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No. 74264-7-I

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

Robert Cummings and Doris Cummings, husband and wife,

Appellants/Plaintiffs

v.

Northwest Trustee Services of Washington; Mortgage Electronic Registration Systems, Inc., and Deutsche Bank National Trust Co., as Trustee for the Registered Certificate Holders of First Franklin Mortgage Loan Trust, Asset-Backed Securities Series 2006-FF8

Respondents.

RESPONDENTS' AMENDED APPELLATE BRIEF

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I. SUMMARY OF THE ARGUMENT

Respondents,[1] Defendants below, submit this response brief in opposition to Appellants' Opening Brief ("Cummings' Brief"). This appeal concerns a deed of trust loan made in 2006 to the Cummings. The Cummings defaulted in making payments in 2010, and their property was sold at a trustee's sale in March 2015. The Cummings' claims against Northwest Trustee Services ("NWTS") were dismissed in April 2015, and the Cummings' claims against the Respondents were dismissed at summary judgment in October 2015.

The Cummings' appeal is without merit and should be denied. The Washington Supreme Court's rulings in *Bain*,[2] as confirmed in *Brown*,[3] conclusively reject the Cummings' arguments that only an owner of the note can enforce a deed of trust securing the note and that Deutsche Bank, as holder of the Cummings' note, lacked the ability to enforce the Cummings' deed of trust. The Cummings' other arguments that a deed of trust transfer must be made in the form of a "deed"; that MERS was the beneficiary and failed to effect a transfer of the note and deed of trust; and

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[1] Mortgage Electronic Registration Systems, Inc. ("MERS") and Deutsche Bank National Trust Co., as Trustee for the Registered Certificate Holders of First Franklin Mortgage Loan Trust, Asset-Backed Securities Series 2006-FF8 ("Deutsche Bank").

[2] *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 103-04, 285 P.3d 34 (2012).

[3] *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 515, 359 P.3d 771 (2015).

that these various actions support CPA claims and claims under 26 U.S.C. section 860(f)(2)(B), are likewise without merit.

Deutsche Bank as trustee holds the original note and held it at the time of the non-judicial foreclosure. Possession of the original note empowers Deutsche Bank to initiate either judicial or non-judicial foreclosure, establishes its right to payment, and defeats the Cummings' CPA and other claims against all parties. The Cummings' legal theories contradict established Washington law and the Cummings lack standing to assert many of their arguments. The Cummings' appeal should be denied.

II. RELEVANT FACTS

In April 2006, Appellants Robert and Doris Cummings (the "Cummings") took out a loan for $240,000 with First Franklin, a Division of National City Bank of Indiana ("First Franklin"), and secured it with a deed of trust against their property in Snohomish County. Clerk's Papers ("CP") 55 et seq. (Sub # 37).

The Cummings' note, endorsed in blank, and deed of trust are now held by the Trust. Select Portfolio Servicing, Inc. ("SPS") is the servicer of the Cummings' loan, and acts on behalf of Deutsche Bank under a limited power of attorney. *Id.* at ¶ 4, Ex. C.

In November 2010, the Cummings defaulted under the note and deed of trust by failing to make their loan payments as they came due. As

a result, Deutsche Bank initiated a non-judicial foreclosure proceeding and the property was sold at a trustee's sale on March 13, 2015. *Id.* at ¶ 5, Ex. D.

Prior to the foreclosure sale, on or about January 20, 2015, the Cummings signed an Assistance Agreement that included their consent to the foreclosure, and a release of all claims related to the property and the foreclosure against Deutsche Bank and MERS. *Id.,* at ¶ 6, Ex. E. The Cummings received consideration of $3,000:

> Mortgagor hereby releases and forever discharges SPS, the Mortgagee, and each of their respective subsidiaries, associates, owners, investors, stockholders, predecessors, successors, agents, directors, officers, partners, employees, representatives, lawyers and all persons acting by, through, under or in concert with them, or any of them, of and from any and all manner of action or actions, causes of action, in law or in equity, suits, debts, liens, contracts, agreements, promises, liability, claims, demands, damages, loss, cost of expense, of any nature whatsoever, known or unknown, fixed or contingent, which Mortgagor now has or may hereafter have against such person, or any of them, by reason of any matter, cause, or thing whatsoever with regard to the Property including, without limitation, any matter, cause, or thing whatsoever with regard to the related foreclosure action.

Id.

III. ARGUMENT

A. The Cummings Consented to the Foreclosure Sale and Released Any Claims

The Cummings freely "consented to the foreclosure" and released all claims against the Respondents pursuant to a written agreement executed prior to the foreclosure sale. Having done so, the Cummings cannot reverse course a few months later, and file a lawsuit seeking to set aside the foreclosure sale.

In the trial court, the Cummings asserted that they signed the consent-to-foreclosure/release agreement under duress. But the Cummings offer no evidence to support this argument. Deutsche Bank proceeded with a foreclosure sale because the Cummings had not made their loan payments since 2010. The Cummings had expressly agreed to foreclosure as a remedy for their default. It is well-established that "'[i]t is never duress to threaten to do that which a party has a legal right to do.'" *Doernbecher v. Mut. Life Ins. Co. of N.Y.*, 16 Wn.2d 64, 73-74, 132 P.2d 751 (1943); *Retail Clerks Health & Welfare Tr. Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 944-45, 640 P.2d 1051 (1982) (the "mere fact that a contract is entered into under stress or pecuniary necessity is insufficient" to prove duress; "there must be proof of more than reluctance to accept or financial embarrassment").

