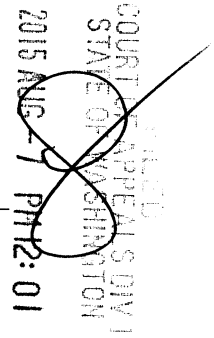
72526-2 72526-2

No. 72526-2-I

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



BLAIR LA MOTHE,

Appellant

v.

U.S. BANK N.A., AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE THORNBURG MORTGAGE SECURITIES TRUST 2005-4 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-4 ITS SUCCESSORS IN INTEREST AND/OR ASSIGNS

Respondents

Appeal from Superior Court for King County
The Honorable Douglass A. North

APPELLANT'S OPENING BRIEF

Blair La Mothe
8117 NE 110th Place
Kirkland, WA 98034

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. BACKGROUND INTRODUCTION

Respondent claims to be the real party in interest to a Promissory Note (the Note) and a Deed of Trust (DOT) relating to 8117 NE 110th PL, Kirkland, WA 98034 (the Property) executed by Appellant Blair LaMothe on October 3, 2005.

Respondent is attempting to acquire ownership of the Property through a judicial foreclosure action.

Appellant asserts that Respondent has no valid evidence to support its claim, presents valid evidence in contradiction of Respondent's claim, and wonders if fraud has been committed upon the court.

Appellant will demonstrate that the Superior Court committed numerous counts of reversible error, in the presence of reasonable doubt that was clearly identified, and therefore seeks to vacate the judgments entered in favor of a fair and just process to flush out the truth.

II. ASSIGNMENT OF ERROR

A. The trial court erred in entering the order of August 8, 2014, which granted U.S. Bank N.A.'s ("Respondent") Motion for Summary Judgment, struck Blair La Mothe's ("Appellant") Affirmative Defenses, and denied Blair La Mothe's Motion for Summary Judgment.

B. The trial court erred in entering the order of September 12, 2014, which denied Blair La Mothe's Motion for Reconsideration.

C. The trial court erred in entering the June 25, 2015 Amended Judgment and Decree of Foreclosure in favor of U.S. Bank N.A. and against Blair La Mothe.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Did the Trial Court commit error by:

1) Accepting Respondent's statement that it had presented "the original Note" to the court when reasonable doubt existed as to the authenticity of the note presented. This reasonable doubt arises from:

a. The fact that two versions of the Note exist

b. There was no chain of title provided

c. Assignments of the Note and DoT were allegedly made by parties on dates when those parties should not have been in possession of the Note or DoT;

2) Stating that "no actual evidence" existed that the Note presented was not the "actual note" when counsel for Appellant clearly stated that Appellant had been "ambushed with a new note";

3) Allowing foreclosure proceedings to be underway when Respondent had not fulfilled its contractual obligations under the DoT to notify Appellant of the initiation of foreclosure proceedings;

4) Proceeding under the impression that Appellant was in default, when in fact Respondent was in default for failing to notify Appellant of changes in payment information and/or servicing rights;

5) Awarding Respondent the right to foreclose based on a copy of the DoT, whereas the DoT states more than 100 times that the original document is required;

6) Failing to review (by their own admission) the evidence presented by Appellant;

7) By stating that "this lawsuit is over the foreclosure of a particular Note" when in fact it is a Deed of Trust that is being foreclosed;

8) Effectively denying Appellant rights to due process, namely the review of all evidence;

9) Denying Appellant's right to discovery of admissible evidence by denying the 56F Motion;

10) Failing to properly review the Motion for Reconsideration when valid, undeniable evidence was provided in support of the Motion;

11) Accepting hearsay testimony from Respondent's witness David Recksieck;

12) Accepting hearsay testimony from Respondent's counsel; and

13) Accepting ER 902(i) relating to Commercial Paper as being sufficient grounds to authenticate the alleged "original" Promissory Note.

IV. STATEMENT OF THE CASE

A. Factual History

In 1988, Appellant bought the current place in Kirkland (Juanita area) with a great view. The lot was a bit narrow and there was a small house on the lot. CP 2585-1623.

The design and permitting process with the County for this property took a year and a half. Appellant then started building his home in 2000 and completed the home in 2002.

It took Appellant approximately five years of brutal work – 16 hour days, seven days a week, with a significant amount of blood, sweat and tears – to finally complete his home from ground to complete finish.

In 2004, Appellant met Jennifer Payment, who worked as a loan officer at Liberty Financial Group, Inc. She was able to provide Appellant with a loan package. In 2005, Appellant refinanced his personal home with Liberty Financial Group, Inc. At that time, Appellant believed Thornburg Mortgage to be his servicer due to their representations of this fact. CP 2585-1623.

On October 3, 2005, Appellant signed a document agreeing to perform obligations, including the obligation to make payments to Liberty

Financial Group, Inc., ("Liberty"), the entity defined as the Lender. CP 2585-1623, Ex. 2. While Appellant did sign a Note, he cannot say for sure whether the Note presented by Select Portfolio Servicing, Inc. ("SPS") is the same Note he signed in 2005. Appellant Declaration at CP 354, ¶ 7. This is due to Appellant's knowledge of SPS' reported business practice of producing fraudulent documents and because the Note he signed did not have barcodes or allonges. *Id.* In the event the Note was sold, according to the terms of the Note, Appellant agreed to perform those same obligations to the "Note Holder." *Id.* That same day, Appellant signed a boilerplate MERS agreement labeled "Deed of Trust," but was identified in the body of the document as a security instrument. CP 2585-1623, Ex. 3. The document labeled MERS as the beneficiary of the security agreement in bold. *Id* at 2 ¶ (E). Thus, at the outset of the loan the parties intended for one party to own and hold the Note while a separate party owned the Deed of Trust.

December 22, 2005 was the startup date for the Thornburg Mortgage Securities Trust 2005-4 Mortgage Pass-Through Certificates, Series 2005-4. **March 22, 2006** was the deadline under the Pooling and Servicing Agreement that created the Trust for the placement of the fixed pool assets of the Trust had to be acquired.

CP 1903-2518, Request for Judicial Notice, Ex. 2, the Pooling and

Servicing Agreement ("PSA") §§ 3.02; 5.01(j)-(k); 11.01. Thus, Appellant's loan documents should have been included as part of the corpus of the Securitized Trust by Wednesday, **March 22, 2006**. March 2006 - deadline for loans to be entered into the Thornburg Mortgage trust 2005. According to the Pooling and Servicing Agreement (PSA) for the Trust accepting loans after this time is a violation of the PSA. Doing so will negate special tax advantages and potentially costing the Trust millions of dollars in back taxes if they are caught by the IRS. This would be a breach of the fiduciary duty by the Trustee.

On September 15, 2008, Liberty is still the owner of the Note and DOT as it was the listed beneficiary on the document Appellant was requested to sign titled "Request for Partial Reconveyance." Declaration of Blair Appellant at CP 355, ¶ 12. The Request for Partial Reconveyance indicated Liberty was the owner and holder of the Note as of September 15, 2008. *Id.*[1]

In June of 2009, Appellant learned that Liberty had been sold and that Thornburg was in bankruptcy. He was not sure who to pay and efforts to contact those firms did not result in any clear answer. When

[1] The Request for Partial Reconveyance is hearsay, but falls under the "Statements in Documents Affecting an Interest in Property" exception to the rule against hearsay. *See* ER 803(15). In addition, Appellant requests this Court take judicial notice of this publicly recorded document that Respondents have never challenged in the 6 years since it was recorded in the county records.

