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

No. 70062-6

MELANIE S. KELLER, an unmarried woman,

Appellant,

vs.

PROVIDENT FUNDING ASSOCIATES, L.P., a
California Corporation; REGIONAL TRUSTEE SERVICES
CORPORATION, a Washington Corporation; ROBINSON TAIT, P.S., a
Seattle Law Firm; MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC. (MERS), a Virginia Corporation; NICOLAS DALUIO,
a Robinson Tait Attorney and Resident of the State of Washington; and
JOESPH TAMI, a Resident of the State of Pennsylvania
Respondents,

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

A. **THIS COURT MUST STRICTLY CONSTRUE THE WASHINGTON DEED OF TRUST ACT (WDTA) IN APPELLANT’S FAVOR AND LENDERS MUST STRICTLY COMPLY WITH THE WDTA.**

Because the act [WDTA] dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures, lenders must strictly comply with the statutes and courts must strictly construe the statutes in the borrower’s favor.” *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 111-12, 752 P.2d 385 (1988).

Albice v. Dickinson, No. 85260-0 at p. 7.

B. **ESSENTIALLY, PROVIDENT CLAIMS IT IS THE “BENEFICIARY” OF THE DEED OF TRUST (DOT) BECAUSE IT “POSSESSES” THE NOTE.**

In its brief, Provident asserts the following:

Here, Freddie Mac is the owner of the instrument, the Note, which is endorsed in blank, thus becoming bearer paper, and Provident is the “holder of the instrument” having “possession of the instrument.” CP 4: 1-3; 4: 16-18. The *Bain* court’s discussion and findings substantiates the correctness of this UCC analysis. *Bain*, 175 Wn.2d at 104; 285 P.3d at 44. Specifically, the *Bain* Court agreed that the interpretation of the WDTA should be guided by these UCC definitions, and thus held that a beneficiary must either actually possess the promissory note or be the payee. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 104, 285 P.3d 34, 44 (2012). The *Bain Court* further observed that this approach accords with the way the term “holder” is used across the deed of trust act and the Washington UCC. *Id.* Because the undisputed facts establish that Provident held the subject Note at the time of foreclosure, there is no merit to Borrower’s claims.

Respondent's Brief at p. 12.

Provident's claim that it is the "beneficiary" is based on a simple, five-step progression: (1) Provident has "physical custody" of the promissory note that I executed on October 9, 2007 (Note), which is secured by a DOT of the same date; (2) "physical custody" of the Note equals "possession" of the Note; (3) pursuant to RCW 62A.1-201(21), Provident is the "holder" of the Note because the Note is blank endorsed and ¹Provident "possesses" it; (4) pursuant to RCW 61.24.005(2), Provident is the "beneficiary" of the DOT because it is the "holder" of the Note; and (5) as an RCW 61.24.005(2) "beneficiary," Provident is entitled to utilize the WDTA to foreclose non-judicially.

As is clear from even a cursory examination of the five-step progression, Provident's claim that it is a RCW 61.24.005(2) "beneficiary" is premised, entirely, on the foundational claim that Provident "possesses" the Note because it maintains "physical custody" of the Note. Consequently, if this foundational claim is proven to be untrue, the entire progression collapses.

This claim that Provident "possesses" the Note because it maintains "physical custody" of the Note is fatally flawed. RCW 62A.9A.-

¹ Solely for the purpose of this appeal, Appellant stipulates that Respondent has "physical custody" of the Note.

313(h) establishes, beyond a reasonable doubt, that Provident has never “possessed” the Note since it sold the Note to the Federal Home Loan Mortgage Corporation (Freddie Mac) on October 24, 2007.

C. PROVIDENT HAS NEVER “POSSESSED” THE NOTE SINCE OCTOBER 24, 2007.

1. Given the facts of this case, RCW 62A.9A.-313(h) determines who has had possession of the Note since October 24, 2007.

Under the facts of this case, RCW 62A.9A.-313(h) and the law of agency prove, beyond a reasonable doubt, that Provident never has “possessed” the Note since it sold the Note to Freddie Mac on October 24, 2007.

