72051-1

72051-1

No. 72051-1-I

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

ALEX C. BARKLEY,

Appellant,

v.

GREEN POINT MORTGAGE FUNDING, INC., et al.,

Respondents.

BRIEF OF RESPONDENTS JPMORGAN CHASE BANK, N.A., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AND U.S. BANK NATIONAL ASSOCIATION

Fred B. Burnside
Hugh R. McCullough
Davis Wright Tremaine LLP
Attorneys for JPMorgan Chase Bank, N.A.,
Mortgage Electronic Registration Systems,
Inc., and U.S. Bank National Association

1201 Third Avenue, Suite 2200
Seattle, Washington 98101-3045
(206) 622-3150 (phone)
(206) 757-7700 (fax)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about a borrower who defaulted on his home loan. Alex C. Barkley sued the holder of his promissory note, and other Respondents, because he wanted to stop his noteholder from enforcing the debt. Barkley is collecting more than $6,000 a month renting out the property securing his debt, but Barkley has not made a payment on the loan in over four years. His default is not caused by confusion about whom to pay, or how much he must pay. Barkley is a real estate agent and investor who knows well he is breaching his obligations to his note holder.

This Court should affirm the Superior Court's entry of summary judgment in favor of Respondents for the following reasons:

First, U.S. Bank was entitled to commence foreclosure because Barkley defaulted and U.S. Bank holds Barkley's promissory note.

Second, the Superior Court properly held that the Respondents are not liable under Washington's Consumer Protection Act (CPA) or Washington's criminal laws because U.S. Bank was entitled to foreclose, and its agents properly communicated that fact to Barkley.

Third, Northwest Trustee acted properly by commencing the nonjudicial foreclosure at U.S. Bank's direction because U.S. Bank, as noteholder, had the right to enforce the deed of trust.

Fourth, the Superior Court properly considered (rather than striking) evidence submitted by Respondents. Nor did the Superior Court err in granting summary judgment just a few months before trial, after Barkley had a fulsome opportunity to conduct discovery.

II. STATEMENT OF ISSUES

1. Did the Superior Court properly dismiss wrongful foreclosure claims against Chase, MERS, and U.S. Bank because Barkley defaulted on his loan and U.S. Bank held his original promissory note?

2. Did the Superior Court properly dismiss Barkley's CPA claims against Chase, MERS, and U.S. Bank because Respondents committed no unfair or deceptive act and their actions did not injure Barkley?

3. Did the Superior Court properly dismiss claims under Washington's criminal laws because Chase, MERS, and U.S. Bank committed no criminal act?

4. Did the Superior Court properly admit the undisputed evidence submitted by Chase, MERS, and U.S. Bank, including declarations by persons with personal knowledge, uncontradicted deposition testimony, and self-authenticating documents?

5. Did the Superior Court property enter summary judgment just a few months before trial, after Barkley had already taken discovery?

III. STATEMENT OF THE CASE

The Superior Court rightly decided that Barkley has no viable claims. Barkley wants to avert foreclosure on his investment property so he can keep collecting roughly $6,400 of monthly rental fees. (CP 751–52 ¶ 17.A.) Unfortunately, Barkley defaulted in August 2010 and doesn't have enough money to pay the arrears on his loan. Nor is he willing to sell

the property to pay his debt, even though he admits there is equity to spare. So he brought this action.

As the Superior Court properly recognized, the undisputed facts show Barkley has no claims. U.S. Bank, through its agents, is in actual possession of the original note. (CP 496 ¶ 5.) Barkley admits he has no evidence to dispute that. (CP 486 at 87:10–88:3; CP 487 at 92:7–22.) Respondents did nothing wrong by communicating to Barkley that unless he cured his default, U.S. Bank would enforce his promises by foreclosing on his investment property.

A. Barkley is a Real Estate Agent and Investor.

Barkley is an experienced real estate investor and agent. Barkley has been a real estate agent since 1999. (CP 472 at 18:15–17.) His most successful years were between 2007 and 2009, when he made between $164,000 and $167,000 a year. (CP 474 at 29:1–18.) To keep his real estate license, he must take between 30 and 40 hours of continuing education classes every two years. (CP 474 at 26:21–27:15.) Those classes include instruction on the law of real estate purchases and sales. (CP 474 at 27:9–13.)

Barkley is also a real estate investor. He rents out the property at issue in this case to make money. (CP 751–52 ¶ 17.A.) Moreover, Barkley buys and sells real estate on his own behalf. (CP 472 at 19:4–21.) He is actively interested in buying and selling more properties. (CP 485 at 72:16–24.) Barkley would have enjoyed borrowing more money to

purchase more properties, but his defaults under his existing loans have prevented him from doing that. (CP 485 at 72:16–24.)

B. Barkley Borrowed Money Secured by a Deed of Trust.

On November 19, 2002, Barkley borrowed money through Greenpoint Mortgage Funding, Inc. to refinance his existing debt on property at 3428 37th Avenue S.W., Seattle, Washington 98126 (the "*Property*"). (CP 2 ¶ 1.1; CP 4 ¶ 3.2.) As evidence of Barkley's obligations to repay the loan, Barkley executed an adjustable rate note (the "*Note*") in favor of Greenpoint in an original principal amount of $291,900. (CP 4 ¶ 3.2; CP 395–400.) The Note explains that the Note could be transferred, and in fact the Note reflects that Greenpoint indorsed the Note in blank, making it bearer paper. (CP 395, 399.)

To secure Barkley's obligations, Barkley executed a deed of trust (the "*Deed of Trust*") stating that if Barkley defaulted on the loan, the noteholder could foreclose. (CP 402–22.) The Deed of Trust identified Greenpoint as "Lender," and identified MERS as "Beneficiary" but solely as nominee for Greenpoint (as the disclosed lender) and any successor or assign of Greenpoint. (CP 4–5 ¶ 3.3; CP 402–22.)

C. Barkley Admitted His Obligation to Repay His Loan.

Barkley does not dispute his loan terms. The settlement statement he received at closing accurately disclosed the payments required during the life of the loan. (CP 478 at 42:12–43:2.) Barkley understood that by signing the Note he was promising to repay the loan. (CP 478 at 43:9–14.) Barkley also understood that by signing the Deed of Trust, his lender

would have the right to foreclose on the Property if Barkley defaulted. (CP 478 at 45:9–18.)

D. Barkley Agreed Greenpoint Could Transfer the Note and Deed of Trust.

Barkley agreed Greenpoint could transfer the right to enforce obligations arising under the Note and Deed of Trust. The Note states that the "Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.'" (CP 395 at ¶ 1.) In the Deed of Trust, Barkley likewise agreed that:

> The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note.

(CP 413 at ¶ 20). Barkley also executed a disclosure statement at the time of his loan. The disclosure statement explained (and Barkley understood) the right to collect his mortgage loan payments might be transferred. (CP 477 at 38:13–23.)

E. U.S. Bank Acquired the Note and Deed of Trust.

U.S. Bank acquired rights to the Note on or around January 30, 2003, the closing date under the Pooling and Servicing Agreement. (CP 425 (defining "Closing Date"), CP 427 (transferring loans to U.S. Bank).) In connection with the acquisition of the Note, U.S. Bank, through its servicer and agents, took delivery of the "Mortgage File," which

included the original Note. (CP 426, 428.) As noteholder, U.S. Bank became beneficiary as a matter of law, with the right to foreclose on the Deed of Trust securing the Note. RCW 61.24.005(2).

