72505-0

72505-0

No. 72505-0

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

KEVIN J. SELKOWITZ,

Appellant,

v.

LITTON LOAN SERVICING LP, et al.,

Respondents.

BRIEF OF RESPONDENT MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

Fred B. Burnside
Hugh R. McCullough
Davis Wright Tremaine LLP
Attorneys for Mortgage Electronic
Registration Systems, Inc.

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

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 APR 10 AM 11:50

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF ARGUMENT 1

II. STATEMENT OF ISSUES 3

III. STATEMENT OF THE CASE 5

A. Selkowitz borrowed money to buy a condominium...................... 5

B. Selkowitz promised to repay his lender and its successors and assigns. 5

C. Selkowitz signed a deed of trust to secure repayment.................. 6

D. Selkowitz made payments. 7

E. Selkowitz stopped making payments because he had no money. 7

F. Litton was entitled to enforce the note and deed of trust. 8

G. Quality Loan Service Corporation of Washington commenced foreclosure. 9

H. Selkowitz demanded a loan modification. 10

I. Selkowitz had no meaningful relationship with MERS. 10

J. Selkowitz believed he was injured. 12

K. Selkowitz chose not to make monthly payments. 13

L. The history of this suit includes answers to certified questions of law. 14

M. The Supreme Court answered. 15

N. Further proceedings in the Superior Court. 17

IV. STANDARD OF REVIEW 18

V. ARGUMENT 19

A. MERS did not cause any injury to Selkowitz's business or property 19

B. Selkowitz's business or property was not injured under the CPA. 23

1. Emotional distress is not an injury under the CPA. 24

2. There was no evidence MERS caused injury to Selkowitz's credit. 25

3. Selkowitz suffered no injury to his real property. 26

4. Selkowitz cannot recover fees and costs spent pursuing his CPA claims. 27

C. The evidence showed MERS did nothing unfair or deceptive to Selkowitz. 30

D. Although not directly pertinent to any claims against MERS, Litton had the authority to commence a non-judicial foreclosure. 33

1. Litton was entitled to foreclose as the holder of the note 33

2. Litton did not need to be both the holder and the owner of the note to commence foreclosure. 37

3. Just because Litton and U.S. Bank kept the note in a secure file room at Deutsche Bank does not mean they lost the right to enforce the note. 40

4. Litton was entitled to foreclose because Selkowitz admitted breaking his promise to make payments. 43

5. MERS, acting in its capacity as nominee, was authorized to appoint a successor trustee. 45

6. Although none of these issues are directly pertinent to the claims against MERS, they show Selkowitz was not wronged. 48

VI. CONCLUSION 50

TABLE OF AUTHORITIES

Page(s)

Cases

Anderson Buick Co. v. Cook,
7 Wn.2d 632 (1941) 45

Andrews v. Kelleher,
124 Wash. 517 (1923) 9, 17, 45

Badgett v. Sec. State Bank,
116 Wn.2d 563 (1991) 23

Bain v. Metro. Mortg. Grp., Inc.,
2013 WL 6193887 (Wash. Super. Ct. 2013) 33

Bain v. Metropolitan Mortgage Group, Inc.,
175 Wn.2d 83 (2012) .... *passim*

Bakhchinyan v. Countrywide Bank, N.A.,
2014 WL 1273810 (W.D. Wash. 2014) 28, 29

Banker's Trust (Del.) v. 236 Beltway Invest.,
865 F. Supp. 1186 (E.D. Va. 1994) 42

Bartlett Estate Co. v. Fairhaven Land Co.,
49 Wash. 58 (1908) 35

Boyd v. Bondy,
113 Wash. 384 (1920) 32

Butler v. One West Bank, FSB (*In re Butler*),
512 B.R. 643 (Bankr. W.D. Wash. 2014) 41

Carr v. Cohn,
44 Wash. 586 (1906) 9, 17, 45

Cedell v. Farmers Ins. Co.,
176 Wn.2d 686 (2013) 32

Central Washington Bank v. Mendelson-Zeller,
113 Wn.2d 346 (1989) 39, 40

Cornelius v. Wash. Dep't of Ecology,
344 P.3d 199 (Wash. 2015)...31

Demopolis v. Galvin,
57 Wn. App. 47 (1990) 28, 30

Dvorak v. AMC Mortg. Servs., Inc.,
2007 WL 4207220 (E.D. Wash. 2007) 26

Eastover Bank for Sav. v. Sowashee Venture (*In re Austin Dev. Co.*), 19 F.3d 1077 (5th Cir. 1994)..48

Fid. & Deposit v. Ticor,
88 Wn. App. 64 (1997) 35

Fid. Trust Co. v. Wash. & Or. Corp.,
217 F. 588 (W.D. Wash. 1914)...17, 45

Fourth Inv. LP v. United States,
720 F.3d 1058 (9th Cir. 2013) 3, 45

Gleeson v. Lichty,
62 Wash. 656 (1911)...41

Gossett v. Farmers Ins. Co.,
133 Wn.2d 954 (1997) 19

Graham v. Concord Constr., Inc.,
100 Wn. App. 851 (2000) 19

Guijosa v. Wal-Mart Stores, Inc.,
144 Wn.2d 907 (2001) 20

Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778 (1986) 20, 23

Hayden v. Mut. of Enumclaw Ins. Co.,
141 Wn.2d 55 (2000) 18

Indoor Billboard v. Integra Telecom of Wash., Inc.,
162 Wn.2d 59 (2007) 20, 31

Jackson v. Quality Loan Serv. Corp.,
No. 72016-3-I, slip op. (Wn. Ct. App. April 6, 2015) 39

John Davis & Co. v. Cedar Glen No. 4, Inc.,
75 Wn.2d 214 (1969) 36, 37, 38

Kezner v. Landover Corp.,
87 Wn. App. 458 (1997) 27

Kiah v. Aurora Loan Servs., LLC,
2011 WL 841282 (D. Mass. 2011) 46

Long v. One W. Bank, FSB,
2011 WL 3796887 (N.D. Ill. 2011) 46

Lyons v. U.S. Bank Nat'l Ass'n,
181 Wn.2d 775 (2014) 24

Massey v. BAC Home Loans Serv. LP,
2013 WL 6825309 (W.D. Wash. 2013) 28

In re McFadden,
471 B.R. 136 (Bankr. D.S.C. 2012) 42

Midfirst Bank, SSB v. C.W. Haynes & Co.,
893 F. Supp. 1304 (D.S.C. 1994) 42

Nance v. Woods,
79 Wash. 188 (1914) 35

Ornelas v. Fid. Nat. Title Co.,
2005 WL 3359112 (W.D. Wash. 2005) 26

Panag v. Farmers Ins. Co.,
166 Wn.2d 27 (2009) 24, 27, 28, 30

Price v. N. Bond & Mortg. Co.,
161 Wash. 690 (1931) 35

Saunders v. Lloyd's of London,
113 Wn.2d 330 (1989) 31

Selkowitz v. First Am. Title Ins. Co.,
No. 10-5523 (W.D. Wash. July 27, 2010) 2, 14, 15, 17

Spencer v. Alki Point Transp. Co.,
53 Wash. 77 (1909)..35

State v. Spillman,
110 Wash. 662 (1920)..41

Thurman v. Wells Fargo Home Mortg.,
2013 WL 3977622 (W.D. Wash. 2013)...28, 30

Trujillo v. Nw. Tr. Servs., Inc.,
181 Wn. App. 484 (2014) .... *passim*

In re Tucker,
441 B.R. 638 (Bankr. W.D. Mo. 2010)...46

Ward v. Sec. Atl.,
858 F. Supp. 2d 561 (E.D.N.C. 2012)...46

Wesche v. Martin,
64 Wn. App. 1 (1992) 39

Young v. Key Pharm., Inc.,
112 Wn.2d 216 (1989) 19

Statutes and Rules

Consumer Protection Act.. *passim*

CR 56(c)...19

Deed of Trust Act, RCW 61.24 *et seq*. .... *passim*

ER 902(i)..36

Fair Credit Reporting Act 26

RCW 11.98.070(8)..9

RCW 30A.08.170 9

RCW 61.24.005(2) 6, 16

RCW 61.24.010 .... 21, 33

RCW 61.24.030 .... 21, 33, 38

RCW 62A.1-103(b) 41

RCW 62A.1-201(21)(a) 34

RCW 62A.3-201, cmt. 1 41

RCW 62A.3-203 .... 34, 36, 37, 41

RCW 62A.3-301 .... 34, 37

RCW 62A.3-308 36

RCW 62A.9-313, cmt. 3 41

RCW 62A.3-420, cmt. 1 41

Uniform Commercial Code .... *passim*

WAC 458-61A-214 9

Other Authorities

Black's Law Dictionary (6th ed. 1990) 46

Report of the Permanent Editorial Board for the Uniform Commercial Code, *Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes* 42

Restatement (Third) Property § 5.4 46

18 *Wash. Prac., Real Estate* § 18.20 (2d ed. May 2012) 35

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Mortgage Electronic Registration Systems, Inc. ("MERS"), did not cause any injury to the business or property of Kevin Selkowitz. MERS was named as the beneficiary in a nominee (agency) capacity under Selkowitz's deed of trust, but that didn't cause Selkowitz's default, interfere with his negotiations with his lender, or otherwise cause him injury. MERS also appointed a successor trustee under Selkowitz's deed of trust, but Selkowitz never even saw the recorded appointment until his deposition, years after he first filed his lawsuit.

