

67005-1

67005-1

No. 67005-1-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

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

Plaintiff/Appellant

v.

RECONTRUST COMPANY, N.A., a Nevada corporation;
COUNTRYWIDE HOME LOANS, INC., a New York corporation;
BAC HOME LOANS SERVICING, L.P., a Texas corporation;
LS TITLE OF WASHINGTON; a Washington corporation
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,
a Delaware corporation;
and DOE defendants 1-20,

Defendants/Respondents

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

BRIEF OF RESPONDENTS

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

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

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2011 OCT 24 PM 4:32

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iv-xi
I. SUMMARY INTRODUCTION.....	1
II. COUNTERSTATEMENT OF ISSUES.....	2
III. COUNTERSTATEMENT OF THE CASE.....	3
IV. LEGAL ARGUMENT.....	6
A. Standard of Review.....	6
B. Leipheimer Cannot State a Claim for Wrongful Foreclosure Because No Sale Has Occurred and Washington Does Not Recognize a Cause of Action Damages Based on Wrongful Initiation of a Nonjudicial Foreclosure.....	7
1. The Deed of Trust Act Has No Express Cause of Action for Recovery of Damages.....	7
2. Injunctive Relief is the Exclusive Remedy for Improperly Initiated Nonjudicial Foreclosure Proceedings.....	8
3. Even if the Court Recognized a Cause of Action for Wrongful Initiation of Foreclosure, No Violations of the Deed of Trust Act Occurred.....	10
C. The Trial Court Properly Dismissed Leipheimer’s Complaint Because All of His Claims Are Based on the Faulty Premise that MERS Cannot Serve as a Nominee Beneficiary and the Irrelevant Issue of ReconTrust’s Ability to Serve as Trustee Under Leipheimer’s Deed of Trust.....	11
1. MERS and Its Functions.....	12

2.	The Washington Deed of Trust Act (“DTA”) Does Not Prohibit MERS From Acting as a Nominee Beneficiary	14
3.	ReconTrust’s Ability to Serve as a Trustee Under Leipheimer’s Deed of Trust Is a Moot Issue Because it Will Not Conduct any Trustee’s Sale of the Property	21
a.	This Court Should Decline to Reach Any Issues Related to ReconTrust Because They Are Moot.....	21
b.	Leipheimer’s Argument That ReconTrust Fails to Meet the “Physical Presence Requirements of the DTA Should Not Be Considered Because He Raises Them for the First Time on Appeal.....	23
c.	To the Extent the Court Considers Issues Related to ReconTrust’s “Physical Presence”, It Should Affirm the Trial Court’s Dismissal of ReconTrust	23
d.	Even If ReconTrust Does Not Satisfy RCW 61.24.030(6), Its Obligation To Do So Is Preempted By the National Bank Act	24
e.	The Court Should Not Consider Leipheimer’s Argument That ReconTrust’s Status as a “Subsidiary” of Bank of America Prevents It From Serving as a Foreclosure Trustee, but if It Does, It Should Reject It	31

D.	The Trial Court Properly Dismissed Leipheimer’s FDCPA Claims.....	33
1.	Leipheimer Cannot State an FDCPA Claim Based on § 1692(e) Because the Conduct of Nonjudicial Foreclosure Proceedings Does Not Constitute Debt Collection for Purposes of that Subsection of the FDCPA.....	34
2.	Even if Subsection § 1692f(6) of the FDCPA Applies to the Initiation of Nonjudicial Foreclosure Proceedings, Leipheimer Has Not Pled a Viable Claim	38
E.	The Trial Court Properly Granted Defendants’ Motion to Dismiss Because the Complaint Fails to Allege Facts That Support the Elements of a CPA Violation.....	40
F.	The Trial Court Properly Dismissed Leipheimer’s Quiet Title Claim Because He Cannot Show That He Satisfied the Obligation Secured by the Deed of Trust.....	42
G.	Leipheimer has Abandoned His Claims for Defamation of Title and for Malicious Prosecution and Certain Statutory Claims, and Improperly Attempts to Argue That New Claims Should Be Considered by the Court.....	44
V.	CONCLUSION	49