U.S. Bank is also beneficiary of record of the Deed of Trust. On September 18, 2012—before any foreclosure sale was even scheduled—MERS, acting in its capacity as nominee (i.e., agent) for U.S. Bank (i.e., Greenpoint's successor and assign as to the Note), assigned its nominee/agency interest under the Deed of Trust to its principal, U.S. Bank, as trustee for Washington Mutual MSC Mortgage Pass-Through Certificates Series 2003-AR1. (CP 8–9 ¶ 3.14; CP 453–54.) This assignment was not given to Barkley (and has no effect on his debt or obligation to pay his loan), and essentially recorded the end of MERS's role as agent under the Deed of Trust. MERS did not assign or purport to assign any interest in the Note. (CP 453–54.) It simply assigned to U.S. Bank any interest MERS had under the Deed of Trust.

F. Chase Acted as Servicer and Attorney-in-Fact for U.S. Bank.

Chase is the servicer for Barkley's loan (i.e., it collects payments, answers questions, etc.). (CP 435–51.) Under a power of attorney, Chase is authorized by U.S. Bank to execute and deliver, on behalf of U.S. Bank, all documents and instruments necessary to conduct any foreclosure, as well as all documents and instruments necessary to assign any deeds of trust. (CP 435–51.) Chase's authority from U.S. Bank is also derived from

the agreement governing the trust for which U.S. Bank acts as trustee. (CP 429–33.)

G. Barkley Knew Chase Was His Servicer.

Barkley knew Chase was his loan servicer—the point of contact for his loan—when he defaulted. Barkley knew he needed to talk to Chase if he wanted a loan modification (*see* CP 479 at 47:2–48:7), and he made payments to Chase through August 2010 (CP 483 at 63:13–23). At the time of foreclosure initiation, Barkley knew no entity other than Chase was claiming to be this loan servicer. (CP 482–83 at 61:25–62:2.) The notice of default correctly identified Chase, as servicer, and U.S. Bank, the owner of Barkley's Note. (CP 49.)

No one other than Chase and U.S. Bank has ever sought to collect payments from Barkley since his default. (CP 480 at 52:9–15; CP 482 at 61:10–15.) No one other than U.S. Bank has ever claimed to own Barkley's loan, or hold his original Note. (CP 483 at 64:3–5.) Barkley has no reason to believe anyone other than U.S. Bank is entitled to payment (by way of U.S. Bank's agent and loan servicer, Chase). (CP 486 at 87:10–88:3; CP 487 at 92:7–22.)

H. U.S. Bank Held the Original Note Through Chase, Its Servicer.

Chase, as servicer for U.S. Bank, had possession of the original Note when Northwest Trustee Services, Inc. ("*NWTS*") commenced the nonjudicial foreclosure proceeding. (CP 496 ¶ 5; *see also* CP 491.) After Barkley commenced this action, Chase delivered the original Note to

counsel for Chase, MERS, and U.S. Bank. (CP 496 ¶ 5.) Barkley recognized his signature on the original Note when it was shown to him during deposition. (CP 478 at 43:4–14, 44:14–22; CP 481 at 56:21–57:1.) Barkley admits he should be paying the person entitled to enforce his Note. (CP 484–85 at 69:5–70:8.) Barkley admits the person entitled to payments is also entitled to foreclose on the Property. (CP 484 at 69:18–23.)

I. Barkley Defaulted, and Profited From His Default.

As a real estate agent, Barkley's income dropped precipitously in 2010. Although in his best year he had made somewhere around $167,000 a year, in 2010 he made only approximately $20,000 a year from his work as a real estate agent. (CP 474–75 at 29:1–30:2.) As a result, it would have been very difficult for him to keep up the payments on the Property. (CP 480 at 51:7–21. 53:9–19.)

Except for one or two subsequent payments, Barkley made his last payment around August 2010—more than four years ago. (CP 475 at 32:18–23; CP 478–79 at 45:20–46:14.) Barkley did not and does not have enough money to cure his default in full without selling the Property. (CP 482 at 60:1–18; CP 480 at 53:3–19.) Barkley could have sold the Property to pay off his defaulted loan. There is equity in the property after accounting for all the liens encumbering it. (CP 473 at 23:6–14.)

Instead, Barkley started making money by renting out the Property while not paying his loan. Barkley does not reside at the Property. (CP 469 at 9:7–8.) He rents out the Property in a series of short-term leases, some

as short as three days. (CP 469 at 9:11–23.) Barkley collects roughly $6,400 a month in rent, which he is not paying to his noteholder. (CP 751–52 ¶17.A.)

Even if Barkley were making his regular monthly payments—which he is not—Barkley still would be profiting. His loan carries a variable rate of interest, which would have required monthly payments of principal and interest of only $1,440.82 (not including amounts required to cure his arrearage). (CP 496 ¶ 6.)

J. Barkley Received an Accurate Notice of Default.

Barkley knew he needed to pay his loan to avoid foreclosure. Barkley received a notice of default that informed him of what he owed and who he could contact to make payments. (CP 48–52.) At the time of the notice of default, Barkley was in arrears by not less than the $16,090.51. (CP 48–52.) The notice of default accurately identified U.S. Bank as the owner of the Note and as the beneficiary of the Deed of Trust. (CP 48–52.) The notice of default also provided Barkley with contact information for U.S. Bank's servicer, Chase. (CP 48–52.)

Although Barkley received the notice of default and understood what it meant, he did not cure his default because he did not have enough money to make the required payments. (*See* CP 480 at 53:3–19.) His default had nothing to do with purported inaccuracies in the notice of default. (*See* CP 480 at 53:14–19.) When asked, Barkley could not identify any basis for disputing the information contained in the notice of default. (CP 486 at 87:10–88:3; CP 487 at 92:7–93:4.)

K. U.S. Bank Commenced Foreclosure.

On November 7, 2012, U.S. Bank, the beneficiary under the Deed of Trust, appointed NWTS to serve as trustee under the Deed of Trust. (CP 456–59.) On December 13, 2012, NWTS recorded a Notice of Trustee's Sale identifying Barkley's default under the loan, with an arrearage of no less than $54,146.44, and notifying Barkley that a foreclosure sale would occur on March 15, 2013, absent payment in full of all delinquencies. (CP 461–65.)

Barkley admits he did not have enough money to pay his loan. (CP 480 at 53:14–19.) When Barkley received the Notice of Trustee's Sale, he could not have paid the arrearage. (CP 482 at 59:22–60:18; CP 485 at 70:16–25.) Barkley admits he cannot cure his default without selling the Property, and Barkley is unwilling to sell the Property. (CP 473 at 23:6–24:8.)

L. Barkley Received Other Accurate Documents.

Barkley was unable to identify anything inaccurate about the documents executed by Chase, MERS, and U.S. Bank. Apart from his lawyer's legal arguments concerning the effect of *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83 (2012), Barkley is not aware of anything inaccurate about the assignment of the deed of trust. (CP 482 at 59:4–7.) Although Barkley does not recall ever having seen the appointment of a successor trustee, Barkley is not aware of anything inaccurate about that document either. (CP 482 at 59:12–20.) And, as

discussed above, there was nothing wrong with the notice of default. (*See supra* Section III.J.)