Appellant learned Liberty was acquired by Guild Mortgage Company and when he discovered his loan servicer at the time, Thornburg Mortgage Home ("Thornburg"), entered bankruptcy, he became concerned that his loan payments were not going to the correct entity. Declaration of Blair Appellant at CP 355-356, ¶¶ 13-17. Despite repeatedly trying to contact Thornburg and Liberty, Appellant was unable to tell who he needed to pay. *Id.* at 15. Accordingly, he stopped paying in June 2009. In the fall of 2009, Appellant received a Notice of Default. **On Nov 9, 2009** Appellant made payment to Thornburg in the amount of $8,433.66. *Id.* at ¶ 20, Exhibit 7. Thornburg took the money out of Appellant's account but failed to credit the payment and refused to stop the non-judicial foreclosure proceeding. *Id.* at ¶ 20.

Thornburg Mortgage Securities Trust

The Thornburg Mortgage Securities Trust 2005-4 (Thornburg Trust) is a securitized trust, created and governed by Delaware law, specifically the Delaware Statutory Trust Act. Request for Judicial Notice, Ex. 2, Trust, Pooling and Servicing Agreement ("PSA"), Thornburg Mortgage Securities Trust 2005-4 (PSA") §§ 1A.03; 1A.09; and 11.06. See CP 1903-2518. Under the PSA, the "Servicer and the Master Servicer" are charged with prosecuting any foreclosure action on

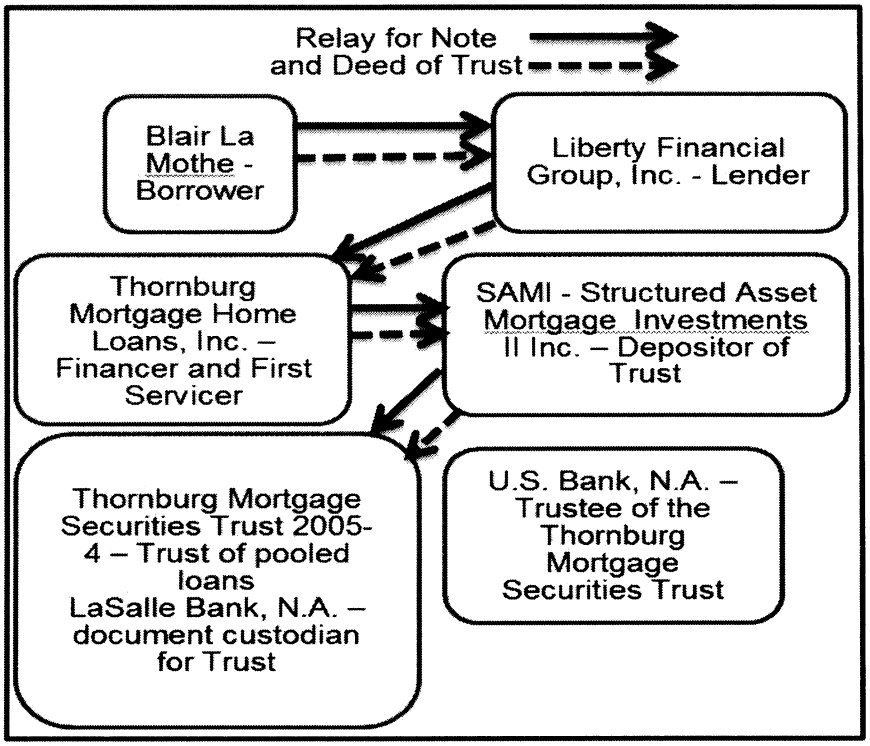
behalf of the Trust and Unnamed Investors. PSA § 3.01, ¶ 4. CP 1903-2518.

Under the PSA that created the Thornburg Trust, the fixed pool assets of the Trust had to be acquired within 90 days after **December 22, 2005**, its startup day. **March 22 2006** is the closing date, meaning that according to the terms of the PSA all loans had to be in the Trust by that time King County 1903-2518, Exhibit No. 2, Part of the Request for Judicial Notice, the Pooling and Servicing Agreement ("PSA") §§ 3.02; 5.01(j)-(k); 11.01[2]. Thus La Mothe's loan documents should have been included as part of the Securitized Trust Pool by Wednesday **March 22, 2006**.

The Thornburg Trust was comprised of a pooling of numerous loans (promissory notes and deeds of trust), including loans generated by Liberty Financial Group, Inc. In order for Appellant's loan to be part of the Thornburg Trust, the Note and Deed of Trust would have needed to go through a relay process in which the Note and DOT were passed from entity to entity until the last entity placed the loan into the securitized trust.

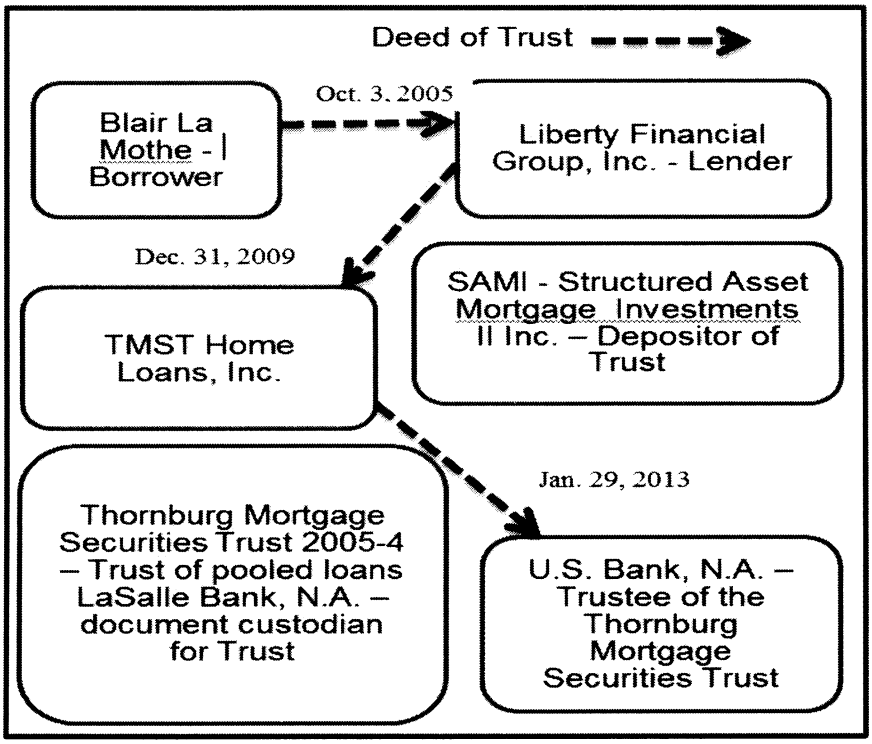
The process can be illustrated with the following:

[2] See Amended Designation of Clerk's Papers.



The final leg of the relay process required Mr. La Mothe's loan (Note and Deed of Trust) to be placed into the custody of the Trust's document custodian, La Salle Bank, N.A. on or before March 22, 2006.

What actually happened with the Note after it was given to Liberty Financial Group, Inc. is anyone's guess and has yet to be revealed to Appellant and the Court. However, the relay process involving the Deed of Trust and the entities involved can be tracked by documents that were recorded with the King County Auditor well after March 22, 2006:



A chronological summary of the above process can be stated as follows:

Oct. 3, 2005	Blair La Mothe signs the Deed of Trust
Dec. 31, 2009	Liberty Financial Group, Inc. assigns Deed of Trust to TMST Home Loans, Inc.
Jan. 29, 2013	TMST Home Loans, Inc. assigns Deed of Trust to U.S. Bank, N.A. as Trustee for the Thornburg Mortgage Securities Trust

The entities depicted in the previous illustrations can be clarified by the following descriptions:

Blair La Mothe – borrower who signed Note and Deed of Trust with lender Liberty Financial Group, Inc. on October 3, 2005.

Liberty Financial Group, Inc. – original lender and beneficiary identified on the Note and DOT. Liberty later acquired by Guild Mortgage Company, however Guild's name was not identified on any documents Appellant has seen.

Transnation Title Insurance – trustee identified on the DOT, later merged into Lawyers Title Insurance Corp.

