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No. 70140-1-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

U.S. BANK NATIONAL ASSOCIATION,
as Trustee of the Banc of America Funding 2007-D,
its successors in interest and/or assigns

Plaintiff-Respondent

v.

BLAIR LA MOTHE,

Defendant-Appellant

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Joan DuBuque)

BRIEF OF RESPONDENT

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I.

INTRODUCTION

This appeal stems from the judicial foreclosure of a deed of trust. Wells Fargo Bank, N.A. was the original beneficiary of the deed of trust. Wells Fargo endorsed the note to plaintiff/respondent U.S. Bank National Association as Trustee for a loan trust (known as the Banc of America Funding 2007-D) (U.S. Bank). With the endorsed note, U.S. Bank had the authority to foreclose the deed of trust securing the note.

After a bench trial, Judge DuBuque granted judgment decreeing the foreclosure. The court found that "the promissory note is endorsed . . . to Plaintiff" and there is "an Assignment of [the] deed of trust to Plaintiff which was recorded . . ."[1] These findings support the legal conclusions that "[p]ursuant to the terms of the note and deed of trust, Plaintiff is entitled to foreclose" and "[t]he correct party in interest was before the court on . . . by and through . . . Wells Fargo Bank, N.A., attorney in fact for Plaintiff."[2]

With new appellate counsel, La Mothe jettisons the theory of the case that he tried below, which had challenged the notarization of the deed of trust, the acceleration of the loan, and the authority of U.S. Bank's representative at trial. The new theory of the case rests on three new

[1] CP 366 (Finding F and G).
[2] CP 367 (Conclusions C and F).

defenses: (1) U.S. Bank was not the real party in interest, (2) U.S. Bank lacked standing to seek a judicial foreclosure, and (3) the trial court erred when it admitted the note into evidence.

These new defenses contradict La Mothe's trial admission that "U.S. Bank" is entitled to collect the loan and "U.S. Bank is the real party in interest."[3] The new defenses also squarely conflict with the unchallenged findings and the record as a whole.

An independent ground for affirmance is La Mothe's failure to preserve the new defenses at trial. While an appellate court retains the discretion to consider issues raised for the first time on appeal, La Mothe has made no argument why that discretion should be exercised in this case. See RAP 2.5(a) ("Errors Raised for the First Time on Review" and identifying categories of errors that may be raised for the first time on review). Having failed to raise arguments why the Court should exercise this discretion in his opening brief, he cannot make new arguments in his reply brief.

For these reasons and additional ones set forth below, this Court should affirm the judgment granting foreclosure.

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[3] See RP (February 13, 2013) 87:22-24 (La Mothe's judicial admission); id. 10:21-111:13 (his counsel's answers to the court's questions in oral argument).

II.

COUNTERSTATEMENT OF ISSUES

1. La Mothe failed to raise at trial the defenses that U.S. Bank lacked standing and real-party-in-interest status to bring this suit. Did his inactions waive appellate review of those defenses?

2. The trial court found that U.S. Bank was endorsee of the original note, which its attorney brought to trial. CP 366 (Finding G). The court also found that U.S. Bank was the beneficiary of the deed of trust and La Mothe had failed to make payments on the loan. CP 366 (Findings B, C-F). La Mothe did not challenge the findings. Do the findings support the conclusion that U.S. Bank is entitled to a sheriff's sale? CP 368 (Conclusion H).

3. A non-holder in possession of a note may qualify as the person entitled to enforce the note.[4] At trial, La Mothe did not move for dismissal on the ground that U.S. Bank had failed to provide direct evidence of the exact date when Wells Fargo endorsed the note to U.S. Bank. Should this Court consider the issue when La Mothe failed to raise it below? Alternatively, does the record establish that U.S. Bank had the right to enforce the note as the holder or qualified non-holder with the right to enforce?

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[4] Report of the Permanent Ed. Bd. for the U.C.C. Application of the U.C.C. to Selected Issues Relating to Mortgage Notes at 5-6 (Nov. 14, 2011) (explaining § 3-301).

4. La Mothe did not object to the admission of the note into evidence. La Mothe did not assign error to the findings of fact that are based on the exhibits admitted into evidence. See, e.g., CP 366 (Findings C-G (the note, deed of trust, and assignment of the deed of trust)). Should this Court consider his new objections that the endorsed note was not sufficiently authenticated and was hearsay? Alternatively, is the note self-authenticating under ER 902(i) as commercial paper? Is the note a legal/verbal act that is exempt from the hearsay rule?

5. The endorsement is on the last page of the note. Trial Exhibit 1. There is no allonge. Id. The record does not mention an allonge. See generally Report of Proceedings ("RP"). Should this Court disregard La Mothe's arguments that the undated allonge is insufficient to establish standing? Opening Br. at 24, 27-29.

III.

STATEMENT OF THE CASE

A. La Mothe Stopped Making Payments on a $700,000 Secured Loan in 2009.

Blair La Mothe purchased the property located at 8115 Northeast 110th Place in Kirkland in 1988.[5] He later divided the property into two rentals.[6] La Mothe refinanced the property with $700,000 borrowed from

[5] RP at 72:18-73:2; id. at 70:5-13.
[6] RP 70:9-13; id. at 72:18-73:12.

Wells Fargo in November 2005.[7] A senior deed of trust mortgage secures the loan.[8] Wells Fargo transferred the loan into a securitized loan trust,[9] which was formed in early May 2006.[10] A year later, a recognition agreement confirmed the transfer of the loan into the trust.[11]

La Mothe granted a junior deed of trust securing up to an additional $250,000 from Wells Fargo in 2007.[12]

La Mothe stopped making payments on the senior loan in October 2009.[13] Seven months later, he received a notice of default on the senior loan from U.S. Bank National Association as Trustee for the loan trust (known as the Banc of America Funding 2007-D). The notice was also sent on behalf of Wells Fargo as the servicer for the trust.[14] Fifteen days later, Wells Fargo recorded an assignment instrument, confirming the transfer of the deed of trust to U.S. Bank as Trustee for the loan trust.[15]

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[7] RP 70:14-72:14.
[8] Ex. 2; RP at 41:7-12.
[9] RP at 35:2-22; Ex. 7. In this brief, all exhibits cited are the trial exhibits.
[10] RP at 37:15-24; RP 38:4-40:24 (Exs. 6 and 7 admitted).
[11] Ex. 7 (Assignment, Assumption and Recognition Agreement, May 31, 2007); RP at 35:2-38:14.
[12] CP 41- 45 (Ex. C to Compl., Deed of Trust).
[13] RP at 74:2-9.
[14] CP 191:11-14.
[15] Ex. 3 (Assignment of Deed of Trust, Recording No. 20100525001201); RP 84:3-85:8.

B. U.S. Bank Brought This Judicial Foreclosure Action in 2011.

U.S. Bank as trustee brought this suit for judicial foreclosure and for the reformation of the deed of trust in August 2011.[16] The suit named Wells Fargo as a defendant in its capacity as the holder of the junior deed of trust.[17] After Wells Fargo failed to appear and defend, the court defaulted Wells Fargo.[18] The suit also named Praerit and Kavita Garga as defendants, but they disclaimed their interest in the property, leading to the dismissal of the claims against them.[19]

When La Mothe answered the complaint, he was represented by counsel.[20] His counsel withdrew, leaving La Mothe to represent himself from January 2012 until February 7, 2013 – six days before trial when David Leen signed an appearance.[21]

The case schedule had set a January 28, 2013 trial. Two weeks before trial, La Mothe moved for continuance and for an order compelling the production of records.[22] The court granted a two-week continuance and required U.S. Bank to produce the original note for inspection six days before trial.[23]

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[16] CP 1-11.
[17] CP 3:10-15; CP 41- 45 (Ex. C to Compl., Deed of Trust).
[18] CP 245-46.
[19] CP 112-17.
[20] CP 82-83 (appearance); CP 84-90 (answer and affirmative defenses).
[21] CP 187-88 (withdrawal); CP 242 (pro se); CP 250-51 (appearance of Leen).
[22] CP 146-51 (motion for continuance); CP 152-186 (motion to compel).
[23] CP 240-41 (order).