M. Barkley's Lawyer Demanded Information Barkley Already Had.

Well after Barkley's default, Barkley's lawyer sent Chase a letter demanding information Barkley already possessed. (CP 54–76.) The letter demanded the identity of the beneficiary under Barkley's Deed of Trust (CP 57), but the notice of default Barkley received already identified the beneficiary as U.S. Bank (CP 49). Barkley's lawyer demanded the identity of Barkley's servicer (CP 62), but Barkley knew who his servicer was from a long course of dealings (*see, e.g.*, CP 479 at 47:2–48:7), as well the recent correspondence in connection with his default (CP 60). Barkley admits his default had nothing to do with his lack of information about the identity of his noteholder or his servicer. Instead, he defaulted because he didn't have enough money to pay his loan. (*See* CP 480 at 53:3–19; CP 482 at 59:12–60:18.)

Chase responded to the letter from Barkley's lawyer (CP 78–81, 86–87). Barkley claims that Chase's response did not include copies of his Note and Deed of Trust. Chase disputes that. (*See* CP 481 at 54:24–57:21.) What is clear, however, is that Barkley already had copies of those documents because he attached them to his complaint. (CP 19–46.)

N. Barkley Suffered No Injury.

Barkley is not sure how he has been injured. (CP 485 at 71:5–8.) No foreclosure actually occurred and Barkley remains the owner of the

Property. (*See* CP 2 ¶ 1.1.) He would have liked to have refinanced his loan at the market low, and he believes his credit has been impaired as a result of his failure to pay his loan. (CP 485 at 71:5–14.) Barkley has not actually tried to obtain any credit apart from one credit card offer. (CP 485 at 71:25–72:15.) The most he can say is if his credit score were higher he would like to have borrowed more money to buy more investment properties. (CP 485 at 72:16–24.)

O. MERS Did Not Injure Barkley.

Barkley has no reason to believe MERS in particular caused him any injury. Barkley does not know what MERS did in connection with his loan transaction. (CP 484 at 67:24–68:4.) MERS did not communicate with Barkley. (CP 484 at 68:5–6.) Barkley does not know whether MERS did anything wrongful (CP 484 at 68:17–19). Barkley did not talk to MERS about a loan modification. (CP 479 at 48:20–24.) Barkley does not know what role MERS played in his loan transaction. (CP 479 at 49:3–11.)

P. U.S. Bank Did Not Injure Barkley.

Barkley does not know what U.S. Bank did to hurt him. (CP 484 at 68:20–22.) Barkley did not contact U.S. Bank to ask about a loan modification. (CP 479 at 49:12–15.) Barkley has no reason to doubt U.S. Bank is entitled to payment. (CP 486 at 87:14–88:3.)

Q. Barkley Commenced This Action.

Barkley commenced this action in King County Superior Court on May 21, 2013. Chase, MERS, and U.S. Bank removed the action to the

U.S. District Court for the Western District of Washington on June 19, 2013 because Barkley based several of his claims on alleged violations of federal law. The district court remanded the case in an order entered October 7, 2013, after Barkley disclaimed any intention to assert federal claims. (CP 1003–04.)

R. Barkley Took Discovery and Was Sanctioned for Failing to Meet His Own Discovery Obligations.

Barkley received an ample opportunity to take discovery. Although Barkley did not choose to take any depositions, he was deposed in February 2014. (CP 467.) Barkley served discovery requests on MERS and NWTS in March 2014, well before the discovery cutoff, and MERS and NWTS served timely responses. (CP 703–44.) The Superior Court heard argument on the Respondents' dispositive motions in May 2014, just a few months before the trial date set for August 2014.

After Respondents filed their motion for summary judgment, Barkley—for the first time—insisted he wanted to take more discovery. Barkley did not, however, specifically identify what discovery he needed to take, the facts he believed he could elicit, or the legal significance of those facts. Instead, he generally asserted that he wanted to "flesh out the ownership" of the Note (CP 568:3–5), even though he had already recognized his signature on the original Note when it was shown to him during his deposition, and even though he had been repeatedly shown that U.S. Bank owned his note (CP 478 at 43:4–14, 44:14–22; CP 481 at 56:21–57:1).

It was Respondents—not Barkley—who had difficulty obtaining adequate discovery. Barkley ended up as the subject of two motions to compel resulting from his failure to respond to discovery requests. (CP 1120–45, 1176–82.) The Superior Court entered an order requiring Barkley to pay certain fees and costs incurred in connection with the second motion to compel. (CP 1334–35, 1351–52.)

S. Barkley Lost on Summary Judgment.

The Superior Court granted summary judgment in favor of Respondents on all counts. (CP 1097–1102.) The Superior Court properly considered the undisputed evidence submitted by the Respondents, including the declarations of John Simionidis and Jeff Stenman. Each submitted testimony based on personal knowledge.

The Superior Court did not merely rely on declarations from the Respondents' representatives. In his deposition, Barkley made crucial admissions. Barkley himself authenticated most of the important documents. (*See* CP 391–392.) Nor was his testimony the only source of authentication. Most documents considered by the Superior Court were self-authenticating. (*See* CP 391–392.)

The Superior Court extended considerable leeway to Barkley in connection with the summary judgment motions. Barkley submitted an over-length, 41-page brief without first asking the Superior Court for permission, which violated the Court's scheduling order. (CP 1069.) Nevertheless, the Superior Court considered Barkley's brief in its entirety. (*See* CP 1095–96.) The Court also considered a declaration submitted by

Barkley's purported expert witness, as well as an argumentative declaration from his lawyer, even though neither document was properly admissible on summary judgment. (*See* CP 570–75, 836–63.) In short, the Court entered summary judgment after giving Barkley a full and fair hearing.

T. Barkley Appealed.

The Superior Court properly granted summary judgment on all claims. Barkley's complaint asserted causes of action against Chase, MERS, and U.S. Bank for alleged violations of the Deed of Trust Act under RCW 61.24, for alleged violations of the CPA under RCW 19.86, and for alleged violations of RCW 9A.82. On appeal, Barkley appears to abandon the Deed of Trust Act claims, which is appropriate because the Washington Supreme Court recently held that the statute permitted no such claims. *See Frias v. Asset Foreclosure Servs., Inc.*, 334 P.3d 529, 537 (Wash. 2014). That leaves only the CPA claim and a claim under RCW 9A.82 (Washington's RICO statute).

IV. STANDARD OF REVIEW

This Court reviews *de novo* an order granting summary judgment, engaging in the same inquiry as the trial court. *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 63–64 (2000). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends. *Graham v. Concord Constr., Inc.*, 100 Wn. App. 851, 854 (2000) (citing *Doe v. Dep't*

of Transp., 85 Wn. App. 143, 147 (1997)). In determining whether a genuine issue of material fact exists, this Court construes the facts and reasonable inferences from them in the light most favorable to the nonmoving party. *Gossett v. Farmers Ins. Co.*, 133 Wn.2d 954, 963 (1997). Once the moving party shows there is no issue of material fact, the burden shifts to the non-moving party to show why summary judgment should not be granted. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 (1989).