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Albers v. Nationstar Mortg. LLC</i> 2011 WL 43584 (E.D.Wash.) (E.D. Wash. 2011).....	37
<i>Allen v. United Financial Mortgage Corp.,</i> 2010 WL 1135787 (N.D.Cal. 2010).....	7
<i>Armacost v. HSBC Bank USA,</i> 2011 WL 825151 (D. Idaho 2011), at *4.....	36, 38
<i>Badgett v. Security State Bank,</i> 116 Wn.2d 563, 807 P.2d (1991)	41
<i>Bank of America v. City and County of San Francisco,</i> 309 F.3d 551 (9th Cir. 2002).....	24
<i>Barnett Bank of Marion Cty., N. A. v. Nelson,</i> 517 U.S. 25, 116 S. Ct. 134 L. Ed. 2d 237 (1996)	30
<i>Brown v. Household Realty Corp.,</i> 146 Wn. App. 157, 189 P.3d 223 (2008)	9, 19
<i>Burns v. McClinton,</i> 135 Wn. App. 285, 143 P.3d 630 (2006)	40
<i>Cebrun v. HSBC Bank USA, N.A.,</i> 2011 WL 321992 (W.D. Wash. 2011)	17
<i>Cervantes v. Countrywide Home Loans, Inc.,</i> No. 09-17364, 2011 U.S. App. LEXIS 18569 (9th Cir. Sept. 7, 2011).....	passim
<i>Clark v. Baines,</i> 150 Wn.2d 905, 84 P.3d 245 (2004)	48
<i>Cox v. Helenius,</i> 103 Wn.2d 383, 693 P.2d 683 (1985)	32

<i>Cutler v. Phillips Petroleum Co.</i> , 124 Wn.2d 749, 881 P.2d 216 (1994)	6
<i>Daddabbo v. Countrywide Home Loans, Inc.</i> , 2010 WL 2102485 (W.D. Wash. 2010) (Slip op.)	17
<i>Demelash v. Ross Stores, Inc.</i> 105 Wn. App. 508, 20 P.3d 447 (2001)	45
<i>Desimone v. Spence</i> , 51 Wn.2d 412, 318 P.2d 959 (1957)	42
<i>Emmerson v. Weilep</i> , 126 Wn. App. 930, 110 P.3d 214 (2005)	44
<i>Evans v. BAC Home Loans Servicing LP</i> , No. CV-10-0656-RSM, 2010 WL 5138394 (W.D. Wash. 2010)..	42, 43
<i>Franklin Nat. Bank of Franklin Square v. New York</i> , 34 U.S. 373, 4 S. Ct. 550, 98 L. Ed. 767 (1954)	30
<i>Gburek v. Litton Loan Servicing, LP</i> , 614 F.3d 380 (7th Cir.2010).....	33
<i>Gwin v. Pacific Coast Financial Services</i> 2010 WL 1691567 (S.D. Cal. 2010)	37, 38
<i>Haberman v. Washington Pub. Power Supply Sys.</i> , 109 Wn.2d 107, 744 P.2d 1032 (1987).....	6
<i>Hamilton v. U.S. Bank, N.A.</i> , No. 11-CV-977 DMS, 2011 U.S. Dist. LEXIS 88140 (S.D. Cal. Aug. 8, 2011)	36
<i>Hangman Ridge Training Stables v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986)	40
<i>Huebner v. Sales Promotion, Inc.</i> , 38 Wn. App. 66, 684 P.2d 752 (1984)	41, 45, 47
<i>Hulse v. Ocwen Federal Bank, FSB</i> , 195 F. Supp. 2d 1188 (D. Or. 2002).....	36, 37

<i>Ives v. Ramsden</i> , 142 Wn. App. 369, 174 P.3d 1231 (2008)	9
<i>Izenberg v. ETS Servs., LLC</i> , 589 F. Supp. 2d 1193 (C.D. Cal. 2008)	36
<i>Jackson v. Mortg. Elec. Registration Sys., Inc.</i> , 770 N.W.2d 487 (Minn. 2009)	13, 14
<i>Kauzlarich v. Yarborough</i> , 105 Wn. App. 632, 20 P.3d 946 (2001)	46
<i>Klinger v. Wells Fargo Bank, N.A.</i> , 2010 WL 5138478 (W.D. Wash. 2010) (Slip op.)	17
<i>LAL v. Am. Home Serv.</i> , 680 F. Supp. 2d 1218 (E.D. Cal. 2010).....	35
<i>Landmark Nat'l Bank v. Kesler</i> , 289 Kan. 528, 216 P.3d 158 (2009).....	19, 20
<i>Lewis v. ACB Bus. Servs., Inc.</i> , 135 F.3d 389 (6th Cir.1998).....	33
<i>M. Nahas Co., Inc. v. First National Bank of Hot Springs</i> , 930 F.2d 608 (8th Cir. 1991).....	24
<i>Mansour v. Cal-Western Reconveyance Corp.</i> , 618 F. Supp. 2d 1178 (D. Ariz. 2009).....	36
<i>Meyers Way Development Ltd. Partnership</i> , 80 Wash. App. 655, 910 P.2d 1308 (1996)	32
<i>Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP</i> , 110 Wn. App. 412, 40 P.3d 1206 (2002)	40
<i>Mikhay v. Bank of Am., N.A.</i> , 2:10-CV-01464 RAJ, 2011 WL 167064 (W.D. Wash. Jan. 12, 2011).....	24
<i>Montgomery v. Huntington Bank</i> , 346 F.3d 693 (6th Cir. 2003).....	35, 38