Selkowitz asks this Court to reverse summary judgment mostly because of how the Washington Supreme Court answered certified questions of law in *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83 (2012). But Selkowitz's application of *Bain* is misplaced. Selkowitz urges this Court to ignore the legal principles announced in *Bain*—such as the Supreme Court's use of the Uniform Commercial Code—apparently because they do not fit his new theory of the case. Instead, Selkowitz spends much of his brief focusing on the "facts" described in *Bain*, even though the Supreme Court was merely answering certified questions of law, not making or reviewing findings of fact.

Selkowitz has it backwards. This Court should look to *Bain* (and this Court's decision in *Trujillo*) for guidance on legal questions, and

should look to the record reviewed by the Superior Court on summary judgment for the undisputed facts. Those facts reveal Selkowitz stopped paying back his loan—even though he knew who and how to pay—and then hired a lawyer to obstruct the lender's exercise of its rights.

Selkowitz explained it well in his deposition. "[T]here's no denying the note holder's right to foreclose on the property if not paid." (CP 416 (104:14–19).) Selkowitz admitted he was not paying his debt. (CP 416 (104:20–22).) And Selkowitz recognized his original note when it was shown to him during his deposition. (CP 413–14 (95:17–96:13).)

What Selkowitz never has explained is how anything MERS did injured his business or property. In fact, Selkowitz admitted he stopped paying his loan because he did not have enough money, not because of anything MERS did or did not do. Based on Selkowitz's testimony, the Superior Court properly granted summary judgment in favor of MERS. This Court should affirm the Superior Court for the following reasons:

First, MERS did not cause any injury to Selkowitz's business or property. Selkowitz failed to come forward with evidence that any unfair or deceptive act or practice of MERS was the but-for cause of any injury to Selkowitz's business or property. To the contrary, Selkowitz admitted MERS had nothing to do with the breach of his promise to repay his loan,

nor Selkowitz's failure to cure those breaches, nor his failure to obtain a loan modification.

Second, the Superior Court properly entered summary judgment for MERS because Selkowitz's business or property has suffered no injury. Emotional distress is not an injury under Washington's Consumer Protection Act. MERS did not deprive Selkowitz of his property. MERS did not cause damage to Selkowitz's credit (a claim that would in any case be preempted by federal law), and Selkowitz cannot recover for time or money spent pursuing this litigation.

Third, MERS committed no unfair or deceptive act or practice in connection with Selkowitz's loan. MERS was named on Selkowitz's deed of trust, and appointed a successor trustee. The evidence showed neither act deceived Selkowitz, nor had the capacity to deceive.

Fourth, although not directly relevant to any claim asserted against MERS, Litton and Quality Loan in fact had the right to enforce Selkowitz's promise to repay his loan, and to foreclose on the property when Selkowitz broke that promise.

II. STATEMENT OF ISSUES

Selkowitz asserted a variety of claims in the Superior Court, but his only claim against MERS on appeal is that MERS allegedly violated Washington's Consumer Protection Act. This gives rise to three issues.

1. Did MERS cause any injury to Selkowitz's business or property, even though Selkowitz admits that MERS did not cause Selkowitz's default, prevent him from curing his default, or keep him from trying to negotiate a loan modification? No, MERS did not cause injury.

2. Did Selkowitz suffer any injury to his business or property under the CPA, even though emotional distress is not a cognizable injury, MERS did not cause any injury to his credit scores, MERS did not foreclose on his property, and Selkowitz's litigation costs are not recoverable injuries? No, Selkowitz did not suffer any injury.

3. Did MERS commit an unfair or deceptive act or one that had the capacity to deceive, even though Selkowitz either did not see, or did not deem relevant, the statements by or about MERS's actions with respect to his loan, and those statements could not have reasonably deceived anyone? No, MERS committed no unfair or deceptive act.

Selkowitz also argues MERS's authority to appoint a successor trustee is at issue in this case. Selkowitz does not identify any claim against MERS arising from that issue, except for his CPA claim. In any case, MERS had the authority to appoint a successor trustee (*infra* Section V.D.5), Quality Loan did nothing wrong by commencing a non-judicial foreclosure (*infra* Section V.D), and no one slandered Selkowitz's title to the property (*infra* Section V.B.3).

III. STATEMENT OF THE CASE

A. Selkowitz borrowed money to buy a condominium.

In 2006, Selkowitz decided to buy a condominium. (CP 391 (6:11–20); CP 391 (11:2–4).) He paid about $380,000 for the property (CP 393 (15:14–15)), and borrowed almost all of the money. (CP 414 (99:11–13).) Selkowitz took out two loans, each secured by a deed of trust on the property. (CP 393 (15:25–16:2).) The first loan, for $309,600, is the subject of this action.

Selkowitz understood the economic terms of the loan. Selkowitz received a disclosure statement identifying his monthly payments. (CP 324–27.) He was never asked to make payments inconsistent with the disclosures. (CP 395 (22:18–23:7).) The broker did not misrepresent any terms of the loan. (CP 394 (18:22–24).)

B. Selkowitz promised to repay his lender and its successors and assigns.

As evidence of his obligation to repay the loan, Selkowitz signed a promissory note. (CP 329–39.) Selkowitz understood he was promising to repay the money he borrowed. (CP 396 (24:18–22).)

New Century Mortgage Corporation was Selkowitz's original lender. (CP 329 ¶ 1.) Selkowitz agreed that New Century could transfer the note. "*I understand that Lender may transfer this Note.* 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 329 ¶ 1, emphasis added.) Selkowitz also agreed that "[a] sale [of the Note] 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 … . There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note." (CP 352.)

Just as Selkowitz agreed it could, New Century transferred the note to U.S. Bank National Association, as trustee for GSAA Home Equity Trust 2007-1, Asset-Backed Certificates, Series 2007-1. (CP 438 (21:3–12); CP 437 (14:18–22).) U.S. Bank and its servicers, including Litton, have had physical possession of the loan documents since 2006 through a custodian, Deutsche Bank. (CP 441 (42:17–43:15).) As custodian, Deutsche Bank kept the documents for U.S. Bank and its servicers and was required to provide the documents to the servicer on demand. (CP 384, 386–88.)

C. Selkowitz signed a deed of trust to secure repayment.

To secure Selkowitz's obligations, Selkowitz executed a deed of trust stating that if Selkowitz defaulted on the loan, the noteholder could foreclose. (CP 341–66.) The deed of trust listed New Century as the "Lender"—which made it beneficiary as a matter of law, under RCW 61.24.005(2)—and identified Mortgage Electronic Registration

Systems, Inc., as beneficiary, but *solely* as nominee for New Century (as the original lender) and any successor or assign of New Century. (CP 341–66.) Selkowitz understood if he broke his promise to repay the loan, the noteholder would have the right to sell the property in a foreclosure sale to recoup loan proceeds. (CP 396 (25:20–23).) "Bottom line, if you don't pay, the note holder has the right to foreclose." (CP 396 (27:5–6).)

D. Selkowitz made payments.

After discussing the purchase with his father and a financial advisor, Selkowitz believed he could afford to make the required payments on his loan. (CP 393 (12:21–13:20).) Selkowitz in fact made payments for at least a year after borrowing the money. (CP 398 (33:13–16).) At first, Selkowitz made payments to New Century directly. (CP 398 (34:18–22).) He then made payments to Avelo, a servicer for the loan, and then to Litton, another servicer. (CP 398 (34:23–35:9, 35:19–25).)

E. Selkowitz stopped making payments because he had no money.

In 2008 or 2009, Selkowitz stopped making payments. (CP 398 (35:19–21).) The only reason Selkowitz stopped making payments was because he did not have "enough money to pay the loan." (CP 398 (33:10–12).) The "economy tanked," which "seriously impacted the revenue of [Selkowitz's] business." (CP 399 (37:25–38:13).) Selkowitz

had to make choices about whom to pay, and he chose not to pay his loan. (CP 399 (39:13–18).)

Selkowitz did not default because he was confused about who he needed to pay. Selkowitz understood Litton was the servicer when he stopped making payments. (CP 398 (35:19–25).) Selkowitz made payments to Litton before he defaulted. (CP 399 (37:5–6).) Selkowitz had no reason to believe anyone other than Litton was his servicer. No one else was demanding payment from Selkowitz. (CP 399 (36:12–20).)

