

67005-1

67005-1
ORIGINAL

67005-1-I

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

~~FILED~~
COURT OF APPEALS DIVISION I
2011 SEP 12 PM 4:57

JOHN LEIPHEIMER

Plaintiff – Appellant,

vs.

RECONTRUST COMPANY, N.A., a Nevada corporation;
COUNTRYWIDE HOME LOANS, INC, a New York corporation; BAC
HOME LOANS SERVICING, L.P., a Texas corporation; LS TITLE OF
WASHINGTON, MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC., a Delaware Corporation; and DOE defendants 1-20

Defendants – Respondents.

REVISED APPELLANT'S INITIAL BRIEF

RICHARD LLEWELYN JONES, P.S.
Richard Llewelyn Jones, WSBA No. 12904
2050 112th Avenue NE, Suite 230
Bellevue, WA 98004
Telephone: 425.462.7322
Facsimile: 425.450-0249
e-mail: rlj@richardjoneslaw.com

I. TABLE OF CONTENTS

	Page
I. Table of Contents	2
II. Table of Authorities	3
III. Assignments of Error	7
IV. Statement of the Case	7
V. Argument	10
A. Respondents violated the provisions of <i>RCW 61.24, et seq.</i> ..	11
i. The Deed of Trust failed the statutory requirements of <i>RCW 61.24</i>	11
ii. Subsequent Assignments and Appointments Invalid	21
iii. Recontrust is not a valid trustee under Washington law .	23
B. Recontrust, BAC and MERS violated the FDCPA	24
C. Recontrust, BAC, and MERS violated the WCPA	28
D. Leipheimer’s Claim for Quiet Title	34
VI. Conclusion	38
Declaration of Service	40
VII. Appendix	42

II. TABLE OF CASES AND AUTHORITIES

CASES	PAGE
<i>Bailey v. Security Nat'l Servicing Corp.</i> , 154 F.3d 384, (7 th Cir. 1998)..	23
<i>Bellistri v. Ocwen Loan Servicing, LLC</i> , 284 S.W.3d 619 (Mo. App. 2009).....	35,36,37,38
<i>Bravo v. Dolsen Cos.</i> , 125 Wash.2d 745, 750, 888 P.2d 147 (1995)	11
<i>Carpenter v. Longan</i> , 83 U.S. 271 (1872).....	17, 35
<i>Cox v. Helenius</i> , 103 Wn.2d 383, 693 P.2d 683 (1985).....	11, 12, 22
<i>Fontes v. HSBC Bank</i> , No. AZ-10-1345-JuMkPa (9 th Cir BAP 2011)....	19
<i>FTC v. Check Investors, Inc.</i> , 502 F.3d 159 (3d Cir. 2007).....	26
<i>Halvorson v. Dahl</i> , 89 Wash.2d 673, 674, 574 P.2d 1190 (1978).....	11
<i>Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wash.2d 778, 719 P.2d 531 (1986).....	28, 30, 31, 32, 33
<i>In re Kang Jin Hwang</i> , 396 BR 757 (Bankr. C.D. Cal 2008).....	19
<i>In re Mitchell</i> , 2009 WL 1044368 at 2-6 (Bankr.D. Nev. 2009).....	19
<i>In re Vargas</i> , 396 BR 511 (Bankr. C.D. Cal 2008)... ..	17,19,36
<i>In re Walker</i> , No. 10-21656 at *2(E.D. Cal. Bankr. May 20, 2010).....	19
<i>In Re: Wilhelm et al.</i> , BAP Case No. 08-20577-TLM (9th Cir)	36, 37, 38
<i>Kelley v. Upshaw</i> , 39 Cal.2d 179 (1952).....	36
<i>Koegel v. Prudential Mut. Sav. Bank</i> , 51 Wn. App. 108, 752 P.2d 385 (1988).....	13
<i>Landmark Nat'l Bank v. Kesler</i> , 216 P.3d 158 (2009).....	15, 19, 35, 36

<u>Leingang v. Pierce County Med. Bureau, Inc.</u> , 131 Wash.2d 133 930 P.2d 288 (1997).....	28
<u>McKinney v. Cadleway Properties, Inc.</u> , 548 F.3d 496 (7 th Cir. 2008)....	26
<u>Mills v. Western Washington University</u> , 150 Wash. App. 260, 208 P.3d 13 (2009).....	20
<u>Mortgage Electronic Registration Systems, Inc. v. Southwest Homes of Arkansas</u> , 2009 Ark. 152 (2009).....	14
<u>Nordstrom, Inc. v. Tampourlos</u> , 107 Wn.2d 735, 733 P.2d 208 (1987)	33
<u>Panag v. Farmers Ins. Co. of Washington</u> , 166 Wn. 2d 27, 204 P.3d 885 (2009).....	28, 30, 32, 33
<u>Parker v. Tumwater Family Practice Clinic</u> , 118 Wash. App. 425, 76 P.3d 764 (2003).....	20
<u>Pollice v. Nat’l Tax Funding, L.P.</u> , 225 F.3d 379, (3d. Cir. 2000).....	25
<u>San Juan County v. No New Gas Tax</u> , 160 Wash.2d 141, 157 P.3d 831 (2007).....	10
<u>Saxon Mortgage Servs. v. Hillery</u> , 2008 WL 5170180 at *5 (N.D. Cal 2008).....	19
<u>Schlosser v. Fairbanks Capital Corp.</u> , 323 F.3d 534 (7 th Cir. 2003).....	25
<u>Short v. Demopolis</u> , 103 Wash.2d 52, 691 P.2d 163 (1984).....	28
<u>Sienkiewicz v. Smith</u> , 97 Wn.2d 711, 716, 649 P.2d 112 (1982).....	20
<u>Wachovia SBA Lending, Inc. v. Kraft</u> , 165 Wash.2d 481, 488, 200 P.3d 683 (2009).....	10
<u>Wadlington v. Credit Acceptance Corp.</u> , 76 F.3d 103 (6 th Cir. 1996).....	26
<u>Wilson v. Draper & Goldberg, P.L.L.C.</u> , 443 F.3d 373 (4 th Cir. 2006)....	25
<u>Whitaker v. Ameritech Corp.</u> , 129 F.3d 952 (7 th Cir. 1997).....	25

WASHINGTON STATE STATUTES

RCW 19.86.....31,38

RCW 19.86.010.....30

RCW 19.86.920.....28

RCW 61.247, 12, 13, 20, 21, 22, 24, 29, 31, 33, 38

RCW 61.24.005(2).....11,12,13,14,19, 29

RCW 61.24.010.....11, 21, 23, 29, 33

RCW 61.24.020.....24

RCW 61.24.030(6).....23

RCW 61.24.030(7)(c).....11

RCW 61.24.090.....12

RCW 61.24.127.....31

RCW 62A.3-301.....13

FEDERAL STATUTES

§807 of the Fair Debt Collection Practices Act.....26

§808 of the Fair Debt Collection Practices Act27

15 U.S.C. § 1692.....31

COURT RULES

ER 201.....23

CR 12(b)(6).....10, 11, 38

CR 59.....10

OTHER AUTHORITY

Arkansas Code § 18-50-101.....14

SSHB 1362, Section 7(8)(b)(iii).....12

Restatement (Third) of Property (Mortgages) Section 5.4, (1997).....35

III. ASSIGNMENTS OF ERROR

1. The Court erred in granting judgment on the pleadings and dismissing John Leipheimer's (hereinafter "Leipheimer") claim for Wrongful Foreclosure when Defendants committed clear and multiple violations of the statutory procedures set forth in *RCW 61.24*.

2. The Court erred in granting judgment on the pleadings and dismissing Leipheimer's claim for violation of the Federal Fair Debt Collection Practices Act.

3. The Court erred in granting judgment on the pleadings and dismissing Leipheimer's claims for violation of the Washington Consumer Protection Act where Plaintiff set forth a clear pattern of deception and misrepresentations on the part of Defendants under *RCW 61.24* and concerning the legal status of a debt.

4. The Court erred in granting judgment on the pleadings and dismissing Leipheimer's claim to Quiet Title where Deed of Trust was invalid under *RCW 61.24* or the security instrument became invalid under commercial law.

IV. STATEMENT OF THE CASE

The Appellant, John Leipheimer (hereinafter "Leipheimer") purchased a personal residence located at 24211 SE 182nd Street, Maple

Valley, WA 98038 in January of 2006, by taking a loan out with Countrywide Homes Loans, Inc.

In connection with the above-mentioned loan, Leipheimer executed a Note and Deed of Trust on January 20, 2006, with Countrywide Home Loans, Inc. (hereinafter "Countrywide") as the lender and LS Title of Washington (hereinafter "Landsafe") as trustee. The Deed of Trust named Mortgage Electronic Registration Systems, Inc. (hereinafter "MERS") as beneficiary. CP 10-20 and CP 337-340.

Although MERS was named Beneficiary in the Deed of Trust, MERS has never owned the Note secured by the Deed of Trust. Further, MERS never had physical possession of the Note. Finally, at no time relevant to this cause of action did Leipheimer owe anything to MERS and never paid any money to MERS.

On May 20, 2009, Recontrust Company, N.A. (hereinafter "Recontrust") mailed a Notice of Default to Leipheimer, naming MERS as the creditor to whom the debt was owed. CP 22-25. The Notice stated that Leipheimer was \$24,900.95 in arrears and owed an additional \$2,858.48 in costs for a total amount due of \$27,759.43. The Notice further stated that in order to reinstate the deed of trust before notice of sale was posted, Leipheimer was required to pay an additional \$6,027.71 monthly payment along with an additional late charge of \$239.37. The

Notice of Default stated a total of \$34,026.51 due from Leipheimer to MERS in order to cure payment defaults. Finally, the subject Notice of Default specifically refers to and invokes application of the Fair Debt Collections Practices Act. CP 24.

On or about May 20, 2009, MERS executed, as purported beneficiary of the security instrument referenced above, an Appointment of Successor Trustee, nominating Recontrust as successor trustee. This was the same day that Recontrust mailed the aforementioned Notice of Default to Plaintiff. This instrument was not recorded until May 29, 2009, in King County. CP 27- 28.

On or about June 18, 2009 Recontrust executed a Notice of Trustee's Sale. The Notice set the trustee's sale for September 25, 2009 at 10:00 A.M. at the King County Administration Building in Seattle, WA. CP 30-34. Again, the document specifically refers to and invokes application of the Fair Debt Collections Practices Act CP 33.

Based on the conduct of all Defendants, Leipheimer suffered damage to his reputation including but not limited to impairment of his credit score, a negative impact upon his ability to secure financing for the residence or other remedial measures to address his financial situation, costs related to the investigation of the above matters, including travel costs expended to receive professional consultation and fees related to

these consultations. Accordingly, Leipheimer filed suit to enjoin the proposed sale of his residence. CP 1-33.

On November 12, 2010 Defendants Recontrust, Countrywide, BAC Servicing, Landsafe, and MERS filed a Motion to Dismiss Complaint under *CR 12(b)(6)*. CP 51-64. Following hearing of the Motion, the Motion was granted and an Order was entered dismissing the Defendants on January 7, 2011. CP 293-294.

On or about January 12, 2011, Leipheimer moved for reconsideration of the trial court's Order of January 7, 2011, pursuant to *CR 59*. CP 464-465. This Motion was denied and an Order was entered denying Leipheimer's Motion for Reconsideration on March 15, 2011. CP 480-481.

On April 8, 2011, Leipheimer filed a Notice of Appeal, seeking review of the trial court's Order of January 7, 2011, granting Defendant's Motion to Dismiss, pursuant to *CR 12(b)*, which Order was reconsidered and reconsideration denied on March 14, 2011. CP 482-490.

V. ARGUMENT

Whether dismissal was appropriate under *CR 12(b)(6)* is a question of law that this court reviews de novo. *San Juan County v. No New Gas Tax*, 160 Wash.2d 141, 164, 157 P.3d 831 (2007). Interpretation of a statute is a question of law reviewed de novo. *Wachovia SBA Lending*,

Inc. v. Kraft, 165 Wash.2d 481, 488, 200 P.3d 683 (2009). Even a hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to a claim. *Bravo v. Dolsen Cos.*, 125 Wash.2d 745, 750, 888 P.2d 147 (1995) (quoting *Halvorson v. Dahl*, 89 Wash.2d 673, 674, 574 P.2d 1190 (1978)).

A. Recontrust, BAC, and MERS violated the provisions of RCW 61.24, et seq. entitling Leipheimer to relief from improperly prosecuted trustee's sale

i. The Deed of Trust failed the statutory requirements of 61.24.

A beneficiary's ability to act depends upon the recording of a deed of trust that adheres to the many statutory requirements of Washington's Deed of Trust Act, *RCW 61.24*. *RCW 61.24.005(2)* provides as follows:

2) "Beneficiary" means the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.

(Emphasis added)

Only a beneficiary defined under *RCW 61.24.005(2)* can appoint a successor trustee or declare a default in the underlying obligation. *RCW 61.24.010*, *RCW 61.24.030(7)(c)*. In the absence of judicial oversight there is an expectation that trustees, and the parties that have retained them, will act consistently with the procedural requirements which are meant to provide borrowers notice of the process and an opportunity to object to the process to protect their rights and prevent abuses. *Cox v.*

Helenius, 103 Wn.2d 383, 693 P.2d 683 (1985). Underlying all the procedures outlined in *RCW 61.24*¹ is the assumption that the borrower will have knowledge or have the ability to reach the holder of the obligation. There must be no uncertainty regarding which party the underlying obligation or covenant secured by a deed of trust is owed to, for the borrower or third party must have such knowledge if they are to take advantage of their rights, including bringing an action to block a trustee's sale or the right to cure as set forth in *RCW 61.24.090*.

Furthermore, the public policies underlying non-judicial foreclosures are not served by lenders and their agents engaging in uncertain and haphazard procedures by creating a straw man that does not accurately reflect the true identities in the public record. Those public policies include (1) the promotion of an efficient and inexpensive foreclosure process; (2) an adequate opportunity for interested parties to prevent a wrongful foreclosure, and (3) the promotion of stability in land titles. *Cox v. Helenius, supra*. The stability in land titles is clearly not served by having what amounts to a false representation concerning the

¹ Recent amendments to *RCW 61.24*, effective July 22, 2011, require proof that the "entity claiming to be the beneficiary is the owner of any promissory note or obligations secured by the deed of trust." This new language further supports Appellant's contention that the language of *RCW 61.24.005(2)* was intended to refer to the owner of the underlying obligation. SSHB 1362, Section 7 (8)(b)(iii).

secured party by hiding the true identity behind a corporate shell.

RCW 61.24, et seq. strips borrowers of many of the protections available under a mortgage. Therefore, lenders must strictly comply with the Deed of Trust statutes, and the statutes and Deeds of Trust must be strictly construed in favor of the borrower. *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 752 P.2d 385 (1988).

Turning to the facts of the present controversy, MERS was designated as beneficiary under the subject Deeds of Trust as “nominee for Lender and Lender’s successors and assigns.” CP 11. But, at no time relevant to this cause of action did MERS have an interest in the underlying Note as required by statute. Accordingly, MERS was not a proper “beneficiary” under *RCW 61.24.005(2)*, which provides that the beneficiary must be “the holder of the instrument or document evidencing the obligations secured by the deed of trust,” a use of language that is similarly found and used in the UCC. *See RCW 62A.3-301* and footnote 1, above.

If MERS, as a “nominee” for the lender, did not have express authority from the assumed lender and MERS’ presumed principal, Countrywide (subsequently succeeded in interest by BAC Home Loans Servicing, L.P.), MERS’ appointment of Recontrust was a nullity. No Washington appellate court has attempted to construe the limits of *RCW*

61.24.005(2).² However, the issue has been addressed in other courts across the nation.

The Supreme Court of Arkansas rejected the designation of MERS as a beneficiary under that state's Deed of Trust statutes. ("MERS is not the beneficiary, even though it is so designated on the deed of trust").

Mortgage Electronic Registration Systems, Inc. v. Southwest Homes of Arkansas, 2009 Ark. 152 (2009). The relevant Arkansas laws closely mirror *RCW 61.24.005*, the Arkansas Code states in pertinent part:

"Beneficiary" means the person named or otherwise designated in a deed of trust as the person for whose benefit a deed of trust is given or his successor in interest.

Arkansas Code § 18-50-101.

The language in the Arkansas statute is less restrictive than we have in Washington, which requires the beneficiary to be the "holder" of the obligation secured.

Supreme Court of Kansas ruled that because MERS had no interest in either the property or the obligation it secured its participation in legal process concerning legal proceedings was not appropriate. A thoughtful

² While no Washington Court has construed this issue it is now before the Washington Supreme Court as a result of a request for review sent by Judge Coughenour in a pair of cases brought before the District Court of the Western District of Washington. *Appendix "A"*. This certification of the focal issue raised herein undermines the trial court's ruling that there were no genuine issues of material fact under Washington law.

review of the Kansas Supreme Court analysis in the matter of Landmark Nat'l Bank v. Kesler, 216 P.3d 158 (2009) reveals the sound logic finding MERS lacked sufficient legal standing to participate in proceedings³:

Mortgage Electronic Registration Systems, Inc. (MERS) and Sovereign Bank seek review of an opinion by our Court of Appeals holding that a nonlender is not a contingently necessary party in a mortgage foreclosure action and that due process does not require that a nonlender be allowed to intervene in a mortgage foreclosure action.

