70295-5

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No. 70295-5-I

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

MICHIKO STEHRENBERGER,

Appellant-Defendant,

v.

JPMORGAN CHASE BANK, N.A.,

Respondent-Plaintiff.

BRIEF OF RESPONDENT-PLAINTIFF JPMORGAN CHASE BANK, N.A.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This is a case about a borrower who is trying to avoid her loan obligations and to profit from the 2008 failure of Washington Mutual Bank ("WaMu"). In 2007, defendant Michiko Stehrenberger obtained a $50,000 commercial line of credit from WaMu, evidenced by a Promissory Note. In September 2008, WaMu failed, and the Federal Deposit Insurance Corporation ("FDIC") placed the bank in receivership. The FDIC and Chase entered a Purchase and Assumption Agreement ("PAA"),[1] under which the FDIC transferred to Chase all of WaMu's loans. Stehrenberger stopped making payments on her loan in 2010 because she disputes that the PAA (to which she is not a party or third-party beneficiary) transferred her loan (or any of WaMu's loans) to Chase, and because WaMu may have lost her Note before it failed.

Due to her default, Chase filed this breach of contract action in King County Superior Court. In response, Stehrenberger filed numerous counterclaims, as well as several other lawsuits against Chase across the country, including in the Eastern District of Washington, the Southern

[1] *See* Purchase and Assumption Agreement, http://www.fdic.gov/about/freedom/Washington_Mutual_P_and_A.pdf. The Court below considered the agreement, CP 1411 (exhibit to declaration of Raymond Diamond in support of Chase's motion for summary judgment), and this Court may take judicial notice of official government publications (like the FDIC PAA), where the information is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b); *see also Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 726 (2008); CP 621-64. Other courts, including the Southern District of Ohio in Stehrenberger's previous case, have taken judicial notice of the PAA. *See Stehrenberger v. JPMorgan Chase Bank, N.A.*, 2012 WL 4473217, *4 n.1 (S.D. Ohio 2012) ("Pursuant to Federal Rule of Evidence 201(b), the Court takes judicial notice of these events and also of the PAA and its provisions, which is available through the FDIC's website." (citing cases taking judicial notice of PAA)); *Lomely v. JPMorgan Chase Bank, N.A.*, 2012 WL 4123403, *2-3 (N.D. Cal. 2012); *Carmichael v. Wash. Mut. Bank, F.A.*, 508 Fed. Appx. 666, 666-67 (9th Cir. 2013); *Erickson v. Long Beach Mortg. Co.*, 2011 WL 830727, *1 (W.D. Wash. 2011).

District of Ohio, and the Southern District of New York. In each case, Stehrenberger alleged Chase did not acquire any of WaMu's loans under the PAA because the FDIC did not execute assignments for each loan. She voluntarily dismissed the Washington and New York actions. *See Stehrenberger v. JPMorgan Chase Bank, N.A.*, 2012 U.S. Dist. LEXIS 154223 (E.D. Wash. 2012); *Stehrenberger v. JPMorgan Chase & Co.*, No. 1:12-cv-07212-AJN (S.D.N.Y. 2013) [Dkt. 18]. The Southern District of Ohio court dismissed her complaint with prejudice, calling her claim "frivolous" and "indisputably meritless." *Stehrenberger v. JPMorgan Chase Bank, N.A.*, 2012 WL 4473217, *2-3 (S.D. Ohio 2012), *adopted* 2012 WL 5389682 (S.D. Ohio 2012).

As that court and the trial court in this case properly understood, the Federal Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1811 *et seq.*, gives the FDIC broad authority to "transfer any asset or liability" of a failed bank "***without*** any … assignment"—as the FDIC did in the case of WaMu and Chase. 12 U.S.C. § 1821(d)(2)(G)(i)(II) (emphasis added). The trial court correctly granted summary judgment for Chase, and this Court should affirm in all respects, because:

First, Chase has authority to enforce Stehrenberger's loan because it acquired the loan from the FDIC as receiver for WaMu by operation of law, and because res judicata bars her counterclaims and legal theories in any event. *See* 12 U.S.C. § 1821(d)(2)(G)(i)(II); *Stehrenberger*, 2012 WL

5389682, *4 (dismissing Stehrenberger's claims; collecting cases holding PAA transferred all WaMu's loans to Chase by operation of law).

Second, Chase has authority to enforce Stehrenberger's loan because as the FDIC's assignee, it stands in the shoes of the FDIC. Stehrenberger failed to present ***any*** evidence on summary judgment suggesting: (1) that WaMu sold her loan before it failed, or disputing that it could have executed a lost note affidavit had it not failed; (2) that Chase (as opposed to WaMu) lost her Note; or (3) that in the six years since she obtained the loan, any other entity has tried or is trying to enforce it.

Third, the federal holder in due course doctrine bars Stehrenberger from asserting defenses or counterclaims against Chase that stem from her loan origination with WaMu. *See Fed. Fin. Co. v. Gerard*, 90 Wn. App. 169, 176-77 (1998) (bank acquiring loan through FDIC is holder in due course entitled to enforce loan).

Fourth, the court properly exercised its discretion in awarding Chase prevailing party fees under the Note.

Because Stehrenberger neither prevailed below nor should prevail here, the Court should deny her fee request under RAP 18.1, and should instead award Chase its fees on appeal under RAP 18.1.

II. STATEMENT OF ISSUES

The trial court did not err in granting summary judgment for Chase, or in awarding Chase prevailing party attorney's fees. Chase offers this statement of issues under RAP 10.3(b) only to properly frame the issues presented in this case.

1. The trial court properly granted summary judgment in Chase's favor on its breach of contract claim, and on Stehrenberger's unjust enrichment and CPA counterclaims, (a) because Chase acquired the Note from the FDIC under the Purchase and Assumption Agreement, and (b) because Chase can enforce the Note without a lost note affidavit under common law assignment principles. CP 1340-43, 1409-10.

2. The trial court properly exercised its discretion in awarding Chase prevailing party attorney's fees under the Note because Stehrenberger's aggressive litigation tactics required the fees Chase incurred. CP 1546-47.

3. The Court should deny Stehrenberger's request for fees under RAP 18.1 because she neither prevailed in the trial court nor should prevail here, on appeal. The Court should award Chase its fees on appeal under RCW 4.84.330 and the Note, because it is the prevailing party.

III. STATEMENT OF THE CASE

A. Factual Background.

1. Stehrenberger Obtained a Commercial Line of Credit from WaMu.

In 2007, Michiko Stehrenberger obtained an unsecured commercial line of credit for $50,000 from WaMu. CP 2 ¶ 5; CP 4-7, 11-13; CP 836 ¶ 3. Stehrenberger does not dispute she applied for and obtained that loan from WaMu, or that she signed a Note evidencing the loan. CP 249 ¶ 64; CP 10; CP 17-18 ¶ 1; CP 22 ¶ 4; CP 24 ¶ 20; CP 1049. The Note defines "Obligor" as Stehrenberger, and "Bank" as WaMu. CP 4. Under the Note, Stehrenberger agreed: "Obligor shall pay this Note in consecutive

monthly installments." CR 4. Stehrenberger also represented "[t]his Note has been carefully read and the contents thereof are known and understood by Obligor." CP 9 ¶ e. The Note makes clear it "shall inure to the benefit of Bank and its successors and assigns." CP 8.

Stehrenberger admitted she left the signed Note at a WaMu branch, stating she "left the signed promissory note on the manager's desk." CP 249 ¶ 64. Stehrenberger and Chase stipulated that the Note is a negotiable instrument under RCW 62A.3-104, "payable to bearer or to order at the time it is issued or first comes into possession of a holder." RCW 62A.3-104(a)(1); CP 143-44; CP 859-60. *See also* CP 24 ¶ 20. Stehrenberger does not allege that before September 2008 she ever paid anyone other than WaMu, and presented no evidence suggesting WaMu sold her loan ***before*** it failed and the FDIC took over as receiver. *See* CP 852, 1051.

