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Washington State Supreme Court

Supreme Court No. 89132-0

MAY - 1 2014

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Ronald R. Carpenter  
Clerk

b/h

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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WINNIE LYONS,

*Appellant,*

v.

U.S. BANK NATIONAL ASSOCIATION, as Trustee for for Stanwich  
Mortgage Loan Trust Series 2012-3, by Carrington Mortgage Services,  
LLC; CARRINGTON MORTGAGE SERVICES, LLC; WELLS FARGO  
BANK, N.A., a chartered national bank; WELLS FARGO BANK, N.A.,  
as servicer; and NORTHWEST TRUSTEE SERVICES, INC., as Trustee,

*Respondents.*

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RESPONDENT NORTHWEST TRUSTEE SERVICES, INC.'S  
STATEMENT OF SUPPLEMENTAL AUTHORITY

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Joshua S. Schaer, WSBA No. 31491  
RCO Legal, P.S.  
Attorneys for Respondent Northwest  
Trustee Services, Inc.  
13555 S.E. 36<sup>th</sup> St., Ste. 300  
Bellevue, WA 98006  
(425) 457-7810

ORIGINAL

Pursuant to R.A.P. 10.8, Respondent NWTs hereby submits the attached additional authorities for the Court's consideration in this case:

1. *Mulcahy v. Fed. Home Loan Mortgage Corp. et al.*, 2014 WL 1320144 (W.D. Wash. Mar. 28, 2014), stating in relevant part, "NWTs was therefore obligated to ascertain only whether Wells Fargo was the holder of the promissory note before issuing the notice of trustee's sale, not whether some entity had a beneficial interest in the proceeds of the note." *Id.* at \*6.

2. *Bakhchinyan v. Countrywide Bank, N.A.*, 2014 WL 1273810 (W.D. Wash. Mar. 27, 2014), stating in relevant part, "The reference to RCW 62A.3-301 is not to the contrary, as that statutory section merely defines who is entitled to enforce the relevant promissory note." *Id.* at \*5.

3. *Coble v. SunTrust Mortgage, Inc. et al.*, 2014 WL 631206 (W.D. Wash. Feb. 18, 2014), stating in relevant part, "Plaintiff also suggests that the holder of the note must be the owner of the obligation- but this argument has been rejected by courts." *Id.* at \*4.

4. *Singh v. Fed. Nat'l Mortgage Ass'n et al.*, 2014 WL 504820 (W.D. Wash. Feb. 7, 2014).

5. *McPherson v. Homeward Residential et al.*, 2014 WL 442378 (W.D. Wash. Feb. 4, 2014), stating in relevant part, "U.S. Bank

had authority to enforce the Note and Deed of Trust, even absent a recorded assignment... because U.S. Bank held and holds the Note.” *Id.* at \*5, *citing* RCW 61.24.005(2), RCW 62A.3-205, RCW 62A.3-301.

6. *Massey v. BAC Home Loans Servicing LP et al.*, 2013 WL 6825309 (W.D. Wash. Dec. 23, 2013), stating in relevant part, “The mere fact that Freddie Mac owned the Note which Bank of America held and enforced on Freddie Mac’s behalf does not render the foreclosure or assignment deceptive. It is well-established that one party may hold and enforce a note on behalf of a second party, and courts have consistently upheld Freddie Mac’s practice of doing so.” *Id.* at \*5.

7. Dale A. Whitman & Drew Milner, *Foreclosing on Nothing: The Curious Problem of the Deed of Trust Foreclosure Without Entitlement to Enforce the Note*, 66 Ark. L. Rev. 21 (2013).

Dated this 29th day of April, 2014.

**RCO LEGAL, P.S.**

By:   
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### Declaration of Service

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. That on April 29, 2014, I caused a copy of **Respondent Northwest Trustee Services, Inc.'s Statement of Supplemental Authority** to be served to the following in the manner noted below:

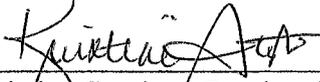
<p>Mary C. Anderson Guidance to Justice Law Firm 2320 130<sup>th</sup> Ave. NE, Suite E-250 Bellevue, WA 98005</p> <p>Attorneys for Plaintiff / Appellant</p>	<p><input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile</p>
<p>Antoinette M. Davis Antoinette M. Davis Law PLLC 528 3<sup>rd</sup> Avenue West, Suite 102 Seattle, WA 98119</p> <p>Attorneys for Plaintiff / Appellant</p>	<p><input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile</p>
<p>Melissa A. Huelsman Law Offices of Melissa A. Huelsman, PS 700 Second Ave., Suite 601 Seattle, WA 98104</p> <p>Attorneys for Plaintiff / Appellant</p>	<p><input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile</p>

<p>Ronald E. Beard Lane Powell, PC 1420 5<sup>th</sup> Avenue, Suite 4200 Seattle, WA 98111</p> <p>Attorneys for Defendants / Respondents Carrington Mortgage Services, LLC; US Bank; Wells Fargo Bank, N.A.</p>	<p><input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile</p>
<p>Matthew Geyman Columbia Legal Services 101 Yesler Way, Suite 300 Seattle, WA 98104-2528</p> <p>Amicus Curiae</p>	<p><input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile</p>
<p>Sheila M. O'Sullivan Audrey L. Udashen Northwest Consumer Law Center 520 E. Denny Way Seattle, WA 98122-2138</p> <p>Amicus Curiae</p>	<p><input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile</p>
<p>Eulalia Sotelo Thomas W. McKay Northwest Justice Project 401 2<sup>nd</sup> Ave. S., Suite 407 Seattle, WA 98104-3811</p> <p>Amicus Curiae</p>	<p><input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile</p>
<p>Lisa Marie von Biela Northwest Justice Project 1420 NW Gilman Blvd., Suite 2274 Issaquah, WA 98027-5394</p> <p>Amicus Curiae</p>	<p><input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile</p>

Ann T. Marshall Katie A. Axtell Bishop, Marshall & Weibel, P.S. 720 Olive Way, Suite 1201 Seattle, WA 98101-3809	<input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile
Amicus Curiae (United Trustees Association)	

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

Signed this 29<sup>th</sup> day of April, 2014.

  
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Kristine Stephan, Paralegal

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#1: *Mulcahy*

2014 WL 1320144

Only the Westlaw citation is currently available.  
United States District Court, W.D. Washington,  
at Seattle.

Vince M. MULCAHY and  
Becky L. Mulcahy, Plaintiffs,

v.

FEDERAL HOME LOAN MORTGAGE  
CORPORATION, et al., Defendants.

No. C13-1227RSL. | Signed March 28, 2014.

#### Attorneys and Law Firms

Melissa A. Huelsman, Seattle, WA, for Plaintiffs.

Ronald E. Beard, Abraham K. Lorber, Lane Powell PC,  
Seattle, WA, Joshua Schaer, Rco Legal, P.S., Bellevue, WA,  
for Defendants.

#### Opinion

#### ORDER GRANTING NORTHWEST TRUSTEE SERVICES' MOTION FOR SUMMARY JUDGMENT

ROBERT S. LASNIK, District Judge.

\*1 This matter comes before the Court on a motion for summary judgment filed by defendant Northwest Trustee Services, Inc. ("NWTS"). Dkt. # 29. Having reviewed the memoranda, declarations, and exhibits submitted by the parties,<sup>1</sup> the Court finds as follows:

#### BACKGROUND

In July 2006, plaintiffs borrowed \$417,000 from Golf Savings Bank to purchase property in Whatcom County. The promissory note was secured by a deed of trust, which lists Golf as "lender," Whatcom Land Title Insurance Company as "trustee," and MERS as both "beneficiary" and "nominee" for the lender and the lender's successors and assigns. Dkt. # 8-4 at 9. Plaintiffs ran into financial difficulties in 2009 and defaulted on the loan. At the time, the debt had been purchased by defendant Freddie Mac, and defendant Wells Fargo was servicing the loan.<sup>2</sup>

Plaintiffs, who were unaware that Freddie Mac had a beneficial interest in their loan, began communicating and working with Wells Fargo to obtain a modification of the terms of their promissory note. Wells Fargo issued a Notice of Default under the Washington Deeds of Trust Act ("DTA") on November 24, 2009, and appointed NWTS as successor trustee shortly thereafter. NWTS issued a Notice of Trustee's Sale, setting April 2, 2010, as the sale date. Plaintiffs continued their efforts to negotiate more manageable loan terms and were assured that their home would not be foreclosed upon because they were being evaluated for a modification. In February 2010, the parties agreed to a temporary modification. Plaintiffs set up an automatic withdrawal in Wells Fargo's favor, and the April foreclosure sale was cancelled (the Notice of Discontinuance of Trustee's Sale was not signed and recorded until September 2010). Although payments under the modified loan were supposed to last for only three months, Wells Fargo made six automatic withdrawals from plaintiffs' account beginning in February 2010 and ending in July 2010.

Plaintiffs allege that Wells Fargo stopped withdrawing mortgage payments and kicked them out of the loan modification program because plaintiffs failed to submit a monthly profit and loss statement. In August 2010, NWTS obtained a declaration that Wells Fargo was the holder of the promissory note (as required by RCW 61.24.030(7)) and issued a second Notice of Default under the DTA. Decl. of Jeff Stenman (Dkt.# 30), Ex. 3; Dkt. # 8-4 at 137. A Foreclosure Loss Mitigation Form, signed by Wells Fargo, accompanied the Notice of Default and declared:

The Beneficiary or beneficiary's authorized agent has exercised due diligence to contact the borrower as required by [RCW 61.24.031(5)] and, after waiting fourteen days after the requirements of [RCW 61.24.031] were satisfied, the Beneficiary or Beneficiary's authorized agent sent to the borrowers(s) [sic], by certified mail, return receipt, the letter required under [RCW 61.24.031].

Dkt. # 8-4 at 140. Wells Fargo's declaration that it had diligently but unsuccessfully attempted to contact plaintiffs is made under penalty of perjury, but was apparently made by someone with no personal knowledge of Wells Fargo's contacts with plaintiffs and without reviewing the transactional history or current status of the loan.

\*2 Plaintiffs attempted to rectify the deficiencies that got them kicked out of the loan modification program, sending in profit and loss statements as requested and repeating paperwork that had previously been submitted. Nevertheless, a Notice of Trustee's Sale was issued on September 20, 2010, setting a sale date of December 27, 2010. As the sale date approached, plaintiffs became increasingly nervous about the lack of a decision regarding their loan modification. Throughout this period, Wells Fargo representatives assured plaintiffs that the foreclosure sale would not go forward because the parties were negotiating a modification. On November 22, 2010, a Wells Fargo employee named Tabitha specifically told plaintiffs that the pending foreclosure sale had been cancelled. Plaintiffs continued to pursue the loan modification, sending in whatever information and forms Wells Fargo requested. When Wells Fargo requested additional information on December 18, 2010 (apparently Mrs. Mulcahy had not signed a financial information statement), it set a compliance deadline of December 28, 2010 (one day after the foreclosure sale had been scheduled to occur). Plaintiffs had sent the requested information in the day before and called on December 20, 2010, to confirm that it had been received: it had. At no point did any Wells Fargo employee mention that the foreclosure sale was still pending on the property.

Plaintiffs' property was sold to Wells Fargo on behalf of Freddie Mac at a foreclosure auction on December 27, 2010. Plaintiffs did not realize that the sale had occurred until they received a notice of eviction in early 2011. Plaintiffs filed this action in state court on December 28, 2012, seeking damages arising from various misrepresentations made to them during the loan modification and foreclosure process, violations of the Deed of Trust Act, and violations of the Consumer Protection Act. Dkt. # 8-1 at 9. The Honorable Deborra E. Garrett, King County Superior Court Judge, dismissed all of plaintiffs' claims as time-barred. Although the damage claims asserted by plaintiffs were expressly exempted from waiver under RCW 61.24.127(1), Judge Garrett dismissed them because plaintiffs filed their lawsuit one day after the statute of limitations expired. RCW 61.24.127(2)(a). Plaintiffs were, however, granted leave to amend their complaint to seek a judicial invalidation of the trustee sale, rather than damages. Judge Garrett also reserved ruling on "whether, in the event the trustee's sale is determined to be void, plaintiffs may be entitled to damages on claims or theories other than those asserted pursuant to RCW 61.24.127." Dkt. # 8-3 at 19. The

case was removed shortly after plaintiffs filed their amended complaint.

Neither Wells Fargo nor Freddie Mac have pursued their efforts to evict plaintiffs from the property.

## DISCUSSION

### A. *Standard for Rule 56 Motion*

Summary judgment is appropriate if, viewing the evidence in the light most favorable to the nonmoving party, "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 846 (9th Cir.2012). The moving party "bears the initial responsibility of informing the district court of the basis for its motion." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). It need not "produce evidence showing the absence of a genuine issue of material fact" but instead may discharge its burden under Rule 56 by "pointing out ... that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to designate "specific facts showing that there is a genuine issue for trial." *Id.* at 324. "The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient:" the opposing party must present probative evidence in support of its claim or defense. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir.2001); *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir.1991). "An issue is 'genuine' only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party ." *In re Barboza*, 545 F.3d 702, 707 (9th Cir.2008) (internal citations omitted).

### B. *Availability of Equitable Relief in General*

\*3 Plaintiffs seek a judicial declaration that the foreclosure sale that occurred on December 27, 2010, is void and of no effect. For the reasons stated in the Order Denying Defendants' Motion to Dismiss (Dkt.# 35), the Court finds that waiver of equitable claims is not automatic under RCW 61.24.040(1(f)(IX) and that plaintiffs have alleged facts from which one could reasonably conclude that their failure to seek a pre-sale injunction did not waive their right to judicial review of the validity of the December 27, 2010, trustee's sale.

**C. Availability of Equitable Relief Against NWTS**

Nevertheless, plaintiffs have not stated a plausible theory under which equitable relief can be obtained from NWTS. The relief sought, namely the invalidation of the sale and/or an order directing reconveyance of the property to plaintiffs, would have no impact or effect on NWTS. With regards to plaintiffs' claim for declaratory relief, NWTS is not a proper defendant.

**D. Claim for Monetary Damages Against NWTS**

To the extent that plaintiffs are asserting a claim for monetary damages against NWTS for alleged violations of the DTA, the claim is untimely. Pursuant to RCW 61.24.127, any claim for damages based on the assertion that the trustee failed to materially comply with the requirements of the DTA must be asserted within two years from the date of the foreclosure sale. Plaintiffs filed this action two years and one day after the sale of their property: their damage claim against NWTS is therefore time-barred.

Plaintiffs' claim for monetary damages against NWTS also fails on the merits. Plaintiffs allege that NWTS lacked authority to foreclose in December 2010 because Wells Fargo was not the "owner" of the promissory note when it appointed NWTS as successor trustee and the declaration of beneficiary status provided by Wells Fargo was not "truthful." Response (Dkt.# 32) at 15–16. As trustee, NWTS had few obligations under the statute. It owed a duty of good faith to the participants (RCW 61.24.010(4)) and was obligated to confirm that Wells Fargo was the owner of the note before issuing the notice of trustee's sale (RCW 61.24.030(7)). Contrary to plaintiffs' assertion, "owner" in this context does not mean the entity or entities that have a beneficial interest in the note. Because the note is bearer

paper, the DTA defines "beneficiary" as the "holder" of the note, *i.e.*, the entity that has actual physical possession of the paper itself. *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wash.2d 83, 89, 285 P.3d 34 (2012) (finding that "only the actual holder of the promissory note or other instrument evidencing the obligation may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property" under the DTA). NWTS was therefore obligated to ascertain only whether Wells Fargo was the holder of the promissory note before issuing the notice of trustee's sale, not whether some other entity had a beneficial interest in the proceeds of the note.

\*4 RCW 61.24.030(7)(a) specifically provides that a declaration stating that the purported beneficiary "is the actual holder of the promissory note or other obligation secured by the deed of trust" is sufficient proof of the beneficiary's right to foreclose. NWTS had in its possession just such a declaration. While plaintiffs assert that the declaration was "untruthful," they have provided only supposition and conjecture in support of their theory that an entity other than Wells Fargo possessed the note during the relevant period. In addition, plaintiffs have not provided any evidence tending to show that NWTS knew that an entity other than Wells Fargo possessed the note or that NWTS acted in bad faith in relying on the beneficiary declaration provided. Having obtained exactly the type of evidence specified in the DTA, and in the absence of any evidence of bad faith, plaintiffs have not established the trustee's breach of duty.

**CONCLUSION**

For all of the foregoing reasons, NWTS' motion for summary judgment (Dkt.# 29) is GRANTED.

Footnotes

- 1 Plaintiffs' response mentions a "Request for Judicial Notice filed concurrently herewith." Dkt. # 32 at 16. No such request was filed with the Court.
- 2 In December 2009, defendant MERS purported to assign whatever beneficial interest it had in the Deed of Trust to Wells Fargo. Dkt. # 8–4 at 31.

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*#2: Bakhchinyan*

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2014 WL 1273810

Only the Westlaw citation is currently available.  
United States District Court, W.D. Washington,  
at Seattle.

Paranzem BAKHCHINYAN, et al., Plaintiffs,  
v.  
COUNTRYWIDE BANK, N.A., et al., Defendants.

No. C13-2273-JCC. | Signed March 27, 2014.

#### Attorneys and Law Firms

Craig R. Elkins, Magnum Law Group PLLC, Bellevue, WA,  
for Plaintiffs.

Steven Joseph Dixon, Christopher G. Varallo, Witherspoon  
Kelley, Spokane, WA, Rebecca Shrader, Bishop White  
Marshall & Weibel, PS, Seattle, WA, for Defendants.

#### Opinion

#### ORDER DISMISSING CASE

JOHN C. COUGHENOUR, District Judge.

\*1 This matter comes before the Court on Defendants Bank of America, N.A.,<sup>1</sup> and Mortgage Electronic Registration Systems, Inc.'s motion to dismiss, (Dkt. No. 11), and Defendant Bishop, White, Marshall & Weibel's separate motion to dismiss. (Dkt. No. 13.) Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motions for the reasons explained herein. The Court hereby dismisses Plaintiffs' fraud and negligence claims with prejudice. Plaintiffs' CPA and wrongful foreclosure claims are dismissed and Plaintiffs are granted leave to file an amended complaint as to those claims. Plaintiffs' claim for a declaratory judgment is dismissed, but they are granted leave to properly assert it as a remedy.

#### I. BACKGROUND

On December 2, 2005, Plaintiffs executed a first mortgage Adjustable Rate Note ("Note") in the principal sum of \$520,500 in favor of the lender, defendant Countrywide Bank, N.A. ("Countrywide"), with a deed of trust ("DOT") recorded in King County, securing the Note against the personal residence of Plaintiffs. (Dkt. No. 1, Ex. A at 3 ¶

3.2.) The DOT stated that Defendant Mortgage Electronic Registration Systems ("MERS"), was the "beneficiary" under the DOT, that Countrywide was the mortgage lender, and that Chicago Title Insurance was the trustee. (*Id.* at 4, ¶¶ 3.3–3.4.) On October 6, 2011, an "Assignment of Deed of Trust was purportedly executed" in Ventura County, California in the name of Ralph Flores, as Assistant Secretary for MERS, that assigned the DOT to Defendant Bank of America, N.A. ("Bank of America"). (*Id.* at 4, ¶¶ 3.6.) Plaintiffs allege that Ralph Flores was not an employee of MERS, was not a corporate officer of that organization, and that the representations in the document were false. (*Id.*) On May 29, 2013, an Appointment of Successor Trustee was purportedly executed in Dallas County, Texas in the name of Kevin Dennison as assistant vice president for Bank of America, appointing Bishop, White, Marshall & Weibel, P.S. ("Bishop White") as the successor trustee under the DOT. (*Id.* at 6, ¶ 3.17.) Plaintiffs allege that Kevin Dennison was not an employee of Bank of America, and that the representations in that document were false. (*Id.*) On July 11, 2013, a Notice of Trustee's Sale was executed by Bishop White, setting the sale date of Plaintiffs' home for November 22, 2013. (*Id.* at 7, ¶ 3.18.)

On November 14, 2013, Plaintiffs sued Defendants, alleging that Bank of America did not properly assign the right to collect mortgage payments to Bishop White, that MERS had no beneficial interest in the Deed of Trust, and that Plaintiffs have a "distinct financial interest that necessitates knowing their mortgage payments are being paid to and credited by the actual holder of the Note" (*Id.* at 5, ¶ 3.7–3.10.) They also argue that defendant Bank of America was unwilling to modify the loan, even after their income was reduced, which contradicted its own statements about the availability of hardship assistance. (*Id.* at 5–6, ¶¶ 3.13–3.16.) However, those allegations do not appear to be a basis for any of their claims for relief. Plaintiffs ask for relief on five grounds: fraud, violations of the Washington Consumer Protection Act ("CPA"), negligence, a declaratory judgment, and wrongful foreclosure. Plaintiffs request damages for "attorney fees, audit fees, accounting fees, travel, [and] loss of business and personal time pursuing this action and attempting to unravel the complicated chain of ownership created by Defendants' [alleged] fraud and deceit." (*Id.* at 7, ¶ 3.19.) Defendants removed this case to this Court on December 19, 2013. (*See* Dkt. No. 1.)

\*2 On January 13, 2014, defendants Bank of America (in its own right and as the successor to defendant Countrywide)

and MERS filed a joint motion to dismiss. (Dkt. No. 11.) On January 16, 2014, defendant Bishop White filed a separate motion to dismiss, joining the previous motion to dismiss and asserting additional arguments. (Dkt. No. 13.) The Court granted the parties' stipulated motion for an extension of time, and ordered that Plaintiffs file their response on or before February 17, 2014, while Defendants' replies would be due February 21, 2014. (Dkt. No. 17.) Plaintiffs filed their response on February 18, 2014, (Dkt. No. 18), and Defendants filed their replies on February 21, 2014. (Dkt. Nos. 19 & 20.)

## II. DISCUSSION

A party may move to dismiss a claim or complaint that fails to state a claim upon which relief may be granted. Fed.R.Civ.P. 12(b)(6). Federal Rule of Civil Procedure 8(a)(2) requires a plaintiff to plead "a short and plain statement of the claim showing that the pleader is entitled to relief." The complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* A claim is facially plausible when the "plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In making this assessment, the Court accepts all facts in the complaint as true. *Barker v. Riverside Cnty. Office of Educ.*, 584 F.3d 821, 824 (9th Cir.2009). However, the court need not accept the plaintiff's legal conclusions. *Iqbal*, 556 U.S. at 678. Finally, the Court dismisses a claim with prejudice only where the pleading could not be cured by the allegation of other facts. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir.2000).

However, under Federal Rule of Civil Procedure 9(b), a plaintiff alleging fraud must "state with particularity the circumstances constituting fraud." Fed.R.Civ.P. 9(b). Rule 9(b)'s heightened pleading standard requires a plaintiff to include in his or her complaint the "who, what, when, where, and how" of the fraud. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir.2003).

### A. The Washington Deed of Trust Act

"In Washington, '[a] mortgage creates nothing more than a lien in support of the debt which it is given to secure.'" *Bain v. Metro. Mortg. Group, Inc.*, 175 Wash.2d 83, 285 P.3d 34, 38 (Wash.2012) (quoting *Pratt v. Pratt*, 121 Wash. 298, 209 P. 535, 535 (Wash.1922)). Mortgages secured by a deed of

trust on the mortgaged property "do not convey the property when executed; instead, '[t]he statutory deed of trust is a form of a mortgage.'" *Id.* (quoting 18 William B. Stoebeck & John W. Weaver, *Washington Practice: Real Estate: Transactions* § 17.1, at 253 (2d ed.2004)). In effect, " 'it is a three-party transaction in which land is conveyed by a borrower, the 'grantor,' to a 'trustee,' who holds the title in trust for a lender, the 'beneficiary,' as security for credit or a loan the lender has given the borrower.'" *Id.* (quoting Stoebeck & Weaver, § 17.3, at 260). However, "only the actual holder of the promissory note or other instrument evidencing the obligation may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property." *Id.* at 36. Even so, the holder of the note can appoint an agent with the power to take action on its behalf, even if the agent is not, in its own right, the true beneficiary. *See id.* at 45 ("[N]othing in this opinion should be construed to suggest an agent cannot represent the holder of a note."). A "trustee" may be either "designated as the trustee in the deed of trust or appointed under RCW 61.24.010(2)." RCW § 61.24.005. Generally, if a trustee is not designated as the trustee in the deed of trust, or if the beneficiary wants to replace the trustee, "the beneficiary shall appoint a trustee or successor trustee." RCW § 61.24.010(2).

\*3 In this case, Countrywide, the lender, was the holder of the promissory note and the beneficiary under Washington law at the time the Note was signed. Because Countrywide has merged with Bank of America, Bank of America may now be the beneficiary of the note, though it is not clear to the Court the date that Bank of America and Countrywide merged. The borrowers, clearly, are Plaintiffs. At issue is the identity of the "trustee" entitled to foreclose on the property. The Court will assume, for the purposes of this order, that MERS was not a proper agent of Countrywide, did not have an actual interest in the DOT, and accordingly could not assign any interest in the deed of trust to any other entity.

### B. Timeliness of Plaintiffs' Reponse

On January 31, 2014, the Court granted the parties' stipulated motion for an extension of time. (Dkt. No. 17). The Court gave Plaintiffs until February 17, 2014 to file their response to Defendants' motions to dismiss. Nonetheless, Plaintiffs' Response was filed February 18, 2014, (*see* Dkt. No. 18), which significantly shortened the time Defendants had to draft and file their replies. Accordingly, Plaintiffs' Response, (Dkt. No. 18), is hereby STRICKEN as untimely.

### C. Plaintiffs' Fraud Claim

In Washington, to state a claim for fraud, a plaintiff must allege:

- (1) a representation of an existing fact;
- (2) its materiality;
- (3) its falsity;
- (4) the speaker's knowledge of its falsity or ignorance of its truth;
- (5) his intent that it should be acted on by the person to whom it is made;
- (6) ignorance of its falsity on the part of the person to whom it is made;
- (7) the latter's reliance on the truth of the representation;
- (8) his right to rely upon it;
- (9) his consequent damage.

*Kirkham v. Smith*, 106 Wash.App. 177, 23 P.3d 10, 13 (Wash.Ct.App.2001). Moreover, "it is clear that common law fraud requires proof of a knowing and intentional misrepresentation." *Id.*

Here, the fraudulent conduct argued by Plaintiffs is that Defendants "misrepresented MERS as the beneficiary," (Dkt. No. 1, Ex. A at 8, ¶ 4.2); that Ralph Flores "robo-signed" the purported assignment of the DOT from MERS to Bank of America, (*id.* at 8, ¶ 4.9); and that Bishop White misrepresented itself as a legitimate successor trustee when it served its Notice of Trustee's Sale on Plaintiffs. (*Id.* at 8, ¶ 4.3.)

#### 1. Alleged Fraud by Defendants Bank of America, Countrywide, and MERS by Misrepresenting MERS the "Beneficiary" of the Deed of Trust

Plaintiffs argue that in "purportedly assigning the DOT to the Bank of America, Defendants misrepresented MERS as the beneficiary."<sup>2</sup> (Dkt. No. 1, Ex. A at 8, ¶ 4.2.) Plaintiffs have failed to plead a number of required elements of fraud.

