

No. 67005-1-I

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

---

JOHN LEIPHEIMER, as his separate estate, a married man,

Plaintiff/Appellant

v.

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; a Washington corporation  
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,  
a Delaware corporation;  
and DOE defendants 1-20

Defendants/Respondents

---

ON APPEAL FROM KING COUNTY SUPERIOR COURT  
Case No. 09-2-39181-5 SEA  
(Hon. Douglass A. North)

---

RESPONDENTS' SUPPLEMENTAL BRIEF

---

John S. Devlin III, WSBA No. 23988  
Andrew G. Yates, WSBA No. 34239  
Timothy C. DeFors, WSBA No. 41731  
Attorneys for Respondents

Lane Powell PC  
1420 Fifth Avenue, Suite 4100  
Seattle, Washington 98101  
Telephone: (206) 223-7000  
Facsimile: (206) 223-7107

09/14/11 11:14 AM  
K

**ORIGINAL**

TABLE OF CONTENTS

	<u>Page</u>
I. SUPPLEMENTAL ARGUMENT.....	1
A. Summary of the Bain Decision.....	1
B. Leipheimer’s Claims Are All Subject to Dismissal for Reasons That Are Unaffected By the Ruling in <i>Bain</i> .....	2
1. The Dismissal of Leipheimer’s Quiet Title Claim Should Be Affirmed.....	3
2. The Dismissal of Leipheimer’s “Wrongful Foreclosure” Claim Should Be Affirmed Because the DTA Does Not Provide a Cause of Action for Damages for Wrongful Initiation of Foreclosure .....	4
3. The Dismissal of Leipheimer’s CPA Claim Should Be Affirmed Because He Has Not Alleged Facts That If True, Would Establish the Essential Elements of Injury and Proximate Cause .....	9
4. The Dismissal of Leipheimer’s FDCPA Claim Should Be Affirmed.....	11
5. The Dismissal of Leipheimer’s Malicious Prosecution and Defamation of Title Claims Should Be Affirmed Because He Failed to Assign Error to Their Dismissal .....	14
II. CONCLUSION.....	15

**TABLE OF AUTHORITIES**

CASES	Page(s)
<i>Amador v. Central Mortg. Co.</i> , No. C11-414-MJP, 2012 WL 405175 (W.D. Wash. February 8, 2012) .....	12
<i>Amresco Independence Funding, Inc. v. SPS Props., LLC</i> , 129 Wn. App. 532, 119 P.3d 884 (2005).....	9
<i>Armacost v. HSBC Bank USA</i> , 2011 WL 825151 (D. Idaho Feb.9, 2011) .....	12
<i>Bain v. Metropolitan Mortg. Group, Inc.</i> , 285 P.3d 34 (2012) .....	passim
<i>Bennett v. Hardy</i> , 113 Wn.2d 912, 784 P.2d 1258 (1990).....	5
<i>Brown v. Household Realty Corp.</i> , 146 Wn. App. 157, 189 P.3d 223 (2008).....	6, 7, 8
<i>City of Federal Way v. Koenig</i> , 167 Wn.2d 341, 217 P.3d 1172 (2009).....	7
<i>Davis v. Dept. of Transp.</i> , 138 Wn. App. 811, 159 P.3d 427 (2007).....	8
<i>Escude v. King County Pub. Hosp. Dist. No. 2</i> , 117 Wn. App. 183, 69 P.3d 895 (2003).....	15
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	2
<i>Indep. Towers of Wash. v. Washington</i> , 350 F.3d 925 (9th Cir. 2003) .....	13
<i>Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.</i> , 162 Wn.2d 59, 170 P.3d 10 (2007).....	10