2. Chase Acquired Stehrenberger's Loan from WaMu Through the FDIC.

Stehrenberger admits that on September 25, 2008, the Office of Thrift Supervision closed WaMu and appointed the FDIC as receiver. CP 93 ¶ 2; CP 249 ¶ 70; CP 1049. The FDIC, as receiver, "succeeded to all of the rights, title, and interest of [WaMu] in and to all of the assets" under FIRREA. CP 193 (citing 12 U.S.C. § 1821(d)(2)(A)(i)). As the receiver, the FDIC had broad authority under FIRREA to "transfer any asset or liability of Washington Mutual, without any approval, assignment, or consent with respect to such transfer." CP 93 ¶ 3; *see also* 12 U.S.C.

§ 1821(d)(2)(G)(i)(II) (same).[2] Invoking this authority, on September 25, 2008, the FDIC executed the Purchase and Assumption Agreement with Chase. CP 93 ¶ 4.[3] The PAA transferred to Chase "certain of the assets, ***including all loans*** and all loan commitments, of Washington Mutual." *Id.* (emphasis added). *See also* CP 633 (stating Chase purchased from the FDIC "all right, title, and interest of the Receiver in and to all of the assets"); CP 660 (listing "Loans" as among the WaMu assets Chase purchased); CP 188; CP 885 ("All WaMu loan files were transferred to JPMorgan Chase pursuant to the [PAA]."). "As a result, on September 25, 2008, [Chase] became the ***owner*** of the loans and loan commitments of Washington Mutual ***by operation of law***," without the need for assignments identifying each loan. CP 93 ¶ 5 (emphasis added).

Chase thus acquired Stehrenberger's loan through the FDIC as receiver for WaMu. Chase received an electronic record generated by WaMu of the loan disbursements and payments made to Stehrenberger. CP 836 ¶ 5; *see also* CP 885. Stehrenberger's loan history shows she received $49,000 on May 30, 2007. *Id.*; CP 668. Chase also received copies of WaMu's monthly statements to Stehrenberger, and issued monthly statements after acquiring the loan. CP 836 ¶ 6; CP 666-834. Stehrenberger admits that "[i]n 2008-2009, [she] received a notice from

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[2] With its motion to dismiss Stehrenberger's counterclaims under CR 12(b)(6), Chase submitted certified copy of the Affidavit of the Federal Deposit Insurance Corporation, signed by Robert C. Schoppe, as Receiver in Charge for FDIC as Receiver of Washington Mutual Bank, and recorded in the King County recorder's office on October 3, 2008. CP 92-94. Because it is a recorded and publicly available document, the trial court properly took judicial notice of the document. CP 72; *see also Rodriguez*, 144 Wn. App. at 726; ER 201(b).

[3] *See* PAA, http://www.fdic.gov/about/freedom/Washington_Mutual_P_and_A.pdf.

[Chase] informing [her] that Chase now owned [her] line of credit." CP 249 ¶ 71. She does not allege any other entity has ever claimed ownership of her loan in the six years since she obtained the loan.

3. Stehrenberger Stopped Making Payments on Her Loan Because She Disputes the PAA and Chase's Right to Enforce the Note.

Under Stehrenberger's Note, default occurs when, among other things, the "Obligor fails to make any payment when due under this Note." CP 6. The Note provides that "[u]pon default, Bank may declare the entire unpaid principal balance on this Note and all accrued unpaid interest immediately due, and then Obligor will pay that amount." CP 7.

Stehrenberger admits that in 2010, she stopped making payments on the commercial line of credit. CP 22 ¶ 4; *see also* CP 837 ¶ 7 (default date of November 2010); CP 1077 (admitting "the money is owed"). She admits she stopped making payments because she disputes Chase acquired her loan—or any other loan—from WaMu, since the FDIC did not execute assignments inventorying each loan. CP 27 ¶ 42. *See also* CP 100-01 ¶¶ 16-17 (arguing Chase never acquired her loan because the FDIC never executed a loan-by-loan inventory of the transferred assets).

She also refuses to pay for her loan because Chase does not have the original Note, CP 269 ¶ 15, and, she claims, "has no information as to whether it ever obtained the original paper note," CP 146. *See also* CP 25 ¶ 27. In its discovery responses, Chase explained it "is not aware that it ever had possession of the original promissory note so it does not know if the note was lost or misplaced by Chase." CP 456:18-21. Chase does not

know if the Note "[was] lost by WAMU prior to the purchase by Chase and thus never delivered to Chase," CP 146, and does not have a lost note affidavit from WaMu, CP 501:14-16. *See also* CP 156-58 (substantially same).

By February 4, 2011, Stehrenberger owed Chase approximately $47,600, including principal, interest, and fees. CP 3 ¶ 11.

B. Procedural Background.

Due to Stehrenberger's default, on February 13, 2011, Chase filed this breach of contract lawsuit in King County Superior Court. CP 2-3. On October 10, 2011, Stehrenberger answered, asserting numerous affirmative defenses and counterclaims. She based these on her theory she has no obligation to pay her loan (a) because the FDIC did not execute an assignment identifying her loan when it transferred WaMu's assets to Chase, and (b) because Chase has not found the original Note or presented a lost note affidavit under RCW 62A.3-309. *See* CP 14-67. Stehrenberger's counterclaims included an indemnification claim against the FDIC, CP 51; Consumer Protection Act, conspiracy, and racketeering claims, CP 54; unjust enrichment, CP 57; and Fair Debt Collection Practices Act ("FDCPA") and Fair Credit Reporting Act ("FCRA") claims, CP 62.

On November 28, 2011, Chase filed a motion to dismiss Stehrenberger's counterclaims. CP 69-81. Stehrenberger responded with numerous "declarations" purporting to characterize phone calls and emails with various Chase personnel, and submitted excerpts of Chase's

responses to her discovery requests, as well as her correspondence with the FDIC regarding her FOIA request. *See* CP 95-252. On March 16, 2012, the court entered an order converting the motion to dismiss into one for summary judgment, dismissing Stehrenberger's FDCPA and FCRA claims, and converting her indemnity counterclaim into an affirmative defense. CP 265-66.

Subsequently, Stehrenberger embarked on a burdensome discovery campaign, serving over 400 discovery requests on Chase and filing motions to compel (necessitating a motion for a protective order). *See* CP 276; *see also* CP 274-577; CP 1411-14. (She had already pursued a FOIA request to the FDIC. CP 188-92.)

On January 11, 2013, Chase filed a motion for summary judgment on its breach of contract claim, and on Stehrenberger's unjust enrichment and CPA counterclaims. CP 588, 591. Chase argued it acquired Stehrenberger's loan from the FDIC, as receiver for WaMu, by operation of law under FIRREA, and so does not need an assignment identifying her loan to prove it owns the loan. CP 591-600. Chase also argued res judicata bars Stehrenberger's claims because the court issued a final judgment on the merits based on the same claims and parties in the Ohio action (*Stehrenberger*, 2012 WL 5389682, *6). CP 1107 & n.5; CP 1110 (order denying Stehrenberger's motion for reconsideration or to amend prior order to a dismissal without prejudice). In addition, Chase showed it could enforce the Note even without a lost note affidavit because as the

FDIC's assignee, it stands in the shoes of the FDIC (and the FDIC does not need a lost note affidavit), and is a holder in due course. CP 601-10. Finally, Chase argued it met the elements of its breach of contract claim because Stehrenberger admitted she obtained the loan and owes money on the loan, but refuses to pay. CP 610-11.