C. After a Bench Trial, Judge DuBuque Granted U.S. Bank Judicial Foreclosure in 2013.

Judge Joan Dubuque presided over the February 13, 2013 trial.[24] Experienced foreclosure counsel (David Leen) represented La Mothe at trial.[25] During the trial, La Mothe stipulated to the reformation of the deed of trust's legal description.[26]

The two trial witnesses were Brook Wiggins (a Wells Fargo vice president for loan documentation) and La Mothe.[27] At the conclusion of the trial, Judge Dubuque made oral rulings.[28] The court found La Mothe acknowledged borrowing the money and defaulting on his obligation in 2009.[29] The court found that U.S. Bank had appeared at trial and it was the correct party in its capacity as the trustee and successor-in-interest in the assignment of the deed of trust and promissory note.[30] The court ruled that Wells Fargo assigned its beneficiary interest under the deed of trust to U.S. Bank by means of the recorded assignment.[31] The court found that U.S. Bank "holds and has brought to the court the original of the

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[24] CP 253.
[25] Id.
[26] CP 75 (stipulation); CP 8:6-9:3 (allegations in the complaint).
[27] CP 257-58; RP 14:9-66; RP 68-88.
[28] RP 120:6-126:20; CP 253-54.
[29] RP 120:17-25.
[30] RP 121:1-4.
[31] RP 121:13-25.

promissory note . . . and it's endorsed by Wells Fargo to the plaintiff [U.S. Bank]."[32]

The court made rulings on other issues that were the trial's focus, but the appeal does not address those issues. Those issues include whether U.S. Bank gave La Mothe appropriate notice of acceleration[33] and whether the deed of trust had been properly acknowledged.[34] The court ruled that even if the deed of trust was not appropriately acknowledged, the deed of trust is enforceable.[35]

U.S. Bank subsequently presented proposed findings and conclusions. La Mothe objected to proposed Findings H and I that he received a notice of acceleration and a notice of the nonjudicial foreclosure.[36] He also objected to some of the proposed conclusions, contesting whether he had received notice of acceleration, whether the foreclosure was an appropriate remedy, whether U.S. Bank through Brook Wiggins was the correct party before the court, and whether U.S. Bank should be awarded fees.[37] La Mothe's objections, however, did not raise the new theory of the case, which is being asserted on review.

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[32] RP 121:25-122:4.
[33] RP 122:5-123:16.
[34] RP 123:17-124:20.
[35] RP 124:22-125:7; CP 367 (Conclusion E, citing RCW 65.08.030).
[36] CP 289-90 (objection).
[37] CP 290:4-291:8.

At a March 1, 2013 hearing, the court entered formal findings, conclusions, a judgment, an order and decree of foreclosure and an attorney fee and cost award.[38]

IV.

SUMMARY OF ARGUMENT

U.S. Bank, as trustee of the loan trust, had authority to bring this suit. A trustee of an express trust is authorized to bring suit on behalf of the trust.[39]

On review, La Mothe raises new defenses that U.S. Bank lacked standing and was not the real-party-in-interest with authority to bring this judicial foreclosure. La Mothe invites this Court to presume that the assignment of the deed of trust was invalid, and to speculate that the endorsement of the note occurred after U.S. Bank brought this suit. He asks this Court to impose new requirements mandating specific proof of when an endorsement is made and restricting the admission of legal instruments into evidence. This Court should reject his invitation. The assignment of the deed of trust was valid. The endorsed note was transferred and was evidence at trial. Any new pleading or proof

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[38] CP 341-53; RP (March 1, 2013) 1-11 (La Mothe timely appealed); CP 355-75.
[39] CR 17(a); see Denny v. Cascade Platinum Co., 133 Wash. 436, 439–40, 232 P. 409 (1925) (trustee has capacity to sue on behalf of a trust even if the trust has no capacity to sue in its own name).

requirements for judicial foreclosures should be adopted through the court's rule-making process and not ad hoc, especially on this record.

V.

ANALYSIS AND ARGUMENT

A. Standard of Review.

La Mothe correctly states that an appellate court reviews conclusions of law de novo.[40] La Mothe, however, did not assign error to the findings of fact.[41] Therefore, the findings are verities on appeal.[42] An appellate court reviews whether those unchallenged findings support the conclusions of law.[43] Even if La Mothe had assigned error to the findings, the deferential, substantial-evidence standard applies in the review of the findings. Substantial evidence is the quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true.[44] Under the deferential test, the court views the evidence and all reasonable inferences in the light most favorable to the prevailing party.[45]

This Court may affirm on any ground supported by the record, whether or not the trial court considered that ground.[46]

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[40] Opening Br. at 4.
[41] CP 365-66 (Findings A to I).
[42] Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995).
[43] Scott v. Trans–Sys., Inc., 148 Wn.2d 701, 707–08, 64 P.3d 1 (2003).
[44] Wenatchee Sportsmen Ass'n v. Chelan Cnty., 141 Wn.2d 169, 176, 4 P.3d 123 (2000).
[45] Korst v. McMahon, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006).
[46] LaMon v. Butler, 112 Wn.2d 193, 200–01, 770 P.2d 1027 (1989).

B. A Deed of Trust May Be Judicially Foreclosed.

When a borrower defaults on a mortgage loan, RCW 61.12.040 provides that "the mortgagee or [its] assigns may proceed in the superior court . . . to foreclose . . ." The Deed of Trust Act "does not preclude a beneficiary from foreclosing a deed of trust in the same manner as a real property mortgage . . ." RCW 61.24.100(8). Because the court is involved, a judicial foreclosure has safeguards that are not present in a non-judicial foreclosure.

This is a judicial foreclosure involving those safeguards. Therefore, it differs from the Washington decisions that La Mothe cites involving non-judicial foreclosures (trustee's sales), where MERS was the beneficiary or nominee for the beneficiary on the deed of trust.[47] Bain, Rucker, and Walker, and other decisions grappling with the legal effect of MERS' instruments do not apply in this case.[48] Instead, this is a straightforward case, where Wells Fargo's assignment of the deed of trust to U.S. Bank was prima facie valid.[49] Wells Fargo originated the loan.[50] Wells Fargo was the original beneficiary on the deed of trust.[51] Wells

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[47] Opening Br. at 14-15.
[48] Opening Br. at 14-15 (citing Bain v. Metro. Mortg. Group, Inc., 175 Wn.2d 83, 110, 285 P.2d 34 (2012); Walker v. Quality Loan Serv. Corp., 176 Wn. App. 294, 308 P.3d 716 (2013); Rucker v. Novastar Mortg., Inc., ___ Wn. App. ___, 311 P.3d 31, 37-83 (2013)).
[49] Ex. 3.
[50] Ex. 1.
[51] Ex. 2.

Fargo endorsed the note[52] and executed an assignment of the deed of trust to U.S. Bank.[53] U.S. Bank brought this suit.

C. U.S. Bank is the Real (True) Party in Interest with Standing to Foreclose.

La Mothe makes one assignment of error: the court erred by failing to dismiss the suit, because U.S. Bank "was not the real party in interest and lacked standing to seek a judicial foreclosure."[54] He is invoking CR 17(a), triggering the deferential abuse of discretion standard that applies to the trial court's decisions regarding the application of the civil rules.[55]

While La Mothe quotes Civil Rule 17(a) governing real parties in interest, he does not discuss the Washington decisions construing the rule and he fails to discuss the Washington law governing standing.[56] Instead,

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[52] Ex. 1.
[53] Ex. 3.
[54] Opening Br. at 1 (Assignment of Error).
[55] "Decisions regarding application of civil rules are reviewed for an abuse of discretion." Sprague v. Sysco Corp., 97 Wn. App. 169, 171, 982 P.2d 1202 (1999).
[56] La Mothe cites State ex rel. Hays v. Wilson, 17 Wn.2d 670, 137 P.2d 105 (1943) as authority for the "real-party-in interest" doctrine in Washington. Opening Br. at 6. But the decision does not use that phrase. Rather, the decision is about the requirement for present harm to a private interest when seeking an injunction against a governmental agency. See, e.g., De Funis v. Odegaard, 82 Wn.2d 11, 23-24, 507 P.2d 1169 (1973) (citing Wilson and ruling that the applicant for law school had standing to bring an injunction action challenging the constitutionality of a law school admissions program).

In Wilson, the court affirmed the denial of an injunction for the benefit of 13 members of a city police department who sued a civil service commission for testing a patrolman who would be ineligible for an appointment as a chief of police due to a residency restriction. 17 Wn.2d at 670-71. The court distinguished taxpayer standing to sue to restrain the expenditure of funds to hire a new patrolman versus the plaintiff officers' lack of direct and immediate injury until the commission determined an eligible

he relies on cases construing the law in other states, some of which have different requirements for judicial foreclosure.