B. The Cummings Waived Their Claims to Contest the Foreclosure

The Cummings failed to take advantage of pre-sale remedies because they consented to the foreclosure. Washington law is clear that "[t]he failure to take advantage of the presale remedies under the deed of trust act may result in waiver of the right to object to the sale, as RCW 61.24.040(1)(f)(IX) provides." *Plein v. Lackey*, 149 Wn.2d 214, 227, 67 P.3d 1061 (2003). Washington courts hold that waiver of any post-sale contest occurs where a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale. *Country Express Stores, Inc. v. Sims*, 87 Wn. App. 741, 749-51, 943 P.2d 374 (1997); *Steward v. Good*, 51 Wn. App. 509, 515-17, 754 P.2d 150 (1988); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 114, 752 P.2d 385 (1988). The Cummings plainly knew they had the right to enjoin the sale, and had knowledge of their alleged defenses, but never filed an action prior to the foreclosure sale to raise these alleged defenses.

Nevertheless, the Cummings argue that "procedural irregularities, such as those that divest a trustee of authority to conduct a sale, can invalidate a sale." Cummings' Brief at 8-9. The Cummings rely upon

three Washington cases. *See Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012); *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 911, 154 P.3d 882 (2007); *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013).

The Cummings' argument for "procedural irregularities" is that Deutsche Bank had to be the "owner" of their note, not just the "holder" of the note, in order to foreclose. But the Cummings fail to establish any argument or fact that brings them within the *Albice, Udall*, or *Schroeder* line of cases. As explained below, the Cummings' argument is contrary to established Washington Supreme Court precedent and should be rejected.

C. The Holder of a Note Is Entitled to Foreclose

As the Cummings acknowledge, the Washington Supreme Court has conclusively rejected their position. The Washington Supreme Court's rulings in *Bain*[4] and *Brown*[5] hold that the "holder" of the borrower's note is entitled to commence and prosecute a non-judicial foreclosure. Under RCW 62A.3-301, a "[p]erson entitled to enforce an instrument means (i) the holder of the instrument." Whether the holder of the note is the "owner" is not a legally relevant inquiry; rather, "proof of [the status of holder] is what entitles a beneficiary to enforce a note

[4] 175 Wn.2d at 103-04.

[5] 184 Wn.2d at 515.

secured by a deed of trust. Ownership of the note is irrelevant." *Trujillo v. Nw. Tr. Servs., Inc.,* 181 Wn. App. 484, 506, 326 P.3d 768 (2014), *rev'd on other grounds,* 183 Wn.2d 820 (2015). The Cummings provide no basis to disregard this recent and conclusive precedent.

D. The Security Follows the Note; the Trust Establishes a Prima Facie Case by Proving It Is the Holder of the Note

The Cummings' unsupported argument is that codification of the rule that "the security follows the note" in the UCC, in fact, materially and substantially (and *sub silentio*) changed that rule to provide that the security follows only the transfer of "ownership" of a note. The Cummings cite no authority for this meritless argument.

The note, a negotiable instrument endorsed in blank, is transferred by transfer of possession. Deutsche Bank is the "holder" of the Cummings' promissory note because it was endorsed in blank and Deutsche Bank possesses the original note.[6] The note in this case was

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[6] *Brown*, 184 Wn.2d at 525 ("Washington's UCC defines a 'holder' to be the 'person in possession of a 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); *accord Black's Law Dictionary* 848 (10th ed. 2014) (defining 'holder' to be a person 'who has legal possession of a negotiable instrument and is entitled to receive payment on it'). The statute's definition of 'holder' does not turn on ownership. That is unsurprising, given that the statute expressly provides that '[a] person may be a person entitled to enforce the instrument ... even though the person is not the owner of the instrument.' RCW 62A.3–301 (emphasis added). A leading treatise on article 3 of the UCC confirms that a (continued . . .)

specially endorsed by First Franklin, the original lender, to First Franklin Financial Corporation ("FFFC"). FFFC, in turn, endorsed the note "in blank." CP 55, Ex. A.

An instrument endorsed in blank is "bearer" paper. Washington law (indeed, established commercial law throughout the country) does not require a written "chain of endorsements" to show that the holder of a note is entitled to enforce the note:

> Under Washington law an instrument endorsed in blank becomes payable to the bearer and may be negotiated. RCW 62A.3-205(b). The holder of a negotiable instrument is the person in possession and is entitled to enforce it. RCW 62A.3-301; 62A.1-201(20). Here, Plaintiff does not contest that Chase is in physical possession of the note and that it is endorsed in blank. Therefore, Chase is the holder of the note as a matter of law.

Zalac v. CTX Mortg. Corp., No. C12–01474 MJP, 2013 WL 1990728, at *3 (W.D. Wash. May 13, 2013). The legal operation and effect of a note endorsed "in blank" under the UCC was recently well explained in *Blomberg v. Maney (In re Blomberg),* No. 2:13-cv-2187, 2014 U.S. Dist.