MERS – identified on the DOT as nominee and beneficiary.

Thornburg Mortgage Home Loans, Inc. – the alleged beneficiary of the Liberty-La Mothe Note and the first servicer of the loan.

TMST Home Loans, Inc. – alleged beneficiary of the Liberty-La Mothe Note.

TMST, Inc. – alleged beneficiary of the Liberty-La Mothe Note.

Structured Asset Mortgage Investment II, Inc. – alleged beneficiary and final purchaser of Blair La Mothe's Note and Deed of Trust.

Thornburg Mortgage Securities Trust 2005-4 – Trust Pool created in December 2005 and closing in March 2006, allegedly containing Blair La Mothe's loan (Note and Deed of Trust) along with many others.

U.S. Bank N.A. – The Trustee for the Thornburg Mortgage Securities Trust 2005-4

LaSalle Bank National Association – document custodian for the Thornburg Mortgage Securities Trust 2005-4's pooled loans (Notes and Deeds of Trust)

Select Portfolio Servicing, Inc. – the second alleged servicer of the Liberty-La Mothe loan

B. Procedural History

On March 11, 2013, Respondent filed a complaint against Appellant. CP 1-61. In its Complaint, Respondent alleged in paragraph 10 that Respondent "executed and delivered" a promissory note in favor of Liberty Financial Group, Inc. CP 3, ¶ 10. Attached as Exhibit C to the Complaint was a document Respondent alleged to be a copy of the Note Appellant executed. CP 27-31, Ex. C ("Complaint Note").

The Complaint Note contains barcodes at the bottom of the first page. Complaint Note at 1. Below the barcodes is text that states "NOTE, SIGNED CERTIFIED Copy." Id. In the bottom left corner of the Allonge to the Complaint Note, the words "Multistate Note Allonge" appear. Id.

On September 16, 2013, Appellant filed an answer wherein he specifically denied Respondent's interpretation of the Complaint Note, including that Appellant executed the Complaint Note. CP 70, ¶ 3.

On July 11, 2014, Respondent filed a Motion for Summary Judgment and the Declaration of David Recksiek ("Recksiek Decl.") in Support of its Motion. CP 95-101; CP 103-105. Attached as Exhibit B to the Recksiek Decl. was a document which Mr. Recksiek declared to be a true and correct copy of the Note Appellant executed. CP 103-105 at ¶ 3. The Complaint Note and the document attached to Recksiek Decl. as Exhibit B are the same document. Compare CP 1-61, Ex. C with CP 103-105, Ex. B.

The deposition of SPS Employee David Recksiek took place on July 16, 2014. See CP 411-469.

Appellant filed a Motion to Strike on July 28, 2014. CP 1641-1652.

At the hearing for Appellant's and Respondent's cross motions for Summary Judgment, Respondent's counsel brought a document ("Attorney Note") to the hearing and alleged that it was the original Note. See Decl. of Brian Fisher, Ex. A. CP 2668-2678.[3] The Attorney Note did

[3] Neither the document nor a copy of the document Respondent's Counsel purported to be the original note was introduced as evidence. Appellant offered the Declaration of Brian Fisher not to add additional evidence on Appellant's Motion to Reconsider, but to

not have barcodes on the first page, did not have the words "NOTE, SIGNED CERTIFIED COPY," nor were the words "Multistate Note Allonge" written in the bottom left corner of the purported Allonge. See id, c.f. Complaint note. Respondent submitted no evidence to authenticate the purported Attorney Note except for Respondent's Counsel's assertion that it was the original Note. ROP 7. Accordingly, at the time of the Court's summary judgment decision, there were two (2) documents that were claimed to be the original promissory note Appellant signed – the Complaint Note and the Attorney Note.

Additionally, at that hearing Appellant was notified its Motion to strike was denied. ROP 3. The order was subsequently entered. CP 1863-1864.

On August 18, 2014, Appellant filed a Motion for Reconsideration. CP 1869-1883. It was denied on September 12, 2014. CP 1892-1893.

Approximately 10 months after the summary judgment hearing, Respondent filed a motion for Amended Judgment and Decree of Foreclosure. CP 2679-2688. It was granted on June 25, 2015. CP 2717-2722.

V. STANDARD OF REVIEW

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simply make sure that the record is correct as to what the Court considered during the hearing.

A trial court's grant of summary judgment is reviewed de novo, and should be reversed where the trial court errs as a matter of law or erroneously determines there are no material issues of fact. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004); *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993).

When the appellate record consists entirely of written materials, the appellate court is in the same position as the trial court and reviews the record de novo. *Harrington v. Spokane Cty.* A summary judgment is reviewed by an appellate court de novo. The court engages in the same inquiry as the trial court under CR 56(c), viewing the facts of the case and the reasonable inferences from those facts in the light most favorable to the nonmoving party. *Harrington v. Spokane County*, 128 Wn. App. 202 (2005).

In determining whether a genuine issue of material fact has been raised, the court must view the evidence and inferences there from in a light most favorable to the nonmoving party. *Barrie v. Hosts of America*, 94 Wn.2d 640 (1980). A fact is material if the outcome of the case, in whole or in part, depends upon it. *Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140,500 P.2d 88 (1972). If reasonable men could reach only one conclusion, no genuine issue of fact exists. Id.

A party must demonstrate by uncontroverted evidence that there is no genuine issue of material fact. *Rossiter v. Moore*, 59 Wn.2d 722, 370 P.2d 250 (1962); and 6 J. Moore, Federal Practice 56.07,56.15(3) (2d ed . 1948). If Respondent does not sustain that burden, the court should not grant summary judgment, regardless of whether Respondent submits affidavits or other materials or not. *Trautman*, Motions for Summary Judgment: Their Use and Effect in Washington, 45 Washington Law Review I, 15 (1970).

As the above standards relate to this case, if, after considering the material evidence in a light most favorable to Appellant, reasonable people might have reached different conclusions about the evidence presented, then Respondents' motion for summary judgment should have been denied. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963); See Also 6 J. Moore, Federal Practice 56.11 (3),56.15(3).

VI. ARGUMENT

1. The Court erred by Accepting Respondent's statement that it had presented "the original Note" to the court when reasonable doubt existed as to the authenticity of the note presented

The Court erred by accepting Respondent's statement that it had presented "the original Note" to the Court when reasonable doubt existed as to the authenticity of the Note presented. This reasonable doubt arises from the following three reasons: 1) the fact that two versions of the Note

exist, 2) there was no chain of title provided and 3) assignments/transfers of the Note and DoT were allegedly made by parties on dates when those parties should not have been in possession of the Note or DoT. The bottom line is there is no valid evidence to justify granting Respondent's summary judgment motion.

A. Two versions of the Note exist

On March 11, 2013, Respondent filed a complaint against Appellant. CP 1-61. In its Complaint, Respondent alleged in paragraph 10 that Respondent "executed and delivered" a promissory note in favor of Liberty Financial Group, Inc. CP 3, ¶ 10. Attached as Exhibit C to the Complaint was a document Respondent alleged to be a copy of the Note Appellant executed. CP 27-31, Ex. C ("Complaint Note"). On September 16, 2013, Appellant filed an answer wherein he specifically denied Respondent's interpretation of the Complaint Note, including that Defendant executed the Complaint Note. CP 70, ¶ 3.