The concepts of "standing" and CR 17(a) "real party in interest" are often interchanged by our courts.[57] Standing requires that the plaintiff demonstrate an injury to a legally protected right,[58] while the real party in interest is the person who possesses the right to be enforced.[59] For example, in Sprague, an employee had standing to sue her former employer for discrimination because she was the party injured by the alleged discriminatory acts.[60] But the employee was not the real party in

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candidate list for the proposed appointment of a chief. Id. at 672-73. The court ruled that the suit for an injunction was premature until there was a proposed appointment. Id. at 673.

La Mothe takes out of context a quotation about the distinction between an owner and a mortgagee. Opening Br. at 6 (quoting from Davis v. Bartz, 65 Wash. 395, 400, 118 P. 334 (1911)). In context, the owner was the owner of real property – not the owner of a note. Bartz involves the issue of who is a necessary-versus-proper defendant in a construction lien foreclosure suit – not the issue of who is a proper plaintiff in a judicial foreclosure. In Bartz, the appellate court ruled that under then applicable law a timely construction lien foreclosure suit brought against the property owner preserved the lien as to the property owner but did not preserve the lien as to the mortgagee that was not named a defendant to the suit. 65 Wash. at 401-02. In this case, U.S. Bank brought the suit against La Mothe who is the property owner and a necessary party in the foreclosure suit.

[57] Philip A. Trautman, Joinder of Claims and Parties in Washington, 14 Gonz. L. Rev. 103, 109 (1978).

[58] Sprague v. Sysco Corp., 97 Wn. App. 169, 171, 982 P.2d 1202 (1999) (citation omitted).

[59] See id.

[60] Sprague v. Sysco Corp., 97 Wn. App. 169, 171, 982 P.2d 1202 (1999) (citation omitted). Id. (reversing dismissal of a discrimination suit and holding the debtor could substitute the bankruptcy trustee as a real party in interest, as the employer would not be prejudiced by substitution, and the only change was to who would benefit from the action.)

interest, because she had declared bankruptcy, causing the bankruptcy estate to hold the right to prosecute the claim.[61]

1. A Defendant May Waive Real-Party-In-Interest and Standing Defenses. Recently, in Trinity Universal Ins. Co.,[62] this Court distinguished standing in our state courts from standing in federal courts. "In federal courts, a plaintiff's lack of standing deprives the court of subject matter jurisdiction, making it impossible to enter a judgment on the merits."[63] Therefore, standing in federal court may not be waived, permitting a party to raise the lack of standing for the first time on appeal, because the lack of standing may deprive the court from having subject matter jurisdiction.

"By contrast, the Washington Constitution places few constraints on superior court jurisdiction. See Const. art. IV, § 6 ('The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court.') . . ."[64] Standing is not a matter of subject matter jurisdiction

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[61] Id.

[62] Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co., 176 Wn. App. 185, 312 P.3d 976, 984 (2013).

[63] Id.

[64] Id.; see Riverview Cmty. Grp. v. Spencer & Livingston, 173 Wn. App. 568, 576, 295 P.3d 258 (2013) (citing Trinity). In Hawaii, where La Mothe's counsel practices, standing is a jurisdictional defense. See Mortg. Elec. Registration Sys., Inc. v. Wise, 130 Haw. 11, 304 P.3d 1192, 1196-1201 (Haw. 2013) (affirming foreclosure judgment) (La Mothe's counsel appearing for petitioner). Id. (stating under Hawaii law standing is a jurisdictional issue may be raised at any stage of the case but ruling a res judicata defense

in this state; standing merely prohibits a litigant from raising another's legal right.[65] Therefore, standing and real-party-in-interest are defenses that may be waived in our state court.[66]

a. La Mothe Failed to Preserve the *New* Civil Rule 17(a) Real-Party-In-Interest Issue. Below, La Mothe argued that U.S. Bank was the real party and a U.S. Bank employee should have appeared at trial instead of a Wells Fargo employee.[67] Now on appeal, La Mothe raises for the first time a new real-party-in-interest issue: U.S. Bank "was not the real party in interest and lacked standing to seek a judicial foreclosure."[68] La Mothe failed to preserve this new issue below. Under RAP 2.5(a), "[t]he appellate court may refuse to review a claim of error which was not raised in the trial court, subject to several exceptions."[69]

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precluded the petitioner from pursuing the standing defense). However, a real party in interest may ratify the actions of another party under Hawaii law. Citcorp Mortg., Inc. v. Bartolome, 94 Haw. 422, 16 P.3d 827, 839 (Haw. Ct. App. 2000) (affirming deficiency judgment) (same counsel). Id. at 839 (alternative ruling that there was no jurisdictional problem with judgment, because even if Fannie Mae owned the loan and not the plaintiff in the foreclosure, Fannie Mae expressly ratified the sale, and a real party in interest may ratify commencement of an action under Rule 17(a)).

[65] Trinity, 312 P.3d at 984. See Berschauer Phillips Constr. Co. v. Mutual of Enumclaw Ins. Co., 175 Wn. App. 222, 226 n. 5, 308 P.3d 681 (2013) (citing Grant Cnty. Fire Protection Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (construing standing under the Uniform Declaratory Judgment Act)).

[66] See, e.g., State v. Cardenas, 146 Wn.2d 400, 404–05, 47 P.3d 127 (2002) (waiver of standing); Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus., 78 Wn. App. 707, 716, 899 P.2d 6 (1995) (real party in interest); Durland v. San Juan Cnty., 175 Wn. App. 316, 325, 305 P.3d 246 (2013) (standing).

[67] RP 108:24-109:15; 109:24-111:10. RP 110:18-20 ("kind of a technical argument").

[68] Opening Br. at 4.

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

The same policy applies to theories not presented below.[70] By not raising the issue and related theories below, La Mothe deprived the trial court of the opportunity to correct the alleged errors, an opportunity that could have avoided an unnecessary appeal.[71] "While an appellate court retains the discretion to consider an issue raised for the first time on appeal, such discretion is rarely exercised."[72]

This Court should decline to exercise that discretion in this case. La Mothe already has taken two bites of the apple regarding the real-party-in-interest defense. La Mothe waited until trial to raise one category of the defense. He first raised the defense based on a local rule.[73] At the start of the trial, he referred to King County Local Civil Rule 4(i) requiring a party to appear on the trial date. He complained a Wells Fargo employee – not U.S. Bank employee – was appearing at trial.[74] Later, during closing argument, La Mothe reframed the argument in terms of "a technical argument" under Civil Rule 17 that U.S. Bank (the real-party-in-interest) had not appeared.[75] The "technical argument" was that Wells Fargo had

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[70] Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 780, 819 P.2d 370 (1991); Lindblad v. Boeing Co., 108 Wn. App. 198, 207, 31 P.3d 1 (2001) ("We will not review an issue, theory, argument, or claim of error not presented at the trial court level.").
[71] Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).
[72] Karlberg v. Otten, 167 Wn. App. 522, 531–32, 280 P.3d 1123 (2012).
[73] RP 12:1-13:1 (opening argument raising the issue of who is the real party in interest in the context of whether Wells Fargo has authority to appear for plaintiff U.S. Bank).
[74] RP 22:16-27:21 (objecting to Brook's testimony as someone not with U.S. Bank but instead with Wells Fargo and has violated King County Local CR 4).
[75] RP 108:24-109:15; RP 109:24-111:10. RP 110:18-20 ("kind of a technical argument").

appeared and it was merely empowered with U.S. Bank's power of attorney that had been recently issued.[76] Judge DuBuque overruled this objection, ruling: "The correct party is in fact before the court in its capacity as the trustee and its successor in interest in the assignment of the deed of trust and promissory note."[77]

The court later entered unchallenged Finding G, establishing that "[t]he correct party in interest was before the court on February 13, 2013, by and through Brock Wiggins, VP of Loan Documentation at Wells Fargo Bank, N.A., attorney in fact for Plaintiff."[78] The substantial evidence supporting Finding G includes the power-of-attorney instrument (Exhibit 8), and Wiggins' testimony.[79] In short, the record establishes that the court did not abuse its discretion in applying the local rule and Civil Rule 17. See Attachment A setting forth CR 17(a).[80] Having raised two real-party-in-interest issues below, La Mothe is barred from raising a third, new real-party-in-interest issue on appeal.

