

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

NO. 75020-8-1

CONCEPCION HERMOSILLO, a single woman,

Appellant,

vs.

QUALITY LOAN SERVICE CORP. OF WASHINGTON, a
Washington Corporation; ERNST, INC.; MORTGAGE
REGISTRATION SYSTEMS, INC., a Delaware Corporation; NEW
YORK COMMUNITY BANK; a New York company; and JOHN
DOES 1-10

Respondents.

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COURT OF APPEALS
DIVISION I
SEATTLE, WA

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

APPELLANT HERMOSILLO'S OPENING BRIEF

JAMES A. WEXLER
WSBA # 7411
Attorney for Appellant
2025 201st Ave. SE
Sammamish, WA 98075
(206) 849-9455; wex(at)seanet.com

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- (1) RCW 61.24.030
- (2) RCW 61.24.031
- (3) RCW 61.24.040

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- (1) RCW 62A.3-310 1

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- (2) RCW 62A.9A-203 1, 2, 12, 13, 14, 15, 16, 17

RCW CHAPTER 64.04

- (1) RCW 64.04.010 5, 6, 20, 21
- (2) RCW 64.04.020 5, 6, 21, 22

CASE LAW

- 1. *Albice v. Premier Mortgage Services of Washington, Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012).....
- 2. *Anderson Buick Co. v. Cook*, 7 Wn.2d 632 (1941);
- 3. *Bain v. Metropolitan Mortgage Grp.*, 175 Wn.2d 83 (2012)
- 4. *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W. 3rd 619, 623 (Mo. Ct. App. 2009)
- 5. *Brower v. State of Washington*, 137 Wn.2d 44 (1998)
- 6. *Brown v. Washington Dept. of Commerce*, 184 Wn.2d 509 (2015)

7. *City of St. Paul v. Butler*, 30 Minn. 459 (1883).
8. *Gilmore v. Westerman*, 13 Wash. 390 (1896)
9. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778 (1986)
10. *Keeting v. Public Utilities Dist. No. 1*, 49 Wn.2d. 761, 306 Pac. 2d. 762 (1957)
11. *Kelly v. Upshaw*, 39 Cal.2nd 179 (1952)
12. *Md. Casualty Company v. Philbrick & Nicholson*, 147 Wash. 277 (1928)
13. *Oregon v. Corvallis Sand and Gravel Co.*, 429 U.S. 363 (1977)
14. *Peters v. St. Louis & I.M.T. Co.*, 24 Mo. 586 (1857);
15. *Saxon Mort. Serv., Inc. No. C-08-4357 EMC*, 2008 WL 5170180 (N.D. Cal. Dec. 9, 2008)
16. *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94 (2013).
17. *Sepp v. McCann*, 47 Minn. 364 (1891);

MISCELLANEOUS AUTHORITY

1. Report of the Permanent Editorial Board for the Uniform Commercial Code, *Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes* (Neil B. Cohen, Et al eds. 2011)
2. American Securitization Form, ASF White Paper Series, *Transfer and Assignment of Residential Mortgage Loans in the Secondary Mortgage Market*, at 23-24 (2010).
3. Washington State Constitution. Article II, Section 1

I INTRODUCTION

Defendant-Respondent New York Community Bank (“Defendant 1”) claims it is entitled to foreclose because it is the *holder* of Plaintiff’s note (“Note”) and deed of trust (“DOT”), citing *Bain v. Metropolitan Mortgage Grp., Inc.* as support for this claim. *CP*, at 149: 4 -6. Defendant 1 alleges its position is supported by the common law *security follows the note* doctrine. *Id.*, at 143: 1 - 7. As a result, asserts Defendant 1, Plaintiff-Appellant Hermosillo (“Plaintiff”) cannot establish its CPA claim because there has been no deceptive act (the first element of a CPA claim), no public impact, and no “but for” causation. *Id.*, 150: 11 – 15.

If, under Washington law, because of the *security follows the note* doctrine, the holder of a secured mortgage note, regardless of ownership of the note, was automatically entitled to enforce the DOT, as Defendant 1 claims and *Brown v. Dept. of Commerce*, 184 Wn.2d 509 (2015) holds, then Defendant 1 would be correct regarding Plaintiff’s CPA claim, and the trial court decision would deserve to be affirmed.¹ However, the *security follows the note* doctrine, interpreted consonant with the requirements of RCW 62A.9A-203, RCW 62A.3-310 (by analogy), and the DOT itself, requires Defendant-Respondent to be both the *holder and owner* of the secured note to be entitled to enforce the DOT that secures it.

¹ Plaintiff’s other CPA-related claims would be unaffected.

RCW 62A.9A-203 is the codification of the centuries-old *security follows the note* doctrine. *Official Comment 9 to UCC § 9-203*. Under Article II, § 1, within constitutional limits, the Washington Legislature has *plenary* authority to enact the laws of the State of Washington. *Brower v. State of Washington*, 137 Wn.2d 44, 54 (1998). Moreover, it is unconstitutional for the legislature to transfer its legislative function to others, including the Washington Supreme Court. *See Keeting v. Public Utilities Dist. No. 1*, 49 Wn.2d 761, 767, 306 Pac. 2d 762 (1957). RCW 62A.9A-203 has never been constitutionally challenged, let alone ruled unconstitutional.

The Washington Supreme Court's decision in *Brown* directly and unavoidably conflicts with the meaning of RCW 62A.9A-203. As such, the *Brown* decision, as is demonstrated below, unconstitutionally encroaches on the legislature's *plenary authority* to enact the laws of the State of Washington. Therefore, if the court upholds *Brown*, the court will be in violation of its obligation to uphold the laws of the State of Washington as enacted by the Washington Legislature.