(. . . continued)
holder 'may sue in his or her own name to enforce payment even though he or she is not the owner of the instrument.' 6B Anderson on the Uniform Commercial Code § 3–301:4R at 267 (Lary Lawrence ed., 3d ed., 2003 rev.). This rule focuses on the party who possesses the note in order to protect the borrower from being sued fraudulently or by multiple parties on the same note. 5A Anderson on the Uniform Commercial Code § 3–207:7, at 449 (3d ed. 1994 rev.) ('The purpose of requiring that the plaintiff have possession of the paper is to protect the defendant from multiple liability.').").

LEXIS 154910 (D. Ariz. Oct. 31, 2014) (applying the same UCC provisions contained in Washington's corresponding RCW chapter 62A):

> The court in *Mesina v. Citibank, NA*, Case No. 10-2304 RTL, 2012 Bankr. LEXIS 2958, 2012 WL 2501123, at *2-3 (Bankr. D.N.J. June 27, 2012), rejected a similar argument based on similar language in the note in question there. The *Mesina* court explained that
>
> > [a] holder of the Note is entitled to enforce it. If the Creditor can prove that it is in possession of the Note endorsed in blank, then as a holder it is entitled to enforce the Note. The Creditor is not required to prove the details of each transfer in the chain of title.
>
> 2012 Bankr. LEXIS 2958, [WL] at *3.
>
> But even assuming that "transfer" as that term is used in the Note means a statutory transfer under the UCC and that BANA had to be a transferee in order to enforce the Note, Blomberg's argument fails because there was a statutory transfer here. "The process of transfer is called 'negotiation[.]'" *In re Veal*, 450 B.R. at 911 n.23. Under the UCC, "[n]egotiation means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder." A.R.S. § 47-3201(A).[7] "[I]f an instrument is payable to bearer, it may be negotiated by transfer of possession alone." A.R.S. § 47-3201(B).[8] More specifically, "[w]hen indorsed in blank, an instrument becomes payable to bearer and may be negotiated by

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[7] RCW 62A.3-201(a): "'Negotiation' means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder."

[8] RCW 62A.3-201(b): "[I]f an instrument is payable to bearer, it may be negotiated by transfer of possession alone."

> transfer of possession alone ... ." A.R.S. § 47-3205(B).[9] Because BANA had actual possession of the Note that had been endorsed in blank, the Note had to have been negotiated, or transferred, to BANA. And contrary to Blomberg's argument, BANA was not required to take the Note for value in order for there to be a statutory transfer. Under the UCC, a "holder" is "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession," A.R.S. § 47-1201(B)(21)(a),[10] while a "holder in due course" is a specific type of "holder." A.R.S. § 47-3302. In other words, not every "holder" is a "holder in due course." BANA could be the "holder" of the Note as a result of a statutory transfer even if it were not a "holder in due course."

Blomberg, 2014 U.S. Dist. LEXIS 154910, at *16-17 (emphases added).[11]

Deutsche Bank was, and is, the holder of the note.

E. The Security Follows the Note

Deutsche Bank holds the Cummings' deed of trust because in Washington, as elsewhere, "the security follows the note."[12] When the Cummings' note was transferred to Deutsche Bank, their deed of trust was transferred with it by operation of law.

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[9] RCW 62A.3-205(b): "When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone . . . ."

[10] RCW 62A.1-201(b)(21): "'Holder' with respect to a negotiable instrument, means: (A) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession."

[11] *Martin v. Martin,* 51 N.E. 691, 692 (Ill. 1898) ("The possession of an unendorsed note is prima facie evidence of ownership in the holder.").

[12] This is sometimes referred to as the "Mary's Little Lamb Rule"—wherever the mortgage note goes, the related mortgage is sure to follow.

> The statute merely codifies the longstanding common law rule that the deed follows the debt: "Transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter." *In re Jacobson*, 402 B.R. 359, 367 (noting that "this principle is neither new nor unique to Washington") (quoting *Carpenter v. Longan*, 83 U.S. 271, 275, 21 L. Ed. 313 (1872)); *see also Fid. & Deposit Co. of Md. v. Ticor Title Ins. Co.*, 88 Wn. App. 64, 68-69, 943 P.2d 710 (1997) (noting "the maxim that the mortgage follows the debt"). Flagstar, as the Note-holder and beneficiary, properly appointed MTC.

Myers v. Mortg. Elec. Registration Sys., No. 11–cv–05582 RBL, 2012 WL 678148, at *3 (W.D. Wash. Feb. 24, 2012) (emphasis added).

> As it is well-established that the "security instrument will follow the note," *Bain*, 285 P.3d at 44, CitiMortgage's possession of the original Note imparts the authority to enforce the terms of the Deed of Trust. *See Lynott v. Mortgage Electronic Registration Systems, Inc.*, 2012 U.S. Dist. LEXIS 170607, 2012 WL 5995053(W.D. Wash. 2013) (explaining that the Deed of Trust Act merely codifies "the longstanding principle that the 'deed follows the debt'") (citing *Carpenter v. Longan*, 83 U.S. 271, 21 L. Ed. 313 (1872)). Thus, Plaintiffs' argument that CitiMortgage lacks standing to enforce the Deed as a valid contract between the parties is unavailing.

Johnson v. CitiMortgage, Inc., No. 2:13-cv-00037 RSM, 2013 WL 6632108, at *4 (W.D. Wash. Dec. 17, 2013) (emphasis added).

The basic premise for the rule has been long established in American jurisprudence:

> The note and the mortgage are inseparable; the former as essential, the later as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.

