

69034-5

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NO. 69034-5-I
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MICHAEL LEVITZ,

Appellant,

v.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,
CAPITAL ONE, NA, US BANK NATIONAL ASSOCIATION, as
Trustee for CHEVY CHASE FUNDING LLC MORTGAGE-BACKED
CERTIFICATES SERIES 2005-1, US BANK, NA as trustee for CCB
LIBOR 2005-1 SERIES TRUST, DOES 1 through XX inclusive, and
BISHOP WHITE MARSHALL & WEIBEL, PS,

Respondents.

RESPONDENT BISHOP, WHITE, MARSHALL & WEIBEL, P.S.'S
BRIEF

APPEAL FROM KING COUNTY SUPERIOR COURT
The Honorable Dean S. Lum

David A. Weibel, WSBA No. 24031
Barbara L. Bollero, WSBA No. 28906
Bishop, White, Marshall & Weibel, P.S.
720 Olive Way, Suite 1201
Seattle, WA 98101-1801
(206) 622-5306, Ext. 5918

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COURT OF APPEALS
STATE OF WASHINGTON

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I. INTRODUCTION

Appellant Michael Levitz filed a foreclosure avoidance Complaint against the parties duly authorized to foreclose a defaulted loan secured by the real property in which Mr. Levitz resided. The property was owned by Mr. Levitz's former wife, Dr. Inesa Levitz, and Mr. Levitz was not a party to the Note or Deed of Trust securing the Note. Mr. Levitz did not obtain an Order restraining the Trustee's Sale, but the foreclosing parties chose not to proceed with the foreclosure. He pleaded claims for fraud, breach of the covenant of good faith and fair dealing, Consumer Protection Act ("CPA") violations, wrongful foreclosure, and gross negligence.¹

The trial court awarded summary judgment, dismissing with prejudice Mr. Levitz's Complaint against the foreclosing Successor Trustee, Bishop, White, Marshall & Weibel, P.S. ("Bishop White"). Mr. Levitz appeals that summary judgment dismissal order.

The trial court correctly awarded summary judgment to Bishop White because:

- Mr. Levitz was not a party to the Note or Deed of Trust nor did he enter any contracts with Bishop White, so Bishop

¹ Mr. Levitz appeals dismissal of only the first three causes of action and not the last two for wrongful foreclosure and gross negligence. [Appellant's Brief, p. 7, n. 1.]

White owed him no implied duty of good faith and fair dealing;

- Mr. Levitz had no interest in the real property, so Bishop White owed him no statutory good faith duty as Trustee;
- Even if Mr. Levitz had a property interest, Bishop White satisfied its ordinary care duty as Trustee to him by relying on the Beneficiary's Declaration as statutorily sufficient proof of Note ownership; and
- After Bishop White satisfied its burden of proof and persuasion that the evidence supported no claims against it, Mr. Levitz did not introduce any controverting evidence.

Consequently, summary judgment was correctly awarded to Bishop White, and that Order should be affirmed.

II. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Respondent Bishop White makes no assignments of error, inasmuch as the summary judgment below was correct. Bishop White restates the issues pertaining to Appellant's assignments of error as follows:

1. As a matter of law, when a property tenant is not a party to a Note and Deed of Trust may he recover on his claim for breach of the

covenant of good faith and fair dealing implied in those contracts against the foreclosing Trustee, with whom he has no contractual relationship?

2. As a matter of law, when a property tenant is not a party to a Note and Deed of Trust and fails to prove that (1) a factual misrepresentation, (2) was made to him by the foreclosing Trustee (3) who knew the representation was false, (4) he reasonably and justifiably relied on the misrepresentation, and (5) his reliance proximately caused him damages, may the tenant prevail on a fraud claim against the foreclosing Trustee?

3. As a matter of law, when a property tenant fails to prove that (1) the foreclosing Trustee engaged in an unfair or deceptive act or practice, (2) such act or practice affected the public interest, and (3) such act or practice proximately caused him damages, may the tenant prevail on a CPA violation claim against the foreclosing Trustee?

III. STATEMENT OF THE CASE

A. Appellant's Lack of Property Interest and Former Wife's Entry of Loan.

Mr. Levitz claims to have married his former wife, Dr. Inesa Levitz, on January 27, 1993. [CP 106, ll. 2-3.] Nevertheless, in April of 1999, Dr. Levitz purchased real property solely in her name as "a single person." [CP 90-91, ¶2; CP 95-96.] The property is commonly known as

3718 East Alder Street, Seattle, Washington 98122 (the “Property”). [CP 4, ¶2.1; CP 90-91, ¶2.]

In September of 2004, Dr. Levitz refinanced her home loan for the Property with Respondent Chevy Chase Bank, F.S.B.² [CP 4, ¶2.1; CP 91, ¶3; CP 97-98.] Dr. Levitz executed a Note drawn to the order of Chevy Chase Bank, F.S.B., secured by a Deed of Trust. [CP 90, ¶4; CP 93, ¶16; CP 99-104; CP 143-57.] Subsequently, Chevy Chase Bank, F.S.B. endorsed the Note payable to the order of U.S. Bank, N.A. as Trustee. [CP 91, ¶4; CP 104.]

On October 27, 2010, the King County Superior Court entered a Decree of Dissolution of the Levitz’s marriage (the “Decree”). [CP 91, ¶7; CP 111-19.] The Decree awarded Mr. Levitz the Property, “subject to all liens, encumbrances, liabilities, and/or obligation related to ownership or possession of said property by [Mr. Levitz].” [CP 115, ¶1.] The Decree specifically stated that the Property was “currently subject to a Deed of Trust foreclosure action” [*Id.*] However, on July 14, 2011, all provisions of the Decree were vacated, except for the dissolution of the Levitz’s marriage. [CP 92, ¶9; CP 129, ¶3³.]

² Contrary to his Statement of the Case, as Appellant previously pleaded the home was refinanced *only* by Dr. Levitz, not by Dr. Levitz *and* Appellant, Mr. Levitz. [Appellant’s Brief, p. 8; CP 4, ¶2.1.]

³ The referenced page contains two paragraphs numbered “3.” Vacation of the Decree’s terms is ordered in the second paragraph numbered “3.”

A few months before the Decree was entered, Mr. Levitz recorded a Claim of Spouse in Community Real Property, referencing the Property. [CP 24, ¶5; CP 26-27; CP 91, ¶5; CP 109-10.] The document was recorded on May 12, 2010. [*Id.*]

B. Appointment of Bishop White as Trustee, Loan Default, First Incorrect Beneficiary Declaration, Resulting Notice of Default, and Discontinuance of First Scheduled Trustee's Sale.

Bishop White was appointed as Successor Trustee of Dr. Levitz's Deed of Trust. [CP 24, ¶6; CP 28-29; CP 199, ¶3; CP 202-03.] The Appointment was recorded on July 1, 2009. [*Id.*]

Dr. Levitz eventually defaulted in payment of her mortgage. [CP 282, ll. 9-13; CP 307, l. 22 – CP 308, l. 9.] About nine months after its appointment as Trustee, on or about March 10, 2010, Bishop White received a completed "Foreclosure Loss Mitigation Form" from Capital One, N.A. [CP 200, ¶6; CP 221.] Under penalty of perjury, the completed form stated that "US Bank, NA as Trustee for CCB Libor Series 2005-1 Trust" ("USBank-Libor") was the beneficiary of Dr. Levitz's loan and that the loan was in default. [*Id.*] U.S. Bank as Trustee was the owner of Dr. Levitz's Note, but it owned the Note as Trustee for "the Chevy Chase Funding LLC Mortgage Backed Certificates Series 2005-1" ("USBank-Chevy Chase"), rather than "CCB Libor Series 2005-1Trust." [CP 88, ¶¶3-4.]

In reliance on the form completed by Capital One, N.A., Bishop White prepared and served a Notice of Default, dated April 12, 2010. [CP 24, ¶8; CP CP 200, ¶7; CP 223-29.] The Notice of Default identified U.S. Bank-Libor as owner of Dr. Levitz's Note, and Capital One, NA as the loan servicer. [CP 229, ¶8.] Based on the incorrectly completed form supplied by Capital One, N.A., the Notice of Default misidentified the owner of the Note. [CP 88, ¶4; CP 92, ¶11.]