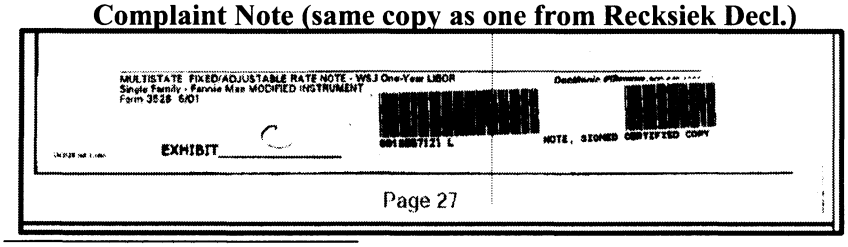
On July 11, 2014, Respondent filed a Motion for Summary Judgment and the Declaration of David Recksiek ("Recksiek Decl.") in Support of its Motion. CP 95-101; CP 103-105. Attached as Exhibit B to the Recksiek Decl. was a document which Mr. Recksiek declared to be a true and correct copy of the Note Appellant executed. CP 103-105 at ¶ 3. The Complaint Note and the document attached to Recksiek's Decl. as

Exhibit B are the same document. Compare CP 27-31, Ex. C with CP 103-105, Ex. B.

The Complaint Note contains barcodes at the bottom of the first page. Complaint Note at 1. Below the barcodes is text that states "NOTE, SIGNED CERTIFIED Copy." Id. In the bottom left corner of the Allonge to the Complaint Note, the words "Multistate Note Allonge" appear. Id.

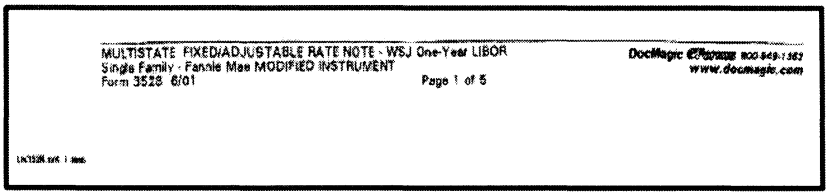
At the hearing for Appellant's and Respondent's cross motions for Summary Judgment, Respondent's counsel brought a document ("Attorney Note") to the hearing and alleged that it was the original Note. See Decl. of Brian Fisher, Ex. A. CP 1653-1718.[4] The Attorney Note did not have barcodes on the first page, did not have the words "NOTE, SIGNED CERTIFIED COPY," nor were the words "Multistate Note Allonge" written in the bottom left corner of the purported Allonge. See id, c.f. Complaint note. A visual comparison of the two notes can be seen below.

Complaint Note (same copy as one from Recksiek Decl.)



[4] Neither the document nor a copy of the document Plaintiff's Counsel purported to be the original note was introduced as evidence. Defendant offers the Declaration of Brian Fisher CP 1653-1718 not to add additional evidence on the Motion to Reconsider, but to simply make sure that the record is correct as to what the Court considered during the hearing.

Attorney Note


MULTISTATE FIXED/ADJUSTABLE RATE NOTE - WSJ One-Year LIBOR
Single Family - Fannie Mae MODIFIED INSTRUMENT
Form 3528 6/01
Page 1 of 5
DocMagic
www.docmagic.com

The two Notes are clearly different. That is why Appellant's counsel, Brian Fisher said he was "ambushed" and made the following statements at the summary judgment hearing:

> This is confusing to me because that document doesn't have any barcodes. This is a true and correct copy, according to David Recksiek, of the note. As you can see right here, there are barcodes. They've been saying the whole time this one with barcodes is the true and correct copy. Now we're being ambushed with a new note, when we've said the whole time Mr. la Mothe can't tell whether that's his own – his own signature because the copy is so poor. I mean, it's a little frustrating that they're saying the whole time that this is a true and correct copy when it clearly isn't.
>
> See ROP, page 19.

Respondent submitted no evidence to authenticate the purported Attorney Note except for Respondent's Counsel's assertion that it was the original Note and did not enter the alleged "original" into evidence. ROP 7. Accordingly, at the time of the Court's summary judgment decision, there were two (2) documents that were claimed to be the original promissory note Appellant signed – the Complaint Note and the Attorney

Note. To date, Respondent has introduced no evidence that the signatures on any of the promissory notes are Appellant's.

B. No Chain of title provided

In the instant case, the record fails to establish that the original lender, Liberty Financial Group, Inc., and subsequent alleged purchasers of the Note, ever properly negotiated and transferred the subject Note to Respondent, sufficient to create a present interest and ownership of the subject Note and DOT allegedly owned and held by Respondent. See e.g. *Davis v. Bantz*, 65 Wash. 395, 400; 118 P.334, 336 (1911) ("the only distinction between an owner and a mortgagee as a party to the lien foreclosure is that the owner is a necessary party to any valid foreclosure, while a mortgagee is a proper party. The only distinction so far as here material, between a necessary party and a proper party is that a foreclosure of the lien without the one is absolutely void, while a foreclosure without the other is void only as to him). Thus Respondent's reliance upon the questionable subject Assignments to create a chain of title between Liberty and Respondent failed to demonstrate the standing required to initiate a judicial foreclosure and sue herein. Without a complete chain of title supported by valid and enforceable transfers of the subject Note and DOT and contractual rights thereunder, Respondent lacked standing to sue, and accordingly the Superior Court committed reversible error by ignoring

deficiencies in chain of title and accepting two different versions of the Note in lieu of chain of title.

The record here should have contained chain of title declarations describing the Note's and DoT's timely and proper transfers. The transfers should have been from Liberty → Thornburg → SAMI → Thornburg Trust (ultimately the Trust's document custodian La Salle Bank and these transfers must have been completed by March 22, 2006). Instead, there was nothing in the record regarding a chain of title for the Note and there were only questionable assignments for the DOT.

If the Liberty-La Mothe Note really was in the Thornburg Trust Pool, then LaSalle Bank National Association should have been the custodian of the Note, not SPS. Yet where is the custodial declaration from a La Salle employee or agent indicating it was in possession of the original signed Note and where that Note had been since October 2005? There was nothing attached to Respondent's complaint nor in Recksiek's declarations or anywhere else in the record that Respondent was the "Note Holder" and in possession of the original Note and DOT on the date this action was filed and on the hearing date of the motion for summary judgment.

C. Assignments/transfers of the Note and DoT were allegedly made by parties on dates when those parties should not have been in possession of the Note or DoT

On October 3, 2005, Blair La Mothe signed a promissory Note agreeing to perform obligations, including the obligation to pay, to Liberty Financial Group, Inc., ("Liberty"), who was defined as the "Lender". A purported copy of the Liberty-La Mothe Note is attached as Exhibit 2 to La Mothe declaration dated July 3, 2014 in support of his Motion for Summary Judgment. King County CP 2585-2623[5]. In the event the Liberty-La Mothe Note was sold, according to the terms of the Note, La Mothe agreed to perform these same obligations to the subsequent "Note Holder." Id., ¶ 1.

That same day, October 3, 2005, La Mothe signed a boilerplate MERS agreement labeled "Deed of Trust," but defined in the body of that document as a "security instrument." A purported copy of that document was attached as Exhibit 3 to the declaration of Blair La Mothe filed in support of his MSJ. CP 2585-2623[6].

The DOT defined MERS as the beneficiary of the security agreement in bold. Id at 2 ¶ (E). See CP 35. Thus, at the outset of the loan the parties intended for one party to own and hold the Note while a separate party owned the Deed of Trust.

The Deed of Trust ("DOT") was recorded against Appellant's real property on October 11, 2005 in the King County auditor's office under

[5] See Amended Designation of Clerk's Papers.
[6] See Amended Designation of Clerk's Papers.

recording number 20051011000890 naming Transnation Title Insurance as Trustee. Liberty is identified on the Note and DOT as the "Lender" as well as the beneficiary. See CP 34.

Three years later, in 2008, La Mothe was given a document to sign titled "Request for Partial Reconveyance." Declaration of Blair La Mothe at paragraph 11. CP 355. The Request for Partial Reconveyance indicated Liberty was still the owner and holder of the Note as of September 15, 2008. Id. That document was recorded with the King County Auditor's office on September 19, 2008, under recording No. 20080919001529.