First, when MERS purportedly assigned the DOT to Bank of America, the parties were not making the representation to Plaintiffs, and so Plaintiffs cannot prove that the statement was made to induce Plaintiffs to rely upon it. Second, *Bain v. Metro. Mortg. Group, Inc.*, upon which Plaintiffs rely to show that Defendants committed fraud in assigning MERS as the "beneficiary" of the deed of trust, was decided in 2012. Accordingly, Plaintiffs and Defendants had the same knowledge concerning the identity of the true beneficiary at the time the alleged statement was made in 2011, and

Plaintiffs have not alleged that Defendants made a "knowing and intentional" misrepresentation. *Kirkham*, 23 P.3d at 13. Third, Plaintiffs have not alleged specific facts showing that they *actually* relied on the statement in any way, or how they relied on the statement, regardless of whether they were entitled to do so.<sup>3</sup> They do not allege that having MERS misrepresented as being the "beneficiary" induced them to take any specific actions. Fourth, they have not alleged specific damages attributable to listing MERS as the beneficiary on the assignment of the DOT, as is required under Federal Rule of Civil Procedure 9(b). Accordingly, this claim is hereby dismissed with prejudice, as amendment would be futile.

#### 2. Alleged Fraud by Defendants Bank of America, Countrywide, and MERS Due to "Robosigning"

\*4 Assuming that the alleged "robo-signing" by Ralph Flores constituted a knowing false statement intended to induce reliance in the party to whom the statements were made,<sup>4</sup> Plaintiffs have still failed to allege sufficient specific facts under Federal Rule of Civil Procedure 9(b). First, the statement was not directed at Plaintiffs, and could not have been intended to induce them to rely on it. Second, Plaintiffs do not plead any facts demonstrating their reliance on the statements or the damages they suffered. Plaintiffs have not alleged that they were unable to make payments on their mortgage due to the robo-signing. They have not described what disputes they have been unable to resolve or legal protections of which they have been unable to avail themselves because of the alleged robo-signing. Third, Plaintiffs do not state how the actions of non-defendant Ralph Flores, who Plaintiffs specifically allege was *not* an employee of Bank of America at the time he signed the contested document, may be imputed to any of the defendants in this action. Finally, Plaintiffs have not alleged any facts showing *why* they believe the robo-signing to have occurred at all; they only state that "upon information," the signatories were not employees or representatives of the parties they said they represented, and so did not have the power to sign on behalf of those parties. However, without stating the facts behind their allegation, the Court cannot find their allegations plausible, let alone sufficient under Rule 9(b)'s heightened pleading standard.

Accordingly, Plaintiffs have not sufficiently alleged that the robo-signing occurred at all, that the statement was made to Plaintiffs with the intent to induce reliance, that Plaintiffs relied on the statements, that the statements may be imputed

to any of the defendants, or that the statement caused any damages. This claim is hereby dismissed with prejudice, as amendment would be futile.

### 3. Alleged Fraud by Bishop White for Not Being Valid Trustee

RCW 61.24.030(7) states:

(7) (a) That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.

(b) Unless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection.

RCW § 61.24.030(7). In this case, the relevant declaration states that "BANK OF AMERICA, N.A. is the beneficiary (as defined by RCW § 61.24.005(2)) and actual holder of the promissory note or other obligation secured by the deed of trust or has requisite authority under the RCW 62A.3-301 to enforce said obligation for the above mentioned loan account." (See Dkt. No. 14, Ex. A.) It was signed under penalty of perjury. (*Id.*) Under RCW § 61.24.030(7)(b), a trustee who has not breached its duty of good faith under RCW § 61.24.010(4) is entitled to rely on the beneficiary's declaration under oath as evidence that the beneficiary is the owner of the promissory note or other obligation secured by the deed of trust.

\*5 Here, Bank of America's assertion, signed under penalty of perjury, that it was the "actual holder" of the promissory note is sufficient to trigger the protections of RCW § 61.24.030(7)(b). The reference to RCW 62A.3-301 is not to the contrary, as that statutory section merely defines who is entitled to enforce the relevant promissory note. See RCW 62A.3-301. Regardless of whether Bank of America is a valid beneficiary, claiming that Bishop White made a knowing false statement, given the declaration signed under penalty of perjury by a representative of the purported beneficiary appointing Bishop White as a trustee, is extremely implausible. Plaintiffs have not alleged that Defendants made

a "knowing and intentional" misrepresentation. *Kirkham*, 23 P.3d at 13. Additionally, Plaintiffs have, again, not alleged causation or damages. Because amendment as to this claim would be futile, the Court dismisses this fraud claim with prejudice.

Accordingly, all fraud claims are hereby dismissed with prejudice.

### D. Plaintiffs' CPA Claim

A private CPA claim has five elements: "(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 719 P.2d 531, 533 (Wash.1986). The Washington Supreme Court has held that if MERS claims to be a beneficiary when it is not, that assertion "presumptively meets the deception element of a CPA claim." *Bain*, 285 P.3d at 51-52. Even so, "the mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury" under the Washington CPA. *Bain*, 285 P.3d at 52. Plaintiffs must still plead all CPA elements. Here, Plaintiffs' CPA claim arises out of the misrepresentation of MERS as a beneficiary to the DOT, and Bishop White's alleged misrepresentation of itself as a valid successor trustee. (See Dkt. No. 1, Ex. A at 10, ¶¶ 5.3-5.5.)

Under the CPA, "[p]ersonal injuries, as opposed to injuries to 'business or property,' are not compensable and do not satisfy the injury requirement." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wash.2d 27, 204 P.3d 885, 899 (Wash.2009) (en banc) (quoting *Wash. State. Physicians Ins. Exch. & Assoc. v. Fisons Corp.*, 122 Wash.2d 299, 858 P.2d 1054, 1061 (Wash.1993)). "[D]amages for mental distress, embarrassment, and inconvenience are not cognizable under the CPA." *Panag*, 204 P.3d at 899 (Wash.2009) (en banc). Similarly, litigation expenses incurred to institute a CPA claim do not constitute injury. *Id.* at 902 (citing *Demopolis v. Galvin*, 57 Wash.App. 47, 786 P.2d 804 (Wash.Ct.App.1990)). However, "consulting an attorney to dispel uncertainty regarding the nature of an alleged debt" may be sufficient to show injury to business or property under certain circumstances. *Panag*, 204 P.3d at 902. But such a consultation must still be for a *purpose*: Plaintiffs must have a reason to resolve the particular uncertainty at issue.

\*6 Here, Plaintiffs argue that "[d]efendants' wrongful conduct has caused injury to Plaintiffs including, but not

limited to, loss of business and personal time, travel, meeting with accountants and attorneys, professional fees and having to file this action.” (Dkt. No. 1, Ex. A at 11, ¶ 5.6.) But, even assuming that Plaintiffs accrued those expenses in an attempt to “dispel uncertainty” about the debt, Plaintiffs have not put forward any explanation for why they need to clarify the identity of the beneficiary. Plaintiffs, as noted above, have not alleged that they were unable to make payments on their mortgage, or described what disputes they have been unable to resolve or legal protections of which they have been unable to avail themselves. Nor do they describe any future actions that they are unable to take without knowledge of the identity of the beneficiary. They do not allege that they had to leave their business to “respond to improper payment demands,” as they do not allege that the payment demands were improper. *Panag*, 204 P.3d at 901. Nor do they state that defendants have sought to collect monies not actually owed, as occurred in *Panag*. *Id.*

Accordingly, Plaintiffs have failed to allege a CPA claim, as they have failed to allege causation and damages. Plaintiffs' CPA claim is dismissed with leave to amend.

#### **E. Plaintiffs' Negligence Claim**

“The essential elements of a negligence action are (1) the existence of a duty to plaintiff; (2) breach of that duty; (3) resulting injury; and (4) proximate cause between the breach and the injury.” *Hutchins v. 1001 Fourth Ave. Associates*, 116 Wash.2d 217, 802 P.2d 1360, 1362 (Wash.1991). “[A] duty of care ‘is defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.’” *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wash.2d 442, 243 P.3d 521, 526 (Wash.2010) (quoting *Transamerica Title Ins. Co. v. Johnson*, 103 Wash.2d 409, 693 P.2d 697, 700 (1985)). “An injury is remediable in tort if it traces back to [a] breach of a tort duty arising independently of the terms of the contract.” *Eastwood v. Horse Harbor Found., Inc.*, 170 Wash.2d 380, 241 P.3d 1256, 1262 (Wash.2010). The Deed of Trust Act specifies that only certain claims, such as claims related to common law fraud or misrepresentation, violations of the CPA, and violations of the DTA, are not waived by failing to bring a civil action to enjoin the initial foreclosure. RCW § 61.24.127(1).

Plaintiffs allege that “Defendants have a strict duty to follow the requirements of the Washington state Deed of Trust Act,” and that Defendants violated that duty. (Dkt. No. 1, Ex. A at 11, ¶ 6.2.) However, common law negligence is not included

in the list of claims allowed to be asserted under the Deed of Trust Act if Plaintiffs failed to bring a civil action to enjoin the initial foreclosure. Plaintiffs have not alleged that they brought an action to enjoin the foreclosure. Under the canon of *expressio unius est exclusio alterius*, a plaintiff may not attempt to enforce the provisions of the Deed of Trust Act by asserting a negligence claim where they never brought an action to enjoin the sale. Accordingly, Plaintiffs' claim for relief under a theory of negligence is legally barred, and dismissed with prejudice because amendment would be futile.

#### **F. Plaintiffs' Request for Declaratory Relief**

\*7 “The Declaratory Judgment Act creates only a remedy, not a cause of action.” *Bisson v. Bank of America, N.A.*, 919 F.Supp.2d 1130, 1139 (W.D.Wash.2013). “Plaintiffs might have a claim for declaratory relief if they could properly plead a cause of action that establishes that they have a legal right” to the relief they seek. *Id.* at 1139–40. “But without such a cause of action, there is no claim for declaratory relief.” *Id.* at 1140. Accordingly, to the extent Plaintiffs are asserting declaratory relief as a cause of action, that claim is DISMISSED without prejudice to Plaintiffs filing an amended complaint explaining for which claim or claims they are requesting declaratory relief.

#### **G. Plaintiffs' Wrongful Foreclosure Claim**

Plaintiffs argue that Defendants have not complied with the Deed of Trust Act, and have wrongfully initiated a foreclosure on Plaintiffs' home. Assuming Plaintiffs are suing for damages under RCW § 61.24.127(1)(c)—that the trustee failed to materially comply with the DTA—it was not stated in the Complaint whether the foreclosure sale actually occurred. *See Frias v. Asset Forfeiture Servs., Inc.*, Case No. C13–0760–MJP, Dkt. No. 48 at 3 (W.D.Wash. Sept. 25, 2013) (certifying questions to the Washington Supreme Court regarding: 1) whether a plaintiff may state a claim for damages related to a breach of the DTA in the absence of a completed trustee's sale; and 2) if so, what principles govern his or her claim under the CPA and the DTA). Even assuming that the foreclosure sale has occurred and Plaintiffs are suing under RCW § 61.24.127(1)(c)—or that the Washington Supreme Court will find that a plaintiff may state a claim for damages even in the absence of a completed trustee's sale—it is not clear: 1) that Bank of America did not have the power to appoint Bishop White as the trustee, though it is now Countrywide's successor; or 2) the damages suffered by Plaintiffs due to the alleged wrongdoing of the defendants.

Accordingly, this claim is dismissed for failure to state a claim on which relief may be granted, and Plaintiffs are granted leave to amend their complaint as to this claim.

### III. CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss the Complaint for failure to state a claim, (Dkt. Nos. 11 & 13), are GRANTED. However, Plaintiffs are granted leave

to amend their complaint as to the CPA claim and the wrongful foreclosure claim. Plaintiffs' fraud claims and their negligence claims are dismissed with prejudice. Plaintiffs' claim for declaratory relief is dismissed, and they are granted leave to properly assert it as a remedy, provided they explain for which claims they are requesting declaratory relief. Plaintiffs are DIRECTED to file an amended complaint, within 30 days of the date of this Order.

#### Footnotes

- 1 Bank of America, N.A. has merged with Countrywide Bank, formerly known as Countrywide Bank, N.A., the original lender. (Dkt. No. 5.) Accordingly, Bank of America, N.A. is appearing not only as a defendant in its own right, but also as the successor to Countrywide Bank, N.A. (*Id.*)
- 2 To the extent Plaintiffs' fraud claim relies on the original designation of MERS as the "beneficiary" in the original DOT, it was untimely, as the DOT was signed in 2005. Plaintiffs were aware of all provisions in the DOT when it was signed. Fraud has a three year statute of limitations. *See* RCW 4.16.080(4).
- 3 Plaintiffs conclusorily assert that they "relied on the Defendant's [sic] representation that MERS was the beneficiary and possessed the legal authority to execute the assignment" signed in October of 2011, (Dkt. No. 1, Ex. A at 9, ¶ 4.10), but do not describe their reliance.
- 4 Plaintiffs do not base their fraud claims on the alleged robo signing of Kevin Dennison, instead relying solely on the actions of Ralph Flores. (Dkt. No. 1, Ex. A at 8, ¶¶ 4.6-4.12.)

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#3: *Coble*

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at Seattle.

Jacque F. COBLE and Kathleen L. Coble, Plaintiffs,  
v.  
SUNTRUST MORTGAGE INC, et al., Defendants.

No. C13-1878-JCC. | Feb. 18, 2014.

#### Attorneys and Law Firms

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Barbara L. Bollero, David A. Weibel, Bishop White Marshall & Weibel, PS, Seattle, WA, Louis A. Santiago, Holland & Knight, Portland, OR, for Defendants.

#### Opinion

### ORDER

JOHN C. COUGHENOUR, District Judge.

\*1 This matter comes before the Court on the motions to dismiss from Defendant Northwest Trustee Services, Inc. (Dkt. No. 14) and Defendant Safeguard Properties Management, LLC (Dkt. No 13). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motion for the reasons explained herein.

#### I. BACKGROUND

This case relates to two pieces of property. The first is the property at 3215 McLeod Road, Bellingham, which was the Cobles' primary residence ("Residential Property"). The second is the property at 3219 McLeod Road, Bellingham ("Rental Property").

##### A. Residence Property

The Cobles purchased the Residential Property in 2002 as their primary residence. (Dkt. No. 37 ¶ 3.1.) On June 22, 2007, Plaintiffs refinanced their home, executing a promissory note to obtain a loan in the amount of \$261,000.00 from Defendant SunTrust Mortgage, Inc. ("SunTrust"). (Dkt. No. ¶ 3.2.) The loan was secured by a Deed of Trust ("Residential Deed of

Trust"), which listed MERS as the "Beneficiary," SunTrust as the "Lender," and Washington Administrative Services, Inc., as the "Trustee." (Dkt. No. 37 ¶ 3.2.)

On July 18, 2011, MERS assigned its "beneficial interest under the Deed of Trust" to SunTrust. The assignment was later recognized as having a "signing/notary issue" and MERS recorded a "Corrective" assignment on September 19, 2012. (Dkt. No. 37 ¶ 3.10.) There appears no dispute that the original assignment contained an error, although the parties dispute the legal effect of the error. (Dkt. No. 14 at 8-10 (not disputing error but stating that the assignment is legally irrelevant); Dkt. No. 37 ¶ 3.8 (defective assignment meant SunTrust lacked authority to appoint a successor trustee)).

On December 5, 2011, NW Trustee as agent for Suntrust issued a notice of default to the Cobles, which listed Fred die Mac as the "owner of the note" and SunTrust as the "loan servicer." (Dkt. No. 29 at 4; Dkt. No. 37 ¶ 3.6.) On January 13, 2012, SunTrust appointed NW Trustee as successor trustee under the Deed of Trust. (Dkt. No. 37 ¶ 3.7.)

On February 25, 2013, NW Trustee recorded a Notice of Trustee's Sale. The Notice advised Plaintiffs that they were in default, that a failure to cure the default would result in foreclosure, and that in order to preserve their rights, they must bring an action to enjoin the sale under Washington law. (Dkt. No. 14, ex. 4) Plaintiffs do not dispute that they defaulted on their loan nor do they suggest that they cured the default or brought an action to enjoin the sale.

The property was sold by nonjudicial foreclosure on December 28, 2012. (Dkt. No. 14 at 4.)

##### B. Rental Property

When Plaintiffs refinanced the Residential Property in 2007, they also purchased the Rental Property. (Dkt. No. 37 ¶ 3.19.) They obtained a loan in the amount of \$168,700.00 from SunTrust. (Dkt. No. 29, ex. F at 2.) The loan was secured by the Rental Deed of Trust, which, like the Residential Deed of Trust, listed MERS as the "Beneficiary," SunTrust as the "Lender," and Washington Administrative Services, Inc., as the "Trustee." (Dkt. No. 37 ¶ 3.20.)

\*2 In early October 2010, the Cobles had fallen behind on their payments on the Rental Property loan. (Dkt. No. 37 ¶ 3.22.) They received a notice stating that the Rental Property was "abandoned" and saw a sticker from LPS Field Services, Inc. ("LPS") on the door of the Rental Property. (*Id.*)

The Cobles telephoned LPS and SunTrust asserting that the property was not abandoned. (*Id.* ¶ 3.22.) On October 7, 2010, Plaintiffs made a payment. (*Id.* ¶ 3.24.) They also discovered that the locks on the Rental Property had been changed and saw a sticker from Defendant Safeguard (“Safeguard”) on the property. (Dkt. No. 37 ¶ 3.23.) Plaintiffs notified SunTrust that the property was not abandoned and demanded access, which was refused. (*Id.* ¶ 3.29.)

On July 14, 2011, MERS executed an assignment of its beneficial interest under the Rental Deed of Trust to SunTrust. (Dkt. No. 37 ¶ 3.32.)

On May 22, 2012, SunTrust executed a document declaring that it was the beneficiary and the holder of the note secured by the Rental Deed of Trust. (*Id.* ¶ 3.33.)

On June 18, 2012, NW Trustee issued a notice of default to the Cobles; the notice listed Fannie Mae as the “owner of the note” and SunTrust as the “loan servicer.” (Dkt. No. 37 ¶ 3.34.) Just under a month later, on August 9, 2012, SunTrust appointed NW Trustee as successor trustee under the Deed of Trust. (Dkt. No. 37 ¶ 3.35.)

On August 21, 2012, NW Trustee recorded a Notice of Trustee's Sale. The Notice advised Plaintiffs that they were in default, that a failure to cure the default would result in foreclosure, and that in order to preserve their rights, they must bring an action to enjoin the sale under Washington law. (Dkt. No. 14, ex. 5.)

On December 28, 2012, the property was sold by nonjudicial foreclosure to the “Beneficiary,” and the deed was issued to Defendant Fannie Mae. (Dkt. No. 37 ¶ 3.41.) Plaintiff states “[u]pon information and belief, between August 8, 2012 and December 28, 2012, Fannie Mae was the owner of the promissory note issued contemporaneously with the Coble Rental Deed of Trust.” (*Id.* ¶ 3.43.)

### 3. Action in this Court

Plaintiffs filed their Second Amended Complaint on November 19, 2013. (Dkt. No. 37.)<sup>1</sup> Against NW Trustee, Plaintiffs' only claims are violations of Wash. Rev.Code § 61.24, Foreclosure Violations of Deed of Trust Act (Dkt. No. 37 at 18–20), Misrepresentation (Dkt. No. 37 at 21–22), and violations of Washington's Consumer Protection Act (“CPA”) (Dkt. No. 37 at 23–24). Plaintiffs alleged SunTrust lacked legal authority to institute a nonjudicial foreclosure,

and that NW Trustee knew or should have known this (Dkt. No. 37 at 19), which forms the basis for the claims of violations of the Deed of Trust Act and of misrepresentation, which are in turn violations of the CPA.

Against Safeguard, Plaintiffs bring claims of trespass and property damage, invasion of privacy/intrusion upon seclusion, conversion of personal property, breach of the right to possession, negligence, and CPA violations (Dkt. No. 37 at 13–18, 24.)

\*3 Both NW Trustee and Safeguard have filed motions to dismiss. (Dkt. Nos. 13, 14.)

## II. DISCUSSION

### A. The Pleading Standard and Leave to Amend

In ruling on a motion to dismiss, the Court assumes that a plaintiff's factual allegations are true and draws all reasonable inferences in a plaintiff's favor. *See OSU Student Alliance v. Ray*, 699 F.3d 1053, 1061 (9th Cir.2012). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 550, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). If the Court dismisses the complaint, the Court should consider whether to grant leave to amend. *See Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir.2000). The court should “freely give” leave to amend “when justice so requires.” Fed.R.Civ.P. 15(a)(2).

### B. Documents Considered

A court may not consider “matters outside the pleadings” when ruling on a motion to dismiss under Rule 12(b)(6) without converting the motion into one for summary judgment. Fed. R. 12(d); *see also United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir.2011). A court may, however, “consider materials that are submitted with and attached to the Complaint.” *Id.* A court “may also consider unattached evidence on which the complaint ‘necessarily relies’ if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document.” *Id.* (internal citation omitted).

### C. NW Trustee's Motion to Dismiss

### 1. Washington's Deed of Trust Act

As the Washington Supreme Court has explained, a deed-of-trust transaction is a three-party transaction in which land is conveyed by a borrower (the 'grantor') to a 'trustee,' who holds title in trust for a lender (the 'beneficiary') as security for a loan the lender has given the borrower. *Bain v. Metropolitan Morg. Grp.*, 175 Wash.2d 83, 285 P.3d 34, 38 (Wash.2012). Deeds of trust may grant trustees the power of sale if the borrower defaults, in which case the trustee can foreclose on the deed of trust and sell the property without judicial supervision. *Id.* Because this process lacks judicial oversight and may make it relatively easy to forfeit borrowers' interests, the state Supreme Court has made clear that the DTA must be construed in favor of borrowers. *See id.* at 39.

### 2. SunTrust's Legal Authority

The issue is whether Plaintiff has alleged facts demonstrating that SunTrust had legal authority to institute a nonjudicial foreclosure by appointing NW Trustee and directing them to conduct a sale-and, if they did not, whether NW Trustee should have known that. (Dkt. No. 29 at 12.) Plaintiffs suggest two reasons why SunTrust lacked such legal authority. One reason is that, as Plaintiffs state, "upon information and belief, [on the relevant dates ], SunTrust was not the holder of the instrument[s] or document[s] evidencing the obligations secured by the [Deeds of Trust ] ." (Dkt. No. 37 ¶ 3.9, 3.37.) The other reason is that SunTrust was not a lawful beneficiary of the Residential Deed of Trust "due to the defective assignment by MERS," (Dkt. No. 37 ¶ 3.8), and was not a lawful beneficiary of the Rental Deed of Trust "due to the fact MERS was never a lawful Beneficiary and had no power to assign a beneficial interest in the Coble Rental Deed of Trust," (Dkt. No. 37 ¶ 3.36).

\*4 The Court concludes that Plaintiffs have failed to provide factual allegations sufficient to infer that SunTrust was not the holder of the note. *See Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level...."). As NW Trustee argues, Suntrust was the original lender, and no facts suggest that they ever negotiated the note. (Dkt. No. 14 at 7-8.) Plaintiff's bare recitals that SunTrust "was not the holder" on relevant dates are conclusory legal statements that provide no factual allegations from which this Court can infer that SunTrust possessed neither note. Neither does SunTrust being listed as the "servicer" in some loan documents create an inference that SunTrust does not hold the note. (Dkt. No. 29 at 14.) *See, e.g., Blake v. U.S. Bank Nat. Ass'n*, No. 12-2186-MJP,

2013 WL 6199213 at \*2 (W.D.Wash. Nov.27, 2013) (servicer was also the holder of the note). Plaintiff also suggests that the holder of the note must be the owner of the obligation-but this argument has been rejected by courts. *See Massey v. BAC Home Loans Servicing LP*, No. 12-cv-1314-JLR, 2013 WL 6825309 at \*5 (W.D.Wash. Dec.23, 2013) (citing cases); *Rouse v. Walls Fargo Bank, N.A.*, No. 13-cv-5706-RBL, 2013 WL 5488817 at \*5 (W.D.Wash. Oct.2, 2013) ("[C]ourts have uniformly rejected claims that only the 'owner' of the note may enforce it.").

Where SunTrust derived its legal authority from its status as a holder-or more precisely: where Plaintiff fails to allege otherwise-the presence of MERS on the deed of trust is not fatal. *See, e.g., Johnson v. CitiMortgage, Inc.*, 13-CV-0037-RSM, 2013 WL 6632108 (W.D.Wash.2013) (citing multiple cases for proposition that MERS being named as beneficiary on a deed of trust does not make the deed of trust unenforceable where the actor derives its authority from holding the note itself); *Babrauskas v. Paramount Equity Mortg.*, No. 13-cv-0494-RSL, 2013 WL 5473909 at \*3 (W.D.Wash. .2013) (stating in the context of a CPA claim: "Charter Bank's claim to beneficiary status for purposes of the DTA comes not from MERS' purported assignment-defective or not-but rather from its physical possession of plaintiff's original note. Absent factual allegations suggesting that Charter Bank was not the beneficiary as represented, plaintiff has failed to allege an unfair or deceptive act on its part."). Plaintiff's reliance on *Bavand v. OneWest Bank, F.S.B.*, 176 Wash.App. 475, 309 P.3d 636 (Wash.Ct.App.2013), is unavailing. In that case, the record did not support One West's contention that it held the note, *Bavand*, 309 P.3d at 648, so the fact that MERS lacked legal authority became relevant, *see id.* at 644. By contrast, no allegations in this case suggest that SunTrust did not hold the note. Indeed, *Bavand* supports the proposition that a party can establish "its beneficiary status for purposes of appoint [ing] ... [a] successor trustee" by establishing that it holds the note. *Id.* at 648.

\*5 Amendment is not necessarily futile because Plaintiffs may be able to articulate appropriate factual bases for the legal conclusions they draw. Plaintiff's DTA claims are thus DISMISSED without prejudice. Plaintiffs may amend their complaint to allege facts supporting their claim that SunTrust was not the holder of the note at the relevant times and that NW Trustee knew of any relevant legal defect.

### 3. Consumer Protection Act claims

The elements of a Washington Consumer Protection Act (“CPA”) claim are: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff or its business or property; and (5) the injury is causally linked to the unfair or deceptive act. *Michael v. Mosquera-Lacy*, 165 Wash.2d 595, 200 P.3d 695, 699 (Wash.2009); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 719 P.2d 531, 533 (Wash.1986). A plaintiff must establish all five elements to state a claim for violation of the CPA. *Hangman Ridge*, 719 P.2d at 535.

Plaintiffs allege that the DTA violations also violated the CPA. (Dkt. No. 37 at 24–25.) But having concluded that Plaintiffs failed adequately to allege violations of the DTA, the Court also DISMISSES without prejudice the CPA claims.

#### 4. Misrepresentation

Plaintiffs plead negligent misrepresentation. (Dkt. No. 37 at 21; Dkt. No. 29 at 23.) Like Plaintiff's CPA claim, this claim relies on the same factual bases as the DTA claims. It is therefore DISMISSED without prejudice.

#### D. Safeguard's motion to dismiss

##### 1. Trespass and Property Damage

Plaintiffs allege that “Safeguard committed a trespass by breaking into the property and changing the locks.” (Dkt. No. 28 at 10; Dkt. No. 37 at 13–14.) The complaint alleges that Defendant LPS Field Services, Inc. (“LPS”) provides lock-change services, but alleges that Safeguard merely provides “inspections, property preservation services, maintenance work, and repair and rehab services.” (Dkt. No. 37 ¶ 1.7.) Even so, Plaintiffs argue that “it is reasonable to infer that Safeguard performed the lock change.” (Dkt. No. 28 at 5.) The Court disagrees. Where only LPS is alleged to provide lock-change services, the mere fact that a Safeguard sticker appeared somewhere on the Rental Property does not create an inference that Safeguard broke into the property and changed the locks. This claim is therefore DISMISSED without prejudice. Plaintiffs may amend their complaint to allege factual allegations supporting the conclusion that Safeguard was the party that changed the locks.