In January 2013, Stehrenberger filed two motions for partial summary judgment and for declaratory relief, improperly noting the first for hearing four days later, CP 840, 995, and the second for hearing one week later, CP 1010, 1037. In these motions, as in her Ohio action, Stehrenberger asked the court to declare that Chase could not enforce her Note because the PAA did not give Chase that authority. CP 845, 847; CP 1011. Stehrenberger also argued Chase lacks authority to enforce her Note because WaMu must have lost it before the bank failed and the FDIC took over and transferred its loans to Chase. CP 852. Stehrenberger made these same arguments in her oppositions to Chase's summary judgment motion, and in her numerous other filings. *See* CP 1048-54, 1056-82. Stehrenberger presented no evidence WaMu sold or transferred her loan before it failed and the FDIC placed it in receivership, that any entity other than Chase attempted to enforce the Note, or that Chase lost the Note.

On February 15, 2013, the trial court granted Chase's motion for summary judgment. CP 1337-47; *see also* CP 1409-16 (signed order dated April 1, 2013). It correctly held the transfer of an instrument "vests in the transferee, in this case [Chase], any right of the transferor, [WaMu]

through the FDIC to enforce the instrument, including any right as a holder in due course." CP 1341:17-21. In reaching this conclusion, the court relied on *Federal Financial Co. v. Gerard*, 90 Wn. App. 169, 176-77 (1998), in which this Court held that under RCW 62A.3-203(b), "the assignment of a note by the FDIC ... carries with it the right to enforce the instrument." CP 1342:8-18.

Subsequently, Stehrenberger filed a motion for reconsideration, again arguing Chase could not enforce her Note because it does not have the original Note or a lost note affidavit. CP 1318-29. In response, Chase argued Washington law allows a party to enforce a note based on a copy of the original; Stehrenberger had presented no evidence suggesting Chase did not purchase her loan from the FDIC under the PAA; and Chase did not need a lost note affidavit to enforce the Note. CP 1369-74. On April 1, 2013, the court denied the motion. CP 1417.

On April 11, 2013, Stehrenberger filed a motion to amend or alter the court's judgment to provide "adequate protection" under RCW 62A.3-309(b), to protect against the possibility some other entity might try to enforce her Note. CP 1424-30. Stehrenberger still presented no evidence that in the six years since she obtained the loan, any entity other than WaMu or Chase had tried or was trying to enforce the Note. Chase opposed the motion, pointing out it was untimely, Stehrenberger had not raised adequate protection in any of her previous filings, and RCW 62A.3-309(b) gives the court discretion to determine whether to order adequate

protection. CP 1435-38. The court denied Stehrenberger's motion. CP 1509. It entered judgment on April 16, 2013. CP 1431-32.

Chase filed a motion for prevailing party attorney's fees under the Note and RCW 4.84.330. CP 1442-49. In her opposition, Stehrenberger primarily argued Chase could not seek fees because it lacks authority to enforce the Note, and Chase caused the discovery fees it incurred by attempting to "subvert" the CR 26(i) discovery conference requirement and having unclean hands. CP 1510-20. Stehrenberger also argued the court should not award Chase fees it incurred as a result of what she perceived to be mistakes. *Id.* The court granted Chase's motion, awarding $98,446.76 in prevailing party fees, on June 4, 2013. CP 1546. In doing so, the court "[found] that these fees and costs were reasonable and necessary to prosecute plaintiffs' claims in light of defendant's protracted defense of this mater." *Id.*

C. Stehrenberger Has a Pattern of Filing Lawsuits Against Chase Based on the Same Loan and Legal Theories.

After Chase filed its complaint in this action, Stehrenberger went on the offensive. She litigated this case aggressively for two years, filing numerous substantive and discovery motions and declarations, and serving hundreds of discovery requests on Chase. CP 275-76; CP 1411-16. On September 24 and 25, 2012, she filed three lawsuits against Chase across the country based on the same commercial line of credit and the same legal theory that Chase did not acquire any of WaMu's loans from the FDIC because the PAA does not itemize the loans. *Stehrenberger v.*

JPMorgan Chase Bank, N.A., No. 2:12-cv-874 (S.D. Ohio 2012) [Dkt. 1]; *Stehrenberger v. JPMorgan Chase & Co.*, No. 1:12-cv-07212-AJN (S.D.N.Y. 2012); *Stehrenberger v. JPMorgan Chase Bank, N.A.*, No. CV-12-543-JLQ (E.D. Wash. 2012) [Dkt. 5]. In each lawsuit, Stehrenberger sought a declaration that Chase does not own any of WaMu's loans, and an injunction barring Chase from attempting to enforce those loans.

Stehrenberger voluntarily dismissed the Southern District of New York and Eastern District of Washington actions. *Stehrenberger*, No. 1:12-cv-07212-AJN [Dkt. 18]; *Stehrenberger*, No. CV-12-543-JLQ, 2012 U.S. Dist. LEXIS 154223, *1-2 (E.D. Wash. 2012). Before Stehrenberger dismissed the Eastern District of Washington action, the judge had ordered her to amend or voluntarily dismiss her complaint, since she failed to plead allegations showing she had standing to challenge the PAA. *Stehrenberger*, No. CV-12-543-JLQ, Dkt. 6 at 3. The court also noted Stehrenberger had "filed a nearly identical suit in the United States District Court for the Southern District of Ohio just days after filing this one." *Id.* at 4.

Meanwhile, the magistrate judge in the Southern District of Ohio action issued an order on September 26 recommending dismissing the complaint because Stehrenberger's theory that Chase did not acquire any of WaMu's loans was "unsupported" and "indisputably lacks merit." *Stehrenberger*, 2012 WL 443217, *3. The magistrate explained the FDIC had statutory authority to transfer WaMu's assets "without any approval,

assignment, or consent with respect to such transfer." *Id.* (quoting 12 U.S.C. § 1821(d)(2)(G)(i)(II). It emphasized numerous courts have held that through the PAA, Chase acquired WaMu's loans. *Id.* (citing cases).

On November 2, 2012, the Ohio Federal District Court adopted the magistrate's recommendation and dismissed Stehrenberger's complaint with prejudice. *Stehrenberger*, 2012 WL 5389682, *1, 6. In so doing, the court ruled that as "a debtor and a nonparty to the PAA," Stehrenberger "lacks standing to challenge alleged flaws in the PAA documents." *Id.* at *4 (citing *Livonia Prop. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC*, 399 Fed. Appx. 97, 102 (6th Cir. 2010)). The court also emphasized that courts have consistently presumed the PAA's validity and held Chase has authority to enforce WaMu loans. *Id.* (collecting cases). And the court noted Stehrenberger had "not alleged that WaMu did not own her loan or that it had transferred its interest in her loan prior to Chase's acquisition of WaMu's assets," or that any other entity had attempted to enforce the Note. *Id.* at *5.[4]

IV. STANDARDS OF REVIEW

This Court reviews an order granting summary judgment de novo. *See Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 271 (2012). Summary judgment is appropriate when the pleadings and supporting materials

[4] Around the same time she filed these lawsuits against Chase, Stehrenberger also filed (and then voluntarily dismissed) two more actions against Chase's trial court attorneys in this case, based on the same theory that Chase acquired none of WaMu's loans, in King County Superior Court. *Stehrenberger v. LaMunyon et al.*, No. 12-2-03366-8 SEA (King Cnty., Jan. 26, 2012) (alleging Chase did not acquire any of WaMu's loans; voluntarily dismissed June 13, 2013); *Stehrenberger v. LaMunyon et al.*, No. 12-2-25983-6 SEA (King Cnty., Aug. 6, 2012) (same allegations; voluntarily dismissed June 13, 2013).