Liberty was acquired by Guild Mortgage Company in May 2008, CP 356, yet Liberty assigns a DOT well after being acquired by Guild? Guild Mortgage Company bought Liberty in 2008, see CP 356. However, as late as December 2009, Liberty through MERS, assigns the DOT to TMST Home Loans, Inc. The assignment mentions nothing about Liberty being acquired by Guild, nor does the assignment identify Guild in any way. This is highly suspicious.

On December 31, 2009, an assignment of DOT was recorded in the King County recorder's office under Auditor's file no. 20091231000386. CP 59-60. MERS through the name of Liberty assigned the DOT from Liberty to TMST Home Loans, Inc. three and one-half years after the Trust cutoff date of March 22, 2006 and the December 2005 closing date

of the Thornburg Trust, as further discussed below, and as indicated in the Pooling and Servicing Agreement identified as CP 1903-2518. Also, Liberty had been acquired by Guild by this time.

Then on December 1, 2012, a corporate assignment of Deed of Trust is recorded, which Liberty assigns to U.S. Bank N.A., as Trustee, on behalf of the holders of the Thornburg Mortgage Securities Trust 2005-4 Mortgage Pass Through Certificates Series 2005-4.

To summarize the relevant dates from above:

3/22/2006	According to the pooling & servicing agreement for the Thornburg Trust, the Note and Deed of Trust were required to be in the possession of the document custodian for the Thornburg Trust. The PSA requires all loans be included by this cutoff date or the Trust can lose tax advantages. Accepting loans after this date may be a breach of fiduciary duty by U.S. Bank, N.A.
5/2008	Guild acquires Liberty
9/19/2008	Liberty records the Request for Partial Reconveyance indicating they are still the beneficiary
12/31/2009	Liberty assigns DOT to TMST Home Loans, Inc.
12/1/2012	Liberty assigns DOT to U.S. Bank N.A.

From the summary provided above and the recorded documents to back up the factual chronology, Liberty and TMST were in possession of the Note as late at 2012, which meant that the Note and Deed of Trust were never placed into the Thornburg Trust in the first place.

2. The Court erred by stating that "no actual evidence" existed that the Note presented was not the "actual note" when counsel for Appellant

clearly stated that Appellant had been "ambushed with a new note"

At the MSJ hearing, the Court had two notes before it. There was evidence indicating the Attorney note was not the actual note. Appellant's counsel stated he had been "ambushed" as the Attorney Note brought to the Court was clearly different than the copy of the Note provided with the original Complaint and David Recksiek's declaration.

3. The Court erred by allowing foreclosure proceedings to be underway when Respondent had not fulfilled its contractual obligations under the DoT to notify Appellant of the initiation of foreclosure proceedings

The Liberty-La Mothe DoT required the Respondent to provide to Appellant proper and timely notice prior to starting a lawsuit. See ¶ 20, CP 46, where it states the following:

> Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action.

No such notice was provided to Appellant. No copy of any such notice was attached to Respondent's original complaint nor is there a copy of such a notice attached to either of Mr. Recksiek's declarations.

Appellant's eighth affirmative defense provided, "This Answering Defendant hereby relies as an affirmative defense upon the doctrine of absence of contractual conditions precedent." As Respondent did not provide the required pre-litigation notice, it breached the DOT contract with Appellant. Therefore, the MSJ hearing should never have been allowed.

4. The Court erred by proceeding under the impression that Appellant was in default, when in fact Respondent was in default for failing to notify Appellant of changes in payment information and/or servicing rights

Respondent is not entitled to foreclose the Deed of Trust because it breached the DOT contract in at least three ways: 1) Respondent required to pay Appellant interest on the money that has been held in suspense, 2) Respondent cannot foreclose on Appellant's Deed of Trust when there is a balance being held in suspense and 3) Respondent's failure to notify Appellant of change of servicers.

Appellant did not pay Appellant interest on the money that had been held in suspense. This violated the terms of the DOT.

a. Suspense Interest

Section 1 Paragraph 2 of the UNIFORM COVENANTS states:

> If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. If Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does

> not do so within a reasonable period of time, Lender shall either apply such funds or return them to borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure.

b. Balance held on suspense

As discussed above, Mr. La Mothe made a payment in November of 2009, in the amount of $8,433.66 that was never credited to his account. Declaration of Blair La Mothe, ¶ 20. Moreover, there is a balance of $6,754.38 held in suspense. Declaration of David Recksiek, ¶ 4. Mr. La Mothe has never been paid any interest on the suspense balance, and he has never received credit for the suspense balance. Declaration of Blair La Mothe, ¶ 29. Additionally, it is clear the unapplied funds were not applied to the outstanding principal balance under the Note immediately prior to foreclosure because as of the date of Mr. Recksiek's declaration (well after the complaint was filed) the unapplied funds are still being held in suspense. Declaration of David Recksiek, ¶ 4. Respondents have not complied with at least two conditions precedent to foreclosure of the Deed of Trust, and therefore the court should deny their request for an order granting foreclosure.

La Mothe unequivocally disputes he was in default of the note and purported security instrument. Lamothe Dec. ¶ 31. Rather, Respondent's predecessors breached the Note and DOT agreement by: 1) not providing

a notice identifying new servicers; 2) not responding to La Mothe's questions regarding ownership of the note and deed; and 3) by refusing to apply his payments toward his debt. See Lamothe Dec. CP 357. Accordingly, La Mothe was entitled to stop making payments at this time. DC Farms, LLC v. Conagra Foods Lamb Weston, Inc., 179 Wn. App. 205, 220, 317 P.3d 543 (Div. 3, 2014) (where substantial performance has not been rendered by one party, further performance by the other party is excused); see also Bailie Communications v. Trend Business Sys., 54 Wn. App. 77, 81, 765 P.2d 339 (Div. 1, 1988) (A material breach suspends the injured party's duties until the breaching party cures the default).

5. The Court erred by awarding Respondent the right to foreclose based on a copy of the DOT, whereas the DOT states more than 100 times that the original document is required

A major issue that was completely ignored during this process is the Anticipatory Breach of Contract behavior engaged in by the "Lender". Such behavior is a central issue in this case and yet it is glossed over or avoided at every step. If Appellant had been able to complete his loan payments to Thornburg (the servicer) during the lifetime of the loan, would the beneficiary have been able to provide him with the original Note and DOT upon completion?

In Section 23, Reconveyance of the DOT, the 'Lender' agreed to return the original DOT and Note once the 'loan' was paid in full:

Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Such person or person shall pay any recordation costs and the Trustee's fee for preparing the reconveyance.

See CPs 47 and 48. However, when all the news about the Thornburg fraud/bankruptcy surfaced La Mothe became concerned that 'lender' would not be able to fulfill this requirement. If they cannot fulfill this requirement then they are NOT entitled to receive payment from La Mothe.

When Respondent showed up at the MSJ hearing with black and white documents it was clear that Respondent did not have the original Note and DOT but when Appellant's counsel raised this objection Judge North ignored it and said it was Appellant's responsibility to have proven Respondent's version of the Note was not an original. See ROP 20.

Judicial findings should be made based on facts, evidence and law. The fact is that Respondent has no right to demand payment from Appellant. This is evidenced by the fact that Respondent did not prove it had the original Note and the original Deed of Trust. The Law states that

if one party to a contract cannot perform his obligations under the contract then the other party is also not required to perform – Judge North ignored all of this and randomly gave Appellant's house away to an impostor.

The DOT contains the verbiage, "THIS" security instrument, not copies thereof. In fact, the term "THIS SECURITY INSTRUMENT" appears over 110 times in the DOT, but nowhere does it mention copies or digital representations thereof. It is clear that 'Lender' must return the original.

We cannot continue to afford such luxuries to any entity as to concede that copies ARE acceptable, when the agreement itself does not support it. Otherwise any person can show up with a hacked digital reproduction. Copies of a DOT or Note are worth no more than photographs of dollar bills. The document is made valuable by the wet ink signature. That is how the Value is created, that is the source of the credit created in the name of the signer. A reasonable person would not pay One Million Dollars for a photocopy of a Rembrandt - only for the original.