b. La Mothe Waived Any Real-Party-In-Interest Defense by Failing to Raise It in a Pretrial Motion. Even if this Court

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[76] RP 108:24-109:15; RP 109:24-111:10; RP 110:18-20 ("kind of a technical argument").
[77] RP 121:1-4.
[78] CP 366.
[79] RP 18:20-22:15 (Ex. 8 offered); RP 25:4-18; RP 27:15-24 (admitted); RP 15:4-23; RP 16:25-17:23, 67:18-68:9 (relying on the power of attorney and purchasing and servicing agreement for authority).
[80] Sprague v. Sysco Corp., 97 Wn. App. at 171 ("Decisions regarding application of civil rules are reviewed for an abuse of discretion.").

were to consider the new defense, this Court should affirm the judgment, because La Mothe waived the defense. A party waives a Civil Rule 17(a) defense by failing to act promptly on it in a pretrial motion.[81] Generally, the real party in interest is "'the person who, if successful, will be entitled to the fruits of the action.'"[82] The purpose of Rule 17(a) is "simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata."[83]

In Beal v. City of Seattle, our state supreme court acknowledged that CR 17(a) permits a plaintiff to amend a complaint to substitute the real party with the amendment relating back, where: (1) the defendant is not prejudiced; and (2) the only change wrought by the amendment is in

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[81] See Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus., 78 Wn. App. 707, 716, 899 P.2d 6 (1995) (If all such parties do not join in the same action, a defendant can object, but the defect will be waived in the event the defendant fails to act promptly.). See generally 4 James Wm. Moore, Moore's Federal Practice § 17.12[2][a] & n. 22 (3d ed. 2013) (section entitled "Untimely Objections Deemed Waived" and compiling decisions from eight federal circuit courts of appeal).

[82] Sprague v. Sysco Corp., 97 Wn. App. at 171 (citation omitted). Id. at 172-80 (reversing dismissal of discrimination suit and holding debtor could substitute bankruptcy trustee as real party in interest, as employer would not be prejudiced by substitution, and only change was to who would benefit from the action.)

[83] Beal v. City of Seattle, 134 Wn.2d 769, 777, 954 P.2d 237 (1998) (quotation omitted). See Rinke v. Johns-Manville Corp., 47 Wn. App. 222, 227, 734 P.2d 533, review denied, 108 Wn.2d 1026 (1987). Id. (quoting Federal Advisory Committee Note to Fed. R. Civ. P. 17(a), 39 F.R.D. 85 (1966)). See also Sprague, 97 Wn. App. at 175 (purpose of this part of the rule is to help "expedite litigation by precluding technical or narrow constructions from interfering with the merits of legitimate controversies").

the representative capacity in which the action is brought.[84] Beal follows a well-established line of decisions reversing dismissals that had been granted under CR 17(a).

For example, in Rinke, this Court reversed the summary judgment dismissal of a personal injury and wrongful death suit.[85] A widow had brought suit before she had been appointed as personal representative for her husband's estate.[86] Four years after filing the complaint, the widow was appointed the estate's personal representative, and she ratified her prior actions.[87] Reversing the dismissal, this Court stated: "The rule is not intended as a method by which the trial court may sanction dilatory plaintiffs; rather, it is meant to insure that the real party in interest will be made a party to the suit at the time when the interests of the defendants will be protected."[88] This Court concluded:

> Dismissal under [CR 17(a)] is appropriate only when the trial court has allowed the plaintiff a reasonable time to bring the real party in interest into the suit and joinder, substitution, and or ratification cannot be effected. In the present case, the purpose of the rule was fulfilled when Rinke became personal representative and ratified her previous action. At that time, the defendants were

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[84] See Beal v. City of Seattle, 134 Wn.2d 769, 777, 954 P.2d 237 (1998) (reversing dismissal). Id. at 239 (holding amendment of complaint to change plaintiff's representative capacity from guardian ad litem of decedent's children to personal representative of estate related back to original filing).
[85] Rinke, 47 Wn. App. at 223-24.
[86] 47 Wn. App. 223-24.
[87] Id.
[88] Id. at 226.

> protected to the same extent as if Rinke had been personal representative from the inception of the suit."[89]

In this case, the judgment and court record protect La Mothe from a subsequent suit by another party. U.S. Bank produced the endorsed note, La Mothe inspected it before trial, and the original note was present at trial, when the court admitted a copy into evidence as Exhibit 1.[90] The record confirms the complaint's allegation that U.S. Bank "is now the holder of the Note and current beneficiary of record under the Deed of Trust."[91] While La Mothe's answer stated he lacked information to admit the allegation, he failed to pursue a defense that U.S. Bank was not the correct party and that someone else was entitled to enforce the note. During the eighteen months that elapsed between the filing of the suit and the trial,[92] La Mothe never moved for dismissal.[93] The well-established rule is that a defendant waives the defense by failing to raise it before trial.[94] Raising the new defense on appeal prejudices U.S. Bank,[95] by

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[89] 47 Wn. App. at 227-28.
[90] RP 28:7-32-32:25.
[91] CP 5 ¶ 14.
[92] CP 1-11 (Compl., Aug. 2011); CP 257-58 (Feb. 13, 2013 trial).
[93] CP 86; CP 88:14-89:14 (affirmative defenses). See, e.g., Dennis v. Heggen, 35 Wn. App. 432, 434, 667 P.2d 131 (1983) (granting 12(b)(6) dismissal on the basis of an assignment affecting real party status).
[94] See Nw. Indep. Forest Mfrs., 78 Wn. App. at 716 ("defect will be waived in the event the defendant fails to act promptly"). "Because requirements in the rule are for the benefit of the defendant, an objection should be raised with 'reasonable promptness;' if not, the general rule is that the objection is deemed waived." Plese-Graham, LLC v. Loshbaugh, 164 Wn. App. 530, 539, 269 P.3d 1038 (2011) (citing United HealthCare Corp. v. Am. Trade Ins. Co., 88 F.3d 563, 569 (8th Cir. 1996)). "The requirement of an objection followed by a reasonable time for the real party to respond, 'implies that the

depriving it of presenting additional evidence and responsive arguments below and scuttling the trial.

c. La Mothe Failed to Preserve the Lack-of-Standing Defense. La Mothe contends that the court "committed reversible error in not dismissing the Underlying Amended Complaint because Respondent . . . lacked standing to seek a judicial foreclosure."[96] But his brief violates RAP 10.3 by failing to reference any part of the record where he moved for dismissal on the basis of lack of standing. Compare Opening Brief at 7-24 (arguing lack of standing) with RAP 10.3(a)(6) (requiring an argument with "references to relevant parts of the record"). He never moved for dismissal on this basis. Also, he did not plead the lack of standing as an affirmative defense.[97]

Shortly before the trial date, La Mothe moved to compel responses to his discovery seeking a certified copy of the note,[98] while also moving

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defense may not be raised at any time, for the real party must have had the opportunity to step into the 'unreal' party's shoes and should not be prejudiced by undue delay.'" Plese-Graham, LLC, 164 Wn. App. at 538-390 (quoting Whelan v. Abell, 953 F.2d 663, 672 (D.C. Cir.), cert. denied, 506 U.S. 906, 113 S. Ct. 300, 121 L. Ed. 2d 223 (1992)). Whelan, 953 F.2d at 671-73 (ruling court abused discretion granting 17(a) defense at trial; the defense was raised on the first day of trial; the real party in interest was prejudiced, because it was too late to ratify). See generally 4 Moore's Federal Practice § 17.12[2][a] (3d ed. 2013).

[95] United States ex. rel. Reed v. Callahan, 884 F.2d 1180, 1183 n. 4 (9th Cir. 1989) (party waived defense when first raised on appeal).

[96] Opening Brief at 1 (assignment of error).

[97] CP 88-89.