"show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c); *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501 (2005). Once the moving party meets the initial burden of demonstrating the absence of genuine issues of material fact, the nonmoving party bears the burden of producing admissible evidence showing that material facts are in dispute. *See Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516 (1990). "A material fact is one upon which the outcome of the litigation depends in whole or in part." *Id.*

The nonmoving party ***cannot*** meet that burden "by responding with conclusory allegations, speculative statements, or argumentative assertions." *Pagnotta v. Beall Trailers of Or., Inc.*, 99 Wn. App. 28, 36 (2000). *See also Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852 (1986) (same). If the nonmoving party "'fails to make a showing sufficient to establish the existence of an element essential to [her] case, and on which [she] will bear the burden of proof at trial,' then the trial court should grant the motion." *Young v. Key Pharmas., Inc.*, 112 Wn.2d 216, 225 (1989) (citation omitted).

This Court reviews attorney fee awards for abuse of discretion. *Mahler v. Szucs*, 135 Wn.2d 398, 435 (1998). An abuse of discretion exists only when the court exercises its discretion on manifestly unreasonable grounds. *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 519 (1996).

V. ARGUMENT

A. The Trial Court Correctly Granted Summary Judgment for Chase Because Chase Acquired and Has Authority to Enforce Stehrenberger's Loan.

The trial court granted Chase's motion for summary judgment on Chase's breach of contract claim, and on Stehrenberger's unjust enrichment and CPA counterclaims, because it correctly found that Chase has authority to enforce the Note "under FDIC and FIRREA" laws, and "the assignment of a note by the FDIC on behalf of a failed institution, in this case Washington Mutual, carries with it the right to enforce the instrument." CP 1342 (citing *Gerard*, 90 Wn. App. at 176-77). The court also found "[w]here a note has been lost, the holder of the note may nonetheless prosecute the claim based upon a lost note," observing Chase "stands in the shoes of Washington Mutual and FDIC." CP 1344:8-11.

The Court should affirm because the trial court correctly acknowledged Chase acquired Stehrenberger's loan by operation of law under FIRREA, and can enforce the Note even without an original copy or a lost note affidavit. The Court may also affirm on the additional grounds that res judicata bars Stehrenberger's claim that Chase did not acquire any of WaMu's loans, and the holder in due course doctrine prohibits Stehrenberger from pursuing claims or defenses to enforcement against Chase. *Washburn v. City of Fed. Way*, 310 P.3d 1275, 1287 n.9 (Wash. Oct. 17, 2013) (court may affirm "trial court's disposition of a motion for summary judgment … on any ground supported by the record.").

1. Chase Acquired Stehrenberger's Loan from the FDIC by Operation of Law.

"FIRREA's statutory scheme ... contemplates the FDIC's sweeping authority to manage the affairs of a failed bank to further the purpose of expeditious resolution of the failed bank's affairs." *GECCMC 2005-C1 Plummer St. Office Ltd. v. JPMorgan Chase Bank, N.A.*, 671 F.3d 1027, 1035 (9th Cir. 2012). Under FIRREA, the FDIC has "broad powers to allocate assets and liabilities." *W. Park Assocs. v. Butterfield Sav. & Loan Ass'n*, 60 F.3d 1452, 1459 (9th Cir. 1995). In particular, FIRREA authorizes the FDIC to "take over the assets of ... the insured depository institution," 12 U.S.C. § 1821(d)(2)(B)(i), and to "take any action . . . which [the FDIC] determines is in the best interests of the depository institution," *id.* § 1821(d)(2)(J)(ii). Stehrenberger agrees with these propositions. CP 21 ¶ 11, 99 n.4 (quoting 12 U.S.C. § 1821(d)(2)(A)-(B)).

As Stehrenberger acknowledges, on September 25, 2008, WaMu was placed in receivership with the FDIC, who, as the receiver, "succeeded to all of the rights, title, and interest of [WaMu] in and to all of the assets." CP 193 (citing 12 U.S.C. § 1821(d)(2)(A)(i)). The FDIC, as receiver, also had authority under FIRREA to "transfer any asset or liability of [WaMu] ***without*** any approval, ***assignment***, or consent with respect to such transfer." 12 U.S.C. § 1821(d)(2)(G)(i)(II) (emphasis added); *Demelo v. U.S. Bank Nat'l Ass'n*, 727 F.3d 117, 125 (1st Cir. 2013) (same). Under this authority, on September 25, 2008, the FDIC

executed the PAA and sold to Chase "all loans and all loan commitments, of Washington Mutual." CP 93 ¶ 4. The PAA states the "the Assuming Bank hereby purchases from the Receiver, and the Receiver hereby sells, assigns, transfers, conveys, and delivers to the Assuming Bank, all right, title, and interest of the Receiver in and to all of the assets," and lists "Loans" as among the WaMu assets Chase purchased. CP 633 ¶ 3.1; CP 660. Under FIRREA, this alone sufficed to transfer all of WaMu's loans from the FDIC to Chase. *See* 12 U.S.C. § 1821(d)(2)(G)(i)(II). "No additional approval, assignment, or consent was necessary to affect the transfer." *Barton v. JPMorgan Chase Bank, N.A.*, 2013 WL 5574429, *1 (W.D. Wash. 2013) (Chase acquired WaMu's loans through PAA; granting motion to dismiss with prejudice).

Indeed, because FIRREA expressly does ***not*** require an assignment identifying each transferred loan, courts have repeatedly found the PAA presumptively valid, and have "consistently held that Chase became the owner of WaMu's loans and loan commitments by operation of law." *Stehrenberger*, 2012 WL 4473217, *3 (collecting cases). *See also GECCMC 2005-C1 Plummer St.*, 671 F.3d at 1035-36 (enforcing PAA between FDIC and Chase); *Stehrenberger*, 2012 WL 5389682, *4 (PAA presumed valid); *Lomely v. JPMorgan Chase Bank*, 2012 WL 4123403, *3-4 (N.D. Cal. 2012) (rejecting argument Chase failed to acquire WaMu loan under PAA; granting motion to dismiss); *Jones v. JPMorgan Chase Bank, N.A.*, 2012 WL 4815468, *1 (N.D. Cal. 2012) (same; granting

motion to dismiss); *Eng v. Dimon*, 2012 WL 3659600, *1 (N.D. Cal. 2012) (Chase "purchased all of Washington Mutual's assets, including the loan at issue here, pursuant to a Purchase and Assumption Agreement"; granting motion to dismiss); *Barton*, 2013 WL 5574429, *1.

For instance, in *Heflebower v. JPMorgan Chase Bank, NA*, 2013 U.S. Dist. LEXIS 141278, *14-16 (E.D. Cal. 2013), the court dismissed plaintiff's unjust enrichment claim against Chase because under the PAA, "the FDIC transferred to Chase 'all right, title, and interest of the Receiver in and to all of the assets' of WaMu." Thus, "Chase purchased WaMu's loans, including the right to collect payments against the loans, and the right to foreclose on them for failure of borrower to tender payments." *Id.* at *14. Because the plaintiff admitted "he contracted to borrow funds from WaMu," and because the PAA transferred all of WaMu's loans to Chase, "Chase was legally and justly entitled to collect and retain loan payments from Plaintiff." *Id.* at *16.

Like the plaintiff in *Heflebower*, Stehrenberger here admits she obtained a loan from WaMu, admits WaMu failed and the FDIC placed it in receivership, admits the FDIC executed the PAA with Chase, and admits she owes money on the loan. *See* CP 249 ¶¶ 64, 70-71; CP 882-86; CP 1011-12, 1016-17; CP 1077. The trial court correctly found no genuine issue of material fact exists that Chase acquired Stehrenberger's WaMu loan from the FDIC, and has authority to enforce that loan under FIRREA. CP 1342; 12 U.S.C. § 1821(d)(2)(G)(i)(II); *Stehrenberger*, 2012

WL 5389682, *3; *Heflebower*, 2013 U.S. Dist. LEXIS 141278, at *14-15; *Barton*, 2013 WL 5574429, *1. Stehrenberger cites no authority to the contrary and indeed, entirely ignores FIRREA and the numerous cases establishing that Chase acquired WaMu's loans under the PAA. Br. at 25.