The Trustee's sale scheduled under the Notice of Default dated April 12, 2010, was discontinued, and no Trustee's sale was conducted. [CP 24, ¶10; CP 35-36; CP 92, ¶11.]

C. **Corrected Beneficiary Declaration, Resulting Correct Notice of Default, and Discontinuance of Second Scheduled Trustee's Sale.**

Nearly one year after completing the initial "Foreclosure Loss Mitigation Form," Capital One, N.A. prepared a Declaration of Ownership dated March 17, 2011, and provided it to Bishop White (the "Beneficiary Declaration"). [CP 92, ¶12; CP 132; CP 200, ¶8; CP 231.] Under penalty of perjury, the Beneficiary Declaration stated that "US Bank, NA as Trustee relating to the Chevy Chase Funding LLC Mortgage Backed Certificates, Series 2005-1 is the owner of (Dr. Levitz's) Promissory Note" and that "[t]he Note has not been assigned or transferred to any other person or entity." [CP 132, ¶¶2-3; CP 231, ¶¶2-3.]

Bishop White relied on the Beneficiary Declaration in preparing and serving an Amended Notice of Foreclosure and Notice to Resident of the Property Subject to Foreclosure Sale, both dated April 15, 2011. [CP 39; CP 92, ¶13; CP 133-36; CP 200, ¶9; CP 233.] The Amended Notice of Foreclosure correctly identified “US Bank, NA as Trustee relating to the Chevy Chase Funding LLC Mortgage Backed Certificates, Series 2005-1” as the beneficiary of Dr. Levitz’s Deed of Trust. [CP 133.]

Bishop White also relied on the Beneficiary Declaration in preparing and serving an Amended Notice of Trustee’s Sale, dated April 15, 2011. [CP 25, ¶12; CP 40-42; CP 92, ¶14; CP 137-42; CP 200, ¶9; CP 234-36.] The Amended Notice of Trustee’s Sale also correctly identified “US Bank, NA as Trustee relating to the Chevy Chase Funding LLC Mortgage Backed Certificates, Series 2005-1” as the beneficiary of Dr. Levitz’s Deed of Trust. [CP 40-41, §I; CP 137-38, §I; CP 234-35, §I.]

As of June 12, 2012, no Trustee’s sale of the Property had been conducted and no foreclosure proceedings were pending against the Property. [RP 3, ll. 8-14.]

D. Trial Court Proceedings.

Mr. Levitz filed his Complaint against Bishop White and other Defendants on May 11, 2007. [CP 1.] He pleaded claims for (1) fraud, (2) breach of the covenant of good faith and fair dealing, (3) CPA

violations, (4) wrongful foreclosure, and (5) gross negligence against Bishop White in its capacity as Successor Trustee of Dr. Levitz's Deed of Trust. [CP 1-12.] Although Mr. Levitz filed a Motion for Temporary Restraining Order to restrain the Trustee's sale [CP 13-22], no order was entered on that motion. Bishop White answered the Complaint on June 9, 2011, and pleaded affirmative defenses. [CP 43-55.]

Three other Defendants, Capital One, N.A. ("Capital One"), Mortgage Electronic Registration Systems, Inc. ("MERS"), and U.S. Bank National Association as Trustee ("USBank") filed their Motion to Dismiss and/or for Summary Judgment on April 19, 2012. [CP 67-86.] The motion was supported by the declarations of Alissia Brunson-Matthews [CP 87-89] and their counsel, John A. Knox, including exhibits [CP 90-186].

Defendant Bishop White filed a Joinder in the co-Defendants' Motion to Dismiss and/or for Summary Judgment. [CP 187-97.] The Joinder was supported by the Declaration of a Bishop White principal, David A. Weibel, including exhibits. [CP 198-236.] Rather than being a "me-too" pleading, the Joinder included a statement of additional facts, authorities and argument. [CP 197-97.]

Mr. Levitz filed a joint Response in Opposition to all Defendants' Motions to Dismiss and for Summary Judgment. [CP 237-55.] He

supported the Opposition by his own Declaration. [CP 256-58.] The only factual statements in Mr. Levitz's Declaration established foundation for the attached exhibits. [*Id.*] In turn, the only exhibits to Mr. Levitz's Declaration were pleadings from his marital dissolution case and from the appeal of orders entered in that case [CP 259-85; CP 288-314], and a copy of his Claim of Spouse in Community Real Property [CP 258, ¶8; CP 286-87]. The latter document was already in the summary judgment record. [CP 91, ¶6; CP 109-10.]

Bishop White filed its Reply brief, asserting Mr. Levitz did not dispute any of the facts underpinning Bishop White's dispositive motion. [CP 328-43.] Capital One, MERS, and USBank also filed a Reply brief. [CP 315-27.]

Oral argument of both summary judgment motions was conducted on June 12, 2012, at which all parties were represented by counsel. [RP 1, ll. 27-33.] The trial court found no triable issue of material fact [RP 16, l. 15 – RP 18, l. 18], and entered an Order dismissing all of Mr. Levitz's claims against Bishop White, with prejudice [CP 370-72]. This appeal followed. [CP 359-69.]

IV. SUMMARY OF ARGUMENT

As the foreclosing Trustee, under RCW 61.24.010(4) Bishop White owed *only* a good faith duty to *only* the borrower, beneficiary, and grantor or the Note and Deed of Trust. Since Mr. Levitz is neither the borrower, beneficiary, nor grantor, Bishop White owed him no duty. Even if Mr. Levitz is found to have held an interest in the real property, Bishop White's duty to him was fulfilled by its good faith reliance on Capital One's two Beneficiary Declarations. Mr. Levitz offered no evidence to controvert that actual proven reliance.

Mr. Levitz asserts Bishop White did not perform its requisite duties under the Deed of Trust Act, and all causes of action are founded on those allegations. Similar to his other claims, he introduced no evidence supporting the supposed violations, and his appellate citations are to arguments, not evidence. Accordingly, his CPA violation, fraud, and breach of covenant of good faith and fair dealing claims fail.

Further, because Mr. Levitz was not a party to the Note and Deed of Trust, and had no other contractual relationship with Bishop White, there is no contract in which to imply a covenant of good faith and fair dealing. Consequently, the trial court correctly awarded summary judgment dismissing all claims against Bishop White, and the decision should be affirmed.

V. ARGUMENT

A. Summary Judgment Standard of Review is *De Novo*.

The appellate standard of review for the summary judgment order is *de novo*, with the reviewing court performing the same inquiry as the trial court. *Del Guzzi Constr. Co. v. Global Northwest Ltd.*, 105 Wn.2d 878, 882, 719 P.2d 120 (1986); *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985).

B. Having Fulfilled its Duty of Care, Bishop White was Correctly Awarded Summary Judgment Regardless of Mr. Levitz's Standing and Property Interest.

A substantial portion of Appellant's Brief is devoted to analyzing his standing to file Property foreclosure avoidance claims. Concerning Bishop White's dismissal, the distinction is one without a difference.

In its summary judgment motion and at the hearing, Bishop White argued that as foreclosing Trustee it owed *only* a good faith duty to *only* the borrower, beneficiary, and grantor under the Note, Deed of Trust, and RCW 61.24.010(4). [CP 190-91; CP 328-30; RP 7, l. 28 – RP 8, l. 12.] It also asserted that it owed *no* fiduciary duty to *anyone* with a property interest under RCW 61.24.010(3). [*Id.*] Mr. Levitz did not dispute this statement of the applicable law in either his opposition briefing or oral argument. [CP 247; RP 16, ll. 11-14.] The trial court recognized that,

since Mr. Levitz was not a party to the Note and Deed of Trust, Bishop White owed no duty to him. [RP 16, l. 29 – RP 17, l. 4.]