Because Defendant 1, as the purported holder of the Note,² was not entitled to foreclose, each of the actions taken by Defendant 1 and Quality Loan Services of Washington ("Defendant 2") in the foreclosure

² If it was the holder of the Note, which Plaintiff does not concede.

proceeding that is the subject of this litigation were taken without legal authorization and were therefore unfair and deceptive acts or practices.

II ASSIGNMENTS OF ERROR

1. The trial court erred in granting Defendant 1's Motion for Summary Judgment.

2. Trial court erred in Granting Defendant 2's Motion for Summary Judgment.

A. Issues Pertaining to Assignments of Error

1. Does Common Law *Security follows Note* doctrine mean Right to Enforce DOT follows transfer of Ownership of Note?

2. Does Holding in *Brown* unconstitutionally encroach on Washington Legislature's plenary authority to enact Washington Laws?

3. Under Washington Real Property Law, May Owner and Holder of Secured Note Enforce DOT in Absence of Lawful Assignment of DOT?

4. Does Foreclosure Procedure utilized by Defendants Violate RCW Chapter 61.24 and, if it does, is the Procedure therefore Unfair and Deceptive?

III STATEMENT OF THE CASE

On August 5, 2005, Plaintiff executed the Note and DOT as part of the process of completing the acceptance of a home loan offered by Ernst, Inc. (“EI”). The DOT listed Fidelity National Title Company of Washington as Trustee, MERS as beneficiary as nominee for EI, and EI as Lender. The DOT was recorded in the Snohomish County Auditor’s Office under Recording Number 200508100286 on August 10, 2005.

A. The Loan Modification Agreement.

On March 1, 2012, more than 6 years after entering the original loan agreement, Plaintiff allegedly entered into a loan modification agreement (“LMA”) with Defendant 1. The LMA sought to amend the Note, DOT, and Timely Payment Rewards Rider (“TPRR”) in the following ways: (a) transfer “Lender” (i.e., owner) of the Note, DOT, and TPRR status from EI to Defendant 1; (b) obtain Plaintiff’s acknowledgement that Defendant 1, not EI, was the “*holder and owner*” of the Note from and after March 1, 2012; (c) obtain Plaintiff’s acknowledgement (1) that, on and after March 1, 2012, Defendant 1 alone -- not EI -- was authorized to transfer the Note, and (2) that anyone who took the Note by transfer and who became entitled to receive payments under the Note would become the “Lender” under the terms of the LMA; and (d) make Defendant 1 the holder and *owner* of the lien (i.e., the DOT) that secured the Note.

The LMA was signed by MERS in its individual capacity, not as a nominee for EI, and MERS' signature, unlike the signatures of both Plaintiff and Defendant 1, *was not acknowledged*.

As of March 1, 2012, ownership of the Note apparently moved from EI to Defendant 1, but ownership of the DOT did not because EI did not execute a "deed" transferring the beneficial interest in the DOT from itself to Defendant 1.

RCW 64.04.010 requires *all* transfers of interests in real property to be accomplished by *deed*. RCW 64.04.020 establishes the 3 requirements for a valid *deed*. A deed must be (1) in writing, (2) signed by the party to be bound thereby, and (3) acknowledged by the party to be bound thereby before a person authorized by statute to take acknowledgements. The LMA could not serve as a "deed" because neither MERS nor EI's signature on the LMA is acknowledged,³ a violation of the third requirement of RCW 64.04.020.

In Washington, as in every other state in the Union, non-UCC, state property laws control the creation of *all* interests -- including security interests -- in real property. *See, e.g., Oregon v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 378-79 (1977); *See also*, Report of the Permanent Editorial Board for the Uniform Commercial Code, *Application of the*

³ EI, as the party that owned the beneficial interest in the DOT (i.e., was the "beneficiary of the DOT) up to March 1, 2012, is the party that had to acknowledge the LMA for the LMA to arguably be considered a "deed."

Uniform Commercial Code to Selected Issues Relating to Mortgage Notes at 12, fn. 43 (Neil B. Cohen, Et al eds. 2011), and American Securitization Form, ASF White Paper Series, *Transfer and Assignment of Residential Mortgage Loans in the Secondary Mortgage Market*, at 23-24 (2010).

RCW 64.04.010 commands that if the *security* for a note is an *interest in real property*, the “security follows the note” *only after* the transferor issues a *deed* to the transferee. To be a deed, the document must meet the requirements of RCW 64.04.020;⁴ otherwise, the security remains with the transferor of the note after the note is transferred. That is, in the absence of an assignment of the DOT, the note and the security for the note become separated.

On March 16, 2012, fifteen days after the LMA had been executed, allegedly making Defendant 1 the owner of the Note, E1 re-filed the original DOT. By re-filing the DOT, which named E1 the beneficiary of

⁴ Plaintiff wishes to make clear that Plaintiff is not indicating the assignment of a DOT must be *recorded*. In Washington, the law does not require a transferee to *record* an assignment of a DOT. However, the law does require a transferee of a DOT to obtain an assignment of that DOT, whether or not that assignment is ultimately recorded.

Defendants will claim assignments are recorded only because recording the DOT gives public notice of the change in ownership of the note a DOT secures. That explanation is a red herring. While the need for public notice might explain the reason for *recording* an assignment, the need for public notice does not explain the reason for *executing* an assignment of DOT in the first place.

Public notice of a change of ownership could be accomplished by the expedient of a written notice simply stating the interest has changed hands. No need for the formal conveyance language, the execution and acknowledgement of the transfer by the transferor, or the acceptance of the acknowledgement by a person authorized by law to accept acknowledgements if preparation of the assignment of the DOT was simply intended to notify the world that ownership of the note and DOT had changed hands. It is not an accident that the language contained in a standard DOT meets the requirements for a *deed* contained in RCW 64.04.020. A standard assignment reads the way it does because it is designed to meet the requirements of RCW 64.04.020, whether or not the assignment is ultimately *recorded*.

the DOT, EI was unambiguously asserting that it had not already assigned the DOT to Defendant 1. On and after March 1, 2012, the date upon which Defendant 1 entered into the LMA, the Note purportedly belonged to Defendant 1, but the beneficial interest in the DOT continued to belong to EI.