Carpenter v. Longan, 83 U.S. 271, 274 (1872) (stating the common law rule). Because the holder of a note may enforce the note, whether or not the holder is also the owner (pursuant to the rules in UCC Article 3), the law developed early that the mortgage is an incident of the note and followed the note's transfer.

> The transfer of these notes ... carried with it, by operation of law, all securities for their payment. The debt is the principal thing, and the securities are only an incident. The transfer of the former, therefore, carries with it the right to the securities, and amounts to an equitable assignment of them. No matter what the form of the security is, whether a real-estate or chattel mortgage, or a pledge of collateral notes, bonds, or other personal property, the purchaser of the principal takes with it the right to resort to these securities; and this is so, although the assignment or transfer does not mention them. The reason of this rule, within all the authorities, seems to be that when the mortgagee transfers the debt, without assigning the mortgage or other security, he becomes a trustee, and holds the security for the benefit of the owner of the note, and the latter may enforce the trust. The debtor is in no wise injured by such rule. He has agreed that the security shall stand for the payment of the debt, and it is of no consequence to him to whom it is paid. He has to pay it but once.
>
> *Tidioute Sav. Bank v. Libbey*, 101 Wis. 193, 77 N.W. 182, 183 (1898), cited in 29 Williston on Contracts § 74:51 Assignee's Right to Security Passing with Assigned Debt (4th Ed., updated 2011). "The rule is that the transfer of a note carries with it all security without any formal assignment or delivery, or even mention of the latter." *Tidioute*, 77 N.W. at 183 (citing *Carpenter v. Longan*, 83 U.S. 271, 276–77, 21 L. Ed. 313 (1873); *Croft v. Bunster*, 9 Wis. 503 (Wis. 1859)).

Edwards v. Deutsche Bank Nat'l Tr. Co. (In re Edwards), No. 11-23195, 2011 Bankr. LEXIS 5065, at *23-24 (Bankr. E.D. Wis. Dec. 23, 2011) (emphasis added). Because Washington's rules place the right to prosecute a non-judicial foreclosure in the hands of the holder of the original note, it is wholly logical and necessary that a transfer of the note to a holder would include a transfer of the deed of trust, an "incident" of the note. This rule applies to a transfer of a note whether by assignment or negotiation, as explained below.

F. Codification of the Rule That "the Security Follows the Note" Did Not Change the Rule

Nevertheless, the Cummings insist that the Washington Supreme Court, and all of the many other courts that have held the same, have got it wrong. Under the Cummings' theory, a holder of a note can no longer enforce a deed of trust securing the note unless the holder is also the owner of the note, because, the Cummings argue, codification of the legal rule that "the security follows the note," in Article 9 of the UCC, did not, in fact, codify a long-existing rule, but instead fundamentally changed that rule. Cummings' Brief at 8-15. The Cummings' thesis is that the UCC modified the common law rule to apply only to transfers of "ownership" by applying UCC section 9-203(a) and (b) to the Mary's Little Lamb Rule. *See* Cummings' Brief at 11.

To be sure, the Cummings do not cite any case law to support this argument. Instead, they simply conclude, without basis, that UCC section 9-203(a) and (b) applies to the "security follows the note" rule.

The Cummings' argument is meritless. The "security follows the note" rule was codified in UCC section 9-203(g). There is no hint or suggestion that in doing so it materially changed or limited the rule to transfers of ownership. There is no hint or suggestion that as part of the codification process, UCC section 9-203(a) and (b) was incorporated into the rule as part of the codification. The Cummings identify no cases or authorities that support their theory.

It is correct that UCC section 9-203(a) and (b) governs transfer of the ownership of notes. But as amply demonstrated in the foregoing sections, ownership of a promissory note is *not* required to enforce the note. *Brown,* 184 Wn.2d at 525, specifically held that a holder of the note was entitled to enforce the instrument (citing RCW 62A.3-301) ("It [3-301] provides that a person need not own a note to be entitled to enforce the note.").

In short, there is no evidence that the UCC changed or limited the Mary's Little Lamb Rule when it was codified so that the security would not follow the note if it were transferred by negotiation to a holder. This conclusion follows from the established case law and treatises.

The Official Comments to the UCC contain no reference or citation to section 9-203(a) and (b) as part of the codification, nor do they mention a substantial change in the rule:

> Subsection (g) codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien.

UCC § 9-203(g), Official Comment 9.

UCC Article 9 governs sales of promissory notes, but that fact does not change the rule that holders of notes have the right to enforce notes and that a transfer of a promissory note – by assignment or negotiation – carries with it, by operation of law, the security for the note.

This conclusion is further confirmed by the Restatement (Third) of Property (Mortgages) section 5.4(a) (1997), which states that "[a] transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise." The Restatement's commentary explained that the reason for the rule is to keep the note and the security in the same hands:

> The essential premise of this section is that it is nearly always sensible to keep the mortgage and the right of enforcement of the obligation it secures in the hands of the same person. This is so because separating the obligation from the mortgage results in a practical loss of efficacy of the mortgage; *see* Subsection (c) of this section. When the right of enforcement of the note and the mortgage are split, the note becomes, as a practical matter, unsecured. This

> result is economically wasteful and confers an unwarranted windfall on the mortgagor.