* * *

Sovereign is a financial institution that putatively purchased the Kesler mortgage from Millennium but did not register the transaction in Ford County. The relationship of MERS to the transaction is not subject to an easy description. One court has described MERS as follows:

"MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members' interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members." *Mortgage Elec. Reg. Sys., Inc. v. Nebraska Depart. of Banking*, 270 Neb. 529, 530, 704 N.W.2d 784 (2005).

* * *

The document began by identifying the parties:

"THIS MORTGAGE is made this 15th day of March 2005, between the Mortgagor, BOYD A. KESLER, (herein 'Borrower'), and the Mortgagee,

³ A copy of this case is attached hereto at *Appendix "B"*.

Mortgage Electronic Registration Systems, Inc. ('MERS'), (solely as nominee for Lender, as hereinafter defined, and Lender's successors and assigns). MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS. MILLENNIA MORTGAGE CORP., A CALIFORNIA CORPORATION is organized and existing under the laws of CALIFORNIA and has an address of 23046 AVENIDA DE LA CARLOTA #100, LAGUNA HILLS, CALIFORNIA 92653 (herein 'Lender')."

* * *

The mortgage instrument states that MERS functions "solely as nominee" for the lender and lender's successors and assigns. The word "nominee" is defined nowhere in the mortgage document, and the functional relationship between MERS and the lender is likewise not defined. In the absence of a contractual definition, the parties leave the definition to judicial interpretation.

What meaning is this court to attach to MERS's designation as nominee for Millennia? The parties appear to have defined the word in much the same way that the blind men of Indian legend described an elephant--their description depended on which part they were touching at any given time. Counsel for Sovereign stated to the trial court that MERS holds the mortgage "in street name, if you will, and our client the bank and other banks transfer these mortgages and rely on MERS to provide them with notice of foreclosures and what not." He later stated that the nominee "is the mortgagee and is holding that mortgage for somebody else." At another time he declared on the record that the nominee

* * *

The legal status of a nominee, then, depends on the context of the relationship of the nominee to its principal. Various courts have interpreted the relationship of MERS and the lender as an agency relationship. See *In re Sheridan*, ___ B.R. ___, 2009 WL 631355, at *4 (Bankr. D. Idaho March 12, 2009) (MERS "acts not on its own account. Its capacity is representative."); *Mortgage Elec. Registration System, Inc. v. Southwest*, 2009 Ark. 152, ___ S.W.3d ___, 2009 WL 723182 (March 19, 2009) ("MERS, by the terms of the deed of trust, and its own stated purposes, was the lender's agent"); *LaSalle Bank Nat. Ass'n v. Lamy*, 2006

WL 2251721, at *2 (N.Y. Sup. 2006) (unpublished opinion) ("A nominee of the owner of a note and mortgage may not effectively assign the note and mortgage to another for want of an ownership interest in said note and mortgage by the nominee.")

The relationship that MERS has to Sovereign is more akin to that of a straw man than to a party possessing all the rights given a buyer. A mortgagee and a lender have intertwined rights that defy a clear separation of interests, especially when such a purported separation relies on ambiguous contractual language. The law generally understands that a mortgagee is not distinct from a lender: a mortgagee is "[o]ne to whom property is mortgaged: the mortgage creditor, or lender." Black's Law Dictionary 1034 (8th ed. 2004). By statute, assignment of the mortgage carries with it the assignment of the debt. K.S.A. 58-2323. Although MERS asserts that, under some situations, the mortgage document purports to give it the same rights as the lender, the document consistently refers only to rights of the lender, including rights to receive notice of litigation, to collect payments, and to enforce the debt obligation. The document consistently limits MERS to acting "solely" as the nominee of the lender.

* * *

What stake in the outcome of an independent action for foreclosure could MERS have? It did not lend the money to Kesler or to anyone else involved in this case. Neither Kesler nor anyone else involved in the case was required by statute or contract to pay money to MERS on the mortgage. See *Sheridan* ("MERS is not an economic 'beneficiary' under the Deed of Trust. It is owed and will collect no money from Debtors under the Note, nor will it realize the value of the Property through foreclosure of the Deed of Trust in the event the Note is not paid."). If MERS is only the mortgagee, without ownership of the mortgage instrument, it does not have an enforceable right. See *Vargas*, 396 B.R. 517 ("[w]hile the note is 'essential,' the mortgage is only 'an incident' to the note" [quoting *Carpenter v. Longan*, 16 Wall. 271, 83 U.S. 271, 275, 21 L. Ed 313 (1872)]).

* * *

One such problem is that having a single front man, or nominee, for various financial institutions makes it difficult for mortgagors and other institutions to determine the identity of the current note holder.

"[I]t is not uncommon for notes and mortgages to be assigned, often more than once. When the role of a servicing agent acting on behalf of a mortgagee is thrown into the mix, it is no wonder that it is often difficult for unsophisticated borrowers to be certain of the identity of their lenders and mortgagees." *In re Schwartz*, 366 B.R. 265, 266 (Bankr. D. Mass. 2007).

"[T]he practices of the various MERS members, including both [the original lender] and [the mortgage purchaser], in obscuring from the public the actual ownership of a mortgage, thereby creating the opportunity for substantial abuses and prejudice to mortgagors..., should not be permitted to insulate [the mortgage purchaser] from the consequences of its actions in accepting a mortgage from [the original lender] that was already the subject of litigation in which [the original lender] erroneously represented that it had authority to act as mortgagee." *Johnson*, 2008 WL 4182397, at *4.

The *amicus* argues that "[a] critical function performed by MERS as the mortgagee is the receipt of service of all legal process related to the property." The *amicus* makes this argument despite the mortgage clause that specifically calls for notice to be given to the *lender*, not the putative mortgagee. In attempting to circumvent the statutory registration requirement for notice, MERS creates a system in which the public has no notice of who holds the obligation on a mortgage.

The Arkansas Supreme Court has noted:

"The only recorded document provides notice that [the original lender] is the lender and, therefore, MERS's principal. MERS asserts [the original lender] is not its principal. Yet no other lender recorded its interest as an assignee of [the original lender]. Permitting an agent such as MERS purports to be to step in and act without a recorded lender directing its action would wreak havoc on notice in this state." *Southwest Homes*, 2009 Ark. at 152.

This Court should adopt the reasoning of the Landmark Court in construing Washington law to find that MERS does not meet the requirements of *RCW 61.24.005(2)* beneficiary and empower the courts to remedy the wrongdoing. The language of the subject Deed of Trust is identical to the language used in the Landmark instrument. As cited above, the Landmark court ruled that MERS had no interest in either the property or the obligation it secured.

The Kansas Supreme Court is not the only court to question the role of MERS in matters such as these. *In re Vargas*, 396 BR 511 (Bankr. C.D. Cal 2008) ("MERS presents no evidence as to who owns the note or any authorization to act on behalf of the present owner"); *Saxon Mortgage Servs. v. Hillery*, 2008 WL 5170180 at *5 (N.D. Cal 2008) ("there is no evidence of record that establishes that MERS either held the promissory note or was given the authority by New Century [the original lender] to assign the note"); *In re Mitchell*, 2009 WL 1044368 at 2-6 (Bankr.D. Nev. 2009); *In re Kang Jin Hwang*, 396 BR 757 (Bankr. C.D. Cal 2008); *In re Walker*, No. 10-21656 at *2(E.D. Cal. Bankr. May 20, 2010) ("since MERS did not own the underlying note, it could not transfer the beneficial interest of the Deed of Trust to another. Any attempt to transfer the beneficial interest of a deed of trust without ownership of the underlying note is void . . ."). See also *Fontes v. HSBC Bank*, BAP No. AZ-10-1345-

JuMkPa (9th Cir BAP 2011) (“Although the deed of trust gave MERS, as nominee, the power to assign the deed of trust, it did not mention the note, nor did the note itself name MERS as nominee, so MERS could not take this right from the documents themselves.”).

Respondents’ have argued that since Leipheimer agreed to MERS designation as the “beneficiary” under the Deed of Trust, he ratified the role of MERS even if it violates the provisions of *RCW 61.24*. However, this argument is simply wrong. A contract that violates a specific statute is illegal and void under the public policy doctrine. *Mills v. Western Washington University*, 150 Wash. App. 260, 208 P.3d 13, 244 Ed. Law Rep. 821 (2009), review denied, 167 Wash. 2d 1020, 225 P.3d 1011 (2010); *Parker v. Tumwater Family Practice Clinic*, 118 Wash. App. 425, 76 P.3d 764 (2003). The proper remedy for a contract directly in violation of *RCW 61.24, et. seq.* is likely rescission, which does not excuse Leipheimer from payment of any monetary obligation, but merely precludes non-judicial foreclosure. Moreover, if the subject Deed of Trust is void, Leipheimer should be entitled to quiet title to his property.

An agreement that violates a statute or municipal ordinance is void, except where the agreement is not criminal or immoral and the statute or ordinance contains an adequate remedy for its violation. *Sienkiewicz v. Smith*, 97 Wash.2d 711, 716, 649 P.2d 112 (1982).

However, *RCW 61.24* provides for no specific remedies for violation of the statute in the context of pre-sale actions meant to prevent the wrongful foreclosure from occurring. Presumably, by providing a basis to block a sale under the statute for statutory violations, the legislature did not intend for a sale to subsequently proceed in contravention of the statute.

ii. Subsequent Assignments and Appointments Invalid

RCW 61.24.010(2), provides as follows:

(2) The trustee may resign at its own election or be replaced by the beneficiary. The trustee shall give prompt written notice of its resignation to the beneficiary. The resignation of the trustee shall become effective upon the recording of the notice of resignation in each county in which the deed of trust is recorded. If a trustee is not appointed in the deed of trust, or upon the resignation, incapacity, disability, absence, or death of the trustee, or the election of the beneficiary to replace the trustee, the beneficiary shall appoint a trustee or a successor trustee. Only upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee

(Emphasis added)

There is no evidence of a legitimate assignment of the Note from Countrywide to MERS. Accordingly as there is no proof that MERS has ever been entitled to act as “beneficiary” under the subject Deed of Trust to act in any capacity, much less to appoint a successor trustee under *RCW 61.24.010*. The entire foreclosure process engaged in by MERS and Recontrust was illegitimate and was prosecuted in violation of state and federal law.

In addition to the procedural deficiencies of the actions taken by MERS and Recontrust there is an additional statutory violation committed by Recontrust. Under *RCW 61.24.010(4)*, Recontrust, as successor trustee, had a duty to act in good faith and impartially in its dealings with Leipheimer, but instead recorded and relied upon documents it knew, or should have known, to be false and misleading. Under the fiduciary standard set out in *Cox v. Helenius, supra.* and subsequent amendments to *RCW 61.24.*, Recontrust should have requested some form of proof from MERS regarding possession of the underlying obligation. Since MERS did not hold the underlying obligation at any time relevant to this cause of action and Recontrust has provided no evidence that any inquiry was ever made regarding the issue, the statutory obligation owed to Leipheimer, that Recontrust act impartially between grantor and the beneficiary, was violated. Indeed, the Notice of Default made an intentionally opaque statement regarding the status of MERS as the creditor to whom the debt was owed. CP 22-25.

In this case, Recontrust failed to take any action to satisfy its duty of impartiality by ensuring MERS was, in fact, the holder of the Note secured by the Deeds of Trust and otherwise assure that the non-judicial foreclosure process was not compromised. Recontrust likely had full knowledge that MERS was not the holder of the Note and conducting the

sale would result in MERS having legal title to a property for which it never invested a cent.⁴ If Recontrust intends to foreclose a property non-judicially, it is obligated to have evidence that it is doing so on a legitimate and legal basis and not simply acting at the behest of a party that may or may not have the legal right to conduct such an action. There is no evidence that Recontrust's actions related to the appointment or assignment referenced above were anything other than wrongful and fraudulent.

iii. *Recontrust is not a valid trustee under Washington law*

In addition to the procedural failings noted above it appears that Recontrust does not meet the requirements of a trustee under *RCW 61.24.010*. Contained within the notices is a statement that Recontrust is based in Simi Valley, California and has an agent for service of process only. An agent for service of process does not meet the statutory requirements demanded of a trustee. *RCW 61.24.030(6)* requires a physical presence within the state for any trustee conducting non-judicial

⁴Adding to the mess created by the Defendants, Recontrust participated with The Bank of New York Mellon in preparing and recording a Corporation Assignment of Deed of Trust in August of 2010, well after the filing of Leipheimer's Complaint.. This Assignment, recorded without notice during the course of litigation exemplifies the sort of shell game borrowers in this state deal with daily at the hands of unscrupulous home lenders and their agents. A copy of this Assignment was publically recorded, is attached hereto as *Appendix "C"* and Appellant requests the Court to take judicial notice of this document, pursuant to *ER 201*.

foreclosures and Recontrust does not maintain the requisite office within this state.

Recontrust is a wholly owned subsidiary of Bank of America, N.A. and conducts foreclosures on behalf of BAC Home Loans Servicing, L.P. (“BAC”). *RCW 61.24.020* prohibits the trustee and beneficiary from being the same entity. At the time the Notice of Trustee’s Sale was sent to Leipheimer and publically recorded BAC was the “servicer” of the loan secured meaning Bank of America was possibly the Note holder at the time. The use of MERS as the foreclosing beneficiary was nothing more than a sham meant to conceal the true ownership of the Note. Recontrust faces a lawsuit recently filed by the State of Washington for similar conduct occurring across this state. *Appendix “D”*

Clearly, Leipheimer’ Amended Complaint presented facts that, if proven at time of trial, would have entitled him to relief under *RCW 61.24, et seq.*, including claims for wrongful foreclosure and quiet title. Accordingly, the trial court erred in dismissing Leipheimer’ claims under *RCW 61.24, et seq.*

B. Recontrust, BAC and MERS violated the FDCPA

Recontrust, BAC and MERS have claimed that the Federal Fair Debt Collections Practices Act (FDCPA) does not apply to them because they are not a “debt collector.” Since the FDCPA is a federal statute, it is

entirely appropriate to look to federal case law to determine if there is any merit in this contention.

When federal case law is reviewed, the argument Defendants advance was explicitly rejected by the 4th Circuit Court of Appeals, which reasoned that a debt remained a debt even after foreclosure proceedings commence. See Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373 (4th Cir. 2006). The logic behind the 4th Circuit decision is unassailable, as the Notice of Default contain demands for payment of sums then due and the foreclosure itself is meant to recover an underlying debt. Accordingly, the FDCPA should apply to Recontrust, BAC and MERS, which has not demonstrated it held the note prior to any alleged default (or at anytime).

The 9th Circuit has not specifically addressed the issues of whether mortgagees and their assignees are “debt collectors” and whether non-judicial foreclosure actions constitute debt collection under the FDCPA. However, other Courts have held that the FDCPA treats assignees as debt collectors if the debt sought to be collected was in default when acquired by the assignee, and as creditors if it was not. Schlosser v. Fairbanks Capital Corp., 323 F.3d 534, 536 (7th Cir. 2003); See also Bailey v. Security Nat’l Servicing Corp., 154 F.3d 384, 387 (7th Cir. 1998); Whitaker v. Ameritech Corp., 129 F.3d 952, 958 (7th Cir. 1997); Pollice v. Nat’l Tax Funding, L.P., 225 F.3d 379, 403-404 (3d. Cir. 2000);

Wadlington v. Credit Acceptance Corp., 76 F.3d 103, 106-107 (6th Cir. 1996). Accordingly, the purchaser of a debt in default is a “debt collector” for purposes of the FDCPA, even though it owns the debt and is collecting for itself. See *McKinney v. Cadleway Properties, Inc.*, 548 F.3d 496, 501 (7th Cir. 2008); *FTC v. Check Investors, Inc.*, 502 F.3d 159, 171-74 (3d Cir. 2007).

The representations and actions of Recontrust, and its principals BAC and MERS, were made in connection with the purported collection of a debt and constitute a clear violation of §807 of the FDCPA:

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * *

(2) The false representation of -

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

* * *

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

* * *

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(Emphasis added)

Moreover, the misstatements of fact regarding a debt owed to MERS constitute an unfair practice under §808 of the FDCPA:

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * *

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if -

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property;
or

(C) the property is exempt by law from such dispossession or disablement.

