73406-7

No. 73406-7

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

FRANK BUCCI

Appellant,

v.

NORTHWEST TRUSTEE SERVICES INC., SUCCESSOR BY MERGER TO NORTHWEST TRUSTEE SERVICES PLLC FKA NORTHWEST TRUSTEE SERVICES, LLC, a Washington corporation; RCO LEGAL, P.S., a Washington Professional Services Organization; JPMORGAN CHASE BANK, N.A., a national banking association; U.S. BANK, NATIONAL ASSOCIATION, a national banking association; SELECT PORTFOLIO SERVICING, INC., a Foreign Corporation registered in Washington,

Respondents.

APPELLATE BRIEF OF RESPONDENTS USB AS TRUSTEE AND SPS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

I. SUMMARY OF THE ARGUMENT

Respondents,[1] Defendants below, submit this response brief in opposition to Appellant Frank Bucci's Opening Brief ("Bucci's Brief").

USB as trustee is the holder of Bucci's original note, endorsed in blank, and the deed of trust. Bucci defaulted on the loan in 2009. Because USB as trustee is the beneficiary of Bucci's deed of trust, USB as trustee is entitled to conduct a non-judicial foreclosure, a remedy expressly provided for in the loan agreements Bucci signed.

The trial court dismissed Bucci's claims against Respondents at summary judgment. Bucci argues that the superior court erroneously relied upon declarations from Respondents' counsel in ruling for Respondents. But Respondents did not rely upon counsel's declaration, as Bucci argues. Rather, Respondents relied upon the original note and deed of trust submitted to the superior court at the summary judgment, because these documents are self-authenticating, non-hearsay "verbal acts" that established a prima facie case for Respondents. Bucci offered no contrary evidence.

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[1] Select Portfolio Servicing, Inc. ("SPS") and U.S. Bank N.A., successor trustee to Bank of America, N.A., successor in interest to LaSalle Bank N.A., as trustee, on behalf of the holders of the WaMu Mortgage Pass-Through Certificates, Series 2007-OA6 ("USB as trustee") (collectively, "Respondents").

Bucci also alleged that his note was not a negotiable instrument because it provided for the possibility of negative amortization, as set forth on the face of the note. As explained below, the superior court correctly rejected this argument.

And because USB as trustee was the beneficiary of Bucci's note, and Bucci was in default, there was no Consumer Protection Act ("CPA") violation by these Respondents.

The trial court properly granted summary judgment to Respondents. Bucci's appeal should be denied.

II. ARGUMENT

A. Relevant Facts

In May 2007, Bucci took out a loan from Washington Mutual Bank, FA ("Washington Mutual"), and signed a note in the original principal sum of $1,530,000 (the "note"). Clerk's Papers ("CP") 1, paragraph 20 (Amended Complaint); CP 220, Declaration of J. Will Eidson ("Eidson Decl.") Exs. A & B. To secure payment of the loan obligation, Bucci gave Washington Mutual a deed of trust on his property. *Id.*

The current holder of Bucci's note and deed of trust is USB as trustee. CP 220 at ¶ 4.[2]

In March 2009, Bucci defaulted under the note and deed of trust by failing to make his loan payments as they came due. After Bucci's default, he communicated with Defendant Chase Bank, N.A. ("Chase") on multiple occasions concerning a loan modification and short sale. CP 220 at ¶ 5, Ex. C. Also following Bucci's default, Northwest Trustee Services, Inc. ("NWTS") commenced, and terminated, a non-judicial foreclosure proceeding in 2009, then again in 2010 and 2013. CP 220 at ¶ 6, Exs. D, E & F.

Bucci's outstanding default as of April 20, 2013, was $1,890,334.87. Defendant SPS became the loan servicer for USB as trustee on or about August 1, 2013. CP 220 at ¶ 7, Ex. G. In 2013, USB as trustee initiated a non-judicial foreclosure proceeding. In January 2014, the proceeding was discontinued. *Id.*

B. The Original Note And Deed Of Trust Are Non-Hearsay And Self-Authenticating, And Establish A Prima Facie Case For The Note Holder

USB as trustee produced the original note at the summary judgment hearing, and established a prima facie case for recovery.[3] The

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[2] The original note and deed of trust were submitted to the Court at summary judgment by USB as trustee. CP 203 (evidence relied upon section); CP 1099-1100.

original Bucci note and deed of trust are admissible evidence at summary judgment and require no authenticating witness. Bucci's attacks on the declaration of Will Eidson, an attorney appearing for USB as trustee and SPS, raise no genuine issues of material fact.[4] The premise of Bucci's argument – that the trial court erroneously relied upon an attorney's declaration – is simply wrong.