Id. at cmt a. Notably, and contrary to the Cummings' argument, the method of transfer – by assignment or negotiation – does not change the rule:

> Ownership of a contractual obligation can generally be transferred by a document of assignment; *see* Restatement, Second, Contracts § 316. However, if the obligation is embodied in a negotiable instrument, a transfer of the right to enforce must be made by delivery of the instrument; see U.C.C. § 3-203 (1995). The principle of this subsection, that the mortgage follows the note, applies to either form of transfer of the note. Moreover, it applies even if the transferee does not know that the obligation is secured by a mortgage. *See* Illustrations 1-3.

Id. at cmt b (emphasis added).

> If the mortgage obligation is a negotiable note, Uniform Commercial Code § 3-203 (1995) is generally understood to make the right of enforcement of the note transferrable only by delivery of the instrument itself to the transferee.

Id. at cmt c.

In sum, the Cummings' argument is wholly contrary to the established case law, the UCC, and the treatises.

The Article 9 "sale" rules provide a means to resolve disputes by and between a promissory note's buyer, seller, bankruptcy trustee, etc. The note maker has no interest in these disputes; her obligation is to pay the note, and pay it only once, but to pay it. The Cummings' argument confuses the roles of Article 3 and Article 9 of the UCC:

> Third and finally, Plaintiffs rely upon UCC Article 9. To begin, Plaintiffs correctly note that Article 9 governs the sale of a promissory note, such as their mortgage note. Mo. Rev. Stat. § 400.9-109(a)(3); *In re Veal*, 450 B.R. 897, 909 (B.A.P. 9th Cir. 2011) (discussing analogous UCC provisions). On this basis, Plaintiffs argue that Article 9 bears on whether the purchaser or seller of that note can enforce it. This argument confuses the different roles of Articles 3 and 9. Article 9 does not determine who can enforce a note; Article 3 does. *In re Knigge*, 479 B.R. at 505-06; *In re Veal*, 450 B.R. at 908-13 (distinguishing between Article 3 and of Article 9). Instead, Article 9 "determines whether the purchaser of the note ... obtains a property interest in the note." *Id.* at 913. Thus, Article 9 identifies "who, among competing claimants, is entitled to the note's economic value" – that is, the borrower's promise to make loan payments. *Id.* at 912. Article 9 resolves disputes between the note's buyer, its seller, and others, such as a bankruptcy trustee. *See Provident Bank v. Cmty. Home Mortg. Corp.*, 498 F. Supp. 2d 558, 568-571 (E.D.N.Y. 2007) (applying Article 9 to resolve dispute between competing claimants to loan's economic value). These matters do not affect Plaintiffs, and have no bearing on whether a party can enforce a note. Id. at 912 ("[Plaintiffs] should not care who actually owns the Note – and it is thus irrelevant whether the Note has been fractionalized or securitized – so long as they do know who they should pay. Returning to the patois of Article 3, so long as they know the identity of the 'person entitled to enforce' the Note, [Plaintiffs] should be content.").

Offield v. FNMA, No. 11-00841-CV-W-BP, 2013 U.S. Dist. LEXIS 50676, at *8-9 (W.D. Mo. Mar. 14, 2013) (emphases added).

The Cummings mistakenly attempt to apply the rules of Article 9, which governs the rights between owners of mortgage paper, to the relationship between the note maker and the holder of the note. But

"[t]hese matters do not affect Plaintiffs, and have no bearing on whether a party can enforce a note." *Id.* (emphasis added). "The debtor is in no wise injured by such rule. He has agreed that the security shall stand for the payment of the debt, and it is of no consequence to him to whom it is paid. He has to pay it but once." *Edwards,* 2011 Bankr. LEXIS 5065, at *23-24. [13] In sum, the Cummings' argument is without support, and should be rejected.

G. Because the Deed of Trust Was Transferred by Operation of Law, a MERS Assignment Only Gave Public Notice

The Cummings argue, in support of their CPA claim, that a MERS assignment was somehow improper or deprived NWTS of its authority to proceed with a non-judicial foreclosure. These arguments are meritless. Any MERS assignment of the deed of trust may transfer whatever interest MERS has to transfer (as a nominee/agent for the note holder) and provides, at most, public notice, but is not otherwise a basis for any claim.

As noted above, the deed of trust followed the transfer of the original note to Deutsche Bank by operation of law. NWTS derived its

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13 As the Kansas Supreme Court concluded:

> White and Summers adopt Krasnowiecki's view that the parties to these transactions live in two separate worlds, that of the mortgagee and that of the mortgagor. 2 White and Summers, Uniform Commercial Code 271 (3d ed. 1988).

Army Nat'l Bank v. Equity Developers, Inc., 774 P.2d 919, 928 (Kan. 1989).

authority to proceed from Deutsche Bank as holder of the original Cummings note. *In re Butler*, 512 B.R. 643, 656 (Bankr. W.D. Wash. 2014) ("[A]ny assignment of the Deed of Trust from MERS to One West had no legal effect on the ownership or possession of the Note and was irrelevant for purposes of the disputes at issue here."); *Myers*, 2012 WL 678148, at *3 ("Even if MERS had improperly assigned the Deed, Flagstar is empowered as the beneficiary to appoint the trustee because it holds [plaintiff's] Note, not because of the assignment."); *Lynott v. Mortg. Elec. Registration Sys., Inc.*, No. 12-cv-5572-RBL, 2012 WL 5995053, at *2 (W.D. Wash. Nov. 30, 2012 ("U.S. Bank is the beneficiary of the Deed because it holds Plaintiff's Note, not because MERS assigned it the Deed."); *Johnson*, 2013 WL 6632108, at *8-10; *McPherson v. Homeward Residential*, No. C12-5920, 2014 WL 442378, at *5 (W.D. Wash. Feb. 4, 2014).