On September 28, 2012, almost seven months after Defendant 1 entered into the LMA, MERS, acting as nominee for EI, for the first time attempted to assign the beneficial interest in the DOT to NYCB (“Attempted Assignment”). The Attempted Assignment was: (1) in writing; (2) signed by MERS, acting on behalf of EI, the party purportedly to be bound thereby; and (3) acknowledged by a notary public. Hence, the Attempted Assignment technically met the requirements for a *deed*. By September 28, 2012, however, EI had not owned any interest in the Note for almost seven months. Plaintiff’s note allegedly had been sold to Defendant 1 on March 1, 2012. Moreover, MERS also owned no interest in the Note or DOT on September 28, 2012.

Transfer of the lien interest in a DOT in the absence of a simultaneous transfer of ownership of the Note the DOT secures is a nullity. *Anderson Buick Co. v. Cook*, 7 Wn.2d 632, 642 (1941); *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W. 3rd 619, 623 (Mo. Ct. App. 2009) (An assignment of the deed of trust separate from the note has no force); *Saxon Mort. Serv., Inc. No. C-08-4357 EMC*, 2008 WL 5170180, at *4-5 (N.D. Cal. Dec. 9, 2008) (“For there to be valid assignment, there must be

more than just assignment of the deed [of trust] alone; the note must also be assigned”); *Kelly v. Upshaw*, 39 Cal.2nd 179, 192 (1952) (“In any event, Kelly’s purported assignment of the mortgage without an assignment of the debt which is secured was a nullity.”).

B. Mandatory foreclosure procedure under the DTA.

In Washington, under the DTA, there is a single, 4-step procedure for non-judicially foreclosing *owner-occupied residential real property*.⁵ With two exceptions, neither of which apply in this case, the DTA provides no other procedure for conducting a non-judicial foreclosure. If a sale is not conducted according to the 4-step procedure provided in the DTA, it is not a lawful non-judicial foreclosure.

The steps of the procedure must be taken in the specific order, and adhering to the minimum timelines, set out in (a) through (d):

(a) RCW 61.24.031(1)(a), (b), and 61.24.031(5), considered together, require a trustee, beneficiary, or authorized agent to contact the borrower by letter at least 30 days before issuing a NOD. Under the DTA, following enactment of the Foreclosure Fairness Act in 2011, the pre-foreclosure letter is the mandatory first step in the non-judicial foreclosure process, even though technically it is a pre-foreclosure step;

⁵ For *non-owner-occupied* residential real property, the pre-foreclosure letter is not required to be sent. *RCW 61.24.030(9)*. Thus, in non-owner-occupied cases, the process requires only 3 steps. The 3 step procedure begins with the issuance of the NOD.

(b) pursuant to RCW 61.24.030(1)(a), only after 30 days have passed following issuance of the pre-foreclosure letter is the trustee authorized to issue a NOD. Until at least 30 days have passed following issuance of the pre-foreclosure letter, a NOD may not be issued lawfully;

(c) RCW 61.24.030(8) requires the trustee to wait at least 30 days after issuing the NOD before recording a Notice of Trustee's Sale ("NOTS"). Among other things, the NOTS sets the sale date. Hence, without the recording of a NOTS, there can be no lawful sale; and

(d) the trustee may not schedule the sale less than 120 days after the date on which the NOTS is recorded.⁶

If the trustee omits one of the steps in the process, none of the steps that follow the omitted step can lawfully be taken. In the case before this Court the trustee omitted one of the required steps: prior to recording the second NOTS ("NOTS 2"), the trustee did not issue a new NOD.

I. Continuation of a sale date.

Pursuant to RCW 61.24.040(6), after the sale date is set, the trustee may, but is not obligated, to continue the sale for a period or periods not exceeding a total of 120 days. If the property has not been sold by the 120th day following the originally-scheduled sale date, the foreclosure proceeding is terminated by *operation of law*.

⁶ For non-owner-occupied residential real property the minimum waiting period is 90 days. *RCW 61.24.040(1)(a)*.

2. Sell of Property violated RCW 61.24.040(6).

Quality recorded the initial notice of trustee's sale ("NOTS 1") on April 16, 2013. NOTS 1 set August 16, 2013 as the original sale date. On August 14, 2013, Plaintiff filed a Chapter 13 petition in federal bankruptcy court. The filing gave Plaintiff an automatic stay of all collection activity, including the foreclosure proceeding. From the date of the filing until March of 2015, Plaintiff made regular monthly payments of \$1409.28 to Defendant 1. The payment amount was higher than Plaintiff's monthly mortgage payment had been prior to the Chapter 13 filing.

On August 19, 2013, Quality *discontinued or terminated* – not postponed --the original non-judicial foreclosure proceeding. On March 4, 2015, the bankruptcy trustee dismissed the Chapter 13 plan. During the 18 months the plan was in place, Plaintiff paid \$50,733 into the Plan. She has posted an additional \$37,000 to be permitted to remain in the home during the pendency of this litigation. Beginning on August 19, 2013 and forever thereafter, because the original sale was voluntarily *discontinued* not postponed, the Property could never lawfully be sold as a consequence of the original 4-step foreclosure process that produced the original August 16, 2013 sale date.

