

72825-3  
J  
7/25/05

72825-3

72825-3

No. 72825-3

IN THE COURT OF APPEALS, DIVISION I,  
OF THE STATE OF WASHINGTON

---

JASON BROCK,

Appellant,

v.

WELLS FARGO BANK, N.A. as trustee on behalf of the holders of the  
Harborview Mortgage Loan Trust Mortgage Loan Pass-Through  
Certificates, Series 2006-12, MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC. ("MERS"); NORTHWEST TRUSTEE  
SERVICES, INC., SELECT PORTFOLIO SERVICING, INC.,

Respondents.

---

**RESPONDENTS' APPELLATE BRIEF**

---

John Glowney, WSBA 12652  
STOEL RIVES LLP  
600 University Street, Ste. 3600  
Seattle, WA 98101  
Telephone: (206) 624-0900  
Facsimile: (206) 386-7500  
*Attorneys for Respondents Wells Fargo  
Bank, as trustee; Select Portfolio  
Servicing, Inc.; MERS*

**ORIGINAL**

**TABLE OF CONTENTS**

Page

TABLE OF AUTHORITIES ..... ii

I. SUMMARY OF THE ARGUMENT .....1

II. ARGUMENT.....1

    A. Possession of the Original Note Authorizes WFB as Trustee, as the Holder, to Enforce the Note and Prosecute a Non-Judicial Foreclosure Proceeding.....2

    B. WFB as Trustee Submitted the Original Note as Evidence at Summary Judgment.....4

    C. The Original Brock Note Is Non-Hearsay and Self-Authenticating.....6

    D. The Deed of Trust Followed Transfer of the Note .....8

    E. WFB Possessed the Note When the Non-Judicial Foreclosure Was Commenced .....10

    F. Brock Submitted No Evidence That WFB Did Not Own and Possess the Original Note in 2012.....13

    G. Payment Is an Affirmative Defense and There Is a Presumption of Non-Payment Established When the Original Note Is Admitted .....15

    H. SPS May Rely upon the Records of a Prior Loan Servicer .....17

    I. The Brock Note Is a Negotiable Instrument; Commercial Certainty Is Determined from the Face of the Instrument.....20

    J. Brock Fails to Identify Any Prejudice Based upon Any Alleged Defect in Prior Assignments.....26

    K. An Authorized Agent of the Beneficiary May Execute the Appointment of a Successor Trustee.....28

    L. Brock’s CPA Claim Is Meritless.....29

    M. Brock Fails to Establish Any of The Five Elements of A CPA Claim against MERS.....31

III. CONCLUSION.....36

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Alpacas of Am., LLC v. Groome</i> 179 Wn. App. 391, 317 P.3d 1103 (2014).....	21, 22
<i>Amalgamated Transit Union Legislative Council v. State,</i> 145 Wn.2d 544, 40 P.3d 656 (2002).....	13
<i>Anderson v. Burson,</i> 35 A.3d 452 (Md. 2011) .....	26
<i>Anderson v. Hoard,</i> 63 Wn.2d 290, 387 P.2d 73 (1963).....	20, 22
<i>Andrews v. Kelleher,</i> 124 Wash. 517, 214 P. 1056 (1923).....	11, 32
<i>Apostol v. CitiMortgage, Inc.,</i> 2013 U.S. Dist. LEXIS 167308, 2013 WL 6328256 (N.D. Cal. Nov. 21, 2013).....	36
<i>Arcweld Mfg. Co. v. Burney,</i> 12 Wn.2d 212, 121 P.2d 350 (1942).....	28
<i>Babrauskas v. Paramount Equity Mortg.,</i> No. C13-0494-RSL, 2013 WL 5743903 (W.D. Wash. Oct. 23, 2013) .....	30, 32, 34
<i>Bain v. Metro. Mortg. Grp., Inc.,</i> 175 Wn.2d 83, 285 P.3d 34 (2012).....	passim
<i>Bain v. Metro. Mortg. Grp. Inc.,</i> No. C09-0149-JCC, 2010 WL 891585 (W.D. Wash. Mar. 11, 2010).....	11
<i>Bank of New England, N.A. v. Greer,</i> 1991 Mass. App. Div. 202 (1991).....	5

<i>In re Bass</i> , 738 S.E.2d 173 (N.C. 2013).....	6
<i>Beal Bank, SSB v. Eurich</i> , 444 Mass. 813, 831 N.E. 2d 909 (Mass. 2005).....	18, 19
<i>Bhatti v. Guild Mortg. Co.</i> , 550 F. App'x 514 (9th Cir. 2013).....	30, 34
<i>Borowski v. BNC Mortg.</i> , 2013 U.S. Dist. LEXIS 122104, 2013 WL 4522253 (W.D. Wn. 2013) .....	10
<i>Browner v. Allstate Indem. Co.</i> , 591 F.3d 984 (8th Cir. 2010) .....	18
<i>Bridge v. Ocwen Fed. Bank FSB</i> , 2013 U.S. Dist. LEXIS 127588 (N.D. Ohio 2013).....	35
<i>Brown v. Dep't of Commerce</i> , 184 Wn.2d 509, 359 P.3d 771 (2015).....	1, 2, 36
<i>Bryant v. Bryant</i> , 125 Wn.2d 113, 882 P.2d 169 (1994).....	28
<i>Burch Mfg. Co. v. McKee</i> , 231 Iowa 730, 2 N.W.2d 98 (1942) .....	17
<i>In re Butler</i> , 512 B.R. 643 (Bankr. W.D. Wash. 2014).....	14, 29, 33, 36
<i>Cantrill v. Am. Mail Line</i> , 42 Wn.2d 590, 257 P.2d 179 (1953).....	19
<i>Carpenter v. Longan</i> , 83 U.S. 271, 21 L. Ed. 313 (1872).....	8
<i>Carr v. Cohn</i> , 44 Wash. 586, 87 P. 926 (1906).....	11, 32
<i>Cartwright v. MBank Corpus Christi, N.A.</i> , 865 S.W.2d 546 (Tex. App. 1993).....	21

<i>Century Brewing Co. v. City of Seattle</i> , 177 Wash. 579, 32 P.2d 1009 (1934).....	12
<i>Chua v. IB Prop. Holdings, LLC</i> , No. CV 11-05894, 2011 WL 3322884 (C.D. Cal. Aug. 1, 2011).....	11
<i>Coleman v. Am. Commerce Ins. Co.</i> , No. 09-5721, 2010 WL 3720203 (W.D. Wash. Sept. 17, 2010).....	31
<i>In re Cook</i> , 457 F.3d 561 (6th Cir. 2006) .....	8
<i>Corales v. Flagstar Bank, FSB</i> , 822 F. Supp. 2d 1102 (W.D. Wash. 2011).....	8, 33
<i>De Grief v. City of Seattle</i> , 50 Wn.2d 1, 297 P.2d 940 (1956).....	12
<i>Debrunner v. Deutsche Bank Nat'l Tr. Co.</i> , 204 Cal. App. 4th 433, 138 Cal. Rptr. 3d 830 (2012).....	27
<i>Demopolis v. Galvin</i> , 57 Wn. App. 47, 786 P.2d 804 (1990).....	31
<i>Dep't of Revenue v. Sec. Pac. Bank of Wash. Nat'l Ass'n.</i> , 109 Wn. App. 795, 38 P.3d 354 (2002).....	26
<i>Dietz v Quality Loan Serv. Corp.</i> , 2014 WL 5343744 (W.D. Wash. 2014).....	32
<i>Dryden v. Dryden</i> , 621 N.E.2d 1216 (Ohio Ct. App. 1993).....	5
<i>Dye v. Wells Fargo</i> , 42014 U.S. Dist. LEXIS 65419 (E.D. Mich. 2014).....	35
<i>Elene-Arp v. Fed. Home Fin. Agency</i> , No. C12-2154, 2013 WL 1898218 (W.D. Wash. May 7, 2013).....	3

<i>In re Estate of Rutter</i> , 633 N.W.2d 740 (Iowa 2001) .....	16
<i>Estribor v Mtn States Mortg.</i> 2013 WL 6499535 (W.D. Wash. 2013).....	32
<i>FDIC v. Staudinger</i> , 797 F.2d 908 (10th Cir. 1986) .....	18
<i>Fergen v. Sestero</i> , 174 Wn. App. 393, 298 P.3d 782 (2013).....	2
<i>Fid. Tr. Co. v. Wash.-Or. Corp.</i> , 217 F. 588 (W.D. Wash. 1914).....	11, 32
<i>Fidelity &amp; Deposit Co. of Maryland v. Ticor Title Ins. Co.</i> , 88 Wn. App. 64, 943 P.2d 710 (1997).....	8
<i>Finney v. Shirley</i> , 7 Mo. 42 (1841) .....	26
<i>First State Bank at Gallup v. Clark</i> , 570 P.2d 1144 (N.M. 1977) .....	21
<i>Flores v. GMAC Mortg., LLC</i> , 2013 U.S. Dist. LEXIS 68606, 2013 WL 2049388 (N.D. Cal. May 14, 2013) .....	35
<i>Florez v. OneWest Bank, F.S.B.</i> , 2012 U.S. Dist. LEXIS 56111, 2012 WL 1118179 (W.D. Wn. 2012) .....	9
<i>Fontenot v. Wells Fargo Bank, N.A.</i> , 198 Cal. App. 4th 256, 129 Cal. Rptr. 3d 467 (2011).....	28, 35
<i>Frick v. Wash. Water Power Co.</i> , 76 Wash. 12, 135 P. 470 (1913).....	16
<i>Gibson v. Harl</i> , 857 S.W.2d 260 (Mo. Ct. App. 1993).....	26
<i>Glenn v. Keedy</i> , 248 Iowa 216, 80 N.W.2d 509 (1957) .....	17

<i>Goss v. Trinity Sav. &amp; Loan Ass'n</i> , 813 P.2d 492, 498 (Okla. 1991).....	20
<i>Gray v. Suttel &amp; Assocs.</i> , No. 09-251, 2012 WL 1067962 (E.D. Wash. Mar. 28, 2012).....	31
<i>Gulf Coast Bank &amp; Tr. Co. v. Donnaud's Inc.</i> , 759 So.2d 268 (La. Ct. App. 2000).....	17
<i>Herman v. U.S. Bank NA</i> , 591 F. App'x 630 (9th Cir. 2015).....	27
<i>Herrera v. Fed. Nat'l Mortg. Ass'n</i> , 205 Cal. App. 4th 1495, 141 Cal. Rptr. 3d 326 (2012).....	27, 28
<i>In re Hipp, Inc.</i> , 71 B.R. 643 (Bankr. N.D. Tex. 1987).....	24, 33
<i>Holsonback v. First State Bank of Albertville</i> , 394 So.2d 381 (Ala. Civ. App. 1980), <i>cert. denied</i> , 394 So.2d 384 (1981).....	21
<i>HSBC Bank USA, Nat'l Ass'n v. Gouda</i> , No. F-20201-07, 2010 WL 5128666 (N.J. Super. Ct. App. Div. Dec. 17, 2010).....	25
<i>Iowa Mortg. Ctr., L.L.C. v. Baccam</i> , 841 N.W.2d 107 (Iowa 2013).....	17
<i>In re Jacobson</i> , 402 B.R. 359 (2009).....	8
<i>Jenkins v. JP Morgan Bank, N.A.</i> , 216 Cal. App. 4th 497, 156 Cal. Rptr. 3d 912 (2013).....	35
<i>Johnson v. CitiMortgage, Inc.</i> , No. 2:13-cv-00037-RSM, 2013 WL 6632108 (W.D. Wash. Dec. 17, 2013).....	10
<i>Kain v. Bank of N.Y. Mellon (In re Kain)</i> , No. 08-08404-HB, 2012 WL 1098465 (Bankr. D. S.C. Mar. 30, 2012).....	2, 15