That the FDIC may transfer a failed institutions assets to the purchasing institution without individual assignments makes sense. Congress intended FIRREA "[t]o provide funds from public and private sources to deal expeditiously with failed depository institutions," *GECCMC 2005-C1 Plummer St.*, 671 F.3d at 1035 (quoting Pub. L. No. 101-73, § 101(8) (1989)), and to "promot[e] free marketability from the FDIC of notes formerly held by failed financial institutions," *Gerard*, 90 Wn. App. at 176. The trial court correctly recognized that these policy concerns support interpreting FIRREA as written—i.e., as permitting the FDIC to transfer all of WaMu's assets to Chase "***without*** any … assignment." 12 U.S.C. § 1821(d)(2)(G)(i)(II) (emphasis added); CP 1342.

To the extent Stehrenberger argues the Court should conclude Chase cannot enforce the Note based on WaMu's allegedly improper conduct, the Court should reject those arguments. *See Washburn*, 310 P.3d at 1287 n.9 (court may affirm on any ground supported in record). Under FIRREA, the FDIC "and ***not*** a subsequent purchaser of assets, is the successor to a failed thrift's liabilities unless [the FDIC] expressly

designates otherwise." *Payne v. Sec. Sav. & Loan Ass'n*, 924 F.2d 109, 111 (7th Cir. 1991) (emphasis added).

Here, Chase expressly assumed WaMu's assets but not "any liability associated with borrower claims for payment of or liability to any borrower." CP 633 ¶ 2.5. As a result, courts have repeatedly held plaintiffs must pursue claims arising from WaMu's conduct against the FDIC, not Chase. *See, e.g.*, *GECCMC 2005-C1 Plummer St.*, 671 F.3d at 1036 (plaintiff required to pursue claim for losses against FDIC, not Chase); *Carmichael v. Wash. Mut. Bank, F.A.*, 508 Fed. Appx. 666, 666-67 (9th Cir. 2013) (plaintiff cannot pursue claims against Chase based on WaMu's alleged wrongful conduct because Chase did not assume borrower liability under PAA); *Yeomalakis v. FDIC*, 562 F.3d 56, 60 (1st Cir. 2009) (plaintiff not permitted to substitute Chase as defendant because claims related to WaMu's actions before September 25, 2008); *McCann v. Quality Loan Serv. Corp.*, 729 F. Supp. 2d 1238, 1241 (W.D. Wash. 2010) (collecting cases); *French v. JPMorgan Chase Bank, N.A.*, 2013 U.S. Dist. LEXIS 168309, *8 (S.D. Cal. 2013); *Coward v. JPMorgan Chase Bank*, 2013 U.S. Dist. LEXIS 22412, *12-13 (E.D. Cal. 2013) (FIRREA bars plaintiff from bringing claim forgery occurred in loan origination against Chase); *Gossen v. JPMorgan Chase Bank*, 819 F. Supp. 2d 1162, 1167-68 (W.D. Wash. 2011); *Rockwell v. Chase Bank*, 2011 U.S. Dist. LEXIS 61279, *10-11 (W.D. Wash. 2011); *Danilyuk v. JPMorgan Chase Bank, N.A.*, 2010 WL 2679843, *3-4 (W.D. Wash.

2010) (collecting cases). Stehrenberger effectively admits as much, acknowledging that "[a]ccording to the Purchase and Assumption Agreement between the [FDIC] and [Chase], Plaintiff Chase did not acquire all liabilities at the same time that it purportedly acquired certain assets." CP 21 ¶ 12.

Finally, the Court may also affirm on the additional ground that, as the Southern District of Ohio court found, Stehrenberger lacks standing to challenge the PAA. *Stehrenberger*, 2012 WL 5389682, *4. Stehrenberger is not a party to the PAA. The PAA "expressly disclaims any intent to create third-party beneficiaries." *GECCMC 2005-C1 Plummer St.*, 671 F.3d at 1034; *see also* CP 654. Stehrenberger therefore cannot establish third-party beneficiary standing to challenge the PAA. *See GECCMC 2005-C1 Plummer Street*, 671 F.3d at 1034; *Stehrenberger*, 2012 WL 5389682, *4 (citing *Livonia*, 399 Fed. Appx. at 102 (borrower lacks standing to challenge flaw in assignment to which borrower was neither a party nor third-party beneficiary)).

The Southern District of Ohio court suggested, however, that Stehrenberger "*would* have standing to defend against Chase's enforcement of her WaMu loan under the theory that WaMu had sold her loan *prior* to Chase entering into the PAA." 2012 WL 5389682, *5. But here, as there, Stehrenberger failed to present any evidence on summary judgment suggesting WaMu sold her loan before the FDIC transferred WaMu's loans to Chase, or that any entity other than Chase is attempting

to enforce the Note. *See id.*; *see also Pagnotta*, 99 Wn. App. at 36 (conclusory or speculative allegations insufficient on summary judgment); *Meyer*, 105 Wn.2d at 852 (same).

2. Res Judicata Bars Stehrenberger from Pursuing Her Claims or Legal Theories.

The Court should affirm the trial court on the additional ground that res judicata bars Stehrenberger from pursuing her claims and defenses against Chase because the Southern District of Ohio reached a final judgment on the merits on the same claims between the same parties. *See Washburn*, 310 P.3d at 1287 n.9. "Under principles of federal supremacy, a federal judgment must be given full faith and credit in the state courts, which includes recognition of the res judicata effect of the federal judgment." *Loveridge v. Fred Meyer, Inc.*, 72 Wn. App. 720, 724 (1993) (citing 1B J. Moore, J. Lucas & T. Carrier, Federal Practice ¶ 0.406[2], at 275 (2d ed. 1991)). *See also Rogers v. City of Whitehall*, 494 N.E.2d 1387, 1389 (Ohio 1986) ("claim litigated to finality in the United States district court cannot be relitigated in a state court").[5]

"Res judicata ensures the finality of decisions," *Pederson v. Potter*, 103 Wn. App. 62, 67 (2000), and prevents against "duplicitous litigation," *Kuhlman v. Thomas*, 78 Wn. App. 115, 120 (1995). "The threshold requirement of res judicata is a final judgment on the merits in the prior suit." *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865 (2004).

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[5] Chase cites Ohio res judicata principles to the extent Ohio law applies to the preclusive effect of the Southern District of Ohio court's decision. The result does not differ under either state's res judicata principles.

See also Rogers, 494 N.E.2d at 1389 (prior action must have been "litigated to finality"). Once the court finds that threshold met, the court must consider whether the two actions share "identity" as to "(1) subject matter, (2) cause of action, (3) persons or parties, and (4) the quality of the persons for or against whom the claim is made." *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 108 (2013) (citation and internal quotation marks omitted); *see also Rogers*, 494 N.E.2d at 1389 (res judicata applies to final judgment from federal district court "when the state claim involves the identical subject matter previously litigated in the federal court, and there is present no issue of party or privity").

Final Judgment on the Merits. "Dismissal of an action 'with prejudice' is a final judgment on [the] merits of a controversy." *Berschauer Phillips Constr. Co. v. Mut. of Enumclaw Ins. Co.*, 175 Wn. App. 222, 228 n.11 (2013). The Southern District of Ohio court dismissed with prejudice Stehrenberger's claim that Chase did not acquire any of WaMu's loans from the FDIC with prejudice. *Stehrenberger*, 2012 WL 5389682, *6. The Southern District of Ohio has therefore reached a final judgment on the merits.