(Emphasis added)

Based upon the foregoing, Leipheimer presented facts that, if proven at time of trial, would have entitled him to relief under the FDCPA. Accordingly, the trial court erred in dismissing Leipheimer' FDCPA claims

C. **Recontrust, BAC, and MERS violated the Washington Consumer Protection Act.**

The elements of a valid claim under Washington State Consumer Protection Act (WCPA) (*RCW 19.86*

, *et seq.*) include the following: (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. *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 719 P.2d 531 (1986). The WCPA should be "liberally construed that its beneficial purposes may be served." *RCW 19.86.920*; *Short v. Demopolis*, 103 Wash.2d 52, 691 P.2d 163 (1984).

Determining whether a particular act is an unfair or deceptive act within the terms of the WCPA is a question of law for the court, if there is no factual dispute. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wash.2d 133, 930 P.2d 288 (1997). Of importance to the facts of the present controversy, an unfair or deceptive act can include misrepresentations of facts related to the legal status of a debt. *Panag v. Farmers Ins. Co. of Washington*, 166 Wn. 2d 27, 204 P.3d 885 (2009)

(deceptive methods used by a collection agency to recover money on behalf of an insurance company).

Panag stands for the proposition that violation of statutes related to the collection of a debt are *per se* unfair and constitute a deceptive act under the first element of the WCPA claim. It is undisputed that BAC and MERS retained the services of Recontrust to represent its alleged interest in the non-judicial foreclosure of the property. The actions of BAC and MERS, and its agent Recontrust, in asserting that they were acting in accordance with the provision of *RCW 61.24, et seq.*, and specifically asserting by their actions that MERS, was a proper “beneficiary” to act under *RCW 61.24.005(2)* and *RCW 61.24.010*, were materially false or misleading to the extent that the purported transactions were not consistent with laws of the State of Washington and therefore failed to meet the legal standards entitling Recontrust, BAC and MERS to take the actions they did.

Moreover, the subsequent assignment of the Deed of Trust by MERS, in violation of *RCW 61.24.005* and its lack of interest in the Note, constituted a materially false and misleading act in violation of the WCPA. The same holds true for the execution of the Appointment of Successor Trustee. As argued elsewhere in this brief, there are numerous violations of *RCW 61.24* that are cited that give rise to Leipheimer’

WCPA claim. Simply put, at no time relevant to this cause of action did Recontrust have the right to dispossess Leipheimer of the property at the time Recontrust threatened Leipheimer with non-judicial foreclosure of the subject property on behalf of MERS or BAC.

Whether an act occurs in trade or commerce is an issue of whether the act "directly or indirectly affect[s] the people of the State of Washington." *RCW 19.86.010(2)*. Misrepresentations concerning the legal status of a debt related to real property and the party to whom the debt is owed clearly affects the people of Washington. The court in *Panag* interpreted the WCPA broadly in order to give maximum effect to the Act in circumstances similar to those alleged in this matter. Additionally, Recontrust, BAC and MERS are companies engaged in similar transactions across the State of Washington and/or nationally.

Among the factors set forth in *Hangman Ridge* in determining if the public interest element is met are: (1) were the alleged acts committed in the course of defendant's business? (2) are the acts part of a pattern or generalized course of conduct? (3) were repeated acts committed prior to the act involving plaintiff? (4) is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? *Hangman Ridge v. Safeco, supra*. For disputes more private in nature, courts will consider whether (1) the acts alleged were committed in the

course of defendant's business? and (2) whether plaintiff and defendant occupy unequal bargaining positions? The answer to most of these questions is an unequivocal "Yes." The misconduct alleged herein was done in the normal course of Recontrust, BAC and MERS businesses and has been repeated in the foreclosure of other properties throughout the State of Washington.

Regardless of the ultimate answer to the above questions, the *Hangman Ridge* court stated that the "*per se* method requires a showing that a statute has been violated which contains a specific legislative declaration of public interest impact." *RCW 61.24.127* specifically references *RCW 19.86* among the claims that are preserved and available to plaintiffs seeking relief for violations of *RCW 61.24*.

Additionally, the FDCPA states as a declaration of purpose that is designed to "protect consumers" across the nation. *15 USC § 1692* provides as follows:

(a) Abusive practices

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

* * *

(e) Purposes

It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses

(Emphasis added)

This is analogous, if not synonymous, with the public interest declaration as described in *Hangman Ridge*. The court in *Panag* stated that “[w]hen a violation of debt collection regulations occurs, it constitutes a *per se* violation of the WCPA and the FTCA under state and federal law, reflecting the public policy significance of this industry.” *Panag*, at page 897.

The acts that Recontrust, BAC and MERS committed in the course of their foreclosure efforts that give rise to Leipheimer’ claim under the WCPA are : (1) Recontrust sent to Leipheimer a Notice of Default despite not meeting the requirements of a successor trustee under *RCW 61.24.010(2)* which Recontrust and BAC knew or should have known at the time the Notice of Default was issued; (2) Recontrust, BAC and MERS facilitated a deceptive and misleading effort to wrongfully execute and record documents each knew or should have known contained false statements related to the Appointment of Successor Trustee and Assignment of Deed of Trust; (3) Recontrust and MERS sent to Leipheimer, executed and recorded Notice of Trustee’s Sale that each

knew contained false statements in that no obligation of the Plaintiff was ever owed to MERS; (4) that as a result of this conduct, Recontrust and MERS knew that its conduct amounted to wrongful foreclosure and was further in violation of the FDCPA; and (5) Recontrust was not a qualified trustee under *RCW 61.24.010*.

The injury to Leipheimer' business or property occurred in the necessity for investigation and consulting with professionals to address Respondents' wrongful foreclosure and collection practices and violation of *RCW 61.24, et seq.* The expenditure of out-of-pocket expenses for postage, parking, and consulting an attorney are sufficient proof of an injury under *Hangman Ridge. Panag* at page 902. Here, Leipheimer had to take time off from work and incurred travel expenses to consult with an attorney to address the misconduct of the Defendants.

Additionally, injury to person's business or property is broadly construed and in some instances where "no monetary damages need be proven, and that non-quantifiable injuries, such as loss of goodwill would suffice for this element of the *Hangman Ridge* test." *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987). All of the injuries outlined were the direct and proximate result of the misconduct of Recontrust, BAC and MERS.

Clearly, Leipheimer presented facts in his Amended Complaint that, if proven at time of trial, would have entitled him to relief under the WCPA. Accordingly, the trial court erred in dismissing Leipheimer's WCPA claims.

D. Leipheimer's Claim for Quiet Title

At all times relevant to this cause of action, Leipheimer has been the owner of the property in fee simple and uninterrupted possession of the property, which is his personal residence. As MERS was never a legitimate beneficiary under *RCW 61.24.005* and the interest in the Deed of Trust has been effectively segregated from the interest in the Note, the Deed of Trust is no longer a valid lien upon Leipheimer's property.

The Assignment of Deed of Trust, dated August 25, 2010 (11 months after the filing of Leipheimer's Complaint herein) purportedly executed by MERS states: "all beneficial interest under that certain Deed of Trust . . . Together with the Note." *Appendix "C"*. Even if MERS had authority to transfer the beneficial interest of the Deed of Trust, which Leipheimer asserts it did not, the Deed of Trust does not contain any grant of authority to MERS to transfer the Note and MERS attempt to assign the Note to The Bank of New York Mellon was a nullity and no party has provided any evidence that such a transfer occurred.

This is relevant to the underlying title as the separation of the Note

from the Deed of Trust renders the subject Deed of Trust unenforceable. In other words, separation of the Note from the Deed of Trust results in the Note being unsecured. Restatement (Third) of Property (Mortgages) Section 5.4, Comment e (1997) (“in general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation”).

This reasoning has been adopted by various courts and should be adopted by this Court. This reasoning was recognized as authority in the Landmark case and was cited by a Missouri court in finding that an assignment of deed of trust (which also purported to assign the underlying note) was of no force or effect. Bellistri v. Ocwen Loan Servicing, LLC, 284 S.W.3d 619 (Mo. App. 2009). When the obligation underlying the subject Deed of Trust has been divorced from the Deed of Trust, the Deed of Trust secures nothing and is an inappropriate cloud on the owner’s title.

This reasoning has long standing acceptance across the country. The United States Supreme Court addressed this issue in Carpenter v. Longan, 83 U.S. 271 (1872) and stated succinctly:

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

Carpenter at 274.

The Supreme Court of California arrived at the same conclusion in Kelley v. Upshaw, 39 Cal.2d 179 (1952) (“purported assignment of the

mortgage without an assignment of the debt which is secured was a legal nullity”).

The Kansas Court in Landmark similarly explained the consequences of such scenarios:

Indeed, in the event that a mortgage loan somehow separates interests of the note and the deed of trust, with the deed of trust lying with some independent entity, the mortgage may become unenforceable.

"The practical effect of splitting the deed of trust from the promissory note is to make it impossible for the holder of the note to foreclose, unless the holder of the deed of trust is the agent of the holder of the note. [Citation omitted.] Without the agency relationship, the person holding only the note lacks the power to foreclose in the event of default. The person holding only the deed of trust will never experience default because only the holder of the note is entitled to payment of the underlying obligation. [Citation omitted.] The mortgage loan becomes ineffectual when the note holder did not also hold the deed of trust." *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 623 (Mo. App. 2009).

The Missouri court found that, because MERS was not the original holder of the promissory note and because the record contained no evidence that the original holder of the note authorized MERS to transfer the note, the language of the assignment purporting to transfer the promissory note was ineffective. "MERS never held the promissory note, thus its assignment of the deed of trust to Ocwen separate from the note had no force." 284 S.W.3d at 624; see also *In re Wilhelm*, 407 B.R. 392 (Bankr. D. Idaho 2009) (standard mortgage note language does not expressly or implicitly authorize MERS to transfer the note); *In re Vargas*, 396 B.R. 511, 517 (Bankr. C.D. Cal. 2008) ("[I]f FHM has transferred the note, MERS is no longer an authorized agent of the holder unless it has a separate agency contract with the new undisclosed principal. MERS presents no evidence as to who owns the note, or of any authorization to act on behalf of the present owner."); *Saxon Mortgage Services, Inc. v. Hillery*, 2008 WL 5170180 (N.D. Cal. 2008) (unpublished opinion) ("[F]or there to be a valid assignment, there must be more than just assignment of the deed alone; the note must also be assigned.... MERS

purportedly assigned both the deed of trust and the promissory note.... However, there is no evidence of record that establishes that MERS either held the promissory note or was given the authority... to assign the note.").

In the case of *In Re: Wilhelm et al.*, BAP Case No. 08-20577-TLM (9th Cir) (opinion of Hon. Terry L. Myers, Chief U.S. Bankruptcy Judge, July 9, 2009), Judge Myers analyzed the case law as to MERS' purported standing to assign the Note where MERS was nothing more than the "nominal beneficiary" under the Deed of Trust. A copy of the *Wilhelm* decision is attached hereto at **Appendix "E"** The Court concluded that even if MERS is granted authority to foreclose if required by "custom or law" (as set forth in the Deed of Trust), this language does not, either expressly or by implication, authorize MERS to transfer promissory notes.

The *Wilhelm* court cited to the cases of *Saxon Mortgage Services v. Hillery*, 2008 WL 5170180 (N.D. Cal., Dec. 9, 2008) and *Bellistri* as being in accord, holding that MERS presents no evidence as to who owns the note or of any authorization to act on behalf of the present owner of the note. Both cases were effectively dismissed (*Hillery* by outright dismissal; *Bellistri* by summary judgment), finding that there was no standing as there was no authority for the MERS assignment of the note. The *Wilhelm* Court quoted the pertinent portion of the *Bellistri* opinion:

"The record reflects that BNC was the holder of the promissory note. There is no evidence in the record or the pleadings that MERS held the

promissory note or that BNC gave MERS the authority to transfer the promissory note. MERS could not transfer the promissory note; therefore the language in the assignment of the deed of trust purporting to transfer [the] promissory note is ineffective.”

Clearly, the segregation of the Note from the Deed of Trust through the assignment of the Deed of Trust from MERS without a valid assignment of the Note renders the subject Deed of Trust a nullity and an improper lien against Leipheimer’s property. Accordingly, this improper cloud on Leipheimer’s property should be cleared and Leipheimer’s title quieted.

Leipheimer presented facts in his Complaint that, if proven at time of trial, would have entitled him to quiet title to his property. Accordingly, the trial court erred in dismissing Leipheimer’ quiet title claims.

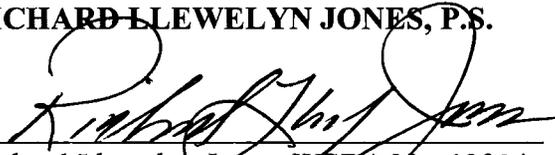
VI. CONCLUSION

Based upon the foregoing, Leipheimer’ Complaint contained sufficient factual allegations to establish claims for violation of *RCW 61.24, et seq.*, violation of the FDCPA, violation of *RCW 19.86, et seq.*, and Quiet Title when viewed in a light most favorable to Leipheimer. Accordingly, the trial court erred in dismissing Leipheimer’s claims pursuant to *CR 12(b)* and Leipheimer requests this Court vacate the trial court’s Orders and remand the matter back to the trial court for a trial on

the merits. Justice demands no less.

RESPECTFULLY RE-SUBMITTED this 12th day of September,
2011.

RICHARD LLEWELYN JONES, P.S.



Richard Llewelyn Jones, WSBA No. 12904

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

That on September 12, 2011, I arranged for service of the foregoing Revised Appellant's Initial Brief on the following parties:

Office of the Clerk
Court of Appeals, Division I
One Union Square
600 University St.
Seattle, WA 98101-4170

Facsimile
 Messenger
 U.S. Mail
 Overnight Mail

John S. Devlin, III
Lane Powell PC
1420 Fifth Avenue, Suite 4100.
Seattle, WA 98101-2338

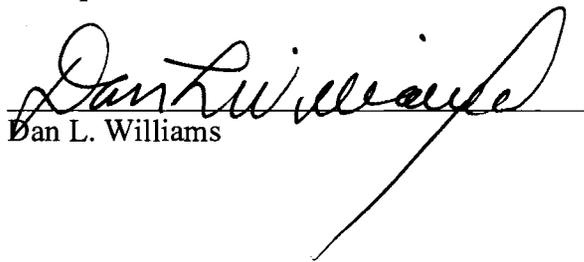
Facsimile
 Messenger
 U.S. Mail
 Overnight Mail

Timothy C. DeFors
Lane Powell PC
1420 Fifth Avenue, Suite 4100.
Seattle, WA 98101-2338

Facsimile
 Messenger
 U.S. Mail
 Overnight Mail

FILED
COURT OF APPEALS DIV I
2011 SEP 12 PM 4:57

DATED this 12th day of September, 2011.


Dan L. Williams

VII. APPENDIX

- APPENDIX “A” Judge Coughenour’s Order Certifying Question to the Washington Supreme Court of June 27, 2011.
- APPENDIX “B” Landmark National Bank v. Kesler, 216 P.3rd 158 (Kan. 2009)
- APPENDIX “C” Corporate Assignment of Deed of Trust of August 25, 2010.
- APPENDIX “D” Attorney General Complaint of August 4, 2011.
- APPENDIX “E” In re Wilhelm. Case No. 08-20577-TLM (9th Cir. BAP 2009).

APPENDIX "A"

THE HONORABLE JOHN C. COUGHENOUR

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KRISTIN BAIN,

Plaintiff,

v.

METROPOLITAN MORTGAGE
GROUP INC. et al.,

Defendants.

CASE NO. C09-0149-JCC

ORDER CERTIFYING QUESTION
TO THE WASHINGTON SUPREME
COURT

KEVIN SELKOWITZ,

Plaintiff,

v.

LITTON LOAN SERVICING LP et al.,

Defendants.

CASE NO. 10-5523-JCC

I. BACKGROUND

This Court previously ordered the parties in *Bain v. Metropolitan Mortgage Group Inc.*, No. C09-0149-JCC (W.D. Wash. removed Feb. 3, 2009), to show cause why this Court should

1 not decline to exercise supplemental jurisdiction over Plaintiff's state-law claims. In its order, the
2 Court asked the parties to identify whether Washington law addresses Mortgage Electronic
3 Registration Systems' (MERS)—and similar organizations'—ability to serve as the beneficiary
4 and nominee of the lender under Washington's Deed of Trust Act when it does not hold the
5 promissory note secured by the deed of trust. (Dkt. No. 130.) The Court also ordered the parties
6 to identify whether Washington law addresses the legal effect in a nonjudicial foreclosure of an
7 unauthorized beneficiary's appointment of a successor trustee. (*Id.*) The parties' responses
8 demonstrated that Washington law does not specifically address these issues.

9 This Court later learned that a Washington Superior Court certified to the Washington
10 Supreme Court similar (if not identical) questions involving MERS's role in the foreclosure
11 process, namely, whether MERS was a lawful beneficiary under Washington's Deed of Trust
12 Act and, if not, the resulting legal effect of the unlawful beneficiary. This Court stayed its cases
13 involving MERS pending resolution by the Washington Supreme Court. *Bain v. Metropolitan*
14 *Mortgage Group Inc.*, No. C09-0149-JCC (W.D. Wash. removed Feb. 3, 2009) (Dkt. No. 155);
15 *Selkowitz v. Litton Loan Servicing LP*, No. C10-5523-JCC (W.D. Wash. removed July 27, 2010)
16 (Dkt. No. 39).