[98] CP 152-88; CP 153 (moving on RFP 3).

for a trial continuance based the outstanding discovery.[99] During the same period, La Mothe filed a trial brief containing the cursory statement that "Plaintiff lacks standing or authority to foreclose. . . ."[100] The brief identifies as legal issue "A" that U.S. Bank failed to produce a certified copy of note in response to discovery and U.S. Bank had provided no proof that it possessed the note "before it initiated this foreclosure action pursuant to RCW 61.24.03."[101] The trial court subsequently granted a continuance and required U.S. Bank to permit La Mothe "to inspect the original note by Tuesday, February 5," eight days before the new trial date.[102]

At trial, a copy of the original note that La Mothe had inspected was admitted into evidence.[103] The trial transcript does not mention the word "standing" except in the context that one attorney was "standing up."[104] In contrast, during closing, La Mothe argued that U.S. Bank was the proper party.[105] During closing, he never argued that U.S. Bank lacked standing. Washington courts have declined to consider standing when a

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[99] CP 146-50.
[100] CP 194:13-14.
[101] CP 192
[102] CP 140.
[103] RP 28-32, Ex. 2.
[104] RP 78:12.
[105] RP 94-124.

party has failed to raise it below.[106] Here, La Mothe waived any standing defense by failing to pursue it at trial. Raising the new defense on appeal prejudices U.S. Bank,[107] by depriving it of presenting additional evidence and responsive arguments below.

2. Findings F and G Establish that U.S. Bank is the Note Holder and Assignee of the Deed of Trust. Even without additional evidence regarding the transfer of the note, the record refutes the new defenses. Two unchallenged findings bar the new defenses in whole or in part. Unchallenged Finding F is that U.S. Bank received a recorded assignment of the deed of trust – three months before U.S. Bank brought this suit. Compare CP 366, Finding F (assignment recorded May 2010) with CP 1 (Aug. 11, 2010 filing of this suit). Unchallenged Finding G is that U.S. Bank, through their attorney, brought the original note to court during trial. Wells Fargo endorsed the note to plaintiff "U.S. Bank." CP 366. Unchallenged Findings F and G support Conclusion F law that the correct party in interest was before the court at trial. CP 367 (Conclusion F). These Findings and the Conclusion are dispositive of the trumped up, newly minted defenses that U.S. Bank was not the correct plaintiff and lacked standing.

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[106] Tyler Pipe Indus., Inc. v. Dep't. of Revenue, 105 Wn.2d 318, 327, 715 P.2d 123 (1986), vacated on other grounds, 483 U.S. 232 (1987).
[107] United States ex. rel. Reed v. Callahan, 884 F.2d 1180, 1183 n. 4 (9th Cir. 1989) (party waived defense when first raised on appeal).

3. U.S. Bank Had Authority to Initiate the Judicial Foreclosure. La Mothe's appellate brief does not frame the issue of standing to initiate the foreclosure in terms of the issue that he raised in his pretrial brief.[108] As stated earlier, before trial, he raised the issue that U.S. Bank had provided no proof that possessed the note "before it initiated this foreclosure action pursuant to RCW 61.24.03,"[109] meaning RCW 61.24.030, which identifies the requisites for a trustee's sale. RCW 61.24.030 ("Requisites to trustee's sale."). In this case, U.S. Bank had elected to forego a trustee's sale, pursuing a judicial foreclosure and reformation of the deed of trust's legal description, so the statute cited in La Mothe's trial brief did not apply. At trial, La Mothe wisely abandoned the issue, now raising another issue on review.

a. La Mothe's Arguments Based On the Trust's Pooling and Servicing Agreement Fail. Among the new issues that La Mothe smuggles into the appeal is his argument that the loan trust had no authority to accept the loan under the terms of the Trust's Pooling and Servicing Agreement.[110] La Mothe argues that the loan was transferred to the trust when the deed of trust assignment instrument was recorded in

[108] Opening Br. at 16-24.
[109] CP 192.
[110] Opening Br. at 18-22 (quoting §§ 2.01, 2.02).

May 2010, after the May 2007 cutoff date for transferring the loan into trust.

The argument fails for at least three reasons. First, he waived the argument by failing to make it below. Second, this Court should adopt the reasoning of the majority of courts rejecting similar arguments under Pooling and Servicing Agreements. Third, there is no evidence that the transfer did not occur in 2007. These three reasons are set forth in more detail below.

1) La Mothe Failed to Invoke the Pooling and Servicing Agreement Below. The pooling and servicing agreement is not a trial exhibit; it was not even on the list of proposed exhibits.[111] At trial, La Mothe did not invoke the agreement.

La Mothe's brief mistakenly refers to "the Pooling and Servicing Agreement identified as 'Plaintiff's Exhibit 6' at trial. See Transcript of Trial February 13, 2013, Pages 39 and 40." Opening Br. at 3. But Exhibit 6 is not the Pooling and Servicing Agreement. Instead, it is the "Second Amended and Restated Master Seller's Warranties and Servicing Agreement" between the loan originator (Wells Fargo) and Bank of America (the purchaser). At trial, Wiggins twice described Exhibit 6 as

[111] CP 256.

"the PSA, purchasing and servicing agreement," including once in response to a question by Judge DuBuque.[112]

Exhibit 6 ("Second Amended and Restated Master Seller's Warranties and Servicing Agreement") is referenced in Exhibit 7 ("Assignment, Assumption and Recognition Agreement"). These exhibits memorialize portions of the series of transactions, where Wells Fargo sold the loan, Banc of America purchased the loan and transferred the loan into the loan trust, and U.S. Bank became the trustee of the trust and Wells Fargo became its master servicer.[113] If this Court were to take judicial notice of the Pooling and Servicing Agreement, then it is at the SEC's Edgar website, where Trial Exhibit 7 is Exhibit 10.2 to the Form 8-K that the Trust filed on June 15, 2007.[114] The Trust's Pooling and Servicing Agreement is Exhibit 4.2 to that electronic filing.[115]

2) This Court Should Adopt the Majority Approach Rejecting Borrower Claims Based on Similar Agreements. Even if this Court were to consider the new arguments, the majority of the courts have rejected similar arguments regarding the standard form

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[112] RP 38:16-21; RP 37:9-19 ("THE COURT: Could I stop – it would be helpful for me if you told me what you mean by PSA. THE WITNESS: Yes, Purchasing and serving [sic] agreement, m'am.").

[113] http://www.sec.gov/Archives/edgar/data/1398425/000137940207000031/0001379402-07-000031-index.htm Ex. 7 at 1.

[114] Id.

[115] Id.

Pooling and Servicing Agreements.[116] The Pooling and Servicing Agreement's § 11.11 "Third Party Beneficiary" prevents La Mothe from invoking the agreement. Under Washington law, La Mothe is merely an incidental beneficiary, lacking the status of a direct third party beneficiary with standing to enforce the agreement.[117] He has failed to overcome the presumption that the parties contract for their own benefit and to prove that they intended to directly benefit him. He has also failed to establish that the transfer of the loan was void.

b. The Evidence Corroborates La Mothe's Binding Admission that U.S. Bank had Authority to Collect the Loan. At trial, in response to a question from his own attorney, La Mothe admitted U.S. Bank was entitled to collect the loan.

> Q. (BY MR. LEEN). Okay. Do you know who is entitled to collect money from you on this loan?
> A. U.S. Bank.[118]

La Mothe offered no evidence and made no argument contradicting, denying, or rebutting this admission. In addition, direct evidence corroborates his trial admission. The direct evidence is that the note is

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[116] See, e.g., Frazer v. Deutsche Bank Nat'l Trust Co., No 11-cv-5454-RBL, 2012 WL 1821386, at *2 (W.D. Wash. May 19, 2012) ("Plaintiffs are not parties to the pooling and servicing agreement and present no authority suggesting standing to challenge it.").
[117] See, e.g., Kim v. Moffett, 156 Wn. App. 689, 234 P.3d 279 (2010).
[118] RP at 86:23-24.

endorsed to U.S. Bank and the recorded instrument confirms the transfer of the deed of trust in the title records. Exhibit 1, 3.

Circumstantial evidence also corroborates his admission: There are discrete purchase records for the bundle of loans and their transfer of them into the loan trust. The Assignment, Assumption and Recognition Agreement from May 2007 confirms a transfer will take place before the Trust closed in 2007. Section 7 provides that Bank of America "hereby instructs Wells Fargo Bank, and Wells Fargo Bank hereby agrees, to release from its custody and deliver the Custodial Mortgage file . . . to Assignee, or a custodian on its behalf under the Pooling Agreement, at the address set forth in Section 8 herein on or before the closing date of the related Securitization Transaction . . ." Exhibit 7.

Wells Fargo transferred the note to U.S. Bank. The endorsed note that the court admitted into evidence at trial is proof of the transfer. Even if the note had been transferred without an endorsement, U.S. Bank would have been a "non-holder in possession of the [note] who has rights of a holder" through the assignment and sale. See supra n. 4 (citing Report at 7, illustrations 3 and 4); RCW 62A.3-203; § 3-301(ii) ("a nonholder in possession . . . who has rights of a holder")).