Selkowitz did not stop making payments because he thought the deed of trust contained deceptive or illegal statements. (CP 411 (86:14–22).) Nor did Selkowitz stop making payments because his loan had been "securitized." (CP 411 (87:10–19).) Selkowitz stopped making payments because he didn't have enough money to make the payments. (CP 399 (37:22–38:2).)

F. Litton was entitled to enforce the note and deed of trust.

After Selkowitz defaulted, Litton, as servicer for U.S. Bank, was in possession of Selkowitz's promissory note (through a custodian) and thus entitled to enforce it. (*See* CP 441 (42:17–43:15).) Selkowitz recognized the original promissory note when it was shown to him during his deposition. (CP 413–14 (95:17–96:13).) Selkowitz also recognized his signatures on the original deed of trust. (CP 414 (97:21–98:9).)

G. Quality Loan Service Corporation of Washington commenced foreclosure.

After Selkowitz's default, Litton directed Quality Loan Service Corporation of Washington to give Selkowitz notice of his default on Litton's behalf. (CP 450 (59:8–14).) MERS—acting on behalf of the note's owner, U.S. Bank, and at the direction of Litton—then appointed Quality Loan to serve as trustee under Selkowitz's deed of trust. (CP 368–70.).[1] Selkowitz does not recall ever seeing the recorded appointment, which is not a document delivered to a borrower under the Deed of Trust Act, RCW 61.24 *et seq.* (CP 403 (52:9–18).)

After its appointment as trustee, Quality Loan commenced a non-judicial foreclosure by recording a Notice of Trustee's Sale. (CP 372–75.) Quality Loan warned Selkowitz that unless he cured his default by paying $15,421, Quality Loan would sell the property. (CP 372–75.) Selkowitz agreed he was not paying his loan at the time of the notice (CP 404 (56:14–21)), and Selkowitz had no reason to believe the amount

[1] By statute, regulation, and at common law, Washington has recognized that parties may use nominees as limited agents to hold title for them. *See, e.g.*, RCW 11.98.070(8) (trustee may hold "property in the name of a nominee or nominees without mention of the trust relationship"); RCW 30A.08.170 (trust company or national bank may hold property through "nominee"); WAC 458-61A-214 ("A 'nominee' is a person who acts as an agent on behalf of another person in the purchase of real property."); *Carr v. Cohn*, 44 Wash. 586, 588 (1906) (nominee can bring quiet title action on deed); *Andrews v. Kelleher*, 124 Wash. 517, 534–36 (1923) (agent could prosecute foreclosure).

he needed to pay was inaccurate (CP 404 (56:1–9). The only reason Selkowitz did not pay $15,421 to avert foreclosure was because he was not able to pay. (CP 404 (56:14–24).) Selkowitz did not even consider curing the default because he didn't have the money. (CP 404 (57:3–12).)

H. Selkowitz demanded a loan modification.

Around the time of his default, Selkowitz asked Litton for a loan modification. (CP 400 (40:23–41:5).) Selkowitz knew that he should contact Litton to discuss a loan modification. (CP 401 (44:15–18).) Selkowitz does not know whether he qualified for loan modification (CP 407 (68:10–16)), and he does not know whether he would have accepted one had it been offered. (CP 416 (104:9–13).) Selkowitz asked for a loan modification because he could not afford his original loan. (CP 407 (70:5–12).) MERS did not prevent him from getting a loan modification. (CP 412 (88:5–8).) After Selkowitz and Litton failed to reach agreement on the terms of a loan modification, Selkowitz hired a lawyer. (CP 401 (47:8–20).)

I. Selkowitz had no meaningful relationship with MERS.

Selkowitz had no meaningful interactions with MERS. Selkowitz did not recall ever receiving any document from MERS (and there is no evidence he did). (CP 403 (52:19–21).) Selkowitz never spoke with anyone at MERS. (CP 403 (52:22–23).) Selkowitz never communicated

by letter or in any other way with MERS. (CP 403 (52:24–53:1).) If Selkowitz wanted to contact MERS, he could have easily done it through a public website or by calling a toll-free number. (CP 427 (88:23–90:1).)

MERS was listed as the beneficiary under Selkowitz's deed of trust, as nominee/agent for the original lender/principal (New Century) and as a continuing agent for the lender's successors and assigns. (CP 341–66.) The deed of trust explained MERS was "acting solely as a nominee for Lender and Lender's successors and assigns." (CP 342 at 2.)

Through the deed of trust and by virtue of their membership in the MERS® system, MERS was granted the authority by U.S. Bank and/or Litton to take actions with respect to Selkowitz's loan, such as substituting the trustee (as requested by U.S. Bank). Under MERS's membership agreements, in the absence of instructions from U.S. Bank, MERS was entitled to rely on instructions issued by Litton, as servicer. (CP 425–26 (73:22–74:14).) U.S. Bank authorized MERS to take direction from Litton with respect to this particular loan because Litton was the servicer of the loan. (CP 428 (92:21–93:10).)

MERS's role in the transaction was not important to Selkowitz when he borrowed the money, and he did not know or think much about MERS when he signed the deed of trust. (CP 397 (31:11–21).) Selkowitz came up with claims against MERS only *after* he hired a lawyer.

(CP 410 (81:9–11).) Selkowitz did not allege MERS did anything wrong, except (1) MERS was listed as beneficiary in a nominee capacity on his deed of trust, and (2) Selkowitz believed (but cited no evidence) that MERS allegedly claimed to hold the note, although he does not dispute MERS never made that representation to *him*. (CP 409–10 (79:25–80:22), CP 411 (85:2–86:3).)

J. Selkowitz believed he was injured.

Stress. Selkowitz sought medical treatment for stress beginning in early 2009, but did not remember seeking treatment for stress specifically because of the foreclosure, or as a result of anything MERS did in particular. (CP 405 (61:4–11).) Selkowitz was "stressed about the lack of money" (CP 405 (61:24–25)), and he didn't have money because the "economy tanked" (CP 399 (37:25–38:13).) Indeed, Selkowitz sought treatment *before* foreclosure even commenced. (CP 302 at 6 n.1.)

Damage to Credit. Selkowitz found it more difficult to borrow money, but conceded that his credit reports accurately reflected the fact that he was not paying his loan. (CP 406 (65:4–66:5).) Selkowitz did not question the accuracy of his credit reports, just the identity of the persons reporting that information to the credit agencies. (CP 406 (65:4–66:5).) Selkowitz was not, however, able to say who was responsible for the damage to his credit. (CP 406 (66:23–67:1).) Selkowitz was not otherwise

aware of any injury to his reputation. (CP 413 (94:19–95:3).) Selkowitz did not produce evidence that MERS ever reported anything to any credit reporting agency or that anything MERS did affected his credit.

Threat of Loss of Property. Selkowitz does not contend MERS ever tried to foreclose on his property. Selkowitz was not deprived of the use of the property. (CP 412 (90:13–91:6).) Selkowitz lived there continuously since he purchased it in November 2006. (CP 407 (70:22–71:2).) There was no non-judicial foreclosure proceeding pending at the time the Superior Court entered judgment for MERS because Quality Loan discontinued the trustee's sale on December 27, 2012. (CP 377–79.) Despite Selkowitz's claim of "ultimate evil" (Selkowitz Br. at 48), Selkowitz was not in fact required to defend "simultaneous foreclosure actions brought by different parties" (Selkowitz Br. at 48).

Fees and Costs. Selkowitz was not injured in any other identifiable way. Selkowitz did not pay any fees or costs associated with the non-judicial foreclosure. (CP 403 (54:8–15).) Selkowitz did not pay any person or agency to investigate his loss, apart from trial experts and attorneys' fees to prosecute this action. (CP 412 (88:9–21).)

K. Selkowitz chose not to make monthly payments.

Although Selkowitz could have been making monthly payments because he had a job, he chose not to because he did not have enough

money to catch up on his arrearage. (CP 398 (34:4–12).) Nor was Selkowitz paying taxes on his property. (CP 407–08 (71:24–72:8).) Selkowitz was not setting aside any money to pay the noteholder (CP 402 (50:1–10)), even though he acknowledged his noteholder was entitled to foreclose if Selkowitz failed to pay (CP 396 (26:15–27:6). Selkowitz never paid any fees or tendered any money to anyone in connection with the foreclosure. (CP 417 (121:2–15).)

L. The history of this suit includes answers to certified questions of law.

Selkowitz filed his first complaint on July 2, 2010. *See Selkowitz v. First Am. Title Ins. Co.*, No. 10-5523, ECF No. 1 (W.D. Wash. July 27, 2010). Defendants removed the case to the U.S. District Court for the Western District of Washington and moved to dismiss the complaint in August 2010. (*Id.*, ECF Nos. 1, 7–8.) Selkowitz responded with a proposed amended complaint and response briefs in August 2010. (*Id.*, ECF No. 9, 16–17.) The district court dismissed the case on August 31, 2010. (*Id.*, ECF No. 22.) Selkowitz thereafter moved to amend the judgment. (*Id.*, ECF No. 25.)