<i>Jara v. Aurora Loan Servs., LLC</i> , 2011 WL 6217308 (N.D. Cal. Dec.14, 2011).....	12
<i>Kazen v. Premier Mortg. Servs. Of Wash., Inc.</i> , 78 Fed. Appx. 586 (9th Cir. 2003).....	14
<i>Kobza v. Tripp</i> , 105 Wn. App. 90, 18 P.3d 621 (2001).....	4
<i>Koegel v. Prudential Mutual Sav. Bank</i> , 51 Wn. App. 108, 752 P.2d 385 (1988).....	9
<i>Lettenmaier v. Fed. Home Loan Mortg. Corp.</i> , 2011 WL 1938166 (D. Or. May 20, 2011).....	12
<i>Long v. Nat’l Default Servicing Corp.</i> , 2010 WL 3199933 (D. Nev. Aug.11, 2010).....	12
<i>Mikhay v. Bank of America, N.A.</i> , 2011 WL 167064 (W.D. Wash. Jan. 12, 2011) .....	5
<i>Nicdao v. Chase Home Finance</i> , 839 F. Supp. 2d 1051 (D. Alaska 2012).....	3
<i>Pizan v. HSBC Bank USA, N.A.</i> , 2011 WL 2531104 (W.D. Wash. June 23, 2011) .....	12
<i>Retail Clerks Health &amp; Welfare Trust Funds v. Shopland Supermarket, Inc.</i> 96 Wn.2d 939, 640 P.2d 1051 (1982).....	4
<i>Rozone v. Aurora Loan Services, LLC</i> , 2011 WL 4074715 (W.D. Wash. Sept. 13, 2011).....	5
<i>Spenser v. Deutsche Bank</i> , 2011 WL 6816343 (W.D. Wash. December 28, 2011) .....	5
<i>State v. ReconTrust Company, N.A.</i> , No. 2:11-cv-1460 (W.D. Wash) .....	8
<i>Thein v. Recontrust Co., N.A.</i> , 2012 WL 527530, *2 (W.D. Wash. February 16, 2012).....	5

<i>Vawter v. Quality Loan Svc. Corp. of Wa.</i> , 707 F. Supp. 2d 1115 (W.D. Wash. 2010) .....	4, 6
---	------

**STATUTES**

15 U.S.C. § 1692(e).....	12
15 U.S.C. § 1692f.....	12, 13, 14
15 U.S.C. § 1692f(6)(A).....	13
RCW 61.24.005(2).....	1
RCW 61.24.040(6).....	8
RCW 61.24.127 .....	4, 7, 8
RCW 61.24.127(1)(a)-(c) .....	7
RCW 61.24.127(1)(c).....	7
RCW 61.24.127(2)(a).....	7
RCW 61.24.127(2)(c).....	7
RCW 61.24.130 .....	7
RCW 61.24.130(1).....	4, 6
RCW 61.24.135 .....	7

**OTHER AUTHORITIES**

Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097, 50108 (Dec. 13, 1988) .....	12
H.R. 1362, 62nd Leg., Reg. Sess. (Wash. 2011) .....	6
H.R. 2614, 62nd Leg., Reg. Sess. (Wash. 2012) .....	6
House Bill Analysis, E.S.B. 5810, 61st Leg., Reg. Sess. (Wash. 2009).....	8
Laws of 2009, ch. 292, § 6.....	8, 7

RAP 10.3.....15  
RAP 18.9.....1  
Senate Bill Report, S.B. 5810, 61st Leg., Reg. Sess. (Wash. 2009).....8

## I. SUPPLEMENTAL ARGUMENT

Pursuant to the Court's September 13, 2012 Order, Respondents respectfully submit the following supplemental brief addressing the impact of *Bain v. Metropolitan Mortg. Group, Inc.*, 285 P.3d 34 (2012) on this case. Respondents are concurrently filing a separate Motion for Relief Pursuant to RAP 18.9 because Appellant John Leipheimer ("Leipheimer") has violated this Court's April 11, 2012 Order requiring him to cure his arrearage and tender his monthly mortgage payments to the Registry of the King County Superior Court. As explained in Respondents' motion, Leipheimer is currently \$271,928.87 in arrears and has not made a mortgage payment since December 30, 2008.

### A. Summary of the *Bain* Decision.

In *Bain*, the Washington Supreme Court held that MERS does not meet the definition of "beneficiary" in Washington's Deed of Trust Act ("DTA"), RCW 61.24.005(2), because it does not hold promissory notes evidencing residential mortgage loans. *Bain*, 285 P.3d at 36-37. Rather, the beneficiary is the holder of the note secured by the deed of trust. *Id.* However, the Court stated that agents, including MERS, can still represent noteholders. *Id.* at 45. The Court declined to conclusively address the legal effect of MERS acting as beneficiary, but refused to accept the

contention that naming MERS as a beneficiary voided the deed of trust and entitled the borrower to quiet title. *Id.* at 48.