<i>Kepner-Tregoe, Inc. v. Leadership Software, Inc.</i> , 12 F.3d 527 (5th Cir. 1994) .....	6
<i>Kiefer v. ABN AMRO</i> , No. 12-10051, 2012 U.S. Dist. LEXIS 117917, 2012 WL 3600351 (E.D. Mich. June 12, 2012).....	35
<i>Klen v Wash. Mut. Bank</i> , 176 Wn.2d 771 (2013) .....	32
<i>Leroux v. Doniphan Retirement Home, Inc.</i> , 663 S.W.2d 791 (Mo. App. 1984) .....	26
<i>Livonia Properties Holdings, LLC v. 12840-2976 Farmington Road Holdings, LLC</i> , 399 Fed. Appx. 97 (6th Cir. 2010).....	35
<i>Lynott v. Mortg. Elec. Registration Sys., Inc.</i> , No. 12-cv-5572-RBL, 2012 WL 5995053 (W.D. Wash. Nov. 30, 2012) .....	3, 9, 33
<i>Lyons v. U.S. Bank Nat'l Ass'n</i> , 181 Wn.2d 775, 336 P.3d 1142 (2014).....	13, 14, 15
<i>Massey v. BAC Home Loans Servicing LP</i> , 2013 U.S. Dist. LEXIS 180472 (W.D. Wash. Dec. 23, 2013) .....	34
<i>McCrorey v. Fed. Nat'l Mortg. Ass'n</i> , No. C12-1630-RSL, 2013 WL 681208 (W.D. Wash. Feb. 25, 2013) .....	30, 34
<i>Mickelson v. Chase Home Fin. LLC</i> , No. C11-1445 MJP, 2012 WL 6012791 (W.D. Wash. Dec. 3, 2012).....	11
<i>Miller v. Deutsche Bank Nat'l Tr. Co.</i> , No. 12-cv-03279-PAB, 2013 WL 4776054 (D. Colo. Sept. 4, 2013) .....	8
<i>Moran v. GMAC Mortgage</i> , 2014 U.S. Dist. LEXIS 84411 (N.D. Cal. June 18, 2014) .....	36

<i>Mueller v. Abdnor</i> , 972 F.2d 931 (8th Cir. 1992) .....	7
<i>Myers v. Mortg. Elec. Registration Sys., Inc.</i> , 2012 No. 11-cv-05582-RBL, 2012 WL 678148 (W.D. Wash. Feb. 24, 2012) .....	9, 33
<i>N. Bank v. Pefferoni Pizza Co.</i> , 562 N.W.2d 374 (Neb. 1997).....	21
<i>In re New Century TRS Holdings, Inc.</i> , 502 B.R. 416 (Bankr. D. Del. 2013) .....	20
<i>Panag v. Farmers Ins. Co. of Wash.</i> , 166 Wn.2d 27, 204 P.3d 885 (2009).....	30, 32
<i>Perma-Fix Nw. Richland, Inc. v. Ecology Servs., Inc.</i> , No. CV-06-5013-FVS, 2008 WL 4148949 (E.D. Wash. Aug. 28, 2008) .....	16
<i>Peterson v. Citibank, N.A.</i> , No. 67177-4-1, 2012 Wash. App. LEXIS 2197, 2012 WL 4055809 (Wash. Ct. App. 2012).....	34
<i>Petheram v. Wells Fargo Bank</i> , No. C13-1016-JLR, 2013 WL 6173806 (W.D. Wash. Nov. 21, 2013) .....	3
<i>Phillips v. Mortg. Elec. Registration Sys., Inc.</i> , No. 5:09-cv-2507-TMP, 2013 WL 1498956 (N.D. Ala. Apr. 5, 2013).....	18
<i>Ralston v. Mortgage Investors Group, Inc.</i> , No. C 08-536, 2010 WL 3211931 (N.D. Cal. Aug. 12, 2010) .....	25
<i>Rotert v. Faulkner</i> , 660 S.W.2d 463 (Mo. App. 1983) .....	26
<i>In re Sagamore Partners, Ltd.</i> , No. 11-37867-BKC-AJC, 2012 WL 3564014 (Bankr. S.D. Fla. Aug. 17, 2012) .....	18

<i>Sherman v. Millikin</i> , 9 Wn.2d 339, 114 P.2d 989 (1941).....	11
<i>In re Sia</i> , No. 10-41873, 2013 WL 4547312 (Bankr. D. N.J. Aug. 27, 2013) .....	19
<i>Siliga v. Mortg. Elec. Registration Sys., Inc.</i> , 219 Cal. App. 4th 75, 161 Cal. Rptr. 3d 500 (2013).....	27, 36
<i>Silving v. Wells Fargo Bank, NA</i> , No. CV 11-0676-PHX-DGC, 2012 WL 135989 (D. Ariz. Jan. 18, 2012).....	11
<i>Simmons v. Aurora Bank, FSB</i> , 2013 U.S. Dist. LEXIS 142917, 2013 WL 5508136 (N.D. Cal. Sept. 30, 2013) .....	35
<i>Slorp v. Lerner, Sampson &amp; Rothfuss</i> , 2013 U.S. Dist. LEXIS 32538 (S.D. Ohio Mar. 8, 2013).....	35
<i>Smith v. Nationstar Mortg. LLC</i> , No. 15-02498, 2015 WL 4652699 (C.D. Cal. Aug. 4, 2015) .....	28
<i>Sorrel v. Eagle Healthcare, Inc.</i> , 110 Wn. App. 290, 38 P.3d 1024 (2002).....	30, 36
<i>State v. Bellerouche</i> , 129 Wn. App. 912, 120 P.3d 971 (2005).....	19
<i>State v. Ben-Neth</i> , 34 Wn. App. 600, 663 P.2d 156 (1983).....	19, 20
<i>State v. Quincy</i> , 122 Wn. App. 395, 95 P.3d 353 (2004), <i>rev. denied</i> , 153 Wn.2d 1028 (2005) .....	19, 20
<i>State v. Williams</i> , 94 Wn.2d 531, 617 P.2d 1012 (1980).....	13

<i>In re Steinberg</i> , No. WY-12-082, 2013 WL 2351797 (B.A.P. 10th Cir. May 30, 2013).....	25
<i>Taylor v. Roeder</i> , 360 S.E.2d 191, 196 (Va. 1987).....	20
<i>Thayer v. Nehalem Mill Co.</i> , 31 Or 437, 51 P 202 (1897) .....	32
<i>Thurman v. Wells Fargo Home Mortg.</i> , No. C12-1471-JCC, 2013 WL 3977622 (W.D Wash. Aug. 2, 2013) .....	31
<i>In re Trafford Distrib. Ctr., Inc.</i> , 414 B.R. 858 (Bankr. S.D. Fla. 2009).....	19
<i>Tuttle v. Rose</i> , 430 N.E.2d 356 (Ill. App. Ct. 1981) .....	3
<i>U.S. Bank Nat’l Ass’n v. Whitney</i> , 119 Wn. App. 339, 81 P.3d 135 (2003).....	16
<i>Ukpoma v U.S. Bank N. A.</i> 2013 WL 1934172 (E.D. Wash. 2013) .....	35
<i>In re United Home Loans</i> , 71 B.R. 885 (W.D. Wash. 1987).....	33
<i>United States v. Carriger</i> , 592 F.2d 312 (6th Cir. 1979) .....	6
<i>United States v. Jakobetz</i> , 955 F.2d 786 (2d Cir. 1992).....	18
<i>United States v. Johnson</i> , 971 F.2d 562 (10th Cir. 1992) .....	18
<i>United States v. Varner</i> , 13 F.3d 1503 (11th Cir. 1994) .....	6, 8, 17
<i>W. Coast Credit Corp. v. Pedersen</i> , 64 Wn.2d 33, 390 P.2d 551 (1964).....	16

<i>WAMCO XXVIII, Ltd. v. Integrated Elec. Env'ts, Inc.</i> , 903 So. 2d 230 (Fla. Dist. Ct. App. 2005) .....	18
<i>Wash. Cent. R.R. Co. v. Nat'l Mediation Bd.</i> , 830 F. Supp. 1343 (E.D. Wash. 1993).....	19
<i>Wash. State Labor Council v. Reed</i> , 149 Wn.2d 48, 65 P.3d 1203 (2003).....	13
<i>Wesla Fed. Credit Union v. Henderson</i> , 655 So. 2d 691 (La. Ct. App. 1995).....	5
<b>Statutes</b>	
RCW 4.16.080 .....	31
RCW 19.52.010 .....	23
RCW 19.144.050 .....	23
RCW 61.24.005(2).....	3
RCW 61.24.030 .....	15
RCW 61.24.030(7)(a) .....	10, 13, 14
RCW 61.24.030(7)(b).....	14
RCW 62A.3-104 .....	22
RCW 62A.3-112(b).....	22, 24
RCW 62A.3-203(b).....	26
RCW 62A.3-205 .....	3
RCW 62A.3-301 .....	3
RCW 62A.3-308(a).....	4
RCWA 62A.3-106 cmt. 1 .....	22
RCWA 62A.3-201 cmt. a.....	29

U.C.C. section 3-307.....	4
U.C.C. § 3-308.....	4, 5, 6
<b>Rules</b>	
ER 902 .....	7, 8
ER 902(i).....	7
ER 902(h).....	7
Fed. R. Evid. 801(c).....	7
Fed. R. Evid. 803(6).....	18
Fed. R. Evid. 902(9).....	8
Fed. R. Evid. 1003 .....	8
<b>Other Authorities</b>	
2 James J. White & Robert S. Summers, <i>Uniform Commercial Code</i> § 16.4.b (5th ed. 2008).....	3
4 William D. Hawkland & Lary Lawrence, <i>Uniform Commercial Code Series</i> § 3-106:2, Westlaw (database updated Dec. 2015).....	21
5A David Frisch, <i>Lawrence's Anderson on the Uniform Commercial Code</i> § 3-101:48, Westlaw (database updated Dec. 2015).....	21
6B David Frisch, <i>Lawrence's Anderson on the Uniform Commercial Code</i> § 3-308:9R, Westlaw (database updated Dec. 2015).....	6
6B Lary Lawrence, <i>Anderson on the Uniform Commercial Code</i> § 3-106:14R (3d ed. 2003).....	22
6 John H. Wigmore, <i>Evidence</i> § 1770 (James H. Chadbourn rev. ed. 1976) .....	7

2 John W. Strong et al., *McCormick on Evidence*, § 249  
(4th ed. 1992).....7

Karl B. Tegland, *Washington Practice: Evidence Law and  
Practice* § 803.42 (5th ed. 2007) .....19

Thomas A. Mauet, *Fundamentals of Trial Techniques* 180  
(1988).....7

## I. SUMMARY OF THE ARGUMENT

Respondents,<sup>1</sup> Defendants below, submit this response brief in opposition to Appellant's Opening Brief ("Brock's Brief"). Brock's appeal is without merit and should be denied. The Washington Supreme Court's rulings in *Bain*,<sup>2</sup> as confirmed in *Brown*,<sup>3</sup> conclusively reject Brock's multiple arguments based upon alleged defects in WFB's status as holder of Brock's original note and deed of trust. WFB holds the original note and held it at the time the non-judicial foreclosure was initiated in 2012. Possession of the original note empowers WFB to initiate either judicial or non-judicial foreclosure, establishes its right to payment, and defeats Brock's CPA and other claims against all parties. Brock submitted no evidence contradicting WFB's evidence, but instead relied upon rejected legal theories, conjecture, and metaphysical possibilities. Brock's appeal should be denied.