The district court issued an order to show cause why certain legal questions arising in connection with the case should not be certified to the Washington Supreme Court along with questions from another case before

Judge Coughenour. (*Id.*, ECF No. 26.) The federal district court decided to certify three legal questions to the Washington Supreme Court. (*Id.*, ECF No. 41.)

The Supreme Court answered some of those questions in part in *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83 (2012). The federal district court then vacated its prior dismissal order and remanded the case to the Superior Court for King County, Washington based on a lack of federal claims.

M. The Supreme Court answered.

Because the federal district court was unclear what role MERS could play under Washington law, it asked the Washington Supreme Court to answer three questions: (a) whether MERS could act as beneficiary of a deed of trust (in its own right) if MERS was not the noteholder; (b) what the legal effect of MERS's actions might be if it took actions only a beneficiary can take; and (c) whether a CPA claim lies against MERS if it took actions only a beneficiary can take. *See Bain*, 175 Wn.2d at 91.

In the Supreme Court (indeed, throughout the case), MERS did not argue that it was the holder of the note; MERS simply held title to the deed of trust, in a nominee capacity. *See Bain*, 175 Wn.2d at 89. This is important, because it confirms that MERS has never represented to a borrower (or anyone else) that it was the noteholder.

The Supreme Court answered that MERS was not a valid beneficiary in its own right, as defined by RCW 61.24.005(2) (rather than as an agent), unless MERS was entitled to enforce the note secured by the deed of trust. *Id.* at 110. The Supreme Court also held that, on the limited record before it, the Supreme Court could not determine the legal effects of MERS taking actions as if it were beneficiary in its own right (rather than as an agent). *Id.* at 110–11. But the Supreme Court rejected the idea that MERS's mere designation as beneficiary in an agency capacity somehow voided the deed of trust, eliminated the debt, separated the note from the deed of trust, or caused injury in any way. *Id.* at 112–14, 120.

The Supreme Court held that it was "likely true" that MERS *could* act as agent for a noteholder, that "nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note," and that "Washington law, and the deed of trust act itself, approves of the use of agents." *Id.* at 106. Nothing in *Bain* suggests it is improper to designate MERS as beneficiary in a deed of trust as an agent for the disclosed principal (i.e., the lender).

To the contrary, in examining whether having a beneficiary of record that differs from the noteholder splits the note from the deed, the Supreme Court recognized that MERS *could* be a proper beneficiary so long as it had a principal controlling it. "If, for example, MERS is in fact

an agent for the holder of the note, likely no split would have happened." *Id.* at 112. This is consistent with more than 100 years of Washington law, holding that noteholders may designate agents as beneficiaries to pursue foreclosure. *See, e.g.*, *Carr*, 44 Wash. at 588 (nominee can bring quiet title action on deed); *Andrews*, 124 Wash. at 534–36 (bondholders' agent authorized to prosecute foreclosure); *Fid. Trust Co. v. Wash. & Or. Corp.*, 217 F. 588, 596 (W.D. Wash. 1914) (same).

Addressing the CPA claim, the Supreme Court held that, "[d]epending on the facts of a particular case," a borrower might show injury if MERS took some action as beneficiary that prevented the borrower from knowing who to deal with to resolve questions about who owns the loan, loan modification, loan servicing questions, or whom to sue. *Bain*, 175 Wn.2d at 118–19. But the Supreme Court also noted that "it is unclear whether the plaintiffs [in *Bain* and *Selkowitz*] can show any injury," it was unclear whether MERS had any "causal role," and "*the mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury.*" *Id.* at 119–20 (emphasis added).

N. Further proceedings in the Superior Court.

After the federal district court remanded the case to the Superior Court, the parties engaged in extensive discovery efforts. Those were necessary because both the district court and the Washington Supreme

Court lacked an adequate evidentiary record upon which to base any findings or conclusions. The Supreme Court, in particular, was simply articulating legal principles and answering certified questions of law.

The defendants took Selkowitz's deposition, and his answers revealed crucial deficiencies in his claims. Selkowitz could not have commenced the lawsuit because of anything MERS said or did to him. For example, Selkowitz admitted he had never even seen the appointment of a successor trustee executed by MERS. (CP 403 (52:9–18).) Selkowitz also made crucial admissions about his alleged injuries. He could identify no colorable injury to his business or property apart from legal fees, expenses, and other inconveniences associated with the commencement of this action.

After considering an extensive record, the Superior Court granted MERS's motion for summary judgment. Selkowitz filed a motion for reconsideration repeating many of the arguments he had made before, and that was denied. This appeal followed.

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). 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, however, 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. MERS did not cause any injury to Selkowitz's business or property.

Selkowitz failed to produce evidence that MERS caused injury to his business or property. MERS only took two actions. MERS was named on Selkowitz's original deed of trust, and MERS appointed a successor trustee under the deed of trust (at the direction of, and with authorization from, MERS's principal). MERS didn't try to foreclose on Selkowitz. MERS didn't keep Selkowitz from negotiating with his lender, or obtaining a loan modification. The Superior Court properly entered

summary judgment because MERS was not the but-for cause of any injury to Selkowitz's business or property.

Selkowitz needed to show that MERS took some unfair or deceptive act in trade or commerce that caused an identifiable injury to Selkowitz's business or property. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986). That required more than just evidence that MERS contributed to some injury. Under the CPA, Selkowitz needed to offer evidence showing that but-for MERS's actions, he would not have suffered an injury. *Indoor Billboard v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 84 (2007). In the absence of a causal link between the injury and the unfair or deceptive act, Selkowitz has no viable CPA claim. *See Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 917 (2001). That is because, as the Washington Supreme Court noted, even if Selkowitz was injured, "MERS may or may not have a causal role." *Bain*, 175 Wn.2d at 119.

MERS did not cause Selkowitz injury because none of MERS's acts caused Selkowitz's default or otherwise caused Selkowitz any identifiable harm. MERS took only two actions. MERS agreed to be designated as a nominee for the lender under Selkowitz's deed of trust (CP 341–66), and MERS, acting in in its capacity as a nominee/agent,

appointed Quality Loan to serve as trustee under the deed of trust. (CP 368–70.) There was no evidence MERS did anything else.

There was also no evidence that those particular acts by MERS caused Selkowitz any injury. MERS was named in Selkowitz's deed of trust, but that did not make any difference to Selkowitz or cause him any injury. "Prior to this lawsuit, I had no idea who MERS was or why they were named in the DOT." (CP 1092 ¶ 5.) MERS's role in the transaction was not important to Selkowitz when he borrowed the money, and he did not know or think much about MERS when he signed the deed of trust. (CP 397 (31:11–21).) Selkowitz freely admitted MERS's status as nominee beneficiary did not matter to him. (CP 397 (31:11–21).)

Nor was there any evidence that MERS's appointment of a successor trustee was the but-for cause of any injury to Selkowitz. Washington's Deed of Trust Act does not require such an appointment to be served on a borrower. *See* RCW 61.24.010, 61.24.030. Selkowitz never even saw the recorded appointment until his deposition, years into this litigation, so any representations in that document could not have injured him. (CP 403 (52:9–18).)

The evidence showed Selkowitz's complaints about MERS were based largely on his misunderstanding of the Supreme Court's decision in *Bain*, and not on any genuine sense of grievance directed towards MERS's

role in the transaction. MERS did not demand payment from Selkowitz or declare him in default. (CP 1093 ¶ 7.) Selkowitz never communicated with MERS or received documents from MERS. (CP 403 (52:19–53:1).)

Selkowitz's Default. Although Selkowitz quibbles about the use of the word "default," he admitted he promised to pay back his loan and admitted he broke that promise because he didn't have enough money to make payments. (CP 396 (25:20–23, 27:5–6), CP 398 (35:19–21), CP 399 (37:22–38:13).) Selkowitz's own testimony established why that happened. The "economy tanked" and Selkowitz's business stopped generating profits. (CP 399 (37:25–38:13).) As a result, Selkowitz did not have enough money to pay his loan. (CP 399 (39:13–18).) If Selkowitz could have paid Litton or Quality Loan to stop the foreclosure, he would have done so, but Selkowitz simply did not have enough money. (CP 404 (56:14–24).)

Payments to His Lender. MERS didn't prevent Selkowitz from making payments to his lender. (CP 399 (37:22–38:2).) Selkowitz knew he needed to make payments to Litton, the servicer for his loan, because he made payments to Litton before running out of money. (CP 398 (35:19–25), CP 399 (36:12–20).) Selkowitz didn't stop making payments because he thought the deed of trust contained deceptive or illegal statements or because his loan had been "securitized." (CP 411 (86:14–22, 87:10–19).)