##### 2. Invasion of Privacy Claim

Plaintiffs' second claim is for invasion of privacy by intrusion upon seclusion. “Invasion of privacy by intrusion consists of a deliberate intrusion, physical or otherwise, into a person's solitude, seclusion, or private affairs. The intruder must have acted deliberately to achieve the result, with the certain belief that the result would happen.” *Fisher v. State ex rel. Dept. of Health*, 125 Wash.App. 869, 106 P.3d 836 (Wash.Ct.App.2005). Like Plaintiffs' trespass claim, Plaintiffs' invasion-of-privacy claim also depends on Plaintiffs' assertion that it was Safeguard who broke into the property and changed the locks. (Dkt. No. 37 at 15; Dkt. No. 28 at 12). For the same reasoning as above, the Court DISMISSES this claim without prejudice.

##### 3. Conversion

\*6 The Second Amended Complaint alleges only that Safeguard “converted the Cobles' personal property.” (Dkt. No. 37 at 16.) Both parties agree that conversion is an intentional tort and that Washington law rejects vicarious liability for intentional torts outside the scope of employment. (Dkt. No. 28 at 13.) In their response to the motion to dismiss, Plaintiffs suggest that the property would have been removed in preparation for the foreclosure sale, so the removal would have been within the scope of employment. (Dkt. No. 28 at 13.) Even assuming that this is a reasonable inference to draw from the allegations in the complaint, the success of Plaintiffs' conversion claim depends on whether the foreclosure sale was properly initiated. For the reasons discussed in relation to NW Trustee's motion to dismiss, Plaintiffs have failed to allege that the foreclosure sale was improperly initiated. Plaintiffs' conversion claims are therefore DISMISSED without prejudice.

##### 4. Breach of Right to Possession

The DTA provides that when a trustee is going to foreclose on a property that is either a single-family residence or a building that contains fewer than five residential units, the trustee must provide a notice to the occupants or tenants. Wash. Rev.Code § 61.24.040(9). This notice must state: “[t]he purchaser at the trustee's sale is entitled to possession of the property on the 20th day following the sale, as against the grantor under the deed of trust (the owner) and anyone having an interest junior to the deed of trust, including occupants who are not tenants.” Wash. Rev.Code § 61.24.040(9). Plaintiffs argue that this provision entitled them to possession of the Rental Property “until the twentieth day after a valid trustee's nonjudicial foreclosure sale,” (Dkt. No. 37 ¶ 7.2), and that Safeguard breached this right.

This provision applies to “occupants,” but Plaintiffs were not occupants of the Rental Property. Nor do they cite any legal authority suggesting that the form of the notice provided to occupants of a property grants them a right of possession under the DTA. Nor do they cite any legal authority suggesting that a company providing property-related services—who is not a borrower, grantor, guarantor, owner, holder, beneficiary, or trustee under a deed of trust—has legal obligations under the DTA. For these reasons, the Court concludes that amendment would be futile, and DISMISSES with prejudice this claim against Safeguard.

### 5. Negligence

A two-year statute of limitations governs negligence claims for injury to real property. *See Wallace v. Lewis Cnty.*, 134 Wash.App. 1, 137 P.3d 101, 107 (Wash.Ct.App.2006) (citing numerous sources) Wash. Rev.Code. § 4.16.130. Plaintiffs argue that the three-year limitation applicable to actions for “taking, detaining, or injuring personal property” should apply. Wash. Rev.Code. § 4.16.080(2). But Plaintiffs' negligence claim is for damage to the property. Plaintiffs' trespass and conversion claims (which relate to personal property) are intentional torts that have already been addressed above. Plaintiffs allege that they became aware

of the property damage on October 7, 2010 (Dkt. No. 37 ¶ 3.25), but they did not file this suit until September 18, 2013. Amendment cannot cure this untimeliness. Plaintiffs' negligence claims are therefore DISMISSED with prejudice.

### 6. CPA claims

\*7 Like the trespass and invasion-of-privacy claims, Plaintiffs' CPA claims depend on Safeguard having changed the locks. (Dkt. No. 37 at 23–25; Dkt. No. 28 at 17–18.) They are therefore DISMISSED without prejudice.

### III. CONCLUSION

For the foregoing reasons, Defendant Northwest Trustee's motion to dismiss (Dkt. No. 14) is GRANTED and Plaintiff's claims against Northwest Trustee are DISMISSED without prejudice. Defendant Safeguard's motion to dismiss is GRANTED (Dkt. No. 13) and Plaintiff's negligence claims and breach-of-right-of-possession claims against Safeguard are DISMISSED with prejudice and the remaining claims are DISMISSED without prejudice.

Plaintiffs are granted leave to amend their complaint. Plaintiffs' amended complaint is due no later than thirty (30) days from the date of this order.

#### Footnotes

- 1 The filing of the Second Amended Complaint did not affect the motions to dismiss, which were pending at the time it was filed. (Dkt. No. 34 ¶ 4.)

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2014 WL 504820

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United States District Court, W.D. Washington,  
at Seattle.

Barjinder SINGH, et al., Plaintiffs,  
v.  
FEDERAL NATIONAL MORTGAGE  
ASSOCIATION, et al., Defendants.

No. C13-1125RAJ. | Feb. 7, 2014.

#### Attorneys and Law Firms

Melissa A. Huelsman, Seattle, WA, for Plaintiffs.

Jody M. McCormick, Steven Joseph Dixon, Witherspoon  
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#### Opinion

### ORDER

RICHARD A. JONES, District Judge.

#### I. INTRODUCTION

\*1 This matter comes before the court on Defendants' motion to dismiss. No party requested oral argument, and the court finds oral argument unnecessary. For the reasons stated herein, the court GRANTS the motion. Dkt. # 5. Plaintiffs may file an amended complaint in compliance with this order no later than February 27, 2014, or the court will dismiss this case with prejudice.

#### II. BACKGROUND

The court describes the facts underlying this case as Plaintiffs Barjinder Singh and Ramandeep Kaur allege them in their complaint and as they appear in documents subject to judicial notice. The court cites the complaint with bare "¶" symbols, and uses "Ex." to cite documents subject to judicial notice attached to the declaration of Defendants' counsel. Dkt. # 6.

Plaintiffs borrowed a total of just under \$380,000 in two loans from Bank of America, N.A. ("BofA") in March 2007, securing each loan with a deed of trust to their condominium in Kent, Washington. Both deed of trusts named Prlap, Inc. as

the trustee and BofA as the lender (and thus the beneficiary). Exs. A–B. The notes whose obligations the deeds of trust secure are not part of the record, but Plaintiffs do not deny their existence. Like Plaintiffs, the court will refer to their two notes as a single note and their two deeds of trust as a single deed of trust.

In a document dated October 12, 2010, but notarized on November 3, 2010, BofA appointed ReconTrust Company, N.A. ("ReconTrust") as the successor trustee. Ex. C.

Plaintiffs fell behind in their loan payments, leading them to communicate with BofA about obtaining a loan modification via the Home Affordable Mortgage Program ("HAMP"). ¶ 2.4. BofA concluded that Plaintiffs did not qualify for HAMP because Mr. Singh's income was too low. Plaintiffs protested the decision, knowing that they faced a May 6, 2011 trustee's sale of their home. ¶ 2.5. Representatives from BAC Home Loan Servicing, LP ("BAC"), a wholly-owned BofA subsidiary, communicated with Plaintiffs in April 2011, telling them to be patient and that their request for modification was still under consideration. ¶ 2.5. Just two days before the foreclosure sale, a third party whom Plaintiffs had hired attempted to negotiate with BAC. ¶ 2.5. Plaintiffs were directed to contact ReconTrust. They attempted to do so, but were unable to reach anyone. ¶ 2.5. Plaintiffs (or the third party) were told by one or more of the Defendants that the foreclosure sale would be postponed. ¶¶ 2.5, 2.6. The foreclosure sale occurred as scheduled in May 2011. Plaintiffs did not sue to enjoin the sale, nor do they allege that they could have satisfied the requirement that they make monthly loan payments to the court as a condition of an injunction against the sale. RCW 61.24.130(1). Plaintiffs attempted to negotiate a rescission of the sale, but had no luck. ¶ 2.7. A trustee's sale occurred in May 2011.

Two years after the trustee's sale, Plaintiffs sued BofA, BAC, and ReconTrust. They also sued the Federal National Mortgage Association, better known as "Fannie Mae." They contend that every Defendant violated the Washington Consumer Protection Act (RCW Ch. 19.86, "CPA"), that ReconTrust breached the duty of good faith that the Washington Deed of Trust Act (RCW Ch. 61.24) imposes on trustees, and that all Defendants are liable for negligent or intentional misrepresentations to Plaintiffs.

\*2 The court now considers Defendants' motion to dismiss Plaintiffs' complaint in its entirety.

### III. ANALYSIS

Defendants invoke Fed.R.Civ.P. 12(b)(6), which permits a court to dismiss a complaint for failure to state a claim. The rule requires the court to assume the truth of the complaint's factual allegations and credit all reasonable inferences arising from those allegations. *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir.2007). The plaintiff must point to factual allegations that “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 568, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). If the plaintiff succeeds, the complaint avoids dismissal if there is “any set of facts consistent with the allegations in the complaint” that would entitle the plaintiff to relief. *Id.* at 563; *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (“When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”). The court typically cannot consider evidence beyond the four corners of the complaint, although it may rely on a document to which the complaint refers if the document is central to the party's claims and its authenticity is not in question. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir.2006). The court may also consider evidence subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir.2003).

#### A. Most of Plaintiffs' Allegations of Wrongdoing Are Implausible.

Plaintiffs describe a host of wrongdoing to support each of their claims. Most of their allegations are implausible, as the court discusses in this section. In the next section, the court will consider whether there are plausible allegations that Defendants' wrongdoing (even assuming that Plaintiffs adequately pleaded it) caused damage to Plaintiffs.

##### 1. There Are No Plausible Allegations that Fannie Mae Held an Interest in Plaintiffs' Property Before the Trustee's Sale.

Plaintiffs allege that Defendants falsely represented that BofA held the note evidencing Plaintiffs' loan. They assert that it was Fannie Mae who held the note. The assertion is not plausible. Plaintiffs allege that the “other documentation in this case makes clear that Defendant Fannie Mae was the supposed note holder and owner of the mortgage loan since shortly after the loan was made.” ¶ 2.9. But Plaintiffs neither attach this “other documentation” to their complaint nor offer any allegations describing it. At best, they

allege that BofA and BAC referred in correspondence with Plaintiffs to an “ ‘investor’ who supposedly owned the loan.” *Id.* “Presumably,” Plaintiffs declare, “that was Defendant Fannie Mae.” *Id.* Nowhere do Plaintiffs explain why they presume that Fannie Mae was the unnamed investor. The only documents Plaintiffs identify with specificity that also mention Fannie Mae are a May 10, 2011 trustee's deed<sup>1</sup> in which ReconTrust conveys Plaintiffs' property to Fannie Mae and a document with the same date assigning BofA's interest in Plaintiffs' deed of trust to Fannie Mae. ¶¶ 2.2, 2.12; Exs. D & F. The court takes judicial notice of both documents, which are consistent with Fannie Mae acquiring an interest in Plaintiffs' property from BofA *after* the trustee's sale. Neither of them is consistent with Plaintiffs' unexplained “presumption” that Fannie Mae had a legal interest in their property or their loan before the trustee's sale. There is, in short, no plausible allegation that Fannie Mae, not BofA, was the beneficiary of Plaintiffs' deed of trust or the holder of their note prior to the trustee's sale. Plaintiffs' allegations that BofA misrepresented its role prior to the trustee's sale are implausible for the same reason.

\*3 The court observes that Defendants are apparently of two minds as to who held the note prior to the trustee's sale. They both concede that Fannie Mae was the beneficiary of the deed of trust and assert repeatedly that BofA was the beneficiary. *Compare* Defs.' Mot. (Dkt.5) at 9 (“Fannie Mae, as the beneficiary under Plaintiffs' [deed of trust], was bestowed with the authority to appoint any entity to service the loan ...”) *with* Defs.' Mot. at 18 (arguing that the foreclosure documents “properly identify [BofA] or BAC ... as the owner of the note and the creditor to whom the debt is owed”). The court has no idea who was the beneficiary or note holder at the time of the foreclosure. It merely holds today that it is implausible, based on the allegations in the complaint, to conclude that BofA was not the beneficiary or noteholder.

##### 2. There Are No Plausible Allegations that ReconTrust Falsely Represented That It Was the Trustee on Plaintiffs' Deed of Trust.

In an October 12, 2010 document, BofA appointed ReconTrust as the successor trustee on the deed of trust. Ex. C. Plaintiffs insist that the assignment was invalid, and that ReconTrust thus acted deceptively when it later claimed to be the trustee authorized to conduct the sale of their property. As was the case with their allegations about BofA's false representations about its role as lender and beneficiary,

Plaintiffs offer no plausible allegations that ReconTrust was not properly appointed as a trustee.

Plaintiffs allege that Leticia Quintana, the “Assistant Secretary” who signed the assignment on behalf of BofA, was not “an actual Assistant Secretary” of BofA, but rather an employee of ReconTrust. ¶ 2.9. Plaintiffs offer no detail that would help make their assertion plausible. But even if they had, their assertions are legally meaningless. The deed of trust permits the beneficiary to appoint a successor trustee, as does the Deed of Trust Act. Ex. A (¶ 24); RCW 61.24.010(2). Plaintiffs, as the borrowers, have no role in appointing trustees and no right to object to the appointment of a trustee. Whatever roles Ms. Quintana played, BofA has not objected to her acting to appoint ReconTrust as a successor trustee. Plaintiffs have no standing to raise that objection on their own behalf.<sup>2</sup>

### **3. There Are No Plausible Allegations that Defendants Misstated the Balance of Plaintiffs' Loan or the Fees Plaintiffs Had Incurred.**

Plaintiffs offer cursory allegations that BofA misrepresented the amount they owed on their loan and how their payments had been applied, ¶ 3.4, and that ReconTrust “inflated some of the other fees associated with sending out the Notice of Default,” ¶ 3.3. These allegations are conclusory. Without more details (*e.g.* allegations that identify the “inflated fees” or the specific misrepresentation about the amount Plaintiffs owed), these allegations are implausible.

### **3. There Are No Plausible Allegations That ReconTrust Lacks the In—State Physical Presence that the Deed of Trust Act Requires.**

\*4 Plaintiffs allege that ReconTrust did not comply with a portion of the Deed of Trust Act that requires that a trustee maintain a physical presence in Washington throughout the foreclosure process. RCW 61.24.030(6) (“[P]rior to the date of the notice of trustee's sale and continuing thereafter through the date of the trustee's sale, the trustee must maintain a street address in this state where personal service may be made, and the trustee must maintain a physical presence and have telephone service at that address.”). The notice of trustee's sale (to which Plaintiffs' complaint refers) states an Olympia address for ReconTrust's agent for service of process and provides the agent's phone number. Ex. E. Against that judicially noticeable statement, Plaintiffs' conclusory assertion that “ReconTrust does not comply with the requirements of RCW 61.24.030(6) by maintaining a

physical presence in the state, along with a street address and operating telephone number where personal service can be made” is implausible. ¶ 2.9. Plaintiffs could, if they had a factual basis to do so, allege that the phone number and street address ReconTrust provided for its Washington agent was a sham. Plaintiffs' decision to simply ignore ReconTrust's designation of an in-state agent renders their assertions implausible.

This court has previously held that designation of a Washington agent with a physical address and phone number suffices to meet the physical presence requirement. *See Douglas v. ReconTrust*, No. C 11–1475RAJ, 2012 U.S. Dist. LEXIS 161268, at \*13–16, 2012 WL 5470360(W.D.Wash. Nov. 9, 2012); *Ayala v. Fannie Mae*, No. C13–285RAJ, 2013 U.S. Dist. LEXIS 139877, at \*6 & n. 2 (W.D.Wash. Sept. 17, 2013). Plaintiffs offer no argument addressing the reasoning in those decisions, and the court reaffirms those decisions today.

### **4. Nothing Prohibits ReconTrust From Serving as Trustee Merely Because It Is Allegedly a Wholly—Owned Subsidiary of BofA.**

Plaintiffs also allege that ReconTrust may not serve as a trustee because it is a wholly-owned subsidiary of BofA, ¶ 2.9, and thus is unable to carry out the duty of good faith that the Deed of Trust Act imposes on trustees. RCW 61.24.010(4). The Deed of Trust Act establishes that the trustee “has a duty of good faith to the borrower, beneficiary, and grantor,” RCW 61.24.010(4), but also relieves the trustee of any “fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust,” RCW 61.24.010(3). Plaintiffs contend that ReconTrust's status as a subsidiary of BofA created a conflict of interest. That, by itself, falls well short of establishing a breach of a duty of good faith. Even before the Washington Legislature amended the deed of trust act to abolish a trustee's fiduciary duty to a borrower, its courts recognized that “an employee, agent, or subsidiary of a beneficiary” could serve as a trustee. *Cox v. Helenius*, 103 Wash.2d 383, 693 P.2d 683, 687 (Wash.1985); *see also Meyers Way Development LP v. University Savings Bank*, 80 Wash.App. 655, 910 P.2d 1308, 1315–16 & n. 8 (Wash.Ct.App.1996) (noting that even the “exceedingly high” fiduciary duty that a trustee owed to a borrower did not prohibit a trustee from “serving simultaneously as the creditor's attorney, agent, employee or subsidiary”). No authority Plaintiffs have cited, and no authority of which the court is aware, prohibits a subsidiary of the beneficiary from serving as a trustee.

**5. Plaintiffs' Plausibly Allege that Some of the Defendants Acted Unlawfully While "Dual-Tracking" Plaintiffs' Foreclosure and Loan Modification Negotiations.**

\*5 Plaintiffs' only plausible allegations of wrongdoing are that ReconTrust, BAC, and BofA collectively misled Plaintiffs about the status of their foreclosure while Plaintiffs attempted to negotiate a loan modification. Plaintiffs "continually received promises from the representatives at the service center that the foreclosure sale would not proceed while their loan modification was being processed ...." ¶ 2.5. The third party who contacted Defendants on their behalf received assurance, even on the day of the trustee's sale, that the sale would not occur. *Id.*

This practice, which Plaintiffs describe as "dual tracking," ¶ 2.7, is unlawful. To the extent that ReconTrust participated, it violated its duty of good faith. To the extent that BofA or BAC participated, they engaged in an unfair or deceptive practice within the meaning of the CPA.<sup>3</sup> RCW 19.86.020. Defendants had no obligation (or at least Plaintiffs do not plausibly allege an obligation) to modify Plaintiffs' loan, but they had an obligation to be honest with Plaintiffs about the foreclosure process. They similarly had an obligation not to make false promises that a trustee's sale would not occur. At substantial risk of stating the obvious, it is unlawful to simultaneously sell Plaintiffs' home and promise them not to sell their home.

**B. Plaintiffs Have Not Plausibly Alleged an Injury Flowing From Defendants' Wrongdoing.**

Each of Plaintiffs' causes of action requires them not merely to allege wrongdoing, but to show that the wrongdoing caused them injury. An unfair or deceptive act within the scope of the CPA is not a violation of the CPA unless it also causes an injury to a plaintiff in her business or property. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins.*, 719 P.2d 531, 523 (Wash.1986). A claim for fraud or negligent misrepresentation requires damages as a result of a plaintiff's reliance on a false statement. *Salter v. Heiser*, 39 Wash.2d 826, 239 P.2d 327, 331 (Wash.1951) (holding that plaintiff in a fraud action "is entitled to recover damages for losses proximately caused by the defendant's fraud"); *Ross v. Kirmer*, 162 Wash.2d 493, 172 P.3d 701, 704 (Wash.2007) (stating elements of negligent misrepresentation). Plaintiffs do not explain what law permits them to recover damages for a trustee's breach of its duty of good faith (the Deed of

Trust Act itself creates no cause of action for damages), but the court is confident that damages are necessary.

Plaintiffs claim a range of damages. They were "deprived of the Property and their home," they were "actually evicted from the Property by Defendant Fannie Mae," they "suffered emotional distress," and they "incurred financial losses as a result of the actions of the Defendants, including the cost of defending the eviction proceeding." ¶ 2.13. They also ask that the court use its equitable power to give them back their property. ¶ IV(5)-(6).

Several of these allegations are easily dismissed. The CPA does not permit recovery of emotional damages. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 858 P.2d 1054, 1064 (Wash.1993). The "eviction proceeding" that Plaintiffs mention is described nowhere in their complaint. The court speculates that Fannie Mae, after acquiring ownership of Plaintiffs' property at the May 2011 trustee's sale, conducted eviction proceedings. If Plaintiffs have a claim for damages arising out of the eviction, they have not stated it in their complaint. Indeed, they have not plausibly alleged any wrongdoing by Fannie Mae.

\*6 Plaintiffs also have no allegations that would overcome the limitation of remedies that the Deed of Trust Act imposes on plaintiffs who fail to seek injunctive relief before a trustee's sale occurs. Failure to sue to enjoin a trustee's sale waives most claims. *Albice v. Premier Mortgage Servs. of Wash., Inc.*, 174 Wash.2d 560, 276 P.3d 1277, 1282 (Wash.2012); *Frizzell v. Murray*, 313 P.3d 1171, 179 Wash.2d 301, 306-10 (Wash.2013). Plaintiffs offer neither allegation nor argument suggesting that they can avoid the waiver that attaches to their failure to seek injunctive relief before the trustee's sale. *See Albice*, 276 P.3d at 1283 (noting circumstances in which waiver doctrine is inapplicable). The Deed of Trust Act exempts some claims from waiver, including claims for fraud or misrepresentation, claims arising under Title 19 of the Revised Code of Washington (which includes the CPA), and claims asserting a trustee's failure "to materially comply" with the Deed of Trust Act. RCW 61.24.127(1). The exemption prohibits "any remedy at law or in equity other than monetary damages," and it declares that no claim may "affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property." RCW 61.24.127(2). Plaintiffs nonetheless ask the court to "prohibit the foreclosure of the Residence," a request that was moot two years before Plaintiffs sued, and to "[v]oid[ ] the foreclosure sale ... and re-vest[ ] title to the Property in the

name of [Ms. Kaur and Mr. Singh].”<sup>4</sup> ¶ IV(5)-(6). Those claims fail as a matter of law.

What remains are Plaintiffs' assertions of financial losses as a result of the foreclosure; Plaintiffs do not adequately tie these assertions to Defendants' wrongdoing. Plaintiffs admit, candidly enough, that they were twenty payments behind on their mortgage. ¶ 2.7. Their complaint thus raises the following question: if Defendants had not violated the law, would Plaintiffs have avoided foreclosure? Even reading their complaint charitably, the answer is no. Plaintiffs do not allege, for example, that if Defendants had been honest about their intent to proceed with the trustee's sale regardless of negotiations over a possible loan modification, they would have done anything differently. They do not allege that they would have sued to enjoin the sale. They do not allege that they could have met the financial obligations that the Deed of Trust Act imposes as a condition of enjoining a trustee's sale. RCW 61.24.130(1). For these reasons, their complaint does not plausibly allege that the financial and emotional damages flowing from foreclosure are attributable to Defendants' misconduct.

It is possible, even for a homeowner who has defaulted on a mortgage, to allege damages flowing from a wrongful foreclosure. For example, a homeowner could allege that had her lender and trustee followed the law, the foreclosure would have taken longer to complete, and that she would have been therefore able to cure her default before foreclosure. Similarly, it is possible that false statements from a lender or trustee could induce a homeowner to forego opportunities that might either avoid a foreclosure or ameliorate its financial impact. There are no such allegations in Plaintiffs' complaint. It is implausible, based on the allegations of the complaint, to conclude that Plaintiffs would be any better off had Defendants complied with the law. The court suggests no approval of Defendants' practices. Defendants, like many banks and their affiliates in recent years, deprived Plaintiffs of their home in a process that may not have complied with the law, and almost certainly did not comply with basic human decency. The court can chide Defendants for abysmal customer service in a business tied intimately to its customers' financial and emotional well-being. The court cannot, however, change the basic truth that if a homeowner cannot pay her mortgage, she will ultimately lose her home.

**C. Although Plaintiffs Have Not Stated a Claim, the Court Will Permit Them to Amend Their Complaint.**

\*7 To summarize, Plaintiffs fail, except as to their “dual-tracking” allegations, to allege plausibly that any Defendant violated the law. Plaintiffs do not identify anything that Fannie Mae did wrong. None of Plaintiffs' allegations plausibly link Defendants' wrongdoing (whether adequately alleged or not) to their damages. Plaintiffs offer no allegations to avoid the bar on injunctive and other equitable relief contained in RCW 61.24.127. For these reasons, Plaintiffs have failed to state a claim on which the court can grant relief. The court need not consider Defendants' additional arguments.<sup>5</sup>

Although the court dismisses the complaint in its entirety, it will permit Plaintiffs to amend their complaint. Plaintiffs did not request leave to amend their complaint. Even absent that request, however, a court cannot dismiss a complaint with prejudice unless it concludes that no amendment could cure the complaint's deficiencies. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir.2000). The court cannot rule out the possibility that Plaintiffs could amend their complaint to state a cognizable claim. They could add plausible allegations of damage flowing from Defendants' dual-tracking. They could add details to support their conclusory assertions that one or more Defendants overstated the balance owing on their loan.

The court does not suggest that Plaintiffs should amend their complaint. If they do, they must at a minimum amend or delete the allegations that do not even describe a violation of law, much less a violation that caused them damages. They must delete requests for relief that the court cannot grant, such as their request that the court void their foreclosure sale. They must be specific about which Defendants engaged in unlawful conduct, or must explain why they are unable to be specific. If Plaintiffs do not comply with this order, and the court grants a subsequent motion to dismiss, it will consider imposing sanctions via 28 U.S.C. § 1927 for unreasonably and vexatiously multiplying proceedings in this case.

**IV. CONCLUSION**

For the reasons previously stated, the court GRANTS Defendants' motion to dismiss. Dkt. # 5. Plaintiffs may file an amended complaint in compliance with this order no later than February 27, 2014. If they do not, the court will dismiss this case with prejudice.

Footnotes

- 1 The trustee's deed bears a printed date of May 10, 2011, has a signature with a handwritten "5/11/11" notation, and was notarized on May 12, 2011. At least one other document before the court has a similar hodgepodge of dates. Plaintiffs insist that this is evidence that the documents are invalid or otherwise problematic. ¶ 2.12. They offer no authority for the notion that, for example, a notary's acknowledgement of a signature from a previous day is invalid. The court will not further consider Plaintiffs' allegations as to the notarization of documents, because Plaintiffs do not plausibly tie them to any wrongdoing.
- 2 Plaintiffs similarly assert that the person who assigned BofA's interest in their deed of trust to Fannie Mae in May 2011 was not actually a BofA employee. ¶ 2.2. Again, Plaintiffs have no standing to raise that objection.
- 3 Plaintiffs' complaint does not make clear who, among BAC, BofA, and ReconTrust, is responsible for the dual-tracking process and the false representations during that process. If Plaintiffs chose to amend their complaint, they must amend their allegations to make clear who is liable.
- 4 Plaintiffs' complaint repeatedly misnames Ms. Kaur and Mr. Singh, and occasionally uses the name of the wrong trustee. That is presumably the error of Plaintiffs' counsel. Decrying the practices of mortgage lenders who use a cookie-cutter process to conduct foreclosures is less effective when the complaint itself bears the hallmarks of a cookie-cutter process.
- 5 The court has no occasion to reach Defendants' argument that Plaintiffs' assertions of fraud and misrepresentation do not comply with the heightened pleading requirement of Federal Rule of Civil Procedure 9(b). If Plaintiffs amend their complaint, however, they must either find authority for their position that federal pleading standards do not apply to state law claims in federal court, they must comply with Rule 9(b), or they must not plead claims subject to Rule 9(b). *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir.2009) (noting that the Federal Rules of Civil Procedure apply in federal court regardless of the source of subject matter jurisdiction); *Yess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102-03 (9th Cir.2003) (concluding that Rule 9(b) applies to state-law causes of action in federal court).