## II. ARGUMENT

Brock's arguments turn mostly upon various legal theories purporting to show that WFB does not have the legal status to enforce Brock's note and deed of trust through a non-judicial foreclosure proceeding. Brock's substantial defaults under the note are not contested. As explained *infra*, Brock's legal arguments are without merit. Moreover,

---

<sup>1</sup> Wells Fargo Bank N.A. as trustee on behalf of the holders of the Harborview Mortgage Loan Trust Mortgage Loan Pass-Through Certificates, Series 2006-12 ("WFB"); Select Portfolio Servicing, Inc. ("SPS"); Mortgage Electronic Registration Systems, Inc. ("MERS").

<sup>2</sup> *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 103-04, 285 P.3d 34 (2012).

<sup>3</sup> *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 515, 359 P.3d 771 (2015).

as discussed *infra*, Brock failed to submit evidence supporting the various arguments raised in his brief. “Evidence supporting a party’s case theory ‘must rise above speculation and conjecture.’” *Fergen v. Sestero*, 174 Wn. App. 393, 397, 298 P.3d 782 (2013) (citation omitted).

The non-movant “must do more than simply show that there is some metaphysical doubt as to material facts.” *Matsushita*, 475 U.S. at 586, 106 S. Ct. 1348 (footnote and citations omitted). One of the purposes of summary judgment is to determine whether the parties can provide evidentiary support for their version of the facts. If a party has credible evidence for its position, it must make the existence of such evidence known because summary judgment cannot be defeated by the vague hope that something may turn up at trial.

*Kain v. Bank of N.Y. Mellon (In re Kain)*, No. 08-08404-HB, 2012 WL 1098465, at \*3 (Bankr. D. S.C. Mar. 30, 2012).

**A. Possession of the Original Note Authorizes WFB as Trustee, as the Holder, to Enforce the Note and Prosecute a Non-Judicial Foreclosure Proceeding**

The loan at issue in this case, evidenced by a note and secured by a deed of trust, was made in October 2006 in the original principal amount of \$825,000. Clerk’s Papers (“CP”) 192-227. Brock defaulted on the loan in or about September 2010. *Id.*

As recently confirmed by the Washington Supreme Court in *Brown v. Department of Commerce*, 184 Wn.2d 509, 359 P.3d 771 (2015), WFB is the beneficiary of Brock’s deed of trust because it holds his original note. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 104, 285

P.3d 34 (2012) (“[A] beneficiary must either actually possess the promissory note or be the payee.”).<sup>4</sup>

As stated in *White and Summers*, “merely by producing a properly indorsed or issued instrument the plaintiff proves that he is entitled to enforce it as a holder.” 2 James J. White & Robert S. Summers, *Uniform Commercial Code* § 16.4.b (5th ed. 2008); *Tuttle v. Rose*, 430 N.E.2d 356, 358 (Ill. App. Ct. 1981) (“[W]hen the signatures on a note are admitted or established, production of the instrument entitles a holder to recover unless the defendant establishes a defense. This means that once the holder produces the instrument, he is entitled to recover in the absence of any further evidence. The defendant has the burden of establishing any defense, including payment, by a preponderance of the evidence.” (emphasis added; citation omitted)).

Possession of Brock’s original note imparts the power to WFB as trustee to enforce it. See *Elene-Arp v. Fed. Home Fin. Agency*, No. C12-2154, 2013 WL 1898218, at \*4 (W.D. Wash. May 7, 2013); *Petheram v. Wells Fargo Bank*, No. C13-1016-JLR, 2013 WL 6173806, at \*2 (W.D. Wash. Nov. 21, 2013). Because WFB possessed the original note, Brock’s various arguments are unavailing.

---

<sup>4</sup> RCW 62A.3-205; RCW 62A.3-301 (the holder of the note includes any party who takes possession of the note, endorsed in blank, by transfer); RCW 61.24.005(2) (beneficiary is the “holder of the [promissory note] . . . secured by the deed of trust”); *Lynott v. Mortg. Elec. Registration Sys., Inc.*, No. 12-cv-5572-RBL, 2012 WL 5995053, at \*2 (W.D. Wash. Nov. 30, 2012) (“U.S. Bank is the beneficiary of the deed because it holds Plaintiff’s note, not because MERS assigned it the deed.”).

**B. WFB as Trustee Submitted the Original Note as Evidence at Summary Judgment**

Brock argues that Respondents submitted multiple copies of Brock's original note to the trial court, and thereby created a material issue of fact. Brock's Brief at 5-6. Brock argues that "[i]t is not controversial to say there can be only one original." *Id.* at 6.

Brock is correct that there is only one original note – and Respondents submitted Brock's original note to the trial court at summary judgment.<sup>5</sup> As discussed below, what is relevant in establishing the originality of the note is Brock's original signature, a material fact unaffected by the existence of copies of the note.<sup>6</sup> The existence of copies of the original, which may bear marginalia or other immaterial surplusage not contained on the original, does not make the original note any less the original note and does not create a genuine issue of material fact.

Under RCW 62A.3-308(a),<sup>7</sup> Brock's signature on the note must be "specifically denied in the pleadings" and is presumed "authentic and authorized" even if Brock denied its validity in his pleadings.

In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument

---

<sup>5</sup> Respondents advised the parties and the Court in its motion pleadings that they would do so. CP 14-28 (WFB as trustee, SPS, and MERS Reply Brief in Support of Summary Judgment Dismissing Complaint at p. 2).

<sup>6</sup> Notably, Brock has not identified any other alleged holder or owner of the note, or identified any risk of double payment, and has presented no evidence suggesting the original is not the original other than noting that a copy has other marginalia on it. But Brock must identify a genuine issue of material fact, not the hypothetical possibility that the original note is not the original.

<sup>7</sup> U.C.C. section 3-307 is now section 3-308. *See* U.C.C. § 3-308, Official Comment 1 ("Section 3-308 is a modification of former Section 3-307. The first two sentences of subsection (a) are a restatement of former Section 3-307(1).").

is admitted unless specifically denied in the pleadings.<sup>8]</sup> 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.

RCW 62A.3-308(a). Because Brock did not specifically deny his signature in his complaint<sup>9</sup> and presented no evidence that the signature on the documents was not his, Respondents were not required to submit any additional evidence. The U.C.C. § 3-308, Official Comment 1 explains:

The question of the burden of establishing the signature arises only when it has been put in issue by specific denial. “Burden of establishing” is defined in Section 1-201. The burden is on the party claiming under the signature, but the signature is presumed to be authentic and authorized except as stated in the second sentence of subsection (a). “Presumed” is defined in Section 1-201 and means that until some evidence is introduced which would support a finding that the signature is forged or unauthorized, the plaintiff is not required to prove that it is valid. The presumption rests upon the fact that in ordinary experience forged or unauthorized signatures are very uncommon, and normally any evidence is within the control of, or more accessible to, the defendant. The defendant is therefore

---

<sup>8</sup> A general denial is not sufficient. *See, e.g., Wesla Fed. Credit Union v. Henderson*, 655 So. 2d 691, 693 (La. Ct. App. 1995) (determining general denial of paragraphs insufficient to constitute a specific denial of the authenticity of the signature); *Dryden v. Dryden*, 621 N.E.2d 1216, 1219 (Ohio Ct. App. 1993) (defining specific denial as “statement that denies a particular fact and then states what actually occurred” and ruling general denial without more insufficient (citation omitted)); *Bank of New England, N.A. v. Greer*, 1991 Mass. App. Div. 202 (1991) (holding general denials in defendants’ answer were insufficient to put the genuineness of signatures on the note into controversy).

<sup>9</sup> The complaint is lengthy and convoluted, and demands that the original note be submitted to the Court, but does not appear to contain a specific denial of the signature. CP 247 et seq. In any event, Brock produced no evidence denying his signature.

required to make some sufficient showing of the grounds for the denial before the plaintiff is required to introduce evidence. The defendant's evidence need not be sufficient to require a directed verdict, but it must be enough to support the denial by permitting a finding in the defendant's favor. Until introduction of such evidence the presumption requires a finding for the plaintiff.

(Emphases added.) In other words, “[t]he defendant is . . . required to make some sufficient showing of the grounds for the denial before the plaintiff is required to introduce evidence.” *Id.*; see 6B David Frisch, *Lawrence’s Anderson on the Uniform Commercial Code* § 3-308:9R, Westlaw (database updated Dec. 2015); *In re Bass*, 738 S.E.2d 173 (N.C. 2013). Brock offered no evidence that the signature was his original signature. WFB had no obligation to submit additional evidence beyond the note and “the presumption requires a finding for the plaintiff.”

**C. The Original Brock Note Is Non-Hearsay and Self-Authenticating**

Brock’s arguments about the role of WFB and SPS’s attorneys’ role as witnesses are irrelevant. Brock’s Brief at 14-20. No witness was required to authenticate the note or deed of trust. Indeed, “[m]ere production of a note establishes prima facie authenticity and is sufficient to make a promissory note admissible.” See, e.g., *United States v. Varner*, 13 F.3d 1503, 1509 (11th Cir. 1994) (citing *United States v. Carriger*, 592 F.2d 312, 316-17 (6th Cir. 1979)).

The Brock note and deed of trust are what the law designates as “verbal acts,” which are non-hearsay. See *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 540 (5th Cir. 1994) (“Signed

instruments such as wills, contracts, and promissory notes are writings that have independent legal significance, and are non-hearsay.” (quoting Thomas A. Mauet, *Fundamentals of Trial Techniques* 180 (1988)). “A contract, for example, is a form of verbal act to which the law attaches duties and liabilities and therefore is not hearsay. See 2 [John W. Strong et al.,] *McCormick on Evidence*, § 249, at 101 [(4th ed. 1992)].” *Mueller v. Abdnor*, 972 F.2d 931, 937 (8th Cir. 1992).<sup>10</sup> The Brock note and deed of trust are non-hearsay.