17 On April 25, 2011, the Commissioner of the Washington Supreme Court, Steven Goff,
18 entered a ruling denying discretionary review of the Superior Court's certified question. Under
19 Washington Rule of Appellate Procedure 2.3(a), "a party may seek discretionary review of any
20 act of the superior court not appealable as a matter of right." The Commissioner concluded that
21 because the Superior Court had not yet ruled on the merits of the MERS issue, there was no "act"
22 of the Superior Court on which to seek discretionary review.

23 Although the Superior Court's certification was not the proper vehicle for review by the
24 Washington Supreme Court, the Commissioner described both the importance of the legal
25 questions posed by the Superior Court as well as the probability that the Washington Supreme
26 Court would eventually address the issue:

1 I agree with Mr. Vinluan that whether MERS can be a deed of trust
2 beneficiary under Washington law is an important issue that deserves resolution,
3 probably by this court. It appears that there is considerable ongoing foreclosure
4 litigation on the point in both state and federal courts, with no authority from this
5 court [or] the Court of Appeals to guide those decisions.

6 *Vinluan v. Fidelity Nat'l Title & Escrow Co.*, No. 85637-1, at *4 (Wash. Apr. 25, 2011) (ruling
7 denying review).¹

8 II. CERTIFICATION

9 Pursuant to Washington Revised Code section 2.60.020,

10 When in the opinion of any federal court before whom a proceeding is pending, it
11 is necessary to ascertain the local law of this state in order to dispose of such
12 proceeding and the local law has not been clearly determined, such federal court
13 may certify to the supreme court for answer the question of local law involved
14 and the supreme court shall render its opinion in answer thereto.

15 The certification process serves the important judicial interests of efficiency and comity. As
16 noted by the United States Supreme Court, certification saves "time, energy, and resources and
17 helps build a cooperative judicial federalism." *Lehman Bros. v. Schein*, 416 U.S. 386, 391
18 (1974). Because this matter involves important and far-reaching issues of first impression
19 regarding MERS's ability to serve as the beneficiary and nominee of the lender under
20 Washington's Deed of Trust Act, this matter should be presented for expedited review to the
21 Washington Supreme Court. The following questions are hereby certified to the Washington
22 Supreme Court:

- 23 1. Is Mortgage Electronic Registration Systems, Inc., a lawful "beneficiary"
24 within the terms of Washington's Deed of Trust Act, Revised Code of
25 Washington section 61.24.005(2), if it never held the promissory note secured
26 by the deed of trust?

¹ The Commissioner also noted that this Court had stayed its cases pending the
Washington Supreme Court's decision whether to accept certification from the Superior Court.

1 2. If so, what is the legal effect of Mortgage Electronic Registration Systems,
2 Inc., acting as an unlawful beneficiary under the terms of Washington's Deed
of Trust Act?

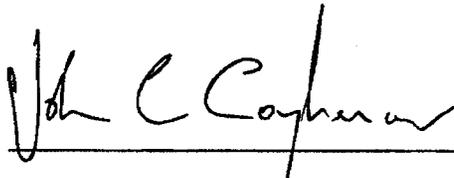
3 3. Does a homeowner possess a cause of action under Washington's Consumer
4 Protection Act against Mortgage Electronic Registration Systems, Inc., if
5 MERS acts as an unlawful beneficiary under the terms of Washington's Deed
of Trust Act?

6 This Court does not intend its framing of the questions to restrict the Washington
7 Supreme Court's consideration of any issues that it determines are relevant. If the Washington
8 Supreme Court decides to consider the certified questions, it may in its discretion reformulate the
9 questions. *See Affiliated FM Ins. Co. v. LTK Consulting Servs. Inc.*, 556 F.3d 920, 922 (9th Cir.
10 2009). Further, this Court leaves to the sound discretion of the Washington Supreme Court the
11 choice of which of the two (or both) of the above-captioned cases it believes serves as the
12 preferable vehicle through which to resolve the questions posed.

13 The Clerk of Court is directed to submit to the Washington Supreme Court certified
14 copies of this Order; a copy of the docket in the above-captioned matters; Docket Numbers 1, 10,
15 21, 22, 24, 30, 31, 39, 41, 42, 44, 48, 57, 62, 65-69, 77, 79, 80, 82, 86-88, 90, 91, 94, 96, 98, 99,
16 102, 104, 107-109, 111, 112, 116-118, 120, 122, 123, 128, 130, 131, 132, 138-146, 148, 149,
17 153, 155, and 156 in Case No. 09-0149-JCC; and Docket Numbers 7-9, 12-17, 20-31, 33, and
18 38 in Case No. C10-5523-JCC. The record so compiled contains all matters in the pending
19 causes deemed material for consideration of the local-law questions certified for answer.

20 This Court STAYS these actions until the Washington Supreme Court answers the
21 certified questions.

22 DATED this 24th day of June 2011.

23
24
25 

26 John C. Coughenour
UNITED STATES DISTRICT JUDGE

APPENDIX "B"

5. K.S.A. 60-255(b) does not require that the party moving for relief from default judgment be a party to the action.

6. It is appropriate for a trial court to consider evidence beyond the bare pleadings to determine whether it should set aside a default judgment. In a motion to set aside default, a trial court should consider a variety of factors to determine whether the defendant or would-be defendant had a meritorious defense, and the burden of establishing a meritorious defense rests with the moving party.

7. Relief under K.S.A. 60-255(b) is appropriate only upon a showing that if relief is granted the outcome of the suit may be different than if the entry of default or the default judgment is allowed to stand; the showing should underscore the potential injustice of allowing the case to be disposed of by default. In most cases the court will require the party in default to demonstrate a meritorious defense to the action as a prerequisite to vacating the default entry or judgment. The nature and extent of the showing that will be necessary lie within the trial court's discretion.

8. The law relating to a contingently necessary party closely resembles the law relating to vacating default judgment, in that both require the party asserting the interest to demonstrate a meritorious defense or an interest that may be impaired.

9. The word "nominee" is subject to more than one interpretation. The legal significance of the word depends on the context in which it is used. The word encompasses a range of meanings from a straw man or limited agent to a representative enjoying

Page 161

the same legal rights as the party that acts as the nominator.

10. The law generally understands that a mortgagee is not distinct from a lender: a mortgagee is a party to whom property is mortgaged, which is to say, a mortgage creditor or lender. A mortgagee and a lender have intertwined rights that defy a clear separation of interests.

11. Parties are bound by the formal admissions of their counsel in an action.

12. The Due Process Clause does not protect entitlements where the identity of the alleged entitlement is vague. A protected property right must have some ascertainable monetary value. An entitlement to a procedure does not constitute a protected property interest.

Tyson C. Langhofer and Court T. Kennedy, of Stinson Morrison Hecker, L.L.P., of Wichita, for appellants/cross-appellees.

Ted E. Knopp, of Ted E. Knopp, Chartered, of Wichita, for appellee Boyd A. Kesler.

David A. Schatz, of Husch Blackwell Sanders L.L.P., of Kansas City, Missouri, for amicus curiae American Land Title Association.

OPINION

ROSEN, J.:

Mortgage Electronic Registration Systems, Inc. (MERS) and Sovereign Bank seek review of an opinion by our Court of Appeals holding that a nonlender is not a contingently necessary party in a mortgage foreclosure action and that due process does not require that a nonlender be allowed to intervene in a mortgage foreclosure action.

The facts underlying this appeal are not in dispute. On March 19, 2004, Boyd Kesler secured a loan of \$50,000 from Landmark National Bank (Landmark) with a mortgage registered in Ford County, Kansas. On March 15, 2005, he

secured an additional loan of \$93,100 from Millennium Mortgage Corp. (Millennia) through a second mortgage registered in Ford County. Both mortgages were secured by the same real property located in Ford County.

The second mortgage lies at the core of this appeal. That mortgage document stated that the mortgage was made between Kesler-the "Mortgagor" and "Borrower" -and MERS, which was acting "solely as nominee for Lender, as hereinafter defined, and Lender's successors and assigns." The document then identified Millennia as the "Lender." At some subsequent time, the mortgage may have been assigned to Sovereign and Sovereign may have taken physical possession of the note, but that assignment was not registered in Ford County.

On April 13, 2006, Kesler filed for bankruptcy in the United States Bankruptcy Court for the District of Kansas, Wichita Division. He named Sovereign as a creditor; although he claimed the secured property as exempt, he filed an intention to surrender the property. The bankruptcy court discharged his personal liability on November 16, 2006. The record contains little documentation or evidence explaining the interplay of the bankruptcy and the foreclosure action, except to suggest that the bankruptcy action may have given Sovereign constructive notice of a possible default on payments.

On July 27, 2006, Landmark filed a petition to foreclose on its mortgage, serving and naming as defendants Kesler and Millennia. It did not serve notice of the litigation on MERS or Sovereign. In the absence of answers from either defendant, the trial court entered default judgment against Kesler and Millennia on September 6, 2006. The trial court then filed an order of sale on September 29, 2006. Notice of the sale was initially published in the Dodge City Daily Globe on October 4, 2006. On October 26, 2006, Dennis Bristow and Tony Woydziak purchased the secured property at a sheriff's sale for \$87,000, and on November 14, 2006, Landmark filed a motion to confirm sale of the secured property.

Also on November 14, 2006, Sovereign filed an answer to the foreclosure petition, asserting an interest in the real property as the successor in interest to Millennia's second mortgage. A week later, on November 21, 2006, Sovereign filed a motion to set aside

Page 162

or vacate the default judgment and an objection to confirmation of sale. The motion asserted that MERS was a K.S.A. 60-219(a) contingently necessary party and, because Landmark failed to name MERS as a defendant, Sovereign did not receive notice of the proceedings. The motion asked the court to vacate the default judgment under K.S.A. 60-260(b). The motion further asked the court to set aside the surplus from the sale, holding it to later to be paid to Sovereign if the court elected not to grant the motion to vacate.

On November 27, 2006, Kesler filed a motion seeking distribution of surplus funds from the sheriff's sale, and on January 3, 2007, Kesler filed a motion joining Landmark's earlier motion to confirm the sheriff's sale. The trial court conducted a hearing on the various motions on January 8, 2007, at which counsel for Landmark, Kesler, Sovereign, and Bristow appeared and presented their cases. The trial court deferred judgment pending review of the pleadings.

On January 16, 2007, MERS filed a motion joining Sovereign's motion to vacate the journal entry of default judgment and objecting to confirmation of the sheriff's sale, followed on January 18, 2007, by a motion to intervene under K.S.A. 60-224. MERS proffered an answer and a cross-claim to the original foreclosure petition.

On that same date, the trial court filed an order finding that MERS was not a real party in interest and Landmark was not required to name it as a party to the foreclosure action. The court found that MERS served only as an agent or representative for Millennia. The court also found that Sovereign's failure to register its interest with the Ford County Register of Deeds precluded it from asserting rights to the mortgage after judgment had been entered. The court denied the motions to set aside judgment and to intervene and granted the motions to confirm the sale and to distribute the surplus.

On February 1, 2007, MERS and Sovereign filed motions to reconsider. The trial court conducted a hearing on those motions, at which counsel for Kesler, Sovereign, and MERS appeared and argued. The trial court subsequently entered an order denying the motions to reconsider. MERS and Sovereign filed timely notices of appeal.

Prior to the appellants submitting their briefs, the purchasers Bristow and Woydziak filed a motion with the Court

of Appeals seeking leave to intervene in the appeal. The Court of Appeals granted the motion. Bristow and Woydziak then filed a motion to compel the office of the Clerk of the Appellate Courts to docket their cross-appeal, which the Court of Appeals denied. The Court of Appeals affirmed the district court in *Landmark National Bank v. Kesler*, 40 Kan.App.2d 325, 192 P.3d 177 (2008). This court granted the appellant's petition for review.

I. Did The District Court Abuse Its Discretion In Denying MERS's Motion To Set Aside Default Judgment And Motion To Intervene As A Contingently Necessary Party?

A. Standard of Review

Denial of a motion to set aside a default judgment is subject to review under a standard of abuse of discretion. See *Canaan v. Barte*, 272 Kan. 720, Syl. ¶ 9, 35 P.3d 841 (2001). A district court decision that denies a motion to join a party as a necessary party under K.S.A. 60-219(a) is also subject to an abuse of discretion standard of review. *State ex rel. Graeber v. Marion County Landfill, Inc.*, 276 Kan. 328, 352, 76 P.3d 1000 (2003). Whether the evidence demonstrates that the statutory requirements for joinder have been met is a mixed question of fact and law. When reviewing a mixed question of fact and law, an appellate court reviews the district court's factual findings for substantial competent evidence and reviews de novo the district court's legal conclusions. *State v. Fisher*, 283 Kan. 272, 286, 154 P.3d 455 (2007).

Intervention as a matter of right is subject to the same mixed determination of law and fact as is joinder. K.S.A. 60-224(a). Permissive intervention lies within the discretion of the district court. K.S.A. 60-224(b); see *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 382 n. 1, 107 S.Ct. 1177, 94 L.Ed.2d 389 (1987) (Brennan, J., concurring) (discussing the different standards

Page 163

applied to Federal Rule of Civil Procedure 24[a] and [b]).

Judicial discretion is abused when no reasonable person would take the view adopted by the trial court. *Harsch v. Miller*, 288 Kan. 280, 293, 200 P.3d 467 (2009). Review for abuse of discretion includes review to determine whether erroneous legal conclusions guided the exercise of discretion. *State v. Skolaut*, 286 Kan. 219, Syl. ¶ 3, 182 P.3d 1231 (2008).

To the extent that this appeal requires interpretation of statutory mandates, this court exercises unlimited review. See *Genesis Health Club, Inc. v. City of Wichita*, 285 Kan. 1021, 1031, 181 P.3d 549 (2008).

B. Analysis

While this is a matter of first impression in Kansas, other jurisdictions have issued opinions on similar and related issues, and, while we do not consider those opinions binding in the current litigation, we find them to be useful guideposts in our analysis of the issues before us.

At the heart of this issue is whether the district court abused its discretion in refusing to set aside the default judgment and in refusing to join MERS as a contingently necessary party.

The statutory provision for setting aside a default judgment is K.S.A. 60-255(b), which refers to K.S.A. 60-260(b), relating to relief from judgment, in a manner similar to the correlation between the corresponding federal rules, Fed. R. Civ. Proc. 55(c) and 60(b). K.S.A. 60-260(b) allows relief from a judgment based on mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence that could not have been timely discovered with due diligence; fraud or misrepresentation; a void judgment; a judgment that has been satisfied, released, discharged, or is no longer equitable; or any other reason justifying relief from the operation of the judgment. K.S.A. 60-260(b) requires that the motion be made by a party or by a representative who is in privity with a party, thus precluding a nonparty of standing to file such a motion. K.S.A. 60-255(b) does not, however, require that the movant be a party to the action. See 11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d § 2865 (1995).

It is appropriate and probably necessary for a trial court to consider evidence beyond the bare pleadings to determine whether it should set aside a default judgment. In a motion to set aside default, a trial court should consider a variety of factors to determine whether the defendant (or would-be defendant) had a meritorious defense, and the burden of establishing a meritorious defense rests with the moving party. See *Canaan v. Bartee*, 272 Kan. 720, 731, 35 P.3d 841 (2001).

This conclusion is consistent with the construction of the parallel federal rules:

" Generally, a federal court will grant a motion under Rule 55(c) only after some showing is made that if relief is granted the outcome of the suit may be different than if the entry of default or the default judgment is allowed to stand; the showing should underscore the potential injustice of allowing the case to be disposed of by default. In most cases, therefore, *the court will require the party in default to demonstrate a meritorious defense to the action as a prerequisite to vacating the default entry or judgment.* ...

" A majority of the courts ... have insisted upon a presentation of some factual basis for the supposedly meritorious defense....

" The demonstration of a meritorious defense is not expressly called for by the federal rules and, therefore, *the nature and extent of the showing that will be necessary is a matter that lies within the court's discretion.* ... *The underlying concern is to determine whether there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default.* " (Emphasis added.) 10A Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d § 2697 (1998).

We accordingly find that it was incumbent on the trial court, when ruling on the motion to set aside default judgment, to consider

Page 164

whether MERS would have had a meritorious defense if it had been named as a defendant and whether there was some reasonable possibility MERS would have enjoyed a different outcome from the trial if its participation had precluded default judgment.

In determining whether MERS was a contingently necessary party that was entitled to relief from judgment, the trial court was required to consider the factors of K.S.A. 60-219(a) in addition to those of K.S.A. 60-260(b).

K.S.A. 60-219(a) defines which parties are to be joined in an action as necessary for just adjudication:

" A person is contingently necessary if (1) complete relief cannot be accorded in his absence among those already parties, or (2) he claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action in his absence may (i) as a practical matter substantially impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."