V. ARGUMENT

A. U.S. Bank Was Entitled to Commence Foreclosure Because it Holds the Original Note, Indorsed in Blank.

1. Barkley broke his promise to make scheduled payments on his loan, giving U.S. Bank, as noteholder, the right to foreclose.

U.S. Bank is the holder of the Note and is entitled to enforce it. Washington's Uniform Commercial Code provides that the entity entitled to enforce the Note is "the holder of the instrument." RCW 62A.3-301. U.S. Bank qualifies as a "person entitled to enforce" the Note because U.S. Bank possesses the Note (through its servicer and agents). The blank indorsement on the back of the Note, coupled with U.S. Bank's possession of the Note, makes U.S. Bank the "holder" of the Note. RCW 62A.3–205(b) states: "If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a 'blank indorsement.' When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed."

Because U.S. Bank holds the Note, indorsed in blank, it has the right to enforce the Note and foreclose. RCW 61.24.005(2).

U.S. Bank acquired the original note under the January 2003 Pooling and Servicing Agreement. (CP 427–28.) After closing, U.S. Bank, through its servicers and agents, took delivery of the "Mortgage File," which included the original Note. (CP 426, 428.) Chase, the current servicer, took possession of the original Note on or around July 17, 2009, years before it commenced nonjudicial foreclosure proceedings. (CP 496 ¶ 5.) U.S. Bank authorized Chase to act as its attorney-in-fact to service and enforce the loan. (CP 429–33; CP 435–51.)

Although U.S. Bank acquired the Note under the Pooling and Servicing Agreement, it makes no difference how U.S. Bank acquired the Note. Since the Note is indorsed in blank, even if U.S. Bank stole the Note, U.S. Bank still would be entitled to enforce the Note. *See* RCW 62A.3-301 ("[A] person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument."); *see also id.* official comment ("The quoted phrase includes a person enforcing a lost or stolen instrument.").

Transfer of the Note and Deed of Trust is no surprise to Barkley, having acknowledged and agreed that Greenpoint could transfer the Note and Deed of Trust: "The Note or a partial interest in the Note (together

with this Security Instrument) can be sold one or more times without prior notice to Borrower." (CP 413 ¶ 20.)

Barkley does not have any basis to dispute that U.S. Bank, acting through its servicer, is holder of the Note. (CP 486 at 87:10–88:3; CP 487 at 92:7–22.) Barkley recognized his original signature on the Note during his deposition. (CP 478 at 43:4–14, 44:14–22; CP 481 at 56:21–57:1.) Barkley, as an experienced real estate professional, understands that the holder of his Note is entitled to enforce the Note, and upon default, is entitled to foreclose on the Property. (CP 484–85 at 69:5–70:8.)

2. U.S. Bank is entitled to enforce the Note even if the Note is in the hands of its agents.

U.S. Bank had the right to enforce the Note and Deed of Trust even though Chase was acting as servicer for U.S. Bank. The Washington Supreme Court approves of the use of agents, including agents under the Washington Deed of Trust Act. "[N]othing in this opinion should be construed to suggest an agent cannot represent the holder of a note. Washington law, and the deed of trust act itself, approves of the use of agents." *Bain*, 175 Wn.2d at 106 (citations omitted).

The Supreme Court's endorsement of agents is a straightforward application of Washington statutes and the common law. *See, e.g.*, RCW 62A.3-201 Official Comment No. 1 (one can possess a note directly "or through an agent"); RCW 62A.9-313 Official Comment No. 3 (may possess through agent); *In re McFadden*, 471 B.R. 136, 175 (Bankr. D.S.C. 2012) (where entity had right to possess note under agreement, that

entity had constructive possession of note even if not actual possession, and had standing to foreclose); *Banker's Trust v. 236 Beltway Invest.*, 865 F. Supp. 1186, 1195 (E.D. Va. 1994) (finding constructive possession under pooling and servicing agreement where note held by agent); *Midfirst Bank, SSB v. C.W. Haynes & Co.*, 893 F. Supp. 1304, 1314 (D.S.C. 1994) ("cases generally hold that constructive possession exists when an authorized agent of the owner holds the note on behalf of the owner") (citations omitted).

Barkley's argument about the distinction between "possession" and "custody" defies Washington law. A federal bankruptcy court recently rejected the same argument—advanced by Barkley's lawyer in another case—because there is no reason why a noteholder cannot instruct its agents to act on its behalf. *See Butler v. One West Bank FSB* (*In re Butler*), 512 B.R. 643, 652–54 (Bankr. W.D. Wash. 2014). An institution like U.S. Bank *must* act through agents because U.S. Bank is a national banking association, not a physical person.

Just because Chase kept the Note safe for U.S. Bank does not mean U.S. Bank stopped being the holder. There is no genuine dispute that Chase ***is*** U.S. Bank's servicer ***and*** attorney-in-fact. Mr. Simionidis testified that Chase is U.S. Bank's attorney-in-fact. (CP 496 ¶ 4.) Chase and U.S. Bank submitted a power of attorney, which is self-authenticating. (CP 435–51.) Importantly, Barkley came forward with no evidence to contest Chase's power to act for U.S. Bank.

B. The Superior Court Properly Held Respondents Are Not Liable Under the CPA or Under Washington's RICO Statute.

1. Respondents did nothing unfair or deceptive and did not cause Barkley injury under the CPA.

The Superior Court properly entered judgment on the CPA claim because U.S. Bank was entitled to enforce the Note and Deed of Trust, and because any claim tied to MERS's designation in the Deed of Trust is time-barred. In any event, Barkley could not satisfy the essential elements for a Washington CPA claim, which requires proof of: (1) an unfair or deceptive act or practice; (2) that occurs in trade or commerce; (3) impacts the public interest; (4) which causes injury to the plaintiff in his or her business or property; and (5) the injury is causally linked to the unfair or deceptive act. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 917 (2001).

Respondents did nothing unfair or deceptive, and Barkley was not injured by the Respondents' actions. Barkley's case—the facts, and the procedural posture—is very different from *Frias*. In *Frias*, the Washington Supreme Court answered two certified questions of law arising from a motion to dismiss. 334 P.3d at 552–53. Here, Barkley was deposed, and, as discussed below, his own testimony showed why he has no CPA claims.

2. The statute of limitations bars Barkley's MERS-based CPA claim.

The Superior Court properly dismissed Barkley's CPA claim because the statute of limitations bars it. "Any action to enforce a claim for damages under [the CPA] shall be forever barred unless commenced within four years after the cause of action accrues." RCW 19.86.120. Deception-based claims like this one accrue when Barkley knows or, through the exercise of due diligence, should have known all the facts necessary to establish a legal claim, i.e., that the challenged statement was false. *Allen v. State*, 118 Wn.2d 753, 758 (1992).

Barkley argued the Deed of Trust misrepresented MERS's authority because it identified MERS as the "beneficiary"—even though the Deed of Trust explains MERS is identified as "beneficiary" solely in an agency capacity for his lender. Barkley signed the Deed of Trust on November 19, 2002 (CP 402–22.), which means he had until November 19, 2006 to file a CPA claim based on the allegedly misleading terms of the Deed of Trust. Barkley commenced this action on May 21, 2013, so his CPA claims based on the Deed of Trust are necessarily barred. *See, e.g.*, *Zhong v. Quality Loan Serv. Corp. of Wash.*, 2013 WL 5530583, *4 (W.D. Wash. 2013) (CPA claim tied to MERS designation time-barred).