Same Subject Matter. The two cases also involve the same subject matter: Stehrenberger's failure to make payments on the commercial line of credit she obtained from WaMu in 2007, and Chase's authority to enforce WaMu loans. *Compare Stehrenberger*, 2012 WL 5389682, *1, *with* CP 28-29 ¶¶ 3-8; CP 38-39 ¶¶ 35-40; CP 53; CP 57-58 ¶¶ 2-12

(alleging Chase lacks authority to enforce WaMu loans, including Stehrenberger's loan, because PAA did not include specific assignments for each loan). In both cases, Stehrenberger alleged she did not have to make her loan payments to Chase because Chase did not validly purchase WaMu's loans under the PAA. And in both cases, Stehrenberger failed to present any evidence that WaMu sold her loan before the FDIC and Chase executed the PAA, or any evidence that any entity other than Chase has tried to enforce the loan. *See Stehrenberger*, 2012 WL 5389682, *5. "[T]he underlying facts are identical in each lawsuit." *Marshall v. Thurston Cnty.*, 165 Wn. App. 346, 353 (2011).

Same Claims. The two actions also involved the same claims. In analyzing whether two actions present identical claims, "courts consider whether (1) prosecuting the second action would destroy rights or interests established in the first judgment, (2) the evidence presented in the two actions is substantially the same, (3) the two actions involve infringement of the same right, and (4) the two actions arise out of the same transactional nucleus of facts." *Id.* at 354 (citing *Rains v. State*, 100 Wn.2d 660, 664 (1983)). *See also Rogers*, 494 N.E.2d at 1388 (final judgment between parties "is conclusive as to all claims that were or might have been litigated in a first lawsuit"); *Osborn v. Ashland Cnty. Bd. of Alcohol, Drug Addiction & Mental Health Servs.*, 979 F.2d 1131, 1134 (6th Cir. 1992) (under Ohio law, "test for determining whether a second suit is for the same cause of action as the first is to consider the facts

necessary to sustain the two claims").

Here, both cases arise from the same transactional nucleus of facts—Stehrenberger's default on the commercial line of credit she obtained from WaMu in 2007, and the FDIC's transfer of WaMu's loans to Chase under the PAA. Both actions also involve the same rights: Chase's right to enforce the Note, and Stehrenberger's purported right to a declaration that Chase cannot collect on her promissory note. *Compare Stehrenberger*, 2012 WL 5389682, *1, *with* CP 58 (alleging Chase lacks authority to enforce any WaMu loans); CP 1011 (asking court to declare that Chase did not acquire WaMu's loans and cannot enforce them). Stehrenberger could have raised in the Southern District of Ohio case the unjust enrichment and CPA claims she brings as counterclaims here.

Same Parties. Finally, the Southern District of Ohio case also involved the exact same parties: Stehrenberger and JPMorgan Chase Bank, N.A. *See Stehrenberger*, 2012 WL 5389682, *1. The Southern District of Ohio and this action thus satisfy all res judicata elements, providing an additional ground for affirming the trial court's order here.[6]

[6] Res judicata bars this lawsuit for the additional reason that Stehrenberger has now voluntarily dismissed two lawsuits against Chase based on the exact same claims and legal theories, which acts as an adjudication on the merits. *See* CR 41(a)(1)(B); *Stehrenberger v. JPMorgan Chase Bank, N.A.*, 2012 U.S. Dist. LEXIS 154223 (E.D. Wash. Oct. 26, 2012); *Stehrenberger v. JPMorgan Chase & Co.*, No. 1:12-cv-07212-AJN (S.D.N.Y. June 12, 2013) [Dkt. 18]. Because Stehrenberger had not voluntarily dismissed her Southern District of New York action by the time the trial court issued its orders in this case, the trial court could not consider these voluntary dismissals as a basis for granting summary judgment in this case.

B. Chase Has Authority to Enforce Stehrenberger's Loan Without a Lost Note Affidavit as the FDIC's Assignee.

The trial court properly held that Article 3 of the Uniform Commercial Code does not relieve Stehrenberger of her obligation to repay her loan. *See* CP 1342-43, 1410, 1417.

1. Chase Satisfied RCW 62A.3-309 by Proving the Terms of the Note and Its Right to Enforce It.

Chase is entitled to enforce Stehrenberger's Note because Chase proved the terms of Stehrenberger's promise to repay her loan, and Chase's right to enforce that promise. RCW 62A.3-309(b) authorizes Chase to enforce Stehrenberger's lost Note if Chase can "prove the terms of the instrument and [Chase's] right to enforce the instrument." The trial court properly found that Chase satisfied each of those conditions by producing undisputed evidence of the terms of the Note and Chase's acquisition of the Note from the FDIC, as receiver for WaMu.

There is no dispute about the terms of the instrument. Stehrenberger concedes that Chase has introduced into evidence a true and correct copy of the original. *See* CP 58 ¶ 20. That evidence suffices to establish the terms of her obligation. *See* RCW 5.46.010 (copies of business records admissible); *Braut v. Tarabochia*, 104 Wn. App. 728, 733-34 (2001) (admitting into evidence a photocopy of lost original promissory note; once admitted, "its terms are established"); *see also* ER 1003 (copy is admissible to same extent as original). Stehrenberger does not claim the original and the copy differ in any substantial way.

Accordingly, the trial court properly found Chase proved the terms of the instrument.

The trial court also properly decided that Chase proved its right to enforce the instrument. RCW 62A.3-309 states a person not in possession of an instrument is entitled to enforce it if: "(i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process." Chase introduced undisputed evidence on each of these points, giving Chase the right to enforce the instrument no matter who lost it, or when.

If Chase lost the Note, the analysis is straightforward. Chase would have been in possession of the Note and entitled to enforce it, when the loss occurred (satisfying the first element). Stehrenberger presented no evidence on summary judgment (and none exists) that Chase transferred the Note, or that anyone seized the Note from Chase (satisfying the second element). Chase cannot find the Note (satisfying the third element). If Chase lost the Note, it is still entitled to enforce the Note's terms under RCW 62A.3-309.

Chase is also entitled to enforce the Note if WaMu lost it. WaMu

possessed the Note and was entitled to enforce it because Stehrenberger admits signing the instrument and leaving it with WaMu (satisfying the first element). CP 249 ¶ 64. Stehrenberger presented no evidence on summary judgment (and none exists) showing WaMu transferred the Note to anyone except Chase, who bought the Note from the FDIC, as receiver (satisfying the second element). If WaMu lost the Note, then it is a tautology that the Note's whereabouts could not be determined (satisfying the third element). Accordingly, WaMu was entitled to enforce the Note, and Chase bought all the rights of WaMu, including the right to enforce the Note. *See Gerard*, 90 Wn. App. at 183.

The official comments to Washington's Uniform Commercial Code confirm that WaMu had the power to transfer to Chase its rights under RCW 62A.3-309. Those comments provide: "Also, the right under Section 3-309 to enforce a lost, destroyed, or stolen negotiable promissory note may be sold to a purchaser who could enforce that right by causing the seller to provide the proof required under that section. This Article rejects decisions reaching a contrary result, e.g., *Dennis Joslin Co. v. Robinson Broadcasting*, 977 F. Supp. 491 (D.D.C. 1997)." RCW 62A.9A-109, cmt. 5. The Permanent Editorial Board for the Uniform Commercial Code agrees that courts should interpret Washington's version of UCC 3-309 to authorize a transferee from the person who lost possession of a note to qualify as a person entitled to enforce it. Report of the Permanent Editorial Bd. for the Uniform Comm. Code at 6 n.25 (ALI

Nov. 14, 2011), *available at* www.ali.org/00021333/peb%20report%20-%20november%202011.pdf; *see also* CP 1067-68, 1413 (citing Report).