<i>Mortgage Electronic Registration Systems, Inc. v. Southwest Homes of Arkansas,</i> 301 S.W.3d 1 (Ark. 2009).....	13, 20, 21
<i>Nguyen v. Calhoun,</i> 105 Cal. App. 4th 428, 129 Cal. Rptr.2d 436 (2003)	27
<i>Nool v. Homeq Servicing,</i> 653 F.Supp.2d 1047 (E.D. Cal. 2009).....	35
<i>Perry v. Stewart Title Co.,</i> 756 F.2d 1197 (5th Cir.1985).....	35
<i>Pineda v. Saxon Mortgage Servicing, Inc.,</i> No. SACV 08-1187, 2008 WL 5187813 (C.D. Cal. 2008)	36
<i>Plein v. Lackey,</i> 149 Wn.2d 214, 67 P.3d 1061 (2003)	7
<i>Ramirez-Melgoze v. Countrywide Home Loan Servicing, LP,</i> No. CV-10-0049-LRS, 2010 WL 4641948 (E.D. Wash. 2010).....	24
<i>Reed v. Am. Honda Finance Corp.,</i> 2005 WL 1398214 (D. Or., June 10, 2005).....	34
<i>Reese v. JPMorgan Chase & Co.,</i> 686 F. Supp. 2d 1291 (S.D. Fla. 2009).....	39
<i>Reynoso v. Paul Fin., LLC,</i> No. 09-3225, 2009 WL 3833298 (N.D. Cal. 2009).....	36
<i>Rodriguez v. Loudeye Corp.,</i> 144 Wn. App. 709, 189 P.3d 168 (2008).....	6
<i>State v. Ross</i> 152 Wn.2d 220, 95 P.3d 1225 (2004)	22
<i>Stewart v. Mortgage Electronic Registration System,</i> 2010 WL 1054384 (D. Or. 2010)	33
<i>Thepvongsa v. Regional Trustee Services Corp.</i> 2011 WL 307364 (W.D. Wash. 2011).....	36

<i>Wawter v. Quality Loan Service Corp.</i> , 707 F. Supp. 2d 1115 (W.D. Wash. 2010)	passim
<i>Wash. State Grange v. Brandt</i> , 136 Wn. App. 138, 148 P.3d 1069 (2006)	42
<i>Watters v. Wachovia Bank, N.A.</i> , 550 U.S. 1, 127 S. Ct. 1559, 167 L. Ed. 2d 389 (2007)	25, 29, 30
<i>Wells Fargo Bank, N.A. v. Boutris</i> , 419 F.3d 949 (9th Cir. 2005).....	24
<i>West v. Reed</i> , 170 Wn.2d 680, 246 P.3d 548 (2010)	22
<i>Wilson Son Ranch, LLC v. Hintz</i> 162 Wn. App. 297, 253 P.3d 470 (2011)	23
<i>Wilson v. Draper & Goldberg P.L.L.C.</i> , 443 F.3d 373 (4th Cir.2006).....	38
<i>Zabka v. Bank of America Corp.</i> , 131 Wn. App. 167, 127 P.3d 722 (2005).....	6

STATUTES AND COURT RULES

12 U.S.C. § 1	25
12 U.S.C. § 92a	passim
12 U.S.C. § 92a(a).....	26
15 U.S.C. § 1692(e).....	33, 34, 38
15 U.S.C. § 1692(f)(1).....	38
15 U.S.C. § 1692(f)(6).....	34, 38, 39
15 U.S.C. § 1692a(6).....	33, 35
15 U.S.C. § 1692a(6)(B).....	35
15 U.S.C. §1692a(6)(F).....	33