3. Barkley did not submit evidence of any unfair or deceptive act or practice.

The basic predicate of any CPA action is an unfair or deceptive act or practice, but there was none here. U.S. Bank, acting through its servicer

and agents, was entitled to enforce Barkley's Note and Deed of Trust. No Respondent acted deceptively by asserting otherwise. "[W]hether the [alleged] conduct constitutes an unfair or deceptive act can be decided by this court as a question of law." *Indoor Billboard Wash., Inc. v. Integra Telecom of Wash.*, 162 Wn.2d 59, 74 (2007). Barkley needed to come forward with evidence showing that Respondents' acts had the capacity to deceive a substantial portion of the public or were a per se unfair trade practice as set out by the Legislature. *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 344 (1989) (quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785–86 (1986)). Barkley did neither.

Respondents did not commit any per se unfair trade practice. Only the Washington Legislature has the authority to declare a trade practice as being per se "unfair." *Hangman Ridge*, 105 Wn.2d at 787. Barkley provided no evidence of a statutory violation that is a legislatively declared per se CPA violation, and thus there was no basis for a CPA claim tied to a per se "unfair" act or practice. Because Barkley could not show that Respondents committed a per se CPA violation, he could not establish a per se unfair act as a basis for a CPA claim.

Further, to show Respondents acted "unfairly" under the CPA—outside the context of a per se unfair trade practice—Barkley needed to introduce evidence Respondents took some action violating the public interest, which typically requires evidence that Respondents' practice

"causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits." *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 787 (2013). Barkley submitted no evidence Respondents acted unfairly at all, let alone in a manner "likely to cause substantial injury to consumers." *Klem*, 176 Wn.2d at 787; *See Henderson v. GMAC Mortg. Corp.*, 2008 U.S. Dist. LEXIS 29329, *22–23 (W.D. Wash. 2008), *aff'd* 2009 U.S. App. LEXIS 21153 (9th Cir. 2009) (dismissing CPA claim because of no underlying unfair or deceptive act or practice).

Barkley likewise introduced no evidence of any deceptive act by Respondents. To be "deceptive," the act or practice must be one that "misleads or misrepresents something of material importance." *Nguyen v. Doak Homes, Inc.*, 140 Wn. App. 726, 734 (2007). Barkley does not allege Respondents misled him about any material fact and thus cannot show deception. In deposition, Barkley could not identify anything inaccurate about the various documents executed in connection with the foreclosure. (*See* CP 478 at 42:12–43:2; CP 482 at 59:4–7, 59:12–20; CP 486 at 87:10–88:3; CP 487 at 92:7–22.) But even if Barkley could introduce evidence of deceptive acts, he needed to introduce evidence showing Respondents' conduct had the capacity to deceive a substantial portion of the public—and he did not.

4. Barkley did not provide evidence of causation or injury.

The Superior Court properly entered judgment on Barkley's CPA claim for lack of injury attributable to Respondents' alleged acts. "Even if the deception element of the CPA is met, the Plaintiffs cannot make a claim under the CPA because they cannot show injury." *Mickelson v. Chase Home Fin. LLC*, 2012 WL 5377905, *3 (W.D. Wash. 2012). There is no evidence of any injury to Barkley. To plead a valid CPA claim, Barkley needed to introduce evidence of facts demonstrating that his injuries were caused by the deceptive practice. To prove causation, the "plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." *Indoor Billboard,* 162 Wn.2d at 84. Barkley needed to introduce evidence demonstrating "a causal link between the misrepresentation and the plaintiff's injury." *Id.* at 83.

Barkley did not identify any action taken by Respondents that caused him injury. Barkley had no evidence, for example, that he paid the wrong person. Indeed, he did not deny breaching his promise to make payments on his loan. (CP 475 at 32:18–23; CP 478–79 at 45:20–46:14.) Barkley still owns the investment property, despite his defaults. (CP 2 ¶ 1.1) Barkley is actually making thousands of dollars a month by renting out the Property, while not paying his loan. (CP 470 at 12:1–10.) Barkley has not cured his defaults and has no evidence suggesting that Respondents are preventing him from doing so.

Barkley could not pay the right party (even after re-confirming Chase was the right party), despite the substantial income he has been earning by renting out the Property. *See Atkins v. Litton Loan Serv., LLP*, 2010 WL 3184350, *3 (N.D. Cal. 2010) ("if plaintiffs were in fact able and willing to make the payments had they allegedly been advised not to do so, they have not alleged facts explaining why their purported reliance on Litton's representations rendered them unable to pay the amounts past due once it became clear that foreclosure was going forward."); *Mortenson v. MERS, Inc.*, 2010 WL 5376332, *8 (S.D. Ala. 2010) ("Because the record unequivocally shows that Mortensen would have defaulted—even in the absence of purportedly fraudulent representations by defendants—because he was simply out of money, he cannot meet the reliance element of his fraud claims").

Nor did Barkley explain how the particular actions taken by Chase, MERS, or U.S. Bank caused him any injury. MERS was named as the beneficiary as nominee for the noteholder and its successors under the Deed of Trust, but "the mere fact MERS is listed on the Deed of Trust as a beneficiary is not itself an actionable injury." *Bain,* 175 Wn.2d at 120. U.S. Bank and Chase appointed NWTS as trustee, but appointing a trustee is only a "ministerial act[]." *Bain v. Metro. Mortg. Grp., Inc.,* 2010 WL 891585, *7 n.5 (W.D. Wash. 2010).

Barkley's low credit scores, his stress, and his attorneys' fees are not injuries under the CPA. *See Massey v. BAC Home Loans Servicing LP*,

2013 WL 6825309, *7–8 (W.D. Wash. 2013); *Bakhchinyan v. Countrywide Bank, N.A.*, 2014 WL 1273810, *5–6 (W.D. Wash. 2014).

Credit Scores. Barkley's failure to pay his loan was caused by his lack of money, not by anything Respondents did, so Barkley's diminished credit is not an injury under the CPA. (*See* CP 485 at 71:15–17.) And the federal Fair Credit Reporting Act preempts claims based on credit reporting issues, even if Barkley suffered injury to his credit. *Dvorak v. AMC Mortg. Servs., Inc.*, 2007 WL 4207220, *4–*5 (E.D. Wash. 2007) (CPA claim for credit defamation preempted); *Ornelas v. Fid. Nat. Title Co. of Wash., Inc.*, 2005 WL 3359112, *4 (W.D. Wash. 2005) (state CPA claims preempted by FCRA because "Congress intended the FCRA to be the sole remedy for a consumer against furnishers of information to credit reporting agencies"), *aff'd*, 245 Fed. App'x. 708 (9th Cir. 2007).

Stress. Barkley cannot recover for "stress" under the CPA because the CPA requires evidence of injury to business or property. *Panag v. Farmers Ins. Co.*, 166 Wn.2d 27, 57 (2009) ("damages for mental distress, embarrassment, and inconvenience are not recoverable under the CPA.").