"Mere production of a note establishes prima facie authenticity and is sufficient to make a promissory note admissible." *United States v. Varner,* 13 F.3d 1503, 1509 (11th Cir. 1994) (citing *United States v. Carriger,* 592 F.2d 312, 316-17 (6th Cir. 1979)). As stated in White and Summers, "merely by producing a properly indorsed or issued instrument the plaintiff proves that he is entitled to enforce it as a holder." 2 James J. White et al., *Uniform Commercial Code* § 17.6 (6th ed. 2015); *Tuttle v. Rose*, 430 N.E.2d 356, 358 (Ill. App. Ct. 1981) ("[W]hen the signatures on a note are admitted or established, production of the instrument entitles a holder to recover unless the defendant establishes a defense. This means that once the holder produces the instrument, he is entitled to recover in the absence of any further evidence. The defendant has the burden of

[3] CP 203 (evidence relied upon); CP 1099-1100.

[4] Bucci's Brief at 8-14.

establishing any defense, including payment, by a preponderance of the evidence." (emphasis added; citation omitted)).

The holder of a note is the beneficiary of a deed of trust securing the note and is entitled to enforce the deed of trust through the non-judicial foreclosure procedure. *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 359 P.3d 771 (2015); *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 104, 285 P.3d 34 (2012) ("[A] beneficiary must either actually possess the promissory note or be the payee.").[5] USB as trustee is the beneficiary of Bucci's deed of trust because it holds his original note.[6]

Contrary to Bucci's arguments focused on the attorney's declaration, the original note is admissible because it is a self-authenticating, non-hearsay "verbal act." The note and deed of trust are what the law designates as "verbal acts," which are non-hearsay. *See Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 540 (5th Cir. 1994) ("'Signed instruments such as wills, contracts, and promissory

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[5] RCW 62A.3-205; RCW 62A.3-301 (the holder of the note includes any party who takes possession of the note, endorsed in blank, by transfer); RCW 61.24.005(2) (beneficiary is the "holder of the [promissory note] . . . secured by the deed of trust"); *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.").

[6] A holder can possess a note "directly or through an agent." RCWA 62A.3-201 cmt. 1. Furthermore, in *Bain*, the Washington Supreme Court expressly recognized that the Deeds of Trust Act approves the use of agents. 175 Wn.2d at 106.

notes are writings that have independent legal significance, and are non-hearsay.'" (quoting Thomas A. Mauet, *Fundamentals of Trial Techniques* 180 (1988))). "A contract, for example, is a form of verbal act to which the law attaches duties and liabilities and therefore is not hearsay." *Mueller v. Abdnor*, 972 F.2d 931, 937 (8th Cir. 1992) (citing 2 John W. Strong et al., *McCormick on Evidence* § 249, at 101 (4th ed. 1992)).[7] Bucci's note and deed of trust are non-hearsay "verbal acts."

The original note and deed of trust are self-authenticating. No witness is required to authenticate a note and deed of trust. ER 902 governs self-authenticating documents. Two provisions of ER 902 cover Bucci's note:[8]

- ER 902(i): "Commercial Paper and Related Documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law."
- ER 902(h): "Acknowledged Documents. Documents accompanied by a certificate of acknowledgment executed in

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[7] Verbal acts, however, are not hearsay because they are not assertions and not adduced to prove the truth of the matter. *See* 2 John W. Strong et al., *McCormick on Evidence*, § 249 at 101 (4th ed. 1992); 6 John H. Wigmore, *Evidence* § 1770 at 259 (James H. Chadbourn rev. ed. 1976). The Federal Rules of Evidence "exclude from hearsay the entire category of 'verbal acts' and 'verbal parts of an act,' in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights." Fed. R. Evid. 801(c) advisory committee's note.

Mueller, 972 F.2d at 937.

[8] Both apply to the deed of trust. ER 902(i) applies to the note.

> the manner provided by law by a notary public or other officer authorized by law to take acknowledgments."

As a self-authenticating document, there is no requirement that a witness authenticate the original note.