The law relating to a contingently necessary party closely resembles the law relating to vacating a default judgment, in that both require the party asserting the interest to demonstrate a meritorious defense or an interest that may be impaired. In order to prevail on appeal, MERS must demonstrate that the trial court abused its discretion when it found, based on the testimony, evidence, and pleadings before the court at the time when it considered the motion to set aside default judgment, that MERS lacked a meritorious defense to the foreclosure proceeding or had an interest that could be impaired. We will accordingly examine the nature of the interest in the mortgage that MERS has demonstrated.

Sovereign is a financial institution that putatively purchased the Kesler mortgage from Millennia but did not register the transaction in Ford County. The relationship of MERS to the transaction is not subject to an easy description. One court has described MERS as follows:

" MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members' interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members." *Mortgage Elec. Reg. Sys., Inc. v. Nebraska Depart. of Banking*, 270 Neb. 529, 530, 704 N.W.2d 784 (2005).

The second mortgage designated the relationships of Kesler, MERS, and Millennia and established payment and notice obligations. That document purported to define the role played by MERS in the transaction and the contractual rights of the parties.

The document began by identifying the parties:

" THIS MORTGAGE is made this 15th day of March 2005, between the Mortgagor, BOYD A. KESLER, (herein ` Borrower'), and the Mortgagee, Mortgage Electronic Registration Systems, Inc. (` MERS'), (solely as nominee for Lender, as hereinafter defined, and Lender's successors and assigns). MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS. MILLENNIA MORTGAGE CORP., A CALIFORNIA CORPORATION is organized and existing under the laws of CALIFORNIA and has an address of 23046 AVENIDA DE LA CARLOTA # 100, LAGUNA HILLS, CALIFORNIA 92653 (herein ` Lender')."

The third paragraph of the first page of the mortgage document conveyed a security interest in real estate:

Page 165

" TO SECURE to Lender the repayment of the indebtedness evidenced by the Note, with interest thereon; the payment of all other sums, with interest thereon, advanced in accordance herewith to protect the security of this Mortgage; and the performance of the covenants and agreements of Borrower herein contained, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS the following described property located in the County of FORD, State of Kansas."

The first paragraph of the second page of the mortgage document contains the following language that apparently both limits and expands MERS's rights:

" Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Mortgage; but, if necessary to comply with law or custom, MERS, (as nominee for Lender and Lender's successors and assigns), has the right: to exercise any and all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing or cancelling this Mortgage."

Paragraph 7 of the mortgage document provides the lender with the right to protect the security:

" If Borrower fails to perform the covenants and agreements contained in this Mortgage, or if any action or proceeding is commenced which materially affects Lender's interest in the Property, then Lender, at Lender's option, upon notice to Borrower, may make such appearances, disburse such sums, including reasonable attorneys' fees, and take such action as is necessary to protect Lender's interest."

Paragraph 9 of the mortgage document provides the lender with rights in the event of a condemnation:

" Condemnation. The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taking of the Property, or part thereof, or for conveyance in lieu of

condemnation, are hereby assigned and shall be paid to Lender, subject to the terms of any mortgage, deed of trust or other security agreement with a lien which has priority over this mortgage."

Paragraph 12 of the mortgage document addresses notice:

" Notice. Except for any notice required under applicable law to be given in another manner, (a) any notice to Borrower provided for in this Mortgage shall be given by delivering it or by mailing such notice by certified mail addressed to Borrower at the Property Address or at such other address as Borrower may designate by notice to Lender as provided herein, and (b) *any notice to Lender* shall be given by certified mail *to Lender's address stated herein* or to such other address as Lender may designate by notice to Borrower as provided herein. Any notice provided for in this Mortgage shall be deemed to have been given to Borrower or Lender when given in the manner designated herein." (Emphasis added.)

The signature page of the mortgage document contains language relating to notice in the event of default:

" *Borrower and Lender request the holder of any mortgage, deed of trust or other encumbrance with a lien which has priority over this Mortgage to give Notice to Lender, at Lender's address set forth on page one of this Mortgage, of any default under the superior encumbrance and of any sale or other foreclosure action.*" (Emphasis added.)

The mortgage instrument states that MERS functions "solely as nominee" for the lender and lender's successors and assigns. The word "nominee" is defined nowhere in the mortgage document, and the functional relationship between MERS and the lender is likewise not defined. In the absence of a contractual definition, the parties leave the definition to judicial interpretation.

What meaning is this court to attach to MERS's designation as nominee for Millennia? The parties appear to have defined the word in much the same way that the blind men of Indian legend described an elephant

Page 166

-their description depended on which part they were touching at any given time. Counsel for Sovereign stated to the trial court that MERS holds the mortgage "in street name, if you will, and our client the bank and other banks transfer these mortgages and rely on MERS to provide them with notice of foreclosures and what not." He later stated that the nominee "is the mortgagee and is holding that mortgage for somebody else." At another time he declared on the record that the nominee

"is more like a trustee or more like a corporation, a trustee that has multiple beneficiaries. Now a nominee's relationship is not a trust but if you have multiple beneficiaries you don't serve one of the beneficiaries you serve the trustee of the trust. You serve the agent of the corporation."

Counsel for the auction property purchasers stated that a nominee is "one designated to act for another as his representative in a rather limited sense." He later deemed a nominee to be "like a power of attorney."

Black's Law Dictionary defines a nominee as "[a] person designated to act in place of another, usu. in a very limited way" and as "[a] party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others." Black's Law Dictionary 1076 (8th ed.2004). This definition suggests that a nominee possesses few or no legally enforceable rights beyond those of a principal whom the nominee serves.

In its opinion below, the Court of Appeals cited *Thompson v. Meyers*, 211 Kan. 26, 30, 505 P.2d 680 (1973), which provides the only discussion in Kansas of the legal significance of a nominee:

"In common parlance the word 'nominee' has more than one meaning. Much depends on the frame of reference in which it is used. In Webster's Third New International Dictionary, unabridged, one of the definitions given is 'a person named as the recipient in an annuity or grant.' We view a 'nominee', as the term was used by the parties here, not simply in the sense of a straw man or limited agent ..., but in the

larger sense of a person designated by them to purchase the real estate, who would possess all the rights given a buyer...."

The legal status of a nominee, then, depends on the context of the relationship of the nominee to its principal. Various courts have interpreted the relationship of MERS and the lender as an agency relationship. See *In re Sheridan*, 2009 WL 631355, at *4 (Bankr.D.Idaho March 12, 2009) (MERS "acts not on its own account. Its capacity is representative."); *Mortgage Elec. Registration System, Inc. v. Southwest*, 2009 Ark. 152, __, __ S.W.3d __, 2009 WL 723182 (March 19, 2009) ("MERS, by the terms of the deed of trust, and its own stated purposes, was the lender's agent"); *LaSalle Bank Nat. Ass'n v. Lamy*, 12 Misc.3d 1191, 824 N.Y.S.2d 769, 2006 WL 2251721, at *2 (Sup.2006) (unpublished opinion) ("A nominee of the owner of a note and mortgage may not effectively assign the note and mortgage to another for want of an ownership interest in said note and mortgage by the nominee.")

The relationship that MERS has to Sovereign is more akin to that of a straw man than to a party possessing all the rights given a buyer. A mortgagee and a lender have intertwined rights that defy a clear separation of interests, especially when such a purported separation relies on ambiguous contractual language. The law generally understands that a mortgagee is not distinct from a lender: a mortgagee is "[o]ne to whom property is mortgaged: the mortgage creditor, or lender." Black's Law Dictionary 1034 (8th ed.2004). By statute, assignment of the mortgage carries with it the assignment of the debt. K.S.A. 58-2323. Although MERS asserts that, under some situations, the mortgage document purports to give it the same rights as the lender, the document consistently refers only to rights of the lender, including rights to receive notice of litigation, to collect payments, and to enforce the debt obligation. The document consistently limits MERS to acting "solely" as the nominee of the lender.

Indeed, in the event that a mortgage loan somehow separates interests of the note and the deed of trust, with the deed of trust lying

Page 167

with some independent entity, the mortgage may become unenforceable.

"The practical effect of splitting the deed of trust from the promissory note is to make it impossible for the holder of the note to foreclose, unless the holder of the deed of trust is the agent of the holder of the note. [Citation omitted.] Without the agency relationship, the person holding only the note lacks the power to foreclose in the event of default. The person holding only the deed of trust will never experience default because only the holder of the note is entitled to payment of the underlying obligation. [Citation omitted.] The mortgage loan becomes ineffectual when the note holder did not also hold the deed of trust." *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 623 (Mo.App.2009).

The Missouri court found that, because MERS was not the original holder of the promissory note and because the record contained no evidence that the original holder of the note authorized MERS to transfer the note, the language of the assignment purporting to transfer the promissory note was ineffective. "MERS never held the promissory note, thus its assignment of the deed of trust to Ocwen separate from the note had no force." 284 S.W.3d at 624; see also *In re Wilhelm*, 407 B.R. 392 (Bankr.D.Idaho 2009) (standard mortgage note language does not expressly or implicitly authorize MERS to transfer the note); *In re Vargas*, 396 B.R. 511, 517 (Bankr.C.D.Cal.2008) ("[I]f FHM has transferred the note, MERS is no longer an authorized agent of the holder unless it has a separate agency contract with the new undisclosed principal. MERS presents no evidence as to who owns the note, or of any authorization to act on behalf of the present owner."); *Saxon Mortgage Services, Inc. v. Hillery*, 2008 WL 5170180 (N.D.Cal.2008) (unpublished opinion) ("[F]or there to be a valid assignment, there must be more than just assignment of the deed alone; the note must also be assigned.... MERS purportedly assigned both the deed of trust and the promissory note.... However, there is no evidence of record that establishes that MERS either held the promissory note or was given the authority ... to assign the note.").

What stake in the outcome of an independent action for foreclosure could MERS have? It did not lend the money to Kesler or to anyone else involved in this case. Neither Kesler nor anyone else involved in the case was required by statute or contract to pay money to MERS on the mortgage. See *Sheridan*, 2009 WL 631355, at *4 ("MERS is not an economic beneficiary under the Deed of Trust. It is owed and will collect no money from Debtors under the Note, nor will it realize the value of the Property through foreclosure of the Deed of Trust in the event the Note is not paid."). If

MERS is only the mortgagee, without ownership of the mortgage instrument, it does not have an enforceable right. See *Vargas*, 396 B.R. at 517 (" [w]hile the note is 'essential,' the mortgage is only 'an incident' to the note" [quoting *Carpenter v. Longan*, 16 Wall. 271, 83 U.S. 271, 275, 21 L.Ed. 313 (1872)]).

When it found that MERS did not have an interest in the property that was impaired by the default judgment, the trial court properly considered four factors: (1) that the written pleadings and oral arguments by MERS and Sovereign identified MERS as acting only as a digital mortgage tracking service; (2) that counsel for MERS insisted that no evidence of a financial or property interest was necessary and its argument rested solely on its identity as the mortgagee on the mortgage document, when counsel was directly challenged to produce evidence of a financial or property interest; (3) that evidence showed that Sovereign was on notice that Landmark had leave of the bankruptcy court to proceed with foreclosure and that MERS did not attempt to intervene in the action until after its alleged principal, Sovereign, had already had its motion to intervene and to set aside judgment denied; and (4) that the case law submitted by the parties weighed more in favor of denying the motion. These factors were properly before the trial court and were consistent with the evidence and supported the court's legal reasoning.

Counsel for MERS explicitly declined to demonstrate to the trial court a tangible interest in the mortgage. Parties

Page 168

are bound by the formal admissions of their counsel in an action. *Dick v. Drainage District No. 2*, 187 Kan. 520, 525, 358 P.2d 744 (1961). Counsel for MERS made no attempt to show any injury to MERS resulting from the lack of service; in fact, counsel insisted that it did not have to show a financial or property interest.

MERS argued in another forum that it is *not* authorized to engage in the practices that would make it a party to either the enforcement of mortgages or the transfer of mortgages. In *Mortgage Elec. Reg. Sys. v. Nebraska Dept. of Banking*, 270 Neb. 529, 704 N.W.2d 784 (2005), MERS challenged an administrative finding that it was a mortgage banker subject to license and registration requirements.

The Nebraska Supreme Court found in favor of MERS, noting that " MERS has no independent right to collect on any debt because MERS itself has not extended credit, and none of the mortgage debtors owe MERS any money." 270 Neb. at 535, 704 N.W.2d 784. The Nebraska court reached this conclusion based on the submissions by counsel for MERS that

" MERS does not take applications, underwrite loans, make decisions on whether to extend credit, collect mortgage payments, hold escrows for taxes and insurance, or provide any loan servicing functions whatsoever. MERS merely tracks the ownership of the lien and is paid for its services through membership fees charged to its members. MERS does not receive compensation from consumers." 270 Neb. at 534, 704 N.W.2d 784.

Even if MERS was technically entitled to notice and service in the initial foreclosure action—an issue that we do not decide at this time—we are not compelled to conclude that the trial court abused its discretion in denying the motions to vacate default judgment and require joinder of MERS and Sovereign. The record lacks evidence supporting a claim that MERS suffered prejudice and would have had a meritorious defense had it been joined as a defendant to the foreclosure action. We find that the trial court did not abuse its discretion and did not commit reversible error in ruling on the post default motions.

We note that various arguments were presented suggesting that economic policy provides independent grounds for reversing the trial court. MERS and the *amicus curiae* American Land Title Association argue that MERS provides a cost-efficient method of tracking mortgage transactions without the complications of county-by-county registration and title searches. The *amicus* suggests the statutory recording system is grounded in seventeenth-century property law that is entirely unsuited to twentieth-century financial transactions. While this may be true, the MERS system introduces its own problems and complications.

One such problem is that having a single front man, or nominee, for various financial institutions makes it difficult for mortgagors and other institutions to determine the identity of the current note holder.

" [I]t is not uncommon for notes and mortgages to be assigned, often more than once. When the role of a servicing agent acting on behalf of a mortgagee is thrown into the mix, it is no wonder that it is often difficult for unsophisticated borrowers to be certain of the identity of their lenders and mortgagees." *In re Schwartz*, 366 B.R. 265, 266 (Bankr.D.Mass.2007).

" [T]he practices of the various MERS members, including both [the original lender] and [the mortgage purchaser], in obscuring from the public the actual ownership of a mortgage, thereby creating the opportunity for substantial abuses and prejudice to mortgagors ..., should not be permitted to insulate [the mortgage purchaser] from the consequences of its actions in accepting a mortgage from [the original lender] that was already the subject of litigation in which [the original lender] erroneously represented that it had authority to act as mortgagee." *Johnson v. Melnikoff*, 20 Misc.3d 1142, 873 N.Y.S.2d 234, 2008 WL 4182397, at *4 (Sup.1008).

The *amicus* argues that " [a] critical function performed by MERS as the mortgagee is the receipt of service of a legal process related to the property." The *amicus* makes this argument despite the mortgage clause

Page 169

that specifically calls for notice to be given to the *lender*, not the putative mortgagee. In attempting to circumvent the statutory registration requirement for notice, MERS creates a system in which the public has no notice of who holds the obligation on a mortgage.

The Arkansas Supreme Court has noted:

" The only recorded document provides notice that [the original lender] is the lender and, therefore, MERS's principal. MERS asserts [the original lender] is not its principal. Yet no other lender recorded its interest as an assignee of [the original lender]. Permitting an agent such as MERS purports to be to step in and act without a recorded lender directing its action would wreak havoc on notice in this state." *Southwest Homes v. Carmen Price*, ___ Ark. at ___.

In any event, the legislature has established a registration requirement for parties that desire service of notice of litigation involving real property interests. It is not the duty of this court to criticize the legislature or to substitute its view on economic or social policy. *Samsel v. Wheeler Transport Services, Inc.*, 246 Kan. 336, 348, 789 P.2d 541 (1990).

II. Did The Trial Court's Refusal To Join MERS As A Party Violate MERS's Right To Due Process?

MERS contends that the Fourteenth Amendment and § 18 of the Kansas Constitution Bill of Rights guarantees of due process were violated when the foreclosure action was consummated without MERS receiving notice of the proceeding and without MERS having the opportunity to intervene in the action.

Although joinder is evaluated under an abuse of discretion standard, if a constitutional right is involved the trial judge's exercise of discretion is limited. Discretion must be exercised not in opposition to, but in accordance with, established principles of law. It is not an arbitrary power. *In re Adoption of B.G.J.*, 281 Kan. 552, 563, 133 P.3d 1 (2006).

The Fourteenth Amendment to the United States Constitution provides: " No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

Section 18 of the Kansas Constitution Bill of Rights provides: " All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."

Due process provides any interested party with the elementary and fundamental right to notice of the pendency of an action and the opportunity to present its objections in any proceeding that is to be accorded finality. *Alliance Mortgage Co. v. Pastine*, 281 Kan. 1266, 1275, 136 P.3d 457 (2006) (citing *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 94 L.Ed. 865, 70 S.Ct. 652 [1950]). In the absence of a protected property or liberty interest, there

can be no due process violation. *State ex rel. Tomasic v. Unified Gov't of Wyandotte County/Kansas City*, 265 Kan. 779, 809, 962 P.2d 543 (1998).

