argument that it breached contracts contained in their trust deeds, where mortgagors avoided dismissal with prejudice of their claim that servicer breached terms of their temporary payment plan agreements by representing to district court that their breach of contract theory was based instead on terms contained in their trust deeds.

Cases that cite this headnote

[3] **Mortgages**
Change in time or mode of payment
Under California law, mortgage servicer did not breach contractual duty contained in mortgagors' deeds of trust by failing to permit them to obtain loan modifications, where nothing in deeds of trust imposed on mortgage servicer any duties whatsoever related to loan modification.

3 Cases that cite this headnote

[4] **Federal Civil Procedure**
Fact issues

Issue of whether mortgage servicer had duty under California law to mortgagors in handling their loan modification applications involved fact issues that could not be resolved on motion to dismiss mortgagors' negligence claims against servicer for failure to state claim.

6 Cases that cite this headnote

**Attorneys and Law Firms**

***607** Lenore Albert, Esquire, Law Offices of Lenore Albert, Huntington Beach, CA, for Plaintiffs–Appellants.

Justin Donald Balser, Victoria Edwards, Akerman Senterfitt, Denver, CO, for Defendant–Appellee.

Appeal from the United States District Court for the Central District of California, James V. Selna, District Judge, Presiding.

Before: NOONAN, WARDLAW, and MURGUIA, Circuit Judges.

**Opinion**

****1** In this case, a group of financially distressed home mortgagors accuse a Aurora Loan Services, LLC, a mortgage servicer, of offering them the illusory relief of a loan modification—illusory because the mortgagors, try as they might, could never actually obtain the modification, and in the meantime accumulated such arrearages that they ended up worse off than if they had never sought a modification at all. But in five attempts, the mortgagors failed almost entirely to turn that general accusation into viable claims for relief, as the district court dismissed their complaint (with leave to amend), their first amended complaint (for the most part, with leave to replead), their second amended complaint, and their third amended complaint—and then denied them leave to file a fourth amended complaint.

Owing to the mortgagors' procedural missteps in the district court, we must pick through a bramble of side issues before tackling the heart of this appeal. After doing so, we are left to resolve two basic issues: (1) whether the district court erred in dismissing a breach of contract claim premised on a breach of the terms of a deed of trust to which Aurora was only arguably a party; and (2) whether the district court erred in denying the mortgagors leave to add a claim that Aurora negligently processed their loan modifications. As discussed below, we affirm the district court's judgment as to the first issue, reverse as to the second, and remand for further proceedings.

[1] First, we address whether Eddie Yau is properly a party to this appeal. The answer: no. The mortgagors' counsel failed to include Yau in the notice of appeal, and instead—months later—filed an amended notice of appeal adding Yau. That was a grievous misstep, because the failure to include a party in a *timely* notice of appeal is fatal to our ability to exercise jurisdiction over that party. *Torres v. Oakland Scavenger Co.,* 487 U.S. 312, 314–15, 317, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988); *Le v. Astrue,* 558 F.3d 1019, 1022 (9th Cir.2009).

[2] Next, we address the question whether the mortgagors abandoned their argument that Aurora breached contracts contained in their temporary payment plan agreements in favor of the argument that Aurora breached contracts contained in the mortgagors' trust deeds. We recently held that "[f]or claims dismissed with prejudice and without leave to amend, we will not require that they be repled in a subsequent amended complaint to preserve them for appeal. But for any claims voluntarily dismissed, we will consider those claims to be waived if not repled." *Lacey v. Maricopa Cnty.,* 693 F.3d 896, 928 (9th Cir.2012) (en banc). Here, the mortgagors avoided dismissal with prejudice of their claim that Aurora breached the terms of their temporary payment plan agreements by representing to the district court that their breach of contract theory was based instead on terms contained in their trust deeds. By changing theories voluntarily rather than accepting an appealable dismissal with prejudice, the mortgagors ***608** abandoned their original theory—that Aurora's alleged breach of contract was premised on a violation of the terms of their temporary payment plan agreements—in favor of the theory that their deeds of trust imposed some contractual duties on Aurora, which Aurora breached.