RCW 62A.9A.-313(h) reads as follows:

(h) Secured party's delivery to person other than debtor. A “secured party” having “possession” of “collateral” does not relinquish possession by delivering the collateral to a person other than the “debtor” or a lessee of the collateral from the debtor in the ordinary course of the debtor's business if the person was instructed before the delivery or is instructed contemporaneously with the delivery:

(1) To hold possession of the collateral for the secured party's benefit; or

(2) To redeliver the collateral to the secured party.

(Quotation marks added.)

It is impossible to understand the meaning of RCW 62A.9A.-313(h) without defining the terms of art that are key parts of the statutory provision. Several words utilized in the Uniform Commercial Code

(UCC)’s definitions of the terms of art contained in RCW 62A.9A.-313(h) also require definition. After all the relevant terms of art have been defined, making the meaning of RCW 62A.9A.-313(h) clear, and the clear meaning of RCW 62A.9A.-313(h) has been applied to the facts in this case, the fact that Freddie Mac, not Provident, has been in “possession” of the Note since October 24, 2007 will have been too clearly established to ignore.²

2. Definition of terms of art contained in RCW 62A.9A.-313(h) and relationship of those terms to the facts in this case.

a. “Secured party” is one of the key terms in RCW 62A.9A.-313(h). In relevant part, RCW 62A.9A.-102(72)(D) defines “secured party” as “a person to which . . . [a] promissory note [has] been sold.”

Freddie Mac bought the Note from Provident on October 24, 2007. The parties to this appeal agree that Freddie Mac has owned the Note, uninterrupted, since that date. For purposes of this litigation, therefore, Freddie Mac is the “secured party.”

² Article 9A---Washington’s version of Article 9 of the UCC---does not apply to a transaction that creates a real property mortgage. (*Official Comment to § 9-109(7), Example 1*: O borrows \$10,000 from M and secures its repayment obligation, evidenced by a promissory note, by granting to M a mortgage on O’s land. This Article does not apply to the creation of the real-property mortgage.).

b. The word “Debtor,” as that word relates to the facts in this case, is defined in RCW 62A.9A.-102(28)(A) as “A person having an interest, other than a security interest or other lien, in the Note, whether or not the person is an obligor.” Under this definition, I am the debtor.

c. Provident is someone other than the debtor (i.e., me), or a lessee of the Note from me in the ordinary course of my business.

d. “Collateral” is defined in RCW 62A.9A.-102(12) and means the property subject to a “security interest,” including promissory notes. My Note is subject to Freddie Mac’s security interest and is therefore the “collateral” in this case.

e. “Security Interest” is defined in RCW 62A.1-201(35) as “any interest of a . . . buyer of . . . a promissory note in a transaction that is subject to Article 9A of this title.”³

3. Consistent with RCW 62A.9A.-313(h), since October 24, 2007, uninterrupted, Freddie Mac, not Provident, has been the “holder” of the Note and “beneficiary” of the DOT. Provident, therefore, was not entitled to utilize the WDTA to foreclose.

³ Provident’s origination of the loan was not subject to Article 9A. *See Fn. 2.* However, Article 9A does apply to every subsequent transfer of an interest in the Note and DOT. Consequently, whether Provident took “possession” of the Note, and whether Provident received an enforceable security interest in the Note and DOT, when Freddie Mac granted “physical custody” of the Note to Provident is governed by Article 9A.

Under RCW 62A.9A.-313(h), a secured party in possession of collateral “*does not relinquish possession*” of the collateral by delivering it to a person other than the debtor, or a lessee of the collateral from the debtor in the ordinary course of the debtor’s business, if, prior to delivering the collateral or contemporaneously therewith, the person to whom the collateral is delivered is instructed to: (1) hold the collateral strictly for the secured party’s benefit; *or* (2) return the collateral to the secured party.