Even if this Court finds Appellant's arguments persuasive and that Mr. Levitz held a community property interest, Bishop White's summary judgment entitlement does not change. By statute, a Trustee's good faith duty is owed only to "the borrower, beneficiary, and grantor." RCW 61.24.010(4). It is undisputed that Mr. Levitz was neither the borrower, beneficiary, nor grantor of Dr. Levitz's Note or Deed of Trust. Should Mr. Levitz be determined to hold a community property interest, that interest would not transform him, *ipso facto*, into a borrower, beneficiary, and/or grantor to whom Bishop White owed a good faith duty.

Further, should this Court read into RCW 61.24.010 a duty of ordinary care or good faith to *any* interested party – regardless of their status as borrower, beneficiary, and/or grantor – Mr. Levitz still cannot prevail against Bishop White. Good faith is "honesty in fact" (RCW 62A.1-201(19)), or "a state of mind indicating honesty and lawfulness of purpose" (*Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 385, 715 P.1d 1133 (1986)), *i.e.*, a mixed objective and subjective standard.

Here, the only evidence in the summary judgment record was that Bishop White relied on the Beneficiary Declarations it received from Capital One, it was entitled by statute to do so, and it served statutorily-

proscribed notices. [CP 200, ¶¶6-9; CP 330; RCW 61.24.030(b).] Mr. Levitz offered no evidence or argument that Bishop White lacked a subjective belief that its actions were honest and its purposes lawful. Indeed, the only opposing evidence he submitted were pleadings from his marital dissolution case [CP 256-314], which acknowledged the loan default and pending foreclosure proceedings [CP 263, ¶1], as he also admitted on appeal [Appellant’s Brief, p. 6 (“Mr. Levitz does not deny that a balance is still owed on the Note”)].

After Bishop White carried its burden of proving entitlement to summary judgment, Mr. Levitz failed to move forward with his burden of adducing competent controverting evidence under CR 56(e). He also failed to assert what duty of care Bishop White owed him, and how it ostensibly breached that duty to him, resulting in damages.

Regardless whether Mr. Levitz had a cognizable property interest, and regardless whether the Trustee owed him a common law ordinary care or statutory good faith duty, Bishop White undisputedly met its duty. Consequently, the trial court correctly awarded it summary judgment of dismissal with prejudice.

C. **Having Committed No Violations of the Deed of Trust Act, Bishop White was Correctly Awarded Summary Judgment Dismissing All of Mr. Levitz’s Claims.**

On appeal, as on summary judgment, Mr. Levitz offers scattershot assertions that Bishop White violated the Deed of Trust Act, RCW 61.24, *et seq.* (“DOTA”). None of these assertions are supported by argument or evidentiary citations, other than to his unverified Complaint’s bald allegations. Although abandoning his wrongful foreclosure claim [Appellant’s Brief, p. 7, n. 1], because Mr. Levitz’s appealed claims all depend on the same asserted DOTA violations, his analytical failures are addressed.

1. Alleged Failure to Serve Written Notice of Default.

Mr. Levitz complains that no default notice was served before the Notice of Trustee’s Sale recorded on July 17, 2009. [Appellant’s Brief, p. 9.] This asserted DOTA violation is not supported by the law, the summary judgment evidence, nor the record on appeal.

The DOTA expressly requires the written Notice of Default be served on “the borrower and grantor.” RCW 61.24.030(8). As discussed above, Mr. Levitz was and is neither the borrower, nor the grantor. Consequently, there would be no DOTA violation if he was not served with default notice.

Regardless, the undisputed sworn evidence of the Trustee is that written default notice was served to the borrower and grantor on May 29, 2009, and the Property also posted with notice. [CP 32, §VI.] As the

spouse of the borrower and grantor, Mr. Levitz was served by both mail and posting at the Property address, where he resided. [CP 34.]

Further, to support this claimed violation Mr. Levitz cites only to his counsel's written and verbal arguments – not any evidence proving default notice was not served. [Appellant's Brief, p. 9, citing to CP 239:5-7 and VRP 11:12-24.] Finally, as Mr. Levitz admits, the Trustee's Sale prefaced by the allegedly unserved default notice was discontinued. [CP 35-36; Appellant's Brief, p. 20.] It is difficult to discern how any claims can arise from alleged failure to receive prefatory notice of an event that did not occur.

Because the undisputed evidence establishes default notice was appropriately served on the statutorily required parties, no DOTA violation occurred.

2. Alleged Incorrect Beneficiary Designation.

Mr. Levitz claims Bishop White's Notice of Default dated April 12, 2010, and its Amended Notice of Trustee's Sale dated June 10, 2010, both incorrectly identified the Deed of Trust beneficiary. [Appellant's Brief, pp. 9-10.]

The default notice identified "U.S. Bank, NA as trustee for CCB Libor Series 2005-1 Trust C/o Mortgage Electronic Registration Systems, Inc. as a nominee for Capital One, N.A. Bank, F.S.B." ("USBank-Libor")

as the owner of the Note, and “Capital One, NA” as the loan servicer. [CP 200, ¶8; CP 229, ¶8.] Although Mr. Levitz *asserted* the Notice of Trustee’s Sale stated it resulted from a default in the obligation to MERS as a nominee for Capital One N.A., there is no evidence in the record to support that statement. [CP 24, ¶9.⁴]

The undisputed evidence on summary judgment and appeal is that Bishop White received a Beneficiary Declaration from Capital One, N.A. identifying USBank-Libor as the current beneficiary of the Deed of Trust. [CP 200, ¶6; CP 221, ¶5.] Bishop White relied on that declaration to prepare the default notice dated April 12, 2010 [CP 200, ¶7; CP 223-29], specifically naming USBank-Libor as beneficiary [CCP 229, ¶8.a.]

Because DOTA provides, “the trustee is *entitled to rely* on the beneficiary’s declaration as evidence of proof required under this subsection” (RCW 61.24.030(7)(b) (emphasis supplied)), Bishop White’s undisputed actual reliance on Capital One’s declaration cannot be a DOTA violation.

3. Alleged Invalid Assignment by MERS.

Next, Mr. Levitz argues that MERS cannot assign the beneficial interest in a trust deed. [Appellant’s Brief, p. 10.] Because Bishop White

⁴ No Exhibit F to the Declaration of Jull J. Smith is contained either within the Clerk’s Papers or trial court case file.

recorded an Assignment executed by MERS [CP 37-38], he asserts Respondent violated DOTA. [Appellant's Brief, pp. 13-14, 24.]

It is correct that in Washington, MERS cannot be a lawful beneficiary if it never held the Note. *Bain v. Metropolitan Mtg. Group, Inc.*, 175 Wn.2d 83, 89, 285 P.3d 34 (2012). But innumerable challenges to the MERS system have been dismissed by Washington state and federal courts both before and after issuance of the *Bain* opinion on August 16, 2012. See, Appendix One of Pre-*Bain* MERS Cases, and Appendix Two of Post-*Bain* MERS Cases.

Notably, the challenged Assignment was recorded on March 25, 2011, nearly 18 months before the Washington Supreme Court issued its pronouncement that MERS could not be a lawful beneficiary under DOTA. At the time of recording, pursuant to the Deed of Trust and Washington law then in effect, MERS was the stated beneficiary, and executed the Assignment in that capacity. Accordingly, Bishop White committed no DOTA violation by recording a document that was factually and legally accurate as of the recording date.

Further, the Assignment's recording is irrelevant. The Assignment did nothing other than make publicly available the correct information that USBank-Chevy Chase held the Note and was entitled to foreclose. It is undisputed that the Note was endorsed in blank, held and owned by

USBank-Chevy Chase, and Capital One was the servicing agent for USBank-Chevy Chase. [CP 91, ¶4; CP 99-104.] Because under long-standing Washington law the security instrument follows the Note, the Assignment only confirmed the fact that USBank-Chevy Chase was the Note holder, entitled to foreclose through its agent, Capital One. *Bain, supra*, at 104 (“Washington’s deed of trust act contemplates that the security instrument will follow the note, not the other way around.”); *In Re Jacobson*, 402 B.R. 359, 367 (W.D.Wash. 2009) (“Having an assignment of the deed of trust is not sufficient [to foreclose], ... because the security follows the obligation secured, rather than the other way around.”).