The Court also held that designating MERS as a beneficiary did not, itself, establish a Consumer Protection Act (“CPA”) violation and that a plaintiff must still plead, and ultimately prove, the five elements of a CPA claim established by *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). *Id.* at 49-52. The Court found the “unfair or deceptive act or practice” and “public interest impact” elements “presumptively met.” *Id.* at 51. However, the Court made it clear that the essential elements of injury and proximate causation were highly fact-specific, stating “[d]epending on the facts of a particular case, a borrower may or may not be injured by the disposition of the note, the servicing contract, or many other things, and MERS may or may not have a causal role.” *Id.*

B. Leipheimer’s Claims Are All Subject to Dismissal for Reasons That Are Unaffected By the Ruling in *Bain*.

At the trial level and in their brief, Respondents did not just argue that all of Leipheimer’s claims failed because MERS was a proper beneficiary under the DTA. Respondents also identified other specific flaws with each of his claims. Brief of Respondents (“RB”) at 5-10, 19-40. These flaws all remain in the wake of *Bain*. Because *Bain* does

not breathe new life into any of the claims in Leipheimer's Complaint, this Court should affirm its dismissal.

1. The Dismissal of Leipheimer's Quiet Title Claim Should Be Affirmed.

In *Bain*, plaintiff Selkowitz<sup>1</sup> made the same argument as Leipheimer makes here: that because MERS is not a proper beneficiary, the deed of trust is void and he is entitled to quiet title. 285 P.3d at 48. The Court refused to accept this argument. *See id.* at 48-49.

A deed of trust is a lien on property consensually given by a borrower in exchange for a loan. *See Bain*, 285 P.3d at 38. Nothing in *Bain* supports the claim that an error in designating a beneficiary voids the deed of trust or changes the essential bargain freely and voluntarily struck in the loan agreement so that a secured obligation becomes an unsecured one.

Moreover, nothing in *Bain* changes the well-established law that a borrower cannot quiet title where the underlying debt remains unpaid. *See* RB 37-39. Leipheimer was admittedly in default when he filed this case and thus cannot assert a quiet title claim against his lender without paying off the debt. *Nicdao v. Chase Home Finance*, 839 F. Supp. 2d 1051 (D. Alaska 2012) (citing *Evans v. BAC Home Loans Servicing LP*, No. C10-0656-RSM, 2010 WL 5138394, at \*3 (W.D. Wash. Dec. 10, 2010)).

---

<sup>1</sup> Selkowitz is represented by the same counsel as Leipheimer.

Quiet title is also an equitable remedy, *Kobza v. Tripp*, 105 Wn. App. 90, 95, 18 P.3d 621 (2001), and the party who seeks equity must do equity and come before the Court with clean hands. *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.* 96 Wn.2d 939, 949, 640 P.2d 1051 (1982). Leipheimer, however, has ignored this Court's April 11, 2012 Order to tender monthly payments to the Superior Court. CP 3, 22-24; Respondents' Motion at 2. It would be highly inequitable to allow Leipheimer to disregard this Court's order, yet attempt to void the security instrument he signed to ensure repayment of the money he borrowed.

2. The Dismissal of Leipheimer's "Wrongful Foreclosure" Claim Should Be Affirmed Because the DTA Does Not Provide a Cause of Action for Damages for Wrongful Initiation of Foreclosure.

The Legislature clearly and expressly set forth the claims that may be brought for a violation of the DTA. Where, as here, a borrower asserts that a foreclosure was wrongfully initiated but not completed, the borrower may bring a claim only for injunctive relief. RCW 61.24.130(1). Where the foreclosure is complete, the borrower may (under certain circumstances) have certain claims for monetary damages. *See* RCW 61.24.127. But nothing in the DTA permits a plaintiff to bring a claim for money damages for a wrongful foreclosure that is not completed. *Vawter*

v. *Quality Loan Svc. Corp. of Wa.*, 707 F. Supp. 2d 1115, 1123–24 (W.D. Wash. 2010).<sup>2</sup> That was the law before *Bain*, and it remains the law today.