15 U.S.C. § 1692c	33
15 U.S.C. § 1692e	34, 37, 38
15 U.S.C. § 1692f(6)	38
15 U.S.C. § 1692f(6)(A).....	34, 38
12 C.F.R. Part 9	30, 31
12 C.F.R. § 7.4009	28
12 C.F.R. § 9.7	25
12 C.F.R. § 9.7(a)	26
12 C.F.R. § 9.7(b).....	26
12 C.F.R. § 9.7(d).....	27
12 C.F.R. § 9.7(d)-(e)	27
12 C.F.R. § 9.7(e)(1)	27
12 C.F.R. § 9.7(e)(2).....	26, 31
Cal. Civ. Code §§ 2924-2924l.....	27
RCW 7.28.120.....	42
RCW 61.24.....	18
RCW 61.24.005(2)	17, 18, 20
RCW 61.24.010(1)(a)-(e)	28
RCW 61.24.010(1)(f)	28
RCW 61.24.010(2)	22
RCW 61.24.010(3), (4).....	32
RCW 61.24.030.....	24
RCW 61.24.030(6)	23, 24, 31

RCW 61.24.040(1)(a).....	22
RCW 61.24.040(6)	22
RCW 61.24.110.....	43
RCW 61.24.127.....	8
RCW 61.24.127(1)(a)-(c).....	8
RCW 61.24.127(1)(c).....	8
RCW 61.24.130(1)	9, 18
RCW 62A.3-201.....	18
RAP 2.5(a).....	45, 46
ER 201	25

OTHER AUTHORITIES

16A Washington Practice, § 21.2	43
18 William B. Stoebuck & John W. Weaver, Washington Practice, Real Estate: Transactions § 20.1 (2d ed. 2004).....	6, 7
Gerald Korngold, LEGAL AND POLICY CHOICES IN THE AFTERMATH OF THE SUBPRIME AND MORTGAGE FINANCING CRISIS, 60 S.C. L. Rev. 727, 741 (2009).....	12, 14
http://www.occ.treas.gov/topics/licensing/national-bank- lists/index-national-bank-lists.html	25
Robert E. Dordan, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS (MERS), ITS RECENT LEGAL BATTLES, AND THE CHANCE FOR A PEACEFUL EXISTENCE, 12 Loy. J. Pub. Int. L. 177 (2010)	13
John A. Gose, The Trust Deed Act in Washington, 41 WASH. L. REV. 94 (1966)	7

Joseph L. Hoffmann, Comment, Court Actions Contesting The
Nonjudicial Foreclosure of Deeds of Trust in Washington, 59
WASH. L. REV. 323 (1984)..... 7

I. SUMMARY INTRODUCTION

In 2006, Appellant John Leipheimer (“Leipheimer”) borrowed \$960,000.00 from Respondent Countrywide Home Loans, Inc. (“Countrywide”) to purchase real property located in King County, Washington. Leipheimer secured this loan with a Deed of Trust. Leipheimer stopped making his regular mortgage payments in 2009. He does not dispute that he stopped making mortgage payments. Nonetheless, he filed a lawsuit to try to stop the foreclosure. Leipheimer based his complaint on the theory that Mortgage Electronic Registration Systems, Inc. (“MERS”) could not serve as the nominee beneficiary of the Deed of Trust and therefore lacked the authority to execute an assignment of the Deed of Trust and appoint ReconTrust Company, N.A. (“ReconTrust”) as successor trustee under the Deed of Trust.

The Washington Supreme Court has accepted review of certain questions certified to it by the United States District Court for the Western District of Washington that will presumably resolve or at least provide substantial guidance regarding many of the MERS-related issues presented by this appeal. Respondents anticipate that this Court will await the Washington Supreme Court’s decisions in the *Bain* and *Selkowitz* matters before deciding this appeal. Here, Respondents focus on case law from the federal courts and other states that have addressed issues similar to

those under review in *Bain* and *Selkowitz* and why the trial court's order dismissing Leipheimer's complaint without prejudice should be affirmed in any event. The claims against ReconTrust are moot in light of the fact that it will not be serving as the Trustee in any eventual foreclosure sale of Leipheimer's property.