The original Brock note and the recorded deed of trust are self-authenticating. ER 902 governs self-authenticating documents. Two provisions of ER 902 cover the Brock note and deed of trust.<sup>11</sup>

ER 902(i) “Commercial Paper and Related Documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.”

ER 902(h) “Acknowledged Documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.”

Contrary to Brock’s arguments, no authenticating witness is required.

Appellants mistake the legal standard governing the admission of a self-authenticating document into evidence.

---

<sup>10</sup> “Verbal acts, however, are not hearsay because they are not assertions and not adduced to prove the truth of the matter. See 2 John W. Strong et al., *McCormick on Evidence*, § 249, at 101 (4th ed. 1992); 6 John H. Wigmore, *Evidence* § 1770, at 259 (James H. Chadbourn rev. ed. 1976). The Federal Rules of Evidence ‘exclude from hearsay the entire category of “verbal acts” and “verbal parts of an act,” in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.’ Fed. R. Evid. 801(c) advisory committee’s note.” *Mueller*, 972 F.2d at 937.

<sup>11</sup> Both apply to the deed of trust. ER 902(i) applies to the note.

Deutsche Bank was not required to present a witness to authenticate the note. See Fed. R. Evid. 1003. Rather, the note was admissible as a self-authenticating document without the need for further evidence in support of its authenticity. Under the Federal Rules of Evidence, signed commercial paper is “self-authenticating,” meaning that it “require[s] no extrinsic evidence of authenticity in order to be admitted.” Fed. R. Evid. 902(9). A signed promissory note falls into this category of evidence. See *In re Cook*, 457 F.3d 561, 566 (6th Cir. 2006) (“the promissory note is self-authenticating evidence pursuant to Rule 902”); *United States v. Varner*, 13 F.3d 1503, 1508-09 (11th Cir. 1994).

*Miller v. Deutsche Bank Nat’l Tr. Co.*, No. 12-cv-03279-PAB, 2013 WL 4776054, at \*10 (D. Colo. Sept. 4, 2013) (emphases added; brackets in original). Respondents did not rely upon any testimony of their attorneys. Brock’s Brief at 14-15.

#### **D. The Deed of Trust Followed Transfer of the Note**

When the note was transferred to WFB, the deed of trust was also transferred. It is black letter law that the security – the deed of trust – follows the transfer of the debt and that a formal assignment of the deed of trust is not required.

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 Jacobson*, 402 B.R. 359, 367 (noting that “this principle is neither new nor unique to Washington”) (*quoting Carpenter v. Longan*, 83 U.S. 271, 275, 21 L. Ed. 313 (1872)); *see also Fidelity & Deposit Co. of Maryland v. Ticor Title Ins. Co.*, 88 Wn. 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.

*Myers v. Mortg. Elec. Registration Sys., Inc.*, 2012 No. 11-cv-05582-RBL, 2012 WL 678148, at \*3 (W.D. Wash. Feb. 24, 2012) (emphasis added). This legal principle also defeats Brock’s claims against MERS. Any document executed by MERS as nominee of the note holder gives public notice of the assignment, and transfers whatever record interest MERS may hold in the trust deed, but does not affect the ownership interest in the deed of trust or effect transfer of the deed of trust which occurs by operation of law. *See Lynott v. Mortg. Elec. Registration Sys., Inc.*, No. 12-cv-5572-RBL, 2012 WL 5995053, at \*2 (W.D. Wash. Nov. 30, 2012) (“U.S. Bank is the beneficiary of the deed because it holds Plaintiff’s note, not because MERS assigned it the deed[,]” and “[i]n sum, possession of the note makes U.S. Bank the beneficiary; the assignment merely publicly records that fact.”).

*See Florez v. OneWest Bank, F.S.B.*, 2012 U.S. Dist. LEXIS 56111, 2012 WL 1118179, \*1 (W.D. Wn. 2012) (distinguishing Bain because defendant “had authority to foreclose, independent of MERS, since [defendant] held Plaintiffs’ Note at the time of foreclosure”); *Myers v. Mortgage Electronic Registration Systems, Inc.*, 2012 U.S. Dist. LEXIS 30891, 2012 WL 678148, \*3 (“Even if MERS had improperly assigned the Deed, Flagstar is empowered as the beneficiary to appoint the trustee because it holds [plaintiff’s] Note, not because of the assignment.”). Bain does not stand for the proposition that a deed of trust is unenforceable simply because it names MERS as a beneficiary. *See Zhong*, 2013 U.S. Dist. LEXIS 145916, 2013 WL 5530583, at \*3 (determining that “Bain also held that a deed of trust naming MERS as a beneficiary is not automatically unenforceable). Indeed, the Deed of Trust remains valid and enforceable by the holder of the Note even where a violation of the Deed of Trust occurs. *See*,

*e.g.*, *Walker*, 308 P.3d at 729 (rejecting the argument that designation of an ineligible beneficiary “standing alone, renders [a deed of trust] void”); *Borowski v. BNC Mortg.*, 2013 U.S. Dist. LEXIS 122104, 2013 WL 4522253, at \*5 (W.D. Wn. 2013) (finding that “a violation of the Deed of Trust Act should not result in a void deed of trust”).

*Johnson v. CitiMortgage, Inc.*, No. 2:13-cv-00037-RSM, 2013 WL 6632108, at \*3 (W.D. Wash. Dec. 17, 2013) (brackets omitted).

**E. WFB Possessed the Note When the Non-Judicial Foreclosure Was Commenced**

Brock argues that there is no evidence that WFB possessed the note in October 2012, when it initiated a non-judicial foreclosure. Brock’s Brief at 8. To the contrary, SPS had a power of attorney from the WFB (CP 172, Suzanne Johnson Decl. Ex. A), and SPS on behalf of WFB provided a beneficiary declaration to Northwest Trustee Services confirming that WFB held the note in 2012 (CP 172, Jeff Stenman Decl. Ex. B). “A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note . . . shall be sufficient proof as required under this subsection.” RCW 61.24.030(7)(a).

Brock argues that the SPS “declaration of ownership” is not sufficient because “the servicer is not the same as the beneficiary” and there was not any sufficient evidence that SPS had any relationship with or authority from the Trust. Brock’s Brief at 37-38. But as noted above, SPS had a power of attorney from WFB. Nothing in RCW 61.24.030(7)(a) prohibits WFB from acting through another authorized party, and nothing

in the statute requires the non-judicial trustee to require conclusive or incontrovertible proof. As noted above, “whatever one may lawfully do for himself, he may lawfully authorize an agent to do for him.” *Sherman v. Millikin*, 9 Wn.2d 339, 341, 114 P.2d 989 (1941). Brock provides no evidence that Washington has *sub silentio* banned the application of powers of attorney under the Deed of Trust Act. *See, e.g., Bain v. Metro. Mortg. Grp. Inc.*, No. C09-0149-JCC, 2010 WL 891585, at \*6 (W.D. Wash. Mar. 11, 2010) (“There is simply nothing deceptive about using an agent to execute a document, and this practice is commonplace in deed of trust actions.”). “Washington law, and the deed of trust act itself, approves of the use of agents.” *Bain*, 175 Wn.2d at 106. *Bain* is consistent with long-standing Washington law. *See, e.g., Carr v. Cohn*, 44 Wash. 586, 588, 87 P. 926 (1906) (nominee can bring quiet title action on deed); *Andrews v. Kelleher*, 124 Wash. 517, 534-36, 214 P. 1056 (1923) (bond holders’ agent authorized to prosecute foreclosure); *Fid. Tr. Co. v. Wash.-Or. Corp.*, 217 F. 588, 596 (W.D. Wash. 1914) (same).<sup>12</sup>

---

<sup>12</sup> In addition, in different contexts, courts have recognized that a person can be an employee of one party and act as an agent of another. *See, e.g., Mickelson v. Chase Home Fin. LLC*, No. C11-1445 MJP, 2012 WL 6012791, at \*2 (W.D. Wash. Dec. 3, 2012) (holding that DTA “approves the use of agents, and Plaintiffs provide no proof or law that shows McElligott could not act as an agent of MERS and separately as an employee for NWTS”); *Silving v. Wells Fargo Bank, NA*, No. CV 11-0676-PHX-DGC, 2012 WL 135989, at \*6 (D. Ariz. Jan. 18, 2012) (“Plaintiffs allegation that Ms. Gregory claimed to be both an employee of First American and a Certifying Officer of MERS is an insufficient basis to state a plausible claim that Ms. Gregory was not properly authorized to execute the deed transfer on behalf of MERS.”); *Chua v. IB Prop. Holdings, LLC*, No. CV 11-05894, 2011 WL 3322884, at \*2 (C.D. Cal. Aug. 1, 2011) (“[T]o the extent that Plaintiffs take issue with [MERS’ certifying officer] Lisa Markham’s dual position, Plaintiffs have not identified a relevant legal authority

Brock relies on a canon of construction, *expressio unius est exclusio alterius*, to argue that under the Deeds of Trust Act the beneficiary cannot have an agent execute an appointment of a successor trustee. This argument should be rejected. The Deeds of Trust Act authorizes beneficiaries to conduct non-judicial foreclosures, and the appointment of a successor trustee is part of the process.<sup>13</sup> Having SPS, WFB's loan servicer, execute the beneficiary declaration does not make the declaration any less the act of the beneficiary, or provide any less "proof" to the non-judicial trustee that WFB is the holder of the note. Brock's argument misapplies and overstates the operation of this canon of construction. *See, e.g., De Grief v. City of Seattle*, 50 Wn.2d 1, 12, 297 P.2d 940 (1956) ("This rule should be applied only if and when it aids in determining legislative intent. We quote from Crawford, *Statutory Construction*, p. 336, § 195: 'In other words, the principle is to be used only as a means of ascertaining the legislative intent where it is doubtful,

---

prohibiting one individual from working for both CitiMortgage and MERS or from acting as an agent for both.").

<sup>13</sup> *Century Brewing Co. v. City of Seattle*, 177 Wash. 579, 585, 32 P.2d 1009 (1934) ("The general rule may be formulated thus: Where particular powers expressly conferred, are followed by a general grant of power, such general grant by intendment may include all powers that are fairly within the term of the grant, and which are essential to the purposes of the municipal corporation, and consistent with the particular powers. Otherwise stated, where the exercise of particular governmental powers may be fairly included in and authorized by general powers granted, 'the rule *expressio unius est exclusio alterius* is not generally applied to specific powers conferred to exclude powers that serve the purposes for which municipalities are organized where such powers are not inconsistent with other powers conferred or with limitations imposed by the charter or by statute upon the municipal powers.'" (citation omitted)).

and not as a means of defeating the apparent intent of the legislature.”  
(citation omitted)).<sup>14</sup>

**F. Brock Submitted No Evidence That WFB Did Not Own and Possess the Original Note in 2012**

Brock offers no contradictory evidence showing a material issue that WFB did not own or possess the note in 2012. Because this was a defense raised by Brock for which Brock would have the burden of proof at trial, Brock’s obligation at summary judgment was to submit specific contradicting evidence. Without contrary evidence before the trial court at summary judgment, there is no need for a trial.