Over a century ago, Washington adopted a rule favoring a low threshold of proof for a plaintiff to establish ownership of a promissory

note that is admitted into evidence at trial. The standard requires "only slight proof to establish a prima facie case, and when the note was introduced in evidence, indorsed in blank, such prima facie case [of ownership] was made out."[119] The court explained: "many courts have held that the production upon the trial of a promissory note made to order was prima facie proof of the title of the holder who was not the payee named in the note, even though it did not purport to have been indorsed."[120] The introduction of the note into evidence "prima facie established the fact that the plaintiff was the owner and holder thereof. Especially is this true where, as in this case, the indorser is made a party to the action against the maker. No other person than such indorser and the plaintiff are shown to have had any connection whatever with the note. . . ."[121] This is such a case where the indorser (Wells Fargo) was a party to the suit, triggering the prima facie presumption that the plaintiff-endorsee (U.S. Bank) is the owner of the note.

The fact that U.S. Bank's counsel had possession of the original note does not undermine the admissibility of the note under Washington law. "[W]here the plaintiff's attorney has possession of the note, and

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[119] Yakima Nat'l Bank v. Knipe, 6 Wash. 348, 350-351, 33 P. 834 (1893).
[120] Knipe, 6 Wash. at 350-351.
[121] Knipe, 6 Wash. at 350-511; Seattle Nat'l Bank v. Emmons, 16 Wash. 585, 48 P. 262 (1897) (same prima facie presumption)

introduces the same in evidence, it must be presumed that he came lawfully by it, and that his possession is the possession of the plaintiff."[122]

In summary, the endorsed note and the recorded assignment are incontestable trial evidence that the loan was transferred to U.S. Bank.[123]

4. La Mothe Relies On Distinguishable Authorities. La Mothe invokes U.S. Bank Nat'l Ass'n v. Kimball,[124] where the Vermont supreme court affirmed the dismissal of a judicial foreclosure complaint for lack of standing.[125] Kimball involved a MERS mortgage, where "the complaint alleged that the mortgage and note were assigned to U.S. Bank by MERS by means of an instrument entitled 'Assignment of Mortgage.'"[126] The borrower moved for summary judgment dismissal of the foreclosure complaint, arguing "MERS . . . lacked authority to assign the mortgage" and that she had received conflicting information about servicing rights and the owner of the loan.[127] The court granted summary judgment, ruling U.S. Bank lacked standing to bring a foreclosure action,

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[122] Lodge v. Lewis, 32 Wash. 191, 194, 72 P. 1009 (1903); Nat'l Surety Corp. v. Dore, 187 Wash. 274, 276-77, 60 P.2d 12 (1936) (rejecting argument that plaintiff did not have sufficient title and possession of note "at the commencement of the litigation," where the court relied upon the admission of the endorsed in blank note into evidence at trial and where "the evidence being, from time to time, the note was in the physical possession of the attorneys for the real owners, with the knowledge and consent of the real owner.").

[123] Exs. 1 and 3. Also, La Mothe's argument on appeal conflicts with his trial brief that conceded that "[o]n or about May 31, 2007 [,] Wells Fargo . . . transferred the Note . . . for deposit into the pool of Notes, which became Banc of America Funding 2007-D. The Note was endorsed . . ." CP 191:7-10.

[124] 190 Vt. 210, 27 A.3d 1087 (Vt. 2011).

[125] 27 A.3d at 1095.

[126] Id. at 1089.

[127] Id.

because there was no evidence of a valid assignment and the endorsement of the note to the plaintiff before complaint was filed.[128] The court denied the bank's reconsideration motion that submitted new evidence, which the appellate court ruled "failed to explain the obvious contradictions with other evidence."[129] On review, the appellate court affirmed the dismissal of the case but ruled the court erred in dismissing the complaint with prejudice.[130]

Kimball differs from this case in several critical ways. The civil procedure requirements in Vermont differ from the Washington civil rules. The Vermont civil rules require a foreclosure complaint to include the "original note . . . proof of ownership thereof, including copies of all original endorsements and assignments. . . ."[131] The Washington Supreme Court has not adopted a similar civil rule. In Kimball, the Vermont Supreme Court ruled that the plaintiff "had notice of the standing deficiency from the start of the litigation and had an opportunity to prove its case. It was unable to do so."[132] The trial "court was not required to give [foreclosing lender] another opportunity to prove its case following

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[128] Id. at 1090.
[129] Id. at 1093.
[130] Id. at 1093-96.
[131] Id. at 1095 n. 5 (noting "the foreclosure rule as amended now specifically requires a plaintiff to attach to the complaint 'the original note and mortgage deed and proof of ownership thereof, including copies of all original endorsements and assignments of the note and mortgage deed.' V.R.C.P. 80.1(b)(1).")
[132] Id. at 1094.

the grant of summary judgment . . ."[133] In the same vein, this Court is not required to give La Mothe another opportunity for a retrial on new theory of the case. He had the opportunity to present a standing defense. He failed to do so. He is not entitled to jettison the trial, wasting public and private time and resources.

La Mothe's reliance on Raftogianis,[134] a New Jersey decision, is also misplaced, because the standing defense was litigated in the trial court. In Raftogianis, the court ruled that the plaintiff failed to comply with a New Jersey rule requiring that a complaint for judicial foreclosure include specific information about assignments.[135] In Raftogianis, the assignment instrument "was executed and recorded [by MERS] a short time after the complaint was filed."[136] While in this case, the note's payee signed the assignment instrument three months before the complaint was

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[133] Id. at 1094.
[134] Bank of N. Y. v. Raftogianis, 13 A.3d 435, 445 (N.J. Super. 2010).
[135] Id. at 459 (ruling MERS assignment was potentially misleading, plaintiff failed to produce loan schedule, and referring to New Jersey Rule 4:64-1(b)(10)). Relying on the rule, the court concluded that the plaintiff had the burden of proving it had the right to enforce the loan at the time of filing the complaint: "Obviously, a complaint to foreclose a mortgage should be filed by or on behalf of the individual or entity which has the right to enforce the mortgage at the time of the filing. That is clearly contemplated by the Rules of Court. See Rule 4:64-1(b)(10) (providing that when the plaintiff is not the original mortgagee or the original nominee mortgagee, the complaint must recite "all assignments in the chain of title."). Wells Fargo Bank, NA. v. Ford, 418 N.J. Super. 592, 15 A.3d 327, 331-32 (2011) (post-Raftogianis decision, reversing summary judgment because plaintiff failed to establish standing by competent evidence; documents in support of motion were not authenticated in any manner).
[136] Id. at 445.

filed.[137] During the trial, La Mothe did not argue that U.S. Bank was required to prove the date when it received physical possession of the endorsed note. In contrast, in Raftogianis, there was a trial on that kind of "factual dispute. Plaintiff was required to establish one basic fact -- that as of the time the complaint was filed, it or its agent did have possession of the note . . ."[138] The trial court observed: "Plaintiff was clearly on notice that the court intended to address the question of whether it had possession of the note as of the date the complaint was filed."[139] In contrast, in this case, La Mothe failed to pursue the question at trial.

In a similar fashion, La Mothe relies on distinguishable New York[140] and other decisions,[141] where the borrowers raised the standing defense in pretrial motions or preserved the alleged errors.