The Due Process Clause does not protect entitlements where the identity of the alleged entitlement is vague. *Castle Rock v. Gonzales*, 545 U.S. 748, 763, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005). A protected property right must have some ascertainable monetary value. 545 U.S. at 766, 125 S.Ct. 2796. Indirect monetary benefits do not establish protection under the Fourteenth Amendment. 545 U.S. at 767, 125 S.Ct. 2796. An entitlement to a procedure does not constitute a protected property interest. 545 U.S. at 764, 125 S.Ct. 2796.

MERS's contention that it was deprived of due process in violation of constitutional protections runs aground in the shallows of its property interest. As noted in the discussion of the first issue above, MERS did not demonstrate, in fact, did not attempt to demonstrate, that it possessed any tangible interest in the mortgage beyond a nominal designation as the mortgagor. It lent no money and received no payments from the borrower. It suffered no direct, ascertainable monetary

Page 170

loss as a consequence of the litigation. Having suffered no injury, it does not qualify for protection under the Due Process Clause of either the United States or the Kansas Constitutions.

Furthermore, MERS received the full opportunity to present arguments and evidence to the trial court. Only after Sovereign clearly had notice of the litigation, had filed a motion to intervene, and had participated in a hearing on the motion did MERS-Sovereign's nominee-elect to file for joinder. Despite its late decision to enter an appearance in the case, the trial court allowed MERS the opportunity to present arguments and evidence. It cannot be said that MERS was prejudicially denied notice and the opportunity to be heard.

We find that the district court did not abuse its discretion in denying the motions to vacate and for joinder and in holding that MERS was not denied due process. We accordingly affirm the district court and the Court of Appeals.

APPENDIX "C"

Electronically Recorded

20100831002455

SIMPLIFILE

ADT

14.00

Page 001 of 001

08/31/2010 03:14

King County, WA

RECORDING REQUESTED BY:
RECONTRUST COMPANY
AND WHEN RECORDED MAIL DOCUMENT
AND TAX STATEMENTS TO:
BAC Home Loans Servicing, LP
400 COUNTRYWIDE WAY SV-35
SIMI VALLEY, CA 93065

TS No. 09-0070197

090352152

SPACE ABOVE THIS LINE FOR RECORDER'S USE

CORPORATION ASSIGNMENT OF DEED OF TRUST

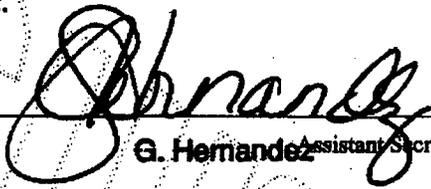
FOR VALUE RECEIVED, THE UNDERSIGNED HEREBY GRANTS, ASSIGNS AND TRANSFERS TO:
THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE
CERTIFICATEHOLDERS CWMBS, INC., CHL MORTGAGE PASS-THROUGH TRUST 2006-HYB 2
MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-HYB2

ALL BENEFICIAL INTEREST UNDER THAT CERTAIN DEED OF TRUST DATED 01/20/2006, EXECUTED
BY: JOHN G LEPHEIMER, AS HIS SEPARATE ESTATE, A MARRIED MAN, TRUSTOR, TO LS TITLE OF
WASHINGTON, TRUSTEE AND RECORDED AS INSTRUMENT NO. 20060125001199 ON 01/25/2006, OF
OFFICIAL RECORDS IN THE COUNTY RECORDER'S OFFICE OF KING COUNTY, IN THE STATE OF
WASHINGTON.

DESCRIBING THE LAND THEREIN: AS MORE FULLY DESCRIBED IN SAID DEED OF TRUST
TOGETHER WITH THE NOTE OR NOTES THEREIN DESCRIBED OR REFERRED TO, THE MONEY DUE
AND TO BECOME DUE THEREON WITH INTEREST, AND ALL RIGHTS ACCRUED OR TO ACCRUE
UNDER SAID DEED OF TRUST/MORTGAGE.

DATED: 8/25/10

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,
INC.

BY: 
G. Hernandez Assistant Secretary

State of: CALIFORNIA
County of: VENTURA

On AUG 28 2010, before me MICHELLE I. MILLER, notary public, personally appeared
G. Hernandez, personally known to me (or proved to me on the basis of
satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to within instrument and acknowledged
to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their
signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the
instrument.

Witness my hand and official seal.


MICHELLE I. MILLER



APPENDIX “D”

1 ReconTrust's services or the cost of the third party services ReconTrust chooses, and they
2 cannot direct ReconTrust's activities. This vulnerable situation is compounded for
3 homeowners by the complexities of the foreclosure process, by the homeowners' highly
4 distressed financial circumstances, and the high stakes nature of the proceeding. Foreclosure
5 sales are usually irreversible. Any defense must be asserted before the sale occurs. Because
6 courts are not involved in foreclosures, homeowners' only protections are the detailed
7 procedures and requirements contained in the Deed of Trust Act, and a neutral foreclosure
8 trustee who insures those procedures are followed to the letter.

9 4.3 ReconTrust is a foreclosure trustee that has failed to comply with the procedures
10 of the Deed of Trust Act in each and every foreclosure it has conducted since at least June 12,
11 2008, and it is a trustee who is wholly owned by the loan servicer seeking to foreclose.

12 **V. FACTS**

13 5.1 ReconTrust regularly acts as a successor trustee for deeds of trust secured by
14 residential real property located in the State of Washington.

15 5.2 ReconTrust has been at all times relevant to this action in competition with
16 others engaged in similar activities in the state of Washington and engages in the acts below as
17 a matter of practice.

18 **ReconTrust Fails to Maintain an Office in the State of Washington as Required by**
19 **Law.**

20 5.3 Defendant has failed to maintain the statutorily-required physical presence in
21 the State of Washington, with telephone service at that address. RCW 61.24.030(6).

- 22 a. By issuing Notices of Trustee's Sale, conducting trustee's sales, and
23 issuing Trustee's Deeds without maintaining the required physical
24 presence, Defendant has misrepresented its authority to issue such
25 notices, conduct trustee's sales, and issue Trustee's Deeds.
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

b. By conducting the nonjudicial foreclosure process while failing to maintain a physical presence with telephone service, the Defendant has unfairly: i) prevented homeowners from having face-to-face contact with their trustee, ii) prevented homeowners from gaining responses to time-sensitive foreclosure issues, iii) prevented homeowners from physically presenting time-sensitive payments to stop a foreclosure, iv) prevented homeowners from delivering payments in a manner that insures that the beneficiary can not deny payment was made, v) prevented homeowners from physically presenting mortgage-related documents in a manner that will stop the beneficiary from claiming the homeowner failed to provide such documents, and vi) potentially clouded title to homes it has sold at auction.

ReconTrust Fails to Conduct Foreclosures as a Neutral Third Party With a Duty of Good Faith Towards the Borrower and the Lender.

5.4 As a trustee on deeds of trust, Defendant has a duty of good faith towards the borrower and grantor on the deed of trust, as well as to the beneficiary.

5.5 ReconTrust has agreements with beneficiaries and/or their agents to the effect that ReconTrust will only cancel or continue non-judicial foreclosure sales if the beneficiary or agent approves.

5.6 When borrowers have asked ReconTrust to cancel a sale date because of issues they believe require cancellation or continuance of the sale, ReconTrust has told borrowers that it will not or cannot stop a sale without the permission of the lender or servicer.

5.7 ReconTrust has committed unfair and deceptive acts and violated its duty of good faith by noticing and conducting trustee sales while failing to perform statutory requisites for conducting such sales as contained in the Deed of Trust Act, RCW 61.24.030 and .040. Those failures include:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

- a. Failing to maintain a physical presence with telephone service at that address.
- b. Failing to identify the actual owner of the Promissory Note in the Notice of Default.
- c. Failing to obtain proof that the beneficiary is the owner of the promissory note secured by the deed of trust.
- d. Failing to clearly and conspicuously identify in the Notice of Trustee's Sale the defaults, other than nonpayment, that entitle the beneficiary to foreclose and which may be cured by the borrower. Instead, ReconTrust's Notices identify every possible default and demand those defaults be cured whether those defaults have actually occurred or not.
- e. Conducting foreclosure sales in non-public places such as the garage of a private office building and a hotel ballroom.
- f. Creating or using documents essential to a valid trustee's sale, or to a reconveyance of the deed of trust, that are improperly executed, notarized or sworn to, including: i) documents that were not signed in front of a notary, ii) documents that had both the signature and notarization applied mechanically while claiming that the signatory personally appeared before the notary, iii) using signatories who simultaneously claim to be officers of the beneficiary, of MERS, and of a servicer, all while actually being employees of ReconTrust, and iv) executing documents without direct knowledge of the facts contained therein.
- g. Conducting joint prosecution and/or defense of legal claims with the beneficiary or its agent on matters related to its duty of good faith to the borrower.

1 5.8 Homeowners have the right to stop a foreclosure by paying an amount (the
2 “reinstatement amount”) set by statute and itemized by the foreclosure trustee.
3 RCW 61.24.090.

4 5.9 The Deed of Trust Act limits the reinstatement amount to the following charges:
5 arrearages on the loan; expenses “actually incurred” by the trustee to enforce the note; a
6 reasonable trustee’s fee; a reasonable attorney’s fee; and, the costs of recording a notice of
7 discontinuance of the foreclosure. RCW 61.24.090 (1)(a) and (b).

8 5.10 Defendant has failed to properly itemize and/or misrepresented the
9 reinstatement amount by, including but not limited to, overcharging for recording fees, posting
10 fees, and mailing fees.

11 5.11 By demanding inaccurate amounts and failing to properly itemize amounts,
12 Defendant has prevented borrowers from determining whether fees are reasonable, has
13 overcharged borrowers and has prevented borrowers from curing their default within the
14 statutory guidelines for reinstatement.

15 **ReconTrust Conceals or Misrepresents the Identity of the Actual Owner of the**
16 **Debt.**

17 5.12 Defendant systematically conceals, misrepresents or inaccurately divulges the
18 true parties to the mortgage transaction in its foreclosure notices and related documents.

- 19 a. ReconTrust accepts and records in county land records Appointments of
20 Successor Trustee from purported beneficiaries such as Bank of
21 America, NA, knowing, or duty-bound to know, that they are not the
22 holders of the loans and are therefore not beneficiaries under the Deed of
23 Trust Act.
- 24 b. In Notices of Default, ReconTrust misrepresents the owner of the
25 Promissory Note by only naming the servicer, such as BAC Home
26 Loans Servicing, LP, when the actual owner is a securitization trust.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Defendant does not identify the actual owner anywhere on the Notices of Default. The Deed of Trust Act requires ReconTrust to identify both the owner of the note and the servicer of the note, with their respective addresses, as well as the servicer's phone number, on each Notice of Default. RCW 61.24.030(8)(1).

- c. In a form document with the title "Important Legal Notice" ReconTrust claims that BAC Home Loans Servicing, LP is the "Creditor to whom the debt is owed" when Defendant knows, or should know, that BAC is not the creditor to whom the debt is owed.
- d. In Notices of Trustee's Sale ReconTrust claims that the current beneficiary is "BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing LP, (BAC)", or "Bank of America, N.A, Successor by Merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing LP", when Defendant knows or should know that these entities are loan servicers and not beneficiaries of the deed of trust. In some Notices of Trustee's Sale, Defendant fails to name any current beneficiary.
- e. In Notices of Trustee's Sale ReconTrust claims that the deed of trust secures an obligation in favor of Mortgage Electronic Registration Systems, Inc, (MERS) as beneficiary, when Defendant knows or should know that MERS is never the party to whom the obligation is owed.
- f. In its Trustee's Deeds ReconTrust claims that the promissory note was executed in favor of MERS when MERS never appears in promissory notes and is never the party to be repaid.
- g. In its Trustee's Deeds ReconTrust claims that BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing LP, was "the

1 holder of the indebtedness secured by the Deed of Trust” at the time it
2 requested that the Defendant foreclose when Defendant knew or should
3 have known BAC was not the holder of the indebtedness.

4 **ReconTrust’s Trustee’s Deeds Contain Material Misrepresentations.**

5 5.13 ReconTrust’s duty of good faith includes creating and recording a Trustee’s
6 Deed after the foreclosure sale which transfers the property from the homeowner to the highest
7 bidder at the foreclosure auction.

8 5.14 The Trustee’s Deed must recite facts showing that the sale was conducted in
9 compliance with the specific requirements of the Deed of Trust Act so that the successful
10 bidder at the sale may rely on these recitals as conclusive evidence the Act was followed, and
11 clear title is delivered. RCW 61.24.040(7).

12 5.15 ReconTrust’s Trustee’s Deeds claim that it has complied with every provision
13 of the Deed of Trust Act when ReconTrust does not comply with every provision of that Act.
14 ReconTrust believes the Deed of Trust Act is preempted by federal law and therefore
15 consciously does not comply with provisions of the Act.

16 5.16 ReconTrust’s Trustee’s Deeds claim that copies of the Note were served on the
17 homeowner when Defendant knew or should have known that copies of the Note were not
18 delivered to the homeowner.

19 5.17 ReconTrust’s Trustee’s Deeds make contradictory assertions regarding a
20 material fact of the trustee’s sale: whether the transaction was sold to the highest bidder for
21 cash or whether it was a “credit bid” where the owner of the debt bid the amount owing in
22 satisfaction of the debt. This distinction has important ramifications regarding title, excise tax
23 consequences, and whether a void foreclosure can be set aside.

24 5.18 Defendant’s failures to abide by the Deed of Trust Act have concealed material
25 information needed by homeowners to assert rights and defenses stemming from their loan
26 transaction, to meaningfully negotiate the terms of a loan modification, to exercise their

1 statutory right to reinstate their mortgage, to cure their defaults, and to postpone or stop a
2 foreclosure sale.

3 **VI. CAUSES OF ACTION**

4 **A. Misrepresentations**

5 6.1 In the course of conducting its business Defendant made numerous
6 misrepresentations and failed to disclose material terms as alleged in paragraphs 1.1 through 5.18.
7 Such conduct constitutes unfair or deceptive acts or practices in trade or commerce, and/or unfair
8 methods of competition in violation of RCW 19.86.020, is contrary to the public interest, and is
9 not reasonable in relation to the development and preservation of business.

10 **B. Unfair Practices**

11 6.2 In the course of conducting its business Defendant engaged in numerous unfair
12 acts and practices as alleged in paragraphs 1.1 through 5.18. Such conduct constitutes unfair
13 practices and violates RCW 19.86.020, is contrary to the public interest, and is not reasonable in
14 relation to the development and preservation of business.

15 **VII. PRAYER FOR RELIEF**

16 **WHEREFORE**, Plaintiff, State of Washington, prays for relief as follows:

17 7.1 That the Court adjudge and decree that the Defendant has engaged in the conduct
18 complained of herein.

19 7.2 That the Court adjudge and decree that the conduct complained of constitutes
20 unfair or deceptive acts and practices and an unfair method of competition and is unlawful in
21 violation of the Consumer Protection Act, Chapter 19.86 RCW.

22 7.3 That the Court issue a permanent injunction enjoining and restraining the
23 Defendant, and its representatives, successors, assigns, officers, agents, servants, employees, and
24 all other persons acting or claiming to act for, on behalf of, or in active concert or participation
25 with the Defendant, from continuing or engaging in the unlawful conduct complained of herein.
26

APPENDIX "E"

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF IDAHO**

IN RE)
)
) **Case No. 08-20577-TLM**
)
) **LAVERL H. WILHELM,**)
) **fdba Porto Uniao, Pain Management**) **Chapter 7**
) **Psychology, Injoy, Wilhelm Ranches,**)
) **Living Waters Coordinated**)
) **Communities, Porto Allegre,**)
)
) **Debtor.**)
)
)

IN RE)
)
) **Case No. 08-02856-TLM**
)
) **JONATHAN DAVID LENHART,**)
) **Chapter 7**
)
) **Debtor.**)
)
)

IN RE)
)
) **Case No. 09-20024-TLM**
)
) **DOUGLAS R. LAFORD,**)
) **dba The Offerman Auctions Services,**) **Chapter 13**
) **fdba Showroom Cars Unlimited,**)
)
) **Debtor.**)
)
)

IN RE)
)
) **Case No. 09-00124-TLM**
)
) **TYLER K. CROFTS and**)
) **KODI C. CROFTS,**) **Chapter 7**
)
) **Debtors.**)
)
)

IN RE)	
)	Case No. 09-20400-TLM
REBECCA L. APPLGATE,)	
fdba Affordable Elegance,)	Chapter 7
)	
Debtor.)	
_____)	

MEMORANDUM OF DECISION

I. INTRODUCTION

In each of the above cases, parties claiming to be secured creditors (collectively, “Movants”) seek relief from the automatic stay. According to Movants, debtors have defaulted on their obligations under secured promissory notes.