6. The Court erred by their own admission failing to review the evidence presented by Appellant

During the MSJ hearing, Judge North admitted he was unable to make it through all the materials. See ROP5:3-7. This is a very troubling statement to hear due to the fact this matter has a very complicated and

multi-year factual history. How could Judge North rule on the MSJs and Affirmative Defenses without reading or reviewing all of the submitted materials? What materials did Judge North read/review versus what he did not read/review? Was the unread material ultimately important to the ruling he made? Did Judge North completely understand all of the complexities involved, including who had what rights and when those rights were obtained?

7. The Court erred by stating that "this lawsuit" is over the foreclosure of a particular Note" when in fact it is a Deed of Trust that is being foreclosed

The Deed of Trust was given "In Trust" by Appellant, and it is clear from all the bogus assignments and failures to notify Appellant of legal proceedings and changes in servicing/payment data that this Trust has been breached. The DoT entitled the Holder of the DoT to take away Appellant's home, subject to contractual conditions precedent. The entire argument presented by Respondent surrounds the Note, if it actually even exists. The Court awarded in favor of Respondent not based on the presence of the original DoT, which is required, but based solely on two different versions of the Note.

8. The Court erred by effectively denying Appellant rights to due process, namely the review of all evidence

The Court failed to review all the evidence provided by Appellant. This effectively denied the Appellant the chance to provide a reasonable defense against Respondent's claims. The Court never did determine whether Respondent was in possession of the original Note back in March of 2013, when Respondent first filed the Complaint. The Court even raised the question during the MSJ hearing but never followed up on it. ROP 5.

9. The Court erred by denying Appellant's right to discovery of admissible evidence by denying the 56F Motion

In support of its July 14, 2014 MSJ, Respondent filed the declaration of David Recksiek. CP 103-105. Appellant's counsel conducted Mr. Recksiek's deposition, two days later, on July 16, 2014. CP 414-472.

During the deposition, Respondent's counsel engaged in troubling behavior which thwarted the discovery process for Appellant. As examples, Appellant's counsel, Scott Stafne provided a declaration outlining Respondent's counsel's troubling behavior as follows:

> 1. Mr. Recksiek was instructed not to answer questions regarding whether or not SPS' practices related to its purported "business records" would be the same to every person whose loan SPS services. Transcript at 36:24-37:10. Had Mr. Recksiek been

allowed to testify, he would have testified that SPS does not use the same documents or processes in creating and maintaining its purported "business records" for every person whose loan is served by SPS.

2. Mr. Recksiek was instructed not to speculate when asked whether SPS would foreclose if SPS had the note but no security on the note. Transcript at 55:11-24. Because the question called for the deponent to speculate, when Plaintiff's Counsel instructed the deponent not to speculate, he was instructing the deponent not to answer. Had Mr. Recksiek been allowed to answer the question, he would have testified that SPS forecloses on notes even where SPS does not have a corresponding security interest with the note.

3. Mr. Recksiek was instructed not to answer as to how SPS makes money. Transcript at 66:5-7 and 67:21. Had Mr. Recksiek been allowed to testify regarding how SPS makes money from servicing of the loans, he would have testified that SPS under most circumstances would be entitled to the proceeds of the judicial foreclosure as well as the funds obtained through a deficiency judgment. In addition, David Recksiek would have testified that under most circumstances Certificate Holders of securitized trusts would get nothing from the judicial foreclosure nor from the deficiency judgment.

4. Mr. Recksiek was instructed not to answer as to how much 0.77% of 2,000,000 was. Transcript at 70:19-25. Had Mr. Recksiek been allowed to testify, he would have testified that the answer was 15,400, or that he did not know.

5. Mr. Recksiek was instructed not to answer when asked for his understanding of the obligations SPS owes to the holders of the certificates, if anything. Transcript at 87:5-18. Had Mr. Recksiek been allowed to testify, he would have testified that because the holders of the certificates had already been paid in full, SPS owes the holders of the certificates nothing, and would take any proceeds from the forced judicial sale and the deficiency judgment.

6. Mr. Recksiek was instructed not to answer when asked if he ever works with certificate holders. Transcript at 87:20-88:2. Had Mr. Recksiek been allowed to testify, he would have testified that he

never works with certificate holders because they have been paid in full by the time SPS brings a foreclosure action in a securitized trust's name.

7. Mr. Recksiek was instructed not to answer when asked how he goes about trying to determine whether Defendant's Deed of Trust (the security instrument) is actually attached to the Note. 111:4-112:24. Had Mr. Recksiek been allowed to testify, he would have testified that he makes no determination as to whether the security instrument is actually attached to the Note, but simply relies on the computer records that the Note is always secured by the security instrument.

8. Mr. Recksiek was instructed not to answer when asked whether he believed and act upon the fact that the note and security instrument, which are held by two different parties, create a mortgage loan. Transcript at 116:14-24. Had Mr. Recksiek been allowed to answer the question, he would have testified that he simply accepts the SPS computer records that state the note is secured by the security instrument even where the note and security instrument are held or owned by two different parties, including when the name of the "lender" on the note and the name of the "beneficiary" on the deed of trust do not match.

9. Mr. Recksiek was instructed not to answer how many cases Mr. Recksiek had testified in. Transcript at 154:3-155:6. Had Mr. Recksiek been allowed to answer the question, the number of cases Mr. Recksiek had testified in would show that Mr. Recksiek is employed by SPS specifically for the purpose of being a witness at trials without any personal knowledge business records, or the facts of each lawsuit because he became involved in this lawsuit "approximately three (3) weeks ago" when "it was understood that a potential witness was needed to testify." Id. at 150:23-24 and 151:10-11.

10. Mr. Recksiek was instructed not to answer when asked what he would do in a situation where the note is owned by one party and the deed of trust is owned by a totally separate party. Transcript at 167:20-168:1. Had Mr. Recksiek been allowed to answer the question, he would have answered that it is SPS' practice to foreclose on notes it holds regardless of whether or not SPS also

owns the deed of trust.

See Stafne Declaration, CP 404-614.

Appellant was prevented by Respondent's counsel from obtaining relevant and timely discovery information. This behavior by Respondent's counsel during a deposition was a significant violation of CR 26. Appellant had a right to obtain discovery, especially as Appellant was required to file its MSJ response by July 28, 2014, just 12 days after conducting Mr. Recksiek's deposition, and was prevented from doing so.

After the deposition was finished, Appellant's counsel filed a CR 56(f) motion to strike on July 29, 2014. CP 1641-1652. The Court denied Appellant's CR 56(f) motion during the MSJ hearing on August 8, 2014. CP 1863-1864 and ROP 3.

The Court erred by denying Appellant's CR 56(f) motion, by not refusing Respondent's application for judgment, by not ordering a continuance, by allowing David Recksiek's declaration testimony to stand despite the numerous discovery violations taking place during Mr. Recksiek's deposition.

10. The Court erred by failing to properly review the Motion for Reconsideration when valid, undeniable evidence was provided in support of the Motion

There were two different versions of the Note presented to the Judge for review. If he had reviewed them he would have noticed that

they were different and he would have realized his obvious and undeniable mistake.

11. The Court erred by accepting hearsay testimony from Recksiek

In support of its MSJ and in responding to Appellant's MSJ, Respondent provided two separate declarations from David Recksiek, who was an employee and document control officer for Select Portfolio Services, Inc. CP 103-146 and CP 1834-1837. He made his declaration under penalty of perjury that the Respondent was in possession of the Liberty-LaMothe Note and Deed of Trust. CP 104, ¶ 3. Neither declaration provided the testimony necessary for the Liberty-La Mothe Note and Deed of Trust to be admissible evidence. SPS is the second alleged servicer of the loans contained in the Trust. Mr. Recksiek was deposed in July 2014. CP 411-469. Respondent relied heavily upon Mr. Recksiek's testimony in its MSJ briefing. CP 96.