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[137] Ex. 3 (assignment by Wells Fargo recorded May 25, 2010); Ex. 1 (Wells Fargo as payee on the note); Ex. 2 (Wells Fargo as the beneficiary on the deed of trust).
[138] Id. at 459.
[139] Id.
[140] Opening Br. at 21-22 (citing PNMAC Mortg. Co. v. Friedman, 35 Misc. 3d 1209(A), 950 N.Y.S.2d 725 (N.Y. Sup. Ct. 2012) (granting a preanswer dismissal motion that plaintiff lacked standing to bring a nonjudicial foreclosure suit, where there no proof as to when the note was negotiated and transferred to plaintiff and where there was an undated allonge in blank to correct an erroneous endorsement to Wells Fargo). U.S. Bank, N.A. v. Sharif, 89 A.D.3d 723, 725, 933 N.Y.S.2d 293 (2nd Dep't. 2011) (on review granting dismissal of foreclosure complaint where plaintiff failed to submit evidence of physical delivery of note or assignment of note in response to dismissal motion); id. (reversing denial of cross-motion to amend lack of standing defense that was raised in response to summary judgment motion). Deutsche Bank Nat'l Trust Co v. Barnett, 88 A.D.3d 636, 637-638, 931 N.Y.S.2d 630 (2nd Dep't 2011) (on review granting dismissal, where there were inconsistent declarations). Citimortgage, Inc. v. Stosel, 89A.D.3d 887, 934 N.Y.S.2d 182 (2d Dep't 2011) (standing placed at issue in summary judgment motion). In re Mims, 438 B.R. 52 (Bankr. S.D.N.Y. 2010) (denying without prejudice motion for relief from stay and concluding the moving party lacked standing) (note was not endorsed to the moving party) (moving party failed to offer evidence that it owned the note, that it

While relying upon these and other out-of-state decisions, La Mothe fails to address Washington law. RCW 4.08.080 provides "[a]ny assignee . . . of any . . . chose in action, for the payment of money, by assignment in writing, signed by the person authorized to make the same, may, by virtue of such assignment, sue and maintain an action or actions in his or her name, . . . notwithstanding the assignor may have an interest in the thing assigned." Under this statute, our supreme court has held that the intended endorsee of a promissory note may maintain an action on the note even if title has not passed to her.[142] Under Washington law, an assignment of mortgage in blank to an unnamed assignee, whose name was later inserted in the blank with consent of assignor, does not the affect right of assignee to maintain the action.[143] Under these policies,

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was the endorsee on the note and had possession of the note, relied upon a MERS assignment).

[141] In re Vargas, 396 B.R. 511 (Bankr. C.D. Cal. 2008) (denying motion for relief from stay, where MERS sought relief on behalf of unidentified parties and the only evidence supporting the motion was provided by a witness incompetent to provide relevant evidence) (MERS had failed to move the original note and deed of trust into evidence) (the borrower disputed the authenticity of the note and deed of trust). In re Hwang, 438 B.R. 661 (C.D. Cal. 2010) (reversing denial of motion for relief from stay) (ruling bankruptcy court abused its discretion in concluding Rule 19 requires the note holder to join the motion) (movant was the endorsee on the note, had possession of the note, and was the beneficiary of the deed of trust, but was closed and taken over by the FDIC while the motions was pending). In re Veal, 450 B.R. 897 (9th Cir. BAP 2011) (holding that a party has standing to prosecute a proof of claim involving a negotiable instrument secured by real property if the party is entitled to enforce the note under the U.C.C.) (bankruptcy court had overruled borrowers' lack of standing defenses). In re Weisband, 427 B.R. 13, 18 (Bankr. D. Ariz. 2010) (borrower challenged loan servicer's standing to seek relief from stay, where servicer was not the holder, relied upon assignment by MERS).

[142] Lodge v. Lewis, 32 Wash. 191, 72 P. 1009 (1903).

[143] Fidelity Ins., Trust & Safe Deposit Co. v. Nelson, 30 Wash. 340, 70 P. 961 (1902).

U.S. Bank had the right to maintain this suit as the beneficiary of record for the deed of trust.

La Mothe quotes Restatement (Third) of Property (Mortgages) § 5.4 (a)-(c) (1997) for the proposition that the person entitled to enforce a mortgage must also be the holder of the secured note.[144] But he ignores his own quotation to § 5.4 (b) that states: "Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise." In other words, a transfer of a deed of trust (e.g. the recorded assignment) may also transfer the secured note.[145] This is not a case where there is a naked assignment of the deed of trust without transfer of the note. Rather, U.S. Bank has belt and suspenders: both the endorsed note and a recorded assignment, with the Mary-had-a-little-lamb effect.

In summary, this Court should reject La Mothe's invitation to impose retroactively a new requirement that in a foreclosure suit the plaintiff must provide specific proof in the complaint of the precise date when it received possession of the secured note and when the note was endorsed. The proper means of imposing any new pleading or proof requirement is through the supreme court's rule-making process, with fair

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[144] Opening Br. at 5-6.
[145] Restatement (Third) of Property (Mortgages) § 5.4 (b).

notice in compliance with due process.[146] La Mothe is raising these new issues more than two years after the suit was filed and after the court tried the case, granting judgment against La Mothe.

It is too little, too late.

D. La Mothe's Newly Minted Challenges to the Admitted Exhibits Fail.

La Mothe's brief does not assign error to the admission of any evidence and to the findings of fact that are based on the admitted exhibits. RAP 10.3(a)(4) (requiring assignments of error); RAP 10.3(g) (special provision for assignment of error for each finding of fact). CP 365-67 (Findings). See RAP 10.7 (Submission of Improper Brief). Even if this Court waives these requirements and considers the arguments regarding admission of evidence, La Mothe has failed to establish any prejudicial error.

La Mothe argues that the endorsed note was inadmissible and the trial witness (Wiggins) lacked "personal knowledge to authenticate the note containing the allonge endorsement."[147] La Mothe is mistaken; there was no allonge. The endorsement was on the last page of the note (Exhibit 1) on the same page where La Mothe's signature is located.

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[146] See, e.g In re Foreclosure Cases, 521 F. Supp. 2d 650 (S.D. Ohio 2007) (plaintiffs failed to comply with local general rule requiring specific items that must accompany a foreclosure complaint under diversity jurisdiction so that the court can confirm standing and diversity jurisdiction at the time the complaint is filed) (cited by La Mothe).
[147] Opening Br. at 24.

Neither the record nor the law supports his newly minted evidentiary objections.

This Court reviews a trial court's admission or exclusion of evidence for abuse of discretion.[148] A court abuses its discretion by making a decision that is manifestly unreasonable or is based on untenable grounds or for untenable reasons.[149] The admission of the exhibits was well within the permissible zone of discretion. Furthermore, any putative error was harmless, where the evidence was on uncontested facts.[150]

1. La Mothe Failed to Preserve Objections. The rule raise-it-or-waive-it applies. Evidence Rule 103(a)(1) states that "[e]rror may not be predicated upon a ruling which admits" evidence unless, "a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context." For an objection to count as timely and be preserved for appellate review there must be "indication anywhere in the record of a contemporaneous objection to that effect."[151]

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[148] State v. Ortiz, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992).
[149] State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).
[150] See Brown v. Quick Mix Co., 75 Wn.2d 833, 839, 454 P.2d 205 (1969) ("The admission of evidence on an uncontested matter is not prejudicial error."); ER 103(a) ("Error may not be predicated upon a ruling which admits . . . evidence unless a substantial right is affected ...").
[151] State v. Thetford, 109 Wn.2d 392, 397, 745 P.2d 496 (1987) (declining to consider hearsay objection where there was no indication of a contemporaneous objection in the record).

"Failure to challenge the admissibility of proffered evidence constitutes a waiver of any legal objection to its being considered as proper evidence by the trier of facts."[152] In other words, the failure to make an objection is a waiver, and the error will not be preserved for appeal.

Not only must the objection be timely, but it must also be specific. If an objection does not indicate the grounds on which it is based, the objection will not be preserved for appellate review.[153] Whatever grounds the objector states then become the only basis on which the appellate court can review the trial court's decision. "If a specific objection is overruled and the evidence in question is admitted, the appellate court will not reverse on the basis that the evidence should have been excluded under a different rule which could have been, but was not, argued at trial."[154]

La Mothe failed to timely and specifically object to the exhibits. Regarding Exhibit 1 (Adjustable Rate Note), La Mothe stated "I have no objection to the document being admitted."[155] His statement is an express waiver of any objection. Regarding Exhibit 3 (Assignment of Deed

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[152] State v. Silvers, 70 Wn.2d 430, 432, 423 P.2d 539 (1967).
[153] State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) ("Since the specific objection made at trial is not the basis the defendants are arguing before this court, they have lost their opportunity for review.")
[154] 5 Karl B. Tegland, Washington Practice: Evidence and Practice § 103.11, at 48 (5th ed. 2007).
[155] RP 32:22-23.