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2014 WL 442378

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United States District Court, W.D. Washington,  
at Tacoma.

Geoff McPHERSON and Roseann McPherson,  
husband and wife, Plaintiffs,

v.

HOMEWARD RESIDENTIAL, et al., Defendants.

No. C12-5920 BHS. | Feb. 4, 2014.

#### Attorneys and Law Firms

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#### Opinion

### ORDER DENYING PLAINTIFFS' MOTION FOR EXTENSION OF TIME AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

BENJAMIN H. SETTLE, District Judge.

\*1 This matter comes before the Court on Plaintiffs Geoff and Roseann McPherson's ("McPherson") motion for extension of time to file a response to Defendants' motion for summary judgment (Dkt.36) and Defendants' motion for summary judgment (Dkt.31). The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file. For the reasons stated herein, the Court hereby grants denies the McPhersons' motion for an extension of time and grants Defendants' motion for summary judgment.

#### I. PROCEDURAL HISTORY

On September 26, 2012, the McPhersons filed a complaint in Pierce County Superior Court for the State of Washington. Dkt. 1-2. The McPhersons allege that Defendants have violated the Washington Consumer Protection Act, RCW Chapter 19.86; violated the

Washington Deed of Trust Act ("DTA"), RCW Chapter 61.24; and committed common law negligence, fraud, and misrepresentation. *Id.* On October 16, 2012, Defendants removed the matter to this Court. Dkt. 1.

The McPhersons also sought to enjoin the pending foreclosure sale. After the initial Notice of Postponement, see Declaration of Melanie MacLellan ("MacLellan Decl."), Ex. G, the foreclosure sale was next scheduled for December 14, 2012. Dkt. 16 at 1. On December 12, 2012, the parties stipulated to and the Court entered an injunction postponing this sale through at least March 9, 2013. Dkt. 16 at 2. As a condition of the stipulated injunction, the Plaintiffs were required to make monthly deposits of \$1,277.00 into the Court Registry. *Id.* The Trustee's Sale was next scheduled for August 21, 2013. Dkt. 28 at 1-2. On August 19, 2013, the McPhersons filed a Motion for Emergency Temporary Restraining Order to stop this sale. Dkt. 29. On August 21, 2013, Plaintiffs' motion was granted. Dkt. 30. As a condition of the restraining order, Plaintiffs were required to make monthly deposits of \$1,277.00 into the Court Registry. *Id.* at 3. The Trustee's Sale has not been rescheduled. Rivera Decl. ¶ 3.

On December 11, 2013, all Defendants moved for summary judgment against the McPhersons on all claims. Dkt. 31. The motion for summary judgment was properly noted for consideration on January 3, 2014. *Id.* and W.D. Local Civil Rule ("LRC") 7(d). The McPhersons' response to the motion was due December 30, 2013. LRC 7(d). They did not timely file a response.

On January 4, 2014, the day after Defendants' motion for summary judgment was noted for the Court's consideration, the McPhersons filed a motion for extension of time to file a response to their motion for summary judgment. Dkt. 36. On January 9, 2014, Defendants filed a response in opposition to the McPhersons' motion for extension of time. Dkt. 37.

On January 17, 2013, Defendant Option One Mortgage ("Option One") was dismissed. Dkt. 21. On January 30, 2014, the Court, by stipulation, dismissed Defendant Fidelity National Title Insurance Company ("Fidelity"). Dkt. 46.

#### II. FACTUAL BACKGROUND'

##### A. The McPhersons' Loan

\*2 In August 2005, the McPhersons obtained a \$295,500

loan to buy a home in Pierce County, Washington from Option One. Compl. ¶¶ 8–10. The McPhersons executed a Deed of Trust securing the loan, which was recorded with the Pierce County Official Recorder on September 7, 2005 as instrument number 200509071317. *Id.* ¶ 10; MacLellan Decl., Ex. A (Deed of Trust).

The Note expressly stated that the McPhersons “understand that Lender may transfer this Note.” Declaration of Kyle Lucas (“Lucas Decl.”), Ex. A at 1. The Note further explained: “Even if, at a time when [the McPhersons are] in default, the Note Holder does not require [the McPhersons] to pay immediately in full as described [in the Note], the Note Holder will still have the right to do so if [McPhersons are] in default at a later time.” *Id.* at 2. Option One endorsed the Note in blank, making it bearer paper. *Id.* at 7.

The Deed of Trust securing the Note identified Option One as the “Lender.” MacLellan Decl., Ex. A (Deed of Trust) at 1. Like the Note, the Deed of Trust explained:

The Note or a partial interest in the Note (together with this Security Instrument) *can be sold one or more times without prior notice to Borrower*. A sale might result in a change in the entity (known as the “Loan Servicer”) that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law.

*Id.* at 5 (emphasis added). The Deed of Trust empowered the Lender to direct a trustee to initiate foreclosure upon the borrowers’ default. *Id.* at 6. The McPhersons initialed each page of (and signed) the Deed of Trust. *See id.*

The McPhersons acknowledge that their loan was sold to U.S. Bank shortly after the loan was originated in 2005. Compl. ¶ 26. U.S. Bank is the current holder of the Note. Lucas Decl., Ex. A (Endorsed Note). All loans in the operative U.S. Bank Pooling and Servicing Agreement were conveyed to U.S. Bank on or before December 1, 2005. MacLellan Decl. ¶ 10 & Ex. I (Pooling and Servicing Agreement). On May 17, 2012, notice of the assignment to U.S. Bank was recorded in the Official Records of Pierce County. Compl. ¶ 25; MacLellan Decl., Ex. B (Assignment of Deed of Trust). Thus, it is uncontroversial that, as of May 17, 2013, U.S. Bank was not only beneficiary as a matter of law (due to its status as

Note holder, RCW 61.24.005(2), see Section III(B)), but also beneficiary of record under the Deed of Trust.

### **B. The McPhersons Default and U.S. Bank Initiates Nonjudicial Foreclosure**

The McPhersons’ Note defined default as the failure to “pay the full amount of each monthly payment on the date it is due.” Lucas Decl., Ex. A at 2. By September 20, 2011, the McPhersons had defaulted on the loan by failing to make required payments. Compl. ¶ 24; MacLellan Decl., Ex. C (Notice of Default).

Due to the McPhersons’ default, on September 20, 2011, Defendant Homeward Residential, Inc. (“Homeward”), formerly known as American Home Mortgage Servicing, Inc., sent them a Notice of Default. Compl. ¶ 24; Answer ¶ 2; MacLellan Decl., Ex. C (Notice of Default). The Notice of Default identified U.S. Bank as the beneficiary. *Id.* Following this notice, Homeward and trustee Fidelity, began foreclosure proceedings on behalf of U.S. Bank. *Id.* Specifically, on May 17, 2012, Homeward, on behalf of U.S. Bank, executed and recorded an Appointment of Successor Trustee, appointing Fidelity as the trustee under the Deed of Trust. MacLellan Decl., Ex. D (Appointment of Successor Trustee). This appointment authorized Fidelity to issue a Notice of Trustee’s Sale. RCW 61.24.010(2) (successor trustee vested with powers upon recording of appointment); RCW 61.24.040 (trustee must record notice of sale).

\*3 Because the McPhersons did not cure their default, on June 27, 2012, 281 days after Homeward transmitted the Notice of Default on behalf of U.S. Bank, and 41 days after Homeward recorded the Appointment of Successor Trustee, Fidelity recorded a Notice of Trustee’s Sale. MacLellan Decl., Ex. E (Notice of Trustee’s Sale); RCW 61.24.030(8) (default must be sent at least 30 days before recording sale notice); RCW 61.24.040 (trustee must record sale notice). The Notice scheduled the sale for 135 days later, November 9, 2012. MacLellan Decl., Ex. E (Notice of Trustee’s Sale); RCW 61.24.040(1) (sale must be at least 90 days after recording sale notice). Fidelity also sent a Notice of Foreclosure to the McPhersons. MacLellan Decl., Ex. F (Notice of Foreclosure); RCW 61.24.040(2).

After defaulting on the loan, the McPhersons requested a loan modification on July 5, 2012. Compl. ¶ 26. The McPhersons claim that Homeward repeatedly told them documents were missing from their application. Compl. ¶¶ 28, 32. The McPhersons assert that they had already provided many of the documents requested by Homeward. *Id.* ¶ 32. Plaintiffs also allege that on August

13, 2012, Homeward told them that the foreclosure sale had been put on hold. *Id.* ¶ 29. Indeed, Fidelity later filed a Notice of Postponement of Trustee's Sale. MacLellan Decl., Ex. G (Notice of Postponement). Following the filing of this litigation, the McPhersons were invited to submit a complete loan modification application package for consideration, as Homeward had indicated to the McPhersons that they had not submitted all necessary documents, including recent bank statements and documents to substantiate rental income. *See* Declaration of Frederick B. Rivera ("Rivera Decl.") ¶ 2. However, the McPhersons refused, claiming they had already provided documents supporting their modification request. *Id.*

### III. DISCUSSION

#### A. Motion for Extension of Time

In their motion for extension of time to file a response, the McPhersons argue that the response time for filing a response was too short to permit them to file a response. Dkt. 36 at 2. They also argue that their counsel needed an extension because she had an appellate brief due during the same period she was to write the response to Defendants' motion. *Id.* They also allege that counsel for Defendants acted "unreasonably by not consulting with counsel before scheduling the hearing date for the motion." *Id.* at 3.

First, Defendants' motion for summary judgment was properly noted pursuant to LRC 7(d). Under these rules, they had the same amount of time to file a response as any other party would.

Second, LRC 7(j), Motion for Relief from Deadline, reads in relevant part as follows:

A motion for relief from a deadline should, whenever possible, be filed sufficiently in advance of the deadline to allow the court to rule on the motion prior to the deadline. Parties should not assume that the motion will be granted and must comply with the existing deadline unless the court orders otherwise.

\*4 The McPhersons failed to comply with this local rule by presuming that their motion would be granted and not complying with the existing deadline ordered by the Court. Failure to comply with this rule is alone sufficient to deny the McPhersons' motion for an extension of time

to file their response.

Additionally, in the absence of the McPhersons' citation to any legal authority or facts demonstrating "excusable neglect," under Fed.R.Civ.P. 6(b), the Court finds no basis warranting an extension. As Defendants maintain, the reasons the McPhersons provide for requesting an extension do not constitute excusable neglect, nor do the McPhersons make any substantive legal argument that their reasons actually constitute excusable neglect. *See* Dkt. 37 at 5–9 (*citing Pioneer Inv. Services Co. v. Bruswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993) (articulating four-factor tests to determine whether party has shown excusable neglect)).

In this case, although Plaintiffs eventually filed a response, it was almost a month past the due date. Thus, for purposes of this analysis, the Court is treating their response as if it had not been filed because the Court finds no basis to grant the McPhersons' motion to continue.

#### B. Motion for Summary Judgment

##### 1. Defendants' Argument

Defendants argue that the McPhersons filed this lawsuit to stop—or at least delay—the foreclosure. Dkt. 31 at 2. Homeward and U.S. Bank contend that the claims under the Washington Consumer Protection Act, chapter 19.86 RCW ("WCPA") and the DTA, for gross negligence, and for common law fraud or misrepresentation are unfounded. *Id.* As Defendants correctly point out, each claim is premised on one of the following contentions: (1) that U.S. Bank is not the beneficiary entitled to enforce the Note and Deed of Trust; (2) that Homeward filed documents as the beneficiary when it was not; and (3) that Homeward owed the McPhersons an obligation to modify their loan after they defaulted. *Id.* at 2–3.

According to Defendants, each of these premises is legally and/or factually flawed: (1) U.S. Bank, as the holder of the original Note endorsed in "blank," is the beneficiary entitled to enforce the Note and Deed of Trust; (2) at all relevant times Homeward properly acted as, and identified itself as, the agent of U.S. Bank, not as the beneficiary; and (3) Homeward owed no obligation to the McPhersons to modify their loan. *Id.* at 3. Thus, Defendants maintain the McPhersons' claims fail as a matter of law and must be dismissed. *Id.*

##### 2. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (nonmoving party must present specific, significant probative evidence, not simply “some metaphysical doubt”). See also Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir.1987).

\*5 The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888–89, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).

A motion for summary judgment should not be granted simply because there is no opposition, even if the failure to oppose violated a local rule. See *Henry v. Gill Indus.*, 983 F.2d 943, 950 (9th Cir.1993). Rather, the moving party must demonstrate the absence of genuine issues of material fact, regardless of whether the party against whom the motion for summary judgment is directed has filed any opposition. See *Cristobal v. Siegel*, 26 F.3d 1488, 1491 (9th Cir.1994).

### 3. Analysis

In the instant case, Defendants have demonstrated that no genuine issue of material fact exists. As the facts above indicate, the McPhersons’ loan was sold to U.S. Bank before December 1, 2005. The Note and Deed of Trust expressly permitted Option One to transfer the Note and Deed of Trust without prior notice to Plaintiffs. Thus, U.S. Bank had foreclosure rights under the Deed of Trust before Option One executed the assignment of record because U.S. Bank took possession of the Note in 2005 as part of the securitization. MacLellan Decl. ¶ 10 & Ex. I; Lucas Decl., Ex. A (Endorsed Note). This is consistent with Washington law, as the sole purpose of recording assignments of deeds of trust is to provide notice to third parties of the security interest, not to provide notice to the borrower. *Corales v. Flagstar Bank, FSB*, 822 F.Supp.2d 1102, 1109 (W.D.Wash.2011); *In re United Home Loans*, 71 B.R. at 891 (“Recording of the assignments is for the benefit of third parties.”).

U.S. Bank had authority to enforce the Note and Deed of Trust, even absent a recorded assignment from Option One, because U.S. Bank held and holds the Note. RCW 61.24.005(2) (beneficiary is the “holder of the [promissory note] secured by the deed of trust”); RCW 62A.3–205; RCW 62A.3–301 (the holder of the note includes any party who takes possession of the note, endorsed in blank, by transfer). No Washington statute requires parties to record transfers of promissory notes by endorsement to enforce rights under transferred notes. The “assignment of a deed of trust and note is valid between the parties whether or not the assignment is ever recorded.” *In re United Home Loans*, 71 B.R. 885, 891 (W.D.Wash.1987).<sup>2</sup>

\*6 As a matter of law, U.S. Bank is the rightful beneficiary under the Deed of Trust and had the right to initiate foreclosure proceedings. Because the McPhersons have based each of their claims on the incorrect theory that U.S. Bank is not the rightful beneficiary, their Complaint should be dismissed.

Further, the McPhersons also argue that Homeward should not have recorded documents with Pierce County because it was not the beneficiary. See, e.g., Compl. ¶¶ 48 (WCPA claim), 59 (DTA claim). However, the relevant Appointment of Successor Trustee expressly states that Homeward recorded this document as the agent of the beneficiary, U.S. Bank, not on its own behalf. See MacLellan Decl., Ex. D. The McPhersons do not dispute that this Appointment of Successor Trustee identifies Homeward as the “attorney in fact” of U.S. Bank. See

Compl. ¶ 17. “Washington law, and the deed of trust act itself, approves of the use of agents.” *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wash.2d 83, 106, 285 P.3d 34 (2012). Thus, as a matter of law, Homeward’s recordings on behalf of U.S. Bank were in accordance with the DTA.

This claim also must fail because the recording of documents did not affect the McPhersons in any way. As noted above, recording of an assignment of a deed of trust does not affect a borrower’s rights. *See In re United Home Loans*, 71 B.R. at 891 (W.D.Wash.1987). Nor did the recording of documents cause the McPhersons to breach their loan agreement by not making payments. As a result, any claim premised on publicly recorded documents must fail.

Further, the McPhersons appear to claim that even if U.S. Bank was the holder of the note, the rightful beneficiary and all transfers completed, assignments made, notices issued, and recordings done were therefore proper, Defendants are still liable for gross negligence due to their failures to modify their loan and engage in good faith negotiations to modify their loan, as they had a duty to do so. Compl. ¶¶ 53–54. Based on the record before the Court, the Defendants were under no obligation to modify the McPhersons’ loan and thus had no duty in regard to such negotiations. *See, e.g., Baggett v. Security State*

*Bank*, 116 Wash.2d 563, 571, 807 P.2d 356 (1991) (“While the parties may choose to renegotiate their agreement, they are under no good faith obligation to do so”). Even if Defendants had such an obligation, in this case, the facts indicate that prior to the initiation of this suit, McPhersons did not complete their loan modification packet and were informed of missing documents. After the initiation of the suit, the McPhersons still refused to submit all the documents necessary to complete a loan modification application when Homeward invited them to complete the packet. Thus, given that Defendants have shown that their motion has merit, the Court finds no genuine issue of material fact as to whether Defendants are liable for failure to either modify their loan or engage in negotiations to do so.

#### IV. ORDER

\*7 Therefore, it is hereby ordered that Plaintiffs’ motion to continue (Dkt.36) is **DENIED**, and Defendants’ motion for summary judgment (Dkt.31) is **GRANTED**. The case is **DISMISSED with prejudice**.

#### Footnotes

- <sup>1</sup> Finding Defendants’ statement of facts consistent with the supporting documentation properly in the record, this factual background is largely taken from their statement of facts.
- <sup>2</sup> *See also Pequignot v. Deutsche Bank Nat’l Trust Co. (In re Pequignot)*, C09–1688JLR, 2010 WL 3605326, at \*3 (W.D.Wash. Sept.10. 2010) (“When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.”) (*quoting* RCW 62A.3–205(b)), *aff’d*, 485 F. App’x 284 (9th Cir.2012). Although the Court does not rely on unpublished decisions to support its conclusion, such decisions, when affirmed by the Circuit, may provide the Court assistance in arriving at its own interpretation of the law.

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at Seattle.

Cindy T. MASSEY, Plaintiff,

v.

BAC HOME LOANS SERVICING LP, et al.,  
Defendants.

No. C12-1314JLR. | Dec. 23, 2013.

#### Attorneys and Law Firms

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#### Opinion

### ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT

JAMES L. ROBART, District Judge.

#### I. INTRODUCTION

\*1 Before the court are Defendant Bank of America, N.A.'s (Bank of America) motion for summary judgment (BANA Mot. (Dkt.# 54)) and Defendants Federal Home Mortgage Corporation ("Freddie Mac"), Mortgage Electronic Registration Systems, Inc., and MERSCORP Holdings Inc.'s (together, "MERS") motion for summary judgment (MERS Mot. (Dkt.# 59)). Plaintiff Cindy T. Massey asserts a claim under the Washington Consumer Protection Act against Defendants in connection with nonjudicial foreclosure proceedings on her property. (Am.Compl.(Dkt. # 29).) Having considered the submissions of the parties, the balance of the record, the relevant law, and no party having requested oral argument, the court GRANTS Defendants' motions for summary judgment.

#### II. FACTS

The following facts are undisputed. On June 12, 2008, Ms. Massey executed a promissory note ("the Note") to obtain a \$357,200.00 mortgage loan ("the Loan") from Countrywide Bank, FSB ("Countrywide"). (See Lamas Dec. (Dkt.# 56) Ex. A (Note).) The Deed of Trust securing the loan identifies Countrywide Bank as the lender, LS Title of Washington as the Trustee, and MERS as the beneficiary "acting solely as a nominee of the Lender and Lender's successors and assigns." (See Lamas Dec. Ex. B (Deed).) The Deed of Trust encumbers Ms. Massey's property located at 28541 NE 151st Street, Duvall, WA 98019 ("the Property"). (Note at 1.) The loan was subsequently sold to Freddie Mac. (Am. Compl. ¶ 3.16; *id.* Ex. 4 (BANA Letter).) On December 1, 2010, MERS recorded an Assignment of Deed of Trust indicating that BAC Home Loans was the new beneficiary under the Deed of Trust. (Lamas Dec. Ex. E (Assignment).) On December 1, 2010, BAC Home Loans appointed Northwest Trustee Services, Inc. ("Northwest Trustee") as successor trustee. (Lamas Dec. Ex. F (Appointment).)

Ms. Massey defaulted on her loan in July of 2010. (Massey Dep. (Dkt.49-9) at 30); *see also* Lamas Dec. Ex. D (Loan History).) She has not made any payments since that time. (*Id.*) On April 25, 2011, Northwest Trustee recorded a Notice of Trustee's Sale. (Elkins Dec. (Dkt.# 63-1) Ex. H.) This sale was postponed due to Ms. Massey's bankruptcy filing. (Resp.(Dkt.# 63) at 4; MERS Mot. at 5.) On May 25, 2012, Northwest Trustee recorded an Amended Notice of Trustee's Sale indicating that Ms. Massey owed over \$55,000 on the Loan and scheduling a sale of the Property. (Lamas Dec. Ex. G.) That sale was discontinued pending resolution of this action. (Lamas Dec. ¶ 18.)

Ms. Massey filed this action on July 5, 2012, alleging numerous statutory and common law claims against Defendants. (See Compl. (Dkt.# 1-1).) After two rounds of motions to dismiss, all that remains to be adjudicated is a single claim under the Washington Consumer Protection Act ("CPA"). (See 10/26/12 Order (Dkt.# 27); Am. Compl.; 2/13/13 Order (Dkt.# 37).) The court previously granted summary judgment in favor of Defendant Northwest Trustee on the CPA claim. (See Dkt.52, 62.) Defendant Bank of America' now brings a motion for summary judgment on the CPA claim. (See *generally* BANA Mot.) Defendants Freddie Mac and MERS, together, also bring a separate motion for summary judgment. (See *generally* MERS Mot.)

### III. ANALYSIS

#### A. Summary Judgment Standard

\*2 Federal Rule of Civil Procedure 56 permits a court to grant summary judgment where the moving party demonstrates (1) the absence of a genuine issue of material fact and (2) entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *see also Galen v. Cnty. of L.A.*, 477 F.3d 652, 658 (9th Cir.2007). The moving party bears the initial burden of production of showing an absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the moving party does not bear the ultimate burden of persuasion at trial, it can show an absence of issue of material fact in two ways: (1) by producing evidence negating an essential element of the nonmoving party's case, or, (2) showing that the nonmoving party lacks evidence of an essential element of its claim or defense. *Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc.*, 210 F.3d 1099, 1106 (9th Cir.2000).

If the moving party meets its burden of production, the burden shifts to the nonmoving party to designate specific facts demonstrating the existence of genuine issues for trial. *Celotex*, 477 U.S. at 324. The "mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In determining whether the factfinder could reasonably find in the nonmoving party's favor, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). However, a jury "is permitted to draw only those inferences of which the evidence is reasonably susceptible; it may not resort to speculation." *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir.1978). If the nonmoving party fails to produce enough evidence to create a genuine issue of material fact, summary judgment for the moving party is proper. *Nissan Fire*, 210 F.3d at 1106.

#### B. CPA

To prevail on a CPA claim, a plaintiff must prove (1) an unfair or deceptive act or practice; (2) that occurs in trade

or commerce; (3) an impact on the public interest; (4) injury to the plaintiff in his or her business or property; and (5) a causal link between the unfair or deceptive act and the injury suffered. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 719 P.2d 531, 535 (Wash.1986). Failure to establish any one of these elements is fatal to a plaintiff's claim. *Id.* at 793, 719 P.2d 531. When parties do not dispute that particular conduct occurred, the question of whether that conduct constitutes a CPA violation is a question of law. *Leingang v. Pierce Cnty. Med. Bureau, Inc.*, 131 Wash.2d 133, 930 P.2d 288, 297 (Wash.1997).

An unfair or deceptive act for the purposes of the CPA is "a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest." *Klem v. Washington Mut. Bank*, 176 Wash.2d 771, 295 P.3d 1179, 1187 (Wash.2013). Ms. Massey advances several theories as to how Bank of America and MERS engaged in deceptive acts under the CPA. The following sections address each theory in turn.

\*3 Ms. Massey, however, fails to identify any deceptive acts perpetrated by Freddie Mac. (*See* Am. Compl. ¶ 3.16, Ex. 4 (establishing only that Freddie Mac purchased and currently owns Plaintiff's loan).) For that reason alone, Ms. Massey's CPA claim against Freddie Mac fails. To the extent that Ms. Massey argues that Freddie Mac is complicit in the allegedly deceptive acts of Bank of America and MERS, her claim against Freddie Mac fails for the same reasons as her claims against Bank of America and MERS fail.

#### C. Loan Origination

Ms. Massey argues that the terms of the Loan and Bank of America's conduct in originating the loan were unfair and deceptive. (Am.Compl.¶¶ 3.3–3.8.) For example, she alleges that "[w]hen the loan was made the Lender did not follow proper underwriting procedures and due diligence" and that therefore "the loan was not what [she] expected and not suitable or affordable." (*Id.* ¶ 3.3) She specifically takes issue with the fact that the Loan included an interest-only term for the first 10 years of repayment, as well as a so-called "discount fee" of 1% which was allegedly not applied to reduce the interest rate of the loan. (*Id.*)

However, there is a four-year statute of limitations for claims brought under the CPA. RCW 19.86.120. Ms. Massey filed her original claim in state court on July 5, 2012. (*See* Compl.) But Ms. Massey signed the Deed of

Trust and underlying Note on June 12, 2008. As such, claims relating to the Loan's terms and origination fall outside the CPA limitations period.

The discovery rule is of no use to Ms. Massey. "The discovery rule merely tolls the running of the statute of limitations until the plaintiff has knowledge of the 'facts' which give rise to the cause of action; it does not require knowledge of the existence of a legal cause of action itself." *Richardson v. Denend*, 59 Wash.App. 92, 795 P.2d 1192, 1194 (Wash.Ct.App.1990). "A cause of action may accrue for purposes of the statute of limitations if a party *should have* discovered salient facts regarding a claim." *Green v. A.P.C.*, 136 Wash.2d 87, 960 P.2d 912, 915 (Wash.1998) (emphasis in original).

Here, the terms of the Note—including the interest-only term and so-called "discount fee" of which she complains—were expressly disclosed to Ms. Massey in the loan documents. (See Note § 3A ("This payment will be interest only for the first 120 months, and then will consist of principal and interest."); *id.* § 3B ("My monthly payment will be in the amount of U.S. \$1,860.42 for the first 120 months of this Note, and thereafter will be in the amount of \$2,610.88."); Lamas Dec. Ex. I (Deductions from Check) at 54 (listing a discount fee at "0.000%" and an origination fee at "1.0000%").) Ms. Massey does not deny that these terms were included in the loan documents. (See *generally* Resp.; Massey Dep. at 21 (agreeing that the Deductions from Check explained the discount fee).) As such, Ms. Massey should have discovered the salient facts regarding this aspect of her claim when she executed the Note. "[A] party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents." *Nat'l Bank of Wash. v. Equity Investors*, 81 Wash.2d 886, 506 P.2d 20 (Wash.1973).

\*4 This court previously declined to apply the discovery rule to Ms. Massey's other claims predicated on the terms of the Loan and on Bank of America's conduct when processing the loan. (See 2/13/13 Order at 7–8.) The court's prior reasoning stands. Ms. Massey has raised no facts or evidence showing that she is entitled to pursue a CPA claim premised on events that occurred at the time of the Loan's origination.<sup>2</sup> See *Howard v. Countrywide Home Loans, Inc.*, C13–0133JLR, 2013 WL 1285859 (W.D.Wash. Mar.26, 2013) (finding no basis for tolling a CPA claim premised on statements made in the loan papers).

#### D. Authority to Foreclose

Ms. Massey argues that Bank of America did not possess

the authority to initiate nonjudicial foreclosure proceedings on the Property for various reasons, the primary of which is the characterization of MERS as the beneficiary on the Deed of Trust. Essentially, Ms. Massey seeks to shoehorn facts supporting her dismissed claim for violations of Washington's Deed of Trust Act into her sole remaining claim under the CPA. Specifically, Ms. Massey argues that the Assignment of the Deed of Trust to Bank of America was void, that the Appointment of Northwest Trustee as successor trustee was void, and that Bank of America did not hold the Note when it initiated foreclosure. (Am.Compl.¶¶ 3.14–3.15, 3.17–3.20.) Ms. Massey concludes that, as a result, those documents and the initiation of foreclosure were unfair or deceptive acts under the CPA.