The trial court properly chose to follow Washington law, and the advice of the Permanent Editorial Board, instead of the out-of-jurisdiction cases Stehrenberger cites, *see* Br. at 21-24, 32-34, including the rejected *Dennis Joslin* decision. *See also Allen v. US Bank, Nat'l Ass'n* (*In re Allen*), 472 B.R. 559, 566 (B.A.P. 9th Cir. 2012) (assignee of lost note could enforce note terms under RCW 62A.3-309, and collecting authorities, including *Atl. Nat'l Trust, LLC v. McNamee*, 984 So.2d 375 (Ala. 2007) (assignee not in possession when note was lost could enforce note under Alabama's former § 7-3-309, which was identical to RCW 62A.3-309, if assignor was entitled to enforce note before assignment)).[7]

2. Stehrenberger Must Pay Chase Under Common Law Principles.

Washington law also gave the FDIC the power to assign WaMu's rights to Chase. In *Federal Financial Co. v. Gerard*, the FDIC, acting as the receiver for a failed bank, assigned a promissory note to a financial institution. 90 Wn. App. 169 (1998). The buyer then sued on the note.

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[7] Stehrenberger's other out-of-jurisdiction authorities are also distinguishable, in any event. *See, e.g.*, Br. at 19 (citing *Premier Capital, LLC v. Gavin*, 319 B.R. 27, 32 (1st Cir. 2004) (no evidence note had been assigned to plaintiff in non-FIRREA case)); Br. at 20 (citing *Marks v. Braunstein*, 439 B.R. 248, 252 (D. Mass. 2010) (party seeking to enforce note failed to present secondary evidence proving existence and terms of note)); Br. at 22 (citing *State St. Bank & Trust Co. v. Lord*, 851 So.2d 790, 791(4th Dist. Ct. App. Fla. 2003) (record showed assignor never possessed note)); Br. at 23 (citing *McKay v. Capital Resources*, 940 S.W.2d 869, 869 (Ark. 1997) (record showed numerous assignments, raising inference of possible double liability)); Br. at 32-34 (citing *Priesmeyer v. Pac. Sw. Bank, F.S.B.*, 917 S.W.2d 937, 940 (Tex. Ct. App. 1996) (bank failed to show transfer and assumption agreement transferred loan at issue as a matter of law, unlike Chase here, which showed numerous cases have repeatedly held the PAA transferred all WaMu's loans to Chase)).

The borrower argued the buyer could not take advantage of an extended statute of limitations provided to the FDIC under federal law. This Court determined that, under Washington law, the buyer was entitled to ***all*** of the rights of the assignor, including "not only those identified in the contract, but also applicable statutory rights." *Id.* at 177. The Court rejected arguments that the extended statute of limitations was personal to the FDIC and could not be assigned because it conferred no benefit independent of the asset to which it related. *Id.* at 178-80. For support, this Court referred to *Puget Sound National Bank v. State Department of Revenue*, which clarifies that "an assignment carries with it the rights and liabilities as identified in the assigned contract, but also all applicable statutory rights and liabilities." 123 Wn.2d 284, 292-93 (1994) (en banc).

The trial court properly relied on *Gerard* when it entered judgment for Chase. If WaMu lost Stehrenberger's Note, WaMu nevertheless would have been entitled to enforce her promises under RCW 62A.3-309. That right did not disappear with WaMu, leaving Stehrenberger with a windfall. To the contrary, the FDIC assigned that right to Chase when it transferred WaMu's other assets. Stehrenberger accurately observes that *Gerard* involved a different statutory right, not a lost note, but the principles articulated by this Court in *Gerard* apply equally here. "[T]he assignment of a note by the FDIC carries with it the right to enforce the instrument." *Gerard*, 90 Wn. App. at 177 (citing RCW 62A.3-203(b)). WaMu's rights

under RCW 62A.3-309 now belong to Chase, and Chase may enforce them.

3. Chase Does Not Need to Introduce a Lost Note Affidavit to Enforce Stehrenberger's Promise.

Chase satisfied all the elements of RCW 62A.3-309 with testimony in the form of declarations and other authenticated evidence. RCW 62A.3-309 does not use the phrase "lost note affidavit," and no such document was required here because the trial court properly determined Chase had introduced "proof" of the Note and Chase's right to enforce it. The rules of evidence permit Chase to introduce any relevant, authenticated evidence as proof of the facts that are of consequence to this action. *See* ER 401, 901. The trial court could properly consider deposition testimony, public records, and other authenticated documents. *See Braut*, 104 Wn. App. at 731-32 (not abuse of discretion to admit photocopy of note, collateral agreement); *Fin. Freedom v. Kirgis*, 877 N.E.2d 24 (Ill. Ct. App. 2007) (proof of debt supplied with deposition testimony, copy of power of attorney, and copy of mortgage agreement), *overruled on other grounds by* 931 N.E.2d 1190 (Ill. 2010).

Chase presented the trial court with incontestable evidence satisfying all the elements of RCW 62A.3-309. Stehrenberger borrowed money and signed a Promissory Note as evidence of her obligation to pay it back. CP 4-13; CP 249 ¶ 64. Stehrenberger signed and left the original Note with WaMu. CP 249 ¶ 64. Chase bought all of WaMu's loans, including WaMu's rights against Stehrenberger. CP 93, 633, 660.

Although the original Note is misplaced, Chase has a copy that reflects all the terms of the original. CP 4-10. This evidence is not in a single document labeled "lost note affidavit," but the trial court properly found that Chase had supplied the requisite proof of the terms of the Note and Chase's right to enforce it.

4. The Court Properly Denied Stehrenberger's Untimely Request for Protection.

The trial court correctly found that Stehrenberger has adequate protection against the risk that some other person might come forward to enforce her Note. RCW 62A.3-309 authorized the trial court to enter judgment in favor of Chase if the trial court found "that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means." The comments to RCW 62A.3-309 explain a substantial risk of loss might exist if the instrument is payable to bearer. If, however, "the instrument was payable to the person who lost the instrument and that person did not indorse the instrument, no other person could be a holder of the instrument." RCW 62A.3-309 (comments). In some cases, "there is risk of loss only if there is doubt about whether the facts alleged by the person who lost the instrument are true." *Id.*

The trial court's decision adequately protects Stehrenberger. She does not need a bond or indemnity because she does not face a risk that she will be asked to pay twice. The Promissory Note was payable to

WaMu; it bears no indorsement that would make it payable to another person or in blank. CP 4-10. In other words, even if some other person now possesses Stehrenberger's Note, that person could not enforce the Note because the Note is payable to WaMu (and Chase is the only entity entitled to enforce WaMu's loans).

The trial court's decision provides the only protection Stehrenberger reasonably needs, considering the absence of any evidence that any person, other than Chase, is entitled to (or is trying to) enforce her debt. Stehrenberger has never articulated any specific basis for her alleged fear that some other person might be entitled to enforce her Note. No one other than Chase and WaMu has ever asked her to pay. No one other than Chase and WaMu and their agents has sent her billing statements, invoices, or default notices. Stehrenberger has never dealt with anyone except Chase and WaMu. The public land records do not show any other person with a security interest in Stehrenberger's property, and no other person has intervened in this action (or the three other actions commenced by Stehrenberger with respect to this commercial line of credit). There is no reasonable basis to doubt that Chase is entitled to enforce the Note.

C. The Holder in Due Course Doctrine Bars Stehrenberger's Defenses to the Note.

The Court may also affirm the trial court's order granting summary judgment for Chase under the federal holder in due course doctrine. When a bank fails and the FDIC steps in as a receiver to facilitate a purchase and assumption agreement, federal common law dictates that the FDIC and its

assignees obtain the underlying loans as holders in due course, free of any previous defenses to enforcement. This fulfills several policy objectives, including "promot[ing] the necessary uniformity of [the] law" and "confidence and stability in financial institutions." *Fed. Sav. & Loan Ins. Corp. v. Murray*, 853 F.2d 1251, 1256-57 (5th Cir 1988).