"*Bain* does not stand for the proposition that a deed of trust is unenforceable simply because it names MERS as a beneficiary." *Johnson*, 2013 WL 6632108, at *3. "[T]he mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury." *Bain*, 175 Wn.2d at 120; *Zalac*, 2013 WL 1990728, at *3 (same); *Bhatti v. Guild Mortg. Co.*, No. C11-0480-JLR, 2011 WL 6300229, at *5 (W.D. Wash. Dec. 16,

2011) (no declaratory relief based on MERS's capacity as nominee in a deed of trust), *aff'd,* 550 F. App'x 514 (9th Cir. 2013).

H. Deeds of Trust Are Not Required to Be Transferred by Deed

The Cummings also argue that under RCW 64.04.010 "deeds of trust must be transferred by deed." The Cummings' argument is wrong, and ignores almost 150 years of established Washington law. RCW 64.04.010 governs "[e]very conveyance of real estate, or any interest therein ..." (emphasis added). Washington has long been a "lien theory" state and, in 1869, Washington law abandoned the concept of a mortgage (or deed of trust) being a conveyance. Indeed, "[i]n 1869, the original version of RCW 7.28.230 changed the nature of a common law mortgage from a conveyance to a security instrument and it expressed the new public policy that the mortgagor was to retain possession until the foreclosure sale." *Kezner v. Landover Corp.*, 87 Wn. App. 458, 463, 942 P.2d 1003 (1997). As such, the Cummings' argument that RCW 64.04.010 requires that a transfer of an interest in a deed of trust be "by deed," fails as a matter of law.

Instead, as the case law previously cited by Defendants amply demonstrates, a deed of trust follows a note as a matter of law. Thus, a

transfer of a note, which is governed by the UCC, carries with it the mortgage securing the note by operation of law.

Early Washington case law interpreting RCW 64.04.010's precursor makes clear that deeds of trust do not fall under its purview. *See, e.g.*, *Howard v. Shaw*, 10 Wn. 151, 155-56, 38 P. 746 (1894). In *Howard*, the Washington Supreme Court, in interpreting the virtually identical precursor to RCW 64.04.010, held that assignments of mortgages, which are treated no differently than deeds of trust, are not subject to the transfer-by-deed requirement. *Id.* Specifically, the Court noted that "assignments of mortgages are not within the operation of recording acts unless there are express provisions to that effect." *Id.* at 155; *see also Fischer v. Woodruff*, 25 Wash. 67, 70, 64 P. 923 (1901) (same).

Courts interpreting Washington law are in accord. *See, e.g., Bethesda Slavic Church v. Assemblies of God Loan Fund,* No. c12-5175 BHS, 2012 WL 3023228, at *2 (W.D. Wash. July 24, 2012) ("Under RCW 7.28.230(1), deeds of trust and mortgages create only a secured lien on real property. They do not convey ownership or a right to possess.").[14]

[14] The Cummings suggest that RCW 62A.9-203 is subordinate to state property laws. *See* Cummings' Brief at 20. This is true only as to transfers of real property. Because the deed of trust is not real property, it is not subject to the state's real property transfer laws.

The deed of trust follows the note, and is not subject to rules governing conveyances of real property. The Cummings' argument is without merit.

I. The Cummings' Claims Based on 26 U.S.C. Section 860(F)(a)(2)(B) and Securitization Fail as a Matter of Law

The Cummings also allege that "foreclosure is forbidden by 26 U.S.C. § 860(F)(a)(2)(B)." The Cummings lack standing to bring such a claim because there is no private right of action for such a claim. *See, e.g.*, *Mohlman v. Long Beach Mortg.*, No. 12-10120, 2013 WL 490112, at *5 (E.D. Mich. Feb. 8, 2013). Indeed, in *Mohlman*, the federal district court noted that "there is no private right of action available to challenge any perceived violation of 26 U.S.C. §§ 860A–G." Accordingly, the Cummings' claims based on 26 U.S.C. section 860 fail as a matter of law. *Id.* Moreover, even if the Cummings had a private right of action (which they do not), "violating the REMIC rules does not establish a defect in ownership of the mortgage." *Id.* (citing *Livonia Prop. Holdings, L.L.C. v. 12840–12976 Farmington Rd. Holdings, L.L.C.*, 717 F. Supp. 2d 724, 748 (E.D. Mich. 2010)).

J. The Cummings' CPA Claims Are Meritless

The Cummings' CPA claims against MERS and Deutsche Bank fail as a matter of law because the Cummings cannot point to any unfair or

deceptive conduct that caused them any injury. As an initial matter, to the extent the Cummings' claims relate to actions taken by MERS or Deutsche Bank at the time the original note or deed of trust was entered into in 2006, such claims are barred as a matter of law by the four-year statute of limitations applicable to claims under the CPA. RCW 19.86.120.

A claim under the CPA requires proof of five elements: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009). The absence of any one of these elements requires dismissal. *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002).