#### 1. Bank of America Held the Note

Ms. Massey's allegations that it was unfair or deceptive for Bank of America to foreclose on the Property have no basis in fact. Ms. Massey admits—and the evidence in the record confirms—that she defaulted on her Loan and remain in default. (Massey Dep. at 30; 59.) Washington state law is clear that a "person entitled to enforce" an instrument includes "(i) the holder of the instrument ..." and that "[a] person may be entitled to enforce the instrument even though the person is not the owner of the instrument." RCW 62A.3–301.

Here, the record shows that Bank of America was the holder of the Note when the Assignment and Appointment were recorded in December 2010 and when the foreclosure proceedings were initiated in May 2012. The Assistant Vice President for the Operations Team Manager at Bank of America, Ms. Maria Lamas, reviewed the loan files and servicing records for Ms. Massey's loan. (Lamas Dec. ¶¶ 1–2.) She confirms that "BANA [Bank of America], as successor by merger to Countrywide Bank, FSB, and BAC Home Loans Servicing, LP ... held the original Note on December 1, 2010 when the Assignment of the Deed of Trust and Appointment of Successor Trustee were recorded, and possessed the authority to enforce the Note and Deed of Trust on behalf of Freddie Mac pursuant to Freddie Mac's servicing guidelines." (*Id.* ¶ 17.) She also confirms that "BANA [Bank of America] ... held the original Note on May 25, 2012, at the time the Notice of Trustee's Sale was recorded." (*Id.* ¶ 18.)

\*5 The mere fact that Freddie Mac owned the Note which Bank of America held and enforced on Freddie Mac's behalf does not render the foreclosure or assignment deceptive. It is well-established that one party may hold and enforce a note on behalf of a second party, and courts

have consistently upheld Freddie Mac's practice of doing so. *See, e.g., Corales v. Flagstar Bank, FSB*, 822 F.Supp.2d 1102, 1107 (W.D.Wash.2011) (finding that although Freddie Mac owned the loan at issue, "Flagstar is the holder of the Note with the right to enforce it and the corresponding Deed of Trust"); *In re Reinke*, No. BR 09-19609, 2011 WL 5079561 (Bankr.W.D.Wash. Oct.26, 2011) ("[A]t the time foreclosure commenced under the Shoreline Deed of Trust, Freddie Mac was the *owner* of the Shoreline Note. The issue of ownership, however, is largely immaterial to the issues before the Court. Because under Washington law the focus of the analysis is on who is the *holder* of the note, and thus the *beneficiary* under the [Deed of Trust Act]."); *Zalac v. CTX Mortgage Corp.*, No. C12-01474 MJP, 2013 WL 1990728 (W.D.Wash. May 13, 2013) (finding a failure to state a CPA claim because "Chase is the holder of the note as a matter of law. Further, despite the sale of Plaintiff's loan to Fannie Mae, Chase alerted Plaintiff that it remained servicer of his loan and was authorized to handle any of Plaintiff's concerns.")

Ms. Massey attempts to create an issue of fact by submitting a declaration claiming that Freddie Mac, not Bank of America, was the holder of the Note "very close to the time" that the Appointment and Assignment were executed. (*See Massey Dec.* (Dkt.# 63-2) ¶ 5.) But Federal Rule of Civil Procedure 56 makes clear that "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed.R.Civ.P. 56(c) (4). Ms. Massey simply has no personal knowledge as to which bank held the Note as of December 2012. As such, her declaration cannot create a material issue of fact.

Neither do the other documents cited in Plaintiff's response create an issue of fact. The letter Ms. Massey received from Bank of America in December, 2011, stating that Freddie Mac "is the current owner of the note" and the print-out of a search of Freddie Mac's website in (apparently) 2013 confirming that Freddie Mac currently owns Ms. Massey's loan simply do not speak to who held the Note as of the date of the Assignment or foreclosure proceedings. (*See Elkins Dec. Ex. D, Ex. E.*) Similarly, a letter from BAC Home Loans in August, 2010, stating that both BAC Home Loans and the "Noteholder" are entitled to enforce the Note does not speak to who held the Note in December 2010, the date of the Assignment. (*See Massey Dec. Ex. A.*)

In short, Ms. Massey presents no cognizable evidence to rebut Bank of America's proof that Bank of America in

fact held the Note and was therefore entitled to foreclose on the Property and assign a successor trustee. A jury "is permitted to draw only those inferences of which the evidence is reasonably susceptible; it may not resort to speculation." *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir.1978). What Ms. Massey demands is speculation. Absent any evidence in Ms. Massey's favor, the law is clear: the foreclosure was not an unfair or deceptive act. *See RCW 62A.3-301.*

\*6 Similarly, because Bank of America held the Note at the time it appointed Northwest Trustee as successor trustee, the Appointment is not void. (Lamas Dec. ¶¶ 17, 18.) Washington law defines the beneficiary of a deed of trust as the actual note holder. RCW 61.24.050(2) ("Beneficiary" means the holder of the instrument or document evidencing the obligations secured by the deed of trust."); *see also Bain*, 175 285 P.3d at 37 ("[O]nly the actual holder of the promissory note ... may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property."). A beneficiary is expressly authorized to appoint a successor trustee. RCW 61.24.010(2) ("The trustee may ... be replaced by the beneficiary."); *id.* ("[U]pon recording the appointment ... successor trustee shall be vested with all powers of an original trustee.") Therefore, the evidence shows that execution of the Appointment was not a deceptive or unfair act under the CPA.

## 2. Assignment of the Deed of Trust

Ms. Massey argues that the Assignment is void and/or deceptive because "MERS was never a beneficiary of this loan and at no time did MERS have the ability to assign beneficial interest in this loan to any other entity." (Am. Compl. ¶ 3.14; *see* Assignment (indicating that BAC Home Loans received "all beneficial interest" in the Deed of Trust).) As discussed in the preceding section, Bank of America's authority to foreclose on the loan stemmed from the fact that Bank of America held the Note. Therefore, Ms. Massey's argument that the Assignment is "without effect and a nullity" (Am.Compl.¶ 3.14) is beside the point. *See Ukpona v. U.S. Bank Nat. Ass'n*, 12-CV-0184-TOR, 2013 WL 1934172 (E.D.Wash. May 9, 2013) ("[B]y virtue of being in possession of the note, U.S. Bank is the lawful owner. Its right to receive payment on the note does not depend upon any assignment of the note from MERS.")

Additionally, since the evidence shows that Bank of America held the Note as of the date the Assignment was recorded, the Assignment is not deceptive or misleading in identifying Bank of America as the beneficiary of the Note. *See RCW 61.24.050(2)* ("Beneficiary" means the

holder of the instrument or document evidencing the obligations secured by the deed of trust.”) To the extent Ms. Massey argues that the Assignment is deceptive merely because it implies that MERS was a beneficiary to the Note, Ms. Massey is, as the following section demonstrates, unable to show that this allegedly deceptive act caused her any injury.

Ms. Massey also argues that the Assignment is forged or fraudulent because Jeff Stenman, who executed the Assignment, is a “known robo-signer and did not have personal knowledge of the document, nor did he personally sign the document.” (Am. Compl. ¶ 3.17; see also *id.* ¶ 6.7) Ms. Massey, however, provides no evidence to support her assertion that Mr. Stenman lacked the authority to sign on behalf of MERS. To the contrary, her theory is flatly contradicted by the record. Mr. Stenman was an employee of Northwest Trustee. (Stenman Dec. (Dkt.# 49–10) ¶ 1.) The “Agreement for Signing Authority” signed by MERS, Northwest Trustee, BAC Home Loans Servicing, and MERSCORP as of November, 2011 expressly authorizes Northwest Trustee employees to act on behalf of MERS in the execution of mortgage documents. (Agreement (Dkt.# 49–4) at 2.) And Mr. Stenman testifies that he had personal knowledge of Ms. Massey’s loan documents and that the Assignment bears his genuine signature. (Stenman Dec. ¶¶ 3–4.)

\*7 Ms. Massey provides no legal authority that such a signature would render the Assignment void. To the contrary, courts routinely reject “robo-signing” as a cognizable legal theory. See, e.g., *Bain v. Metro. Mortg. Group, Inc.*, 2010 WL 891585, at \*6 (W.D.Wash.2010) (“There is simply nothing deceptive about using an agent to execute a document, and this practice is commonplace in deed of trust actions.”).<sup>3</sup> Accordingly, Ms. Massey has not demonstrated that Mr. Stenman’s execution of the Assignment constitutes a deceptive or unfair practice under the CPA.

#### **E. Characterizing MERS as a Beneficiary**

Finally, Ms. Massey alleges that, by “designating MERS a ‘beneficiary’ of the DOT [Deed of Trust], the Lender and MERS provided to Plaintiff false information that they knew or should have known would mislead Plaintiff as to the true identity of the holder of the Note.” (Am.Compl.¶ 3.13.) Under *Bain*, “characterizing MERS as the beneficiary” of a Deed of Trust presumptively meets the first and third elements of the CPA. *Bain*, 285 P.3d at 51. However, “the mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury.” *Id.* at 52. A plaintiff must also establish that “but for the defendant’s unfair or deceptive practice, the

plaintiff would not have suffered an injury.” *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wash.2d 59, 170 P.3d 10, 22 (2007). “Personal injuries, as opposed to injuries to ‘business or property,’ are not compensable and do not satisfy the injury requirement.” *Panag v. Farmers Ins. Co. of Washington*, 166 Wash.2d 27, 204 P.3d 885, 899 (Wash.2009).

Here, Ms. Massey is unable to show any cognizable injury due to MERS’ presence on the Deed of Trust or the Assignment.<sup>4</sup> The only evidence Ms. Massey provides in support of the injury and causation elements is a declaration by Ms. Massey listing the following alleged injuries:

(1) loss of any equity in my home and the loss of my down payment of \$93,000; (2) damage to my credit as a result of having to file bankruptcy to stop a trustee’s sale; (3) the time, travel, wear a tear [sic] on my vehicle having to meet with my attorney; (4) bankruptcy fees and costs; (5) attorney fees and costs, of which I have paid only \$1,200 to date; (6) personal stress and emotional upset from going into default ...; (7) out of pocket expenses for gas, postage, parking to consult with attorneys; (8) distraction and loss of time to pursue business and job opportunities and personal activities due to the necessity of investigating the wrongful conduct of the defendants in processing the foreclosure of my home.

(Massey Dec. ¶ 3.) Ms. Massey further claims in her declaration that she “suffered associated damage to my reputation in the community, damage to my credit history ... damage to my reputation on social media, damage to my reputation with current and future employers, decreased ability to find new employment, higher interest rates and increased insurance premiums.” (*Id.* ¶ 4, 204 P.3d 885.)

\*8 First, many of these claimed injuries are not cognizable under the CPA. “[D]amages for mental distress, embarrassment, and inconvenience are not recoverable under the CPA.” *Panag*, 204 P.3d at 899. As such, Ms. Massey’s assertions of “personal stress,” “distraction,” and “damage to [her] reputation” in various forms are of no consequence. Similarly, litigation expenses incurred to institute a CPA claim do not constitute injury. (*Id.* (citing *Demopolis v. Galvin*, 57 Wash.App. 47, 786 P.2d 804, 809 (Wash.App.1990).) Therefore, Ms. Massey’s laundry list of the costs of instituting this action, including attorney fees, “wear and tear” on her vehicle, and buying postage stamps, is inapposite. See *id.*

Second, Ms. Massey fails to provide any evidence

connecting her remaining injuries with MERS' presence on the Deed of Trust or Assignment (or, for that matter, with any other action by Bank of America, MERS, or Freddie Mac). Again, Ms. Massey admits that she stopped making payments on the Loan. (Massey Dep. at 30.) Any injuries associated with the foreclosure proceedings, including the bankruptcy filing, "damage to [her] credit," and the alleged "loss of any equity in my home and the loss of my down payment," were caused solely by her own default. See, e.g., *Babrauskas v. Paramount Equity Mortgage*, No. C13-0494RSL, 2013 WL 5743903, \*4 (W.D.Wash. Oct.23, 2013) (finding no injury under the CPA because "plaintiff's failure to meet his debt obligations is the 'but for' cause of the default, the threat of foreclosure, any adverse impact on his credit, and the clouded title"); *McCrorey v. Fed. Nat. Mortg. Ass'n*, No. C12-1630RSL, 2013 WL 681208 (W.D.Wash. Feb.25, 2013) (finding no injury under the CPA because "it was [plaintiffs'] failure to meet their debt obligations that led to a default, the destruction of credit, and the foreclosure"); *Peterson v. Citibank, N.A.*, No. 67177-4-1, 2012 WL 4055809 (Wash.Ct.App.2012) ("[R]egardless of MERS's conduct as the beneficiary under the deed of trust, the Petersons' property would still have been foreclosed upon based on their failure to make payments on the loan.").

The court in *Bain* contemplated that MERS' presence on a Deed of Trust could cause injury under the CPA if it led to confusion regarding or an inability to locate the party accountable for a plaintiff's loan. *Bain*, 285 P.3d at 51; see also *Babrauskas*, 2013 WL 5743903, \* 4. But here, Ms. Massey admits that she was not confused about who to submit her loan payments to or who to contact to apply for a loan modification. (See Massey Dep. at 22 ("Q: Were you ever confused as to who to pay your mortgage

loan to? A: No."); *id.* (Q: "Did you apply for a modification of your loan? A: Yes. Q: Who did you submit the modification to? A: Bank of America. Q: Were you confused about who you should submit the mortgage modification to? A: No."))<sup>5</sup> In fact, Ms. Massey did not even see the Assignment until it was made a part of her complaint. (*Id.* at 23.) By that time, most of her alleged injuries had already occurred. Therefore, Ms. Massey fails to provide evidence sufficient to establish an issue of material fact as to whether the presence of MERS on the Deed of Trust or the Assignment was a but-for cause of any injury cognizable under the CPA.

<sup>9</sup> In sum, with respect to all of Ms. Massey's theories, Defendants have either shown that Ms. Massey lacks evidence of essential elements of her CPA claim (causation and injury) or they have produced evidence that negates an essential element of her CPA claim (deceptive act). See *Nissan Fire*, 210 F.3d at 1106. In response, Ms. Massey has failed to produce sufficient evidence to permit a jury to reasonably find in her favor. See *Anderson*, 477 U.S. at 252. Therefore, summary judgment is appropriate.

#### IV. CONCLUSION

For the foregoing reasons, the court GRANTS Defendant Bank of America's motion for summary judgment (Dkt.# 54). The court also GRANTS Defendants Freddie Mac and MERS' motion for summary judgment (Dkt.# 59).

#### Footnotes

- <sup>1</sup> Bank of America is successor by merger to Countrywide and to named defendant BAC Home Loans Servicing, LP ("BAC Home Loans"). (Lamas Dec. ¶¶ 6-7.) For simplicity, the court refers to these three entities as "Bank of America" for the remainder of this order.
- <sup>2</sup> The Washington Supreme Court's holding that characterizing MERS as a beneficiary to a Deed of Trust presumptively meets the first element of a CPA claim did not occur until 2012. See *Bain v. Metro. Mortgage Grp., Inc.*, 175 Wash.2d 83, 285 P.3d 34, 51 (2012). Therefore, out of an abundance of caution, the court also addresses Ms. Massey's claims predicated on MERS' presence on the Deed of Trust in Section III.E below.
- <sup>3</sup> To the extent that Ms. Massey argues that "robo-signing" rendered the Assignment void or voidable (as opposed to merely deceptive), as a borrower and third party to the transaction, she lacks standing to challenge the validity of the Assignment. See *Ukpoma*, 2013 WL 1934172 at \*4 (granting summary judgment on mortgagor's allegations of "robo-signing" for lack of standing to challenge assignment); *Brodie v. Nw. Tr. Servs., Inc.*, 12-CV-0469-TOR, 2012 WL 6192723, at \*2 (E.D.Wash. Dec.12, 2012) (collecting cases dismissing borrower's claims of "robo-signing" for lack of standing to challenge the transaction).
- <sup>4</sup> To the extent Ms. Massey argues that characterizing MERS as a beneficiary in the Assignment is also a deceptive act, the court assumes, without deciding, that such a characterization meets the first element of the CPA. The court does not need to reach that

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issue because Ms. Massey is, as discussed further in this section, unable to show any cognizable injury under the CPA due to MERS' presence on the Assignment.

<sup>5</sup> (See also Massey Dep. at 22 (“Q: Did you ever think that maybe you should make payments to any other entity other than Countrywide and then Bank of America? A: No. Q: Did you ever think you should make payments to MERS? A: No. Q: Did you ever think you should make your payments to anybody else? A: No.”).)

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# #7: Whitman & Milner article

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Symposium Article

**\*21 FORECLOSING ON NOTHING: THE CURIOUS PROBLEM OF THE DEED OF TRUST FORECLOSURE  
WITHOUT ENTITLEMENT TO ENFORCE THE NOTE**

Dale A. Whitman<sup>nl</sup> Drew Milner<sup>nal</sup>

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In this article we propose to examine the extent to which a party conducting a nonjudicial foreclosure of a mortgage or deed of trust must establish that it is entitled to enforce a promissory note that the mortgage or deed of trust secures. It may seem patently obvious that such a showing is required, but that proposition turns out to be far from true.

In Part I, we provide background on the law governing the transfer of the right to enforce notes, particularly negotiable notes under UCC Article 3. We also describe the nature and structure of nonjudicial foreclosure in the United States. Part II looks at seven western states that use nonjudicial foreclosure of deeds of trust and investigates whether and how those states require proof of the right to enforce the note. In Part III, we consider the same issue across the rest of the nation, but rather than engage in a state-by-state analysis, we examine only recent judicial decisions addressing this point. Part IV discusses the related issue of enforcement of notes that have been lost, a problem that is addressed by UCC Article 3 but largely ignored by the nonjudicial foreclosure statutes. Finally, our overall conclusions are set out in Part V.

**\*22 I. THE FORECLOSURE CRISIS**

The foreclosure crisis that began in the latter half of 2007 has been a bitter pill to swallow for the American economy at large and for many thousands of families who have lost, or are in the process of losing, their homes to foreclosure.<sup>1</sup> But even such pervasively bad news has a good side, for there are many lessons of law, economics, and policy to be learned from this experience. This article addresses one such lesson.

Before the crisis began, most lawyers familiar with the process of mortgage foreclosure in the United States would probably have regarded it as a satisfactory, if not somewhat dull, area of the law. Foreclosure did not generate much appellate litigation, and those few lawyers who specialized in the field, mostly representing lenders, had little difficulty in getting the results they needed from the mechanisms of foreclosure.

That process has now changed radically. The foreclosure crisis resulted in the creation of a new kind of lawyer: the foreclosure-defense specialist. As these specialists began to poke and prod at the foreclosure process, they found plenty of weaknesses. They raised dozens of questions about precisely what sort of evidence or proof, and in what form, needed to be adduced by those instigating foreclosure, particularly when the loan had been sold on the secondary-mortgage market. For example, they forced the courts to focus on issues such as whether a chain of mortgage assignments (recorded or not) was required as a prerequisite to foreclosure.<sup>2</sup>

**\*23** In addition, the impact of the Mortgage Electronic Registration System (MERS) became highly controversial.<sup>3</sup> MERS was created by a group of major mortgage-market participants in the mid-1990s as mortgage loans were traded on the secondary market, primarily to avoid the necessity of repeated recordings of mortgage assignments.<sup>4</sup> MERS holds mortgages as “nominee” for the loan owner, but the scope of MERS’s authority as nominee was unclear.<sup>5</sup> For instance, could MERS foreclose in its own name?<sup>6</sup> Was it entitled to notice of foreclosures or other actions affecting the property?<sup>7</sup> Did the fact that MERS held the mortgage while an investor held the note create a separation of the two documents that would somehow be fatal to the effort to foreclose?<sup>8</sup> A whole constellation of related issues arose around MERS’s involvement in the foreclosure

process.

While plenty of uncertainty existed, one concept clearly emerged from litigation during the 2008-2012 period: in order to foreclose a mortgage by judicial action, one had to have the right to enforce the debt that the mortgage secured.<sup>9</sup> It is hard to imagine how this notion could be controversial. From its earliest beginnings, \*24 American mortgage law held that a mortgage must secure an obligation, and since foreclosure is a means for the creditor to realize on the obligation, the foreclosing creditor must be entitled to enforce that obligation.<sup>10</sup> As the Restatement explains, "The mortgage becomes useless in the hands of one who does not also hold the obligation because only the holder of the obligation can foreclose."<sup>11</sup> In the case of a loan that has been sold on the secondary market, this means that the right to enforce the obligation must have been transferred to the party now purporting to foreclose the mortgage, or if the foreclosing party is an agent, to its principal.<sup>12</sup>

Observe that the obligation must be explicitly transferred, not the mortgage. For this reason, in the absence of a contrary statute, an assignment of the mortgage is not necessary to transfer the power to foreclose.<sup>13</sup> As the old cases put it, the mortgage follows the note<sup>14</sup> and will automatically inure to the benefit of the party to whom the obligation is owed.<sup>15</sup>

### **\*25 A. What Must Be Transferred: Ownership or PETE Status?**

Transferring the obligation is a bit more complex than might first appear. The reason is that under the UCC there are two quite distinct sets of rights in a promissory note and they need not necessarily be held by the same party. One set of rights, commonly termed "PETE status," refers to the right to enforce the note; "PETE" is an acronym for "person entitled to enforce," a term used by UCC § 3-301.<sup>16</sup> UCC Article 3 deals exclusively with negotiable instruments; however, if the note is nonnegotiable and is not ordinarily transferred by delivery, the right of enforcement (or PETE status) is governed by the common law.<sup>17</sup>

The other set of rights, termed "ownership" by the Code, is governed by UCC Article 9 regardless of whether the note is negotiable.<sup>18</sup> Ownership means the right to economic benefits of the note and includes monthly payments, the proceeds of a voluntary payoff or short sale, and foreclosure proceeds.<sup>19</sup> The significance of these two sets of rights, ownership and PETE status, is sharply distinct. PETE status refers to rights against the maker of the note--the borrower. Thus, a borrower can negotiate with the party having PETE status to modify the loan, accept a payoff for less than the face amount owed, or approve a "short sale" or a deed in lieu of foreclosure and be assured that any agreement reached with the PETE in any of these negotiations will be binding. On the other hand, the borrower is typically unconcerned with the identity or separate existence of the owner--the party to \*26 whom the proceeds of the loan will ultimately be paid.<sup>20</sup> If the borrower pays the PETE, the borrower's obligation is satisfied.

While these two sets of rights may well be, and often are, held by the same party, they can also be separated.<sup>21</sup> For example, Fannie Mae and Freddie Mac, two large government-sponsored secondary-market purchasers of mortgage loans, normally deliver possession of a note to the servicer when it is necessary to foreclose. Hence, the servicer becomes the PETE, while Fannie or Freddie remains the owner and has the right to the proceeds of foreclosure.

The distinction between ownership and PETE status has been widely misunderstood in the past and has been responsible for considerable confusion in judicial decisions<sup>22</sup> and statutes.<sup>23</sup> In November 2011, the \*27 Permanent Editorial Board (PEB) of the Uniform Commercial Code issued a report that sought to explain these UCC concepts insofar as they directly relate to the transfer and enforcement of notes secured by mortgages on real property.<sup>24</sup> The report is in many ways a brilliant exposition of an exceedingly complex topic, and since its release, courts have generally improved at the task of understanding and applying the distinction between ownership and PETE status.<sup>25</sup>

The potential bifurcation of ownership and PETE status raises the following question: given the truth of the aphorism that "the mortgage follows the note," if ownership and PETE status are separated, which of those rights does the mortgage follow? Or to put it differently, in order to have standing to foreclose a mortgage, does the foreclosing party need to be the owner, the PETE, or both? Finding case authority on this question is not easy. Most of the older judicial opinions do not recognize or understand the distinction and, hence, are useless in resolving this issue.<sup>26</sup> Since the publication of the PEB Report, however, a fair number of courts have addressed the question knowledgeably, and their answers are consistent: PETE status, and not ownership per se, confers the right to foreclose.<sup>27</sup> This result is perfectly sensible, since \*28 foreclosure is

simply one way for a creditor to realize payment of the debt that the note represents. Any payment received by virtue of the foreclosure must be applied against the balance owed on the note, and if foreclosure results in payment in full, the note is discharged.<sup>28</sup> Hence, to view the power to foreclose as dependent on a creditor's right to enforce the note--or PETE status--is entirely logical.

### B. Who Can Enforce a Negotiable Note?

This brings us to the discussion of how a party becomes a PETE. UCC Article 3 provides the answer but is applicable only if the note is negotiable. The concept of negotiability is complex, with the consequence that it may sometimes be unclear whether Article 3 or the common law governs a particular mortgage note.<sup>29</sup> Indeed, despite considerable litigation, it remains uncertain whether the standard Fannie Mae or Freddie Mac residential-mortgage note is negotiable.<sup>30</sup> Courts often apply a presumption that \*29 mortgage notes are negotiable, perform a cursory analysis of the issue, or completely refrain from any analysis at all.<sup>31</sup> This situation is, to put it mildly, unsatisfactory; it is absurd that in a modern industrialized society, it is unclear what law governs the largest financial transaction most households will ever make. But that is a problem that cannot be resolved here. For the moment, let us assume that the note in question is negotiable and, therefore, is covered by UCC Article 3.

Article 3 provides three ways by which a party can become a "person entitled to enforce."<sup>32</sup> The first is to be a "holder," which requires the person to be in possession of the note.<sup>33</sup> In addition, the note must either be made payable or endorsed to the person in possession, made payable to bearer, or endorsed in blank.<sup>34</sup> Endorsements on the note must be examined because an endorsement may be "special"--that is, to a particular endorsee--or may be in blank, so that the note becomes bearer paper and anyone in possession will be considered the bearer.<sup>35</sup>

Second, one may become a "nonholder with the rights of a holder."<sup>36</sup> This occurs if possession is delivered without an endorsement (and without the note being bearer paper), and "for the purpose of giving to the person receiving \*30 delivery the right to enforce the instrument."<sup>37</sup> Thus, both holder and "nonholder with the rights of a holder" status require possession of the note; the difference is that the former requires an appropriate endorsement (if the note was not originally to bearer, as mortgage notes rarely are, and has not previously been endorsed in blank) and the latter does not.

The third method of establishing the right of enforcement expressly does not depend on possession of the paper; rather, the right of enforcement is established by providing a lost-note affidavit.<sup>38</sup> The requirements for the affidavit are quite strict: the note must have been destroyed, its whereabouts not discoverable, or it must be in the wrongful possession of an unknown person or one who cannot be served.<sup>39</sup> Before accepting such an affidavit, a court might well demand evidence as to the efforts that have been made to locate the note. In addition, the court can require the enforcing party to provide assurance, typically in the form of a bond or indemnity agreement, against the possibility that the borrower will have to pay twice.<sup>40</sup>

The Code's lost-note provisions were quite obviously drafted with judicial enforcement of the note in mind. These provisions state that persons seeking enforcement must prove the terms of the instrument and the right to enforce, and they speak of "the court" providing protection against the possibility of a double claim against the note's maker.<sup>41</sup> The possibility that the note might be enforced by \*31 way of a nonjudicial proceeding does not seem to have been contemplated by the drafters and raises an interesting dilemma which we will address below.