Brock’s argument, in fact, is an attempt to impose a higher “proof” requirement than provided by the statute. The successor trustee must have proof – not absolute proof or proof beyond a reasonable doubt – that the beneficiary is the holder or owner of the note before starting a foreclosure proceeding: “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). Nor is proof of ownership limited to a beneficiary declaration: “ownership can be proved in different ways.” *Lyons v. U.S. Bank Nat’l Ass’n*, 181 Wn.2d 775, 789, 336 P.3d 1142 (2014).

---

<sup>14</sup> *Wash. State Labor Council v. Reed*, 149 Wn.2d 48, 59, 65 P.3d 1203 (2003) (“However, this maxim ‘cannot be rigidly applied to . . . defeat the intent of the legislature.’ *State v. Williams*, 94 Wn.2d 531, 538, 617 P.2d 1012 (1980). *In Amalgamated Transit Union Legislative Council v. State*, the court indicated that the rule of *expressio unius est exclusio alterius* did not necessarily apply without considering other factors which may persuade the court that legislative intent was the opposite of what the statutory construction rule would require. *Amalgamated Transit Union Legislative Council v. State*, 145 Wn.2d 544, 552-57, 40 P.3d 656 (2002)” (ellipsis in original)).

Although ownership can be proved in different ways, the statute itself suggests one way: “A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note . . . shall be sufficient proof as required under this subsection.” RCW 61.24.030(7)(a). Typically, unless the trustee has violated a duty of good faith, it is entitled to rely on the beneficiary’s declaration when initiating a trustee’s sale. *See* RCW 61.24.030(7)(b). But if there is an indication that the beneficiary declaration might be ineffective, a trustee should verify its veracity before initiating a trustee’s sale to comply with its statutory duty.

*Id.* at 789-90 (emphasis added; ellipsis in original). Thus, while a beneficiary declaration is “sufficient,” it is plain that a beneficiary declaration is not an *exclusive* form of “proof” under the statute. Moreover, in order to investigate an ownership issue further, the successor trustee must have some reason to do so, either arising from the information the successor trustee has or presented by the borrower.

Here, the successor trustee had the beneficiary declaration – but nothing presented by Brock or otherwise suggesting that the beneficiary declaration was questionable or incorrect.<sup>15</sup> In *Lyons*, the court recognized that the trustee, if she had contradictory evidence, needed to investigate and not accept the beneficiary declaration. But Brock submitted no such contradictory evidence. Again, Brock’s burden, at summary judgment, is to provide the Court with specific contrary evidence, not metaphysical

---

<sup>15</sup> *See In re Butler*, 512 B.R. 643 (Bankr. W.D. Wash. 2014), for a useful and thoughtful explication of these and related issues.

possibilities.<sup>16</sup> If a borrower believes that the trustee should have investigated some aspect of the ownership of the note before proceeding, the deed of trust statute gives a borrower the opportunity to go to court and obtain an injunction to halt a non-judicial foreclosure proceeding by providing evidence to the court supporting the borrower's allegations. RCW 61.24.030. Yet, Brock provided no such evidence.

Unlike the facts before the trial court in *Lyons*, here there has been no evidence provided by Brock that WFB was not the owner and holder of the note in 2012. The non-judicial trustee had "proof" that WFB was the owner and holder. Brock, who is in substantial default, cannot prevent the exercise of the very remedies he agreed to when he fails to present evidence to the Court.

**G. Payment Is an Affirmative Defense and There Is a Presumption of Non-Payment Established When the Original Note Is Admitted**

Brock argues that the declaration of Suzanne Johnson was inadmissible to establish the current balance on Brock's note. Brock's Brief at 16, *et seq.* But this argument wholly misapprehends the parties' burdens of proof when the original note is presented.

WFB makes a prima facie case to collect the face amount of the note by submitting the original note into evidence. WFB has no obligation to provide an accounting of payments as part of its case. To the contrary,

---

<sup>16</sup> "If a party has credible evidence for its position, it must make the existence of such evidence known because summary judgment cannot be defeated by the vague hope that something may turn up at trial." *Kain*, 2012 WL 1098465, at \*3.

payment is an affirmative defense that must be raised by the borrower or it is waived, and it is the borrower's burden to prove payment, not the note holder's. CR 8(c); *U.S. Bank Nat'l Ass'n v. Whitney*, 119 Wn. App. 339, 347, 81 P.3d 135 (2003); *W. Coast Credit Corp. v. Pedersen*, 64 Wn.2d 33, 35-36, 390 P.2d 551 (1964).<sup>17</sup> That payment is an affirmative defense that must be proven by the defendant is widely established in Washington and elsewhere.

[I]t is a rule of almost universal application that a claim for a greater amount necessarily includes the lesser. For example: In an action upon a promissory note, or any other contract, where it is alleged that the whole amount thereof is due, the plaintiff will be permitted to recover the amount actually due, notwithstanding he willfully alleges and testifies that the whole thereof is due, when in truth only a small part is due. The defense of payment in such cases is an affirmative defense, and must be proved as such.

*Frick v. Wash. Water Power Co.*, 76 Wash. 12, 13-14, 135 P. 470 (1913) (emphasis added). By submitting the original note, the holder establishes a presumption of non-payment.

Under our common law, when a holder of a promissory note is in possession of the promissory note, possession of the promissory note "raises a rebuttable presumption that a note was not paid." *In re Estate of Rutter*, 633 N.W.2d 740, 747 (Iowa 2001). Once the holder of the promissory note introduces the promissory note into evidence, the borrower may then claim he or she made more payments on

---

<sup>17</sup> "The general rule, therefore, which we find to be in accord with reason and justice, is that failure to pay must be alleged if it is an essential element of the claim for relief, as in this case, where the breach of the contract consists of nonpayment; but the burden rests upon the defendant to prove payment[.]" *Pedersen*, 64 Wn.2d at 35-36; *Perma-Fix Nw. Richland, Inc. v. Ecology Servs., Inc.*, No. CV-06-5013-FVS, 2008 WL 4148949 (E.D. Wash. Aug. 28, 2008).

the promissory note. In an action on a promissory note, we recognize this claim by the borrower as the defense of payment. The defense of payment in an action is an affirmative defense. Glenn v. Keedy, 248 Iowa 216, 221, 80 N.W.2d 509, 512 (1957). The burden is on the borrower to prove his or her defense of payment. Id. In an action on a promissory note, where the holder of the promissory note claims less than the total amount is due and owing on the promissory note, the rebuttable presumption of nonpayment only applies to the amount the holder claims is still due and owing. See Burch Mfg. Co. v. McKee, 231 Iowa 730, 731-33, 2 N.W.2d 98, 99 (1942).

*Iowa Mortg. Ctr., L.L.C. v. Baccam*, 841 N.W.2d 107, 112 (Iowa 2013) (emphases added). As established legal authority holds, the beneficiary only need produce the original note to make a prima facie case to enforce the note. “Once the holder of a promissory note produces the note, he is entitled to the face amount on the note. Payment is an affirmative defense to a suit on a promissory note, and the burden is on the defendant to prove payment.” *Gulf Coast Bank & Tr. Co. v. Donnaud’s Inc.*, 759 So.2d 268, 272 (La. Ct. App. 2000) (emphasis added); *Varner*, 13 F.3d 1503; *White & Summers, supra*. Brock failed to submit evidence in support of his affirmative defense of payment.

#### **H. SPS May Rely upon the Records of a Prior Loan Servicer**

Because of the foregoing rule, the burden rests upon Brock, if he disputes the amount SPS states is owing, to prove that a different amount is owing. Moreover, contrary to Brock’s argument, a loan servicer may rely upon a predecessor’s records, and such records may be introduced

into evidence as business records that have been transferred from a predecessor loan servicer as in this case.

Moreover, the Court is persuaded by the conclusions of courts in other jurisdictions that have confronted this issue and have agreed that the loan records and transaction history of a prior loan servicer can be: (i) relied on by a subsequent servicer; and (ii) admitted into evidence as the subsequent servicer's business records. *See, e.g., Beal Bank, SSB v. Eurich*, 444 Mass. 813, 831 N.E. 2d 909, 914 (Mass. 2005).

*In re Sagamore Partners, Ltd.*, No. 11-37867-BKC-AJC, 2012 WL 3564014, at \*5 (Bankr. S.D. Fla. Aug. 17, 2012).<sup>18</sup>

Given the common practice of banks buying and selling loans, we conclude that it is normal business practice to maintain accurate business records regarding such loans and to provide them to those acquiring the loan. Therefore, the bank need not provide testimony from a witness with personal knowledge regarding the maintenance of the predecessors' business records. The bank's reliance on this type of record keeping by others renders the records the

---

<sup>18</sup> *See United States v. Jakobetz*, 955 F.2d 786, 801 (2d Cir. 1992) ("Even if the document is originally created by another entity, its creator need not testify when the document has been incorporated into the business records of the testifying entity."); *Phillips v. Mortg. Elec. Registration Sys., Inc.*, No. 5:09-cv-2507-TMP, 2013 WL 1498956 (N.D. Ala. Apr. 5, 2013); *WAMCO XXVIII, Ltd. v. Integrated Elec. Env'ts, Inc.*, 903 So. 2d 230, 233 (Fla. Dist. Ct. App. 2005); *Brawner v. Allstate Indem. Co.*, 591 F.3d 984, 987 (8th Cir. 2010).

"We do not agree with appellant that the failure to call the records custodians from the banks that generated the documents is determinative of the documents' admissibility under Rule 803(6). 'A foundation for admissibility may at times be predicated on judicial notice of the nature of the business and the nature of the records as observed by the court, particularly in the case of bank and similar statements.' *FDIC v. Staudinger*, 797 F.2d 908, 910 (10th Cir. 1986) (citing *Weinstein's Evidence* at 803-178). . . . As noted above, bank records are particularly suitable for admission under Rule 803(6) in light of the fastidious nature of record keeping in financial institutions, which is often required by governmental regulation." *United States v. Johnson*, 971 F.2d 562, 571 (10th Cir. 1992).

equivalent of the bank's own records. To hold otherwise would severely impair the ability of assignees of debt to collect the debt due because the assignee's business records of the debt are necessarily premised on the payment records of its predecessors.

*Beal Bank*, 831 N.E.2d at 914 (citations omitted).