Attorneys' Fees. Although Barkley paid his lawyer to sue, his attorneys' fees spent pursuing his CPA claims are not compensable under the CPA. *See Thurman v. Wells Fargo Home Mortg.*, 2013 WL 3977622, *3–4 (W.D. Wash. 2013) (resources spent pursuing a CPA claim are not recoverable injuries under the CPA; collecting cases); *Panag*, 166 Wn.2d at 62 (the cost of consulting an attorney to institute a CPA claim is

"insufficient to show injury to business or property."); *Demopolis v. Galvin*, 57 Wn. App. 47, 54 (1990). Barkley, like the plaintiffs in *Bakhchinyan v. Countrywide Bank, N.A.*, did not produce evidence showing that his attorneys' fees were incurred as a result of some legal wrong done to him. 2014 WL 1273810, *5–6 (W.D. Wash. 2014) (consulting an attorney to "dispel uncertainty" is not sufficient unless the uncertainty can be tied to the defendants' wrongful conduct).

5. Respondents didn't commit any wrongful act, much less a criminal act under Washington's RICO statute.

The Superior Court properly entered judgment on Barkley's criminal profiteering claims because Respondents did not commit any crime, much less any of the enumerated felonies giving rise to liability. Washington enacted the Criminal Profiteering Act, RCW 9A.82, or "little RICO," to combat organized crime. *Winchester v. Stein*, 135 Wn.2d 835, 848–49 (1998). "The statute requires an injury to a person, business or property by an act of criminal profiteering, which requires a commission of specific enumerated felonies for financial gain, that is part of a pattern of criminal profiteering (three or more acts within a five year period that are similar or interrelated to the same enterprise) and damages." *Robertson v. GMAC Mortg. LLC*, 2013 WL 1898216, *3 (W.D. Wash. 2013) (citing RCW 9A.82.010(4)). To establish a claim under the Criminal Profiteering Statute, Barkley must have evidence that Respondents engaged in a pattern of criminal profiteering, which means:

> [E]ngaging in at least three acts of criminal profiteering, one of which occurred after July 1, 1985, and the last of which occurred within five years ... after the commission of the earliest act of criminal profiteering. In order to constitute a pattern, the three acts must have the same or similar intent, results, accomplices, principals, victims, or methods of commission, or be otherwise interrelated by distinguishing characteristics including a nexus to the same enterprise, and must not be isolated events.

RCW 9A.82.010(12). In addition, to show a pattern, Barkley must also make the same showing required by the federal RICO counterpart: relationship plus continuity. *State v. Barnes*, 85 Wn. App. 638, 667 (1997). Courts require state RICO claims to meet the specificity requirements of CR 9(b) and its federal equivalent, meaning Barkley must allege "the time, place, and nature of the … fraudulent activities." CR 9(b); *see also Kauhi v. Countrywide Home Loans Inc.*, 2009 WL 3169150, *4–*5 (W.D. Wash. 2009); *Bowler v. ING Direct*, 2012 WL 1536216, *1 (W.D. Wash. 2012). Thus, Barkley must introduce evidence of a pattern of criminal profiteering and evidence that Respondents engaged in at least three acts of criminal profiteering that had the same or similar "intent, results, accomplices, principals, victims, or methods of commission, or be otherwise interrelated by distinguishing characteristics including a nexus to the same enterprise, and must not be isolated events." *Kauhi*, 2009 WL 3169150, *7.

The Superior Court properly granted Respondents summary judgment on Barkley's criminal profiteering claim because that claim is entirely premised on Respondents' alleged recording of "fraudulent and

false instruments affecting real property titles" and not any specified "criminal" acts. (*See* CP 16, 565–67.) There is no evidence that Respondents acted "criminally," which, by definition, is a necessary requirement for any claim for "criminal profiteering" under RCW 9A.82. While Barkley accuses Respondents of "extortion" by "conceal[ing] ownership of mortgage loans," and assigning mortgage loans "to entities with no interest for the sole purpose of foreclosure for gain," Barkley offers no factual allegations of extortion or any criminal conduct (let alone the pattern of conduct required) and has no evidence to support of such those allegations. (*See* CP 566–67.) Simply put, Barkley has not and cannot establish a claim for relief under RCW 9A.82. *See Robertson*, 2013 WL 1898216, *3–*4 (rejecting criminal profiteering claim on similar allegations).

C. Northwest Trustee Did Not Need To "Investigate" Because There Is No Reasonable Dispute U.S. Bank Was Entitled To Foreclose.

1. U.S. Bank was entitled to foreclose because the Deed of Trust follows the Note.

The right to enforce the Note carries with it the right to enforce the Deed of Trust securing that Note. As the Supreme Court observed in *Bain*, the holder of a note secured by a deed of trust is entitled to foreclose on the deed of trust. 175 Wn.2d at 101–02. The deed of trust follows the note. "Washington's deed of trust act contemplates that the security instrument will follow the note, not the other way around." *Id.* at 104. That proposition is confirmed by prior authorities. "[T]ransfer of the

obligation … should carry the mortgage along with it. This is indeed the universal result in American law. … Washington decisions, though old, support this proposition." Wm. B. Stoebuck & John W. Weaver, 18 *Wash. Prac., Real Estate* § 18.20 (2d ed. May 2012); *Fid. & Deposit v. Ticor*, 88 Wn. App. 64, 68–69 (1997); *Price v. N. Bond & Mortg. Co.*, 161 Wash. 690, 695 (1931) ("the note is considered the obligation, and the mortgage … passes with it"); *Nance v. Woods*, 79 Wash. 188, 191 (1914) ("mortgage follows the note"); *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 90 (1909) ("assignment of the notes ipso facto passes the security"); *Bartlett Estate Co. v. Fairhaven Land Co.*, 49 Wash. 58, 63 (1908) (mortgage "passes to the assignee by an assignment of the debt").

Under *Bain* and the authorities preceding it, U.S. Bank, as the holder of the Note, is entitled to enforce the Deed of Trust as a matter of course. To avoid any potential ambiguity in the land records, U.S. Bank took the additional step of having its agent (MERS) assign MERS's nominee (i.e., agency) interest in the Deed of Trust back to U.S. Bank (essentially terminating the agency relationship). (CP 453–54.) That assignment, although helpful to avoid confusion, was in no way necessary under Washington law because—under *Bain*—U.S. Bank is entitled to enforce the Deed of Trust as the holder of the Note. *Compare Smith v. Nw. Tr. Serv., Inc.*, 2014 WL 2439791, *4 (E.D. Wash. 2014) ("The Court can discern no reason why MERS would be prohibited from conveying its interest in the deed of trust back to SunTrust upon the latter's request";

"SunTrust apparently avoided this [*Bain*] issue by reacquiring its full status as a beneficiary before appointing a successor trustee").

There is not and never has been any genuine dispute about U.S. Bank's right to enforce the Note and the Deed of Trust. That makes this case very different from *Lyons v. U.S. Bank N.A.*, 336 P.3d 1142 (Wash. 2014). In *Lyons*, there was "an indication that the beneficiary declaration might be ineffective," leading the court to conclude that "there remains a material issue of fact as to whether Wells Fargo was the owner prior to initiating the trustee's sale." *Id.* at 1150–51. That is not true in this case. Barkley introduced no evidence suggesting anyone other than U.S. Bank and its agents have ever claimed to hold his Note or sought to enforce his lawful obligations.