****2** Likewise, the mortgagors abandoned their claim under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof.Code § 17200, *et seq.,* when they failed to plead it in their third amended complaint. While the district court nominally dismissed the mortgagors' UCL claim with prejudice, the prejudice was no prejudice at all, because the district judge expressly allowed the mortgagors to replead a UCL claim so long as they either pleaded a breach of contract claim that could serve as a predicate violation for the UCL, or obtained leave to plead some other predicate act.

**[3]** We thus turn to the first question properly before us on appeal. In granting Aurora's motion under Federal Rule of Civil Procedure 12(b)(6), the district court dismissed with prejudice the mortgagors' claim that Aurora breached a contractual duty contained in the mortgagors' deeds of trust. We review the district court's decision de novo, *Hartmann v. Cal. Dep't of Corr. & Rehab.,* 707 F.3d 1114, 1121 (9th Cir.2013), and conclude that it dismissed the claim appropriately. First, we note that the mortgagors did not even argue in their opening brief that this claim was dismissed incorrectly, instead arguing only over the breach of contract theory they abandoned below. That alone is enough for us to resolve this issue in Aurora's favor. *See Smith v. Marsh,* 194 F.3d 1045, 1052 (9th Cir.1999) ("[A]rguments not raised by a party in its opening brief are deemed waived."). Nevertheless, even if we consider the mortgagors' argument regarding their breach-of-the-trust-deed theory, and even assuming Aurora is a party to the deeds of trust at issue—a question upon which we need not opine—the mortgagors failed to identify a single term in the deeds that Aurora breached.

Instead, the mortgagors made allegations that suggest a claim for a breach of the covenant of good faith and fair dealing, *e.g.,* "Aurora's failure to perform its duties as impliedly promised under the deed of trust (e.g., to act fairly, competently, honestly and in a timely manner) after undertaking the task of reviewing the plaintiffs for a loan modification...." The mortgagors point to nothing in the deeds of trust, however, that would foist on Aurora any duties whatsoever related to a loan modification. Attaching such duties to the deeds would augment or contradict their express terms—an outcome forbidden by California law. *See, e.g., Pasadena Live, LLC v. City of Pasadena,* 114 Cal.App.4th 1089, 1094, 8 Cal.Rptr.3d 233 (2004) ("The implied covenant of good faith and fair dealing is limited to assuring compliance with the *express terms* of the contract, and cannot be extended to create obligations not contemplated by the contract." (internal quotation marks omitted)).

We therefore turn to the second, and final, issue before us: whether the district court erred in denying the mortgagors leave to add a negligence claim to their pleadings, after finding that amendment would be futile. We review the decision to deny a plaintiff leave to amend for an abuse of discretion, *Hartmann,* 707 F.3d at 1129, though if the decision was premised on the futility of the amendment, we review de novo the question whether the amendment would actually have been futile, *Zucco Partners, LLC v. Digimarc Corp.,* 552 F.3d 981, 1007 (9th Cir.2009).

****3** **[4]** Relying on the "general rule" in California that "a financial institution owes no duty of care to a borrower when the ***609** institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money," *Nymark v. Heart Fed. Sav. & Loan Ass'n,* 231 Cal.App.3d 1089, 1096, 283 Cal.Rptr. 53 (1991); *see also Ragland v. U.S. Bank Nat'l Ass'n,* 209 Cal.App.4th 182, 206, 147 Cal.Rptr.3d 41 (2012), the district court concluded that it would be futile to allow the mortgagors to plead a negligence claim against Aurora for its handling of their loan modification applications. We observe, however, that the California courts of appeal appear to be of two minds on the application of that general rule in cases involving offers of loan modifications handled negligently. At least one has instead applied the six-factor test outlined in *Biakanja v. Irving,* 49 Cal.2d 647, 650, 320 P.2d 16 (1958) to determine whether a lender or loan servicer owes a duty of care to a borrower in the same position as these mortgagors allegedly find themselves. *Jolley v. Chase Home Fin., LLC,* 213 Cal.App.4th 872, 898–906, 153 Cal.Rptr.3d 546 (2013); *but see Ragland,* 209 Cal.App.4th at 206, 147 Cal.Rptr.3d 41. We note that the district court did not have the benefit of the *Jolley* decision when it denied the mortgagors' motion for leave to amend. Because the mortgagors' proposed negligence claim would not have been futile, we reverse and remand for the district court to evaluate, consistently with this memorandum, the mortgagors' request for leave to add a negligence claim. We deny the pending emergency motion for an injunction pending appeal (Doc. No. 32), and lift the temporary stay of foreclosure. The parties shall bear their own costs.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