Foundational testimony from a "qualified witness," is a term that has been "broadly interpret[ed]" by Washington courts. *State v. Quincy*, 122 Wn. App. 395, 399, 95 P.3d 353 (2004), *rev. denied*, 153 Wn.2d 1028 (2005); *State v. Ben-Neth*, 34 Wn. App. 600, 603-05, 663 P.2d 156 (1983) (bank's computer records admitted, over objections, that foundation witnesses did not create or supervise creation of computer records, did not understand how records were assembled at the computer center, and had never been to the computer center); *State v. Bellerouche*, 129 Wn. App. 912, 917, 120 P.3d 971 (2005) (testimony that record "filed, kept, and accessed in accordance with the routine recordkeeping procedures" was sufficient foundation). Identification by a custodian may be sufficient even though the custodian was hired after the record was made. 5C Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 803.42, at 107 (5th ed. 2007). The person who created the record need not identify it. *Cantrill v. Am. Mail Line*, 42 Wn.2d 590, 257 P.2d 179 (1953); *Ben-Neth*, 34 Wn. App. at 603. Courts have held that "'personal knowledge can come from [a] review of the contents of files and records.'" *In re Sia*, No. 10-41873, 2013 WL 4547312, at \*5 (Bankr. D. N.J. Aug. 27, 2013) (quoting *Wash. Cent. R.R. Co. v. Nat'l Mediation Bd.*, 830 F. Supp. 1343, 1353 (E.D. Wash. 1993)); *In re Trafford Distrib. Ctr., Inc.*, 414 B.R. 858,

862 (Bankr. S.D. Fla. 2009) (same); *In re New Century TRS Holdings, Inc.*, 502 B.R. 416 (Bankr. D. Del. 2013).

Ultimately, admissibility hinges upon the opinion of the court that the sources of information, method, and time of preparation were such as to justify their admission. *Quincy*, 122 Wn. App. at 401; *Ben-Neth*, 34 Wn. App. at 603. Accordingly, the business records setting forth the details of Brock's default are admissible.

**I. The Brock Note Is a Negotiable Instrument; Commercial Certainty Is Determined from the Face of the Instrument**

Brock also argues that the Brock note is not a negotiable instrument, relying largely upon an outdated 1963 case, *Anderson v. Hoard*, 63 Wn.2d 290, 387 P.2d 73 (1963), dealing with payment of taxes, insurance, and other like charges. Brock's Brief at 25, *et seq.* But an examination of the modern rules of negotiability shows that Brock's arguments are misplaced and that *Hoard* is inapplicable.<sup>19</sup>

---

<sup>19</sup> Contrary to Brock's argument that a negotiable instrument must be "as precise as a dollar bill," the courts in fact have long held that it is "commercial certainty, not mathematical certainty" that is sought. *See Goss v. Trinity Sav. & Loan Ass'n*, 813 P.2d 492, 498 (Okla. 1991) ("If the intent of the Code was to aid in the continued expansion of commercial practices, then common sense would tell us that when faced with a widespread commercial practice, such as in the present case, this court should acknowledge it. 'The rule requiring certainty in commercial paper was a rule of commerce before it was a rule of law. It requires commercial, not mathematical, certainty. An uncertainty which does not impair the function of negotiable instruments in the judgment of business men ought not to be regarded by the courts. . . . The whole question is, do [the provisions] render the instruments so uncertain as to destroy their fitness to pass current in the business world?'" (ellipsis and brackets in original) (quoting *Taylor v. Roeder*, 360 S.E.2d 191, 196 (Va. 1987) (Compton, J., dissenting))).

The authorities hold that to meet the fixed amount requirement, the fixed amount generally must be determinable by reference to the instrument itself without any reference to any outside source. 4 William D. Hawkland & Lary Lawrence, *Uniform Commercial Code Series* § 3-106:2, Westlaw (database updated Dec. 2015).

The courts apply a version of the “four corners rule” to determine negotiability from the face of the instrument without reference to extrinsic facts. “Negotiability is determined from the face, the four-corners, of the instrument without reference to extrinsic facts.” *Holsonback v. First State Bank of Albertville*, 394 So.2d 381, 383 (Ala. Civ. App. 1980), *cert. denied*, 394 So.2d 384 (1981). This rule, which is reflected in the U.C.C. negotiability provisions and the related comments, follows from the purpose and policy behind the concept of a negotiable instrument.<sup>20</sup>

A recent Washington case demonstrates this approach. *Alpacas of Am., LLC v. Groome* 179 Wn. App. 391, 397, 317 P.3d 1103 (2014) (“We analyze the promissory notes’ contents to determine whether the notes’

---

<sup>20</sup> “The whole purpose of the concept of a negotiable instrument under Article 3 is to declare that transferees in the ordinary course of business are only to be held liable for information appearing in the instrument itself and will not be expected to know of any limitations on negotiability or changes in terms, etc., contained in any separate documents. The whole idea of the facilitation of easy transfer of notes and instruments requires that a transferee be able to trust what the instrument says, and be able to determine the validity of the note and its negotiability from the language in the note itself.” *First State Bank at Gallup v. Clark*, 570 P.2d 1144, 1147 (N.M. 1977). Whether an instrument is negotiable is a question of law to be determined by the court. *See N. Bank v. Pefferoni Pizza Co.*, 562 N.W.2d 374, 376 (Neb. 1997); *Cartwright v. MBank Corpus Christi, N.A.*, 865 S.W.2d 546, 549 (Tex. App. 1993); 5A David Frisch, *Lawrence’s Anderson on the Uniform Commercial Code* § 3-101:48, Westlaw (database updated Dec. 2015).

holder could determine her or his rights, duties, and obligations with respect to the payment on the notes without having to examine any other documents. *See* RCWA 62A.3-106 cmt. 1.”).

RCWA 62A.3-106 cmt. 1 states, “The rationale is that the holder of a negotiable instrument should not be required to examine another document to determine rights with respect to payment.” And an instrument can retain its negotiability when it merely refers to the existence of another writing and does not require reference to the other writing as to whether or when payment is due. 6B Lary Lawrence, *Anderson on the Uniform Commercial Code* § 3-106:14R (3d ed. 2003).

*Id.* at 397 n.1.

This rule is reflected in other parts of the statute. A “negotiable instrument” means “an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order.” RCW 62A.3-104 (emphasis added).<sup>21</sup> As is plain from this language, the inclusion of “other charges” in the note does not affect negotiability because they are described in the note. *Hoard* is not applicable.

Under RCW 62A.3-112(b): “Interest may be stated in an instrument as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information not contained in the instrument. If an instrument

---

<sup>21</sup> Former section 3-106 recognized that a “sum certain” was being paid even if the note provided that it could be paid “with a stated discount or addition if paid before or after the date fixed for payment.”

provides for interest, but the amount of interest payable cannot be ascertained from the description, then except as otherwise provided in RCW 19.52.010, interest is payable at the judgment rate in effect at the place of payment of the instrument and at the time interest first accrues.” (Emphasis added.)<sup>22</sup>

The fact that the note provides for the accrual and payment of variable amounts of interest and interest rates, some of which may, under specified circumstances, as stated on the face of the instrument, be re-characterized as principal up to a maximum limit, is disclosed and set out in detail on the face of the note.<sup>23</sup>

Thus, negotiability exists if the fixed amount can be determined from the face of the instrument, without reference to outside sources (although, as noted above, this rule has been relaxed with respect to calculations and amounts of interest). Brock’s argument therefore fails because the note states a fixed amount, and interest accrual, and all amounts that may accrue, is fully described on the face of the instrument,

---

<sup>22</sup> As an additional example, this principle addresses Brock’s argument regarding prepayment provisions as reflected in Official Comment 1 to section 3-104: “Many notes issued in commercial transactions are secured by collateral, are subject to acceleration in the event of default, or are subject to prepayment. A statement of rights and obligations concerning collateral, prepayment, or acceleration does not prevent the note from being an instrument if the statement is in the note itself. See Section 3-104(a)(3) and Section 3-108(b)” (emphases added). Thus, Brock’s argument that a prepayment provision destroys negotiability is incorrect.

<sup>23</sup> RCW 19.144.050, which addresses negative amortization, was enacted in 2008. The Brock note was executed in 2006.

and the amount to be paid can be determined from the face of the instrument. Therefore, the note is negotiable.

Brock argues that the note does not provide for payment of “fixed amount of money.” Here, the note provides that Brock will pay \$825,000, a fixed amount.<sup>24</sup> CP 200. Notably, Brock’s argument that the note does not provide for payment of a “fixed” amount of principal relies upon an extended discussion of the operation of the *interest rate provisions* contained in the note. *See* Brock’s Brief at 28-29. But under RCW 62A.3-112(b): “Interest may be stated in an instrument as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information not contained in the instrument.” (Emphasis added.) Here, the interest accrual mechanisms are also “described” on the face of the note. CP 200, *et seq.*

Brock argues that the current outstanding note balance will change as interest accrues, and payments are made or not made. But it is not the *current balance* of a note that must be “fixed” as Brock seems to argue. The *subsequent current* principal balance of a note always changes – that is true of every note upon which payments are made and interest accrues.

---

<sup>24</sup> *Cf. In re Hipp, Inc.*, 71 B.R. 643, 649 (Bankr. N.D. Tex. 1987) (the “principal sum of TWO MILLION AND NO/100 (\$2,000,000.00) DOLLARS, or so much thereof as may be advanced to the undersigned” (emphasis added)). Unlike the present case, in *Hipp* the sum was uncertain on the face of the note, and there was no description of how interest accrual would be calculated on the face of the note.

Brock also cites *Ralston v. Mortgage Investors Group, Inc.*, No. C 08-536, 2010 WL 3211931, at \*2 (N.D. Cal. Aug. 12, 2010), for an argument that a note that makes negative amortization inevitable by its terms is not negotiable. Brock's Brief at 28. *Ralston*, a case dealing not with negotiability issues but failure to disclose issues, is inapposite. In *Ralston*, the possibility of negative amortization was not disclosed and (at least at the pleading stage) was viewed as inevitable. 2010 WL 3211931, at \*2. But here, the possibility of negative amortization is expressly disclosed in Brock's note and is not inevitable.

Brock's note provides for a monthly minimum payment, but Brock is not limited to paying only the "minimum" payment and may make a full payment. See CP 192 Suzanne Johnson Decl. Ex. B, Section 3. Brock's note discloses that negative amortization will occur only if Brock chooses not to pay the full amount of interest due each month and only if the monthly minimum payment is insufficient to cover the accrued interest. See Brock's Brief at 29-30. The interest accrual formula is fully laid out on the face of the note, and negative amortization is not inevitable.<sup>25</sup> *Ralston* is inapposite. Brock's note was negotiable.

---

<sup>25</sup> Similarly, the courts have recognized that prepayment terms in notes do not destroy negotiability because prepayment is voluntary. Cf. *HSBC Bank USA, Nat'l Ass'n v. Gouda*, No. F-20201-07, 2010 WL 5128666, at \*3 (N.J. Super. Ct. App. Div. Dec. 17, 2010) ("Quite the opposite, the right of prepayment is a voluntary option that [borrowers] may elect to exercise solely at their discretion. Indeed, such an allowance confers a benefit, not a burden, upon [borrowers], who can freely choose to decline the opportunity."); *In re Steinberg*, No. WY-12-082, 2013 WL 2351797, at \*4 & n.34 (B.A.P. 10th Cir. May 30, 2013) (prepayment voluntary).