> Appellants mistake the legal standard governing the admission of a self-authenticating document into evidence. Deutsche Bank was not required to present a witness to authenticate the note. *See* Fed. R. Evid. 1003. Rather, the note was admissible as a self-authenticating document without the need for further evidence in support of its authenticity. Under the Federal Rules of Evidence, signed commercial paper is "self-authenticating," meaning that it "require[s] no extrinsic evidence of authenticity in order to be admitted." Fed. R. Evid. 902(9). A signed promissory note falls into this category of evidence. *See In re Cook*, 457 F.3d 561, 566 (6th Cir. 2006) ("the promissory note is self-authenticating evidence pursuant to Rule 902"); *United States v. Varner,* 13 F.3d 1503, 1508-09 (11th Cir. 1994).

Miller v. Deutsche Bank Nat'l Tr. Co., No. 12-cv-03279, 2013 U.S. Dist. LEXIS 126888, at *27-28 (D. Colo. Sept. 4, 2013) (emphasis added; brackets in original).

In short, Bucci's lengthy arguments regarding the superior court's alleged reliance on a declaration from counsel are not relevant because no testimony from the attorney was required to establish that USB as trustee is the holder of the note. The status of holder was established by USB as trustee by producing into court the original note endorsed in blank. The superior court had no need to rely upon the attorney's declaration or to weigh the evidence.

USB as trustee established a prima facie case for enforcement by producing the original note into court. Bucci submitted no contrary evidence. There was nothing for the superior court to weigh. Bucci failed to demonstrate the existence of a genuine issue of material fact.

C. Bucci Failed To Deny The Original Note Or Submit Contrary Evidence

The Uniform Commercial Code ("UCC") provides rules for challenging the originality of a note. What makes an original note the original is the original signature of the maker. Under RCW 62A.3-308, Bucci must "specifically den[y]" the validity of his signature in his pleadings, or the signatures are "admitted."[9]

> In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature.

RCW 62A-308(a) (emphasis added).[10] As the official UCC § 3-308 comment explains, even if Bucci had made such a specific denial, he must put on evidence to show that the signature is forged or unauthorized:

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[9] CP 1, paragraph 20.

[10] A general denial is not sufficient. *See, e.g., Wesla Fed. Credit Union v. Henderson,* 655 So. 2d 691, 693 (La. Ct. App. 1995) (determining general denial of paragraphs insufficient to constitute a specific denial of the authenticity of the

> The question of the burden of establishing the signature arises only when it has been put in issue by specific denial. "Burden of establishing" is defined in Section 1-201. The burden is on the party claiming under the signature, but the signature is presumed to be authentic and authorized except as stated in the second sentence of subsection (a). "Presumed" is defined in Section 1-201 and means that until some evidence is introduced which would support a finding that the signature is forged or unauthorized, the plaintiff is not required to prove that it is valid. The presumption rests upon the fact that in ordinary experience forged or unauthorized signatures are very uncommon, and normally any evidence is within the control of, or more accessible to, the defendant. The defendant is therefore required to make some sufficient showing of the grounds for the denial before the plaintiff is required to introduce evidence. The defendant's evidence need not be sufficient to require a directed verdict, but it must be enough to support the denial by permitting a finding in the defendant's favor. Until introduction of such evidence the presumption requires a finding for the plaintiff.

UCC § 3-308 Official Comment 1 (emphasis added). In other words, "[t]he defendant is therefore required to make some sufficient showing of the grounds for the denial before the plaintiff is required to introduce evidence." *Id.*; *see In re Bass,* 738 S.E.2d 173, 177 (N.C. 2013).

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signature); *Dryden v. Dryden*, 621 N.E.2d 1216, 1219 (Ohio Ct. App. 1993) (defining specific denial as "'statement that denies a particular fact and then states what actually occurred'" and ruling general denial without more was insufficient (citation omitted)); *Bank of New England, N.A. v. Greer,* 1991 Mass. App. Div. 202, 1991 WL 285755, at *2 (Mass. Dist. Ct. 1991) (holding general denials in defendants' answer were insufficient to put the genuineness of signatures on the note into controversy); *Coupounas v. Madden,* 514 N.E.2d 1316, 1320 (Mass. 1987) (defendant disputing validity of notes "had to do more than 'call into question' the 'integrity' of the notes"); *Triffin v. Somerset Valley Bank,* 777 A.2d 993 (N.J. Super. Ct. App. Div. 2001) (general denial insufficient).

Bucci failed to specifically deny the validity of the note in his pleadings, and failed to submit any evidence purporting to show that the original note was forged or unauthorized.