Finally, because he is neither the beneficiary, borrower, nor grantor, Mr. Levitz has no standing to challenge the Assignment under DOTA – indeed the parties to the Assignment and MERS’s principal, USBank-Chevy Chase, do not contest the Assignment. Even if Mr. Levitz had a Property interest, however, “[r]ecording of the assignments is for the benefit of third parties; it has no bearing on the rights as between assignor and assignee.” *In re United Home Loans, Inc.*, 71 B.R. 885, 891 (W.D.Wash. 1987).

Bishop White committed no DOTA violation by recording MERS’s Assignment.

4. Alleged References to Invalid Assignment by MERS.

The next group of alleged DOTA violations concerns references to MERS's Assignment in other documents that Bishop White recorded. [Appellant's Brief, pp. 10-11.] Such a reference is included in Bishop White's Amended Notice of Trustee's Sale dated April 15, 2011, correctly naming USBank-Chevy Chase as beneficiary. [CP 138, §I.]

Mr. Levitz misreads the 2011 Notice of Trustee's Sale, asserting that, "it is intended to secure an obligation in favor of MERS as nominee for Chevy Chase ..." [Appellant's Brief, pp. 10-11.] In fact, the quotation refers to – and correctly describes – the language of the Deed of Trust itself. [Compare CP 137-38, §I, with CP 143-44.] The Notice also correctly describes the Assignment to USBank-Chevy Chase. [CP 37-38; CP 138, §I.] Mr. Levitz fails to explain in what matter an accurate notice violates DOTA.

Mr. Levitz attempts to bolster this asserted DOTA violation by additional assertions, but none are supported by the record. There is no evidence of a MERS directive [Appellant's Brief, p. 11], nor argument how such a directive – if one indeed exists and was violated – could be the basis of a DOTA claim against Bishop White, a non-member of MERS, by Mr. Levitz, also a non-member of MERS. Similarly, Appellant's claim

that a fraudulent party directed foreclosure is unsupported by any evidentiary citation. [Appellant’s Brief, p. 12.]

Finally, Mr. Levitz asserts – again without citing to any controlling authority – that Bishop White’s 2011 Notice of Trustee’s Sale utilized “duplicitous” and “meaningless” language that USBank was the trustee “relating to” the Chevy Chase trust, rather than “for” the trust. [Respondent’s Brief, pp. 11-12.] But the language used in Bishop White’s Notice was identical to the information provided in Capital One’s second Beneficiary Declaration. [*Compare* CP 231, ¶2 with CP 235, §I.] As with the first Beneficiary Declaration, by statute Bishop White was entitled to rely on the second one as sufficient proof of Note ownership. RCW 61.24.030(7)(a).

Due to Bishop White’s undisputed actual reliance on Capital One’s Beneficiary Declaration, its preparation and service of the Amended Notice of Trustee’s Sale [CP 200, ¶¶8-9; CP 231; CP 234-36] cannot constitute a DOTA violation.

D. Having Committed No Violations of the Consumer Protection Act, Bishop White was Correctly Awarded Summary Judgment.

Mr. Levitz asserts the trial court erred in dismissing his claim against Bishop White for violating Washington’s CPA, RCW 19.86, *et seq.* He submits Bishop White’s deceptive and unlawful practices include

“robo-signed” documents and unauthorized and untimely foreclosure notices, and asserts there is a “reasonable inference” of Bishop White’s CPA liability. [Appellant’s Brief, p. 23.]

Bishop White moved for and was granted CR 56 summary judgment of dismissal, not CR 12(b)(6) dismissal for failure to state a claim. [CP 187-97; RP 16, ll. 11-25.] The requested “reasonable inferences” that may be drawn from Mr. Levitz’s Complaint are insufficient to defeat summary judgment under CR 56:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party *may not rest upon the mere allegations or denials of his pleading*, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. *If he does not so respond, summary judgment, if appropriate, shall be entered against him.*

CR 56(e) (emphasis supplied).

Similarly, unsupported factual and conclusory assertions of “robo-signing,” and unauthorized and untimely foreclosure notices – without proof of and argument concerning those elements – will not defeat a properly supported summary judgment motion, and will not even withstand a dismissal motion. *See, Mickelson v. Chase Home Finance, LLC*, 2012 WL 3240241, *6 (W.D.Wash. Aug. 7, 2012) (“Plaintiffs plead only legal conclusions that [certain] Defendants ... engaged in unfair and

deceptive practices in trade or business which injured Plaintiffs, including engaging in and/or participating with regard to ‘robo-signing’ practices. ... These claims are DISMISSED and the motion is GRANTED as pertains to them.”); *Chan v. Chase Home Loans, Inc.*, 2012 WL 1576164, *4 (W.D.Wash. May 4, 2012); *In Re Marks*, 2012 WL 6554705, *9 (BAP, 9th Cir. 2012) (“[The borrower] fails to prove that Kaminski is a robo-signer or, more importantly, to cite any authority supporting her contention that an assignment signed by an alleged robo-signer renders it fraudulent or void. Disparaging terms and unsupported allegations about what might have occurred with respect to the Assignment fail to establish any claim that it is void or that fraud has been perpetrated against [the borrower].”).

Under *Bain* dictum, “robo-signing” *may* be the basis of a CPA claim. *Bain, supra*, 175 Wn.2d at 118, n. 18 (“Also, while not at issue in these cases, ... issu[ing] assignments without verifying the underlying information, ... could well be the basis of a meritorious CPA claim.”)⁵ However, where there exists only the mere argument of “robo-signing” without supporting evidence, as here, summary judgment is correctly awarded under CR 56(e).

⁵ It is difficult to discern in what manner a “robo-signed” Assignment could harm a borrower, giving rise to a CPA claim. If an unauthorized Assignment was issued, recorded, and acted upon, only the Note holder who loses its secured lien position would be harmed, not the defaulting borrower whose property may only be foreclosed once, regardless whether by the true Note holder or a fraudulently appointed imposter.

Further, Mr. Levitz did not prove all elements of his CPA violation claim. Although he correctly cites those elements [Appellant's Brief, p. 21], he fails to explain how they apply to the evidence here.

Citing *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013), Appellant relies on the unfair or deceptive acts in violation of the public interest prong of a CPA claim.⁶ [Appellant's Brief, pp. 23-24.] But he fails to identify precisely which of Bishop White's acts were allegedly "unfair" or "deceptive" and how those acts could and/or did affect the public and proximately caused him damages. Failing to establish even one of the elements is fatal to a CPA violation claim. *Indoor Billboard/Washington, Inc. v. Integra Telecom*, 162 Wn.2d 59, 74, 170 P.3d 10 (2007).

Here, Mr. Levitz has not identified a single material fact about which Bishop White misled him. He has not explained how any notice issued by Bishop White could have the capacity to deceive any portion of the public, let alone a substantial portion. The Trustee's reliance on a beneficiary declaration is "a requirement particular to each individual

⁶ Appellant's briefing on the precise issue is unclear. Initially he asserts, "it is not necessary for an act or practice to be a per se violation of the [DOTA] to state a [CPA] claim" and "it is not a requirement that the specific unfair or deceptive act be defined in a statute as a per se violation of a statute for that act or practice to violate the CPA." [Appellant's Brief, pp. 23-24.] But later he asserts, "Respondent BMW engaged in these unfair and deceptive business practices as per se violations of their statutory responsibilities under the [Deed of Trust] Act." As argued in §IV.C, *supra*, Bishop White committed no DOTA violations. Accordingly, any claim of *per se* CPA violation against it fails.

foreclosure. [When] Plaintiffs plead no factual allegations that [the Trustee did not have proof of Note ownership and] this practice extends beyond this particular instance or that it has a capacity to deceive a large portion of the population,” the plaintiff’s CPA claim must be dismissed. *Mickelson, supra*, at *6. Further, Mr. Levitz has not attempted to explain how a cancelled Trustee’s sale has caused him any injury.

Because he failed to carry his burden of rebutting Bishop White’s evidence that it relied on Capital One’s Beneficiary Declarations as it was entitled to, committed no DOTA violations, and engaged in no unlawful or deceptive practices, Mr. Levitz’s CPA claim against the Trustee was correctly dismissed, with prejudice.