3. August 7, 2015 Sale Date Unlawful.

No additional efforts were made to foreclose until April 8, 2015. On that date, Quality commenced a new foreclosure proceeding by recording NOTS 2. NOTS 2 set an August 7, 2015 sale date. There was no

connection between the August 7, 2015 foreclosure proceeding and the 2013 attempt to foreclose because Quality voluntarily discontinued the 2013 attempt to foreclose on August 19, 2013. Moreover, the last date on which the 2013 attempt to foreclose could have taken place lawfully was December 14, 2013.

Consequently, if the August 7, 2015 attempt to foreclose was an attempt to continue the 2013 foreclosure effort, the August 7, 2015 attempt is unlawful because the August 7, 2015 sale date more than 120 days after the original August 16, 2013 sale date. *RCW 61.24.040(6)*. Therefore, the August 7, 2015 sale date is the penultimate result of a new foreclosure proceeding that is unrelated to the 2013 attempt to foreclose.

NOTS 2 was not preceded in the new foreclosure proceeding by: (a) the issuance of a new NOD, or any of the accurate information required to be provided in the NOD; or (b) the 30-day period mandated by RCW 61.24.030(8)(f), that commences with the issuance of the NOD, during which, if Plaintiff pays the amount in arrears, the trustee must reinstate Plaintiff's note and deed of trust and must not record the NOTS. The fact a NOD was provided in the 2013 foreclosure effort is irrelevant because that effort was terminated by Defendant 2 voluntarily on August 19, 2013 and by operation of law on December 14, 2013.

The August 7, 2015 sale was a new trustee's sale. The DTA provides only one way to conduct any foreclosure sale of owner-occupied,

residential real property – the mandatory 4-step process. Because Defendants did not meet the requirements of the DTA, the sale of the Property on August 7, 2015 was unlawful.

IV ARGUMENT

A. Security Follows Transfer of Ownership of Note.

Defendant claims the *security follows the note* doctrine automatically gives Defendant the right to enforce the DOT that secures the Note. The version of the security follows the note doctrine espoused by Plaintiff in this case is, admittedly, widely accepted in Washington today. But the widely-accepted, judicially-created version that is in vogue in Washington today stands in direct opposition to RCW 62A.9A-203(a), (b), and (g), a constitutionally enacted statute.

RCW 62A.9A-203 has been the law in Washington for 16 years, and the courts of this state, from the Supreme Court down, are only now beginning to understand and appreciate the meaning of this section of the Washington version of the Uniform Commercial Code (“UCC”). It is little known, for example, that the *security follows the note* doctrine both Plaintiff and Defendants rely on is codified at 9A-203(g). *Official Comment 7 to UCC 9-203*.

Most Washington lawyers and judges simply do not understand that RCW 62A.9A-203(a), (b), and (g) states that the *security follows the note* doctrine applies *only if* the note is transferred *by sell*. Additionally,

the centuries-old, common law doctrine has *always* and *universally* stood for the same principle: the security for an obligation follows the sale of the obligation. *Md. Casualty Company v. Philbrick & Nicholson*, 147 Wash. 277, 285 (1928) (this case proceeds “upon the well-known principle that the bond is security for the debt, and that the assignment⁷ of the debt carries the security with it”); *Gilmore v. Westerman*, 13 Wash. 390, 395 (1896); *Sepp v. McCann*, 47 Minn. 364, 366 (1891); *Peters v. St. Louis & L.M.T. Co.*, 24 Mo. 586, 589 (1857); *See generally, City of St. Paul v. Butler*, 30 Minn. 459 (1883).

As RCW 62A.9A-203 and the cases cited immediately above indicate, the *security follows the note* doctrine is, and for centuries has been, a *security-follows-the-sale-of-a-note* concept, not a *security-follows-the-transfer-of-the-right-to-enforce-the-note* concept.

As a result of the *Brown* and *Bain* decisions, Washington now recognizes two versions of the *security follows the note* doctrine. The two versions are irreconcilable. *Brown* and *Bain* state the holder of the note, irrespective of ownership of the note, is automatically entitled to enforce the security for the note. RCW 62A.9A-203 directly opposes *Brown* and *Bain*. RCW 62A.9A-203(g), not *Brown* or *Bain*, is the codification of the

⁷ An “assignment” is the transfer of the *entire interest* in the property transferred. A transfer of the *right to enforce a note*, unless as part of a transfer of *ownership* of the note, is not a transfer of the entire interest in the note. A transfer of the *right to enforce a note* is the transfer merely of one of the rights in the full bundle of rights that comprise the note. As such, consistent with the common law *security follows the note* doctrine and RCW 62A.9A-203, a transfer of the right to enforce a secured note does not carry with it the right to enforce the security for the note.

centuries-old *security follows the note* doctrine. *Official Comment 9 to UCC § 9-203*.

B. *Brown* Unconstitutionally Encroaches on Washington Legislature’s Plenary Authority to enact Washington Laws?

Under Article II, § 1, within constitutional limits, the Washington Legislature has *plenary* authority to enact the laws of the State of Washington. *Brower v. State of Washington*, 137 Wn.2d 44, 54 (1998). Moreover, it is unconstitutional for the legislature to transfer its legislative function to others, including the Washington State Supreme Court. *See Keeting v. Public Utilities Dist. No. 1*, 49 Wn.2d 761, 767, 306 Pac. 2d 762 (1957). As a result, if RCW 62A.9A-203 requires a lawful transfer of ownership of a secured note to transfer the right to enforce the DOT that secures the note, and it does, and *Brown* and other Washington cases require only that one be the *holder* of a secured note to be authorized to enforce the DOT, the court decisions, all of them, must yield.

RCW 62A.9A-203(a), (b), and (g) mandate a transfer of ownership of a secured note for the transferee to obtain the right to enforce the DOT that secures the note. *Brown* and other Washington cases require only the transfer of the right to enforce the note. *Brown* and other Washington cases that hold the deed of trust follows a transfer of the right to enforce the note the DOT secures are unconstitutional decisions and must yield.