D. The Bucci Note Is A Negotiable Instrument

Bucci also attacks the note by claiming that it is not a negotiable instrument. He asserts that a negotiable instrument must contain a promise to pay a fixed sum of money, and that because his note contains a negative amortization feature, it is not negotiable. Bucci's Brief at 15-22. Bucci's argument fails under the rules governing negotiability.

Contrary to Bucci's argument that the rules of negotiability require a negotiable instrument to be "as precise as a dollar bill," the courts, in fact, have long held that in determining negotiability it is commercial certainty, not mathematical certainty, that is sought.

> If the intent of the Code was to aid in the continued expansion of commercial practices, then common sense would tell us that when faced with a widespread commercial practice, such as in the present case, this court should acknowledge it.
>
> "The rule requiring certainty in commercial paper was a rule of commerce before it was a rule of law. It requires commercial, not mathematical, certainty. An uncertainty which does not impair the function of negotiable instruments in the judgment of business men ought not to be regarded by the courts. . . . The whole question is, do [the provisions] render the instruments so uncertain as to destroy their fitness to pass current in the business world?"

Goss v. Trinity Sav. & Loan Ass'n, 813 P.2d 492, 498 (Okla. 1991) (ellipsis and brackets in original) (quoting *Taylor v. Roeder,* 360 S.E.2d 191, 196 (Va. 1987) (Compton, J., dissenting)). As reflected in the following discussion, this focus on commercial certainty, not mathematical certainty, is reflected in the modern UCC rules governing negotiability.

1. Bucci's Note Contains A Promise To Pay A Fixed Amount

Bucci's note provided that Bucci will pay the fixed amount of "$1,530,000." *See* RCW 62A.3-104. The authorities hold that to meet the fixed amount requirement, the fixed amount generally must be determinable by reference to the instrument itself without any reference to any outside source.[11] 4 William D. Hawkland & Lary Lawrence, *Uniform Commercial Code Series* § 3-106:2, Westlaw (database updated Dec. 2015).[12] Because Bucci's note satisfies this rule, the note is negotiable.

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[11] *Cf., e.g., In re Hipp, Inc.,* 71 B.R. 643, 649 (Bankr. N.D. Tex. 1987) (the "'principal sum of TWO MILLION AND NO/100 ($2,000,000.00) DOLLARS, or so much thereof as may be advanced to the undersigned'" (emphasis added) (quoting note)). Unlike the present case, in *Hipp* the sum was uncertain on the face of the note, and there was no description of how interest accrual would be calculated on the face of the note.

[12] Former section 3-106(1)(b) recognized that a "sum certain" was being paid even if the note provided that it could be paid "with a stated discount or addition if paid before or after the date fixed for payment." Respondents have found no case law or other authority suggesting that the outcome is different when the language employed is "fixed amount" of money.

2. A Negative Amortization Feature Does Not Render A Note Non-Negotiable; There Is No Requirement That A Note Disclose The Current Principal Balance On Its Face

Nevertheless, Bucci argues that his note is not a negotiable instrument because "it has a principal balance that increases." Bucci's Brief at 15. Bucci's argument is not in fact based upon the face amount of the note, which contains a promise to pay a "fixed amount," but is instead mistakenly based upon a claim that the transferee of the note should be able to determine the *current* principal balance of the note from the face of the note. Bucci argues that the current outstanding note balance will change as interest accrues, and payments are made or not made, and that the *current balance* of the note cannot be determined from the face of the note.

But the rules of negotiability do not require that the *current balance* of a note must be found on the face of the note, as Bucci argues. Negotiability requires a promise to pay a fixed amount. The *subsequent current* principal balance of a note always changes – that is true of every note upon which payments are made and interest accrues. The UCC

standard for negotiability is based upon what appears on the face of the note, not what its current balance might be at any point in time.[13]

Bucci's argument, that a *subsequent* principal balance cannot increase and must be found on the face of the note, is not supported by any legal authority. A principal balance that may increase as a result of negative amortization of interest does not render a note non-negotiable. Moreover, this accrual of interest, even if such accrual results in negative amortization, is fully disclosed on the face of Bucci's note, which is all that is required under modern UCC law.