- a. Stating the clear meaning of RCW 62A.9A.-313(h) after replacing the terms of art contained in the provision with the names of the appropriate persons and financial documents in this case to which the replaced terms of art refer.**

After the names of the appropriate people and financial documents are inserted in place of the terms of art in RCW 62A.9A.-313(h), RCW 62A.9A.-313(h) reads as following: Freddie Mac did not relinquish possession of the Note by delivering it to Provident if, prior to delivering the Note or contemporaneously therewith, Provident was instructed by Freddie Mac to: (1) hold the Note strictly for Freddie Mac’s benefit; *or* (2) return the Note to Freddie Mac.

- b. Provident was instructed by Freddie Mac to: (1) hold the Note strictly for Freddie Mac’s benefit; and (2) return the Note to Freddie Mac when the**

**Note was no longer needed. As a result,
Provident is not in “possession” of the Note.**

Provident was required to fill out and execute Freddie Mac Form 1036 before obtaining custody of the Note.⁴ An unexecuted copy of Freddie Mac Form 1036 is attached hereto as Exhibit 1 and is incorporated herein by this reference.⁵

In relevant part, Form 1036 reads as follows:

All documents released to the Seller/Servicer shall be held in trust by the Seller/Servicer *for the benefit of Freddie Mac*, and the Seller/Servicer’s possession of such documents shall be solely for the purpose indicated below. *The Seller/Servicer shall promptly return the documents to the Custodian when the Seller/Servicer’s need therefore no longer exists*, except where the Mortgage is paid in full or otherwise disposed of in accordance with Freddie Mac’s *Single-Family Seller/Servicer Guide*.

(Italics added.)

Provident was required by Freddie Mac to fill out and execute Form 1036 *before* Freddie Mac authorized its Document Custodian to release the Note to Provident. As the Court can read, the first paragraph of Form 1036 requires Provident to hold the original Note in trust for Freddie Mac’s benefit *and* to promptly return the Note to Freddie Mac’s Document Custodian when Provident’s need for the Note no longer exists.

⁴ Freddie Mac Seller/Service Guide, § 66.20, ¶ 1 – “If the original Note is needed to perform the foreclosure, the Servicer must request the Note from the Document Custodian holding the Note by submitting to the Document Custodian a completed Form 1036, Request for Release of Documents, or an electronic or system-generated version of the form[.]”

⁵ I had not utilized discovery to obtain an executed copy of Freddie Mac Form 1036 from Provident before the trial court granted summary judgment.

Pursuant to RCW 62A.9A.-313(h), if, prior to receiving custody of a Note from a secured party or simultaneously therewith, a person states either (1) that it will hold the Note for the secured party's benefit, *or* (2) that it will return the Note to the secured party, then the secured party does not relinquish possession of the Note when the secured party grants physical custody of the Note to the person.

In Form 1036, Provident agreed both that it would hold the Note for Freddie Mac's benefit *and* that it would return the note to Freddie Mac when Provident's need for the Note no longer existed. Consequently, Freddie Mac *never relinquished possession* of the Note, and Provident *never obtained possession* of the Note, even though Provident obtained *physical custody* of the Note. Provident's claim, therefore, that it is in "possession" of the Note is meritless.

c. Provident's five-step argument fails because it does not "possess" the Note.

Provident never has had "possession" of the Note because, prior to receiving custody of the Note, it promised to: (1) hold the Note for Freddie Mac's benefit; and (2) return the Note to Freddie Mac. By making those dual promises, Provident satisfied both requirements in RCW 62A.9A.-313(h) for determining when a secured party does not relinquish possession of a promissory note upon delivering custody of the Note to a

third party. RCW 62A.9A.-313(h) requires either one of the requirements to be satisfied, not both.

Provident never has been the “holder” of the Note because it never has had “possession” of the Note. Provident never has been the “beneficiary” of the deed of trust because it never has been the “holder” of the Note. And, since its claim that it is entitled to utilize the WDTA to foreclose rests, completely, on the antecedent claim that it is the “beneficiary” of the DOT, Provident is not entitled to utilize the WDTA to foreclose.

D. PURSUANT TO THE REQUIREMENTS OF RCW 62A.1-201(35), NO SECURITY INTEREST WAS CREATED IN FAVOR OF PROVIDENT WHEN PROVIDENT OBTAINED CUSTODY OF THE NOTE.