2. Although U.S. Bank does not need to prove it is the owner of the Note because holding the Note is sufficient, U.S. Bank is in fact the owner.

U.S. Bank holds the original note, which means it is the beneficiary under the deed of trust, and entitled to foreclose. *Bain*, 175 Wn.2d at 98–99 (holder of instrument evidencing the obligations secured by deed of trust is beneficiary of the deed of trust). The Supreme Court endorses the plain words of RCW 62A.3-301, which says a person may be "entitled to enforce the instrument ***even though the person is not the owner of the instrument or is in wrongful possession of the instrument***." *Bain*, 175 Wn.2d at 104 (emphasis added). That has been the law for more than 40 years: "The holder of a negotiable instrument may sue thereon in

his own name, and payment to him in due course discharges the instrument. ***It is not necessary for the holder to first establish that he has some beneficial interest in the proceeds.***" *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 222–23 (1969) (emphasis added).

Barkley's arguments about a purported "unknown investor" do not matter because Washington law does not care who has an ownership interest in the proceeds of a note. *See Trujillo v. Nw. Tr. Servs., Inc.*, 181 Wn. App. 484, 498–500 (Wn. App. 2014) (noteholder may enforce note even if not also the owner). U.S. Bank's role as trustee for various investors does not give those investors an interest in the Note or Deed of Trust. *See Cashmere Valley Bank v. State of Wash.*, 334 P.3d 1100, 1107–09 (Wash. 2014). U.S. Bank is entitled to foreclose because it holds the Note (although it is also the owner). *See Bain*, 175 Wn.2d at 111 (U.S. Bank can enforce deed of trust by showing it "holds" note); *In re Brown*, 2013 WL 6511979, *9 n.23 (B.A.P. 9th Cir. 2013) (rejecting argument by same counsel); *In re Butler*, 2012 WL 8134951, *2 (Bankr. W.D. Wash. 2012) (rejecting argument made by same counsel).

U.S. Bank is acting as a trustee for various investors, but its relationship with those investors has no effect on Barkley. He is not a party to those contracts. Securitization did not and could not relieve Barkley of the obligation to repay his loan to the noteholder, U.S. Bank.

> Under established rules, the maker should be indifferent as to who owns or has an interest in the note so long as it does not affect the maker's ability to make payments on the note. Or, to put this statement in the context of this case,

> the [borrowers] should not care who actually owns the Note—and it is thus irrelevant whether the Note has been fractionalized or securitized—so long as they do know who they should pay. Returning to the patois of Article 3, so long as they know the identity of the "person entitled to enforce" the Note, the [borrowers] should be content.

In re Veal, 450 B.R. 897, 912 (B.A.P. 9th Cir. 2011). This makes sense because "securitization merely creates a separate contract, distinct from plaintiffs' debt obligations under the Note and does not change the relationship of the parties in any way." *Lamb v. MERS, Inc.*, 2011 WL 5827813, *6 (W.D. Wash. 2011) (citing cases) (emphasis added); *Bhatti v. Guild Mortg. Co.*, 2011 WL 6300229, *5 (W.D. Wash. 2011) (citing cases); *Moseley v. CitiMortgage, Inc.*, 2011 WL 5175598, *7 (W.D. Wash. 2011) (securitization irrelevant); *Horvath v. Bank of N.Y., N.A.*, 641 F.3d 617, 626 n.4 (4th Cir. 2011) (securitization irrelevant to debt; rejecting argument that only original lender can foreclose); *Logvinov v. Wells Fargo Bank*, 2011 WL 6140995, *3 (N.D. Cal. 2011) ("The argument that parties lose their interest in a loan when it is assigned to a trust pool or REMIC has been rejected by numerous courts.").

Although various investors may eventually receive the proceeds that would be generated if Barkley were paying his loan, that does not give those investors an interest in his Note or Deed of Trust. The Washington Supreme Court recently rejected the proposition that an investor in a securitization transaction is a beneficiary under a Washington deed of trust. "While it is true that the interest received by Cashmere from the REMICs ultimately comes from promissory notes secured by mortgages

and deeds of trust, Cashmere has no interest in the underlying mortgages and deeds of trust and is not a beneficiary of those instruments." *Cashmere*, 334 P.3d at 1106.

D. There Was Nothing Wrong With Respondents' Evidence and No Need For More Discovery.

1. The Superior Court properly considered the Respondents' evidence, most of which was self-authenticating and properly authenticated by declarations and deposition testimony.

The Superior Court properly considered the declaration of John J. Simionidis and the documents he helped authenticate. Under CR 56(e), declarations must be made on personal knowledge, must set forth facts admissible in evidence, and must show that the declarant is competent to testify to the information contained in the declaration. Importantly, Washington courts consider the requisite of personal knowledge to be satisfied if the proponent of the evidence satisfies the business records statute. *See Discover Bank v. Bridges,* 154 Wn. App. 722, 726 (2010); *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 674–75 (2012) (rejecting challenge to bank employee declaration, holding that affiant's personal knowledge of how records are kept generally was sufficient for business records exception).

Washington's business records statute, RCW 5.45.020, allows a "qualified witness" to submit business records into evidence, even records that witness did not create. Courts broadly interpret the term "qualified witness" under the business records statute. *State v. Smith,* 55 Wn.2d 482,

419–20 (1960); *State v. Ben-Neth,* 34 Wn. App. 600, 603 (1983); *State v. Quincy,* 122 Wn. App. 395, 399 (2004). Under the statute, a qualified witness need not have created the record to authenticate it. *Cantrill v. Am. Mail Line, Ltd.*, 42 Wn.2d 590, 608 (1953); *Ben-Neth,* 34 Wn. App. at 603.

Testimony by a witness who has access to the record as a regular part of his work suffices. *Quincy*, 122 Wn. App. at 399; *Ben–Neth,* 34 Wn. App. at 603. Admissibility hinges upon the opinion of the court that the sources of information, method, and time of preparation were such as to justify its admission. *Quincy*, 122 Wn. App. at 401; *Ben–Neth*, 34 Wn. App. at 603. Computerized records are treated the same as any other business records. *Quincy*, 122 Wn. App. at 399.

The Simionidis declaration squarely meets these requirements and is indistinguishable from evidence this Court has previously approved. For instance, in *Discover Bank v. Bridges*, Discover Bank relied on three affidavits from employees of DFS, an affiliated entity that assisted Discover Bank in collecting delinquent debts. The three affiants stated in their respective affidavits that (1) they worked for DFS, (2) that two of the affiants had access to the Bridges' account records in the course of their employment, (3) the same two affiants testified based on personal knowledge and review of those records, and (4) the attached account records were true and correct copies made in the ordinary course of business. *Discover Bank*, 154 Wn. App. at 726. The Court rejected the

Bridges' contention that the trial court improperly admitted the affidavits into evidence. *Id.*

As in *Discover Bank*, Simionidis stated in his declaration that he has personal knowledge of Chase's business records. Moreover, Simionidis states he personally reviewed those records. (CP 495 ¶ 3.) Furthermore, he has personal knowledge of how Chase's business records were "created or collected as part of Chase's regular practices, and were kept by Chase in the course of its regularly-conducted business activities." *Id.* While Simionidis does not state he was a custodian of the records, neither did the affiants in *Discover Bank.* The Superior Court correctly allowed into evidence the Simionidis declaration and its supporting documents. *Compare Walsh v. Microsoft Corp.*, ___ F. Supp. 2d ___, 2014 WL 5365450, *2 (W.D. Wash. 2014) (discussing parallel language in federal rule and admitting declaration: "'A witness does not have to be the custodian of documents offered into evidence to establish Rule 803(6)'s foundational requirements. The phrase 'other qualified witness' is broadly interpreted to require only that the witness understand the recordkeeping system.'") (citation omitted).