3. The Face Of The Note Fully Discloses The Note's Transferee's Rights, Duties, And Obligations

Bucci's argument is flawed in several ways. First, Bucci cites no cases or other authorities supporting his theory. Instead, Bucci relies upon an outdated 1963 case, *Anderson v. Hoard*, 63 Wn.2d 290, 387 P.2d 73 (1963), dealing with payment of taxes, insurance, and other like charges under an earlier version of the UCC repealed in 1965. Bucci's Brief at 16.

Contrary to Bucci's outdated argument, an examination of the modern rules of negotiability shows that Bucci's arguments are misplaced and that *Hoard* is inapplicable. The courts apply a version of the "four

[13] Under Bucci's theory, every note would lose its negotiability status once a payment of principal is made, because the current balance changes due to payments. That absurd result demonstrates the fallacy of Bucci's theory.

corners" or "face of the note" rule to determine negotiability from the face of the instrument without reference to extrinsic facts. "Negotiability is determined from the face, the four-corners, of the instrument without reference to extrinsic facts." *Holsonback v. First State Bank of Albertville*, 394 So. 2d 381, 383 (Ala. Civ. App. 1980), *cert. denied*, 394 So. 2d 384 (Ala. 1981). This rule, which is reflected throughout the UCC negotiability provisions and the related comments, follows from the purpose and policy behind the concept of a negotiable instrument.[14]

A recent Washington case demonstrates this approach. *See Alpacas of Am., LLC v. Groome,* 179 Wn. App. 391, 397, 317 P.3d 1103 (2014) ("We analyze the promissory notes' contents to determine whether the notes' holder could determine her or his rights, duties, and obligations with respect to the payment on the notes without having to examine any

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[14] The whole purpose of the concept of a negotiable instrument under Article 3 is to declare that transferees in the ordinary course of business are only to be held liable for information appearing in the instrument itself and will not be expected to know of any limitations on negotiability or changes in terms, etc., contained in any separate documents. The whole idea of the facilitation of easy transfer of notes and instruments requires that a transferee be able to trust what the instrument says, and be able to determine the validity of the note and its negotiability from the language in the note itself.

First State Bank at Gallup v. Clark, 570 P.2d 1144, 1147 (N.M. 1977). Whether an instrument is negotiable is a question of law to be determined by the court. *See N. Bank v. Pefferoni Pizza Co.*, 562 N.W.2d 374, 376 (Neb. 1997); *Cartwright v. MBank Corpus Christi, N.A.*, 865 S.W.2d 546, 549 (Tex. App. 1993); 5A David Frisch, *Lawrence's Anderson on the Uniform Commercial Code* § 3-101:48, Westlaw (3d ed., database updated Dec. 2015).

other documents." (citing RCWA 62A.3-106 cmt. 1)). Notably, the rights, duties, and obligations of the transferee – not the current balance – must be found on the face of the note.

> RCWA 62A.3-106 cmt. 1 states, "The rationale is that the holder of a negotiable instrument should not be required to examine another document to determine rights with respect to payment." And an instrument can retain its negotiability when it merely refers to the existence of another writing and does not require reference to the other writing as to whether or when payment is due. 6B Lary Lawrence, *Anderson on the Uniform Commercial Code* § 3-106:14R (3d ed. 2003).

Id. at 397 n.1.

Notably, Bucci submits no case holding that the holder of a negotiable note must be able to determine the current principal balance of a note at points in time subsequent to the issuance of the note. Instead, the negotiability "face of the note" rule focuses on whether the transferee can determine from the face of the note the "*rights, duties, and obligations* with respect to the payment on the notes" (*Groome,* 179 Wn. App. at 397 (emphasis added)), not the *current* principal balance.[15] Bucci's note is

[15] These negotiability rules also comport with the rules governing enforcement of a note. Because, as noted above, "merely by producing a properly indorsed or issued instrument the plaintiff proves that he is entitled to enforce it as a holder," the holder of the note is not required to know the amount currently owed in order to enforce it. To the contrary, "payment" is an affirmative defense the borrower must raise and prove. CR 8(c); *U.S. Bank Nat'l Ass'n v. Whitney*, 119 Wn. App. 339, 347, 81 P.3d 135 (2003); *W. Coast Credit Corp. v. Pedersen*, 64 Wn.2d 33, 35-36, 390 P.2d 551 (1964); *Frick v. Wash. Water Power Co.*, 76 Wash. 12, 14, 135 P. 470 (1913) ("The defense of payment in such cases is an affirmative

negotiable because it sets forth the parties rights, duties, and obligations on the face of the note.