Before we leave the matter of establishing the right of enforcement, we need to comment briefly on nonnegotiable notes, to which UCC Article 3 is completely inapplicable. Here, as with negotiable notes, it seems entirely possible to separate ownership and PETE status, but such a separation can follow only from an agreement or set of agreements, and not from the method of transfer per se, as it can with negotiable notes. How does a secondary-market purchaser of such a note acquire the right of enforcement? It is clear that, unlike a negotiable instrument, enforcement rights in a nonnegotiable note can be transferred by a separate document of assignment.<sup>42</sup> These rights can also be transferred by delivery of the note, which has the same effect as an assignment.<sup>43</sup> However, modern case authority is sparse, and beyond these general principles, not much can be said.

### C. Foreclosing Deeds of Trust

We turn now to a consideration of the interaction between the rules for transfer of PETE status discussed above and the procedure for nonjudicial foreclosure. This form of foreclosure is comparatively new; it became popular in the United States over the course of the twentieth century.<sup>44</sup> Nonjudicial foreclosure was developed to afford a quicker, cheaper, and more efficient process than was provided by the traditional method of foreclosure by judicial action, which originated in England.<sup>45</sup> \*32 Nonjudicial foreclosure is now authorized in thirty-five states and the District of Columbia.<sup>46</sup> In twenty-three of those jurisdictions, the preferred, or sometimes only, security instrument is the deed of trust, while the remaining thirteen states permit the use of a mortgage with a “power of sale” (that is, a power to foreclose) vested in the mortgagee.<sup>47</sup>

The introduction of the deed of trust has an odd history. It was initially developed in England around the turn of the nineteenth century as a method of foreclosure that would avoid the delays and intricacies for which the English equity courts had become infamous.<sup>48</sup> The idea was to cause the borrower to convey title to trustees and vest in them a power to sell the property without the intervention of the equity courts if a default on the obligation occurred.<sup>49</sup> However, within a short time, English lawyers realized that the use of trustees was unnecessary, and they shifted to the practice of simply including in mortgages a power of sale, exercisable by the mortgagee.<sup>50</sup> That remains the British custom today,<sup>51</sup> so the deed of trust is no more than a historical footnote in Britain.

\*33 Given that the British long ago forsook the deed of trust, why it became the predominant model for nonjudicial foreclosure in the United States is unclear. Perhaps the presence of the trustee, a purportedly independent party with duties to both borrower and lender, gave an air of greater fairness to the foreclosure process. In practice, this has turned out to be a dubious proposition. We know of no evidence that foreclosure by a trustee offers the borrower any benefit over foreclosure by a mortgagee with a power of sale,<sup>52</sup> and questions about the precise nature of the trustee’s duties have proven a fruitful generator of litigation.<sup>53</sup>

Conceptually, it is perfectly clear that the trustee is not meant to act unless and until instructed to do so by the holder of the obligation that the deed of trust secures. This notion is spelled out in many of the foreclosure statutes. The Arkansas statute, for example, permits foreclosure to be initiated only by the “beneficiary or mortgagee”—not the trustee.<sup>54</sup> Likewise, the Nevada statute provides that the notice of default and election to sell must recite that “the trustee has the authority to exercise the power of sale with respect to the property pursuant to the instruction of the beneficiary of record and the current holder of the note secured by the deed of trust.”<sup>55</sup> But not all of the statutes \*34 make this principle clear. The California statute, for example, authorizes either the beneficiary or the trustee to commence the foreclosure, and the statute contains no express statement that the trustee can act only upon the beneficiary’s instruction.<sup>56</sup> This raises the somewhat bizarre possibility that a trustee might foreclose a defaulted deed of trust even if the beneficiary has failed to request foreclosure or told the trustee not to foreclose!<sup>57</sup>

Consider for a moment what a trustee is obligated to do before foreclosing on the instruction of the purported holder of the promissory note. Does the trustee have any due-diligence duties? Not many, it seems. For example, Missouri caselaw holds that the trustee need not make any investigation of whether the debt is actually in default<sup>58</sup> or whether the debtor has a defense or offset that would make foreclosure improper.<sup>59</sup> The trustee usually does not have the same sort of fiduciary duties to the borrower as a traditional, common-law trustee, but instead simply has a duty to conduct a fair sale.<sup>60</sup>

There is one duty, however, that seems logically inescapable. If the party requesting the foreclosure is not the named beneficiary or mortgagee in the deed of trust or mortgage--thus indicating that a secondary-market transfer has occurred--then surely the trustee has a duty to verify that the foreclosing party is the PETE of the promissory note. Otherwise, there would be nothing to prevent a complete imposter from directing a foreclosure sale to occur! In such a case, the trustee would literally be foreclosing on nothing. Moreover, it seems plausible to assume that the borrower who is about to be foreclosed upon should be entitled to see and review the evidence that the foreclosing party is the PETE. Of course, if the foreclosure is wrongful, the borrower may be entitled to enjoin it or set it aside after the fact, but these actions require the hiring of counsel, judicial intervention, and the \*35 expenditure of substantial amounts of money. The borrower’s opportunity to verify the foreclosing party’s PETE status should be built into the standard process.

These suppositions may be sensible, but, remarkably, they are often ignored in nonjudicial foreclosure statutes. In examining this phenomenon, we focus primarily on the statutes of seven western states that use deeds of trust in nonjudicial foreclosure: Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington.<sup>61</sup> We chose to examine these statutes because they are similar to one another in operation (if not in detailed wording) and because the issue was first called to our attention by a

cluster of federal-district-court rulings in the western United States--rulings that initially seemed patently wrong, but that have, in some cases, been confirmed by the appellate courts of those states.

Before we begin our analysis, we might observe that the issue we are confronting is the nonjudicial foreclosure analogue of the “show me the note” defense in a judicial foreclosure. As we have suggested above, it is standard doctrine in a judicial foreclosure of a mortgage that the foreclosing party must provide proof that it has the power to enforce the note.<sup>62</sup> In a nonjudicial foreclosure by a trustee under a deed of trust, only the trustee acts as a proxy for the judge in a judicial foreclosure. And if neither the trustee nor anyone else is obligated to verify that the foreclosing party holds the note, then the borrower is exposed to the very real and potentially serious risk of losing the real estate in foreclosure and subsequently being sued on the note by its actual holder. Surely, it seems to us, no sensible legal system would expose borrowers to such a risk.

## \*36 II. CONSTRUING NONJUDICIAL FORECLOSURE IN THE WESTERN “DEED OF TRUST” STATES

In this Part, we present the state of nonjudicial foreclosure law in the seven western states identified above, with particular reference to whether a party that does not have the right to enforce the promissory note might nonetheless successfully foreclose the deed of trust securing that note.

### A. California

We begin our analysis with federal cases in California, since it was there that this issue was first raised. The earliest decision seems to be the 2007 case of *Neal v. Juarez*, where the court merely held that “the allegation that the trustee did not have the original note or had not received it is insufficient to render the foreclosure proceeding invalid.”<sup>63</sup> That statement does not quite address our point; the issue is whether the trustee must determine that the purported holder of the note actually holds it, not whether it has been given to the trustee. A more relevant early decision is *Candelo v. NDex West, LLC*, where the Eastern District of California emphasized the view of the California state courts that the nonjudicial foreclosure statute is a “comprehensive statutory framework” and “is intended to be exhaustive.”<sup>64</sup> The court then observed that “[n]o requirement exists under the statutory framework to produce the original note to initiate non-judicial foreclosure.”<sup>65</sup> In other words, because it is not an explicit requirement of the foreclosure statute, production of the note is not required at all. The same theme was followed by the Northern District of California in the 2009 case of *Gamboa v. Trustee Corps*.<sup>66</sup> Since *Candelo* was published, it has been cited by federal district courts in California at least thirty-three times for the proposition that production \*37 of the note is not required to foreclose nonjudicially.<sup>67</sup> However, all of these decisions are unpublished. In 2012, the Bankruptcy Appellate Panel for the Ninth Circuit published an opinion that agreed with *Candelo* and went even farther in the case of *In re Cedano*.<sup>68</sup> There, the court stated, “Under Cal. Civ. Code § 2924, the party initiating foreclosure proceedings is not required to have a beneficial or economic interest in the note in order to foreclose.”<sup>69</sup> Observe the leap: the foreclosing party not only is not required to produce the note, but need not even hold an interest in it!

None of these decisions cite to any controlling state-court case, leaving one to wonder if the federal courts got it right. It appears that they did. Finally, in 2012, in *Debrunner v. Deutsche Bank National Trust Co.*,<sup>70</sup> the California Court of Appeal fully endorsed the aforementioned federal cases in construing California law:

Plaintiff’s reliance on the California Uniform Commercial Code provisions pertaining to negotiable instruments is misplaced. . . . “There is no stated requirement in California’s non-judicial foreclosure scheme that requires a beneficial interest in the Note to foreclose. Rather, the statute broadly allows a trustee, mortgagee, beneficiary, or any of their agents to initiate non-judicial foreclosure. Accordingly, the statute does not require a beneficial interest in both the Note and the Deed of Trust to commence a non-judicial foreclosure sale.”<sup>71</sup>

This language is more revealing than it may first appear. When the loan has been sold on the secondary market, the foreclosing party is not the “mortgagee, beneficiary, or any of their agents.”<sup>72</sup> These parties have parted with their interest in the loan. Rather bizarrely, the statute does not seem to recognize that anything like the \*38 secondary-mortgage market exists or that mortgage loans are routinely transferred by the original deed of trust beneficiary.<sup>73</sup> There is no reference to transfers of the note or obligation or even to assignments of the deed of trust.

Under the statutory language, the trustee holds the power to foreclose when the loan has been sold.<sup>74</sup> The trustee is an agent<sup>75</sup>

and is empowered by the statute to represent whom? Logically, we want to answer that the trustee must now represent the current holder of the note, but the court in Debrunner has explicitly told us that the trustee has no responsibility to determine whether the party being represented holds the note or not.<sup>76</sup> Perhaps the statute contemplates that the trustee represents the holder of an assignment of the deed of trust, but it is far from clear in saying so, and in any event, there is no assurance at all that the assignee of the deed of trust will also have possession of, or the right to enforce, the note. The trustee is thus represented by the Debrunner reasoning as a sort of legal Don Quixote, foreclosing on his or her own initiative when a default is discovered. The result is potential legal chaos!

To reach this position, the court needed to ignore UCC Article 3, and that is precisely what it did: Likewise, we are not convinced that the cited sections of the California Uniform Commercial Code (particularly § 3301) displace the detailed, specific, and comprehensive set of legislative procedures the Legislature has established for nonjudicial foreclosures. “Although Article 3 of the UCC governs negotiable instruments, it does not apply to nonjudicial foreclosure under deeds of trust.”<sup>77</sup>

**\*39** Suppose a trustee conducted a nonjudicial-foreclosure sale on the instruction of a party who had an assignment of the deed of trust but who did not hold the note. A judicial foreclosure under these circumstances would be inappropriate, but a nonjudicial foreclosure is depicted by Debrunner and the prior federal cases as perfectly appropriate. Apparently a California court would not enjoin the sale (the actual context of the Debrunner case), would not set it aside after it had occurred, and would not award damages against the foreclosing party or the trustee for their actions (the context of most of the federal cases discussed above).

In July 2012, after Debrunner was decided, the California legislature amended the nonjudicial-foreclosure statute as part of the package of bills known as the California Homeowner Bill of Rights.<sup>78</sup> One provision of the amendment may bear on the present issue. A new subsection (a)(6) was added to California Civil Code § 2924:

No entity shall record or cause a notice of default to be recorded or otherwise initiate the foreclosure process unless it is the holder of the beneficial interest under the mortgage or deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest. No agent of the holder of the beneficial interest under the mortgage or deed of trust, original trustee or substituted trustee under the deed of trust may record a notice of default or otherwise commence the foreclosure process except when acting within the scope of authority designated by the holder of the beneficial interest.<sup>79</sup>

Because under common-law principles only the party who can enforce the note can be the beneficial holder of the deed of trust,<sup>80</sup> irrespective of who the nominal assignee is, the first sentence might be read to say that an assignee of a deed of trust can commence a nonjudicial foreclosure only **\*40** if the assignee also holds the right to enforce the note. However, even if this meaning is assigned to the language of the statute, the text still independently authorizes the original or substituted trustee to commence foreclosure--apparently with no instruction from the holder of “the beneficial interest under the mortgage or deed of trust” at all.<sup>81</sup>

The second sentence of the new subsection is no help; it simply limits the actions of an agent of the holder of the beneficial interest (presumably, a servicer) to those acts authorized by the holder. In sum, if the amendment was intended to require that the party instigating foreclosure must be entitled to enforce the note, then it is an incredibly inept effort to say so. Indeed, aside from providing that servicers must act within their authority as agents (an obvious proposition that would seem to require no legislative reinforcement), it is hard to see why subsection (a)(6) was added to the statute. The basic premise of Debrunner still seems to be intact in California.

Can this result really have been the intention of the California state legislature? After all, California enacted UCC Article 3 as well as the foreclosure statute. Would it be so difficult to read the two in harmony and to hold the trustee to a duty that ensures the demands of Article 3 are satisfied before proceeding with foreclosure? It is true that the foreclosure statute does not incorporate or refer to Article 3 specifically, but the statute likewise does not dismiss Article 3.

Perhaps the real explanation for California state and federal courts’ refusal to consider Article 3 in the context of nonjudicial

foreclosure is that, after all, the borrower is clearly in default and has no substantive defense to foreclosure. The demand for production of the note is seen as simply a technicality designed to delay the inevitable loss of the real estate and to clog the courts in the process. The chances that someone else has the note and will later try to enforce against the borrower are remote, and, even if it occurred, the borrower would be entitled to a credit for the amount bid at the foreclosure sale. Moreover, deficiency **\*41** judgments on purchase-money mortgage loans and deeds of trust foreclosed by nonjudicial process are barred by statute in California.<sup>82</sup> The remaining balance would, therefore, be uncollectible. Thus, the probability that anyone holding the note would even attempt to enforce it against the borrower is extremely unlikely.

In light of the fact that deficiency claims are barred against all mortgage loans foreclosed nonjudicially, but only for some loans foreclosed judicially,<sup>83</sup> there is a rationale supporting California's policy of requiring proof of the right to enforce the note in judicial foreclosures but not in trustee's sales. Nonetheless, there is an unseemly casualness about the distinction. After all, different lenders have different policies and procedures with respect to forbearance, loan modification, mediation, approval of short sales, and a variety of other measures to relieve the harshness of foreclosure. Hence, many consequences may turn on which lender attempts to foreclose. As a matter of orderly process and fundamental fairness, should not borrowers be eligible to know that the party depriving them of their real estate is legally entitled to do so and to have the opportunity to claim whatever foreclosure mitigation procedures that particular lender has adopted? We think they should.

## B. Following in California's Footsteps

Two other western states, Arizona and Idaho, present legal landscapes similar to California. In both states, foreclosure is usually carried out by a trustee's sale under a deed of trust, and neither state's foreclosure statute contains any reference to the UCC or any requirement that the foreclosing party show entitlement to enforce the promissory note.<sup>84</sup>

### **\*42** I. Arizona

The Arizona statute, even more starkly than California's statute, appears to contemplate foreclosure by the trustee without any instruction to foreclose by the beneficiary of the deed of trust,<sup>85</sup> thus presenting the possibility of a rogue trustee as discussed above.<sup>86</sup> As in California, Arizona's drafters seem to have been completely unaware that a secondary market in mortgage loans exists. Before the Arizona state courts addressed the issue, several Arizona federal courts held that the foreclosing party had no duty to show entitlement to enforce the note, reasoning--like California federal courts--that since the foreclosure statutes were silent on the point, no incorporation of the Article 3 requirement to show entitlement to enforce could be implied.<sup>87</sup>

When the matter finally came up on appeal, however, the Arizona Supreme Court followed a slightly different approach.<sup>88</sup> Rather surprisingly, the court first noted that "a deed of trust, like a mortgage, may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures."<sup>89</sup> Not so fast! Noting that the borrower had failed to allege that the foreclosing party lacked the note, the court concluded that nothing in the foreclosure statute placed the burden of proof on the foreclosing lender.<sup>90</sup> The court then slipped into the comfortable rhetoric used by the prior federal and California cases: "the deed of trust statutes impose no obligation on the beneficiary to 'show the note' before the **\*43** trustee conducts a non-judicial foreclosure."<sup>91</sup> Moreover, the court, inconsistently, seemed to find that the UCC did not apply. The court stated, "The UCC does not govern liens on real property. The trust deed statutes do not require compliance with the UCC before a trustee commences a non-judicial foreclosure."<sup>92</sup>

In summary, the court's position seems to be that the foreclosing party must have the right to enforce the note but need not prove or provide evidence of it. This gives the borrower a sort of right without a remedy. Perhaps the court's statements were only about the burden of going forward with evidence. The court pointed out that the borrower "alleges that [the investor and servicer of the loan] have the burden of demonstrating their rights before a non-judicial foreclosure may proceed. Nothing in the non-judicial foreclosure statutes, however, imposes such an obligation."<sup>93</sup> Suppose the borrower had alleged in his complaint that the assignee of the deed of trust lacked possession of the note. Would the court have compelled the assignee to produce it then?<sup>94</sup>

Of course, this position seems nonsensical; it effectively requires the borrower to bring a lawsuit in order to make such an allegation and then places the burden of alleging evidence as to possession of the note on the borrower-- the party least likely to have any information or knowledge on the subject. The court's handling of this issue is, to put it mildly, unsatisfactory.

The Arizona court attempted to buttress its position by referring to the state's anti-deficiency legislation, but its effort was not very convincing:

\*44 [The borrower] suggests that if we do not require the beneficiary to "show the note," the original noteholder may attempt to later pursue collection despite a foreclosure. But Arizona's anti-deficiency statutes protect against such occurrences by precluding deficiency judgments against debtors whose foreclosed residential property consists of 2.5 acres or less, as is the case here.<sup>95</sup>

Fair enough, but Arizona's anti-deficiency statute for nonjudicial foreclosures is far less comprehensive than California's.<sup>96</sup> What about foreclosures on nonresidential property or on houses located on parcels larger than 2.5 acres? Would those borrowers (who have no protection against a later lawsuit for the remainder of the debt) be entitled to demand production of the note as a precondition of foreclosure? Nothing in the opinion suggests that they would. On this point, as on the question of whether the court is merely speaking to the burden of going forward with evidence, the opinion seems maddeningly inconsistent. As a practical matter, Arizona has ended up in the same position as California; the trustee can foreclose the deed of trust without making any inquiry as to whether the foreclosing party holds the note.<sup>97</sup>

## 2. Idaho

Idaho's history and results are similar to Arizona,<sup>98</sup> but the Idaho Supreme Court employed even more radical reasoning. In *Trotter v. Bank of New York Mellon*, the borrower asserted that the foreclosing party (the trustee of \*45 a securitized trust) was obliged to establish its standing to foreclose by proving that it held the loan.<sup>99</sup> The court was unimpressed, stating that nothing in the statute could "reasonably be read to require the trustee [of a deed of trust] to prove it has 'standing' before foreclosing. Instead, the plain language of the statute makes it clear that the trustee may foreclose on a deed of trust if it complies with the requirements contained within the Act."<sup>100</sup>

The Act, in turn, has five requirements: (1) that any assignments of the deed of trust or substitutions of the trustee have been recorded; (2) that there is a default by the borrower; (3) that an appropriate notice of default has been recorded; (4) that no suit on the debt is pending; and (5) that a notice of sale has been given to the proper parties.<sup>101</sup> Taking the bare-bones nature of these requirements literally, the court in *Trotter* not only rejected placing a duty on the foreclosing party to show that it held the note, but it also explicitly adopted the "rogue trustee" concept, which we inferred from the California and Arizona statutes, when it found that "a trustee may initiate nonjudicial foreclosure proceedings on a deed of trust without first proving ownership of the underlying note or demonstrating that the deed of trust beneficiary has requested or authorized the trustee to initiate those proceedings."<sup>102</sup> This statement seems to defy common sense!

Moreover, the risk to a borrower of being subjected to double liability on a promissory note is real and serious in Idaho. The situation is very different than California, where the protection from deficiency judgments after a nonjudicial foreclosure is complete,<sup>103</sup> and Arizona, where this protection is partial.<sup>104</sup> In Idaho, if the foreclosing party does not hold the note, and the actual holder subsequently brings an action to enforce it against the borrower, there is no anti-deficiency statute to protect the \*46 borrower against a judgment.<sup>105</sup> Idaho deficiency judgments are limited to the amount by which the secured debt exceeds the fair market value of the real estate at the date of the foreclosure sale; therefore, presumably the borrower would be entitled to a credit for the greater of the amount bid or the fair market value but would be exposed to potential liability for the remainder of the debt.

## C. Oregon and Utah

Two other western states, Oregon<sup>106</sup> and Utah,<sup>107</sup> have nonjudicial foreclosure statutes similar to those of California, Arizona, and Idaho. These statutes make no mention of possession or holding of the promissory note. Although neither Oregon nor Utah has a judicial decision construing its statute on the point, it seems likely that courts in both states would follow the California, Arizona, and Idaho decisions discussed above. Most likely, Oregon and Utah courts would find no obligation on the trustee to verify that the foreclosing party had the right to enforce the note<sup>108</sup> and would give no rights to the borrower to enjoin the foreclosure on account of the absence of proof of the foreclosing party's right to enforce.

## D. Better Drafting in Nevada and Washington

The statutes of California, Arizona, and Idaho are abysmal failures in reconciling the demands of UCC Article 3 and the procedure for foreclosure of deeds of trust. But the task of reconciliation is not difficult, and two other \*47 western states using deeds of trust, Nevada and Washington, handle it nicely.

### I. Nevada

Under the Nevada statute, the power of sale cannot be exercised until:

The beneficiary, the successor in interest of the beneficiary or the trustee first executes and causes to be recorded in the office of the recorder of the county . . . a notice of the breach [that] . . . includes a notarized affidavit of authority to exercise the power of sale stating, based on personal knowledge and under the penalty of perjury . . . [t]hat the beneficiary under the deed of trust, the successor in interest of the beneficiary or the trustee is in actual or constructive possession of the note secured by the deed of trust.<sup>109</sup>

In 2012, both the Nevada federal district court and the Nevada Supreme Court affirmed that the statute means what it says, and that noncompliance bars the power to foreclose.<sup>110</sup> In *Hernandez v. IndyMac Bank*, the federal court granted an order enjoining the foreclosure sale because the evidence showed that the foreclosing party did not hold the note.<sup>111</sup> The court held that “Nevada law, by including, among other provisions, various recording and notice requirements, places the burden on the foreclosing entity to demonstrate their authority to initiate foreclosure proceedings.”<sup>112</sup>

In *Edelstein v. Bank of New York Mellon*, the issue was whether BNY Mellon, the loan’s servicer, was the proper party to engage in the preforeclosure mediation process required by Nevada statutes.<sup>113</sup> The Nevada Supreme Court found that it was, concluding that nonjudicial foreclosure was proper only if the foreclosing party was \*48 both the assignee of the deed of trust and entitled to enforce the note.<sup>114</sup> If the two documents were split, neither holder could foreclose, but reuniting the deed and note would restore the right to foreclose.<sup>115</sup> Because BNY Mellon had an assignment of the deed of trust and its trustee, Recon Trust, held possession of the note, it was the proper party to mediate with the borrower.<sup>116</sup>

### 2. Washington

Washington handles the question of whether the foreclosing party must show the right to enforce the note in a manner similar to Nevada. Washington’s nonjudicial foreclosure statute provides:

That, for residential real property, before the notice of trustee’s sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.<sup>117</sup>

In addition, if the property secured by the deed of trust is residential real property, the notice of default sent to the borrower must include “the name and address of the owner of any promissory notes or other obligations secured by the deed of trust.”<sup>118</sup> In *Bain v. Metropolitan Mortgage Group, Inc.*, the Washington Supreme Court held that the previous provision was substantive; a party could not be a \*49 “beneficiary” and, hence, could not foreclose under the statute unless it held the note.<sup>119</sup>

There is a subtle difference between the Nevada and Washington statutes. In Nevada, the notice of breach must include an affidavit “based on personal knowledge” that the beneficiary holds the note.<sup>120</sup> If the trustee, rather than the beneficiary, records and issues the notice, this presumably means that the trustee is responsible to actually see the note. In Washington, on the other hand, the trustee may accept the beneficiary’s sworn declaration that it holds the note.<sup>121</sup> Some foreclosure defense lawyers would likely argue that the protection provided to the borrower by the Washington procedure is inadequate, and that secondary-market investors and their servicers are apt to lie about holding the note when they do not have it in fact. Perhaps this point is legitimate, but even the Washington process is far more satisfactory than the processes in California, Arizona, and Idaho, where the trustee need pay no attention at all to whether the assignee of the deed of trust also holds the note.<sup>122</sup>

### III. THE REST OF THE COUNTRY: THE BAD NEWS AND THE GOOD NEWS

The initial task we set for ourselves in this article was to analyze the nonjudicial-foreclosure processes of seven western states. The picture that has emerged from this analysis is far from a comprehensive snapshot of American nonjudicial foreclosure. In the present Part, we propose to consider what has happened in the rest of the country, but we do so only by referring to recent case decisions, rather than engaging in a thorough statute-by-statute investigation. Many of these cases involve states where mortgagees have a direct power of sale, so that the use of \*50 deeds of trust and trustee's sales is unnecessary (and in most of them, unheard of).

The results of this survey, like the results in the seven western states discussed above, present a mixed picture. If one believes, as we do, that proof of entitlement to enforce the promissory note should be an essential prerequisite to the power to foreclose, the holdings of recent cases have produced both bad news and good news. First, we will discuss the bad news.

#### A. Texas

Texas employs deeds of trust with power of sale, much like the western states discussed above.<sup>123</sup> Like most of those western states, Texas's statutes make no reference to the promissory note.<sup>124</sup> Unsurprisingly, federal courts in Texas have consistently held that possession of the note is entirely irrelevant to the power to foreclose.<sup>125</sup> For example, one federal court stated:

The current statutory procedure for a deed of trust foreclosure does not require mortgage servicers to produce or hold the note. The mortgage servicer need only provide notice of default, with an opportunity to cure, and notice of the actual foreclosure sale. Production of the original promissory note is not necessary. The Property Code also specifically enables mortgage servicers to foreclose if they (1) are authorized to do so by agreement with the mortgagee, and (2) disclose their relationship to the mortgagee in the notices required by section 51.002. Again, there is no requirement to produce or even possess the note, original or otherwise.<sup>126</sup>

There is no clear state-court authority in support of this position, but neither is there reason to expect the state \*51 courts to disagree. The Texas statute authorizes "a mortgagee" or mortgage servicer to foreclose and defines "mortgagee" as "the grantee, beneficiary, owner, or holder of a security instrument," with no mention of holding the note.<sup>127</sup> In light of the federal-court decisions, there is little likelihood that Texas courts will read the statute to require the mortgagee to hold the note.