**J. Brock Fails to Identify Any Prejudice Based upon Any Alleged Defect in Prior Assignments**

Moreover, non-negotiability of a note is not a defense to payment to the transferee of the original note. A promissory note is a contract to pay money. *Dep't of Revenue v. Sec. Pac. Bank of Wash. Nat'l Ass'n.*, 109 Wn. App. 795, 808 n.11, 38 P.3d 354 (2002). As such, it is enforceable by a transferee.

Negotiability is not an essential quality of a promissory note. § 400.3-104(3); *Finney v. Shirley*, 7 Mo. 42 (1841); *Leroux v. Doniphan Retirement Home, Inc.*, 663 S.W.2d 791, 792[1] (Mo. App. 1984). A note that is not negotiable may nevertheless be transferred by assignment. § 400.3-201(1); *Rotert v. Faulkner*, 660 S.W.2d 463, 468[2] (Mo. App. 1983). Nor does the want of negotiability affect the liability of the maker to the assigns. *Leroux*, 663 S.W.2d at 792[1].

*Gibson v. Harl*, 857 S.W.2d 260, 267 (Mo. Ct. App. 1993).

And under the U.C.C., a note does not need to be endorsed to a transferee to be enforceable by the transferee. This doctrine is known as the “shelter rule.”

(b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

RCW 62A.3-203(b) (emphasis added); see *Anderson v. Burson*, 35 A.3d 452, 461 (Md. 2011) (“A transfer vests in the transferee only the rights enjoyed by the transferor, which may include the right to enforce the

instrument.”). The note is negotiable, but even if it were not, it is the original note, and it is therefore enforceable by WFB.

Notably, this loan was made in 2006. Now, ten years later, Brock has submitted no evidence showing that WFB does not hold the original note or did not hold it in 2012 or showing any risk of double payment to some other claimant to the note. In such circumstances courts have rejected arguments premised upon alleged possible defects in the chain of assignments.

Herman does not contest that he is in default on his mortgage or that the original lender could foreclose on his home. Instead, he premises his wrongful foreclosure claim on “asserted defects in the chain of assignments and the absence of ‘lawful ownership’ of the note” by the defendants. *Debrunner v. Deutsche Bank Nat’l Tr. Co.*, 204 Cal. App. 4th 433, 444, 138 Cal. Rptr. 3d 830 (2012). Such defects are insufficient to show prejudice, *see id.* at 443-44, and Herman failed to plead any other facts demonstrating prejudice. Therefore, the district court did not err in dismissing Herman’s claim for wrongful foreclosure. *See Herrera v. Fed. Nat’l Mortg. Ass’n*, 205 Cal. App. 4th 1495, 1507, 141 Cal. Rptr. 3d 326 (2012).

*Herman v. U.S. Bank NA*, 591 F. App’x 630, 631 (9th Cir. 2015).

Assuming that Plaintiff could allege facts showing that the assignment of the DOT was void, “under Fontenot, [he] must also show [that he was] prejudiced.” *Herrera v. Fed. Nat’l Mortg. Ass’n*, 205 Cal. App. 4th 1495, 1507, 141 Cal. Rptr. 3d 326 (2012). Where Plaintiff “do[es] not dispute that [he is] in default,” “[t]he assignment . . . d[oes] not change [his] obligations,” and “there is no reason to believe that . . . the original lender would have refrained from foreclosure in these circumstances,” he “fail[s] to allege any facts showing that [he] suffered prejudice as a result of any lack of authority of the parties participating in the foreclosure process.” *Siliga*, 219 Cal. App. 4th at 85. “If

MERS lacked authority to assign the DOT and note to [the initial transferee] and, in turn, [the initial transferee] lacked authority to assign the DOT and note to [the subsequent transferee], the true victim[] [was] not [Plaintiff] but the lender.” *Herrera*, 205 Cal. App. 4th at 1508 (citing *Fontenot*, 198 Cal. App. 4th at 272).

*Smith v. Nationstar Mortg. LLC*, No. 15-02498, 2015 WL 4652699, at \*5 (C.D. Cal. Aug. 4, 2015) (ellipses and brackets omitted). The only evidence before the trial court is that WFB held the original note in 2012 when it commenced non-judicial foreclosure proceedings, and held it when the summary judgment argument was held. Brock has offered no evidence, after ten years, that any other party has sought to collect from him or has claimed to own the note. Brock’s arguments fail.

**K. An Authorized Agent of the Beneficiary May Execute the Appointment of a Successor Trustee**

Brock’s argument that SPS could not appoint a non-judicial trustee for WFB is meritless. SPS acted under a power of attorney from WFB authorizing it to appoint a successor trustee for foreclosure and take other acts related to foreclosure. CP 192, Suzanne Johnson Decl. Ex. A. Powers of attorney create an agency relationship and are strictly construed to grant only those powers specified in the instrument. *Bryant v. Bryant*, 125 Wn.2d 113, 118, 882 P.2d 169 (1994). A power of attorney is a written instrument by which one person, as principal, appoints another as agent and confers on the agent authority to act in the place and stead of the principal for the purposes set forth in the instrument. *Arcweld Mfg. Co. v.*

*Burney*, 12 Wn.2d 212, 221, 121 P.2d 350 (1942). Brock’s argument has been correctly rejected by the courts.

In *Ortega*, Wells Fargo was a loan servicer on behalf of HSBC, and Wells Fargo physically possessed the note. Wells Fargo executed a beneficiary declaration identifying HSBC as the “actual holder,” and Wells Fargo appointed the successor trustee. The court stated:

The *Ortegas* take issue with [Wells Fargo] acting as [HSBC’s] agent in holding the note and appointing [the] successor trustee. However, a holder can possess a note “directly or through an agent.” RCWA 62A.3-201 cmt. a. The *Bain* court also acknowledged that the deed of trust act approves the use of agents. MERS is not a proper agent, because its principal is unidentifiable. Here, in contrast, [HSBC] is clearly the principal in control of its agent, [Wells Fargo]. [Wells Fargo’s] agency is permissible under *Bain*.

*In re Butler*, 512 B.R. 643, 653-54 (Bankr. W.D. Wash. 2014) (brackets in original); see *Bain*, 175 Wn.2d at 106 (“[N]othing in this opinion should be construed to suggest an agent cannot represent the holder of a note.”).

#### **L. Brock’s CPA Claim Is Meritless**

Brock’s allegations of claims under the CPA fail because WFB as the holder of Brock’s original note has the power to enforce its deed of trust by judicial or non-judicial foreclosure. Brock can have no claim of damages against any party where his non-payment of his debt expressly authorizes the note holder to enforce its deed of trust. Brock’s CPA claims against all parties fail as a matter of law because Brock cannot point to any unfair or deceptive conduct that caused Brock any injury. A claim under the CPA requires proof of five elements: (1) an 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 Wn.2d 27, 37, 204 P.3d 885 (2009). The absence of any one of these elements requires dismissal. *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002). Because Brock's CPA claim is for alleged "wrongs" all based upon the alleged impropriety of WFB commencing a non-judicial foreclosure, Brock's CPA claim against all parties fails as a matter of law.

Plaintiffs' foreclosure was not caused by a violation of the DTA because Guild was both the note holder and the beneficiary when it initiated foreclosure proceedings, and therefore the "cause" prong of the CPA is not satisfied.

*Bhatti v. Guild Mortg. Co.*, 550 F. App'x 514, 515 (9th Cir. 2013). Brock also has no CPA claim because his own defaults in making payments are the "but for" cause for the Trust exercising the remedy to which Brock agreed. Brock is properly subject to a non-judicial foreclosure because he has failed to make the payments he agreed to make. Because WFB holds Brock's note and deed of trust, WFB is entitled to conduct a non-judicial foreclosure, the express remedy provided by the deed of trust. *Babrauskas v. Paramount Equity Mortg.*, No. C13-0494-RSL, 2013 WL 5743903, at \*4 (W.D. Wash. Oct. 23, 2013) (finding no injury under the CPA because "plaintiff's failure to meet his debt obligations is the 'but for' cause of the default, the threat of foreclosure, any adverse impact on his credit, and the clouded title"); *McCrorey v. Fed. Nat'l Mortg. Ass'n*, No. C12-1630-RSL, 2013 WL 681208, at \*4 (W.D. Wash. Feb. 25, 2013) (finding no injury

under the CPA because “it was [plaintiffs’] failure to meet their debt obligations that led to a default, the destruction of credit, and the foreclosure”).

Brock also may not claim that alleged expenditures in efforts to litigate his meritless claims are a basis for CPA damages. *See Demopolis v. Galvin*, 57 Wn. App. 47, 786 P.2d 804 (1990) (litigation expenses are not “injury” under the CPA); *Thurman v. Wells Fargo Home Mortg.*, No. C12-1471-JCC, 2013 WL 3977622, at \*4 (W.D. Wash. Aug. 2, 2013) (citing *Gray v. Suttel & Assocs.*, No. 09-251, 2012 WL 1067962, at \*7 (E.D. Wash. Mar. 28, 2012) (“[T]ime and financial resources expended to . . . pursue a WCPA claim do not satisfy the WCPA’s injury requirement.”); *Coleman v. Am. Commerce Ins. Co.*, No. 09-5721, 2010 WL 3720203, at \*4 (W.D. Wash. Sept. 17, 2010) (“The cost of having to prosecute a CPA claim is not sufficient to show injury to business or property.”) (brackets and ellipsis in original)).

**M. Brock Fails to Establish Any of The Five Elements of A CPA Claim against MERS**

As explained in the foregoing sections, because WFB held the original note, and therefore was authorized to foreclose, Brock has no CPA or other claims against any party, including MERS.<sup>26</sup>

Brock’s Brief suggests that one element of a CPA claim might be established by a MERS assignment document. Brock’s Brief at 38-39.

---

<sup>26</sup> To the extent any claims against MERS are based on the contents of the original note or deed of trust sounding in fraud or misrepresentation, those claims are barred by the three-year statute of limitations. RCW 4.16.080.

But Brock fails to provide argument as to the other four elements of a CPA claim against MERS and Brock fails to establish any of the five elements of CPA claim. *Panag, supra*.

MERS did not hold itself out as a beneficiary but as a “nominee” for the beneficiary.<sup>27</sup> In *Estritor v Mtn States Mortg.* 2013 WL 6499535 (W.D. Wash. 2013), the court recognized that MERS acting in its nominee capacity did not evidence an unfair or deceptive act:

[T]here is no standard set out in Bain for an action against MERS when MERS is acting as a nominee. In the absence of a case directly on point or per se violation of a statute, [plaintiff] bears the burden of showing an unfair or deceptive act. On this issue, the Court is not convinced that MERS’ assignment of the Deed of Trust was unfair, deceptive, or in violation of public interest. *Klen v Wash. Mut. Bank*, 176 Wn.2d 771, 787 (2013). The Deed of Trust clearly states MERS is a nominee for the lender and lender’s successors and assigns. It is unclear how actions within that capacity are unfair or deceptive.