The Cummings attempt to base CPA claims upon claims related to prior assignments of the loan. But the Cummings are without standing to challenge transfers to Deutsche Bank under the REMIC rules or otherwise. Washington courts, and courts across the country, have repeatedly rejected challenges by borrowers to various assignments or contracts to which they are not parties. *Borowski v. BNC Mortg., Inc.*, No. C12-5867, 2013 WL 4522253, at *5 (W.D. Wash. Aug. 27, 2013) ("[B]orrowers, as third parties to the assignment of their mortgage (and

securitization process), cannot mount a challenge to the chain of assignments."); *Andrews v. Countrywide Bank, NA*, No. C15-0428 JLR, 2015 U.S. Dist. LEXIS 43555, at *8 (W.D. Wash. Apr. 1, 2015) ("[A] borrower generally lacks standing to challenge the assignment of its loan documents unless the borrower shows that it is at a genuine risk of paying the same debt twice."); *see also Frazer v. Deutsche Bank Nat'l Tr. Co.*, No. 11-cv-5454 RBL, 2012 WL 1821386, at *2 (W.D. Wash., May 18, 2012) (unpublished) ("Plaintiffs are not parties to the pooling and servicing agreement and present no authority suggesting standing to challenge it."); *Zhong v. Quality Loan Serv. Corp.*, No. C13–0814-JLR, 2013 WL 5530583, at *3 (W.D. Wash. Oct. 7, 2013) ("[Plaintiff], as a borrower and third party to the transactions, lacks standing to challenge the Assignment."); *Ukpoma v. U.S. Bank Nat'l Ass'n,* No. 12-CV-0184 TOR, 2013 WL 1934172, at *4 (E.D. Wash. May 9, 2013) ("Even assuming for the sake of argument that the assignments in question were fraudulently executed, Plaintiff, as a third party, lacks standing to challenge them."); *Brodie v. Nw. Tr. Servs., Inc.,* No. 12-CV-0469 TOR, 2012 WL 6192723, at *2-3 (E.D. Wash. Dec. 12, 2012) (dismissing claims based on borrower's challenge to deed of trust assignment for lack of standing); *In re Smoak*, 461 B.R. 510, 519 (Bankr. S.D. Ohio 2011) (holding that debtors under securitized notes lacked standing to raise

violations of the pooling and servicing agreement); *Correia v. Deutsche Bank Nat'l Tr. Co.* (*In re Correia*), 452 B.R. 319 (B.A.P. 1st Cir. 2011) (same); *In re Almeida*, 417 B.R. 140, 149 n.4 (Bankr. D. Mass. 2009) (holding that debtors, as makers of the notes, were not parties or third-party beneficiaries to the pooling and servicing agreement and, therefore, lacked standing); *Bittinger v. Wells Fargo Bank NA*, 744 F. Supp. 2d 619, 625-26 (S.D. Tex. 2010) (obligor cannot sue for breach of contract based upon a pooling and servicing agreement to which it is not a party).

Indeed, the securitization of a loan does not change the obligations of a note or deed of trust. *See, e.g., Lamb v. MERS, Inc.*, No. C10-5856-RJB, 2011 U.S. Dist. LEXIS 133547, at *16 (W.D. Wash. Nov. 18, 2011) (citing cases); *see also Ukpoma*, 2013 U.S. Dist. LEXIS 66576, at *7 ("The note remained secured by the deed of trust despite the fact that the former was securitized."); *Bhatti*, 2011 U.S. Dist. LEXIS 145181, at *15-16 (citing similar cases); *Moseley v. CitiMortgage Inc.*, No. C11-5349-RJB, 2011 U.S. Dist. LEXIS 125805, at *19-20 (W.D. Wash. Oct. 31, 2011) (finding that securitization is irrelevant); *Horvath v. Bank of N.Y., N.A.*, 641 F.3d 617, 626 n.4 (4th Cir. 2011) (finding securitization irrelevant to debt and rejecting argument that only original lender can foreclose); *Logvinov v. Wells Fargo Bank*, No. C-11-04772-DMR, 2011 U.S. Dist. LEXIS 141988, at *8 (N.D. Cal. Dec. 9, 2011) ("The argument

that parties lose their interest in a loan when it is assigned to a trust pool or REMIC has been rejected by numerous courts."); *Wadhwa v. Aurora Loan Servs., LLC*, No. 11–1784, 2011 WL 2681483, at *4 (E.D. Cal. July 8, 2011) (same).

The fact that Deutsche Bank holds the original note defeats the Cummings' attempts to allege some defect in the PSA or prior transfers of the note and deed of trust. The borrower must make a real showing that he is at risk for making double payments. Otherwise, borrowers "[do] not have standing . . . to inspect each and every contract or agreement between any predecessor and successor mortgagee, searching for 'irregularities' and noncompliance."[15] In particular, where the lender produces the original note, as here, there is no risk of double payment and the borrower has no standing. *Livonia Props. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC,* 399 F. App'x 97, 102 (6th Cir. 2010); *Bridge v. Ocwen Fed. Bank FSB,* No. 1:07 CV 2739, 2013 U.S. Dist. LEXIS 127588, at *17 (N.D. Ohio Sept. 6, 2013) ("Where, as here and in Livonia, the foreclosing party produces the original note, the obligor 'cannot credibly claim to have standing to challenge' the assignments and

[15] *Kiefer v. ABN AMRO,* No. 12-10051, 2012 WL 3600351, at *4 (E.D. Mich. June 12, 2012).