II. COUNTERSTATEMENT OF ISSUES

Leipheimer's appeal presents the following issues:

1. Whether the trial court properly dismissed, without prejudice, Leipheimer's wrongful foreclosure cause of action where no foreclosure has actually occurred, and his claim is premised on a theory that the naming of MERS as the nominee beneficiary under the Deed of Trust renders the entities involved in his foreclosure without the requisite authority to act.

2. Whether the trial court properly dismissed, without prejudice, Leipheimer's cause of action for violation of the Fair Debt Collection Practices Act ("FDCPA") where the conduct on which Leipheimer bases his claim either does not implicate the FDCPA or is not actionable under the FDCPA.

3. Whether the trial court properly dismissed, without prejudice, Leipheimer's cause of action for violation of the Washington Consumer Protection Act ("CPA") where the Complaint fails to

adequately allege the predicate false or deceptive act or an injury to business or property within the meaning of the CPA.

4. Whether Leipheimer has abandoned his causes of action for defamation of title and malicious prosecution where he has not assigned error to the dismissal of these causes of action or included any argument regarding them in his opening brief.

III. COUNTERSTATEMENT OF THE CASE

On or about January 20, 2006, Leipheimer secured a promissory note ("Note") evidencing a \$960,000.00 residential mortgage loan with a deed of trust ("Deed of Trust") on his residence, commonly known as 24211 SE 182nd Street, Maple Valley, Washington, 98038 ("the Property"). CP 10-12. The Deed of Trust was recorded on January 25, 2006, under King County Recorder's File No. 20060125001199. CP 10. The Deed of Trust Leipheimer signed provides:

"MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. **MERS is the beneficiary under this Security Instrument.**

CP 11 (emphasis in original). This Deed of Trust further provides:

Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security instrument, but, if necessary to comply with law or custom, **MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property;** and to take any action required by Lender ...

CP 12 (emphasis added). Leipheimer agreed to and executed this Deed of Trust. CP 20.

By May 20, 2009, Leipheimer had defaulted on his obligation to make the monthly payments due under the Note. CP 23-24. ReconTrust executed the Notice of Default dated May 20, 2009, in its capacity as agent for the loan servicer, BAC Home Loans Servicing, LP.¹ CP 25. Leipheimer does not dispute that he failed to make mortgage payments as required by his Note and Deed of Trust. *See* CP 3. On or about May 20, 2009, MERS executed an Appointment of Successor Trustee appointing ReconTrust as the successor trustee under the Deed of Trust. CP 27-28. This Appointment of Successor Trustee was recorded on May 29, 2009, under King County Recorder's File No. 20090529001465. CP 27.

On or about June 18, 2009, ReconTrust executed a Notice of Trustee's Sale of the Property, which set the trustee's sale for September 5, 2009. CP 30-34. ReconTrust recorded this Notice on June 24, 2009, under King County Recorder's File No. 20090624002466.² CP 30. The Notice of

¹ BAC Home Loans Servicing, LP has since merged with Bank of America, N.A., ("BANA") and is referred to in this brief by its present name.

² In his brief, Leipheimer also takes issue with a subsequent assignment of the Deed of Trust by ReconTrust in August 2010, and alleges that it is part of a "shell game" played by "unscrupulous home lenders and their agents." Rev. App. Br., p. 23, fn 4. That subsequent assignment is evidence of nothing besides an assignment. He does not even attempt to justify how it is illegal or wrongful. This issue was not raised in the proceedings below and the recorded assignment is not part of the record in this matter, despite Leipheimer's belated and improper attempt to introduce it. It is properly ignored by this Court.

Sale shows that as of June 18, 2009, Leipheimer was in arrears on his loan obligation by over \$34,000.00. CP 31. ReconTrust continued the original September 25, 2009 sale date to October 30, 2009, but Leipheimer filed suit on October 23, 2009 and the sale never took place. CP 1, 40.

On October 23, 2009 – a week before the scheduled foreclosure sale – Leipheimer attempted to state causes of action in King County Superior Court for: (1) Wrongful Foreclosure, (2) Defamation of Title, (3) Malicious Prosecution, (4) Violation of the CPA, (5) Quiet Title, and (6) Violation of the FDCPA (“Complaint”). CP 1-7.