*Id.* at \*3; see *Dietz v Quality Loan Serv. Corp.*, 2014 WL 5343744 (W.D. Wash. 2014); *Babrauskas v Paramount Equity Mortg.* 2013 WL 5743903, \*5 (W.D. Wash. 2013).

As explained above, it is well-established that the deed of trust follows the note as a matter of law, and therefore the existence, or non-

---

<sup>27</sup> MERS was plainly identified in the deed of trust as a “nominee,” a status well-recognized in real estate law. See, e.g., *Carr v. Cohn*, 87 P 926, 927 (Wash 1906) (nominee to whom property has been deeded without consideration and merely as title-holder for grantors, to convey as they might direct, can bring quiet title action on deed); *Andrews v. Kelleher*, 124 Wn. 517, 534-36 (1923) (bond holders’ agent authorized to prosecute foreclosure); *Fid. Trust Co. v. Wash. & Or. Corp.*, 217 F. 588, 596 (W.D. Wash. 1914) (same); *Thayer v. Nehalem Mill Co.*, 31 Or 437, 440-42, 51 P 202 (1897) (confirming that agent had authority to execute mortgage on behalf of principal).

existence, of a MERS assignment has no legal consequence on the foreclosure process.<sup>28</sup> *E.g. Myers v. Mortgage Electronic Registration Systems, Inc.*, 2012 U.S. Dist. LEXIS 30891, 2012 WL 678148, \*3 (“Even if MERS had improperly assigned the Deed, Flagstar is empowered as the beneficiary to appoint the trustee because it holds [plaintiff’s] Note, not because of the assignment.”); *Lynott v. Mortg. Elec. Registration Sys., Inc.*, No. 12-cv-5572-RBL, 2012 WL 5995053, at \*2 (W.D. Wash. Nov. 30, 2012) (“U.S. Bank is the beneficiary of the deed because it holds Plaintiff’s note, not because MERS assigned it the deed.”). The presence, or absence, of a recorded assignment of the deed of trust is legally without consequence and creates no claim against MERS.

This is consistent with Washington law, as the sole purpose of recording assignments of deeds of trust is to provide notice to third parties of the security interest, not to provide notice to the borrower. *Corales v. Flagstar Bank, FSB*, 822 F. Supp. 2d 1102, 1109 (W.D. Wash. 2011); *In re United Home Loans*, 71 B.R. at 891 (“Recording of the assignments is for the benefit of third parties.”). . . . No Washington statute requires parties to record transfers of promissory notes by endorsement to enforce rights under transferred notes. The “assignment of a deed of trust and note is valid between the parties whether or not the assignment is ever recorded.” *In re United Home Loans*, 71 B.R. 885, 891 (W.D. Wash. 1987).

*McPherson*, 2014 U.S. Dist. LEXIS 15123 \*\*14-15 (emphasis added).

---

<sup>28</sup> See *Butler v. One West Bank, FSB (In re Butler)*, 512 B.R. 643, 656 (Bankr. W.D. Wash. 2014) (“Therefore, any assignment of the Deed of Trust from MERS to One West had no legal effect on the ownership or possession of the Note and was irrelevant for purposes of the disputes at issue here.”)

Because WFB was the note holder and beneficiary when it initiated foreclosure proceedings, Brock cannot satisfy the “cause” prong of the CPA against MERS. *Bhatti* 550 F. App’x at 515.

And as discussed above, Brock has suffered no damages as the result of any act of MERS.

Ms. Massey fails to provide any evidence connecting her remaining injuries with MERS’ presence on the Deed of Trust or Assignment (or, for that matter, with any other action by Bank of America, MERS, or Freddie Mac). Again, Ms. Massey admits that she stopped making payments on the Loan. (Massey Dep. at 30.) Any injuries associated with the foreclosure proceedings, including the bankruptcy filing, “damage to [her] credit,” and the alleged “loss of any equity in my home and the loss of my down payment,” were caused solely by her own default. *See, e.g., Babrauskas v. Paramount Equity Mortgage*, No. C13-0494RSL, 2013 U.S. Dist. LEXIS 152561, 2013 WL 5743903, \*4 (W.D. Wash. Oct. 23, 2013) (finding no injury under the CPA because “plaintiff’s failure to meet his debt obligations is the ‘but for’ cause of the default, the threat of foreclosure, any adverse impact on his credit, and the clouded title”); *McCrorey v. Fed. Nat. Mortg. Ass’n*, No. C12-1630-RSL, 2013 U.S. Dist. LEXIS 25461, 2013 WL 681208 (W.D. Wash. Feb. 25, 2013) (finding no injury under the CPA because “it was [plaintiffs’] failure to meet their debt obligations that led to a default, the destruction of credit, and the foreclosure”); *Peterson v. Citibank, N.A.*, No. 67177-4-1, 2012 Wash. App. LEXIS 2197, 2012 WL 4055809 (Wash. Ct. App. 2012) (“[R]egardless of MERS’s conduct as the beneficiary under the deed of trust, the Petersons’ property would still have been foreclosed upon based on their failure to make payments on the loan.”).

*Massey v. BAC Home Loans Servicing LP*, 2013 U.S. Dist. LEXIS 180472 (W.D. Wash. Dec. 23, 2013). And in the absence of claims of a risk of double payment, Brock has no standing to challenge any assignment of the

loan. Borrowers “[do] not have standing . . . to inspect each and every contract or agreement between any predecessor and successor mortgagee, searching for ‘irregularities’ and noncompliance.”<sup>29</sup> In particular, where the lender produces the original note, as here, there is no risk of double payment and the borrower has no standing. *Livonia Properties Holdings, LLC v. 12840-2976 Farmington Road Holdings, LLC*, 399 Fed. Appx. 97, 102 (6th Cir. 2010); *Bridge v. Ocwen Fed. Bank FSB*, 2013 U.S. Dist. LEXIS 127588 (N.D. Ohio 2013) (“Where, as here and in *Livonia*, the foreclosing party produces the original note, the obligor “cannot credibly claim to have standing to challenge” the assignments and other agreements to which they were not a party.”) (emphasis added).<sup>30</sup> See *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) (citing cases).

“Third-party borrowers lack standing to assert problems in the assignment of the loan” because the borrowers have not suffered an injury in fact. *Flores v. GMAC Mortg., LLC*, 2013 U.S. Dist. LEXIS 68606, 2013 WL 2049388, at \*3 (N.D. Cal. May 14, 2013); see also *Jenkins v. JP Morgan Bank, N.A.*, 216 Cal. App. 4th 497, 513-14, 156 Cal. Rptr. 3d 912 (2013); *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 129 Cal. Rptr. 3d 467 (2011). Assignment defects do not injure borrowers because “even if there were some defect in the [subsequent] assignment of the deed of trust, that assignment would not have changed plaintiff’s payment obligations.” *Simmons v. Aurora Bank*,

---

<sup>29</sup> *Kiefer v. ABN AMRO*, No. 12-10051, 2012 U.S. Dist. LEXIS 117917, 2012 WL 3600351, at \*4 (E.D. Mich. June 12, 2012).

<sup>30</sup> *Slorp v. Lerner, Sampson & Rothfuss*, 2013 U.S. Dist. LEXIS 32538 at \*5 (S.D. Ohio Mar. 8, 2013) (where there is no risk plaintiff may have to pay the debt twice, plaintiff may not challenge assignment whatever relief is sought); *Dye v. Wells Fargo*, 42014 U.S. Dist. LEXIS 65419 (E.D. Mich. 2014).

*FSB*, 2013 U.S. Dist. LEXIS 142917, 2013 WL 5508136, at \*2 (N.D. Cal. Sept. 30, 2013); see *Siliga v. Mortg. Elec. Registration Sys., Inc.*, 219 Cal. App. 4th 75, 85, 161 Cal. Rptr. 3d 500 (2013) (“The assignment of the deed of trust and the note did not change [Plaintiffs’] obligations under the note, and there is no reason to believe that . . . the original lender would have refrained from foreclosure in these circumstances.”); *Apostol v. CitiMortgage, Inc.*, 2013 U.S. Dist. LEXIS 167308, 2013 WL 6328256, at \*7-8 (N.D. Cal. Nov. 21, 2013).

*Moran v. GMAC Mortgage*, 2014 U.S. Dist. LEXIS 84411 \*12 (N.D. Cal. June 18, 2014).

The absence of any element of a CPA claim requires dismissal. *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002). Brock cannot establish any of the five elements of a CPA claim against MERS based upon a document which has “no legal effect on the ownership or possession of the Note and was irrelevant for purposes of the disputes at issue here.” *In re Butler, supra*. Brock’s CPA claims against MERS are legally meritless and the trial court’s dismissal of these claims should be upheld.

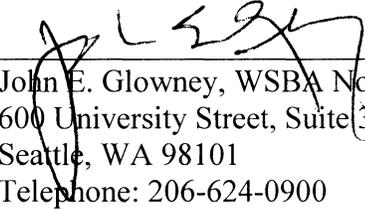
### III. CONCLUSION

Brock’s appeal is without merit and should be denied. WFB’s status as holder of Brock’s original note and deed of trust under *Brown* and *Bain* empowers WFB to initiate either judicial or non-judicial foreclosure, establishes its right to payment, and defeats Brock’s CPA and other claims against all parties. Brock failed to establish any of the five elements of a CPA claim against MERS. Brock submitted no evidence

contradicting WFB's evidence. Brock's appeal should be denied as to all parties.

Respectfully submitted this 18<sup>th</sup> day of February 2016.

STOEL RIVES LLP



---

John E. Glowney, WSBA No. 12652  
600 University Street, Suite 3600,  
Seattle, WA 98101  
Telephone: 206-624-0900  
*Attorneys for Respondents*

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the state of Washington that I caused **Respondents' Appellate Brief** to be filed with the Court of Appeals (original and one copy); and caused a true and correct copy of same to be served upon the party listed below by email/pdf and Via: U.S. Mail:

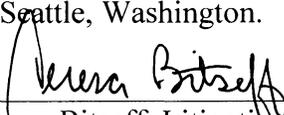
Joshua B. Trumbull  
Emily A. Harris  
JBT & ASSOCIATES, P.S.  
106 E. Gilman Avenue  
Arlington, WA 98223  
josh@jbtlegal.com  
emily@jbtlegal.com  
cc: ashley@jbtlegal.com

John M. Thomas  
RCO LEGAL, PS  
511 SW 10th Avenue, Ste. 400  
Portland, OR 97205  
Email: [jthomas@rcolegal.com](mailto:jthomas@rcolegal.com)

Counsel for Defendant NWTs

Attorneys for Appellant

DATED: February 18, 2016, at Seattle, Washington.

  
\_\_\_\_\_  
Teresa Bitseff, Litigation Practice Assistant  
STOEL RIVES LLP