1. Rules for Enforcement of Secured Notes Differ from Rules for Enforcement of DOT.

Notes and the security for notes are separate items. The UCC deals with them separately. The rules concerning the creation and enforcement of negotiable instruments are found in the negotiable instruments article—Article 3. The rules concerning the creation and enforceable of the *security* for negotiable instruments are found in the *secured transactions article*—Article 9.

Any person, regardless of station, who offers Article 3 provisions as support for the claim that an entity is automatically entitled to enforce the security for a note simply that entity is entitled to enforce the note has very little understanding of how the UCC is structured or of what provisions of Article 3 actually mean.

Again, Defendant 1, invoking the version of the “security follows the note” doctrine recently created out of whole cloth by the courts, claims it is entitled to enforce the DOT because it is the holder of the Note. The *Brown* Court invoked the same doctrine by analyzing RCW 62A.9A-203(g), the codification of that doctrine:

The parties agree the note is secured by a publicly recorded deed of trust, but the deed is not in this court’s record. The deed’s absence from the record does not affect this case because RCW 62A.9A-203(g) “codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien.” UCC REPORT ON MORTGAGE NOTES, *supra*, at 12 n. 44 (quoting RCWA 62A.9A-203 UCC cmt. 9); see also RCW 62A.9A-203(g) (“The attachment of a security interest [i.e., the interest of a

. . . buyer of . . . a promissory note,” RCW 62A.1-201(b)(35),] in a right to payment . . . secured by a security interest . . . on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.”) This statute “explicitly provides that . . . the assignment of the interest of the seller . . . automatically transfers a corresponding interest in the mortgage to the assignee.” UCC REPORT ON MORTGAGE NOTES, supra, at 12. The parties present no arguments relating to the deed of trust as distinct from the note.

Brown v. Washington Dept. of Commerce, 184 Wn.2d 509, 529, fn. 9 (2015).

The passage quoted immediately above confirms the meaning of RCW 62A.9A-203 and destroys the *Brown* Court’s holding. In the passage, the Court acknowledges that the attachment of an *ownership* interest of a *buyer* of a promissory note (in *Brown*, a mortgage note) in a *right to payment* (i.e., in *Brown*, the mortgage note) that is secured by a “security interest” on real property (Ms. Brown’s DOT provides a security [lien] interest on her real property.) is also attachment of a security interest (i.e., ownership interest) in Ms. Brown’s DOT. The *Brown* Court then thrusts a dagger into the heart of its own opinion by acknowledging that RCW 62A.9A-203(g) “explicitly provides that . . . the assignment of the interest of the *seller* . . . automatically transfers a corresponding interest in the mortgage to the *assignee*.”⁸ *Brown*, 184 Wn.2d at 529, fn. 9 [quoting UCC REPORT ON MORTGAGE NOTES].

As the *Brown* Court indicates in fn. 9 of the opinion, it is the attachment of the *ownership* interest of a *buyer* of a secured promissory

⁸ Assignment of a note provides an ownership interest in the note to the assignee.

note to the promissory note that automatically transfers to the *buyer* of the promissory note (i.e., the assignee) the *seller's* interest in the deed of trust that secures the note.

The *buyer's ownership interest* in the promissory note attaches to the promissory note only at the moment the *ownership interest* in the promissory note becomes enforceable against the *seller* of the promissory note. *RCW 62A.9A-203(a)*. The *ownership interest* of the *buyer* becomes enforceable against the *seller* of the promissory note at the precise moment that the *buyer* of the promissory note can be said to have met the 3 requirements of *RCW 62A.9A-203(b)*. The *seller's ownership interest* in the DOT is transferred to the *buyer* of the promissory note at the exact moment that the *buyer's ownership interest* in the note becomes enforceable against the *seller* of the note. In other words, the deed of trust follows a transfer of *ownership* of the note, *not* a transfer of the right to enforce the note! Defendant 1 and the courts are simply wrong.

C. Consumer Protection Act Claim

To prevail on a claim for violation of the Consumer Protection Act ("CPA"), Plaintiff must prove: (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 business or property; and (5) causation. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778 (1986).

1. Deceptive acts and/or practices

As stated in Plaintiff's Complaint and documented in the exhibits attached to the Complaint, Defendants have engaged in a pattern of deceptive and unfair acts and practices in this attempt to foreclose non-judicially.

a. MERS assigned Note and DOT.

1. MERS, in Own Right, cannot be Beneficiary of DOT.

It is impossible for one to be the beneficiary of a DOT that secures a note if one holds *no interest* in the note secured or the DOT that secures it. MERS *never* holds an interest in a note or DOT. Thus, MERS, in its own right, can never be the beneficiary of a DOT. *Bain v. Metropolitan Mortgage Grp.*, 175 Wn.2d 83 (2012).

On September 28, 2012, MERS, allegedly acting as EI's nominee (agent), attempted to assign the DOT to Defendant 1. EI originated Plaintiff's home loan on August 5, 2005. However, on September 28, 2012, EI *held no interest in Plaintiff's Note* because the Note allegedly was sold to Defendant 1 on March 1, 2012.

On March 1, 2012, Defendant 1 entered into a loan modification agreement ("LMA") with Plaintiff. The LMA purported to make Defendant 1 the "Lender" under the Note and DOT. Thus, after March 1, 2012, EI, by its own admission, maintained *no* interest in Plaintiff's Note.

Accordingly, since MERS was never the agent for any entity other than EI, MERS' September 28, 2012 attempt to transfer the Note was void ab initio.