Despite the similarities in the pending motions, the trustees have not uniformly responded. In *Applegate* and *Wilhelm*, trustee Ford Elsaesser objects to the motions, asserting that Movants failed to show an interest in the promissory notes at issue.¹ In *Laford*, trustee C. Barry Zimmerman stipulated to stay relief.² In *Lenhart*, trustee Richard Crawford filed a notice of non-opposition.³ In *Crofts*, trustee Jeremy Gugino remained silent.

But despite the lack of opposition to many of the motions, the Court cannot

¹ See *Applegate* Doc. No. 16; *Wilhelm* Doc. No. 77.

² See *Laford* Doc. No. 52.

³ See *Lenhart* Doc. No. 35.

simply grant relief on that basis. Rather, the Court must first satisfy itself that relief is proper. *See, e.g., In re Millspaugh*, 302 B.R. 90, 95, 04.1 I.B.C.R. 25, 26 (Bankr. D. Idaho 2003); *In re Lancaster*, 03.1 I.B.C.R. 31, 32, 2003 WL 109205, at *2 (Bankr. D. Idaho 2003) (lack of opposition “does not absolve the Court of its responsibility to ensure that relief may properly be entered”). As explained below, the Court will deny all these motions because the Movants have failed to show they have standing to seek stay relief.

Before delving into the specifics of these cases, it is worth reiterating that changes in mortgage practices during the past several years – including, most prominently, the serial assignment of mortgage obligations – have complicated the factual situations to which the standing analysis applicable to stay relief motions must be applied. *See In re Sheridan*, 09.1 I.B.C.R. 24, 24, 2009 WL 631355, at *1 (Bankr. D. Idaho 2009). Several bankruptcy courts – including this Court, in *In re Sheridan* – have been required to issue decisions explaining who does (and who does not) have standing to seek stay relief. *See, e.g., In re Jacobson*, 402 B.R. 359, 365-67 (Bankr. W.D. Wash. 2009); *In re Vargas*, 396 B.R. 511, 520-21 (Bankr. C.D. Cal. 2008); *In re Hwang*, 396 B.R. 757, 765-69 (Bankr. C.D. Cal. 2008); *In re Mitchell*, 2009 WL 1044368, at *2-6 (Bankr. D. Nev. Mar. 31, 2009).

In *In re Sheridan*, for example, this Court explained that a stay relief motion “must be brought by one who has a pecuniary interest in the case and, in

connection with secured debts, by the entity that is entitled to payment from the debtor and to enforce security for such payment.” 09.1 I.B.C.R. at 25, 2009 WL 631355, at *4. In hundreds of stay relief motions, including many post-*Sheridan*, creditors are providing adequate documentation and explanation to meet the requisite standing requirements. These Movants, all of whom are represented by attorney Matthew Cleverly (“Counsel”), are an exception.

II. BACKGROUND

Each Movant submitted various documents in support of its motion, including promissory notes, deeds of trust, declarations, and (in four of the five cases) assignment documents. Section II.A., below, sets forth the particulars of each promissory note at issue and identifies the Movant seeking to enforce the note. Section II.B. discusses factual and procedural issues common to all cases.

A. The promissory notes and the Movants⁴

1. *In re Applegate*, Case No. 09-20400-TLM

In *In re Applegate*, “Indymac Federal Bank, FSB, [and] its assignees and/or successors” seek stay relief relating to real property located in Hayden, Idaho and owned by debtor Rebecca Applegate. *Applegate* Doc. No. 14. The property is

⁴ For ease of reference, the cases are listed in alphabetical order. In many of these cases, Counsel did not number exhibits to the motions, but instead named them. For example, a promissory note is identified as “Exhibit Note” and a deed of trust as “Exhibit Deed of Trust.” *See, e.g., Applegate* Doc. No. 14. The Court’s electronic filing system assigns “parts” to these filings. For example, if the first document appended to a motion was the deed of trust, the motion appears as part 1, and the deed of trust appears as part 2. For convenience, this Decision cites the motion exhibits by part, rather than by exhibit name.

security for an August 29, 2005 secured promissory note in the principal amount of \$208,900. *Id.*, part 2. The payee on the note is Land Home Financial Services. *Id.*

2. *In re Crofts, Case No. 09-00124-TLM*

In *In re Crofts*, JPMorgan Chase Bank, National Association and its assignees and/or successors (“JPMorgan Chase”) seek stay relief relating to real property located in Nampa, Idaho and owned by Tyler and Kodi Crofts. *Crofts* Doc. No. 21.⁵ In the motion, JPMorgan Chase indicates that the debt was incurred on August 9, 2006. *Id.* ¶¶ 3-4. Similarly, the deed of trust referred to an August 9, 2006 note, and further indicated that the principal amount of the note is \$32,000, and that the payee is Aegis Wholesale Corporation. *See Crofts* Doc. No. 21, part 4 (deed of trust).

The note filed with the motion, however, is dated October 24, 2005, the principal amount is \$28,540, and the payee is M&T Mortgage Corporation. *See Crofts* Doc. No. 21, part 5 (note and addendum). Thus, in this case, it is unclear which note JPMorgan Chase seeks to enforce.

3. *In re Laford, Case No. 09-20024-TLM*

In *In re Laford*, two motions for stay relief, pertaining to two separate notes,

⁵ The motion at issue was filed on March 17, 2009. *See Crofts* Doc. No. 21. A second motion relating to this property was filed on March 20, 2009. *See Crofts* Doc. No. 24. Although the second motion suffers from many of the same defects discussed later in this Decision, the Court entered an order granting the motion. *See Crofts* Doc. No. 35. This order was an error, but will stand.

were filed by JPMorgan Chase Bank, NA, on behalf of “Bank of America, as successor by merger to LaSalle Bank, NA, as trustee for Washington Mutual Asset-Backed Certificates, WMABS Series 2007-HE2 Trust [and its assignees and/or successors.”⁶ (This Movant is individually referred to as “Bank of America”). *See Laford* Doc. No. 46 (motion related to first deed of trust); *Laford* Doc. No. 48 (motion related to second deed of trust).

Bank of America seeks stay relief in order relating to real property located in Lewiston, Idaho and owned by debtor Douglas Laford. Although each motion presumably relates to just one note, Bank of America submitted two notes with each motion. Both notes are dated November 15, 2006, and are payable to WMC Mortgage Corp. One note is in the principal amount of \$108,240, while the other shows a principal amount of \$27,060. *Laford* Doc. No. 46, part 4; *Laford* Doc. No. 48, part 3.

It appears that the \$108,240 note is secured by a first deed of trust, and the \$27,060 note is secured by a second deed of trust. *See Laford* Doc. No. 46, part 3 (deed of trust related to the \$108,240 note); and Doc. No. 48, part 2 (deed of trust related to the \$27,060 note). *See also Laford* Doc. No. 68 (unrecorded assignment

⁶ The Court notes that some of the motions within this group are brought by loan servicers. *See Laford* Doc. Nos. 46 and 48; *Lenhart* Doc. No. 13. The Court does not need to decide any “loan servicer” issues, however (including, for example, whether these servicers have established authority to enforce the obligations at issue) as it is denying the motions for other reasons.

referring to the first deed of trust); *Laford* Doc. No. 69 (unrecorded assignment relating to the second deed of trust).

4. *In re Lenhart*, Case No. 08-02856-TLM

In *In re Lenhart*, Ocwen Loan Servicing, on behalf of “HSBC Bank USA, N.A., as Trustee for the registered holders of Nomura Home Equity Loan, Inc. Asset-Backed Certificates Series 2007-2, [and] its assignees and/or successors” seeks stay relief relating to real property located in Middleton, Idaho and owned by debtor Jonathan Lenhart and non-debtor Maricruz Lenhart. See *Lenhart* Doc. Nos. 13, 21.⁷ (This Movant is referred to as “HSBC”). The property is security for an October 31, 2006 secured promissory note in the principal amount of \$180,800. The payee on the note is Ownit Mortgage Solutions. *Lenhart* Doc. No. 13, part 3; *Lenhart* Doc. No. 21.

5. *In re Wilhelm*, Case No. 08-20577-TLM

In *In re Wilhelm*, “Aurora Loan Services, LLC, [and] its assignees and/or successors” (referred to herein as “Aurora”) seeks stay relief relating to real property located in Coeur D’Alene and owned by debtor Laverl Wilhelm. *Wilhelm* Doc. No. 75. The property is security for an August 25, 2005 secured promissory note in the principal amount of \$154,400. *Id.*, part 2. The payee on the note is

⁷ HSBC filed its motion on January 9, 2009, but included only one page of the note at issue. See *Lenhart* Doc. No. 13, part 3. On February 12, 2009, HSBC filed an addendum containing what appears to be a complete copy of a note. See *Lenhart* Doc. No. 21.

Plaza Home Mortgage, Inc. *Id.*

B. Factual issues common to all cases

Factual issues common to all or most of the cases include the following:

First, as already noted, none of the relevant notes names a Movant as the payee.

Second, none of the notes is indorsed, either in blank or to any specific person or entity.⁸

Third, neither the motions nor the supporting declarations establish that Movants possess the notes they seek to enforce.⁹

Fourth, each deed of trust names Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary under the deed of trust, clarifying, however, that MERS is acting “solely as a nominee for Lender and Lender’s successors and assigns.” Each deed also states that MERS holds “only legal title” to the deed of trust, but it may foreclose and sell the property, among other things, “if necessary to comply with law or custom.”

These deeds do not state that MERS is authorized to transfer the promissory

⁸ See *Applegate* Doc. No. 14, part 2; *Crofts* Doc. No. 21, part 5; *Laford* Doc. No. 46, part 4; *Laford* Doc. No. 48, part 3; *Lenhart* Doc. No. 13, part 3; *Lenhart* Doc. 21; *Wilhelm* Doc. No. 75, part 2.

⁹ See *Applegate* Doc. No. 18; *Crofts* Doc. No. 28; *Laford* Doc. No. 55, 57; *Lenhart* Doc. No. 16; *Wilhelm* Doc. No. 78.

notes.¹⁰ Nevertheless, in four of the five cases, Movant submitted an assignment in which MERS purports to assign to Movant the relevant deed of trust “together with” the corresponding secured promissory note.¹¹

III. DISCUSSION AND DISPOSITION

A. Real Party in Interest and Standing

To obtain stay relief, each Movant must have standing, and be the real party in interest under Federal Rule of Civil Procedure 17.¹² *See, e.g., In re Sheridan,*

¹⁰ *See Applegate* Doc. No. 14, part 3, at 1-3; *Crofts* Doc. No. 21, part 4 at 2-3; *Laford* Doc. No. 46, part 3 at 1-3; *Laford* Doc. No. 48, part 2 at 1-2; *Lenhart* Doc. No. 13, part 4 at 1-3; *Wilhelm* Doc. No. 75, part 3 at 1-3.

The relevant language regarding MERS is as follows: Initially, the deeds state:

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender’s successors and assigns) and the successors and assigns of MERS.

E.g., Wilhelm Doc. No. 75, part 3 at 2. The deeds then typically provide that:

Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but if necessary to comply with law or custom, MERS (as nominee for Lender and Lender’s successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of the Lender including, but not limited to, releasing and canceling this Security Instrument.

Id. at 3.

¹¹ *See Applegate* Doc. No. 14, part 4; *Crofts* Doc. No. 34; *Laford* Doc. Nos. 68 and 69; *Wilhelm* Doc. No. 75, part 4.

¹² Federal Rule of Civil Procedure 17(a)(1) provides:

An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose

(continued...)

09.1 I.B.C.R. at 25, 2009 WL 631355, at *4; *In re Mitchell*, 2009 WL 1044368, at *2.

Standing and the real-party-in-interest requirement are related, but not identical, concepts. Standing encompasses both constitutional and prudential elements. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 498-99 (1975); *In re Simplot*, 2007 WL 2479664, at *9 (Bankr. D. Idaho. Aug. 28, 2007). To have constitutional standing, the litigant must allege an “injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant’s challenged behavior; and likely to be redressed by a favorable ruling.” *Davis v. Fed. Election Comm’n*, ___ U.S. ___, 128 S. Ct. 2759, 2768 (2008). Prudential standing includes the idea that the injured party must assert its own claims, rather than another’s. *See, e.g., Warth*, 422 U.S. at 499. Thus, the real-party-in-interest doctrine generally falls within the prudential standing doctrine. *See Hwang*, 396 B.R. at 769. That is, as “a prudential matter, a plaintiff must assert ‘his own legal interests as the real party in interest, *Dunmore v. United States*, 358 F.3d 1107, 1112 (9th Cir. 2004), as found in Fed. R. Civ. P. 17[.]” *Mitchell*, 2009 WL 1044368, at *2.

¹² (...continued)

benefit the action is brought: (A) an executor; (B) an administrator; (C) a guardian; (D) a bailee; (E) a trustee of an express trust; (F) a party with whom or in whose name a contract has been made for another’s benefit; and (G) a party authorized by statute.

(internal paragraphs between lettered paragraphs omitted).

Applying these principles in the § 362 stay relief context, each Movant must show that it has an interest in the relevant note, and that it has been injured by debtor's conduct (presumably through a default on the note). Such is necessary to establish constitutional standing. *Cf. In re Hayes*, 393 B.R. 259, 268-70 (Bankr. D. Mass. 2008) (movant lacked standing altogether as it failed to show the note was transferred to it, and thus had no rights of its own to assert). Beyond that, Movants must also show they have the right, under applicable substantive law, to enforce the notes. As explained by one court, the "real party in interest in relief from stay is whoever is entitled to enforce the obligation sought to be enforced." *Jacobson*, 402 B.R. at 366; *see also id.* at 367 ("Generally, a party without the legal right under applicable substantive law to enforce the obligation at issue . . . lacks prudential standing."); *In re Sheridan*, 09.1 I.B.C.R. at 25, 2009 WL 631355, at *4. In other words, Movants must also satisfy the prudential, real-party-in-interest standing component.

Under these principles, there are two threshold questions in each of these motions: (1) Have Movants established an interest in the notes? (2) Are Movants entitled to enforce the notes? The answer to both these questions is no, as set forth in the remainder of this Decision. Before resolving these questions, however, the Court will address two preliminary arguments raised by Movants Bank of America

and HSBC Bank.¹³

B. Bank of America/HSBC's arguments regarding standing and real-party-in-interest requirements

Movants Bank of America/HSBC contend that stay relief motions need not be pursued by a real party in interest, as required by Federal Rule of Civil Procedure 17. Bank of America/HSBC also argue they do not have the burden of proving standing to obtain stay relief. *See Laford* Doc. Nos. 72 and 73; *Lenhart* Doc. No. 38. Both contentions lack merit.

As to the real-party-in-interest argument, this Court recently held that motions brought under § 362(g) are subject to Federal Rule of Civil Procedure 17's requirement that actions be prosecuted in the name of the real party in interest. *In re Sheridan*, 09.1 I.B.C.R. at 25, 2009 WL 631355, at *3. As explained in *Sheridan*:

Under Rule 9014, which by virtue of Rule 4001(a)(1) governs stay relief requests, certain "Part VII" rules are applicable. *See* Rule 9014(c). Among these incorporated rules is Rule 7017, which in turn incorporates Fed. R. Civ. P. 17, and Rule 17(a)(1) provides that "An action must be prosecuted in the name of the real party in interest."

Id.; *see also In re Hwang*, 396 B.R. at 766. Bank of America/HSBC have provided no persuasive authorities or arguments to the contrary.

Bank of America/HSBC's next argument, regarding standing, has two basic

¹³ For some reason, not all of Counsel's clients made these arguments. Accordingly, and for ease of reference, the Court refers to these two entities as "Bank of America/HSBC" in the following section, III.B. The same analysis would apply, however, to the other Movants.

parts. First, they argue that standing may be established solely by the allegations in their stay relief motions. *See Laford* Doc. No. 72, at 2, 7. Second, they argue that if a party challenges standing, the burden falls upon that party to disprove standing. As Bank of America/HSBC put it:

Congress specifically shifted the burden of proof in stay relief motions. The moving party has the burden of proving lack of equity in the property. The party opposing the stay relief motion has the burden to *disprove* everything else, including the creditor's standing.

Id. at 4.

These arguments reflect a misunderstanding of the standing doctrine in general as well as the burden of proof (as distinct from the burden of persuasion) applicable to stay relief motions.

Regarding standing in general, Bank of America/HSBC initially fail to recognize that this Court may raise standing issues *sua sponte*.¹⁴ Similarly, they fail to acknowledge that a party seeking to invoke a federal court's jurisdiction must prove its standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). This obligation exists separate and apart from other elements of a plaintiff's claim. *See id.* As the Supreme Court explained, because elements of standing

¹⁴ *See, e.g., Warth*, 422 U.S. 490; *B.C. v. Plumus Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999) ("federal courts are required *sua sponte* to examine jurisdictional issues such as standing"); *Hwang*, 396 B.R. at 770 (overruling objection to court's *sua sponte* consideration of whether movant was real party in interest in a stay relief motion) (citing *Weissman v. Weener*, 12 F.3d 84, 85-86 (7th Cir. 1993)).

are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.