The Ninth Circuit has expressly adopted the federal holder in due course doctrine: "Developed as a matter of federal common law, the federal holder-in-due-course doctrine affords federal bank regulatory agencies the same defenses accorded a holder-in-due-course under state law, even where those agencies do not meet the 'technical state-law requirements for holder in due course status.'" *Resolution Trust Corp. v Kennelly*, 57 F.3d 819, 821 (9th Cir. 1995) (citations omitted). The FDIC's status as a holder in due course carries over to assignees (like Chase) under the shelter doctrine. "Under the governing federal law, the FDIC and similar financial institution insurers receive are given holder in due course status and that status is also acquired by their assignees under the shelter doctrine." 2 White & Summers, *Uniform Commercial Code*, § 17-13 (5th ed. 2008). *See also Fed. Sav. & Loan Ins. Corp. v. Cribbs*, 918 F.2d 557, 559-60 (5th Cir. 1990) (extending federal holder in due course status to private assignees of FDIC and FSLIC).

Washington law agrees: "Transfer of an instrument ... vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course." RCW 62A.3-203(b). As a general

rule, a holder in due course takes a negotiable instrument free from "all claims to it on the part of any person," and from "all defenses of any party to the instrument with whom the holder has not dealt." *Wesche v. Martin*, 64 Wn. App. 1, 8 (1992) (citations omitted).

The holder in due course doctrine bars Stehrenberger from asserting claims or defenses against Chase arising from WaMu's conduct or loan origination. "[T]he assignment of a note by the FDIC carries with it the right to enforce the instrument." *Gerard*, 90 Wn. App. at 177 (assignee of note from FDIC, acting as receiver, had right to enforce note free from most defenses); RCW 62A.3-305. The very purpose of the shelter doctrine is "to promote a free market for instruments," and allowing Stehrenberger to assert against Chase defenses arising from WaMu's conduct would defeat that purpose. *Id.* Because Chase obtained Stehrenberger's loan from the FDIC (acting as receiver) as part of a purchase and assumption agreement, Chase acquired that loan as a holder in due course. *See Gossen*, 819 F. Supp. 2d at 1167-68 (applying holder in due course doctrine to bar borrower claims and defenses against Chase arising from WaMu's conduct).

D. The Court Properly Exercised Discretion in Granting Chase Fees as the Prevailing Party Under the Note.

The trial court properly exercised its discretion in granting Chase's request for prevailing party fees under the Note and RCW 4.84.330. CP 1442-49. RCW 4.84.330 provides: "In any action on a contract ..., where such contract ... specifically provides that attorney's fees and costs, which

are incurred to enforce the provisions of such contract ..., shall be awarded to one of the parties, the prevailing party ... shall be entitled to reasonable attorneys' fees" and costs. Stehrenberger agreed under the Note that she "will pay Bank" its attorney's fees and legal expenses incurred "to help collect this Note if [she] does not pay." CP 7. The Note states it "shall inure to the benefit of Bank and its successors and assigns." CP 8. Chase became the assignee under the Note when it acquired WaMu's loans from the FDIC through the Purchase and Assumption Agreement. *See* CP 93; *Barton*, 2013 WL 5574429, *1; *Heflebower*, 2013 U.S. Dist. LEXIS 141278, *14-15. RCW 4.84.330 and the Note thus give Chase the right to seek prevailing party attorney's fees.

Stehrenberger does not dispute that Chase was the prevailing party in the trial court; nor does she dispute the hourly rates. Br. at 40-41. Instead, she takes issue with the $32,000 Chase spent in responding to her over 400 discovery requests and multiple motions to compel, as well as other unidentified billings she believes were "wasteful or duplicative." *Id.* at 41. The trial court "[found] that these fees and costs were reasonable and necessary to prosecute plaintiffs' claims in light of defendant's protracted defense of this mater." CP 1546. Stehrenberger complains this finding does not reveal "whether or not careful consideration was given" to her objections. Br. at 41. But the trial court has broad discretion to determine the reasonableness of a fee award. *Unifund CCR Partners v. Sunde*, 163 Wn. App. 473, 484 (2011). As the trial court found,

Stehrenberger's aggressive approach to this case—filing numerous oppositions, substantive and discovery motions, and declarations; serving hundreds of discovery requests; and litigating the case for two years—necessitated the work Chase performed and the fees it incurred. CP 1546; *see also Unifund CCR Partners*, 163 Wn. App. at 484-85 (record sufficed to affirm fee award in debt collection case even absent specific factual findings where defendant failed to contest facts supporting fee motion and litigated case for several years). The Court should affirm the fee award.

E. The Court Should Deny Stehrenberger's Request for Fees Under RAP 18.1, and Should Award Chase Fees.

The Court should deny Stehrenberger's request for fees on appeal under RAP 18.1, and should instead award Chase its fees on appeal. "RAP 18.1(a) permits [this Court] to award attorney fees and costs on appeal if applicable law grants a party the right to recovery attorney fees or expenses." *Martin v. Johnson*, 141 Wn. App. 611, 623 (2007). *See also* RAP 18.1(a) (same). Stehrenberger seeks fees under RCW 4.84.330 and the Note. Br. at 42. Stehrenberger effectively concedes she must be a prevailing party to obtain such fees, however. *See id.* at 42 (citing *Kaintz v. PLG, Inc.*, 147 Wn. App. 782 (2008) (prevailing party in contract action may seek fees even if party prevailed in establishing contract was unenforceable)). "In general, a prevailing party who is entitled to attorney fees below is entitled to attorney fees if [she] prevails on appeal." *Martin*, 141 Wn. App. at 523. But Stehrenberger did not prevail in the trial court

and will not prevail here, so she has no right to seek fees on appeal. *See id.* The Court should therefore deny her fee request.

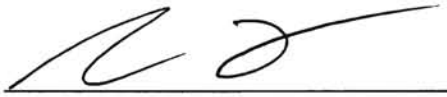
Meanwhile, the Court should award Chase its fees on appeal. Unlike Stehrenberger, Chase may obtain these fees under RCW 4.84.330 because it is the prevailing party and because, as Stehrenberger acknowledges, *see* Br. at 42, the Note contains a fee provision, under which she agreed to pay Chase fees incurred in collecting on the Note. CP 7, 8 (bank and its assigns may seek fees incurred in collecting on note); CP 93 (Chase acquired WaMu's loans from FDIC by operation of law under FIRREA). "A provision in a contract providing for the payment of attorneys' fees in an action to collect any payment due under the contract includes both fees necessary for trial and those incurred on appeal as well." *Boyd v. Davis*, 127 Wn.2d 256, 264 (1995) (affirming award of fees on appeal under RCW 4.84.330) (quoting *Granite Equip. Leasing Corp. v. Hutton*, 84 Wn.2d 320, 327 (1974)). *See also Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 402 (2010) (granting fee request on appeal under RAP 18.1 and RCW 4.84.330) (citing *Boyd*, 127 Wn.2d at 264-65). The Court should thus award Chase fees under RAP 18.1.

VI. CONCLUSION

For the foregoing reasons, Chase respectfully requests that the Court affirm the trial court's grant of summary judgment, affirm the award of attorneys' fees and costs, deny Plaintiff's request for fees and costs under RAP 18.1, and grant Chase's request for fees and costs under RAP 18.1.

RESPECTFULLY SUBMITTED this 23rd day of December, 2013.

Davis Wright Tremaine LLP
Attorneys for JPMorgan Chase Bank, NA

By 

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CERTIFCATE OF SERVICE

I hereby certify that on December 23, 2013, I caused the foregoing *Brief of Respondent-Plaintiff JPMorgan Chase Bank, N.A.* to be filed with the Clerk of the above-entitled Court and served upon counsel of record in the manner as indicated below:

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