D. Under Washington Real Property Law, Owner and Holder of Secured Note May Not Enforce DOT in Absence of Lawful Assignment of DOT?

Throughout the United States, including in Washington, transfer of the lien interest in a DOT in the absence of a simultaneous transfer of ownership of the Note the DOT secures is a nullity. *Anderson Buick Co. v. Cook*, 7 Wn.2d 632, 642 (1941); *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W. 3rd 619, 623 (Mo. Ct. App. 2009) (An assignment of the deed of trust separate from the note has no force); *Saxon Mort. Serv., Inc.* No. C-08-4357 EMC, 2008 WL 5170180, at *4-5 (N.D. Cal. Dec. 9, 2008) ("For there to be valid assignment, there must be more than just assignment of the deed [of trust] alone; the note must also be assigned"); *Kelly v. Upshaw*, 39 Cal.2nd 179, 192 (1952) ("In any event, Kelly's purported assignment of the mortgage without an assignment of the debt which is secured was a nullity.").

Because EI held no interest in the Note on September 28, 2012, MERS' September 28, 2012 attempt to assign the beneficial interest in the DOT to Defendant 1 was a nullity and was therefore deceptive, unfair and legally ineffective. Defendant 1 participated fully in that attempt.

Under the MERS system, at loan origination, if the loan originator is a MERS member, MERS is made the "beneficiary" of the DOT as

nominee for the loan originator. If the loan is subsequently sold by the originator to another MERS member, MERS automatically ceases to be the nominee “beneficiary of the DOT” for the loan originator and instantaneously transforms into the nominee “beneficiary of the DOT” for the transferee.

Defendant 1 is a MERS member. Its MERS Organization ID# is 1009244. EI is also a MERS member. If it were not, MERS would not have been made the nominee beneficiary of the DOT when EI originated Plaintiff’s loan on August 5, 2005. By MERS’ rules, upon execution of the LMA on March 1, 2012, MERS automatically ceased to be EI’s nominee “beneficiary of the DOT” and instantaneously transformed into Defendant 1’s nominee “beneficiary of the DOT.” In other words, as it relates to Plaintiff’s loan, after March 1, 2012, MERS no longer had any connection to EI. Accordingly, when MERS, deceptively claiming to act as nominee for EI, attempted to “deed” the DOT to Defendant 1, *Defendant 1 received nothing*.

The MERS assignment on September 28, 2012 did not transfer the beneficial interest in the DOT. There was never any other attempt to transfer the beneficial interest in the DOT from EI to Defendant 1. Consequently, the beneficial interest in the DOT was never transferred from EI to Defendant 1.

Under RCW 64.04.010, interests in real property – *any interest in real property* – must be transferred by a deed that meets the requirements of RCW 64.04.020. An assignment of DOT conveys *a lien interest in real property*. *Brown*, 184 Wn.2d at 515. Among the three requirements contained in RCW 64.04.020 for the lawful transfer of an interest in real property is the requirement that the writing be signed by the party to be bound by the transfer. In this case, the party to be bound by the transfer was EI. But MERS, a separate corporate entity, executed the assignment, and MERS was not EI's agent at the time.

Again, the September 28, 2012 assignment was required by RCW 64.04.010 and was legally ineffective.

1. In Washington, under these circumstances, security does not automatically follow note.

In Washington, because of RCW 64.04.010 and .020, if the *security* for the note is an *interest in real property*, the security follows the note *only after* the transferor issues a deed to the transferee that meets the requirements of RCW 64.04.020. Otherwise the security remains with the transferor of the note after the note is transferred.

RCW 64.04.010 requires that *all* interests *in* real property be transferred by deed. In Washington, a lien on real property is an interest *in* real property. *Brown*, 184 Wn.2d at 515. Washington is a lien theory state. Therefore, a DOT provides a lien on the real property to which it is

attached. As such, the lien interest created by the DOT can be transferred *only by deed*.

RCW 64.04.020 requires that, to be lawful, a deed must be (1) in writing, (2) signed by the party to be bound thereby, and (3) acknowledged by the party to be bound thereby before a person authorized by statute to take acknowledgements. Clearly, to be bound by a transfer of an “interest in real property” the transferor must have an “interest in the property” prior to the transfer. Otherwise the transferor is not in a position to transfer anything.

MERS lacked the lien interest in the Property provided by the DOT. Moreover, MERS was not EI’s nominee on September 28, 2012. Hence, MERS’ September 28, 2012 assignment transferred to Defendant 1 only that which MERS possessed – nothing!

Defendant 1’s decision to aid MERS in the creation of this invalid assignment by taking prior actions that led to the assignment’s creation, and by taking actions subsequent to its creation that were based upon the assignment, was unfair and deceptive.

E. Foreclosure procedure utilized by Defendants Violates RCW Chapter 61.24 and is therefore unfair and deceptive.

Under the DTA, there is a single, 4-step procedure for non-judicially foreclosing owner-occupied residential real property.⁹ The DTA provides no other procedure for conducting a non-judicial foreclosure of owner-occupied residential real property. If a sale is not conducted according to the 4-step procedure provided in the DTA, and is not one of the two exceptions to the 4-step procedure, it is not a lawful non-judicial foreclosure.

The 4 steps detailed immediately below must be taken in the specific order herein recited. Additionally, in taking each of those 4 steps, the trustee must wait at least the minimum number of days between each step mandated by the DTA.