other agreements to which they were not a party." (emphasis added));[16] *see, e.g., Moran v. GMAC Mortg.*, No. 5:13-CV-04981, 2014 U.S. Dist. LEXIS 84411, at *11-12 (N.D. Cal. June 18, 2014):

> "Third-party borrowers lack standing to assert problems in the assignment of the loan" because the borrowers have not suffered an injury in fact. *Flores v. GMAC Mortg., LLC*, 2013 U.S. Dist. LEXIS 68606, 2013 WL 2049388, at *3 (N.D. Cal. May 14, 2013); *see also Jenkins v. JP Morgan Bank, N.A.*, 216 Cal. App. 4th 497, 513-14, 156 Cal. Rptr. 3d 912 (2013); *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 129 Cal. Rptr. 3d 467 (2011). Assignment defects do not injure borrowers because "even if there were some defect in the [subsequent] assignment of the deed of trust, that assignment would not have changed plaintiff's payment obligations." *Simmons v. Aurora Bank, FSB*, 2013 U.S. Dist. LEXIS 142917, 2013 WL 5508136, at *2 (N.D. Cal. Sept. 30, 2013); *see Siliga v. Mortg. Elec. Registration Sys., Inc.*, 219 Cal. App. 4th 75, 85, 161 Cal. Rptr. 3d 500 (2013) ("The assignment of the deed of trust and the note did not change [Plaintiffs'] obligations under the note, and there is no reason to believe that ... the original lender would have refrained from foreclosure in these circumstances."); *Apostol v. CitiMortgage, Inc.*, 2013 U.S. Dist. LEXIS 167308, 2013 WL 6328256, at *7-8 (N.D. Cal. Nov. 21, 2013).

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[16] *Slorp v. Lerner, Sampson & Rothfuss*, No. 2:12-cv-498, 2013 U.S. Dist. LEXIS 32538, at *5 (S.D. Ohio Mar. 8, 2013) (where there is no risk plaintiff may have to pay the debt twice, plaintiff may not challenge assignment whatever relief is sought); *Dye v. Wells Fargo Home Mortg.*, No. 13-cv-14854, 42014 U.S. Dist. LEXIS 65419 (E.D. Mich. May 13, 2014).

K. The Cummings' Failure to Make Payments Is the Cause of the Foreclosure Against Their Property

The Cummings were properly subject to a non-judicial foreclosure because for several years they failed to make the payments they agreed to make. Because Deutsche Bank was, and is, the beneficiary of the Cummings' deed of trust, Deutsche Bank was entitled to conduct a non-judicial foreclosure, the remedy the Cummings expressly agreed to. The Cummings have no CPA claim because their own defaults in making payments are the "but for" cause for Deutsche Bank exercising the remedy that the Cummings agreed to. *Babrauskas v. Paramount Equity Mortg.*, No. C13-0494-RSL, 2013 WL 5743903, at *4 (W.D. Wash. Oct. 23, 2013) (finding no injury under the CPA because "plaintiff's failure to meet his debt obligations is the 'but for' cause of the default, the threat of foreclosure, any adverse impact on his credit, and the clouded title"); *McCrorey v. Fed. Nat'l Mortg. Ass'n*, No. C12-1630-RSL, 2013 WL 681208, at *4 (W.D. Wash. Feb. 25, 2013) (finding no injury under the CPA because "it was [plaintiffs'] failure to meet their debt obligations that led to a default, the destruction of credit, and the foreclosure").

The Cummings cannot show that any action of the Defendants to enforce their contractual rights after the Cummings' multiple payment defaults were the "but for" cause of any damage or injury:

> "A plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 83, 170 P.3d 10 (2007) ... . "[B]orrowers, as third parties to the assignment of their mortgage . . . cannot mount a challenge to the chain of assignments unless a borrower has a genuine claim that they are at risk of paying the same debt twice if the assignment stands." *Borowski v. BNC Mortg. Inc.*, 2013 U.S. Dist. LEXIS 122104, 2013 WL 4522253, *5 (W.D. Wash. Aug. 27, 2013). Estribor's claim falls squarely within this precedent, and he has failed to show that, but for MERS or Chase's alleged misconduct, Chase would not have initiated a foreclosure on his house. Estribor does argue that the Assignment was the "initial step" in the attempted foreclosure (Dkt. 31 at 13), but an agreement entered into only for the benefit of subsequent purchasers fails to establish but for causation under the CPA. Therefore, the Court grants Chase's and MERS's motions on Estribor's CPA claim.

Estribor. As such, all of the Cummings' CPA claims should be dismissed as a matter of law.

IV. CONCLUSION

Deutsche Bank as trustee holds the original note and held it at the time of the non-judicial foreclosure. The Cummings consented to the foreclosure; the deed follows the note and does not require a real property assignment; the Cummings lack standing to challenge prior assignments or contracts to which they are not parties. The Cummings state no claims against MERS. Possession of the original note empowers Deutsche Bank to initiate either judicial or non-judicial foreclosure, establishes its right to

payment, and defeats the Cummings' CPA and other claims against all parties. The Cummings' legal theories contradict established Washington law and the Cummings lack standing to assert many of their arguments. The Cummings' appeal is without merit and should be denied.

Respectfully resubmitted this 6th day of April 2016.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that I caused **Respondents' Amended Appellate Brief (Redone to reflect double spacing only)** to be filed with the Court of Appeals (original and one copy); and caused a true and correct copy of same to be served upon the party listed below by email/pdf and via U.S. Mail:

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