MURGUIA, Circuit Judge, dissenting in part:

****3** I agree with my colleagues, save for one point: I disagree with their decision to remand this case to the district court to consider anew whether the mortgagors may add a claim for negligence to their pleadings. While I agree with the majority that such a claim might not be futile, I would nevertheless affirm the district court on the basis that the mortgagors, afforded several opportunities to plead their claim properly, have failed to do so repeatedly. [1] *See Destfino v. Reiswig,* 630 F.3d 952, 958–59 (9th Cir.2011) ( "Plaintiffs had three bites at the apple, and the court acted well within its discretion in disallowing a fourth."); *see generally Zixiang Li v. Kerry,* 710 F.3d 995, 999 (9th Cir.2013) (observing that we may uphold the district court's ruling on any basis supported by the record). I therefore dissent, respectfully, from the portion of the ruling remanding this case to the district court on the question of the mortgagors' leave to amend.

**All Citations**

525 Fed.Appx. 606, 2013 WL 2302438

Footnotes

1 My disagreement with the majority should not be read as a comment on the viability of a properly pled negligence claim in this case. It should, however, be read as an expression of my concern that the mortgagors will not plead the claim properly. My fear, confirmed by counsel's mea culpa at argument, is that the mortgagors' counsel is ill-equipped to deal with a putative class action the size and scope of the one pled here. Nevertheless, the majority has given the mortgagors another opportunity to proceed with their case. I therefore recommend, consistently with the California Rules of Professional Conduct, that if their counsel is not prepared to handle a case of this magnitude, she associate with a lawyer, or lawyers, who can.

**End of Document**

2013 WL 1990728
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Seattle.

Richard J. ZALAC, Plaintiff,
v.
CTX MORTGAGE CORPORATION et al., Defendants.

No. C12–01474 MJP. | May 13, 2013.

**Attorneys and Law Firms**

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William K. Rasmussen, Fred B. Burnside, Davis Wright Tremaine, Seattle, WA, Heidi Buck Morrison, RCO Legal, P.S., Bellevue, WA, for Defendants.

## AMENDED ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

MARSHA J. PECHMAN, Chief Judge.

***1** This matter comes before the Court on Defendants' motion to dismiss for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). Having reviewed the motions (Dkt. No. 17, 20), response (Dkt. No. 24), replies (Dkt. No. 31, 32), and all related documents, the Court GRANTS Defendants' motion and DISMISSES this case.

### Background

This dispute involves a non-judicial foreclosure of Plaintiff's home. On June 10, 2005, Plaintiff borrowed $352,500 for the purchase of his Enumclaw home. (Dkt. No 3, Ex. A.) He executed a Deed of Trust, listing CTX as Lender, Mortgage Electronic Recording Systems, Inc ("MERS") as the Beneficiary, and Steward Title as the Trustee. (*Dkt. No. 3, Ex. B.*) Two months later, CTX wrote to Plaintiff informing him of the transfer of his loan to Countrywide Home Loans LP ("Countrywide"). (Dkt. No. 4 at 9.) About a year later, the loan was transferred to J.P. Morgan Chase ("Chase").(*Id.*) Countrywide sent a letter to Plaintiff informing him of the transfer and that the servicing of his loan, the right to collect payments from him, would also be conduct by Chase. (*Id.*) Chase has been servicing Plaintiff's loan since the transfer in 2006. (*Id.*)

Roughly four years later, MERS executed an assignment of the Deed of Trust, assigning all its beneficial interests to Chase. (Dkt. No. 3, Ex. H.) Chase then appointed Northwest Trustee Services ("NWTS") as successor trustee.(*Id.,* Ex. I.) NWTS, acting as Chase's agent, sent Plaintiff a notice of default stating that Plaintiff had failed to make payment since November 1, 2011. (*Id.,* Ex. F.) After the notice of default, Chase sold Plaintiff's loan into a public security managed by Federal National Mortgage Association ("Fannie Mae"), but Chase remained servicer of the loan. (*Id.,* Ex. G.) Chase notified Plaintiff of these changes. (*Id.*) A month after the notice of default, NWTS executed a notice of trustee's sale, and scheduled the sale of Plaintiff's home for July 20, 2012. (*Id.,* Ex. J.)