Leipheimer appears to be arguing that the DTA contains an implied cause of action for attempted wrongful foreclosure that Washington courts have never before recognized. Under Washington law, the three-part test for an implied cause of action is:

[F]irst, whether the plaintiff is within the class for whose “especial” benefit the statute was enacted; second, whether the legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.

*Bennett v. Hardy*, 113 Wn.2d 912, 920–21, 784 P.2d 1258 (1990).<sup>3</sup> The test’s second requirement (whether the legislative intent explicitly or implicitly supports creating or denying a remedy) and the third requirement (whether implying a remedy is consistent with the underlying purpose of the legislation) are not satisfied.

---

<sup>2</sup> See also *Mikhay v. Bank of America, N.A.*, 2011 WL 167064, \*2 (W.D. Wash. Jan. 12, 2011) (“Plaintiffs have not cited any authority supporting their ability to raise such a claim where no trustee’s sale has occurred and a number of courts have recently found that such a cause of action does not exist.”); *Thein v. Recontrust Co., N.A.*, 2012 WL 527530, \*2 (W.D. Wash. February 16, 2012) (“In Washington, there is no cause of action for “wrongful foreclosure” when no foreclosure has in fact occurred. Absent a trustee’s sale of the property, a claim for wrongful foreclosure must be dismissed as a matter of law.”) (internal citations omitted); *Spenser v. Deutsche Bank*, 2011 WL 6816343 (W.D. Wash. December 28, 2011) (holding that “there is no cause of action for ‘wrongful foreclosure’ when no foreclosure has in fact occurred”); *Rozone v. Aurora Loan Services, LLC*, 2011 WL 4074715 (W.D. Wash. Sept. 13, 2011) (“In Washington, there is no cause of action for “wrongful foreclosure” when no foreclosure has in fact occurred. Absent a trustee’s sale of the property, a claim for wrongful foreclosure must be dismissed as a matter of law.”) (internal citations omitted).

<sup>3</sup> The first requirement is not at issue in this case.

The DTA establishes a comprehensive scheme for the nonjudicial foreclosure process and restraint of the sale on “any proper legal or equitable ground,” RCW 61.24.130(1), ““is the only means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure.”” *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 163, 189 P.3d 223 (2008) (quoting *Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985)). *See also* RB 6-8. Thus, injunctive relief (not a claim for damages) is the express remedy the legislature established for challenging wrongful nonjudicial foreclosure proceedings.

Judicial creation of an implied cause of action for damages for wrongful initiation of a trustee’s sale would not only be inconsistent with the expressly granted injunction remedy, it would also violate the rules of statutory construction. The Western District of Washington issued *Vawter* on April 22, 2010. CP 371. Since that time, the Washington legislature has significantly amended the DTA twice, but has not enacted any provision establishing a cause of action for wrongful initiation of foreclosure.<sup>4</sup> Washington courts “presume[] that the legislature is aware of judicial interpretations of its enactments and take[] its failure to amend a statute following a judicial decision interpreting that statute to indicate

---

<sup>4</sup> *See, e.g.*, H.R. 1362, 62nd Leg., Reg. Sess., at § 1(a) (Wash. 2011) (establishing state’s Foreclosure Fairness Mediation program); H.R. 2614, 62nd Leg., Reg. Sess., at § 1 (Wash. 2012) (enacting various provisions effective June 7, 2012 related to short sales and the mediation program).

legislative acquiescence in that decision.” *City of Federal Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009). This Court should not do what the legislature declined to do.

In the event the legislature had desired to create a damages cause of action for wrongful initiation of foreclosure, it could easily have done so.<sup>5</sup> The July 2009 amendments to the DTA include RCW 61.24.127<sup>6</sup>, which preserves specific causes of action for damages that were previously waived by a failure to bring a pre-sale suit to enjoin a trustee’s sale. RCW 61.24.127(1)(a)-(c); (2)(a)-(f). Notably, the trustee’s failure to *materially* comply with the DTA is one of the claims preserved by the new statute, RCW 61.24.127(1)(c), but that claim was not added to RCW 61.24.130. There can be no doubt that the legislature responds to judicial interpretations of the DTA when it believes it necessary to do so. After the Court of Appeals held in *Brown* that a borrower’s failure to bring a pre-sale action to enjoin a sale waived their claims for damages, the