On October 29, 2009, Leipheimer obtained a temporary restraining order enjoining the trustee’s sale. CP 39-41. On November 12, 2010, Respondents filed a CR 12(b)(6) Motion to Dismiss, noting the hearing for January 7, 2011. CP 51. On March 14, 2011, the Honorable Douglass A. North denied Leipheimer’s Motion for Reconsideration of the prior order dismissing the Complaint without prejudice. CP 480-481. This appeal followed. CP 482-483.³

³ On January 7, 2011, the Honorable Douglass A. North granted Defendants’ CR 12(b)(6) Motion to Dismiss, dismissing Leipheimer’s Complaint without prejudice. CP 293-294. The order of dismissal noted the fact that Leipheimer had not filed a Response. CP 293. On January 12, 2011, Leipheimer’s counsel filed a Motion to Extend Time to Respond to Defendants’ Motion to Dismiss due to a death in his family and a response to Defendants’ CR 12(b)(6) Motion to Dismiss that included an 138 pages of exhibits. CP 296-461. On January 13, 2011, Leipheimer filed a Motion for Reconsideration. CP 464-465. Respondents filed a Response to the Motion for Reconsideration, stating that, based on the representations in Leipheimer’s Motion to Extend Time, they did not oppose consideration of Leipheimer’s January 12, 2011, Response to Motion to Dismiss. CP (continued . . .)

IV. LEGAL ARGUMENT

A. Standard of Review.

A trial court's decision to dismiss a complaint under CR 12(b)(6) is reviewed *de novo*. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). A CR 12(b)(6) motion should be granted only if it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle him to relief. *Zabka v. Bank of America Corp.*, 131 Wn. App. 167, 170, 127 P.3d 722 (2005). A plaintiff's factual allegations are presumed to be true, but the Court need not accept the plaintiff's legal conclusions as true. *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032, 1046 (1987). CR 12(b)(6), read together with CR 8(a), requires the court to decide whether a plaintiff's allegations constitute a short and plain statement of the claim and demonstrate that the pleader is entitled to relief. *Id.* A court may take judicial notice of public documents if their authenticity cannot be reasonably disputed when ruling on a motion to dismiss. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725-726, 189 P.3d 168 (2008). Documents whose contents are alleged in a complaint may also be considered, even if not physically attached to the complaint. *Id.*

(. . . continued)

470-471. On February 28, 2011, the Court notified the parties that the CR 12(b)(6) Motion to Dismiss would be heard on March 11, 2011, without oral argument. CP 473.

B. Leipheimer Cannot State a Claim for Wrongful Foreclosure Because No Sale Has Occurred and Washington Does Not Recognize a Cause of Action Damages Based on Wrongful Initiation of a Nonjudicial Foreclosure.

1. The Deed of Trust Act Has No Express Cause of Action for Recovery of Damages. The Deeds of Trust Act (“DTA”) governs statutory deeds of trust in Washington. Laws of 1965, ch. 74; *see also* 18 William B. Stoebuck & John W. Weaver, Washington Practice, Real Estate: Transactions § 20.1, at 403 (2d ed. 2004). A deed of trust is a form of three-party mortgage, involving not only a lender and a borrower, but also a neutral third party called a trustee. 18 Stoebuck & Weaver, § 20.1 at 403; John A. Gose, The Trust Deed Act in Washington, 41 WASH. L. REV. 94, 96 (1966). Under this system, “[a] borrower or obligor incurs a debt or other obligation to a ‘beneficiary’ and, as security for that obligation, the ‘grantor’ conveys an estate in land to a third-party ‘trustee.’” 18 Stoebuck & Weaver, § 20.1 at 403. The “key feature” of the DTA is that it permits a deed of trust to be foreclosed nonjudicially by trustee’s sale. *Id.*

The legislature enacted the DTA to promote three goals: (1) an efficient and inexpensive nonjudicial foreclosure process; (2) an adequate opportunity for interested parties to prevent wrongful foreclosure; and (3) the stability of land titles. *Plein v. Lackey*, 149 Wn.2d 214, 225, 67 P.3d 1061, 1065 (2003); Joseph L. Hoffmann, Comment, Court Actions

Contesting The Nonjudicial Foreclosure of Deeds of Trust in Washington, 59 WASH. L. REV. 323, 330 (1984). There is no express right of action to recover damages for wrongful institution of a foreclosure. This point is underscored by the fact that the legislature enacted RCW 61.24.127 as part of the July 2009 amendments to the DTA.⁴ That statute preserves certain causes of action for damages that were previously waived by a failure to bring a pre-sale suit to enjoin a Trustee's Sale, subject to certain restrictions, including that such claims be brought within two years of the sale or within the applicable statute of limitations, whichever expires first. RCW 61.24.127(1)(a)-(c); (2)(a)-(f). Notably, claims based upon the trustee's alleged failure to materially comply with the DTA is one of the claims preserved by this statute. RCW 61.24.127(1)(c).