E. Having No Contracts with Mr. Levitz, Bishop White was Correctly Awarded Summary Judgment on his Breach of Good Faith and Fair Dealing Covenant Claim.

Mr. Levitz’s brief concerning implied good faith contractual covenant law is generally correct. However, he fails to address a critical condition precedent to application of that law: There must first be a written contract within which to imply the covenant of good faith performance of contractual duties. As noted by the Washington Supreme Court, there is no “free-floating” duty of good faith; rather, the good faith requirement must be tied to performance of a specific contract term. *Keystone Land & Development Co. v. Xerox Corp.*, 152 Wn.2d 171, 177,

94 P.3d 945 (2004) (citing *Badgett v. Sec'y. St. Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991)).

Here, Mr. Levitz fails to address the undisputed facts that he was not a party to the only two written contracts in evidence, the Note and Deed of Trust, nor did he have *any* relationship, contractual or otherwise, with Bishop White. [CP 91, ¶4; CP 99-104; CP 199, ¶¶4-5.] Absent proof of any written contract with Bishop White, Mr. Levitz's breach of the covenant of good faith and fair dealing claim against the Trustee necessarily fails.⁷

F. No Evidence of Fraud being Introduced, Bishop White was Correctly Awarded Summary Judgment.

As with his CPA briefing, Mr. Levitz's analysis of his fraud claim dismissal rests on the mistaken understanding that Bishop White was awarded a CR 12(b)(6) dismissal, rather than a CR 56 summary judgment. [Appellant's Brief, p. 28.] Accordingly, regardless what Mr. Levitz *pleaded*, it is what was *proven* on the summary judgment record that is dispositive. CR 56(e). His briefing fails to cite any evidence in the record to support his arguments of a viable fraud claim against Bishop White.

⁷ Mr. Levitz's briefing concerning RCW 61.24.101(2)'s requirement of recording a Successor Trustee Appointment to effectuate it is puzzling. [Appellant's Brief, pp. 27-28.] There is no dispute that Bishop White's Appointment was recorded on July 1, 2009 [CP 199, ¶3; CP 202-03], well before any Bishop White acts listed in Appellant's timeline of pertinent events [Appellant's Brief, p. 19].

1. No Evidence of a Fraudulent Assignment or Appointment was Introduced.

Initially Mr. Levitz's fraud claim is premised on his "*reason to believe* that the signatures verifying the assignment and appointment *may ... be* fraudulent." [Appellant's Brief, p. 29 (emphasis supplied).] Unfortunately, Mr. Levitz failed to back up his personal beliefs with any evidence, or even suggest what caused him to form such beliefs that the signatories "*may well be* 'robo-signers.'" [*Id.* (emphasis supplied).] Implying that he realizes he needs evidence and has none, Mr. Levitz suggests that he needed to pursue discovery on the issue [*id.*]; however, no CR 56(f) continuance motion was made in the trial court.

Further, the challenged Appointment and Assignment are both notarized. [CP 38; CP 203.] In Washington, a certificate of acknowledgment in due form by a notary public constitutes *prima facie* proof of the document's execution. *Blewett v. Bash*, 22 Wn. 536, 541, 61 P. 770 (1900).

Bishop White also argued on summary judgment that both documents were presumptively authentic and admissible under ER 902(i) and (j), Mr. Levitz offered no controverting evidence besides sheer speculation, and the Court must accept them as proven in the face of his unsupported claims of "robo-signing." [CP 331.] The trial court correctly

awarded summary judgment for Mr. Levitz's failure to create a triable issue of material fact concerning alleged "robo-signing."

Similarly unsupported is Mr. Levitz's claim that because he could not locate USBank-Libor's registration with the Securities and Exchange Commission, that entity has no property interest and is not entitled to foreclose. [Appellant's Brief, pp. 29-30.] There is no citation to any evidence concerning this alleged non-registration, because there is none in the record. In addition, Mr. Levitz provides no legal authority for the proposition that an "unregistered" entity may not hold a Note.

Significantly, even if accurate, the information about USBank-Libor's "non-registration" is not a material factual issue: it was the entity mistakenly named in Capital One's first Beneficiary Declaration [CP 200, ¶6; CP 221, ¶5], which led to Bishop White's first Notice of Default and Trustee's Sale [CP 200, ¶7; CP 223-29], which was later discontinued [CP 24, ¶10; CP 35-36; CP 92, ¶11]. Accordingly, the registration status of that entity is irrelevant to any present or future foreclosure proceedings, as they are not being and will not be conducted in its name.

The undisputed evidence is that the Note was endorsed to U.S. Bank as Trustee,⁸ is held and owned by USBank-Chevy Chase, is in

⁸ As admitted by Mr. Levitz's counsel at oral argument. RP 12, ll. 24-30.

default, and Capital One has authority to foreclose as agent of USBank-Chevy Chase. [CP 87-88; CP 91, ¶4; CP 104.] As that entity has the right to foreclose, summary judgment on Mr. Levitz's fraud claim was correctly awarded.

2. MERS being a Party to the Deed of Trust does Not Support a Fraud Claim.

While perhaps generally accurate concerning the parties' inability to contractually vary DOTA's terms, Mr. Levitz's briefing does not address how the naming of MERS as the beneficiary's nominee in his former spouse's Deed of Trust states a fraud claim against Bishop White. [Appellant's Brief, pp. 30-32.] He argues only that, "[a] party cannot take the actions of a successor trustee until the Appointment of Successor Trustee is recorded with the County and cannot alter this requirement of the statute by claiming that some alleged private agency arrangement allows them to circumvent that requirement." [Appellant's Brief, p. 32.]

Identification of MERS as the beneficiary's nominee in Dr. Levitz's Deed of Trust supports no fraud claim against Bishop White for four reasons. First, the Deed of Trust correctly and accurately identifies MERS as the lender's nominee. [CP 144, §E.] It describes an agency relationship which in fact existed and which is recognized under *Bain* and DOTA. *Bain, supra*, 175 Wn.2d at 107 ("[N]othing in this opinion should be construed to suggest an agent cannot represent the holder of a note.

Washington law, and the deed of trust act itself, approves of the use of agents.”).

Second, Mr. Levitz was and is not a party to the Deed of Trust. [CP 205-19.] Accordingly, no fraudulent representations were made to him in that document.

Third, Bishop White was not a party to the Deed of Trust until it was appointed as Successor Trustee, nearly five years after that contract was entered. [*Compare* date of CP 202-03 to date of CP 205-19.] Accordingly, it did not directly make any of the representations contained within the trust deed; rather, at most, it adopted those representations five years after the other parties had already agreed to them.

Fourth, Bishop White neither attempted to alter Washington’s recording statutes or DOTA, nor did it take any actions as Trustee before its Appointment was recorded. There is no dispute that Bishop White’s Appointment as Successor Trustee was recorded on July 1, 2009 [CP 199, ¶3; CP 202-03], well before any Bishop White acts listed in Appellant’s timeline of pertinent events [Appellant’s Brief, p. 19]. Bishop White never claimed that “some alleged private agency arrangement allows [it] to circumvent [DOTA’s] requirement[s]” [Appellant’s Brief, p. 32], nor did it ever attempt to “circumvent” any DOTA requirement.

The trial court correctly awarded summary judgment dismissing Mr. Levitz's fraud claim against Bishop White, due to his failure to adduce evidence supporting the claim.

VI. CONCLUSION

After the moving party shows the absence of material facts, the summary judgment inquiry shifts to the party with the burden of proof at trial. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the non-moving party then fails to establish the existence of an element essential to that party's case, the moving party is entitled to summary judgment as a matter of law. *Id.*, at 225; *Sun Mountain Productions, Inc. v. Pierre*, 84 Wn. App. 608, 616, 929 P.2d 494 (1997).

Here, Respondent Bishop, White, Marshall & Weibel, P.S. proved its summary judgment motion by uncontroverted, competent, admissible evidence. Both in the trial court and on appeal, Mr. Levitz does not dispute the existence or terms of the Note, Deed of Trust, default, Bishop White's Appointment as Successor Trustee, or the existence of the two Beneficiary Declarations and Bishop White's good faith reliance on them. The circumstances surrounding Mr. Levitz's claims, while unfortunate, do not differ from those of many other litigants, and do not allow him to state claims against the Successor Trustee, a party with whom he had no contractual relationship.