RCW 62A.1-201(35) determines whether a security interest was created in favor of Provident when Provident obtained custody of the Note. For a security interest to have been created, Provident would have had to accept the Note as security for a different obligation, or purchase the Note. They did neither.

By admitting Freddie Mac owns the Note, Provident simultaneously has admitted that it did not obtain the Note from Freddie Mac by purchase. Consequently, the section of RCW 62A.1-201(35) that

authorizes creation of a security interest by purchase does not apply to Provident. Additionally, Provident never has claimed that it accepted the Note from Freddie Mac as security for a different obligation. Accordingly, the portion of RCW 62A.1-201(35) that authorizes creation of a security interest by acceptance of an interest in a promissory note as security for different obligation does not apply.

These are the only two ways to create an Article 9A security interest. As a result, Provident has no security interest in the Note. And if it has no interest in the Note, it cannot have any interest in the DOT.⁶ The idea, therefore, that Provident is the “beneficiary” of the DOT is ludicrous.

E. EVEN IF, BY SOME PREVIOUSLY UNKNOWN METHOD, A SECURITY INTEREST HAD BEEN CREATED IN PROVIDENT’S FAVOR WHEN PROVIDENT OBTAINED CUSTODY OF THE NOTE, PROVIDENT STILL WOULD NOT HAVE BEEN ENTITLED TO UTILIZE THE WDTA TO FORECLOSE.

RCW 62A.9A.-203(a) and (b), in relevant part, reads as follows:

a) **Attachment.** A security interest *attaches* to collateral *when it becomes enforceable* against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

(b) **Enforceability.** Except as otherwise provided in subsections (c) through (i) of this section, a

⁶ “Finally, it is implicit from subsection (b) that one cannot obtain a security interest in a lien, such as a mortgage on real property, that is not also coupled with an equally effective security interest in the secured obligation.” *Official Comment to § 9-109(7), Example 1, ¶ 2.*

security interest is enforceable against the debtor and third parties with respect to the collateral *only if*:

(1) Value has been given[.]

(Italics added).

RCW 62A.9A.-203(a) and (b) is the Article 9A provision that determines whether a security interest attached to my Note and the DOT incident to it when Provident obtained custody of the Note from Freddie Mac; and, if a security interest did attach, when that security interest attached.

9A.-203(a) clearly states that a security interest “attaches” to collateral when it becomes *enforceable* against the debtor with respect to the collateral. Subsection (b), inter alia, states the security interest becomes *enforceable* only if “value” is given for the collateral.

Provident did not give “value” for the Note.⁷ It merely filled out Freddie Mac Form 1036 and delivered the executed form to Freddie Mac’s Document Custodian to obtain temporary “physical custody” of the Note. As a result, even if Provident had had a security interest, that security interest would not have attached to the Note. And if the security interest

⁷ Please notice that under Article 9A, there are only two ways a security interest can be created in a secured promissory note and in the security interest that attends that promissory note: (1) the note can be used as security for payment or performance of another obligation; or (2) the Note can be purchased in a transaction that is subject to Article 9A. In both cases, “value” is given for the interest in the note., whether the interest is a “security interest” as that concept is commonly understood, or an “ownership” interest. In other words, whether one is creating a “security interest” under RCW 62A.1-201(35) or attaching a pre-existing security interest to collateral under RCW 62A.9A.-203, value must be given. Provident gave no value to obtain custody of the Note.

did not attach to the Note, the security interest did not attach to the DOT.

See fn. 6.

Provident is not the “beneficiary” of the DOT and therefore is not entitled to utilize the WDTA to foreclose.

F. IF PROVIDENT’S CLAIM THAT ALL NOTE HOLDERS ARE BENEFICIARIES UNDER THE WDTA AND ARE ENTITLED TO UTILIZE THE WDTA TO FORECLOSE ON DEFAULTING BORROWERS IS CORRECT, THEN THIEVES AND OTHERS WHO BECOME NOTE HOLDERS BY ILLEGAL MEANS ARE LEGALLY ENTITLED TO UTILIZE THE WDTA TO FORECLOSE ON DEFAULTING BORROWERS.