Plaintiff Richard J. Zalacfiled suit in King County Superior Court against the five entities who have serviced his loan, held the note, or were otherwise involved in his mortage. [1] Defendants timely removed the case to this Court. Plaintiff alleges: (1) wrongful foreclosure; (2) violation of the Washington Consumer Protection Act ("CPA"); and (3) Criminal Profiteering in violation of 9A.82. (Dkt. No. 3.) Defendants move for dismissal of each of these claims. (Dkt. No. 17.)

### Discussion

A motion to dismiss filed pursuant to Rule 12(b)(6) tests the sufficiency of the complaint. *Conley v. Gibson,* 355 U.S. 41, 45–6, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). On a motion to dismiss, the Court must accept the material allegations in the complaint as true and construe them in the light most favorable to Plaintiff. *Aschcroft v. Iqbal,* 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)."To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"*Id.* at 662 (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 554, 570 (2007)). The plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."*Twombly,* 550 U.S. at 555.

#### 1. *Wrongful Foreclosure Claim*

***2** Plaintiff alleges Defendants wrongfully attempted to foreclose on Plaintiff's home and that irregularities in the proceedings entitle Plaintiff to relief under the Washington Deed of Trust Act ("DTA"), RCW 61.24 *et seq.* Defendants move to dismiss Plaintiff's wrongful foreclosure claim because he is missing an element of the claim, a foreclosure sale.

The DTA governs the foreclosure process and furthers three objectives: (1) ensuring nonjudicial foreclosure remains efficient and inexpensive; (2) providing an adequate opportunity for interested parties to prevent wrongful foreclosure; and (3) promoting the stability of land titles. *Plein v. Lackey,* 149 Wash.2d 214, 225, 67 P.3d 1061 (2003). The DTA "sets forth the only means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure."*Cox v. Helenius,* 10 Wn.2d 383, 388 (1985). The DTA does not, however, authorize a cause of action for damages for the wrongful institution of nonjudicial proceedings where no trustee's sale actually occurs. *See Vawter v. Quality Loan Serv. Corp. of Wash.,* 707 F.Supp.2d 1115, 1123 (W.D.Wash.2010).

Here, the Court grants motion to dismiss because under Washington law a foreclosure sale is a prerequisite to any DTA claim. Plaintiff does not allege a sale occurred. Additionally, Washington does not recognize a claim for wrongful *initiation* of foreclosure proceedings. Thus, Plaintiff's claim fails as a matter of law and is DISMISSED.

Plaintiff also cites RCW 61.24.010, alleging Defendant NWTS, as successor trustee, breached their duty of good faith by neglecting to identify the true holder of the promissory note when it was assigned. While the Plaintiff is correct in asserting NWTS's duty of good faith, Plaintiff does not allege specific acts NWTS committed to breach their duty of good faith. Thus, Plaintiff's bare legal conclusions are not sufficient to uphold his claim and the Court DISMISSES this claim as well.

**2. *CPA Claim***

Plaintiff alleges Defendants violated the CPA by relying on documents that they knew or should have known to be false or deceptive. Specifically, Plaintiff alleges Defendants Chase and MERS acted deceptively by purporting to be the holder and beneficiary, respectively, of Plaintiff's note. Defendants correctly move to dismiss Plaintiff's claim because the Complaint fails to allege any unfair or deceptive act.

To prevail on his CPA claim, Plaintiff must establish five distinct elements: "(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation."*Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wash.2d 778, 780, 719 P.2d 531 (1986). Whether a practice is unfair or deceptive is a question of law for the court to decide if the parties do not dispute their conduct. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.,* 162 Wash.2d 59, 74, 170 P.3d 10 (2007). To satisfy the first element, Plaintiffs must show that the act or practice either has a capacity to deceive a substantial portion of the public or that it constitutes an unfair trade or practice.