This Court should affirm entry of the trial court's Order Granting Defendant Bishop, White, Marshall & Weibel, P.S.'s Joinder in Motion to for Summary Judgment, dated June 12, 2012, and dismiss this appeal.

RESPECTFULLY SUBMITTED this 29th day of May, 2013.

BISHOP, WHITE, MARSHALL
& WEIBEL, P.S.



David A. Weibel, WSBA #24031
Barbara L. Bollero, WSBA #28906
Attorneys for Respondent Bishop,
White, Marshall & Weibel, P.S.
720 Olive Way, Suite 1201
Seattle, WA 98101-1801

1 APPENDIX ONE

2 **Pre-Bain Ninth Circuit and Washington District Non-Judicial Foreclosure Opinions**

3 **Addressing MERS's Authority to Act as Deed of Trust Beneficiary**

4 1. *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1042 (9th Cir.
5 2011) (“While the plaintiffs’ allegations alone fail to raise a plausible fraud claim, we also
6 note that their claim is undercut by the terms in [their] standard deed of trust, which
7 describe MERS’s role in the home loan. ... In light of the explicit terms of the standard
8 deed [they] signed ..., it does not appear that the plaintiffs were misinformed about
9 MERS’s role in their home loans. Moreover, amendment would be futile. In their
10 proposed Second Amended Complaint, the plaintiffs seek to add further detail concerning
11 how MERS works in general and how it has facilitated the trade in mortgage-backed
12 securities. But none of the new allegations cure the First Amended Complaint’s
13 deficiencies: the plaintiffs have not shown that they received material misrepresentations
14 about MERS that they detrimentally relied upon.”)

15 2. *Buchna v. Bank of Am.*, 2012 WL 2832461, *1 (9th Cir. July 11, 2012)¹
16 (Summarily affirming dismissal of claims against MERS and lender without leave to
17 amend where plaintiffs asserted the note and deed of trust were “split,” and that MERS is
18 not a valid beneficiary.)

19 3. *St. John v. Northwest Trustee Svcs., Inc.*, 2011 WL 4543658 (W.D.Wash.
20 May 23, 2011) (Judge Settle) (“[W]hether or not [plaintiffs’] case presents a question
21 regarding MERS’ beneficiary status that is similar to the issue stayed in *Bain* is irrelevant
22 to whether or not they can obtain a TRO or preliminary injunction. ... [Plaintiffs] have
23

24 _____
25 ¹ Fed. R. App. P. 32.1(a) and Ninth Circuit Rule 36-3 allow citation to unpublished opinions.

1 failed to provide sufficient argument or competent evidence to establish that they are likely
2 to prevail on this issue.”)

3 4. *Salmon v. Bank of Am. Corp.*, 2011 WL 2174554 (E.D.Wash. May 25,
4 2011) (Judge Peterson) (“The Plaintiffs restate the argument ... that the foreclosure cannot
5 proceed because MERS has not proven itself to be the original beneficiary of the First
6 Deed of Trust because it has not produced evidence to show that it is the holder of the First
7 Note. ... [T]he Court finds that with regard to this argument that Plaintiffs do not state a
8 plausible claim for relief.”)

9 5. *Rhodes v. HSBC Bank USA, N.A.*, 2011 WL 3159100 (W.D.Wash. July 26,
10 2011) (Judge Bryan) (“Plaintiff apparently alleges that, by operation of law, MERS could
11 not be a beneficiary under the Deed of Trust. Plaintiff’s claims regarding the role of
12 MERS under the Washington Deed of Trust Act is similar to other claims that have been
13 rejected in past cases brought in this district. ... MERS had the authority to act as a
14 beneficiary under a Deed of Trust where such authority was explicitly granted by plaintiff
15 upon execution of the instrument. In this case, plaintiff specifically agreed to MERS’ role
16 as beneficiary under the Deed of Trust she signed. Her allegations that MERS did not have
17 that authority do not state a claim for relief.”)

18 6. *Dooms v. Cal-Western Reconveyance Corp. of Wash.* 2011 WL 3501723
19 (W.D.Wash. Aug. 10, 2011) (Judge Bryan) (“First, to the extent Plaintiffs argue that
20 MERS acted without ‘authority to appoint Cal–Western’ as trustee, Plaintiffs have not
21 shown they are likely to succeed on the merits of their claim. They offer no authority for
22 their contention. Plaintiffs are merely attempting to state a legal conclusion, without any
23 reasoning to support such a conclusion. This issue has been repeatedly raised and rejected
24 by several courts in this district.”)

1 7. *Dean v. Aurora Bank FSB*, 2011 WL 3812653 (W.D.Wash. Aug. 29, 2011)
2 (Judge Leighton) (“No matter what the [Washington Supreme Court’s] answers [to the
3 certified questions in *Bain*] are, however, they are not going to bolster Plaintiff’s rather
4 novel claim that [the lender] is liable to her for entering into a contract with Plaintiff which
5 named MERS as a beneficiary. That claim has no precedent, and its viability does not
6 depend on the Supreme Court’s answers to the certified questions.”)

7 8. *St. John v. Northwest Trustee Svcs., Inc.*, 2011 WL 4543658 (W.D.Wash.
8 Sept. 29, 2011) (Judge Settle) (“This Court has previously and consistently ruled that,
9 when a plaintiff affixes a deed of trust that he/she signed wherein MERS is named as a
10 beneficiary with the right to transfer such rights, the plaintiff’s arguments that MERS is not
11 a beneficiary under the security instrument are without merit.”)

12 9. *Corales v. Flagstar Bank, FSB*, 2011 WL 4899957 (W.D.Wash. Oct. 14,
13 2011) (Judge Robart) (“Although Plaintiffs’ allegations are somewhat unclear, they appear
14 to be asserting that MERS was not a proper beneficiary under the Deed of Trust and thus
15 could not assign its beneficial interest. This court has repeatedly rejected the argument that
16 MERS is not a proper beneficiary under a Deed of Trust where the plaintiff has executed a
17 deed which expressly acknowledges MERS’s status as a beneficiary. ... Accordingly, the
18 court grants [defendants’ dismissal] motion with regard to this issue.”)

19 10. *Reinke v. Northwest Trustee Services, Inc., et al*, 2011 WL 5079561, *6-8
20 (Bkrcty.W.D.Wash. Oct. 26, 2011) (Judge Overstreet) (“Plaintiff contends that MERS
21 could not be the beneficiary under the deeds of trust at issue here because it never had any
22 interest in the notes. From that, Plaintiff further contends that when MERS assumed its
23 role as the nominee for the beneficiary under the deeds of trust, the deeds of trust were
24 effectively separated from the notes, rendering the notes unsecured. ... This Court

1 concludes that there is nothing inherent in the use of MERS as nominee under a deed of
2 trust which irreparably splits the note from a deed of trust so as to render the note
3 unsecured. ... The Court finds nothing unlawful about MERS' activities in this case.”)

4 11. *Moseley v. Citimortgage, Inc.*, 2011 WL 5175598, *6-7 (W.D.Wash. Oct.
5 31, 2011) (Judge Bryan) (“[Plaintiff] claims that [the lender] is not the real party in interest
6 because it does not hold the Note, that the assignment of the Deed of Trust to MERS was
7 invalid because MERS did not hold a beneficial interest in the Note, and that there was an
8 invalid assignment of the Deed of Trust, including invalid securitization of the Note. ...
9 [Plaintiff’s] claim regarding MERS is without merit because he cannot establish that [the
10 borrowers] were misinformed about the MERS system, relied on any misinformation in
11 entering into the home loan, or were injured as a result of the misinformation.”)