4. Negative Amortization Does Not Make A Note Non-Negotiable

Negative amortization is a function of interest rate provisions that, consistent with the "face of the note" rule, are fully disclosed in Bucci's note. Indeed, Bucci's argument that the note must contain a "fixed amount" relies upon an extended discussion of the operation of the *interest rate provisions* contained in the note. *See* Bucci's Brief at 15-22.

The "face of the note" rule for interest rates and amounts is reflected throughout the UCC. A "negotiable instrument" means "an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order."[16] RCW 62A.3-104(a) (emphasis added).

Under RCW 62A.3-112(b), "[i]nterest may be stated in an instrument as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require

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defense, and must be proved as such."); *Iowa Mortg. Ctr., L.L.C. v. Baccam*, 841 N.W.2d 107, 112 (Iowa 2013).

[16] As is plain from this language, the inclusion of "other charges" in the note does not affect negotiability because they are described in the note. *Hoard* is not applicable.

reference to information not contained in the instrument." (Emphasis added.)[17]

Bucci's note fully discloses, in detail, how interest accrual may result in negative amortization, depending on the amount Bucci chooses to make as a monthly payment.[18] Negative amortization will occur only if Bucci chooses not to pay the full amount of interest due each month and only if the monthly payment is insufficient to cover the accrued interest. Bucci's note provides for a monthly payment, but Bucci is not limited to paying only the "monthly" payment. The note expressly permits Bucci to make prepayments of principal. CP 220, Ex. A at Section 5.[19]

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[17] A further example of this principle is reflected in Official Comment 1 to UCC § 3-106: "Many notes issued in commercial transactions are secured by collateral, are subject to acceleration in the event of default, or are subject to prepayment. A statement of rights and obligations concerning collateral, prepayment, or acceleration does not prevent the note from being an instrument if the statement is in the note itself. *See* Section 3-104(a)(3) and Section 3-108(b)." (Emphasis added.)

[18] The provisions of Bucci's note for the accrual and payment of variable amounts of interest and interest rates, some of which may, under specified circumstances as stated on the face of the instrument, be recharacterized as principal up to a maximum limit, are disclosed and set out in detail on the face of the note.

[19] The courts have recognized that prepayment terms in notes do not destroy negotiability, because prepayment is voluntary. *Cf. HSBC Bank USA, Nat'l Ass'n v. Gouda*, No. F-20201-07, 2010 WL 5128666, at *3 (N.J. Super. Ct. App. Div. Dec. 17, 2010) ("Quite the opposite, the right of prepayment is a voluntary option that [borrowers] may elect to exercise solely at their discretion. Indeed, such an allowance confers a benefit, not a burden, upon [borrowers], who can freely choose to decline the opportunity."); *In re Steinberg*, 498 B.R. 391 (table), 2013 WL 2351797, at *4 & n.34 (B.A.P. 10th Cir. 2013) (unpublished opinion) (prepayment voluntary).

Bucci's negative amortization argument is not supported by any applicable legal authority. The concept of negative amortization has been around a long time, yet Bucci fails to submit any case law showing that negative amortization renders a note non-negotiable. The only case Bucci cites, *Ralston v. Mortgage Investors Group, Inc.*, No. C 08-536, 2010 WL 3211931 (N.D. Cal. Aug. 12, 2010), is a case addressing failure-to-disclose issues, *not* negotiability issues. Bucci's Brief at 19. In *Ralston,* the possibility of negative amortization was not disclosed and (at least at the pleading stage) was viewed as inevitable. 2010 WL 3211931, at *2. *Ralston* did not address negotiability and as such is inapposite.[20]

In accordance with the "face of the note" rule, the rules governing interest, including the potential for negative amortization, are set forth in detail on Bucci's note. Bucci's argument therefore fails because Bucci's note states a fixed amount, and interest accrual – and all amounts that may accrue – is fully described on the face of the instrument. Bucci's note is negotiable.

Moreover, regardless of Bucci's attacks on the negotiability of the note, Bucci submitted no evidence to contradict the fact that USB as

[20] Whether negative amortization should or should not be permitted in consumer loans is a different public policy question. But it is clear that it is a question that is not addressed through the rules of negotiability of promissory notes.

trustee holds Bucci's deed of trust. It is well-established that a transfer of the note, whether by negotiation or otherwise, transfers the deed of trust.

> 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 such, USB as trustee is also able to enforce the note under the UCC's "shelter rule."

> Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

RCW 62A.3-203(b) (emphasis added); *see Anderson v. Burson,* 35 A.3d 452, 461 (Md. 2011) ("A transfer vests in the transferee only the rights enjoyed by the transferor, which may include the right to enforce the instrument.").

E. Bucci Fails To Demonstrate He Is At Risk Of Paying Twice

As Washington courts and courts across the nation have recognized, a borrower's standing to challenge transfers or assignments of his loan requires a showing that the borrower may be at risk of paying twice, i.e., the note presented to the court for enforcement is not the original note. Bucci's arguments challenging the negotiability of the note do not provide any evidence that purports to show that USB as trustee does not hold the original note.[21] Because USB as trustee holds the original note, Bucci cannot argue he is at risk of paying the note twice.

> "[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 v. Mountain States Mortg., No. C13-5297, 2013 U.S. Dist. LEXIS 174312, at *9 (W.D. Wash. Dec. 11, 2013) (alterations in original); *see Florez v. OneWest Bank, F.S.B.*, No. C11-2088, 2012 WL 1118179, at *1 (W.D. Wash. Apr. 3, 2012) (distinguishing *Bain* because defendant "had authority to foreclose, independent of MERS, since [defendant] held Plaintiffs' Note at the time of foreclosure"). Otherwise,

[21] For a note originally made in 2007, it is reasonable to believe that Bucci could identify another party who claims to hold Bucci's note, if such a party existed, because such a party would have demanded payment from Bucci by now. The only party claiming to hold Bucci's note is USB as trustee.

borrowers "'[do] not have standing . . . to inspect each and every contract or agreement between any predecessor and successor mortgagee, searching for "irregularities" and noncompliance.'" *Kiefer v. ABN AMRO*, No. 12-10051, 2012 WL 3600351, at *4 (E.D. Mich. June 12, 2012) (citation omitted; brackets in original). In particular, where the lender produces the original note, as here, there is no risk of double payment and the borrower has no standing to challenge prior assignments. *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 other agreements to which they were not a party." (emphasis added; citation omitted)).[22]

> "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

[22] *Slorp v. Lerner, Sampson & Rothfuss*, No. 2:12-cv-498, 2013 U.S. Dist. LEXIS 32538, at *13 (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, 2014 U.S. Dist. LEXIS 65419 (E.D. Mich. May 13, 2014).

> Cal. App. 4th 256, 129 Cal. Rptr. 3d 467 (2011). Assignment defects do not injure borrowers because "[e]ven 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*, No. 13-00482 HRL, 2013 U.S. Dist. LEXIS 142917, 2013 WL 5508136, at *2 (N.D. Cal. Sept. 30, 2013); *see Apostol v. CitiMortgage, Inc.*, No. 13- 01983 WHO, 2013 U.S. Dist. LEXIS 167308, 2013 WL 6328256, at *7-8 (N.D. Cal. Nov. 21, 2013); *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.").

Moran v. GMAC Mortg., LLC, No. 5:13-CV-04981, 2014 U.S. Dist. LEXIS 84411, at *11-12 (N.D. Cal. June 18, 2014) (alterations in original). Bucci's erroneous arguments over negotiability do nothing to contradict the fact that USB as trustee holds Bucci's original note and is seeking to enforce the remedy to which Bucci agreed.

F. Bucci Submitted No Evidence That Created Any Question That USB As Trustee Holds The Note

Bucci raises various legal arguments related to the "proof" that NWTS had that Bank of America ("BofA") was the owner or holder of Bucci's note and deed of trust.[23] Those arguments fail under the plain language of the statute and the Washington Supreme Court's ruling in

[23] Bucci's arguments are addressed in detail in Northwest Trustee Services, Inc. response appellate brief.

Lyons v. U.S. Bank National Ass'n, 181 Wn.2d 775, 336 P.3d 1142 (2014). The statute does not require any specific form of "proof" that a non-judicial trustee must possess to commence a non-judicial foreclosure. RCW 61.24.030(7)(a) provides:

> That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.

(Emphasis added.) The *Lyons* court expressly recognized what the statute clearly states: a beneficiary declaration is one way, but not the exclusive way, that the requisite ownership can be proven. Indeed, the *Lyons* court characterized the beneficiary declaration as a suggestion, not a requirement.