---

<sup>5</sup> See RCW 61.24.135 (declaring collusive bid suppression or chilling, failure to mediate in good faith under the FFA or comply with certain reporting and initial contact requirements to be unfair or deceptive practices under the CPA). It is also worthy of note that the legislature amended the DTA in 2009 to provide that a borrower/grantor does not waive certain claims for damages by failing to bring a civil action to enjoin a foreclosure sale. RCW 61.24.127; Laws of 2009, ch. 292 § 6. However, this provision contemplates that such an action would arise only after a foreclosure sale has occurred. RCW 61.24.127(2)(a) (“The claim must be asserted or brought within two years from the date of the foreclosure sale.”); RCW 61.24.127(2)(c) (“The claim may not affect in any way the validity or finality of the foreclosure sale.”).

<sup>6</sup> This statute does not play a direct role in this case because Leipheimer did bring a pre-sale action to enjoin the sale.

Legislature enacted RCW 61.24.127 the very next year and the legislative history associated with RCW 61.24.127 contains specific references *Brown*.<sup>7</sup> This Court cannot amend the DTA where the legislature has declined to do so. It is a legislative prerogative (not a judicial one) to modify the statutory remedy after weighing public policy factors. As the *Bain* Court stated: “The legislature, not this court, is in the best position to assess policy considerations.” *Bain*, 285 P.3d at 46.

Nor can Leipheimer save his “attempted wrongful foreclosure” claim based on ReconTrust’s alleged lack of authority to serve as a foreclosure trustee.<sup>8</sup> The Notice of Sale at issue in Leipheimer’s appeal set an original sale date of September 25, 2009, but no sale has occurred. *See* CP 30. ReconTrust will not be conducting any future sale of the Property because it has entered into a Consent Decree with the Washington Attorney General in which it has agreed not to conduct trustee’s sales in Washington.<sup>9</sup> Because a sale can be continued only up to 120 days from the original sale date, RCW 61.24.040(6), this Notice of Sale is no longer operative and therefore irrelevant in the absence of a

---

<sup>7</sup> Laws of 2009, ch. 292, § 6; Senate Bill Report, S.B. 5810, 61<sup>st</sup> Leg., Reg. Sess. (Wash. 2009); House Bill Analysis, E.S.B. 5810, 61<sup>st</sup> Leg., Reg. Sess. (Wash. 2009).

<sup>8</sup> If the Court resolves the wrongful initiation of foreclosure claim on this ground, it is unnecessary for it to reach ReconTrust’s preemption arguments. *See Davis v. Dept. of Transp.*, 138 Wn. App. 811, 826, 159 P.3d 427 (2007).

<sup>9</sup> *See* Consent Decree entered on August 14, 2012 in *State v. ReconTrust Company, N.A.*, No. 2:11-cv-1460 (W.D. Wash).

completed sale. Any claim seeking injunctive relief relating to the Notice of Sale, or ReconTrust's authority to serve as trustee, is moot.<sup>10</sup> The dismissal of Leipheimer's "wrongful foreclosure" claim should be affirmed.

3. The Dismissal of Leipheimer's CPA Claim Should Be Affirmed Because He Has Not Alleged Facts That If True, Would Establish the Essential Elements of Injury and Proximate Cause.

Under *Bain*, a borrower seeking to bring a CPA claim based on the designation of MERS as a beneficiary under the DTA must allege facts that would support the following five elements: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) a public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation. 285 P.3d at 50.

*Bain* makes clear that the injury and causation elements necessarily depend on the specific facts and circumstances of each case. *Id.* at 18. In order to prove causation, a "plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have

---

<sup>10</sup> Even if Leipheimer could otherwise state a claim for damages under the DTA, the dismissal of this claim was proper because he has not alleged prejudice. If prejudice is necessary to set aside a *completed* trustee's sale, this requirement should also apply to a claim for wrongful initiate of foreclosure. See *Amresco Independence Funding, Inc. v. SPS Props., LLC*, 129 Wn. App. 532, 119 P.3d 884, 886-87 (2005) ("Despite the strict compliance requirement, a plaintiff must show prejudice before a court will set aside a trustee sale."); *Koegel v. Prudential Mutual Sav. Bank*, 51 Wn. App. 108, 752 P.2d 385 (1988) (declining to set aside trustee's sale despite trustee's failure to comply with the DTA's notice requirements because plaintiff had not shown prejudice).

suffered an injury.” *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 84, 170 P.3d 10 (2007). It therefore follows that in order to plead a valid CPA claim, a plaintiff must allege facts demonstrating that his or her injuries were caused by the allegedly deceptive practice. *See id.*

Here, Leipheimer’s alleged injuries in his CPA claims against BANA, ReconTrust, and MERS<sup>11</sup> are “the distraction and the loss of time to pursue business and personal activities due to the necessity of addressing the wrongful conduct” by filing his lawsuit and taking other unspecified actions. CP 5.