First, RCW 61.24.031(1)(a), (b), and 61.24.031(5), considered together, require a trustee, beneficiary, or authorized agent to contact the borrower by letter at least 30 days before issuing a notice of default (“NOD”). Under the DTA, the “Pre-foreclosure Letter” is the mandatory first step in the non-judicial foreclosure process, even though, technically, the letter is a pre-foreclosure step. Second, pursuant to RCW 61.24.030(1)(a), if at least 30 days have passed following issuance of the Pre-foreclosure Letter, and the homeowner has not responded to the letter,

⁹ For *non-owner-occupied* residential real property, the pre-foreclosure letter is not required to be sent. *RCW 61.24.030(9)*. Thus, in non-owner-occupied cases, the process requires only 3 steps. The 3 step procedure begins with the issuance of the NOD.

then, *and only then*, is the trustee authorized to issue a NOD. Third, RCW 61.24.030(8) requires the trustee to wait at least 30 days after issuing the NOD before recording a Notice of Trustee's Sale ("NOTS").¹⁰ Among other things, the NOTS sets the sale date. Hence, without the lawful recording of a NOTS, there can be no lawful sale. Fourth, the trustee may not schedule the sale for a date that is less than 120 days after the date on which the NOTS is recorded.¹¹ *RCW 61.24.040(1)(a)*.

The structure of the DTA makes it clear that if the trustee omits one of the 4 steps in the process outlined above, none of the steps that follow the omitted step can lawfully be taken. The Washington Supreme Court has also made this point clearly. *See generally, Albice v. Premier Mortgage, Inc.*, 174 Wn.2d 560 (2012). Hence, if each of the 4 steps is not taken, or the steps are not taken in the correct order, or the minimum time periods between each step are not observed, and a sale occurs, the sale is invalid.

In the foreclosure proceeding that is the subject of this litigation, the trustee omitted one of the required steps. Prior to recording NOTS 2, the trustee failed to issue a new NOD. Among other injuries, the failure to issue a new NOD shortened the process considerably, and denied Plaintiff's statutorily-created right to prevent the trustee from gaining

¹⁰ Pursuant to RCW 61.24.030(8)(f), if the homeowner pays the arrearages during this 30 day period, the trustee must reinstate the homeowner's note and DOT and never becomes authorized to record, transmit or serve a NOTS.

¹¹ For non-owner-occupied residential real property the minimum waiting period is 90 days. *RCW 61.24.040(1)(a)*.

lawful authority to record a new NOTS by paying the arrearages. These two failure were injurious, unfair and deceptive.

1. Continuation of a sale date.

Pursuant to RCW 61.24.040(6), after a sale date is set, the trustee may, but is not obligated, to continue the sale for a period or periods not exceeding a total of 120 days. If the property has not been sold by the 120th day following the originally-scheduled sale date, the foreclosure proceeding is terminated by operation of law.

2. Foreclosure process employed by Defendants in this case does not comply with DTA.

Plaintiff occupies the Property, so the four-step process is mandatory in this case.

In paragraph VI of NOTS 2, Defendants admit that the NOD required by RCW 61.24.030(8) to precede by at least 30 days the recording of NOTS 2 is the same NOD that was issued as the statutorily-mandated antecedent to NOTS 1. So there is no dispute that a new NOD was not issued as part of the new foreclosure proceeding that resulted in the filing of NOTS 2. Also, Defendants cannot deny that the original foreclosure proceeding was voluntarily terminated by Quality on August 19, 2013 and again terminated -- this time by operation of law -- on December 15, 2013. Nor can Defendant reasonably deny that beginning on August 19, 2013, and forever thereafter, the Property could never lawfully be sold as a result of the original foreclosure proceeding. Finally,

Defendants can point to no provision in RCW 61.24 that gave Defendants permission to conduct the August 7, 2015 sale, a new foreclosure sale, without issuing a new NOD, which *Albice* requires.

a. Proceeding is not lawful continuation of original proceeding.

If Defendants are permitted to utilize the NOD that was part of the twice terminated 2013 foreclosure proceeding, then, no matter what Defendant says to the contrary, the evidence says the August 7, 2015 foreclosure proceeding was an attempt to continue the original foreclosure proceeding. The original foreclosure proceeding was voluntarily terminated on August 19, 2013 and terminated a second time -- by operation of law -- on December 15, 2013.

The August 7, 2015 sale date was *501* days beyond December 15, 2013 and *721* days beyond August 19, 2013. In *Albice v. Premier Mortgage Services of Washington, Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012), the Washington Supreme Court invalidated a sale that occurred 161 days after the sale date. Summing up its reasoning, the Court made the following statement: “Here, Premier issued the notice of trustee's sale listing the sale date as September 8, 2006. Premier held the actual sale on February 16, 2007, *161* days from the original sale date in violation of the statute and divesting its statutory authority to sell. The sale was invalid.”

If the sale is a continuation of the original foreclosure proceeding, it is clearly invalid. As a result, the only way the sale can be lawful is if it

is a product of a new, independent foreclosure proceeding; a proceeding that is unrelated to the 2013 foreclosure proceeding.

b. August 7, 2015 Sale did not comply with Mandatory 4-step process.

The DTA provides only one method for conducting any new, independent foreclosure proceeding: the 4-step, mandatory process. The foreclosure proceeding that resulted in the sale of Plaintiff's Property violated that 4-step process. Defendant 2's issuance of NOTS 2 was not preceded by issuance of a new NOD.

RCW 61.24.030 is entitled "Requisites to a Trustee's Sale." Therefore, the requirements listed in RCW 61.24.030(1) – (9) are *requisites* to a lawful trustee's sale. If any one of the subsections of .030 is violated, the sale is invalid. *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 106-107 (2013).

Defendant 2's failure to issue a new NOD before recording NOTS 2 was a deceptive and unfair act. Defendant 1 participated fully in that act.

c. Failure to issue new NOD is "substantial," failure.