Selkowitz understood his noteholder had the right to foreclose because of his broken promises. "Bottom line, if you don't pay, the note holder has the right to foreclose." (CP 396 (27:5–6); *see also* CP 396 (25:20–23).)

Loan Modification Efforts. MERS did not prevent Selkowitz from getting a loan modification. (CP 412 (88:5–8).) Selkowitz understood that MERS was not his servicer. (CP 398 (35:19–25).) Selkowitz knew he should contact Litton to discuss a loan modification. (CP 499 (36:12–20), CP 401 (44:15–18).) Selkowitz in fact did contact Litton to discuss loan modification (CP 400 (40:23–41:5)), although he does not know whether he qualified for one (CP 407 (68:10–16)) or even whether he would have accepted one had it been offered. (CP 416 (104:9–13).) Litton was not obligated to offer Selkowitz a loan modification. *See Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569 (1991).

B. Selkowitz's business or property was not injured under the CPA.

Selkowitz suffered no injury to his business or property—a prerequisite for his CPA claim. To sustain his CPA claim against MERS, Selkowitz needed to submit evidence that he was injured by MERS in his business or property. *Hangman Ridge*, 105 Wn.2d at 780. The Supreme Court made it clear that "the mere fact MERS is listed on the deed of trust as a beneficiary *is not itself an actionable injury*" under the CPA. *Bain*,

175 Wn.2d at 120 (emphasis added). The Supreme Court speculated that Selkowitz *might* be able to show injury, but because the Supreme Court was only answering certified questions of law, it did not have the facts necessary to determine whether Selkowitz was actually injured.

The Superior Court properly entered summary judgment for MERS because the evidence showed Selkowitz suffered no injury to his business or property. Stress is not a CPA injury, MERS didn't damage Selkowitz's credit, Selkowitz was still living in the property (despite having made not a single payment since 2009), and Selkowitz did not pay any of the fees or costs of the lender in connection with the attempted foreclosure.

1. Emotional distress is not an injury under the CPA.

Selkowitz cannot recover for "stress" under the CPA because the CPA requires evidence of injury to business or property. "Personal injuries, as opposed to injuries to 'business or property,' are not compensable and do not satisfy the injury requirement. Thus, damages for mental distress, embarrassment, and inconvenience are not recoverable under the CPA." *Panag v. Farmers Ins. Co.*, 166 Wn.2d 27, 57 (2009). *Lyons* didn't change that rule. *See Lyons v. U.S. Bank Nat'l Ass'n*, 181 Wn.2d 775, 786 n.4 (2014) ("emotional distress, embarrassment, and inconvenience are excluded" from injury under the CPA). Selkowitz

alleged he suffered stress and mental anguish, but those are not injuries to business and property.

In any case, Selkowitz admitted his stress was caused by his financial embarrassment resulting from the downturn in the economy. (CP 404 (61:4–25).) Selkowitz was under stress and felt uncertainty about the outcome of this litigation (CP 1099–100 ¶¶ 20–21, 23), but admitted the stress was caused in part by the "loss of my business" (CP 1099 ¶ 20), and admitted he did not seek treatment because of the foreclosure or as a result of anything MERS did. (CP 405 (61:4–11).) Selkowitz sought treatment before the foreclosure started. (CP 302 at 6 n.1.) Selkowitz did not produce evidence that MERS caused his stress.

2. There was no evidence MERS caused injury to Selkowitz's credit.

Selkowitz cannot recover for his diminished credit score because Selkowitz admitted the credit score accurately reflected the fact that he was not paying his loan. (CP 406 (65:4–66:5).) Since, as discussed above, Selkowitz's failure to pay his loan was caused by his lack of money, not by anything MERS did, and since his credit reports accurately reflected his failure to pay, Selkowitz's diminished credit is not an injury under the CPA. Selkowitz's only concern was whether the right person is reporting his failure to pay to the credit agencies. (CP 406 (65:4–66:5).) Even if that

were injury, Selkowitz acknowledged he had no reason to believe MERS made those reports. (CP 406 (66:23–67:1).)

Selkowitz also has no CPA claim because the federal Fair Credit Reporting Act ("*FCRA*") preempts any state-law claim tied to credit reporting issues. *Dvorak v. AMC Mortg. Servs., Inc.*, 2007 WL 4207220, at *4–5 (E.D. Wash. 2007) (CPA claim for credit defamation preempted); *Ornelas v. Fid. Nat. Title Co.*, 2005 WL 3359112, at *4 (W.D. Wash. 2005) (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. Appx. 708 (9th Cir. 2007).

Under FCRA, if a borrower believes a creditor has made a false report, he must first contact the credit reporting agency so that the agency can ask the creditor to investigate the claim. Liability attaches only after a creditor makes an investigation, and fails to remove an untrue report. *Ornelas*, 2005 WL 3359112, at *3. There was no evidence MERS made a false report (or any kind of report) to a credit reporting agency, no evidence Selkowitz contacted a credit reporting agency, and no evidence MERS failed to remove an untrue report.

3. Selkowitz suffered no injury to his real property.

Selkowitz never lost control over the property and continuously resided there since purchasing it in 2006. (CP 407 (70:22–71:2), CP 412

(90:13–91:6).) Although he stopped making payments in 2009, his lender has been paying the property taxes to avert a tax sale. (CP 407–08 (71:24–72:8).) Granted, Selkowitz was worried about losing control of his property, but the mental distress suffered by concerns over possible foreclosures are mental injuries that are not compensable under the CPA. *See Panag*, 166 Wn.2d at 57. Nor did anyone "slander" Selkowitz's title; Washington is a lien theory state and a deed of trust does not affect title to property. *Kezner v. Landover Corp.*, 87 Wn. App. 458, 463 (1997). MERS did not, in any event, make any false or malicious statement about Selkowitz's "title." Accordingly, Selkowitz was not injured by the loss of use or enjoyment of his property.

4. Selkowitz cannot recover fees and costs spent pursuing his CPA claims.

Selkowitz can't recover for fees, costs, or time spent in pursuing his CPA claims. The CPA requires evidence of an actual injury, distinct from attorneys' fees incurred pursuing a lawsuit. Accordingly, while investigation expenses "and other costs resulting from a deceptive business practice" can be an injury, the cost of "consulting an attorney to institute a CPA claim" is not an injury. *See 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."); *see also Demopolis v. Galvin*, 57 Wn. App. 47, 54 (1990).

In *Demopolis*, the Washington Court of Appeals held that a plaintiff who borrowed money failed to meet the CPA's injury requirement, even though the underlying loan agreement was allegedly usurious, because the plaintiff had not actually paid any usurious interest and so had suffered no injury. 57 Wn. App. 47 (1990). The Washington Supreme Court cited *Demopolis* with approval when it observed that the cost of consulting an attorney to institute a CPA claim is "insufficient to show injury to business or property." *Panag*, 166 Wn.2d at 62.

In cases like this one, where there was no foreclosure, courts repeatedly hold plaintiffs like Selkowitz have suffered no CPA injury. *See Thurman v. Wells Fargo Home Mortg.*, 2013 WL 3977622, at *3–4 (W.D. Wash. 2013) (resources spent pursuing a CPA claim are not recoverable injuries under the CPA; collecting cases); *Massey v. BAC Home Loans Serv. LP*, 2013 WL 6825309, at *7–8 (W.D. Wash. 2013).

The court in *Bakhchinyan v. Countrywide Bank, N.A.*, explained why it isn't sufficient for a plaintiff to point to his attorneys' fees in these kinds of cases. A plaintiff must produce evidence showing that his attorneys' fees were incurred as a result of some legal wrong done to him. *See* 2014 WL 1273810, at *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. *Id.*

There is a good reason why those courts joined the Washington Supreme Court in refusing to recognize the costs of litigation as injuries under the CPA. If the rule were otherwise, courts could dispense with the "injury" element of the CPA because it would be met automatically in every case where the plaintiff's claim satisfied the other elements. *Every* CPA claim that makes its way to court involves fees, costs, and other inconveniences. If those fees, costs, and inconveniences are "injuries," there will always be injury in every CPA claim. But that is not the rule.

Selkowitz was not injured by paying any fees or costs associated with the foreclosure itself. (CP 403 (54:8–15), CP 417 (121:2–15), CP 398 (34:4–12).) Selkowitz did not pay those fees or charges or make any other payments on his loan. (CP 398 (34:4–12).) To the contrary, Selkowitz inflicted thousands of dollars of injuries on his lender by remaining in the property without making a single payment since 2009, leaving his lender to pay the taxes on the property. (CP 407–09 (71:24–72:8).)