Leipheimer has not identified a single fact that would support his injury claim. Even if he had alleged a cognizable CPA injury, his alleged “injuries” were not caused by the alleged CPA violations – errors in the designation of the beneficiary of his deed of trust and in the appointment of the successor trustee. Leipheimer’s does not contest his default or that the natural and agreed-upon consequence of this default was the initiation of nonjudicial foreclosure proceedings. This default, not MERS or any other Respondent, led to the initiation of foreclosure proceedings and his

---

<sup>11</sup> See footnote 16 at page 44 of RB. Respondents refer to all Respondents here in an abundance of caution and to make it clear that this claim would fail against any of them.

potential loss of the property. *See* CP 12. Leipheimer does not and cannot allege otherwise.

In *Bain*, the Court recognized that under certain circumstances it was conceivable that the designation of MERS in a deed of trust might cause injury, “such as when homeowners need to deal with the holder of the note to resolve disputes or to take advantage of legal protections.” 285 P.3d at 51. Here, however, Leipheimer does not and cannot allege any such injury caused by the designation of MERS in the deed of trust. Accordingly, the dismissal of the CPA claim should be affirmed.

4. The Dismissal of Leipheimer’s FDCPA Claim Should Be Affirmed.

Leipheimer’s FDCPA claim was properly dismissed for the reasons set forth at pages 33 to 39 of Respondents’ Brief, none of which are directly impacted by the *Bain* decision because it was not asked to consider any FDCPA questions.<sup>12</sup> As also explained in Respondents’ brief at footnote 9, this claim is only at issue with respect to ReconTrust and BANA.

The *Bain* decision does not alter the majority view that an FDCPA claim based on the activities necessary to carry out a nonjudicial foreclosure

---

<sup>12</sup> Indeed, it would be unusual for a federal court to ask a state court to interpret a federal statute.

is recognized if at all under 15 U.S.C. § 1692f.<sup>13</sup> As the Western District of Washington recently noted, a contrary result “would create a tension between the notice requirements set forth in Washington’s Deed of Trust Act and the FDCPA’s requirement that a debt collector communicate only through a debtor’s counsel.” *Amador v. Central Mortg. Co.*, No. C11-414-MJP, 2012 WL 405175 (W.D. Wash. February 8, 2012) (citing *Kazen v. Premier Mortg. Servs. Of Wash., Inc.*, 78 Fed. Appx. 586, 587 (9th Cir. 2003) (finding no FDCPA violation when lender merely mailed Plaintiff a “notice of default”)). The trial court properly dismissed the portion of Leipheimer’s FDCPA claim based on § 1692(e) because Respondents could be “debt collectors” if at all, only under § 1692f.

To the extent Leipheimer attempted to state a claim under Section 1692f(6) of the FDCPA, it was properly dismissed. *See* CP 5. He devoted a single sentence of his Complaint to this theory, stating only the boilerplate allegation that “[a] threat to take non-judicial action to dispossess the Plaintiffs [sic] of their [sic] real property, without a present

---

<sup>13</sup> *See, e.g., Jara v. Aurora Loan Servs., LLC*, 2011 WL 6217308, at \*5 (N.D. Cal. Dec.14, 2011); *Pizan v. HSBC Bank USA, N.A.*, 2011 WL 2531104, at \*3 (W.D. Wash. June 23, 2011); *Lettenmaier v. Fed. Home Loan Mortg. Corp.*, 2011 WL 1938166, at \*11–12 (D. Or. May 20, 2011); *Armacost v. HSBC Bank USA*, 2011 WL 825151, at \*5–6 (D. Idaho Feb.9, 2011); *Long v. Nat’l Default Servicing Corp.*, 2010 WL 3199933 at \*4 (D. Nev. Aug.11, 2010). *See also* Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097, 50108 (Dec. 13, 1988) (relying on the two-part definition of “debt collector” to find that, if a party falls only within the security interest provisions of the definition, then they “are subject only to this provision [§ 1692f(6)] and not the rest of the FDCPA.’ ”).