#### B. Hawaii

Hawaii has traditionally recognized nonjudicial foreclosures of mortgages containing a power of sale.<sup>128</sup> The existing caselaw--all of it in the federal courts--is based on a version of the Hawaii statute that was repealed in 2011.<sup>129</sup> The federal decisions repeatedly rejected the claim that the statute required the foreclosing mortgagee to provide evidence that it held the note.<sup>130</sup> The statute made no such demand, and the courts refused to adopt it by implication.<sup>131</sup> As one federal judge put it, "[N]on judicial foreclosure statutes may change the common law rule requiring a mortgagee to hold the underlying note, which appears to be exactly what the Hawaii legislature did in enacting [its statute]."<sup>132</sup>

However, it is unclear whether these decisions have any continuing relevance. In a complex series of actions, the Hawaii legislature first imposed a moratorium upon, and then repealed, the nonjudicial-foreclosure procedure upon which they were based.<sup>133</sup> A revised alternative \*52 nonjudicial process has been authorized by the legislature<sup>134</sup> but thus far has not been used.<sup>135</sup>

#### C. Michigan

Two midwestern states using mortgages with power of sale have followed the California-Arizona-Idaho model, concluding that holding the note was not essential to the right to foreclose. The Michigan Supreme Court, in *Residential Funding Co., v.*

Saurman, held that MERS, as holder of a mortgage in the capacity of nominee for the noteholder, could foreclose in its own name despite not holding the note.<sup>136</sup> Unfortunately, the opinion is so badly fractured as to be almost nonsensical: [A]s record-holder of the mortgage, MERS owned a security lien on the properties, the continued existence of which was contingent upon the satisfaction of the indebtedness. This interest in the indebtedness--i.e., the ownership of legal title to a security lien whose existence is wholly contingent on the satisfaction of the indebtedness--authorized MERS to foreclose by advertisement under MCL 600.3204(1)(d).<sup>137</sup>

The court was clearly determined to uphold foreclosures filed in the name of MERS<sup>138</sup> and willing to engage in a certain amount of verbal nonsense in order to do so. In any event, the net result seems to be that an assignee of the mortgage need not show that it holds the \*53 note to foreclose nonjudicially in Michigan.<sup>139</sup> The decision indicates no awareness whatsoever of the requirements of UCC Article 3.

#### D. Minnesota

Likewise, the Eighth Circuit Court of Appeals in *Stein v. Chase Home Finance, LLC* considered whether Minnesota law allowed a party to commence a nonjudicial foreclosure when it arguably had already assigned the promissory note to another party.<sup>140</sup> Based on its interpretation of the Minnesota Supreme Court's decision in *Jackson v. Mortgage Electronic Registration Systems, Inc.*,<sup>141</sup> the Eighth Circuit concluded that holding the note was not necessary to commence the foreclosure:

[T]he right to enforce a mortgage through foreclosure by advertisement lies with the legal, rather than equitable, holder of the mortgage. The assignment of the promissory note to another "operates as an equitable assignment of the underlying [mortgage]," but the right to enforce the mortgage remains with the legal holder of the mortgage.<sup>142</sup>

This view is consistent with the Minnesota Supreme Court's holding in *Jackson*, and there is no reason to expect state courts to disagree.

Now, the good news.

#### E. Maryland

Maryland generally employs deeds of trust with a power of sale, but unlike nearly all other states that do so, \*54 foreclosure is commenced by a judicial filing and is governed by court rules.<sup>143</sup> The applicable rule requires that the filing be accompanied by "a copy of any separate note or other debt instrument supported by an affidavit that it is a true and accurate copy and certifying ownership of the debt instrument."<sup>144</sup> Construing this language, the Maryland Court of Appeals had no difficulty concluding that the foreclosing party was required to show in the affidavit that it was entitled to enforce the note under UCC Article 3.<sup>145</sup> It was an easy case.

#### F. North Carolina

North Carolina is similar to Maryland. Foreclosure is ordinarily implemented by a trustee's sale under a deed of trust, but the foreclosure process must be commenced by filing a "notice of hearing" with the clerk of court, who then schedules a hearing to consider the evidence that foreclosure is proper.<sup>146</sup> The clerk must find, among other things, the existence of a "valid debt of which the party seeking to foreclose is the holder."<sup>147</sup> In the case of *In re David A. Simpson, P.C.*,<sup>148</sup> the North Carolina Court of Appeals had no difficulty equating the "valid debt" language with entitlement to enforce the note under UCC Article 3.<sup>149</sup> Again, in light of the statutory language, it was an easy case.

#### G. Georgia

Georgia recognizes a nonjudicial power of sale in the grantee of a security deed (Georgia's equivalent of a mortgage). In *Morgan v. Ocwen Loan Servicing, LLC*, the \*55 plaintiff sued in federal court to enjoin the foreclosure and also sought

damages for wrongful foreclosure, alleging that Ocwen, the servicer, did not possess the note (an allegation taken as true for purposes of resolving Ocwen's motion to dismiss).<sup>150</sup> The Georgia statute refers to the foreclosing party as the "secured creditor,"<sup>151</sup> and the court held (based on less than conclusive prior state-court authority) that one could be a "secured creditor" only by having the right to enforce the note.<sup>152</sup> "[T]he right to foreclose lies with the party that holds the indebtedness."<sup>153</sup> The court's conclusion makes good sense, but the statute provides no method by which the foreclosing party can notify the borrower that it has the note and no method of making a record of the fact.

## H. Virginia

Virginia's situation is murkier. Foreclosure is ordinarily accomplished by a trustee's sale under a deed of trust.<sup>154</sup> The applicable statute provides that "[i]f a note or other evidence of indebtedness secured by a deed of trust is lost or for any reason cannot be produced,"<sup>155</sup> the trustee of the deed of trust must obtain a lost-note affidavit from the lender as a prerequisite to foreclosure and must advise the borrower that he or she may petition the circuit court for an order requiring a bond or other protection.<sup>156</sup> This wording implies, but does not explicitly state, that the trustee should begin this process by verifying that the foreclosing party possesses the note. The federal courts applying Virginia \*56 law have referred to this section in determining that the note holder need not appear in court and produce the note as a precondition to foreclosure,<sup>157</sup> but those holdings are not quite to the point. It remains unclear whether the trustee has a duty to see the note, although that would surely be a reasonable construction. In any event, there is no provision in the statute for notifying the borrower or making record of the trustee's findings (unless the note in fact proves to be lost, of course).

## I. Massachusetts

We have saved the best for last! A far more satisfactory approach to foreclosure of a mortgage by power of sale is illustrated by the Massachusetts Supreme Judicial Court's opinion in *Eaton v. Federal National Mortgage Ass'n*.<sup>158</sup> The Massachusetts statute, like those in Michigan and Minnesota, makes no explicit reference to any necessity of holding the promissory note.<sup>159</sup> In an action by the borrower to enjoin a nonjudicial foreclosure because the foreclosing party conceded to not possessing the note, the court first recognized the familiar principle that having the right to enforce the note was an essential element of common-law judicial foreclosures in Massachusetts.<sup>160</sup> The court then closely read the nonjudicial-foreclosure statute and recognized in it the implicit assumption that "the holder of the mortgage note and the holder of the mortgage are one and the same."<sup>161</sup> Hence, the court concluded that holding the note is essential to the right to foreclose: "[W]e construe the term 'mortgagee' in [the nonjudicial foreclosure statute] to mean a mortgagee who also holds the underlying mortgage note."<sup>162</sup>

\*57 This conclusion makes such obvious good sense that one wonders why the courts in California, Arizona, Idaho, Michigan, and Minnesota did not follow a similar path. However, the Massachusetts court raised a procedural question: how does evidence that the foreclosing party holds the note become a matter of public record and available to the borrower? The court's two-fold answer was creative but also entirely logical. First, the court made its holding prospective only.<sup>163</sup> This was necessary because prior nonjudicial-foreclosure practice in Massachusetts made no reference to holding the note, so the public record of previous foreclosures would otherwise appear to be incomplete and defective under the court's new holding.<sup>164</sup> Second, the court provided a procedure to be followed in the future:

[A] foreclosing mortgage holder . . . may establish that it either held the note or acted on behalf of the note holder at the time of a foreclosure sale by filing an affidavit in the appropriate registry of deeds . . . . The statute allows for the filing of an affidavit that is "relevant to the title to certain land and will be of benefit and assistance in clarifying the chain of title." Such an affidavit may state that the mortgagee either held the note or acted on behalf of the note holder at the time of the foreclosure sale.<sup>165</sup>

Thus, the Massachusetts court adopted precisely the same process that is built into the Nevada<sup>166</sup> and Washington<sup>167</sup> statutes to ensure that foreclosures are being conducted by the party who is entitled to enforce the secured obligation and that the record of the foreclosure will reflect that fact.

The *Eaton* opinion is a brilliant reconciliation of the common-law concept that the one who can enforce the obligation can also foreclose the mortgage, the UCC's insistence that one must hold the note or provide a "lost- \*58 note" affidavit in order to have the right to enforce the obligation,<sup>168</sup> and a statute that failed to take these principles explicitly into account. In effect,

the court repaired the statute, reading it to say what its drafters would have said if they had possessed a better understanding of the law and the secondary market.

In sum, it appears that the foreclosing party need not provide any proof of entitlement to enforce the note in Texas, Hawaii, Michigan, or Minnesota, but the foreclosing party must adduce such proof in Maryland, North Carolina, Georgia, Massachusetts, and arguably in Virginia. Because deficiency judgments are generally allowed after nonjudicial foreclosures in Texas<sup>169</sup> and Michigan,<sup>170</sup> the risk to the borrower of double liability is particularly significant in those states.<sup>171</sup>

#### IV. THE LOST NOTE PROBLEM

As we observed earlier, under Section 3-309 of the UCC, a person who does not have possession of a negotiable note may still enforce it by providing a "lost-note affidavit."<sup>172</sup> However, this section of the UCC was obviously drafted with judicial enforcement of notes in mind. The provision says the party who seeks to enforce the note must "prove" the note's terms and the party's right to enforce, and it provides that "the court" may not "enter \*59 judgment" unless the court "finds" that the borrower is adequately protected against double liability.<sup>173</sup>

How do these requirements apply in the context of a nonjudicial foreclosure? If the jurisdiction is one in which the foreclosing party is not required to show entitlement to enforce the note, the question is irrelevant, of course. But, what of the states in which possession of the note is generally required? Common sense indicates that a creditor should have the same opportunity to use the "lost-note" procedure (and the borrower should be given the same protections when the procedure is used) whether enforcement of the note is through a lawsuit on the note or a nonjudicial foreclosure of the mortgage or deed of trust.

Noticeably absent is a process for accomplishing this in the foreclosure context. We know of only one state--Virginia--that has addressed this issue in its foreclosure statute.<sup>174</sup> The Virginia provision was obviously drafted in an attempt to make it work smoothly in conjunction with Section 3-309 of the UCC. If the note has been lost, the foreclosing party must submit an affidavit to the foreclosure trustee, must notify the borrower that the foreclosure will proceed after a fourteen-day delay, and must provide notification that during this period the borrower may petition the circuit court for an order providing "adequate protection" against the risk of double liability on the note.<sup>175</sup> Thus, Virginia's foreclosure statute recognizes the legitimacy of the "lost-note affidavit" process, and at the same time provides borrowers with essentially the same benefits in a nonjudicial foreclosure that they would have in a judicial action to enforce the note. The one exception, of course, is that in the nonjudicial foreclosure context the borrower must take the initiative to present the issue to a judge.

No other state legislature seems to have thought about this problem. In states employing deeds of trust, a foreclosure trustee might, *sua sponte*, require the foreclosing party to provide a lost-note affidavit if the note \*60 is missing and might forward that affidavit to the borrower. Of course, nothing in the statutes (except in Virginia) directly requires the trustee to address this issue, and many trustees might be inclined simply to ignore it. In any event, a foreclosure trustee is not a judge and is not likely to feel comfortable telling the foreclosing party that a bond or indemnity must be provided to give the borrower "adequate protection" against double liability. A borrower who becomes aware that the note is lost might apply to a court for such protection, but in the absence of statutory guidance, it is uncertain how the court would react to such a request arising out of a nonjudicial foreclosure. The whole situation is murky and unpredictable.

These complications are worse, of course, in states that use mortgages with power of sale rather than deeds of trust. There, no foreclosure trustee is present to act as an arbiter or insist on the production of a lost-note affidavit in the first place. It beggars belief that mortgage holders will voluntarily prepare such affidavits and send them to borrowers; lenders are not specifically required to do so by statute, and it would obviously complicate the foreclosure process and raise the risk of incurring added cost and delay. That simply isn't going to happen.

In sum, the lost-note problem is just one more illustration of the failure of most state legislatures to think through the need to coordinate the nonjudicial foreclosure process with the requirements of UCC Article 3. We think legislative amendment is needed to address this point.

#### V. CONCLUSION

As we have shown, in a number of nonjudicial-foreclosure states, the requirements of UCC Article 3 and the corresponding statutory foreclosure procedures seem to exist in different universes. The problem is larger than a simple mistaken misapplication of the correct statute; the statutes themselves are inadequate.

The Massachusetts Supreme Judicial Court largely solved the problem by creative interpretation.<sup>176</sup> Most of the courts, however, have utterly failed to do so. Two \*61 major themes seem to explain the reasoning behind the courts' favoring foreclosure statutes over the UCC--antiquity and a desire for simplicity.

First, we discuss antiquity. Most state nonjudicial-foreclosure statutes were enacted before the widespread development of the secondary mortgage market. The drafters of the statutes could not have foreseen, and thus did not take into account, the broad changes that have taken place in the mortgage industry in recent decades. The fact that the statutes are not clear as to who is entitled to enforce a deed of trust is understandable, since most were drafted at a time when notes were usually held in a portfolio by the original lender, who generally was the party to foreclose in the event of default. The foreclosing party would almost always have been in possession of the note, so the question of who was entitled to enforce the note was not an issue at the time most nonjudicial-foreclosure statutes were drafted.

Second, the courts have an understandable desire to avoid complicating a simple process. It is simple to say that one who has an assignment of the mortgage or deed of trust can foreclose. If we substitute the notion that one must hold the note to foreclose, as UCC Article 3 would demand, then someone must determine whether that requirement has been satisfied. This is not impossible; the determination can be made by the foreclosure trustee, as in Nevada and Washington,<sup>177</sup> or by a preliminary judicial filing, as in Maryland and North Carolina.<sup>178</sup> Doing so, though, deprives the process of some of its simplicity. The California Court of Appeal's opinion in *Debrunner* illustrates this concern well:

The comprehensive statutory framework established to govern nonjudicial foreclosure sales is intended to be exhaustive. Because of the exhaustive nature of this scheme, California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute. . . . [W]e are not convinced that the cited sections of the Commercial Code (particularly section 3301) displace the detailed, specific, and \*62 comprehensive set of legislative procedures the Legislature has established for nonjudicial foreclosures.<sup>179</sup>

Moreover, the fact that UCC Article 3 requires a complex determination of whether a note is negotiable--merely as a precursor to determining whether Article 3 applies to the note at all--appears only to bolster courts' hesitancy to make additions to statutory foreclosure requirements.

However, Article 3's insistence that the party who enforces a note must possess the note (or comply with the lost-note process) is not a mere technicality; that requirement is there for a reason.<sup>180</sup> It allows the borrower to be sure that he or she is paying, negotiating with, or mediating with the correct party. The borrower who sees proof that the foreclosing party holds the note is ensured against double enforcement, making the borrower certain that any agreement to modify the terms of the loan, engage in a short sale, or compromise the amount owing is an agreement with the appropriate person.

These protections are lost if nonjudicial foreclosures can be completed without holding the note. It is true that if a complete bar to deficiency liability is available under the foreclosure statute (as it is in California), the risk of double liability disappears. But none of the other states that disregard Article 3's requirements fully prohibit deficiency judgments. Moreover, even in the absence of the risk of double liability, the borrower still has a strong interest in knowing for certain that he or she is dealing with the right party, in order to determine that party's policies for loan modification. Beyond this, the orderly administration of justice surely demands that borrowers be able to tell \*63 whether the enforcement of their obligations--including enforcement by nonjudicial foreclosure--is being pursued by a party with the legal right to do so.

So, what is to be done? Legislative action is needed. Too many state nonjudicial foreclosure statutes are simply inadequate to address the problems created by the sale of mortgages on the secondary market. The changes brought on by the development of that secondary market have modified the dynamics of the relationship between borrower and lender. When enacted, most state nonjudicial foreclosure statutes afforded adequate protections to the borrower, but the rules have changed. No longer can a borrower obtain a loan and be assured the loan will be held by that lender for the loan's entire life. As the cases above illustrate, courts have, for the most part, displayed an unwillingness to address this problem. Only state legislatures are able

to protect borrowers by ensuring that nonjudicial foreclosure statutes are properly amended to require enforcing parties to prove they hold the note and meet the requirements of UCC Article 3.

State legislatures must realize that this can and should be done. This requirement will not significantly hinder the speedy, less expensive alternative provided by nonjudicial foreclosure, and it will afford the protections that borrowers require and deserve in the modern mortgage market.

Footnotes

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<sup>1</sup> Nearly twenty million home foreclosures are estimated to have occurred in 2007-2012. See Home Foreclosure Statistics, Stat. Brain (Oct. 15, 2012), <http://www.statisticbrain.com/home-foreclosure-statistics/>. The rate of loss of homes due to foreclosure finally seemed to have bottomed out in 2012. See Morgan Brennan, Why the New Wave of Foreclosures Is Good News for Homeowners, *Forbes* (June 14, 2012, 5:34 PM), <http://www.forbes.com/sites/morganbrennan/2012/06/14/heres-why-the-new-wave-of-foreclosures-is-good-news-forhomeowners/2/>.

<sup>2</sup> Compare U.S. Bank Nat'l Ass'n v. Ibanez, 941 N.E.2d 40, 54-55 (Mass. 2011) (chain of assignments required for nonjudicial foreclosure but not needed to be recorded), and Barnett v. BAC Home Loan Servicing, L.P., 772 F. Supp. 2d 1328, 1336 (D. Or. 2011) (recorded chain of assignments required for nonjudicial foreclosure), with MetLife Home Loans v. Hansen, 286 P.3d 1150, 1158 (Kan. Ct. App. 2012) (formal assignment not necessary), and Bank of Am. v. Kabba, 276 P.3d 1006, 1008-09 (Okla. 2012) (chain of assignments is unnecessary to foreclose).

<sup>3</sup> See, e.g., Christopher L. Peterson, Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory, 53 *Wm. & Mary L. Rev.* 111, 118 (2011). Peterson's depiction of MERS is, in our view, hypercritical, but he correctly identifies the major controversies in which MERS has been embroiled.

<sup>4</sup> See Carson Mullen, MERS: Tracking Loans Electronically, *Mortgage Banking*, May 2000, at 63, 64.

<sup>5</sup> Hansen, 286 P.3d at 1158.

<sup>6</sup> In fact, MERS did foreclose in its own name until mid-2011. Compare Niday v. GMAC Mortg., LLC, 284 P.3d 1157, 1169 (Or. Ct. App. 2012), and Bain v. Metro. Mortg. Grp., Inc., 285 P.3d 34, 47 (Wash. 2012) (en banc) (holding that MERS lacked the authority to foreclose in its own name), with In re Mortg. Elec. Registration Sys. (MERS) Litig., MDL Docket No. 09 2119 JAT, 2011 WL 251453, at \*5 (D. Ariz. Jan. 25, 2011), and Ferguson v. Avelo Mortg., LLC, 126 Cal. Rptr. 3d 586, 593 (Ct. App. 2011) (holding that MERS was entitled to foreclose in its own name).

<sup>7</sup> See Mortg. Elec. Registration Sys., Inc. v. Sw. Homes of Ark., Inc., 2009 Ark. 152, at 8, 301 S.W.3d 1, 5 (holding that MERS, as a mere nominee, was not entitled to notice of pending judicial actions); Landmark Nat'l Bank v. Kesler, 216 P.3d 158, 168 (Kan. 2009).

<sup>8</sup> This argument was little short of silly, and the courts roundly rejected it. See Hansen, 286 P.3d at 1157-58; Bank of N.Y. v. Raftogianis, 13 A.3d 435, 450 (N.J. Super. Ch. Ch. Div. 2010).

<sup>9</sup> 59 C.J.S. Mortgages § 399 (2012).

<sup>10</sup> Long v. O'Fallon, 60 U.S. (1 How.) 116, 122 (1856).

<sup>11</sup> Restatement (Third) of Prop.: Mortgages § 5.4 reporters' note (1997).

<sup>12</sup> Hansen, 286 P.3d at 1156 (MERS became an agent of the current holder of the mortgage by virtue of the mortgage language); Eaton v. Fed. Nat'l Mortg. Ass'n, 969 N.E.2d 1118, 1131 (Mass. 2012) ("[W]e interpret [the Massachusetts nonjudicial foreclosure statutes] to permit one who, although not the note holder himself, acts as the authorized agent of the note holder, to stand 'in the shoes' of the 'mortgagee' as the term is used in these provisions.").

<sup>13</sup> Hansen, 286 P.3d at 1156-57.

<sup>14</sup> Carpenter v. Longan, 83 U.S. (1 Wall.) 271, 274 (1872) ("The note and mortgage are inseparable ... An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.").

<sup>15</sup> See, e.g., Horvath v. Bank of N.Y., 641 F.3d 617, 623 (4th Cir. 2011) (noting that transfers of secured debt also bring the security without formal assignment); In re Bryant, 452 B.R. 876, 880 (Bankr. S.D. Ga. 2011) ("In South Carolina, a mortgage travels with the promissory note even without a written assignment."); Deutsche Bank Trust Co. Ams. v. Codio, 943 N.Y.S.2d 545, 546 (App. Div. 2012). A few title-theory states take a slightly different view, although the ultimate result is the same. See U.S. Bank Nat'l Ass'n v. Ibanez, 941 N.E.2d 40, 54 (Mass. 2011) ("[T]he holder of the mortgage holds the mortgage in trust for the purchaser of the note, who has an equitable right to obtain an assignment of the mortgage, which may be accomplished by filing an action in court and obtaining an equitable order of assignment.").

<sup>16</sup> U.C.C. § 3-301 (2002).

<sup>17</sup> Morgan v. Farmers Merchs. Bank, 856 So. 2d 811, 819 (Ala. 2003).

<sup>18</sup> U.C.C. § 9-203(b) provides that a security interest is enforceable only if the transferee gives value, the transferor holds the rights being transferred, and there is either a written agreement of transfer or a delivery of possession of the note to the transferee. See Morgan, 856 So. 2d at 825-26 (holding that a nonnegotiable note may be considered an "instrument" for purposes of Article 9 so that a security interest in it could be perfected by possession).

<sup>19</sup> See Dale Whitman, "The Person Entitled to Enforce": Lessons Learned from BAC Home Loans Servicing v. Kolenich, ABA Real Prop. News, Dec. 2012, at 1.

<sup>20</sup> Foreclosure-defense lawyers sometimes argue that it is indeed important to know the identity of the loan's owner because the owner's rules and procedures may determine how much authority the PETE has to negotiate loan modifications. This is, we think, a legitimate point, but it does not stand in the way of the basic principle that, whatever agreement the PETE makes will be binding so far as the borrower is concerned.

<sup>21</sup> See Permanent Editorial Bd. for the Unif. Commercial Code, Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes 4 n.15 (2011) [hereinafter PEB Report], available at [http://www.uniformlaws.org/Shared/Committees\\_Materials/PEBUCC/PEB\\_Report\\_111411.pdf](http://www.uniformlaws.org/Shared/Committees_Materials/PEBUCC/PEB_Report_111411.pdf) ("The concept of 'person entitled to enforce' a note is not synonymous with 'owner' of the note. A person need not be the owner of a note to be the person entitled to enforce it, and not all owners will qualify as persons entitled to enforce." (citation omitted)).

<sup>22</sup> See, e.g., CPT Asset Backed Certificates, Series 2004-EC1 v. Cin Kham, 278 P.3d 586, 592 (Okla. 2012) (providing a meticulous analysis of the PETE doctrine and concluding that the PETE is the party entitled to foreclose the mortgage and ownership of the note is controlling). Even well-crafted opinions by judges who understand the distinction are, to some extent, captives of earlier

opinions by judges who did not. See, e.g., *Eaton v. Fed. Nat'l Mortg. Ass'n*, 969 N.E.2d 1118, 1125-26 (Mass. 2012). There, the court consistently and correctly employs the term "holder" to refer to the foreclosing party, but the court also cites to *Weinberg v. Brother*, 160 N.E. 403 (Mass. 1928), where the court called the foreclosing party the "owner" of the note. *Eaton*, 969 N.E.2d at 1126.

<sup>23</sup> Washington's nonjudicial-foreclosure statute, for example, conflates "owner" and "holder." Wash. Rev. Code § 61.24.030(7)(a) (West 2012) ("[T]he trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust." (emphasis added)). However, the statute then requires the trustee to provide the homeowner with "the name and address of the owner of any promissory notes or other obligations secured by the deed of trust" before foreclosing on an owner-occupied home. Wash. Rev. Code § 61.24.030(8)(l) (emphasis added). Further, the statute defines the beneficiary as "the holder of the instrument or document evidencing the obligations secured by the deed of trust." Wash. Rev. Code § 61.24.005(2) (emphasis added); see also *Bain v. Metro. Mortg. Grp., Inc.*, 285 P.3d 34, 36-39 (Wash. 2012) (en banc) (attempting to reconcile the statute's confusing terminology).

<sup>24</sup> See PEB Report, *supra* note 21.

<sup>25</sup> See, e.g., *Bank of Am. v. Kabba*, 276 P.3d 1006, 1008 n.2 (Okla. 2012) (citing the PEB Report and understanding it thoroughly).

<sup>26</sup> Not all are useless, however. In 1923, the Oklahoma Supreme Court noted that "the mortgage securing the payment of a note is merely an incident and accessory to it, and the indorsement and delivery of a note carries with it the mortgage without any formal assignment thereof." *Chase v. Commerce Trust Co.*, 224 P. 148, 149 (Okla. 1923).

<sup>27</sup> The decisions often use the term "holder" as synonymous with PETE, although, as we will discuss below, being a holder is only one way of being a PETE. The clearest statements that the PETE has the right to foreclose are provided by courts in Nevada and Ohio. See *BAC Home Loans Servicing, LP v. Kolenich*, No. CA2012-01-001, 2012 WL 5306059, at \*6 (Ohio Ct. App. Oct. 29, 2012) ("The current holder of the note and mortgage is entitled to bring a foreclosure action against a defaulting mortgagor even if the current holder is not the owner of the note and mortgage."); *Edelstein v. Bank of N.Y. Mellon*, 286 P.3d 249, 257 (Nev. 2012) ("Indeed, to foreclose, one must be able to enforce both the promissory note and the deed of trust. Under the traditional rule, entitlement to enforce the promissory note would be sufficient to foreclose ...." (citation omitted)); see also *In re Tikhonov*, BAP No. CC 11 1698 MKBePa, 2012 WL 6554742, at \*7-8 (B.A.P. 9th Cir. Dec. 14, 2012) (explaining that a party must show it is the holder of the note in order to have standing to seek relief from an automatic stay of foreclosure in bankruptcy); *Nelson v. Fed. Nat'l Mortg. Ass'n*, 97 So. 3d 770, 779 (Ala. Civ. App. 2012) ("[T]he owner of the debt may foreclose on property that is the subject of a mortgage securing that debt if the owner is the holder of the promissory note at the time the owner initiates foreclosure proceedings."); *Eaton*, 969 N.E.2d at 1129 ("[W]e construe the term 'mortgagee' in [the foreclosure statute] to mean a mortgagee who also holds the underlying mortgage note."); *CPT Asset Backed Certificates*, 278 P.3d at 591 ("To commence a foreclosure action in Oklahoma, a plaintiff must demonstrate it has a right to enforce the note ...."); *Bain*, 285 P.3d at 44 (relying on the definition of PETE in UCC § 3-301).

<sup>28</sup> See PEB Report, *supra* note 21, at 4 ("(1) [T]he maker's obligation on the note is to pay the amount of the note to the person entitled to enforce the note; (2) the maker's payment to the person entitled to enforce the note results in discharge of the maker's obligation; and (3) the maker's failure to pay, when due, the amount of the note to the person entitled to enforce the note constitutes dishonor of the note." (footnotes omitted)).

<sup>29</sup> See U.C.C. § 3-104 (2002) (defining negotiability).