Nor can Selkowitz recover for fees, costs, and time spent investigating or pursuing his CPA claim. Selkowitz admitted he did not pay any investigator, apart from lawyers and purported experts to pursue this action. (CP 412 (88:9–21).) The declaration Selkowitz submitted on

summary judgment didn't contradict his prior deposition testimony. To the contrary, he claimed his damages were "ongoing" because he continued to pay his attorney (CP 1099–100 ¶ 21–22) and his experts (CP 1100 ¶ 22), and he continued to spend time and money on the case and its ancillary costs (CP 1099–100 ¶¶ 21–22). These aren't injuries—these are just the ordinary costs of litigation. Under *Demopolis*, *Panag*, and *Thurman*, attorneys' fees to prosecute a CPA claim are not injury under the CPA—attorneys' fees are a CPA *remedy*, not an element.

Even if litigation costs could be injuries, Selkowitz still doesn't have a CPA claim against MERS. As discussed above, Selkowitz didn't incur those costs as a result of any act or omission of MERS. Selkowitz did not devise reasons to assert claims against MERS until *after* he hired a lawyer. (CP 410 (81:9–11).) And, as discussed below, the result of Selkowitz's litigation activity has been to prove what Selkowitz knew all along—that he broke his promise to pay back his loan, and that Litton was entitled to foreclose as a result. *See infra* Section V.D.

C. The evidence showed MERS did nothing unfair or deceptive to Selkowitz.

This Court should affirm the Superior Court because MERS proved that it did nothing unfair or deceptive in connection with Selkowitz's loan transaction. When there is no dispute about what the

defendant did, a court may determine as a matter of law whether a practice is unfair or deceptive. *Indoor Billboard*, 162 Wn.2d at 74. MERS showed that its acts were neither a per se unfair trade practice, as set out by the Washington legislature, nor had the capacity to deceive a substantial portion of the public. *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)).

When it answered certified questions of law, the Supreme Court reviewed a MERS assignment from another case that (wrongly) suggested MERS was acting on behalf of itself, and disavowed having any principal. The Court stated that, in that context, "characterizing MERS as the [noteholder] has the capacity to deceive," and consequently the first element of a Washington CPA claim—establishing an unfair or deceptive act or practice—was "presumptively" met. Nevertheless, the Washington Supreme Court was careful to say that naming MERS as beneficiary is not "*per se* deceptive." *Bain*, 175 Wn.2d at 117.

Legal presumptions like the one in *Bain* are merely that—presumptions—which shift the burden to the party opposing the presumption to produce contrary evidence. *See Cornelius v. Wash. Dep't of Ecology*, 344 P.3d 199, 213 (Wash. 2015) (party opposing presumption overcame it by presenting contrary evidence of intent to abandon water

rights); *Cedell v. Farmers Ins. Co.*, 176 Wn.2d 686, 700 (2013) (remanding for further proceedings, noting presumption of no attorney-client privilege when insured claims bad faith could be overcome simply by "a showing" as to the contrary); *Boyd v. Bondy*, 113 Wash. 384, 389–90 (1920) (presumption that property acquired after marriage is community property overcome "by the evidence showing it to be [wife's] separate estate").

Although MERS was named as the beneficiary, in a nominee capacity, under Selkowitz's deed of trust, that designation lacked the capacity to deceive a substantial portion of the public because designating an agent for a disclosed principal cannot be deceptive (and did not deceive Selkowitz or cause him any confusion, in any event). MERS's role in the transaction was not important to Selkowitz when he borrowed the money. He did not know or think much about MERS when he signed the deed of trust. (CP 397 (31:11–21).) MERS didn't communicate with Selkowitz or prevent Selkowitz from dealing with the servicer for his loan. "Prior to this lawsuit, I had no idea who MERS was or why they were named in the DOT." (CP 1092 ¶ 5.)

Nor did MERS's appointment of a successor trustee have the capacity to deceive Selkowitz or anyone else. Selkowitz never even saw the recorded appointment before his deposition, so any representations in

that document could not have injured him. (CP 403 (52:9–18).) The Deed of Trust Act does not require notice of a trustee appointment to be provided to a borrower. *See* RCW 61.24.010, 61.24.030. Moreover, because MERS was authorized to act as an agent in appointing the trustee, its actions in doing so cannot have been either unfair or deceptive. *See infra* Section V.D.5.

If the Washington Supreme Court had held that naming MERS as a beneficiary under a deed of trust was per se deceptive, then none of this evidence would matter. But the Supreme Court expressly declined to do that. Instead, it left open the possibility that the evidence would show that naming MERS as the beneficiary under Selkowitz's deed of trust was not, in fact, unfair or deceptive. MERS presented that evidence to the Superior Court, and the Superior Court properly entered summary judgment for MERS. *See also Bain v. Metro. Mortg. Grp., Inc.*, 2013 WL 6193887, at *4–6 (Wash. Super. Ct. 2013).

D. Although not directly pertinent to any claims against MERS, Litton had the authority to commence a non-judicial foreclosure.

1. Litton was entitled to foreclose as the holder of the note.

The Superior Court properly entered summary judgment for Litton and others because Litton was the holder of Selkowitz's promissory note

when Litton commenced a non-judicial foreclosure. RCW 62A.3-301 states that a person entitled to enforce an instrument includes "the holder of the instrument" and "a non-holder in possession of the instrument who has the rights of a holder." A holder is simply a person "in possession of the negotiable instrument that is payable either to bearer or to an identified person that is the person in possession ... ." RCW 62A.1-201(21)(a). As the comments to RCW 62A.3-203 note, "an instrument is a reified right to payment. The right is represented by the instrument itself."

The Supreme Court in *Bain*, and this Court in *Trujillo*, explained how to apply those principles in the context of a non-judicial foreclosure proceeding under Washington's Deed of Trust Act. "The plaintiffs [including Selkowitz] argue that our interpretation of the Deed of Trust Act should be guided by the UCC definitions, and thus a beneficiary must either actually possess the promissory note or be the payee. E.g., Selkowitz Opening Br. at 14. We agree." *Bain*, 175 Wn.2d at 104; *see also Trujillo v. Nw. Tr. Servs., Inc.*, 181 Wn. App. 484, 500–01 (2014).

As the Supreme Court held 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, even without the execution of separate assignments of the deed of trust. "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 a straightforward application of the UCC and Washington real property law, Litton was entitled to foreclose. Litton qualified as a "person entitled to enforce" the note because Litton possessed the note, indorsed in blank. The undisputed evidence showed Litton was the noteholder when it began the non-judicial foreclosure. (CP 569 ¶¶ 2–5; CP 441 (42:17–43:15).) Selkowitz recognized the original promissory note (CP 413–14 (95:17–96:13)), and introduced no evidence to suggest the

indorsement by New Century was invalid. *See* RCW 62A.3-308; ER 902(i). The deed of trust followed the note to Litton as a matter of law.

Perhaps recognizing he has no hope of disputing Litton's right to foreclose under Washington's UCC, Selkowitz contradicts his prior arguments to the Washington Supreme Court and now claims the UCC should not apply at all. That is inconsistent with *Bain*, which applied the UCC at Selkowitz's own insistence. *See* 175 Wn.2d at 103–04. The argument also contradicts this Court's well-reasoned decision in *Trujillo*, which applied the UCC to similar claims. *See* 181 Wn. App. at 498–501.

Nor does the text of Selkowitz's promissory note itself require the application of some different body of law. The note defines the noteholder as "Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note." (CP 329 ¶ 1.) That is practically the same language used by Washington's UCC. *See e.g.*, RCW 62A.3-203(a). The note does not further specify "who is entitled to receive payments," which means this Court must look to the UCC to determine that.

Even if this Court chose not to apply the UCC, it would still conclude that Litton was entitled to enforce Selkowitz's promissory note under the common law. In *John Davis & Co. v. Cedar Glen No. 4, Inc.*, 75 Wn.2d 214 (1969), the Supreme Court applied the common law and Washington's mortgage statute to conclude that the holder of a note can

enforce it. This Court relied on *Davis* in its own decision in *Trujillo*. 181 Wn. App. at 498–99. Selkowitz doesn't explain why the Court should depart from the rule announced in *Davis* almost 50 years ago.

2. Litton did not need to be both the holder and the owner of the note to commence foreclosure.

Litton was entitled to enforce the note even though it was an agent for U.S. Bank, the owner. That is because the Supreme Court endorsed the plain words of RCW 62A.3-301, which say 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.

The Supreme Court correctly interpreted Washington's UCC's when it observed that the holder of the note need not also be the owner of the note to enforce it. The comments to RCW 62A.3-203 include an extensive discussion of the distinction between ownership and enforcement rights. "The right to enforce an instrument and ownership of the instrument are two different concepts. A thief who steals a check payable to bearer becomes the holder of the check and a person entitled to enforce it, but does not become the owner of the check." RCW 62A.3-203, cmt. 1. There is no improving on this Court's discussion of that distinction in *Trujillo*. *See* 181 Wn. App. at 497–501.

Both *Bain* and *Trujillo* fit squarely within long-standing Washington law that allows holders—even those acting as agents for owners—to enforce debts. "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*, 75 Wn.2d at 222–23 (citation omitted) (emphasis added).