Additionally, Mr. Recksiek's two supporting declarations fail to contain any sort of chain of custody descriptions and attendant exhibits regarding the authenticity of the Liberty-La Mothe Note and DOT. Why did the Judge accept Recksiek's declarations when they failed to contain custodial declarations involving the alleged loan document chain of custody from employees of Liberty, Thornburg Mortgage Home Loans, Inc., SAMI, LaSalle Bank National Association, or SPS regarding the

alleged transfers?

In fact, Mr. Recksiek's declaration completely failed to provide the identity of the previous servicer and the identity of the Respondent's document custodian. How could Recksiek claim he had attached true and correct copies of the Note and Deed of Trust to his declaration when physically he had never actually seen the originals, in violation of the Rules of Evidence? Recksiek also claimed that the originals had been sent to Respondent's attorney yet his declarations provided no relevant and admissible details as to who sent the originals, when specifically the originals were sent and where the originals were being sent from. See CP 103-105 and CP 1834-1836.

The copies of the documents Recksiek attached to his declaration were not admissible. A business record is admissible only if a "custodian" or other "qualified witness" testifies to its identity and mode of preparation." RCW 5.45.020. A "custodian" is: "[a] person or institution that has charge of or custody of ... papers, or other valuables." *Black's Law Dictionary*, 441 (9th Ed. 2009). In this case, Recksieck, who only reviewed these records for purposes of litigation,[7] is not a "qualified

[7] Cf. *State v. Jasper*, 174 Wn.2d 96, 112, 271 P.3d 876 (2012) ("[d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. But this is not the case if the regularly conducted business activity is the production of evidence for use at trial.").

person" because he does not have charge or custody of the records, except those which are necessary to secure a foreclosure. Indeed, in this case the evidence shows Recksieck did not have access to the agreement between the Thornburg bankruptcy trustee and SPS which sets forth the terms for servicing the Trust, which Recksiek claimed owned La Mothe's mortgage loan. Transcript at 43:16-25.

As servicers for the Thornburg Trust, neither Thornburg nor SPS had custody of the Note. Recksiek admitted in his declaration the original Note was "maintained by a custodian on behalf of the Trust and USB as trustee...", basically, neither Recksiek, nor SPS had the Note as it was somewhere else, which leads one to the reasonable belief that he did not know where they were located. 2 at ¶ 3, CP 104. The Note, according to the Thornburg Trust documents, should have been transferred several times before ultimately being placed in the care of Respondent's document custodian.

Hearsay is defined in ER 801. It is not disputed that the only basis for Mr. Recksiek's testimony is hearsay, which the Respondent claims falls within the "business records exception" to the hearsay rule. ER 802 provides: "Hearsay is not admissible except as provided by these rules, by other court rules, or by statute." RCW 5.45.020 provides:

"A record of an act, condition or event, shall in so far as relevant,

be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

The statute includes within its exception a record of "an act, condition, or event." The statute does not allow records to prove legal conclusions contained in the records, such as: 1.) the identity of the Note Holder; 2.) whether the Note owned by Liberty was secured by the security instrument owned by MERS; or 3.) the existence and identity of a beneficiary within the meaning of RCW 61.24.005(2). *Liljeblom v. Department Labor & Indus.*, 57 Wn.2d 136, 141, 356 P.2d 307 (1960). The requirements of RCW 5.45.020 are to be strictly construed. *State v. Finkley*, 6 Wn. App. 278, 280, 492 P.2d 222 (Div. 1, 1972).

Significantly, Mr. Recksiek only came into the case in early July 2014, a few weeks prior to the MSJ hearing, for the specific purpose of testifying in accordance with his job responsibilities as a document control officer. Declaration of Scott Stafne, Ex. 1, Deposition of David Recksiek Transcript ("Transcript") at CP 449, 151:6-12. During Mr. Recksiek's deposition, Respondent's counsel repeatedly coached the deponent through objections and instructions and improperly instructed him not to

answer questions reasonably calculated to lead to discoverable evidence. *See* Appellants' Motion to Strike and accompanying declarations thereto. CP 1641-1652 and CP 1653-1718[8].

A declarant's credibility can be attacked pursuant to ER 806; except counsel for SPS would not allow it. *See e.g.* Transcript, pp. 80-81 CP 431 (instructing witness not to answer because question went to declarant's credibility). In this regard, it should be noted that documents recorded at the King County Auditor's office prove that MERS and Liberty (even though Liberty was no longer in business) owned and held the Note in question (they were the beneficiaries in 2008), which happens to be the same time frame in which Recksiek claimed the Note was held and owned by the Thornburg Trust. *See* La Mothe Declaration. CP 355, ¶ 12.

It is difficult to understand based on these commonly known facts documented in King County's public records, which Appellant judicially noticed, coupled with Lavalle's Dec. that the trial Court could be of the opinion that "the sources of information, method and time of preparation were such as to justify its [their] admission."

In order to allow the admission of hearsay records and the testimony based thereon this Court must be of the opinion that "the

[8] See Second Amended Designation of Clerk's Papers for specific references.

sources of information, method and time of preparation were such as to justify its admission." RCW 5.45.020. This determination should be based on the circumstances surrounding the creation of the records. Respondent's counsel would not allow Mr. Recksiek to testify regarding how SPS creates its records. Transcript at 36:24-37:10. This is troubling given SPS' history of providing false and fraudulent pleadings, affidavits, and evidence in judicial foreclosure actions. Lavalle Dec. at ¶¶ 35-39. Accordingly, because there is no information before the Court as to the sources of information, method and time of preparation of the records Mr. Recksiek purports to rely on in his declaration, this Court cannot determine that the circumstances regarding the creation of these business records are such as to justify the records admission.

Additionally, in order to qualify for this exception the business records must be shown to have been "made in the regular course of business, at or near the time of the act, condition or event." RCW 5.45.020. Although Recksiek attempted to claim the records of La Mothe's alleged default were made in the regular course of SPS' business, he could not do so because the alleged defaults occurred before SPS acquired the servicing rights from the bankrupt Thornburg servicer. The accuracy of Recksiek's testimony regarding the defaults and money owed as a result thereof is called into question by La Mothe's proof that he paid

the then servicer in November, 2009. *See also* Lavalle Dec.; Stafne Dec. Ex. 4 (The Declaration of Brent Rasmussen's (declaration regarding SPS' servicing practices)).

Also, Respondent attempts to use the business records exception to prove legal conclusions. When asked how he determined that Respondent was the Note Holder, Mr. Recksiek said his conclusion was based "on [his] review of [SPS'] business records that show the name of the holder of the note." Transcript at 99:11-19. CP 436. Mr. Recksiek testified the identity of the Note Holder was entered into the record prior to Mr. Recksiek's review, *id* at 100:18-22. In other words, Mr. Recksiek simply looked up the computer records and then swore under penalty of perjury that he had personal, hands-on knowledge of the identity of the Note Holder and owner of the DoT. This is a travesty. He blindly accepted who the computer screen tells him is the Note Holder for the purposes of testifying. He says nothing in either of his declarations about ever seeing the original Note and Deed of Trust. Nor does he say anything about who had custody of the Note and Deed of Trust and when it was allegedly sent to Respondent's counsel. And nowhere to be found is any custodial declaration indicating how the Note came to be in Respondent's hands or even if the Note in Respondent's hands was the original document signed by Appellant.

In conclusion, it should be noted Respondent's entire case is based on the declarations of Mr. Recksiek, whom the Plaintiff has identified as its only trial witness. Mr. Recksiek is not a custodian of business records within the meaning of RCW 5.45.020, but rather a clerk hired for purposes of testifying in litigation. Recksiek's testimony is hearsay as it is not based upon personal knowledge but upon what he could see from computer screens and he never declared he had physically seen the original Note or Deed of Trust and he never provided any sort of a chain of title documenting the transfers of the Note. The Court should not have based any factual findings and legal conclusions upon such inadmissible "evidence".