The failure to issue a new NOD is not just some "*technical failure*." It has substantial and injurious consequences. Because a new NOD was not issued as part of the foreclosure proceeding that resulted in the sale of the Property on August 7, 2013, among other injuries, Plaintiff did not receive a timely, accurate "itemized account" of the amount that

she was in arrears. Such an “itemized account” is mandated by RCW 61.24.030(8)(d). Plaintiff did not receive a timely, accurate “itemized account” of all other specific charges, costs, and fees she was or might have been obligated to pay to reinstate the DOT *before* the recording of NOTS 2. Such an “itemized account” is mandated by RCW 61.24.030(8)(e). She did not receive a statement showing the current total of subparts (d) and (e) of subsection (8) “designated clearly and conspicuously as the amount necessary to reinstate the Note and DOT before the recording of NOTS 2.” Such a statement is mandated by RCW 61.24.030(8)(f). And perhaps most importantly, respecting the current foreclosure proceeding, she did not receive the statutorily-mandated, minimum 30-day period to pay the arrearages and fees and thereby prevent Quality from gaining the authority to record NOTS 2. The minimum 30-day period is mandated by RCW 61.24.030(8).

All of the rights recited in the preceding paragraph are requirements of a lawful trustee’s sale. With respect to the foreclosure proceeding that resulted in the sale of Plaintiff’s Property, these requirements were not met.

Defendants will almost certainly argue there is nothing in the DTA that requires Defendants to re-issue a NOD. This argument, when carefully considered, rings hollow.

Without re-issuance, the statutory requirements simply were not met. Among other issues, the arrearages listed in the 2-year old NOD, even if Plaintiff had been able to find it prior to the sale, would not have told Plaintiff what were her arrearages. Under RCW 61.24.030(8), it was Defendant 2's responsibility to provide Plaintiff with a current statement of arrearages and other costs and charges at least 30 days prior to recording NOTS 2. The old NOD did not meet that obligation.

d. Defendant 2 should have started the process from the beginning.

The August 7, 2015 foreclosure proceeding was a new foreclosure proceeding that was unconnected to the previous effort to foreclose. There is nothing in the DTA that states a trustee is permitted to abbreviate the 4-step process if the current foreclosure effort is not the original foreclosure effort. Under the DTA, all new foreclosure proceedings are exactly the same as all other new foreclosure proceedings. The statute does not differentiate between original foreclosure attempts and subsequent foreclosure attempts.

Because Defendants omitted one of the mandatory steps (issuance of a new NOD), the sale of the Property was a violation of the DTA.

The steps taken in the foreclosure proceeding that led to the sale of Plaintiff's Property on August 7, 2015 was unfair and deceptive. The sale should have been prevented until Defendants complied with the DTA.

3. Acts Capable of Repetition and have Substantial Impact on Public Interest.

Defendants clearly have the capacity to repeat the acts complained against herein, and in fact have repeated these acts in scores, if not hundreds, of other foreclosure proceedings that are now concluded or are currently underway. Because these actions are so often repeated, the practices described herein have a widespread impact on some of Washington's most vulnerable and exposed citizens. They certainly have had an adverse effect on Plaintiff.

Finally, the loss of the Property was entirely due to Defendants' unlawful conduct. In this case it doesn't matter that Plaintiff is in arrears -- although Plaintiff made on-time monthly mortgage payments to Defendant 1--payments that exceeded the monthly mortgage payment amount--for 18 consecutive months before Defendant 1 initiated this foreclosure proceeding. The Property should still belong to Plaintiff, and she should have the right to the continued enjoyment of the Property until she pays it off or someone can take it from her in a manner that complies with the DTA.

Each Defendant's participation in the preparation, execution and implementation of the numerous false documents that have been prepared and executed in this case, as well as the sale itself, violated the DTA. There is a clear pattern of collusion and cooperation between Defendants 1 and 2 in the execution, recording and implementation of those false

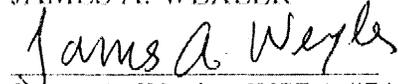
documents and in the sale of the Property. The primary, if not exclusive, purpose of this collusion and cooperation has been to deprive Plaintiff of the Property unlawfully. The prejudice to Plaintiff is obvious. Her home was sold. Additionally, Plaintiff has had to employ consultants to inform her about the illegalities involved and has had to incur additional out-of-pocket costs. These additional costs will be proven at time of trial.

V CONCLUSION

Based on the foregoing, Plaintiffs hereby request that this Court enter an order reversing the trial court's order granting summary judgment to Defendants, and each of them, rescinding the August 7, 2015 sale and thereby returning the Property to Plaintiff, and requiring the trial court to conduct the trial of this matter.

RESPECTFULLY SUBMITTED this 5th day of August 2016.

JAMES A. WEXLER



James A. Wexler, WSBA #7411

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I certify that on August 5, 2016, I caused a true and correct copy of this Appellant's Opening Brief and this Certificate of Service to be served on the following in the manner indicated below:

1. On Defendant Quality Loan Service Corporation of Washington, a Washington corporation by causing a copy of said document to be delivered by email as agreed to Robert McDonald, General Counsel for Quality Loan Service at 108 1st Ave. S. #202, Seattle, WA 98104 by email as agreed;
2. On Joseph McIntosh, McCarthy-Holthus LLP, Attorney for Defendant New York Community Bank 108 – 1st Avenue S. Suite 300, Seattle, WA. 98104 by email as agreed;

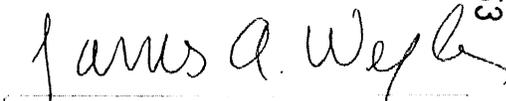
AND TO the Clerk with a Judge's working copy hand delivered and filed with:

Court of Appeals, Division I
One Union Square
600 University Street
Seattle, Washington 98101-4170

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 5th day of August 2016 at Sammamish, Washington.

BY: JAMES A. WEXLER


James A. Wexler, WSBA # 7411
Attorney for Plaintiff/Appellant

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