Selkowitz doesn't give this Court any good reason to reject *Trujillo* or *Bain*. Selkowitz's arguments contradict the plain terms of Washington's UCC, and Selkowitz's own arguments to the Washington Supreme Court, which agreed with Selkowitz that "our interpretation of the deed of trust act should be guided by these UCC definitions ... ." *Bain*, 175 Wn.2d at 104. That Litton was acting as servicer for others made no difference to Litton's right to enforce the note and deed of trust.

Nor is Selkowitz's new position an appropriate interpretation of Washington's Deed of Trust Act. Washington's legislature decreed that a beneficiary under a deed of trust may establish its right to foreclose by signing a declaration that it is the "holder" of the instrument. RCW 61.24.030(7)(a). The beneficiary is not required to declare it is also the owner. Again, this Court's discussion in *Trujillo* has it exactly right.

See also Jackson v. Quality Loan Serv. Corp., No. 72016-3-I, slip op. at 11 (Wn. Ct. App. April 6, 2015).

Even if the rule were otherwise, however, Litton would still have had the right to commence a non-judicial foreclosure under these circumstances. Although Litton was not itself the owner of the note, it was an agent for U.S. Bank, who was the owner. (CP 822–23.) The Washington Supreme Court approves of the use of agents, including agents under the Washington Deed of Trust Act. *Bain*, 175 Wn.2d at 106. "[N]othing in this opinion should be construed to suggest an agent cannot represent the holder of a note. Washington law, and the Deed of Trust Act itself, approves of the use of agents." *Id.* (citations omitted).

Selkowitz argues an agent cannot be the "holder" of a note, citing *Central Washington Bank v. Mendelson-Zeller*, 113 Wn.2d 346, 358 (1989). *Central Washington* is not on point; the case concerned whether an agent who accepted an instrument on behalf of another party was a "holder in due course," not a holder. *Id.* A "holder in due course" differs from a holder in that, if a party satisfies the criteria to qualify as a holder in due course, it "enjoys certain privileges and immunities which [a holder] does not have." *Wesche v. Martin*, 64 Wn. App. 1, 11 (1992). The *Central Washington* court expressly held that an agent who accepted a note on behalf of his clients *was* a holder; however, he was not a "holder in due

course" because the parties for whom he was an agent did not qualify as a holder in due course. 113 Wn.2d at 358. *Central Washington* actually holds the exact opposite of what Selkowitz suggests: "Although the checks from the buyers were made payable to MZ, thus making MZ a 'holder', *see* § 1-201(20), MZ was not accepting the instruments on its own behalf, but as an agent of the Stirlings, who were the owners of the instruments.... Thus *MZ was a holder of the instruments* [but] only for its ultimate principal, the Stirlings." *Id.* at 358 (emphasis added).

Accordingly, even if this Court rejects Washington's UCC and its own prior decision in *Trujillo*, Litton still had the right to foreclose as the holder of the note and as agent for the owner. As agent, Litton was foreclosing under the authority given it by U.S. Bank. There was no violation of the Deed of Trust Act because Litton was simply acting on behalf of the owner when it pursued foreclosure.

3. Just because Litton and U.S. Bank kept the note in a secure file room at Deutsche Bank does not mean they lost the right to enforce the note.

Litton did not lose its right to foreclose on Selkowitz's deed of trust by prudently keeping the original note in a secure file room at Deutsche Bank. Ordinary people do not lose their rights to property by locking up that property in banks. Similarly, Litton did not lose its right to enforce the note by depositing the note with a custodian. That's because a

note is not considered transferred for purposes of enforcement if "delivery of possession is for some purpose other than transfer of the right to enforce." RCW 62A.3-203, cmt. 1. Neither Litton nor U.S. Bank deposited the note "for the purpose of giving to [Deutsche Bank] ... the right to enforce the instrument." RCW 62A.3-203(a).

A federal court bankruptcy court located here in Washington recently rejected exactly this argument. *See Butler v. One West Bank, FSB (In re Butler)*, 512 B.R. 643, 654–55 (Bankr. W.D. Wash. 2014). The court in that case concluded the custodian was just an agent for the noteholder for purposes of keeping the note physically secure. *Id.* The court held that the bank in question (Deutsche Bank, the same custodian at issue here) was always acting at the direction of the servicer and note owner. *Id.*

Washington law allows a person to hold a note through an agent. RCW 62A.3-201, cmt. 1 ("[N]obody can be a holder without possessing the instrument, either directly *or through an agent*.") (emphasis added); RCW 62A.3-420, cmt. 1 ("Delivery to an agent [of a payee] is delivery to the payee."); RCW 62A.9-313, cmt. 3 (may possess through an agent); RCW 62A.1-103(b) (common law, including agency law, applies to UCC transactions); *State v. Spillman*, 110 Wash. 662, 667 (1920) (constructive possession exists "where there is a right to the immediate, actual possession of property."); *Gleeson v. Lichty*, 62 Wash. 656, 659 (1911)

("But, if we assume that the note was not in [defendant's] actual possession, it was clearly under his control, and therefore constructively in his possession.").

In that respect, Washington law is the same as the law in other jurisdictions. *See, e.g.*, Report of the Permanent Editorial Board for the Uniform Commercial Code, *Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes*, at 5 (Nov. 14, 2011) (noting possession under "UCC Section 3-301 includes possession by a third party on behalf of the holder); *see also In re McFadden*, 471 B.R. 136, 175 (Bankr. D.S.C. 2012) (owner of the note can have constructive possession of the note through an agent servicer, and be a holder, even if the note never leaves the servicer's office); *Banker's Trust (Del.) v. 236 Beltway Invest.*, 865 F. Supp. 1186, 1195 (E.D. Va. 1994) (constructive possession where note held by agent); *Midfirst Bank, SSB v. C.W. Haynes & Co.*, 893 F. Supp. 1304, 1314–15 (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").

UCC and agency principles explain why Litton did not lose the right to enforce the note just by keeping it safe at Deutsche Bank. No one presented any evidence to the Superior Court that the note was deposited with Deutsche Bank for the purpose of giving Deutsche Bank the right to

enforce the note. Instead, the note was deposited with Deutsche Bank to keep it safe from harm. Deutsche Bank was always responsible for delivering the note at the instructions of Litton and U.S. Bank. (CP 822 ¶ 7; CP 384–85 at 93; CP 386–88.)

The parade of horribles Selkowitz envisions in his brief vanishes after the application of the Washington UCC and agency law. It is not true that "anyone who touches the note for any purpose ... can arguably initiate non-judicial foreclosure" (Selkowitz Br. at 25) because most of the people touching the note would be doing so under a limited dispensation given by the owner or its agents. Setting aside Selkowitz's hypotheticals, here, the uniform evidence submitted to the Superior Court demonstrated Litton was entitled to enforce the instrument.

4. Litton was entitled to foreclose because Selkowitz admitted breaking his promise to make payments.

Selkowitz admitted breaking his promise to repay his loan. That was a default under his promissory note, whether Selkowitz admitted it or not. Selkowitz conceded he promised to pay back his loan. (CP 399 (37:22–38:2).) Selkowitz also conceded he broke that promise because he didn't have enough money to make payments. (CP 396 (25:20–23, 27:5–6), CP 398 (35:19–21), CP 399 (37:22–38:13).) His failure to pay his note was a default, giving Litton the right to foreclose. (*See*

CP 331 ¶ 7(b) ("If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.").)

Aside from semantic arguments about whether to use the word "default," Selkowitz seems to focus on his allegation that the person entitled to enforce his note did not declare him to be in default. That's not accurate. Litton, acting through Quality Loan, sent him a notice of default before commencing a non-judicial foreclosure. (CP 450 (59:8–14).) As discussed above, Litton was entitled to enforce Selkowitz's note.

Even if there were some obligation for the *owner* of the obligation to send notice of default, that happened here because Litton was acting as U.S. Bank's agent when it sent the notice of default. U.S. Bank is an incorporeal body and must act through agents. In this case, it acted through a grant of authority to Litton, its servicer. As servicer, Litton was empowered to send notice of default in its discretion without first consulting with the owner.

There's nothing in Washington's Deed of Trust Act that prohibits this kind of grant of authority to an agent. To the contrary, the Supreme Court in *Bain* endorsed the use of agents in connection with non-judicial foreclosures. *See* 175 Wn.2d at 106. Selkowitz presented no evidence suggesting Litton acted outside the scope of its authority in declaring Selkowitz to be in default and commencing a non-judicial foreclosure. All

the testimony submitted to the Superior Court demonstrated Litton acted appropriately when it commenced the non-judicial foreclosure.