12. The Court erred by accepting hearsay testimony from Respondent's Counsel

On July 11, 2014, Respondent filed a Motion for Summary Judgment and the Declaration of David Recksiek ("Recksiek Decl.") in Support of its Motion. CP 95-101; CP 103-105. Attached as Exhibit B to the Recksiek Decl. was a document which Mr. Recksiek declared to be a true and correct copy of the Note Appellant executed. CP 103-105 at ¶ 3. The Complaint Note and the document attached to Recksiek Decl. as Exhibit B are the same document. Compare CP 1-61, Ex. C with CP 103-105, Ex. B.

The Complaint Note contains barcodes at the bottom of the first page. Complaint Note at CP 1. Below the barcodes is text that states "NOTE, SIGNED CERTIFIED Copy." Id. In the bottom left corner of the Allonge to the Complaint Note, the words "Multistate Note Allonge" appear. Id.

At the hearing for Appellant's and Respondent's cross motions for Summary Judgment, Respondent's counsel brought a document ("Attorney Note") to the hearing and alleged that it was the original Note. See Decl. of Brian Fisher, Ex. A. CP 1653-1718.[9] The Attorney Note did not have barcodes on the first page, did not have the words "NOTE, SIGNED CERTIFIED COPY," nor were the words "Multistate Note Allonge" written in the bottom left corner of the purported Allonge. See id, c.f. Complaint note. Respondent submitted no evidence to authenticate the purported Attorney Note except for Respondent's Counsel's assertion that it was the original Note. See ROP. Accordingly, at the time of the Court's summary judgment decision, there were two (2) documents that were claimed to be the original promissory note Appellant signed – the Complaint Note and the Attorney Note. To date, Respondent has

[9] Neither the document nor a copy of the document Plaintiff's Counsel purported to be the original note was introduced as evidence. Defendant offers the Declaration of Brian Fisher not to add additional evidence on this Motion to Reconsider, but to simply make sure that the record is correct as to what the Court considered during the hearing.

introduced no evidence that the signatures on any of the promissory notes are Appellant's.

In his answer, Appellant denied the validity of his signature when he contested whether he executed the Complaint Note. CP 70-74. It is inconsequential that in a later declaration Appellant stated that he was not sure whether the Complaint Note contained his signature; Appellant met the requirements of RCW 62A.3-308(a) when he denied that he executed the Complaint Note in his answer. Accordingly, it became Respondent's burden to establish the validity of the signature on the Complaint Note.

Rather than meet its burden, Respondent's attorney instead brought the Attorney Note, a completely different document than the Complaint Note, and alleged the Attorney Note was the original note. See Fisher Decl, Ex. A. CP 42. The only evidence offered that the Attorney Note was the original note was Respondent's Counsel's statement that it was the original note. Respondent's Counsel may not simultaneously be an advocate and a witness as to the validity of the Attorney Note where the validity of the signature is in dispute. See RPC 3.7(a); see also id. cmt 2. This violation of the Rules of Professional Conduct constitutes grounds for reconsideration under CR 59(a)(1). Respondent's Counsel testified about a contested issue; his testimony was inadmissible. Accordingly,

Respondent offered no admissible evidence that the Attorney Note was the note that Appellant signed.[10]

13. The Court erred by accepting ER 902(i) relating to Commercial Paper as being sufficient grounds to authenticate the alleged "original" Promissory Note

During the MSJ Hearing, Respondent's counsel cited ER 902 (i) as the relevant authority governing authentication of Commercial Paper and Judge North accepted this, even though a Promissory Note is not Commercial Paper. Commercial paper is a short term corporate financing document usually due within 270 days or less, therefore the assertion that presentation of the document automatically amounts to authentication of said documents is incorrect.

The acceptance by Judge North of ER 902(i)-Self Authentication was improper as relating to Commercial Paper as being sufficient grounds to authenticate the alleged "original Promissory Note. ER 902(i) states:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
> ...
> (i) Commercial Paper and Related Documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

VII. CONCLUSION

[10] Even if one assumes that RPC 3.7(a) does not apply and the Attorney Note is the same document that Appellant originally signed (which Appellant does not concede), Respondent's Counsel merely proved that Respondent held the Attorney Note on August 8, 2014. Respondent's Counsel has no personal knowledge of whether or not Plaintiff held the note on March 11, 2013, the date the Complaint was filed. CP 1.

Appellant has maintained since 2009 that the identity of the Note Holder, and therefore the party entitled to receive payment under the Note, cannot be determined. Appellant also maintains that the identity of the party holding the original Deed of Trust cannot be determined, in which case it cannot be enforced. This is the heart of the matter.

The validity of Appellant's claim is supported by substantial evidence and becomes unmistakable in light of the fact that Respondent has provided two different versions of the alleged "original note" to the court. A "certified copy" of the original Note cannot magically acquire bar code data that is not present in the alleged "original". Appellant has been denied Discovery, has been denied review of evidence and it is clear that the facts and the evidence do not support the decision handed down by the Superior Court.

The court erred by:

1) Accepting Respondent's statement that it had presented "the original Note" to the court when reasonable doubt existed as to the authenticity of the note presented. This reasonable doubt arises from

a. The fact that two versions of the Note exist
b. There was no chain of title provided
c. Assignments of the Note and DoT were allegedly made by parties on dates when those parties should not have been in possession of the Note or DoT

2) Stating that "no actual evidence" existed that the Note presented was not the "actual note" when counsel for Appellant clearly stated that Appellant had been "ambushed with a new note".

3) Allowing foreclosure proceedings to be underway when Respondent had not fulfilled its contractual obligations under the DoT to notify Appellant of the initiation of foreclosure proceedings

4) Proceeding under the impression that Appellant was in default, when in fact Respondent was in default for failing to notify Appellant of changes in payment information and/or servicing rights

5) Awarding Respondent the right to foreclose based on a copy of the DoT, whereas the DoT states more than 100 times that the original document is required

6) (by their own admission) Failing to review the evidence presented by Appellant

7) By stating that "this lawsuit is over the foreclosure of a particular Note" when in fact it is a Deed of Trust that is being foreclosed.

8) Effectively denying Appellant rights to due process, namely the review of all evidence

9) Denying Appellant's right to discovery of admissible evidence by denying the 56F Motion

10) Failing to properly review the Motion for Reconsideration when valid, undeniable evidence was provided in support of the Motion

11) Accepting hearsay testimony from David Recksieck

12) Accepting hearsay testimony from Respondent's Counsel

13) Accepting ER 902(i) relating to Commercial Paper as being sufficient grounds to authenticate the alleged "original" Promissory Note.

Appellant requests that Judge North's order granting summary judgment to Respondent should be vacated, Appellant's affirmative defenses reinstated and/or that the case be dismissed as Respondent did not have standing at the time it filed this action against Appellant. Should the this action not be dismissed, Appellant requests the parties be allowed to flush out the identity of the real party in interest according to the provisions set forth for such matters under the Revised Code of Washington, including the benefit of discovery and impartial review by the Superior Court.

DATED this 7th day of August, 2015

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below, I hand delivered a true and accurate copy of the Appellant's Opening Brief in Court of Appeals Cause No. 72526-2-I to the following party:

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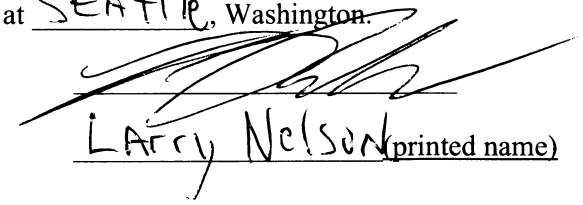
I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated: August 7th, 2015 at SEATTLE, Washington.



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