2. Injunctive Relief is the Exclusive Remedy for Improperly Initiated Nonjudicial Foreclosure Proceedings. The DTA establishes “a comprehensive scheme for the nonjudicial foreclosure process, including specific remedies for grantors and borrowers facing the potential loss of their homes.” *Vawter v. Quality Loan Service Corp.*, 707 F. Supp. 2d 1115, 1123 (W.D. Wash. 2010). Under the DTA, a borrower or grantor may restrain a trustee's sale on “any proper legal or equitable ground.”

⁴ The DTA's anti-waiver section does not play a direct role in this case because Leipheimer did bring a pre-sale action to enjoin the sale.

RCW 61.24.130(1). “This statutory procedure is ‘the only means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure.’” *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 163, 189 P.3d 223 (2008) (quoting *Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985)).

The DTA does not provide a private right of right of action.⁵ In *Vawter*, the Western District of Washington recently declined to recognize an implied cause of action for wrongful institution of foreclosure proceedings. 707 F. Supp. 2d at 1124. The Court identified three key reasons why an implied cause of action for wrongful institution of foreclosure proceeding was inappropriate: (1) neither the Act itself or any case law supported such a claim; (2) the Act’s comprehensive scheme for handling the nonjudicial foreclosure process; and (3) and a cause of action for damages for wrongful institution of foreclosure proceedings could undermine the legislature’s goal that the nonjudicial foreclosure process remain efficient and inexpensive. *Id.*, at 1123-24.

⁵ To determine if a statute contains an implied private right of action, Washington courts consider whether: (1) the plaintiff is within the class for whose benefit the statute was enacted, (2) legislative intent, explicitly or implicitly, supports creating or denying a remedy, and (3) implying a remedy is consistent with the underlying purpose of the statute. *Ives v. Ramsden*, 142 Wn. App. 369, 389, 174 P.3d 1231 (2008). Here, although borrowers and grantors such as Leipheimer are within one of the classes of people to whom the DTA extends certain protections and the right to seek to enjoin an improper foreclosure, legislative intent and purposes of the DTA establish that the Act carries no private right of action for wrongful initiation of foreclosure.

As the *Vawter* court correctly recognized, a pre-sale claim for damages would “undermine the legislature’s goal that the nonjudicial foreclosure process remains efficient and inexpensive ...[and] spawn litigation ...while at the same time failing to address directly the propriety of foreclosure or advancing the opportunity of interested parties to prevent wrongful foreclosure.” *Id.*, at 1123-24; *see also Cervantes*, 2011 WL 3911031, at *6 (concluding that amending complaint to add wrongful foreclosure claim would have been futile after surveying cases and recognizing that such claims are typically available only after foreclosure and when borrower is not in default). A right of action for damages for wrongful initiation of nonjudicial foreclosure proceedings would be contrary to these legislative goals, the plain language of the Act, and applicable case law.

Here, there is no dispute that Leipheimer is in serious default, no sale has occurred, and the only “irregularities” in the sale process are based exclusively on his attacks on the MERS system. A wrongful initiation of foreclosure claim does not exist under the facts of this case.

3. Even if the Court Recognized a Cause of Action for Wrongful Initiation of Foreclosure, No Violations of the Deed of Trust Act Occurred. For the reasons stated above, this Court should not create new law and recognize a cause of action for wrongful initiation of

foreclosure. However, even if the Court were to reach the substance of Leipheimer's alleged violations, Leipheimer still cannot state a claim upon which relief can be granted. Leipheimer's allegations, even if accepted as true, do not actually amount to any violation of the Act. Rather, as explained in the following sections, his theory of wrongful foreclosure is fundamentally flawed and rests on a misunderstanding of the operative facts and law.

C. The Trial Court Properly Dismissed Leipheimer's Complaint Because All of His Claims Are Based on the Faulty Premise that MERS Cannot Serve as a Nominee Beneficiary and the Irrelevant Issue of ReconTrust's Ability to Serve as Trustee Under Leipheimer's Deed of Trust.