Id.

As applied in the stay relief context, movants bear the burden of proof on standing, in addition to the other elements necessary to obtain relief. *Cf., e.g., In re Hayes*, 393 B.R. at 267 (“To have standing to seek relief from the automatic stay, [movant] Deutsche Bank was required to establish that it is a party in interest and that its rights are not those of another entity.”).

As for the proof required to demonstrate standing, it depends upon the stage of the proceedings. At the pleading stage, plaintiffs in federal court may rely on the allegations of their complaint to establish standing. *Lujan*, 504 U.S. at 561. Similarly, stay relief movants may initially rely upon their motion. But if a trustee or debtor objects to a stay relief motion based upon lack of standing, the movant must come forward with evidence. Additionally, if the stay relief motion itself reveals a lack of standing, movants cannot rest on the pleadings. *See, e.g., Sprewell v. Golden State Warriors*, 266 F.3d 979, 988-89, *amended on denial of pet'n for reh'g*, 275 F.3d 1187 (9th Cir. 2001) (plaintiff “plead himself out of a claim” because allegations in the complaint were contradicted by uncontested facts set forth in an arbitration award appended to the complaint).

Here, even accepting Bank of America/HSBC's contention that the Court is limited to considering the allegations in the motions, these allegations are insufficient to establish standing. Among other things, the narrative allegations are contradicted by the exhibits to the motions.¹⁵ Moreover, Bank of America/HSBC did not cure the standing issues with the declarations submitted in support of their motions, as these declarations fail to comply with basic evidentiary rules.¹⁶ In short, as discussed further below, standing has not been properly alleged, much less proved.

Finally, it is worth noting that Bank of America/HSBC's misconceptions regarding the burden of proof on the standing issue reflect a larger misunderstanding regarding stay relief motions. As Bank of America/HSBC correctly point out, § 362(g) imposes upon the party opposing stay relief the burden of proof on all issues – other than the existence of the debtor's equity in the collateral. *See generally 3 Collier on Bankruptcy* ¶ 362.10 (Alan N. Resnick & Henry J. Sommer, eds., 15th ed. rev. 2009). But § 362(g) “does not address the

¹⁵ Local Bankruptcy Rule 4001.2(b)(5) requires movants to attach to stay relief motions “accurate and legible copies of all documents evidencing the obligation and the basis of perfection of any lien or security interest.”

¹⁶ Although Bank of America/HSBC argue they are entitled to rest upon the allegations in their motions, they also submitted declarations in an effort to establish standing. *See, e.g., Laford Doc. No. 72*, at 7 (under the heading “*Evidence Before the Court*,” Bank of America argues that the Court has before it both the “Motion . . . whereby Secured Creditor alleges its interest in the Property” and “a Declaration under penalty of perjury that it holds the original promissory note and is entitled to payment on the loan”).

burden of going forward with evidence, which is generally placed upon the party seeking relief.” *Id.* As explained in *In re Kowalsky*, 235 B.R. 590, 594 (Bankr. E.D. Tex. 1999), “the party requesting relief from the stay must sustain the initial burden of production or going forward with the evidence to establish that a *prima facie* case for relief exists before the respondent is obligated to go forward with its proof.” *Accord In re Elmira Litho, Inc.*, 174 B.R. 892, 900 (Bankr. S.D.N.Y.1994) (“[A] party can bear the initial burden of going forward even if it does not bear the ultimate burden of persuasion. If it fails to carry its initial burden, the Court will dismiss its application without requiring the party that bears the ultimate burden of persuasion to offer any evidence.”). So it is here. To make out a *prima facie* case, Bank of America/HSBC must demonstrate standing.

C. Substantive law governing negotiable instruments

To resolve the standing and real-party-in-interest issues presented here, the Court must determine who has the right to enforce the notes. Because bankruptcy law does not provide for enforcement of promissory notes, the Court looks to applicable non-bankruptcy law. *See generally Butner v. United States*, 440 U.S. 48, 54-55 (1979) (nature and extent of property interests in bankruptcy are determined by applicable state law). Article 3 of Idaho’s enactment of the Uniform Commercial Code governs negotiable instruments. *See Idaho Code* § 28-3-102(a); *id.* § 28-3-104(1) (defining negotiable instruments). Under Article 3,

persons entitled to enforce an instrument include: (1) a “holder of the instrument,” and (2) “a nonholder in possession of the instrument who has the rights of a holder[.]” Idaho Code § 28-3-301(i), (ii).

To be the “holder” of an instrument one must possess the note *and* the note must be payable to the person in possession of the note, or to bearer. *See* Idaho Code § 28-1-201(b)(21)(A). The “holder” option is not available to Movants; none of the notes is payable to the Movant and none of the notes has been indorsed, either in blank or specifically to a Movant. *See id.*; Idaho Code § 28-3-205 (regarding special and blank indorsements). Thus, the relevant inquiry in these five cases is whether Movants are non-holders in possession with rights to enforce.

A “nonholder in possession of the instrument who has the rights of a holder,” Idaho Code § 28-3-301(ii), includes persons who acquire physical possession of an unindorsed note. *See* Idaho Code § 28-3-203 (1), (2).¹⁷ As the

¹⁷ These sections provide as follows:

28-3-203. Transfer of Instruments - Rights acquired by transfer.

(1) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

(2) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any rights 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

(continued...)

statutory comments explain, however, such nonholders must “prove the transaction” by which they acquired the note:

If the transferee is not a holder because the transferor did not indorse, the transferee is nevertheless a person entitled to enforce the instrument under Section 3-301 if the transferor was a holder at the time of transfer. Although the transferee is not a holder, under subsection (b) [sic, (2)] the transferee obtained the rights of the transferor as holder. Because the transferee’s rights are derivative of the transferor’s rights, those rights must be proved. Because the transferee is not a holder, there is no presumption under Section 3-308 that the transferee, by producing the instrument, is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it.

Id. cmt. 2 (emphasis added).

Importantly, however, if a person “proves the transaction” by which it acquired the note, but fails to show possession, he or she cannot enforce the note. *See generally* 11 Am. Jur. 2d *Bills and Notes* § 210 (2009) (discussing differences between a “holder” of a note, and an “owner” of a note). Again, the statutory comments explain:

[A] person who has an ownership right in an instrument might not be the person entitled to enforce the instrument. For example, suppose X is the owner and holder of an instrument payable to X. X sells the instrument to Y but is unable to deliver immediate possession to Y. Instead, X signs a document conveying all of X’s right, title and interest in the instrument to Y. Although the document may be effective to give Y a claim of ownership of the instrument, Y is not the person entitled

¹⁷ (...continued)

course if the transferee engaged in fraud or illegality affecting the instrument.

to enforce the instrument until Y obtains possession of the instrument. No transfer of the instrument occurs under Section 3-203(a) until it is delivered to Y.

Idaho Code § 28-3-203, cmt. 1.

Here, Movants have not demonstrated possession of the notes. Nor have they proved any transaction by which they acquired ownership of the notes.

1. Movants have not established possession of the notes

Turning first to possession, Movants presumably rely on the supporting declarations, because the motions themselves do not allege that Movants possess the notes. (Although the motions typically allege that Movants are the “holders” of the notes, the notes – filed as exhibits to the motion – defeat this allegation since, as already noted, the notes are not indorsed.)

The declarations parrot the motions, again stating that Movant is the “holder” of the original promissory note at issue.¹⁸ But this statement is an inadmissible legal conclusion – and an impossible one at that, given the absence of indorsements – not a fact. As explained, “holder” is a defined term when dealing with negotiable instruments. To qualify as holders, these Movants must possess an indorsed note. *See* Idaho Code § 28-1-201(b)(21)(A). None of these notes is

¹⁸ *See Applegate* Doc. No. 18 at 1-2 (“Secured Creditor is the holder [of] the Original Promissory Note dated 08/29/2005, in the principal amount of \$208,900, which is secured by the Deed of Trust encumbering the Property.”); *Crofts* Doc. No. 28 at 2 (similar); *Laford* Doc. No. 55 at 2 (similar); *Laford* Doc. No. 57 at 2 (similar); *Lenhart* Doc. No. 16 at 2 (similar); *Wilhelm* Doc. No. 78 at 1-2 (similar).

indorsed, either in blank or specifically, making it impossible for any of these Movants to be a “holder.”¹⁹ The declarations are insufficient. *See, e.g., Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1059-60 (9th Cir. 2008) (whether witness’ testimony was lay or expert, court did not abuse discretion in excluding legal conclusion that defendant violated UCC).

Moreover, it is the Court’s job (not the witnesses’) to determine whether the relevant facts establish, as a matter of law, that Movants are holders. The same proposition applies to the question of whether they are non-holders with rights of enforcement. So what the Court needs to know is a fact: Who has possession of the original notes? None of the declarations answers that question. *Accord Sheridan*, 09.1 I.B.C.R. at 26, 2009 WL 631355, at *5 (noting that the movant’s submissions did not answer “the key question - Who was the holder of the Note at the time of the Motion?”).

Finally, one of the declarations in this group particularly illustrates the haphazard nature in which these motions were filed and the declarations

¹⁹ The Court questions whether the declarants appreciated the legal significance of the term “holder” and meant to assert the legal conclusion, or whether they simply signed form declarations provided to them, presumably by Counsel. Further, Movants cannot rely on these declarations to demonstrate that Movants are nonholders in possession of the notes, with rights to enforce. *See Idaho Code § 28-3-203, cmt. 2.* Not only do the declarations fail to actually state that Movants *possess* the notes, there is no foundation for any such statement. *See generally Fed. R. Evid. 602* (witness “may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter”). Nor is there foundation for the declaration testimony regarding Movants’ purported ownership interest in the notes. *See generally Fed. R. Evid. 602, 803(6).*

completed. In support of the *Crofts* motion, a declarant swore, under penalty of perjury, (1) that JPMorgan Chase “is the holder of the *original* Promissory Note dated 08/09/2006, in the principal amount of \$32,000.00”; and (2) that a “true and correct copy” of that note was attached to the declaration. *Crofts* Doc. No. 28 ¶ 6 (emphasis added).

The first problem with this statement is that no note was actually attached to the declaration. Even more troubling, however, is that the note submitted with the underlying motion bears a different date and principal amount. *See Crofts* Doc. 21, part 5 (October 24, 2005 note in the principal amount of \$28,540). Further, although the declaration does not indicate the note’s payee, the deed of trust filed with the motion refers to a note payable to Aegis Wholesale Corporation, *Crofts* Doc. No. 21, part 4, but the note filed with the motion is payable to M&T Mortgage Corporation. *See* Doc. No. 21, part 5.

There may be some logical explanation for these discrepancies. But the Court will not simply assume that this Movant possesses the original note referenced in the motion.²⁰ The Court will require compliance with Local

²⁰ Relatedly, the Court notes that Movants’ submissions in many of these cases were filed helter-skelter. Documents supporting the motions were typically filed piecemeal, with supplements abounding. Such filings make the Court’s work more time-consuming and difficult. Counsel compounded this difficulty by sometimes filing pleadings and documents that obviously had nothing to do with the case at issue. *See Crofts* Doc. No. 27; *Laford* Doc. Nos. 56, 67. The Court is tolerant of an occasional clerical mistake or supplemental filing. But sloppiness pervaded this group of motions. The Court reasonably should expect better, and the governing
(continued...)

Bankruptcy Rule 4001.2, which requires, among other things, copies of “all documents evidencing the obligation and the basis of perfection of any lien or security interest.” *Accord Sheridan*, 09.1 I.B.C.R. at 26, 2009 WL 631355, at *5.

In conclusion, Movants have failed to establish they possess the notes at issue. For this reason alone, the Court can, and will, deny their motions.

2. Nor have Movants established any transaction by which they acquired possession of the notes

Even if Movants had established possession, they still cannot enforce the notes because they have not shown any transaction by which they acquired possession of the notes. *See Idaho Code § 28-3-203(2)*, cmt. 2 (quoted earlier).

In four of the five cases, Movants apparently rely upon an assignment document to show that the notes were transferred to them.²¹ The signature block in

²⁰ (...continued)

rules demand it. In general, counsel should gather the appropriate documents and factual data *before* filing the motions (as required by Rule 9011 in any event), rather than attempting to cure patently defective motions with serial supplemental filings. It is true that at one hearing, Counsel apologized for pleadings being filed in the wrong cases, or in the right case but with the wrong document attached. He offered that the matter was caused by inadequately trained or supervised clerical staff. As every lawyer knows, the buck stops elsewhere.

²¹ *See Applegate* Doc. No. 14, part 4 (Dec. 23, 2008 assignment); *Crofts* Doc. Nos. 34 (unrecorded May 5, 2009 assignment); *Laford* Doc. Nos. 68 (unrecorded May 5, 2009 assignment); *Laford* Doc. No. 69 (unrecorded May 5, 2009 assignment); *Wilhelm* Doc. No. 75, part 4 (unrecorded Apr. 29, 2009 assignment).

The Court here looks to the assignments, because Movants cannot rely upon the declarations to establish the transfer. Among other things, the declarations lack foundation, either to authenticate the documents (none of which are self-authenticating under Federal Rule of Evidence 902(4)) or to establish that Movants purchased the notes at issue. *See Fed. R. Evid. 602; In re Mitchell*, 2009 WL 1044368, at *6 (discussing evidentiary problems with declarations
(continued...)

these assignments typically indicate that MERS executed the assignments on behalf of the original lender and that lender's successors and assigns.²² Movants seem to presume that the assignments, standing alone, entitle them to enforce the underlying notes. Such a presumption is unfounded, however, because Movants have not established MERS's authority to transfer the notes at issue. As noted above, the relevant deeds of trust name MERS as the "nominal beneficiary" for the lender. Further, MERS is granted authority to foreclose if required by "custom or law." But what this language does not do – either expressly or by implication – is authorize MERS to transfer the promissory notes at issue.

At least two other courts construing similar MERS assignments are in accord. *See Saxon Mortgage Servs. v. Hillery*, 2008 WL 5170180, at *5 (N.D. Cal. Dec. 9, 2008); *Bellistri v. Ocwen Loan Servicing, LLC*, ___ S.W.3d ___, 2009 WL 531057, at *3 (Mo. Ct. App. Mar. 3, 2009). *Cf. also In re Vargas*, 396 B.R. at 517 ("MERS presents no evidence as to who owns the note, *or of any authorization to act on behalf of the present owner.*") (emphasis added).

In *Saxon*, a lender purported to hold the promissory note and deed of trust at

²¹ (...continued)
supporting stay relief motions).

²² The *Applegate* assignment is the exception. There, MERS did not even purport to act for the original lender, as it did in the other assignments. Rather, in the *Applegate* assignment, MERS purports to act for "*its* [own] successors and assigns . . ." *Applegate* Doc. No. 14, part 4 (emphasis added).

issue by virtue of a MERS assignment similar to the ones here. 2008 WL 5170180, at *1, 4-5. The district court dismissed the complaint for lack of standing, observing that although MERS purportedly assigned both the deed of trust and the promissory note to plaintiff Consumer, “there is no evidence of record that establishes that MERS either held the promissory note or was given the authority by New Century [the original lender] to assign the note.” *Id.* at *5.

In *Bellistri*, third party Crouther purchased property and executed a promissory note and deed of trust. 2009 WL 531057, at *1. BNC was the lender and payee on the note, while the deed of trust named MERS as the beneficiary “solely as BNC’s nominee.” *Id.* After Crouther failed to pay taxes on the property, Bellistri purchased the property at a delinquent tax sale and was issued a collector’s deed. *Id.* After this deed was issued, MERS, as nominee for BNC, assigned the deed of trust and note to Ocwen Loan Servicing, LLC. *Id.*

The Missouri Court of Appeals affirmed the trial court’s summary judgment in Bellistri’s favor, holding that Ocwen lacked standing. As the court explained:

The record reflects that BNC was the holder of the promissory note. There is no evidence in the record or the pleadings that MERS held the promissory note or that BNC gave MERS the authority to transfer the promissory note. MERS could not transfer the promissory note; therefore the language in the assignment of the deed of trust purporting to transfer promissory note is ineffective.

Id. at *3.

As in *Saxon* and *Bellistri*, Movants cannot rely on the MERS assignments

to establish an interest in the notes. Because Movants failed to establish possession of and an ownership interest in the notes, they are not shown to be the real party in interest, and they lack standing to bring the motions.

IV. CONCLUSION

Movants lack standing to seek stay relief. The objections to the *Laford* and *Lenhart* Motions will be sustained, and all pending motions will be denied without prejudice. The Court will issue an Order so providing.

DATED: July 7, 2009



A handwritten signature in cursive script, reading "Terry L. Myers".

TERRY L. MYERS
CHIEF U. S. BANKRUPTCY JUDGE