12 12. *Dooms v. Cal-Western Reconveyance Corp. of Wash.* 2011 WL 5592760
13 (W.D.Wash. Nov. 16, 2011) (Judge Bryan) (“[T]hese allegations ... are premised on the
14 notion that MERS did not have the authority to appoint Cal–Western as the successor
15 trustee or assign to Auruora its beneficial interest in the Deed of Trust and Note
16 Plaintiffs offer no authority for their contention that MERS was without authority to take
17 these actions. Plaintiffs are merely attempting to state a legal conclusion, without any
18 reasoning to support such a conclusion. This issue has been repeatedly raised and rejected
19 by several courts in this district.”)

20 13. *Lamb v. Mtg. Elec. Reg. Sys., Inc.*, 2011 WL 5827813 (W.D.Wash. Nov. 18,
21 2011) (Judge Bryan) (“The claims plaintiffs make regarding the role of MERS is (*sic*)
22 similar to other claims that have been rejected in past cases brought in this district. ...
23 [P]laintiffs’ claim regarding MERS is without merit because they cannot establish that they
24 were misinformed about the MERS system, relied on any misinformation in entering into

1 the home loan, or were injured as a result of the misinformation. ... In fact, the provisions
2 in the Deed of Trust, which plaintiffs signed, specifically provided MERS with the rights
3 to foreclose and to sell the property, and to transfer interests under the Deed of Trust.
4 These causes of action fail to state a claim and should be dismissed.”)

5 14. *Hanson v. U.S. Bank, N.A.*, 2011 WL 5864722, *2 (W.D.Wash. Nov. 22,
6 2011) (Judge Leighton) (“Plaintiff has not stated a claim upon which relief may be granted
7 in his current Complaint. Plaintiff’s existing claims are familiar ones about MERS’ right
8 to assign his deed of trust and the overall impropriety of the timing of the assignment of
9 the deed of trust *vis-a-vis* the transfer of the loan. Both of these claims have been
10 repeatedly and correctly rejected.”)

11 15. *Bhatti v. Guild Mtg. Co.*, 2011 WL 6300229, *5 (W.D.Wash. Dec. 16,
12 2011) (Judge Robart) (“The court concurs with the reasoning and conclusions set forth in
13 [other MERS’ opinions]. MERS has the authority to act as a beneficiary under the Deed of
14 Trust where such authority is explicitly granted upon execution of the instrument. In this
15 case, Plaintiffs specifically agreed to MERS’ role as beneficiary under the Deed of Trust
16 they signed. Their allegations that MERS did not have authority do not state a claim for
17 relief.”)

18 16. *McNellis v. Mtg. Elec. Reg. Sys., Inc.*, 2011 WL 6440424, *4 (W.D.Wash.
19 Dec. 21, 2011) (Judge Leighton) (“[Plaintiffs] seek a declaratory judgment that MERS’
20 ‘service as a beneficiary under the subject Deed of Trust has no basis in law or equity.’ ...
21 [T]his Court and the Ninth Circuit have both held that to argue MERS is not a proper
22 beneficiary is insufficient to defeat a Rule 12 motion to dismiss.”)

23 17. *Hernandez v. Response Mtg. Svc., Inc.*, 2011 WL 6884794 (W.D.Wash.
24 Dec. 29, 2011) (Judge Leighton) (“[A]ll of Plaintiff’s claims depend on his allegation that

1 the entire mortgage industry was wrongful in the manner in which MERS was nominated
2 and used, in which the Note was securitized, and in which the Note and Deed of Trust were
3 'separated.' He admits he did not pay as required. ... All claims based on the allegation
4 that the Defendants cannot prove (to his satisfaction) that they are entitled to enforce the
5 Deed of Trust are unavailing. No court has sanctioned his claim that the securitization,
6 separation, or assignment of Notes and Deeds of Trust renders them unenforceable (or that
7 these facts support any other claim).")

8 18. *Williams v. Wells Fargo Bank, N.A.*, 2012 WL 72727, *3 (W.D.Wash. Jan.
9 10, 2012) (Judge Settle) ("Plaintiffs allege ... that the role played by MERS in the deed of
10 trust, which lists MERS as the 'nominee', was improper, and that MERS' assignment of all
11 beneficial interest under the deed of trust to [the defendant] under the Assignment of the
12 Deed of Trust was invalid. ... The Court finds that there is no merit to these arguments.")

13 19. *Treece v. Fieldston Mtg. Corp.*, 2012 WL 123042 (W.D.Wash. Jan. 17,
14 2012) (Judge Bryan) ("To the extent that Plaintiffs appear to base their RESPA claim on
15 the allegation that MERS does not have a beneficial interest in the note, their claim should
16 be dismissed. Plaintiffs offer no authority for their contention that MERS was without
17 authority to make the assignments of which they complain. Plaintiffs are merely
18 attempting to state a legal conclusion, without any reasoning to support such a conclusion.
19 This issue has been repeatedly raised and rejected by several courts in this district.")

20 20. *Szmania v. Bank of Am. Home Loans, Inc.*, 2012 WL 254084 (W.D.Wash.
21 Jan. 26, 2012) (Judge Bryan) ("[Plaintiff] has failed to show that any of the MERS issues
22 before the Washington Supreme Court impact his case. He has not articulated good cause
23 for a modification of the case schedule and his motion to stay should be denied.")

24 21. *Buddle-Vlasyuk v. Bank of New York Mellon, et al*, 2012 WL 254096, *5

1 (W.D.Wash. Jan. 27, 2012) (Judge Leighton) (“Lastly, [plaintiff] objects to MERS’s
2 assignment of the Deed. ... But, [she] identifies no action that MERS took in her
3 regard—it sent no notice of default, recorded no notice of trustee’s sale, and took no other
4 discernible action directly affecting her. In any event, the Ninth Circuit has held that
5 MERS may properly serve as beneficiary.”)

6 22. *Amador v. Central Mtg. Co.*, 2012 WL 405175, *3 (W.D.Wash. Feb. 8,
7 2012) (Judge Pechman) (“While Plaintiffs argue MERS could not have transferred a
8 beneficial interest ... because it was not a beneficiary, the argument fails. As stated in the
9 Deed of Trust, MERS ‘is the beneficiary under this Security Interest.’ Therefore, there is
10 no genuine issue of material fact that Defendants did not take or threaten to take any
11 nonjudicial action to effect dispossession of the property that it did not have a present right
12 to possession.”)

13 23. *Myers v. Mtg. Elec. Reg. Sys., Inc.*, 2012 WL 678148, *3 (W.D.Wash. Feb.
14 24, 2012) (Judge Leighton) (“[Plaintiff] asserts that MERS’s involvement taints the
15 foreclosure process, and thus, Defendants have violated the Deed of Trust Act. Courts
16 routinely reject these claims. First, [the borrower] agreed that MERS would serve as ‘the
17 nominee for Lender and Lender’s successors and assigns.’ ... The Deed of Trust Act
18 states that ‘parties may insert in [a] mortgage any lawful agreement or condition,’
19 including the agreement that MERS serve as an agent. ... Second, [the borrower] fails to
20 allege that MERS took any action in regards to him. He does not allege that MERS
21 initiated or participated in the foreclosure process in any way. The Complaint thus fails to
22 allege facts sufficient to state a claim for relief.”)

23 24. *Fay v. Mtg. Elec. Reg. Sys., Inc.*, 2012 WL 993437 (W.D.Wash. March 22,
24 2012) (Judge Settle) (“The argument that MERS is not a proper beneficiary because MERS

1 only tracks deeds instead of actually holding the deed has been consistently rejected by this
2 Court. ... [Plaintiff] has failed to allege facts or advance an argument that distinguishes
3 his case from these recent cases. In addition, [he] signed a Deed of Trust that specifically
4 states that MERS acts 'as nominee for Lender and Lender's successors and assigns' and
5 that MERS 'has the right: to exercise any or all of those interests [granted by the borrower
6 in the Deed of Trust], including, but not limited to, the right to foreclose and sell the
7 Property; and to take any action required of Lender ...' ... Therefore, the Court concludes
8 that [plaintiff's] claims based on the role of MERS as beneficiary must be denied.")