> Although ownership can be proved in different ways, the statute itself suggests one way: "A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note . . . shall be sufficient proof as required under this subsection." RCW 61.24.030(7)(a). Typically, unless the trustee has violated a duty of good faith, it is entitled to rely on the beneficiary's declaration when initiating a trustee's sale. *See* RCW 61.24.030(7)(b). But if there is an indication that the beneficiary declaration might be ineffective, a trustee should verify its veracity before initiating a trustee's sale to comply with its statutory duty.

181 Wn.2d at 789-90 (emphasis added; ellipsis in original). Thus, a beneficiary declaration is "one way" proof of ownership may be shown, but ownership can be proven in different ways. The successor trustee must have some proof that the beneficiary is the owner of the note before starting a foreclosure proceeding, but such evidence need not be a declaration from the beneficiary directly, nor does it need to be absolute proof, nor proof beyond a reasonable doubt.

Bucci has never submitted any contrary evidence to NWTS or this Court. Under *Lyons*, without any "conflicting information" regarding ownership, NWTS had nothing to investigate, and did not violate its duty of good faith.

In *Lyons,* the borrower, before the sale, presented to NWTS real evidence showing that there was some real question over who was the actual beneficiary, and NWTS initially refused or failed to investigate this conflicting information. *Lyons*, 181 Wn.2d at 788. If NWTS knew about "conflicting information regarding [its] right to initiate foreclosure but did not look into this matter, there are issues regarding whether this indicates deferral to [the lender] and therefore lack of impartiality." *Id.* When such conflicting information is presented to a successor trustee, "[a] trustee does not need to summarily accept a borrower's side of the story or instantly submit to a borrower's demands. But a trustee must treat both

sides equally and investigate possible issues using its independent judgment to adhere to its duty of good faith." *Id.* at 787.

For Bucci to make a similar argument here, he needs to have presented or identified "conflicting information" to NWTS in order to create a need to investigate. But Bucci has presented no "conflicting information" at any time. Even faced with the summary judgment motion, Bucci presented no conflicting evidence to the court. There was nothing for NWTS to investigate, either in the course of the prior non-judicial foreclosure proceedings or now.

G. Bucci's CPA Claims Fail Because Bucci's Material Default In Making His Mortgage Payments Is The Cause Of The Non-Judicial Foreclosure

Bucci's CPA claims against these Respondents also fail as a matter of law because Bucci cannot point to any unfair or deceptive conduct that caused him any injury. USB as trustee holds Bucci's note, there can be no CPA claim where a lender seeks to enforce its contractual remedies against a defaulting borrower. 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).

Bucci argues that USB as trustee and SPS committed an unfair and deceptive act by initiating a non-judicial foreclosure against Bucci when USB as trustee was not the beneficiary. But as the foregoing discussion shows, USB as trustee was and is the beneficiary. Therefore, it is no CPA violation for the beneficiary to commence a non-judicial foreclosure proceeding against a borrower who has failed for years to make mortgage payments.

Because USB as trustee is the beneficiary of Bucci's deed of trust, USB as trustee is entitled to conduct a non-judicial foreclosure, the remedy Bucci expressly agreed to. Bucci has no CPA claim because his own defaults in making payments are the "but for" cause of USB as trustee exercising the remedy that Bucci 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").

Bucci cannot show that any action of the Respondents to enforce their contractual rights after Bucci's multiple payment defaults was 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/Washington, Inc. v. Integra Telecom of Washington, 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, 2013 U.S. Dist. LEXIS 174312, at *8-9 (first ellipsis added; all other alterations in original). As such, all of Bucci's CPA claims should be dismissed as a matter of law.

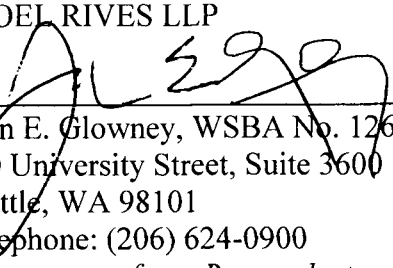
III. CONCLUSION

USB as trustee produced the original note and Bucci offered no contradictory evidence. Bucci did not deny he was in substantial default

and cannot deny that foreclosure is a remedy to which he agreed. Bucci's legal theories are meritless, and he produced no relevant evidence showing a genuine issue of material fact. Bucci's note was admissible and negotiable. Bucci's appeal should be denied.

Respectfully submitted this 2nd day of May 2016.

STOEL RIVES LLP



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that I caused **Appellate Brief of Respondents USB as Trustee and SPS** 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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