<sup>30</sup> Several recent cases have found these notes to be negotiable, but the courts' reasoning is hardly overwhelming. See *HSBC Bank USA Nat'l Ass'n v. Gouda*, No. F-20201-07, 2010 WL 5128666, at \*3 (N.J. Super. Ct. App. Div. Dec. 17, 2010) (concluding that the clause obligating the mortgagor to notify the mortgagee of an intent to prepay the loan did not render the note nonnegotiable). One federal district court, several bankruptcy courts, and an Alabama appellate court agreed with this approach. See *Picatinny Fed. Credit Union v. Fed. Nat'l Mortg. Ass'n*, No. 09 1295 (GEB), 2011 WL 1337507, at \*7 (D.N.J. Apr. 7, 2011); *In re Walker*, 466 B.R. 271, 283-84 (Bankr. E.D. Pa. 2012); *In re Kain*, No. 08-09404-HB, 2012 WL 1098465, at \*5 (Bankr. D.S.C. Mar. 30, 2012); *In re Edwards*, No. 11 23195, 2011 WL 6754073, at \*5 (Bankr. E.D. Wis. Dec. 23, 2011); *Thomas v. Wells Fargo Bank, N.A.*, \_\_\_

So. 3d \_\_\_, \_\_\_, 2012 WL 3764729, at \*6-7 (Ala. Civ. App. 2012); see also Dale A. Whitman, How Negotiability Has Fouled Up the Secondary Mortgage Market, and What To Do About It, 37 Pepp. L. Rev. 737, 749-50 (2010).

31 Whitman, *supra* note 30, at 754; see also CPT Asset Backed Certificates, 278 P.3d at 591. In CPT, the court said, “Because the note is a negotiable instrument, it is subject to the requirements of the UCC” without the slightest analysis of the note’s content. Id. At least one reason for the evident preference of courts to assume that mortgage notes are negotiable is that UCC Article 3 provides a clear set of rules for the transfer of PETE status for negotiable notes, while the transfer of PETE status for nonnegotiable notes is governed by the common law, and there are few modern cases explicating it.

32 U.C.C. § 3-301 (2002).

33 U.C.C. § 1-201(b)(21)(A) (2001).

34 U.C.C. § 1-201(b)(21)(A).

35 U.C.C. § 3-205.

36 U.C.C. § 3-301.

37 U.C.C. § 3-203(a); see *Leyva v. Nat’l Default Servicing Corp.*, 255 P.3d 1275, 1281 (Nev. 2011) (requiring the servicer to provide specific, affirmative proof that the note was delivered for the purpose of transferring the right of enforcement).

38 U.C.C. § 3-309.

39 U.C.C. § 3-309.

40 U.C.C. § 3-309.

41 U.C.C. § 3-309(b). The party enforcing the note must also prove its terms, which may or may not be possible if the note has been lost. See, e.g., *JPMorgan Chase & Co. v. Casarano*, 963 N.E.2d 108, 111 (Mass. App. Ct. 2012) (holding that if the original note is lost and no photocopies can be found, it may be impossible to determine the terms of the original note and enforcement may be denied); *Howard v. PNC Mortg.*, 269 P.3d 995, 997 (Utah Ct. App. 2012) (correctly accepting a photocopy of the note as proof of its possession, where the mortgagor admitted the note had been transferred, and a photocopy showed that the mortgage had been properly endorsed).

42 *Margiewicz v. Terco Props. of Miami Beach, Inc.*, 441 So. 2d 1124, 1125 (Fla. Dist. Ct. App. 1983); *Bank of N.Y. v. Raftogianis*, 13 A.3d 435, 438 (N.J. Super. Ct. Ch. Div. 2010).

43 *Poirot v. Gundlach*, 1 N.E.2d 801, 804 (Ill. App. Ct. 1936); *Hayter v. Dinsmore*, 265 P. 1112, 1113 (Kan. 1928); *Va. Lee Homes, Inc. v. Schneider & Felix Const. Co.*, 395 P.2d 99, 100-02 (Wash. 1964).

44 The earliest nonjudicial foreclosure statute seems to have been adopted in California in 1872. See Cal. Civ. Code § 2924 (West 2012). The most recent state to adopt nonjudicial foreclosure is New Mexico, effective May 17, 2006. See N.M. Stat. Ann. § 48-10-10 (West 2012).

45 There is no doubt that nonjudicial foreclosure achieves these objectives. One study, based on 2010 data, found that the average time to process a residential foreclosure in nonjudicial states was 141 days, compared with 504 days in judicial states. Beacon Econs., *Foreclosure Reform in California: An Economic Analysis* 8 (2012). The same study found that foreclosure rates toward the end of the period of 2007-2012 had declined much faster in nonjudicial states than in judicial states. *Id.* at 12.

46 *Am. Coll. of Mortg. Att'ys, Mortgage Law Summary* (2012).

47 *Id.* All of the states where deeds of trust are authorized by statute permit them to be foreclosed nonjudicially. Arkansas is counted here as a “mortgage with power of sale” state, but it is actually agnostic as to the use of mortgages or deeds of trust. Ark. Code Ann. § 18-50-102 (Supp. 2011). Georgia uses the “security deed,” classified here as a mortgage. Ga. Code Ann. § 44-14-162.2 (West 2012). The use of a mortgage with power of sale is restricted in Vermont and Maine to nonresidential properties. Me. Rev. Stat. Ann. tit. 14, § 6203-A(1) (2011); Vt. Stat. Ann. tit. 12, § 4961 (West 2012). Other restrictions may also apply; for example, nonjudicial foreclosure is limited to nonagricultural property in Arkansas and to parcels of forty acres or less in Montana. Ark. Code Ann. § 18-50-116 (Supp. 2011); Mont. Code Ann. § 71-1-302 (West 2011).

48 Charles Dickens indicted equity practice in *The Pickwick Papers* and *Bleak House*. See generally William S. Holdsworth, *Charles Dickens as a Legal Historian* (1929).

49 John A. Gose & Aleana W. Harris, *Deed of Trust: Its Origin, History and Development in the United States and in the State of Washington*, *Real Prop., Prob. & Tr.*, Summer 2005, at 8, 8 (2005).

50 *Id.*

51 *Law of Property Act, 1925*, 15 Geo. 5, c. 20, §§ 101-107 (Eng.).

52 As one experienced real-estate lawyer recently put it, “It seems hard to argue that one nonjudicial foreclosure system is inherently better than another. From the borrowers’ perspective, the real issues are how much time the borrowers have to refinance or relocate, and how much protection they have against deficiency liability. Those protections are created, or not, by substantive law, regardless of whether an ostensible third party administers the disposition of the mortgaged property.” Charles Calvin, *Fagre Baker Daniels*, Denver, CO, comment in [nyclarealprop@googlegroups.com](mailto:nyclarealprop@googlegroups.com), Dec. 10, 2012.

53 See *Shuster v. BAC Home Loans Servicing, L.P.*, 149 Cal. Rptr. 3d 749, 753 (Ct. App. 2012) (the deed of trust is not void despite its failure to name a trustee); see also Nev. Rev. Stat. Ann. § 107.028(5) (West 2012) (“The trustee does not have a fiduciary obligation to the grantor or any other person having an interest in the property which is subject to the deed of trust.”); *Spires v. Edgar*, 513 S.W.2d 372, 378-79 (Mo. 1974) (en banc) (in the absence of unusual circumstances, the trustee has no duty to verify that default has occurred). Compare *Cox v. Helenius*, 693 P.2d 683, 686 (Wash. 1985) (en banc) (the trustee has fiduciary duties to borrower and lender), with *Monterey S.P. P’ship v. W.L. Bangham, Inc.*, 777 P.2d 623, 628 (Cal. 1989) (en banc) (the trustee is not bound by the fiduciary duties that characterize a true trustee).

54 Ark. Code Ann. § 18-50-103 (Supp. 2011).

55 Nev. Rev. Stat. Ann. § 107.080(2)(c)(4) (West 2012).

56 Cal. Civ. Code § 2924(a) (West 2012).

57 We hasten to add that we know of no such case, and that such a “rogue trustee” would be unlikely to be named as a trustee in future transactions.

58 Spires. 513 S.W.2d at 378-79.

59 Killion v. Bank Midwest, N.A., 987 S.W.2d 801, 813 (Mo. Ct. App. 1998).

60 Madden v. Alaska Mortg. Grp., 54 P.3d 265, 270 (Alaska 2002); Warner v. Clementson, 492 S.E.2d 655, 657 (Va. 1997).

61 See *infra* Part II.

62 See, e.g., Chase Home Fin., LLC v. Fequiere, 989 A.2d 606, 611 (Conn. App. Ct. 2010); Harvey v. Deutsche Bank Nat'l Trust Co., 69 So. 3d 300, 304 (Fla. Dist. Ct. App. 2011); MetLife Home Loans v. Hansen, 286 P.3d 1150, 1154-55 (Kan. Ct. App. 2012); Bank of N.Y. v. Raftogianis, 13 A.3d 435, 459 (N.J. Super. Ct. Ch. Div. 2010); U.S. Bank Nat'l Ass'n v. Baber, 280 P.3d 956, 958-59 (Okla. 2012); see also Alan M. White, Losing the Paper--Mortgage Assignments, Note Transfers and Consumer Protection, 24 Loy. Consumer L. Rev. 468, 476 (2012).

63 Civil No. 06cv0055 J(JMA), 2007 WL 2140640, at \*8 (S.D. Cal. July 23, 2007).

64 No. CV F 08-1916 LJO DLB, 2008 WL 5382259, at \*4 (E.D. Cal. Dec. 23, 2008) (quoting *Moeller v. Lien*, 30 Cal. Rptr. 2d 777, 785 (Ct. App. 1994)).

65 *Id.*

66 No. 09-0007 SC, 2009 WL 656285, at \*4 (N.D. Cal. Mar. 12, 2009).

67 This count is based on the citing references listed in Westlaw as of February 9, 2013.

68 470 B.R. 522, 530 (B.A.P. 9th Cir. 2012).

69 *Id.*

70 138 Cal. Rptr. 3d 830 (Ct. App. 2012).

71 *Id.* at 835-36 (quoting *Lane v. Vitek Real Estate Indus. Grp.*, 713 F. Supp. 2d 1092, 1099 (E.D. Cal. 2010)).

72 *Id.*

73 Cal. Civ. Code § 2924 (2012).

74 Cal. Civ. Code § 2924.

75 *Lancaster Sec. Inv. Corp. v. Kessler*, 324 P.2d 634, 638 (Cal. Ct. App. 1958) (“The trustee of a trust deed is not a trustee in the strict sense of the word. The role of such a trustee is more nearly that of a common agent of the parties to the instrument.”).

- 76 Debrunner v. Deutsche Bank Nat'l Trust Co., 138 Cal. Rptr. 3d 830, 836 (Ct. App. 2012).
- 77 Id. (citations omitted) (quoting Padayachi v. IndyMac Bank, No. C 09-5545 JF (PVT), 2010 WL 4367221, at \*3 (N.D. Cal. Oct. 28, 2010)).
- 78 A.B. 278, 2012 Leg., Reg. Sess. (Cal. 2012); S.B. 900, Reg. Sess. (Cal. 2012).
- 79 Cal. Civ. Code § 2924(a)(6) (West 2012).
- 80 Cal. Civ. Code § 2936 (West 2012) (“The assignment of a debt secured by mortgage carries with it the security.”).
- 81 See Cal. Civ. Code § 2924(a)(6).
- 82 Cal. Civ. Proc. Code § 580b (West 2012); see also Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 8.3 (5th ed. 2007). The protection from deficiency liability for purchase-money mortgages was expanded in 2012 to include loans made to refinance original purchase-money mortgages on owner-occupied residences. See S.B. 1069, Reg. Sess. (Cal. 2012).
- 83 Non-purchase-money borrowers remain liable for deficiencies in judicial foreclosures. See Cal. Civ. Proc. Code § 580b.
- 84 Ariz. Rev. Stat. Ann. § 33-807 (West 2012); Cal. Civ. Code § 2924; Idaho Code Ann. § 45-1505 (West 2012).
- 85 Ariz. Rev. Stat. Ann. §§ 33-807 to -808.
- 86 See supra text accompanying note 76.
- 87 Mansour v. Cal-Western Reconveyance Corp., 618 F. Supp. 2d 1178, 1181 (D. Ariz. 2009) (“Arizona’s judicial foreclosure statutes ... do not require presentation of the original note before commencing foreclosure proceedings.”); Diessner v. Mortg. Elec. Registration Sys., 618 F. Supp. 2d 1184, 1187 (D. Ariz. 2009); Blau v. America’s Servicing Co., No. CV-08-773-PHX-MHM, 2009 WL 3174823, at \*6 (D. Ariz. Sept. 29, 2009) (“Absent specific and compelling Arizona case law, this Court will not presume that the UCC has any applicability to foreclosure proceedings.”); Goodyke v. BNC Mortg., Inc., No. CV 09 0074 PHX MHM, 2009 WL 2971086, at \*4 (D. Ariz. Sept. 11, 2009); In re Weisband, 427 B.R. 13, 22 (Bankr. D. Ariz. 2010), aff’d, 2011 WL 3303453 (B.A.P. 9th Cir. 2011).
- 88 Hogan v. Wash. Mut. Bank, N.A., 277 P.3d 781 (Ariz. 2012).
- 89 Id. at 783 (citations omitted) (internal quotation marks omitted).
- 90 Id.
- 91 Id.
- 92 Id. (citation omitted).

93 Hogan, 277 P.3d at 783.

94 We are unsure whether such an allegation, based on nothing more than suspicion, is improper or sanctionable in Arizona. Arizona's Rules of Civil Procedures prohibit "the filing of a pleading when the party or counsel knew, or should have known by such investigation of fact and law as was reasonable and feasible under all the circumstances that the claim or defense was insubstantial, groundless, frivolous or otherwise unjustified." *Gilbert v. Bd. of Med. Exam'rs*, 745 P.2d 617, 631 (Ariz. Ct. App. 1987) (emphasis omitted). What sort of investigation can the plaintiff or his counsel make? Is simply asking the foreclosing party whether it has the original note likely to do any good? It seems probable that such a request would be ignored.

95 Hogan, 277 P.3d at 784.

96 See generally Emily Gildar, Comment, Arizona's Anti-deficiency Statutes: Ensuring Consumer Protection in a Foreclosure Crisis, 42 *Ariz. St. L.J.* 1019 (2010).

97 Hogan, 277 P.3d at 783.

98 Before the Idaho Supreme Court spoke to the point, the federal district court in Idaho took an innovative and much more pro-borrower position. The court conceded that the Idaho statute made no reference to UCC Article 3's requirements, but concluded that the borrower's action to enjoin the foreclosure was "not challenging Defendant's procedure ... [but was] challenging Defendant's right to initiate the procedure." *Armocost v. HSBC Bank USA*, No. 10 CV 274 EJM LMB, 2011 WL 825151, at \*10 (D. Idaho Feb. 9, 2011). The court continued, "One could not reasonably contend that compliance with a procedure gives substantive rights not otherwise possessed." *Id.* This view, however, seems to have been firmly rejected by the subsequent Idaho Supreme Court opinion discussed below.

99 275 P.3d 857, 862 (Idaho 2012).

100 *Id.*

101 Idaho Code Ann. § 45-1505 (West 2012).

102 Trotter, 275 P.3d at 862.

103 See *supra* text accompanying note 82.

104 See *supra* text accompanying note 96.

105 See Idaho Code Ann. § 45-1512 (West 2012).

106 Or. Rev. Stat. Ann. §§ 86.710-86.795 (West 2012).

107 Utah Code Ann. §§ 57-1-19 to -32 (West 2012). The notice of default recorded by the trustee need merely contain "a statement that a breach of an obligation for which the trust property was conveyed as security has occurred, and setting forth the nature of that breach." Utah Code Ann. § 57-1-24(1). A separate notice mailed to the borrower must include this information, plus an itemized statement of the amounts that must be paid to cure the default and the contact information for a "single point of contact" designated by the beneficiary or servicer. Utah Code Ann. § 57-1-24.3(2)(b).

- <sup>108</sup> In *Niday v. GMAC Mortgage, LLC*, 284 P.3d 1157, 1164-66 (Or. Ct. App. 2012), the court seemed to assume that it was necessary for the foreclosing party to hold the promissory note. Yet, the servicer in fact had possession of the note, and this was not an issue in the case. *Id.*
- <sup>109</sup> Nev. Rev. Stat. Ann. § 107.080(2)(c) (West 2012) (emphasis added).
- <sup>110</sup> *Hernandez v. IndyMac Bank*, No. 2:12-cv-00369-MMD-CWH, 2012 WL 3860646, at \*4 (D. Nev. Sept. 5, 2012); *Edelstein v. Bank of N.Y. Mellon*, 286 P.3d 249, 252 (Nev. 2012).
- <sup>111</sup> 2012 WL 3860646, at \*4-5, \*7 (D. Nev. 2012).
- <sup>112</sup> *Id.* at \*5.
- <sup>113</sup> 286 P.3d at 253-54.
- <sup>114</sup> *Id.* at 252.
- <sup>115</sup> *Id.*
- <sup>116</sup> *Id.* at 261.
- <sup>117</sup> Wash. Rev. Code Ann. § 61.24.030(7)(a) (West 2012) (emphasis added).
- <sup>118</sup> Wash. Rev. Code Ann. § 61.24.030(8)(1). Observe the apparent inconsistency of the statute. The first subsection cited refers to the “holder” of the promissory note, and the second subsection to the “owner.” See discussion *supra* note 23.
- <sup>119</sup> 285 P.3d 34, 36 (Wash. 2012) (en banc); see also *In re Allen*, 472 B.R. 559, 569 (B.A.P. 9th Cir. 2012).
- <sup>120</sup> Nev. Rev. Stat. Ann. § 107.080(2)(c) (West 2012).
- <sup>121</sup> Wash. Rev. Code Ann. § 61.24.030(7)(a) (West 2012).
- <sup>122</sup> *Hogan v. Wash. Mut. Bank*, 277 P.3d 781, 783 (Ariz. 2012) (en banc); *Debrunner v. Deutsche Bank Nat’l Trust Co.*, 138 Cal. Rptr. 3d 830, 835 (Ct. App. 2012); *Trotter v. Bank of N.Y. Mellon*, 275 P.3d 857, 862 (Idaho 2012).
- <sup>123</sup> See Tex. Prop. Code Ann. § 51.002(a) (West 2011).
- <sup>124</sup> Tex. Prop. Code Ann. § 51.002; Tex. Prop. Code Ann. § 51.0025 (West 2011).
- <sup>125</sup> *Kan v. OneWest Bank, F.S.B.*, 823 F. Supp. 2d 464, 469 (W.D. Tex. 2011).

- <sup>126</sup> Id. at 470 (citations omitted); see also *Casterline v. OneWest Bank*, F.S.B., No. 2:12-CV-00150, 2012 WL 6630024, at \*1 (S.D. Tex. Dec. 19, 2012); *Knapik v. BAC Home Loans Servicing, LP*, 825 F. Supp. 2d 869, 873 (S.D. Tex. 2011).
- <sup>127</sup> Tex. Prop. Code Ann. § 51.0001(4)(A) (West 2011); Tex. Prop. Code Ann. § 51.0025.
- <sup>128</sup> *Lee v. Mortg. Elec. Registration Sys., Inc.*, No. 10-00687 JMS/BMK, 2012 WL 6726382, at \*6 (D. Haw. Dec. 26, 2012).
- <sup>129</sup> Id.; see also Haw. Rev. Stat. § 667-5 (repealed 2012).
- <sup>130</sup> *Lee*, 2012 WL 6726382, at \*6; *Nottage v. Bank of N.Y. Mellon*, No. 12-00418 JMS/BMK, 2012 WL 5305506, at \*7 (D. Haw. Oct. 25, 2012); *Pascual v. Aurora Loan Servs., LLC*, No. 10-00759 JMS-KSC, 2012 WL 3583530, at \*3 (D. Haw. Aug. 20, 2012); *Lindsey v. Meridias Capital, Inc.*, No. 11-00653 JMS/KSC, 2012 WL 488282, at \*8 (D. Haw. Feb. 14, 2012).
- <sup>131</sup> *Lee*, 2012 WL 6726382, at \*6; *Nottage*, 2012 WL 5305506, at \*7; *Pascual*, 2012 WL 3583530, at \*3; *Lindsey*, 2012 WL 488282, at \*8.
- <sup>132</sup> *Nottage*, 2012 WL 5305506, at \*7 (citing *In re Veal*, 450 B.R. 897, 916-17 (B.A.P. 9th Cir. 2011)).
- <sup>133</sup> Everett S. Kaneshige & Seth J. Corpuz-Lahne, *The New Foreclosure Law*, Haw. B.J., Oct. 2012, at 4.
- <sup>134</sup> See Haw. Rev. Stat. § 667-22 (West 2012) (stating the requirements for the notice of default and intention to foreclose under the revised procedure). There is still no requirement for proof that the foreclosing party holds the note, but merely a requirement to include a copy of the note and any endorsements or allonges. Haw. Rev. Stat. § 667-22(c).
- <sup>135</sup> See Ron Margolis, *Foreclosure Thoughts on New Hawaii Law Act 182-- Hawaii's Reparations and the Foreclosure Mediation Program*, *Hawai'i Life* (July 26, 2012), <http://www.hawaiilife.com/articles/2012/07/hawaii-law-act-182/>. The new procedure requires mediation of residential mortgage foreclosures and has been considered burdensome by lenders, who have thus far resorted to judicial foreclosure instead. Id.
- <sup>136</sup> 805 N.W.2d 183, 183 (Mich. 2011).
- <sup>137</sup> Id.
- <sup>138</sup> Ironically, in July 2011, MERS discontinued the practice of foreclosing in its own name. Policy Bulletin No. 2011-5 from MERS to MERS System Members (July 21, 2011), available at [foreclosurebu33.files.wordpress.com/2011/07/policy-bulletin-2011-5.pdf](http://foreclosurebu33.files.wordpress.com/2011/07/policy-bulletin-2011-5.pdf).
- <sup>139</sup> See *Hargrow v. Wells Fargo Bank N.A.*, No. 11-1806, 2012 WL 2552805, at \*2 (6th Cir. July 3, 2012).
- <sup>140</sup> 662 F.3d 976, 981 (8th Cir. 2011).
- <sup>141</sup> 770 N.W.2d 487 (Minn. 2009). *Jackson* did not involve the question we are now considering; rather, it dealt with whether an assignment of a secured note (which concededly carried with it the mortgage) had to be recorded as a precondition to foreclosing the mortgage in Minnesota. Id. at 501.

- <sup>142</sup> Stein, 662 F.3d at 980 (second alteration in original) (citation omitted); see also *Brinkman v. Bank of Am., N.A.*, No. 11 3240 (JRT/TNL), 2012 WL 6600315, at \*3 (D. Minn. Aug. 23, 2012); *Welk v. GMAC Mortg., LLC*, 850 F. Supp. 2d 976, 985-86 (D. Minn. 2012) (citing numerous other federal district court cases following the holding of Stein).
- <sup>143</sup> Md. R. 14-207 (explaining that a power of sale proceeding is commenced by filing an “order to docket”).
- <sup>144</sup> Md. R. 14-207(b)(3).
- <sup>145</sup> *Anderson v. Burson*, 35 A.3d 452, 460 (Md. 2011).
- <sup>146</sup> N.C. Gen. Stat. Ann. § 45-21.16 (West 2012).
- <sup>147</sup> N.C. Gen. Stat. Ann. § 45-21.16(d).
- <sup>148</sup> 711 S.E.2d 165 (N.C. Ct. App. 2011).
- <sup>149</sup> *Id.* at 171-72. The foreclosing party did have possession of the note, but it did not contain a complete chain of endorsements. *Id.* at 172. Oddly, the court seems to have considered only the “holder” branch of the “entitlement to enforce” principle and failed to consider the “nonholder with the rights of a holder” branch. *Id.*; see also text accompanying note 36.
- <sup>150</sup> 795 F. Supp. 2d 1370, 1372 (N.D. Ga. 2011).
- <sup>151</sup> Ga. Code Ann. § 44-14-162(b) (West 2012) (“The security instrument or assignment thereof vesting the secured creditor with title to the security instrument shall be filed prior to the time of sale in the office of the clerk of the superior court ...” (emphasis added)); Ga. Code Ann. § 44-14-162.2(a) (“Notice of the initiation of proceedings to exercise a power of sale in a mortgage, security deed, or other lien contract shall be given to the debtor by the secured creditor no later than 30 days before the date of the proposed foreclosure.” (emphasis added)).
- <sup>152</sup> *Morgan*, 795 F. Supp. 2d at 1376.
- <sup>153</sup> *Id.*
- <sup>154</sup> Va. Code Ann. § 55-59.1 (West 2012).
- <sup>155</sup> Va. Code Ann. § 55-59.1(B).
- <sup>156</sup> Va. Code Ann. § 55-59.1(B). The obvious objective of this wording is to make the nonjudicial-foreclosure process conform to UCC § 3-309, the lost-note-affidavit section. See U.C.C. § 3-309 (2006).
- <sup>157</sup> *Blick v. Wells Fargo Bank, N.A.*, No. 3:11-cv-00081, 2012 WL 1030137, at \*5 (W.D. Va. Mar. 27, 2012); *Gallant v. Deutsche Bank Nat’l Trust Co.*, 766 F. Supp. 2d 714, 721 (W.D. Va. 2011).

158 969 N.E.2d 1118 (Mass. 2012).

159 See Mass. Gen. Laws Ann. ch. 244, § 14 (West 2012).

160 Eaton, 969 N.E.2d at 1125.

161 *Id.* at 1128.

162 *Id.* at 1129.

163 *Id.* at 1133.

164 *Id.* at 1132-33.

165 Eaton, 969 N.E.2d at 1133 n.28.

166 See *supra* text accompanying note 109.

167 See *supra* text accompanying note 117.

168 It is interesting that the court did not place this holding squarely on the shoulders of UCC Article 3, although it did observe that “[w]e perceive nothing in the UCC inconsistent with our view that in order to effect a valid foreclosure, a mortgagee must either hold the note or act on behalf of the note holder.” Eaton, 969 N.E.2d at 1131 n.26.

169 Texas deficiency claims following nonjudicial foreclosure can be offset by the amount that fair market value of the property exceeded the foreclosure sale bid. Tex. Prop. Code Ann. § 51.003(c) (West 2012).

170 In Michigan, deficiency judgments are permitted, but if the mortgagee is the successful bidder in a nonjudicial foreclosure, the borrower may attempt to show that the bid at the sale was substantially below true value, in which case a deficiency claim will be barred. Mich. Comp. Laws Ann. § 600.3280 (West 2012).

171 Hawaii bars deficiency judgments against owner-occupants of residential property following nonjudicial foreclosures if that property is the sole collateral for the loan. Haw. Rev. Stat. § 667-38 (West 2012). Minnesota bars deficiency judgments following nonjudicial foreclosures in most circumstances. See Minn. Stat. Ann. § 582.30 (West 2012).

172 See *supra* text accompanying notes 38-40.

173 U.C.C. § 3-309(b) (2002).

174 Va. Code Ann. §55-59.1(B) (West 2012).

175 Va. Code Ann § 55-59.1(B) (“Adequate protection” is typically provided by requiring the foreclosing party to provide a bond or

indemnity.)

176 See supra text accompanying notes 158-68.

177 See supra text accompanying notes 109-22.

178 See supra text accompanying notes 143-49.

179 *Debrunner v. Deutsche Bank Nat'l Trust Co.*, 138 Cal. Rptr. 3d 830, 835-36 (Ct. App. 2012) (citations omitted) (internal quotation marks omitted).

180 The use of possession of original promissory notes as an indicium of the right to enforce may seem archaic in an era in which electronic obligations and record-keeping systems have become commonplace. One of the present authors has suggested the creation of a nation-wide electronic registration system for mortgage notes to replace the present system adopted by Article 3. See Dale Whitman, *A Proposal for a National Mortgage Registry: MERS Done Right*, \_\_\_ Mo. L. Rev. \_\_\_ (forthcoming 2013). But unless and until such a scheme is adopted, Article 3 is the system we have. We cannot afford to disregard it.

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66 ARLR 21

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