right of possession by ... [ReconTrust] or any other party, is a violation of § 808(6) of the [FDCPA].” *Id.* A violation of this section of the FDCPA prohibits a debt collector from “[t]aking or threatening to take any nonjudicial action to effect dispossession ... of property if ... there is no present right to possession of the property claimed as collateral through an enforceable security interest.” 15 U.S.C. § 1692f(6)(A). As appellant, Leipheimer, has the “burden on appeal to present the court with legal arguments to support [his] claims.” *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 930 (9th Cir. 2003). Thus, when a complex statutory framework such as the FDCPA is at issue, this Court may “decline to pick through the many detailed sections and subsections in an effort to match the statutes and regulations with a [ ] theory not articulated to [it].” *Id.* Because Leipheimer fails to articulate any actual facts in support of his conclusory statement that ReconTrust violated 15 U.S.C. § 1692f(6), the dismissal of this claim without prejudice was entirely proper and should be affirmed.

Moreover, the allegations of the Complaint establish only that ReconTrust’s only arguable “debt collection” activities were not actionable. Here the only actions taken by ReconTrust were the issuance of a May 20, 2009 Notice of Default in its capacity as an agent and the issuance and recordation of a Notice of Trustee’s Sale. CP 22-25; 30-34.

The mere issuance of a Notice of Default does not violate the FDCPA. *See Kazen*, 78 Fed. Appx. at 587. This is the correct view here as well because the ambit 15 U.S.C. § 1692f(6) is the actual or threatened taking of property subject to a security instrument without a present right to do so. A notice of default is simply a notification to the borrower that they have failed to comply with the terms of the debt obligation. *See CP 22-25*.

When Leipheimer took out his loan he secured it with a deed of trust under which he irrevocably granted to the original and any successor trustee the power to sell his property if he defaulted. CP 11. There is no dispute Leipheimer defaulted. CP 4, 22-25. After his default, MERS appointed ReconTrust as a successor Trustee and ReconTrust recorded a Notice of Sale, but no sale ever occurred. *See CP 27-33*. Recognizing a cause of action under the FDCPA based only the recordation of a notice of trustee's sale would be inconsistent with the view that there is no cause of action for damages for wrongful initiation of foreclosure under the DTA, the Act pursuant to which the Notice of Sale was recorded.

5. The Dismissal of Leipheimer's Malicious Prosecution and Defamation of Title Claims Should Be Affirmed Because He Failed to Assign Error to Their Dismissal.

As discussed in detail at pages 40-44 of Respondents' brief, Leipheimer has failed to assign error to the dismissal of his malicious

prosecution or defamation of title claims or offer any argument in support of reversing the dismissal of these claims. Nothing in *Bain* changes the basic rule that “a party’s failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error.” *Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003). Dismissal of these claims should be affirmed.

## II. CONCLUSION

Respondents respectfully request that this Court affirm the order dismissing Leipheimer’s complaint without prejudice.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of October, 2012.

LANE POWELL PC

By  \_\_\_\_\_  
John S. Devlin III  
WSBA No. 23988  
Andrew G. Yates  
WSBA No. 34239  
Timothy C. DeFors  
WSBA No. 41731  
Attorneys for Respondents

**CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury under the laws of the State of Washington that on October 12<sup>th</sup>, 2012, I caused to be served a copy of the foregoing on the following person(s) in the manner indicated below at the following address(es):

Richard Llewelyn Jones  
Kovac & Jones, PLLC  
2050-112<sup>th</sup> Ave., N.E., Suite 230  
Bellevue, WA 98004

- by Electronic Mail**
- by Facsimile Transmission**
- by First Class Mail**
- by Hand Delivery**
- by Overnight Delivery**

Signed this 12<sup>th</sup> day of October, 2012, at Seattle, Washington.

  
Sabrina Koskinen  
Sabrina Koskinen

2012 OCT 12 11:40  
STATE OF WASHINGTON  
CLERK OF SUPERIOR COURT  
SEATTLE