**A. *CPA Claim Against MERS***

***3** Plaintiff alleges that MERS engaged in a deceptive act when it purported to act as beneficiary when it knew or should have known that it must hold the note to be the beneficiary under Washington law.

Here, Plaintiff assumes that if Defendant MERS was involved in his mortgage, then the CPA's unfair or deceptive act element is met. (Dkt. No. 24 at 15.)Plaintiff's position lacks merit because it is a misapplication of the Washington State Supreme Court's decision in *Bain v. Metropolitan Mortg. Group, Inc.,* 175 Wash.2d 83, 117, 285 P.3d 34 (2012). The Court in *Bain* only held that characterizing MERS as the beneficiary on a deed of trust has the capacity to deceive homeowners, but held that MERS involvement does not by itself constitute a per se violation of the CPA. *Bain,* 175 Wash.2d at 117, 285 P.3d 34. Unlike the "concealment" by MERS at issue in *Bain,* here, Plaintiff does not allege any specific unfair or deceptive act by MERS. *Id.* at 116, 285 P.3d 34 (finding that MERS may act deceptively when it conceals the identity of its principal and purports to act on behalf of itself). Instead, Plaintiff routinely received written notification regarding which entity was servicing his loan and had no communication with MERS. Plaintiff fails to make the specific allegation that he was deceived by the characterization of MERS as a beneficiary on the Deed of Trust. *Bain,* 175 Wash.2d at 120, 285 P.3d 34 ("the mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury"). Because Plaintiff has failed to allege any cognizable deceptive or unfair trade or practice arising out of MERS's involvement, the CPA claim is DISMISSED.

**B. *CPA Claim Against Chase and NWTS***

Plaintiff alleges Chase and NWTS violated the CPA by deceptively presenting Chase as the holder of Plaintiff's note in the notice of default and notice of trustee's sale, when they knew or should have known the actual holder to be Fannie Mae. Defendant Chase asserts that it is the true *holder* of the note, even if Fannie Mae is the *owner* of the note. NWTS argues that as Chase's agent, it was entitled to rely on representations from its principal.

Under Washington law an instrument endorsed in blank becomes payable to the bearer and may be negotiated. RCW 62A.3–205(b). The holder of a negotiable instrument is the person in possession and is entitled to enforce it. RCW 62A.3–301; 62A.1–201(20).

Here, Plaintiff does not contest that Chase is in physical possession of the note and that it is endorsed in blank. Therefore, Chase is the holder of the note as a matter of law. Further, despite the sale of Plaintiff's loan to Fannie Mae, Chase alerted Plaintiff that it remained servicer of his loan and was authorized to handle any of Plaintiff's concerns. Additionally, Plaintiff does not allege that NWTS was not an authorized agent of Chase or acting beyond the scope of its authority at any time. Because Plaintiff has failed to allege an unfair or deceptive act by Defendants, the Court DISMISSES Plaintiff's CPA claim.

*4 Plaintiff also cites to RESPA, 12 U.S.C § 2605, and the FDCPA, 15 U.S.C. §§ 1692, *et seq.,* claiming Defendants' actions constitute *per se* violations of the CPA, but fails to allege any facts to support such claims. The Court therefore also DISMISSES Plaintiff's RESPA and FDCPA claims.

### 3. *Criminal Profiteering Claim—RCW 9A.82*

Plaintiff claims Defendants violated RCW 9A.82.45, which makes unlawful an attempt by "any person knowingly to collect an unlawful debt."Plaintiff fails to allege with particularity any act by Defendants that qualifies as criminal profiteering. Thus, the Court DISMISSES Plaintiff' s Criminal Profiteering claim.

## Conclusion

Because Plaintiff fails to allege specific facts to support any of his claims, the Court GRANTS Defendants' motion and DISMISSES all claims with prejudice. The clerk is ordered to provide copies of this order to all counsel.

### All Citations

Not Reported in F.Supp.2d, 2013 WL 1990728

Footnotes

1 This Court previously dismissed all of Plaintiff's claims against the original lender, CTX, as barred by the statute of limitations. (Dkt. No. 19.)

**End of Document**

## DECLARATION OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of California that on this 9th day of September 2015, I caused to be served a true and correct copy of the foregoing Appendix of Federal Authorities in Support of respondents' Brief on the parties shown below via-e-mail:

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