Importantly, the Superior Court did not need the Simionidis declaration to admit all the documents that Simionidis referred to in his declaration. Every one of those documents was both self-authenticating and authenticated by other testimony. (*See* CP 391–92.) For example, Simionidis attached a copy of the Note. The Note is self-authenticating

under RCW 62A.3-308 and ER 902(i). Barkley himself authenticated the Note by attaching a copy to his complaint (CP 4 ¶ 3.1, CP 20–25) and by identifying the Note in his deposition (CP 478 at 43:4–14, 44:14–22; CP 481 at 56:21–57:1). Simionidis also authenticated an assignment of the Deed of Trust, which Barkley himself authenticated in his complaint (CP 8–9 ¶ 3.14), which was authenticated by a certification from the King County's Recorders Office under ER 902(d) and RCW 5.44.060, and which was self-authenticating by a certificate of acknowledgement under ER 902(h). Finally, the Simionidis declaration attached a copy of the limited power of attorney, which was self-authenticating by a certificate of acknowledgement under ER 902(b). Barkley came forward with not a single piece of evidence to create a genuine issue of fact about the authenticity of any of those documents.

2. The Superior Court properly decided that Barkley had already been given an appropriate opportunity to conduct discovery.

One year after filing his complaint, and three weeks after being served with Respondents' motion for summary judgment, Barkley's opposition to Respondents' motion asked the Superior Court to continue the motion for additional discovery to "flesh out the ownership of the subject Note and Deed of Trust and the agency relationships, if any, among the Respondents, and learn the identity of the 'undisclosed investor.'" (CP 567–68; Barkley's Br. at 47–48.)

The Superior Court properly denied Barkley's CR 56(f) request because: (1) Barkley failed to state what evidence he would establish through additional discovery, (2) the evidence sought would not have raised a genuine issue of fact rendering delay and further discovery futile, and (3) the Barkley failed to offer good reason for their delay in obtaining the evidence desired. *See Molsness v. City of Walla Walla*, 84 Wn. App. 393, 400 (1997). Failure to meet one of these requirements is fatal and the timing of a motion for summary judgment is irrelevant to whether a continuance should be denied. *See, e.g.*, *Manteufel v. SAFECO Ins. Co.*, 117 Wn. App. 168, 175 (2003) (denying request to continue motion for summary judgment one month after filing of the complaint). The Superior Court properly denied Barkley's request for the following reasons:

First, delay for additional discovery "is not justified if the party fails to support the request with an explanation of the evidence to be obtained through additional discovery." *Molsness*, 84 Wn. App. at 400–01. "Vague, wishful thinking is not enough." *Id.* at 401 (holding trial court did not abuse discretion by denying continuance). Barkley needed to identify, by affidavit, specific evidence he would obtain that was necessary to oppose summary judgment. *See* CR 56(f); *Molsness*, 84 Wn. App. at 401. Barkley failed to present any such affidavit to the Superior Court.

Barkley also failed to identify any specific evidence he might uncover by delaying the motion for additional discovery. While Barkley claimed to require additional discovery "to flesh out the ownership of the

subject Note and Deed of Trust and the agency relationships, if any, among the Respondents, and learn the identity of the 'undisclosed investor'" (CP 567–68; Barkley's Br. at 47–48), Respondents submitted evidence showing that U.S. Bank, through its agent, had physical possession of the original Note, and as a result, had the authority to foreclose. Barkley himself saw the original Note during his deposition and recognized his signature. (CP 478 at 43:4–14, 44:14–22; CP 481 at 56:21–57:1.) Moreover, the identity of the purported "undisclosed investor" does not matter because "[i]t is not necessary for the holder [of a promissory note] to first establish that he has some beneficial interest in the proceeds." *John Davis & Co..*, 75 Wn.2d at 222–23 (citation omitted).

Second, the Superior Court properly denied Barkley's request for delay because Barkley did not and could not demonstrate that additional discovery could raise a genuine issue of fact. *Stranberg v. Lasz*, 115 Wn. App. 396, 406–07 (2003). The mere possibility that discoverable evidence exists that may be relevant is not sufficient. *Molsness*, 84 Wn. App. at 401. Barkley did not and could not submit any material facts because U.S. Bank was indisputably the holder of the Note.

Third, the Superior Court properly denied Barkley's request for delay because Barkley failed to offer good reason for his delay in obtaining the evidence desired. CR 56(f) is not intended to endorse inaction and delay. *Bridges v. ITT Research Inst.*, 894 F. Supp. 335, 337 (N.D. Ill. 1995) ("Rule [56(f)] is not to be used as a delay tactic or

scheduling aid for busy attorneys"). "The failure to conduct discovery diligently is grounds for denial of a Rule 56(f) motion." *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1005 (9th Cir. 2002). Washington state courts interpret CR 56(f) consistently with its federal counterpart. *Turner v. Kohler*, 54 Wn. App. 688, 693 (1989) (looking to Fed. R. Civ. P. 56(f)). Barkley had almost one year prior to Respondents' motion for summary judgment to take discovery. Yet, Barkley waited until the deadline for responding to Respondents' motion before asking the Superior Court for a continuance. As a result, the Superior Court properly denied Barkley's request for delay to conduct additional discovery.

VI. CONCLUSION

For the foregoing reasons, the Court should affirm the Superior Court's order granting summary judgment for Chase, MERS, and U.S. Bank.

RESPECTFULLY SUBMITTED this 9th day of January, 2015.

Davis Wright Tremaine LLP
Attorneys for JPMorgan Chase Bank, N.A., Mortgage Electronic Registration Systems, Inc., and U.S. Bank National Association

By _____
Fred B. Burnside
Hugh R. McCullough

1201 Third Avenue, Suite 2200
Seattle, Washington 98101-3045
(206) 622-3150 (phone)
(206) 757-7700 (fax)

CERTIFICATE OF SERVICE

I hereby certify that I caused the document to which this certificate is attached to be delivered to the following as indicated:

Richard Llewelyn Jones Kovac & Jones PLLC 1750 112th Ave NE Ste D151 Bellevue, WA 98004-3768	☑ Messenger ☐ U.S. Mail, postage prepaid ☐ Federal Express ☐ Facsimile ☐ Email
Joshua Schaer RCO Legal, P.S. 13555 SE 36th Street, Suite 300 Bellevue, WA 98006-1489	☑ Messenger ☐ U.S. Mail, postage prepaid ☐ Federal Express ☐ Facsimile ☐ Email

Declared under penalty of perjury under the laws of the state of Washington dated at Seattle, Washington this 9th day of January, 2015.

Elaine Huckabee

Elaine Huckabee