5. MERS, acting in its capacity as nominee, was authorized to appoint a successor trustee.

The evidence proved that MERS had the authority to appoint a successor trustee because MERS was authorized to take action at the direction of Litton and U.S. Bank. According to the deed of trust, MERS was the nominee for New Century and its successors and assigns (which included U.S. Bank). A nominee is an agent, albeit one with a limited role and purpose. "A nominee is one who holds bare legal title to property for the benefit of another." *Fourth Inv. LP v. United States*, 720 F.3d 1058, 1066 (9th Cir. 2013); *see also supra* Section III.G n.1. Without using the term "nominee," Washington courts have for more than a century approved of precisely this role. *See, e.g.*, *Carr*, 44 Wash. at 588 (nominee can bring quiet title action on deed); *Andrews*, 124 Wash. at 534–36 (bondholders' agent authorized to prosecute foreclosure); *Fid. Trust Co.*, 217 F. at 596 (same); *Anderson Buick Co. v. Cook*, 7 Wn.2d 632, 641–42 (1941) (mortgage remains valid even where named mortgagee "held the bare legal title" for real party in interest). "Nominee" includes "one designated to act for another in his or her place," and the term "is used

sometimes to signify an agent or trustee." Black's Law Dictionary at 1090 (6th ed. 1990).

MERS's role as nominee included the power to act on behalf of its principal as an agent. *See In re Tucker*, 441 B.R. 638, 646 (Bankr. W.D. Mo. 2010) ("MERS was the agent for New Century under the Deed of Trust from the inception, and MERS became agent for each subsequent note-holder under the Deed of Trust"); *Ward v. Sec. Atl.*, 858 F. Supp. 2d 561, 567 n.5 (E.D.N.C. 2012) ("As long as the sale of the note involves a member of MERS, MERS remains the beneficiary of record on the deed of trust and continues to act as nominee for the new beneficial owner"); *Kiah v. Aurora Loan Servs., LLC*, 2011 WL 841282, at *4 (D. Mass. 2011) ("dissolution of [lender] would not and could not prevent [noteholder] from obtaining an assignment of the mortgage from MERS, both as a matter of law and according to the arrangement that existed between MERS and [noteholder] as a 'successor and assign'"); *Long v. One W. Bank, FSB*, 2011 WL 3796887, at *3 (N.D. Ill. 2011) ("whether [lender] was in bankruptcy prior to the assignment by MERS to Deutsche is irrelevant and does not show that the assignment was invalid"); *see also* Restatement (Third) Property § 5.4 cmt. e ("Courts should be vigorous in seeking to find such [agency] relationship").

The evidence presented to the Superior Court resolved any lingering questions, arising from *Bain*, about MERS's role as nominee. The Supreme Court was not able to determine whether MERS was an agent because of the limited record provided to the Supreme Court. When the federal district court certified the record to the Supreme Court, it transmitted only a small portion of the record (mainly pleadings and briefs, but not evidentiary materials). The incomplete record, and the relatively early stage of the cases at the time of certification, contributed to the mistaken impression at the Supreme Court that MERS had no principal controlling MERS's actions, and was acting as beneficiary not as an agent, but for itself. *See Bain*, 175 Wn.2d at 90 & n.2, 107 & n.12.

MERS cleared up this confusion on summary judgment. MERS is listed as the beneficiary under Selkowitz's deed of trust, as nominee/agent for the original lender/principal (New Century) and as a continuing agent for the original lender's successors and assignts. (CP 341–66.) The deed of trust explained MERS was "acting solely as a nominee for Lender and Lender's successors and assigns." (CP 342 at 2.)

Through the deed of trust and as members of the MERS® system, U.S. Bank and Litton each gave MERS the authority to take actions with respect to Selkowitz's loan, such as substituting the trustee (as requested by U.S. Bank). In the absence of instructions from U.S. Bank, MERS was

entitled to rely on instructions issued by Litton, as servicer. (CP 425–26 (73:22–74:14).) U.S. Bank authorized MERS to take direction from Litton, the servicer of Selkowitz's loan. (CP 428 (92:21–93:10).)

Selkowitz now contests MERS's authority based on a new argument derived from New Century's bankruptcy filing. First, MERS was acting for U.S. Bank, not New Century, when it appointed a successor trustee. (Recall the deed of trust expressly described MERS as the nominee for the original lender and "Lender's successors and assigns.") Second, although MERS is not relying on them for its authority to appoint a successor trustee in this case, New Century's bankruptcy didn't actually "void" its contracts with MERS. *See Eastover Bank for Sav. v. Sowashee Venture* (*In re Austin Dev. Co.*), 19 F.3d 1077 (5th Cir. 1994) (rejection is a breach, not a termination).

6. Although none of these issues are directly pertinent to the claims against MERS, they show Selkowitz was not wronged.

Whatever this Court decides with respect to claims against Litton and others, it should affirm the grant of summary judgment in favor of MERS. MERS did not communicate with Selkowitz, seek to enforce his promissory note, or commence a non-judicial foreclosure. Arguments about Litton's right to enforce the note and to commence foreclosure ultimately have little to do with MERS's role in this transaction.

MERS has nevertheless submitted briefing on these points because it is important to note that, in a broader sense, Selkowitz did not suffer any wrong in connection with his loan transaction. Contrary to Selkowitz's allegations in his complaint, Selkowitz was not injured by a foreclosure commenced by a person who lacked authority to do so. It's apparent now—based on the evidence not available to the Supreme Court when it answered certified questions of law—that Selkowitz breached his promise to pay back his loan and then staved off foreclosure with a complaint filled with inaccurate allegations.

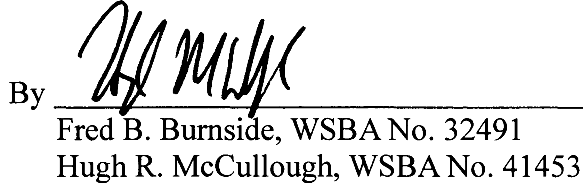
The Superior Court properly granted summary judgment for MERS and the other defendants after reviewing an extensive record of discovery, and Selkowitz's own words from his deposition. The Superior Court had the benefit of the full evidentiary record, which the Washington Supreme Court did not have available to it when it decided *Bain* in 2012. The Superior Court properly granted summary judgment after applying the legal principles enunciated by the Supreme Court to the actual facts that were subsequently developed through discovery.

VI. CONCLUSION

For the foregoing reasons, the Court should affirm the Superior Court's order granting summary judgment for MERS.

RESPECTFULLY SUBMITTED this 10th day of April, 2015.

Davis Wright Tremaine LLP
Attorneys for Mortgage Electronic
Registration Systems, Inc.



By ______________________
Fred B. Burnside, WSBA No. 32491
Hugh R. McCullough, WSBA No. 41453

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

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on April 10, 2015, I caused the document to which this certificate is attached to be delivered to the following as indicated:

Richard Llewelyn Jones, Esquire Kovac & Jones, PLLC 1750 112th Avenue N.E., Suite D151 Bellevue, WA 98004 *rlj@kovacandjones.com* Attorneys for Appellant	☑ Messenger ☐ U.S. Mail, postage prepaid ☐ Federal Express ☐ Facsimile ☐ E-mail
Richard B. Sanders, Esquire Goodstein Law Group, PLLC 502 S G Street Tacoma, WA 98405-4715 *rsanders@goodsteinlaw.com* Attorneys for Appellant	☑ Messenger ☐ U.S. Mail, postage prepaid ☐ Federal Express ☐ Fax ☐ E-mail
Mary Stearns, Esquire Annette Elena Cook, Esquire McCarthy & Holthus, LLP 108 First Avenue South, Suite 300 Seattle, WA 98104 *mstearns@mccarthyholthus.com* *acook@mccarthyholthus.com* Attorneys for Quality Loan Service Corporation of Washington	☐ Messenger ☑ U.S. Mail, postage prepaid ☐ Federal Express ☐ Facsimile ☑ E-mail

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 APR 10 AM 11:51

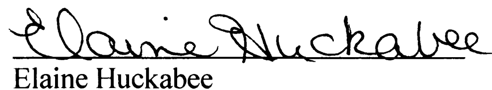
Robert W. Norman, Jr. Lauren D. Humphreys, Esquire Houser & Allison, APC 1601 Fifth Avenue, Suite 850 Seattle, WA 98101 *rnorman@houser-law.com* *lhumphreys@houser-law.com*	☐ Messenger ☑ U.S. Mail, postage prepaid ☐ Federal Express ☐ Facsimile ☑ E-mail

Attorneys for Litton Loan Servicing, L.P.

Emile Ka-Aw Edling, Esquire Houser & Allison, APC 9600 S.W. Oak Street, Suite 570 Portland, OR 97223 *eedling@houser-law.com*	☐ Messenger ☑ U.S. Mail, postage prepaid ☐ Federal Express ☐ Facsimile ☑ E-mail

Attorneys for Litton Loan Servicing, L.P.

Dated at Seattle, Washington this 10th day of April, 2015.



Elaine Huckabee