9 25. *Florez v. Onewest Bank, F.S.B.*, 2012 WL 1118179 (W.D.Wash. April 3,
10 2012) (Judge Coughenour) ("Plaintiffs err in their conclusion as to the status of MERS in
11 this situation. Here, it is undisputed that Plaintiffs signed a Deed of Trust designating
12 MERS as the beneficiary and nominee for the lender. ... This expression of consent is
13 crucial as courts in this District have consistently rejected the argument that MERS is not a
14 proper beneficiary under a Deed of Trust where the plaintiff has executed a deed which
15 expressly acknowledges MERS's status as a beneficiary.")

16 26. *Chan v. Chase Home Loans, Inc.*, 2012 WL 1252649 (W.D.Wash. April 13,
17 2012) (Judge Robart) ("[L]iberally construing Plaintiff's allegations, it appears to the court
18 that he is attempting to assert the argument that MERS is not a proper beneficiary because
19 MERS only tracks deeds instead of actually holding the deed and note. ... This argument
20 has been consistently rejected by this court. ... Plaintiff has failed to allege facts or
21 advance an argument that distinguishes his case from these recent decisions. ...
22 Accordingly, the court dismisses Plaintiff's claim with respect to MERS.")

23 27. *Mickelson v. Chase Home Fin., LLC*, 2012 WL 1301251 (W.D.Wash. April
24 16, 2012) (Judge Pechman) ("Plaintiffs' first claim is misguided as to MERS. Plaintiffs

1 seem to contend that MERS cannot be a beneficiary to the deed of trust because it cannot
2 be the nominee and beneficiary. This argument is flawed. There is no legal reason why
3 MERS cannot be the beneficiary The deed of trust discloses MERS as the nominee
4 and beneficiary and Plaintiffs have not identified any provision of [the Deed of Trust Act]
5 that would preclude MERS from being both nominee and beneficiary. Although certain
6 issues related to MERS's role remain pending before the Washington Supreme Court, the
7 Ninth Circuit has rejected the argument that MERS cannot serve as a nominee on a deed of
8 trust where the lender still holds the note. ... The CPA claim related to MERS cannot
9 proceed.”)

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25 APPENDIX ONE RE PRE-*BAIN* MERS CASES - 9

BISHOP, WHITE, MARSHALL & WEIBEL, P.S.

720 OLIVE WAY, SUITE 1201

SEATTLE, WASHINGTON 98101-1801

206/622-5306 FAX: 206/622-0354

1 4. *Zamzow v. Homestead Residential, Inc.*, 2012 WL 6615931, *1, 12-CV-
2 5755-BHS (W.D.Wash. Dec. 19, 2012) (Court dismissed at least 11 causes of action
3 relating to the plaintiffs' mortgage loan, citing *Bain*, and noting that "it is not a violation in
4 Washington to split the note from the deed [of trust].")

5 5. *Moore v. Fed. Nat'l. Mtg. Assoc.*, 11-CV-1342-RSL, *2, 2012 WL 6059192
6 (W.D.Wash. Dec. 6, 2012) ("Plaintiff objects to the fact that MERS is identified as the
7 'beneficiary' of the deed of trust when it never had possession of the underlying debt
8 instrument. The fact that the parties to the contract called MERS the 'beneficiary' is
9 simply a label: it does not, in and of itself, constitute a promise, give rise to a breach, or
10 cause damage.")

11 6. *Mickelson v. Chase Home Finance LLC*, 11-CV-1445-MJP, *2, 2012 WL
12 6012791 (W.D.Wash. Dec. 3, 2012) ("[T]he DTA approves the use of agents, and
13 Plaintiffs provide no proof or law that shows [the signing employee] could not act as an
14 agent of MERS and separately as an employee for [the Successor Trustee]. [The
15 employee's] actions do not convert [the Successor Trustee] into both beneficiary and
16 trustee.")

17 7. *Buchna v. Bank of Am., N.A., et al*, 478 F.App'x. 425, 425 (9th Cir. 2012)
18 ("The [plaintiffs] argue that the note and deed of trust were split, rendering the non-judicial
19 foreclosure provisions in the deed of trust unenforceable. That argument fails to state a
20 claim because it is based on nothing more than conclusory speculation that the parties
21 exercising power under the deed of trust are not the note holder or agents of the note
22 holder.").

23 8. *Lynott v. Mortgage Elec. Registration Sys., Inc.*, 12-CV-5572-RBL, 2012
24 WL 5995053, *2 (W.D. Wash. Nov. 30, 2012) ("In sum, possession of the note makes U.S.

1 Bank the beneficiary; the assignment merely publicly records that fact. Because U.S. Bank
2 is the proper beneficiary, it is empowered to initiate foreclosure following Plaintiff's
3 default. Plaintiff relies heavily on *Bain* in arguing that MERS's assignment renders U.S.
4 Bank incapable of foreclosing. In *Bain*, the court held that MERS could not act as a
5 beneficiary unless it actually held a borrower's note. ... *Bain* did not, however, create a
6 *per se* cause-of-action based solely on MERS's involvement.")

7 9. *Kullman v. Northwest Trustee Svcs., Inc.*, 12-CV-5852-RBL, 2012 WL
8 5922166, *2 (W.D. Wash. Nov. 26, 2012) ("Plaintiffs' claims fail as a matter of law.
9 Although the Washington State Supreme Court has ruled that MERS cannot serve as
10 beneficiary (unless, of course, it actually holds a promissory note), the court did not rule
11 that MERS's involvement renders a foreclosure *per se* invalid. See *Bain v. Metropolitan*
12 *Mortg. Group, Inc.*, 175 Wash.2d 83, 285 P.3d 34 (2012). Further, Plaintiffs have failed
13 to allege any prejudice arising from MERS's role in the foreclosure. Plaintiffs admit
14 default and seek to generate controversy where none exists.")

15 10. *Mickelson v. Chase Home Finance LLC*, 2012 WL 5377905, *2
16 (W.D.Wash. Oct. 31, 2012) ("*Bain* does not hold that the presence of MERS in a mortgage
17 creates a presumptive CPA claim. In fact, the Supreme Court clearly states that
18 '[d]epending on the facts of a particular case, a borrower may or may not have been
19 injured by the disposition of the note, the servicing contract, or many other things, and
20 MERS may or may not have a causal role.'")

21 11. *Beadles v. Recontrust Co., N.A.*, 2012 WL 4904461, *, 12-CV-00378-JLQ
22 (E.D.Wash, Oct. 15, 2012) ("Contrary to Plaintiff's argument, the Washington Supreme
23 Court did *not* hold that MERS claiming to be the beneficiary was *per se* deceptive. ")

ORIGINAL

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

MICHAEL LEVITZ,

Appellant,

v.

MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.,
CAPITAL ONE, NA, US BANK
NATIONAL ASSOCIATION, as
Trustee for CHEVY CHASE
FUNDING LLC MORTGAGE-
BACKED CERTIFICATES SERIES
2005-1, US BANK, NA as trustee for
CCB LIBOR 2005-1 SERIES TRUST,
DOES 1 through XX inclusive, and
BISHOP WHITE MARSHALL &
WEIBEL, PS,

Respondent.

Case No. 69034-5-I

AFFIDAVIT OF
SERVICE

FILED
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STATE OF WASHINGTON
2013 MAY 30 PM 1:35

COUNTY OF KING)
) ss
STATE OF WASHINGTON)

The undersigned being first duly sworn upon oath, deposes and
says:

That on the 29th day of May, 2013, she caused to be delivered
copies of the following document: Bishop, White, Marshall & Weibel,
P.S.'s Response Brief, to the following parties in the manner indicated:

Via U. S. Mail

Jill J. Smith
Natural Resource Law Group, PLLC
2217 NW Market Street, Suite 27
P. O. Box 17741
Seattle, WA 98127-1300

Via U. S. Mail

John A. Knox
Williams, Kastner & Gibbs, PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380

Dated this 29th day of May, 2013.



Barbara L. Bollero, WSBA# 28906
Attorneys for Respondent
720 Olive Way, Suite 1201
Seattle, Washington 98101
(206) 622-5306, Ext. 5918

SIGNED AND SWORN TO (or affirmed) before me on the 29th day of
May, 2013.



ANA I. TODAKONZIE
Notary Public in and for the
State of Washington.
Residing in Seattle, Washington.
My appointment expires: 2/28/2015.