Trust), U.S. Bank did not offer this exhibit. La Mothe did.[156] When he moved for admission of the exhibit, he did not ask the court to limit its admission to a specific purpose.[157] Regarding Exhibit 6 (Second Amended and Restated Master Seller's Warranties and Servicing Agreement), the court admitted the exhibit after La Mothe withdrew his objection regarding signatures.[158] Regarding Exhibit 7 (Assignment, Assumption, and Recognition), La Mothe did not voice any objection when U.S. Bank offered this exhibit. Upon U.S. Bank moving for its admission, La Mothe objected solely on the basis of relevancy, stating "I think there's – there's no relevance to this that I can see."[159] When the court sought clarification that relevancy was the only objection, La Mothe confirmed the relevance objection, and the court overruled the objection.[160]

In short, the record demonstrates that La Mothe waived any objections to the exhibits. His newly minted objections are also not well taken.

2. The Note is Self-Authenticating. La Mothe argues that U.S. Bank failed to authenticate Exhibit 1, the promissory note, with

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[156] RP 84-85.
[157] See ER 105 (Limited Admissibility).
[158] RP 38:16-40:24.
[159] RP 38:4-14.
[160] Id.

testimony about its creation and endorsement.[161] But notes, other commercial paper, and acknowledged documents are self-authenticating under the Evidence Rules. Evidence Rule 902 is titled "Self-Authentication." It identifies the categories of documents that are self-authenticating. Rule 902 provides: "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: ... (h) Acknowledge Documents. . . . (i) Commercial Paper and Related Documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law."

Rule 902(i) is identical to the Federal Evidence Rule 902(9) for purposes of commercial paper. While no Washington appellate cases apply this rule, an extensive body of federal case law upholds the self-authenticating nature of notes, checks, and other commercial papers.[162]

Exhibit 1 (Adjustable Rate Note) is commercial paper. La Mothe states: "The Note, which is a negotiable instrument governed under the Uniform Commercial Code . . ."[163] His statement that the note is a

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[161] Opening Br. at 24-27.

[162] See, e.g., United States v. Pang, 362 F. 3d 1187, 1192 (9th Cir. 2004) ("As a negotiable instrument, a check is a species of commercial paper, and therefore self-authenticating."); In re Cook, 457 F.3d 561, 566 (6th Cir. 2006) ("the promissory note is self-authenticating pursuant to Rule 902 . . ."); Theros v. First Am. Title Ins. Co., No. C10-2021, 2011 WL 462564, at *2 (W.D. Wash. Feb. 3, 2011) ("Promissory notes are self-authenticating ...").

[163] Opening Br. at 12.

negotiable instrument is an acknowledgement that the note is commercial paper. Commercial paper is the term previously used to describe negotiable instruments governed by Article 3 of the Uniform Commercial Code.[164] Thus, as a commercial paper, the note is self-authenticating and testimony from a party with personal knowledge is superfluous for admitting the exhibit.

3. The Note is a Legal/Verbal Act Exempt from the Hearsay Rule.

La Mothe's next argument is that the note and other loan document exhibits amount to hearsay and cannot qualify for the business records exception without additional testimony. This argument ignores the extensive body of case law providing that commercial paper and legal documents are legal/verbal acts exempt as non-hearsay.

Recently in Bank of America, NA v. Neise,[165] another state appellate court concluded that a mortgage and note are not hearsay. The court adopted "a consensus rule that contracts, including promissory notes, are not hearsay when they are offered only for their legal effect, not 'to prove the truth of the matter asserted.'" The decision cites a litany of state and federal decisions and treatises recognizing the documents that have

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[164] Compare RCW 62A.3-101 (negotiable instruments) with Laws 1993, ch. 229, § 3 (rewriting section, which previously read: "62A.3-101. Short title," "This Article shall be known and may be cited as Uniform Commercial Code--Commercial Paper.")
[165] 349 Wis. 2d 461, 835 N.W.2d 527 (Wis. Ct. App. 2013).

independent legal significance are exempt from the hearsay rule as verbal acts.[166]

The rule is consistent with the Washington decisions recognizing the general verbal act exemption to the hearsay rule.[167] Applying the policies of these decisions, this Court should apply the verbal act/independent legal significance rule to the promissory note. The note is indisputably commercial paper affecting the legal rights of the parties. It has significance per se, independent of its contents. The verbal act exemption applies and the exhibit is non-hearsay—mooting La Mothe's concerns about the business records exception.

La Mothe relies on several Wisconsin decisions, where a custodian's testimony was insufficient to authenticate a note and an

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[166] See, e.g., Kenneth S. Brown, 2 McCormick on Evidence § 249 at 133 (6th ed. 2006) "[w]hen a suit is brought for breach of a written contract, no one would think to object that a writing offered as evidence of the contract is hearsay"); United States v. Pang, 362 F.3d at 1192 (9th Cir. 2004) ("out-of-court statements that are offered as evidence of legally operative conduct are not hearsay . . . [c]hecks fall squarely in this category . . ."); United States v. Rubier, 651 F.2d 628, 630 (9th Cir. 1981) ("Facts of independent legal significance constituting a contract which is at issue are not hearsay."), cert. denied, 454 U.S. 875 (1981). See Major v. Comm'r, 89 T.C.M. (CCH) 1440, at *4 (2005) (finding that checks, as a negotiable instrument, are legally operative and subject to the verbal acts exclusion).

[167] See Hartford v. Faw, 166 Wash. 335, 336-42, 7 P.2d 4 (1932) (reversing judgment and reversing exclusion of testimony about oral consent to transfer of lease, and discussing authorities on verbal acts). There are statements that operate as "simply 'verbal acts'; their significance [is] not in the truth of any matter asserted therein but in the fact they were made." State v. Gillespie, 18 Wn. App. 313, 315, 569 P.2d 1174 (1977) (applying the verbal acts exemption to a suspect's consent to a search).

assignment.[168] Those decisions are distinguishable. In one decision, the trial court had sustained objections against the admission of a MERS assignment.[169] In the second decision, the borrower objected to declarations regarding a MERS assignment and a copy of the note.[170] In the third decision, the borrower made a hearsay objection to the admission of account statements.[171] In addition to being cases where evidentiary objections were preserved, the three decisions did not address the application of the self-authentication rule to promissory notes and the legal/verbal act exemption to the hearsay rule.

As demonstrated above, La Mothe waived his evidentiary objections and the objections cannot withstand appellate scrutiny.

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[168] Opening Br. at 25-27.

[169] Opening Br. at 25-27 (citing Aurora Loan Servs., LLC v. Carlsen, 332 Wis. 2d 807, 798 N.W.2d 321 (Wis. Ct. App. 2001) (unpublished) (reversing foreclosure judgment; no admissible evidence supports the finding that Aurora had been assigned the note/was the holder of the note). The court sustained Carlsen's objections that the custodian lacked personal knowledge and there was a lack of foundation for a MERS document purporting to assignment the note and mortgage. Aurora did not move the exhibits into evidence, and there was no trial evidence that the assignment instrument was recorded.

[170] PHH Mortg. Corp. v. Kolodziei, 332 Wis. 2d 804, 798 N.W.2d 319 (Wis. Ct. App. 2011) (unpublished) (reversing summary judgment for foreclosure and remanding for further proceedings). The borrower objected to declaration attaching a MERS assignment instrument and to a declaration attaching a copy of the endorsed note. The note attached to complaint did not have an endorsement to PHH. The declaration failed to authenticate the assignment as a regularly maintained business record or as a copy of a public record/title record that the witness compared to the original. The declaration did not authenticate the copy of the note as a self-authenticating business record under a rule provision that Washington has not adopted.

[171] Palisades Collection LLC v. Kalal, 324 Wis. 2d 180, 781 N.W.2d 503 (Wis. Ct. App. 2010) (published) (reversing summary judgment and remanding for further proceedings). The plaintiff's affidavit failed to provide adequate foundation to establish bank account statements fell within the business records exception. The witness lacked personal knowledge about how statements were prepared and whether they were prepared in the ordinary course of business.

VI.

CONCLUSION

This Court should reject La Mothe's invitation to consider issues that he failed to preserve below. A defendant waives the defenses of standing and real-party-in-interest status when he or she fails to raise them at trial. Moreover, the record including the unchallenged findings demonstrate that U.S. Bank as the endorsee of the note and beneficiary of the deed of trust was entitled to bring this foreclosure suit. Therefore, this Court should affirm the judgment granting a foreclosure sale.

RESPECTFULLY SUBMITTED this 16th day of January, 2014.

LANE POWELL PC

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Appendix A

CR 17(a) provides:

Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on January 16th, 2014, I served a copy of the foregoing document on all counsel of record as indicated below:

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DATED this 16th day of January, 2014.

David Spellman
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