Article 3 provides that one can be the “holder” of a note without being the “owner” of the note. *RCW 62A.3-301*. Additionally, the Official Comments to the UCC clearly state that thieves and others who obtain notes by illegal means are note holders, even though they do not own the notes they hold. *RCW 62A.3-203, Official Comment 1; and RCW 62A.3-201, Official Comment 1.*

If Provident’s claim that it is the beneficiary because it is a note holder is upheld, the ruling will mean that all “holders” of notes that are secured by deeds of trust---including those who have obtained the notes by illegal means--- are entitled to utilize the WDTA to foreclose if the borrower defaults. I am sure it would surprise every members of the Washington Legislature to find out they voted for enactment of a statute

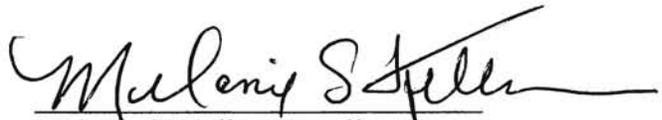
that authorizes thieves to foreclose on defaulting borrowers to obtain the economic value of notes they stole.

II. CONCLUSION

The trial court's summary judgment order should be overturned, either my home or its economic value should be returned to me, and this case should be returned to the trial court with instructions to the trial court to enter an order not inconsistent with this Court's ruling.

DATED this 30th day of August, 2013.

By: Melanie S. Keller

A handwritten signature in black ink that reads "Melanie S. Keller". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Melanie S. Keller, Appellant Pro se
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EXHIBIT 1

Request for Release of Documents

TO: Name of Custodian ("Custodian")		Custodial Agreement number	
Address			
<p>In connection with the administration of the Mortgages you hold in custody for Freddie Mac, the undersigned Seller/Service requests the release of the Mortgage documents described below in accordance with Section 2(c) of the Custodial Agreement entered into between the Seller/Service, the Custodian (identified as Freddie Mac Custodian no. _____), and Freddie Mac, and for the reason indicated below. All documents released to the Seller/Service shall be held in trust by the Seller/Service for the benefit of Freddie Mac, and the Seller/Service's possession of such documents shall be solely for the purpose indicated below. The Seller/Service shall promptly return the documents to the Custodian when the Seller/Service's need therefore no longer exists, except where the Mortgage is paid in full or otherwise disposed of in accordance with Freddie Mac's <i>Single-Family Seller/Service Guide</i>.</p>			
Freddie Mac Loan Number		Seller/Service Loan Number	
Borrower's last name		Property address (number, street, city, state)	
Note Date		Documents requested for release	
		Note	Modifying instrument (description)
		Assignment	Entire File
Reason for requesting documents			
Maturity	Foreclosure	Modification	Recordation of Assignment
Prepayment	Substitution	Conversion	Other (must explain)
Repurchase	Assumption	New York CEMA	
Seller/Service name		Seller/Service number	
Authorized signature of Seller/Service		Date	Phone:
Name (typed or printed)		Title	E-mail address:
To Custodian: You must retain this form for your file in accordance with the terms of the Custodial Agreement.			
Authorized signature of Custodian		Date of release	
Name (typed or printed)		Title	
Reason given by Seller/Service for return to custody (foreclosure discontinued, assumption completed, modification completed, etc.)			
Attach copy of supporting document (assumption agreement, etc.)			
Authorized signature of Custodian (acknowledging receipt of returned document)		Date document returned to custody	
Name (typed or printed)		Title	

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on this date I served the foregoing document (Appellant's Reply Brief plus Exhibit 1) upon the following attorney:

Nicolas A. Daluiso
Attorney at Law
710 2nd Ave. Ste. 710
Seattle, WA 98104-1724

by hand delivering a copy of Appellant's Reply Brief plus Exhibit 1 to the above address and by emailing a copy of the Reply plus Exhibit 1 to Mr. Daluiso at ndaluiso@robinsontait.com. Mr. Daluiso is the attorney for all of the Respondents.

Signed this 30th day of August, 2013 in Seattle, WA by

A handwritten signature in black ink, appearing to read "Nicolas A. Daluiso", is written over a horizontal line.