Leipheimer's Complaint is predicated on the theories that: (1) MERS cannot appoint a successor trustee because it is not a valid "beneficiary" under the DTA, (2) ReconTrust cannot serve as a trustee under Deeds of Trust recorded against real property located in Washington because it lacks a "physical presence" in the state. CP 4-8.

Respondents anticipate that the Washington Supreme Court's opinions in the *Bain* and *Selkowitz* cases will affirm MERS' ability to serve as the nominee beneficiary of a deed of trust, consistent with numerous decisions from the federal courts and the courts of other states. ReconTrust's ability to serve as the trustee is moot because the most recent Notice of Sale recorded against Leipheimer's property has expired

and ReconTrust will not be the trustee conducting any eventual Trustee's Sale of the Property. ReconTrust's alleged prior actions do not give rise to any claims because as discussed above, there is no cause of action for damages for wrongful initiation of foreclosure under the DTA.

1. MERS and Its Functions. In 1993, the Federal National Mortgage Corporation ("Fannie Mae"), Federal Home Loan Mortgage Corporation ("Freddie Mac"), the Government National Mortgage Association ("Ginnie Mae"), the Federal Housing Administration, the Department of Veterans Affairs and the Mortgage Bankers' Association created MERS. Gerald Korngold, LEGAL AND POLICY CHOICES IN THE AFTERMATH OF THE SUBPRIME AND MORTGAGE FINANCING CRISIS, 60 S.C. L. Rev. 727, 741 (2009). MERS is a private electronic database, operated by MERSCORP, Inc., that tracks transfers of the beneficial interest in home mortgage loans, as well as any changes in the loan servicer (the entity that collects the borrower's payments), sends them to the loan owner, and handles the administrative aspects of the loan. *Cervantes v. Countrywide Home Loans, Inc.*, No. 09-17364, 2011 U.S. App. LEXIS 18569 at *1 (9th Cir. Sept. 7, 2011). Many of the companies that participate in the mortgage industry – by originating loans, buying or investing in the beneficial interest in loans, or servicing loans -- are MERS members and pay a fee to use the tracking system. See

Jackson v. Mortg. Elec. Registration Sys., Inc., 770 N.W.2d 487, 490 (Minn. 2009).

When a borrower obtains a home loan, he or she executes a promissory note evidencing the debt and the terms on which the loan will be repaid, and a deed of trust that transfers legal title in the property to a trustee with an irrevocable power of sale as collateral to secure the loan in the event of default. *See Cervantes*, 2011 WL 3911031, *2; CP 11. At the origination of the loan, MERS is designated in the deed of trust as a nominee for the lender and the lender's "successors and assigns." *See Id.* If the lender sells or assigns the beneficial interest in the loan to another MERS member, the change is recorded only in the MERS database, not in county records, because MERS continues to hold the deed on the new lender's behalf. *Id.* If the beneficial interest in the loan is sold to a non-MERS member, the transfer of the deed from MERS to the new lender is recorded in county records and the loan is no longer tracked in the MERS system. *Id.* It has become common for original lenders to bundle the beneficial interest in individual loans and sell them to investors as mortgage-backed securities, which may themselves be traded. *See Robert E. Dordan, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS (MERS), ITS RECENT LEGAL BATTLES, AND THE CHANCE FOR A PEACEFUL EXISTENCE*, 12 Loy. J. Pub. Int. L. 177, 180 (2010); *Jackson*, 770 N.W.2d

at 490. MERS was designed to avoid the need to record multiple transfers of the deed by serving as the nominal record holder of the deed on behalf of the original lender and any subsequent lender. *Jackson*, 770 N.W.2d at 490. The MERS member who owns the beneficial interest in a loan may assign those beneficial ownership rights or servicing rights to another MERS member. Korngold, 60 S.C. L. Rev. at 741. These assignments need not be recorded, but are tracked electronically on MERS' records, which allows "subsequent transactions [to] be done quickly at a low cost from a central location utilizing modern technology without the need for local recording of paper assignment documents." *Id.*

2. The Washington Deed of Trust Act ("DTA") Does Not Prohibit MERS From Acting as a Nominee Beneficiary. Central to Leipheimer's case theory is the argument that MERS cannot serve as a "beneficiary" under the DTA because it does not hold Leipheimer's note nor does it have any beneficial interest in the loan. CP 3-4, 7.

In *Cervantes*, the Ninth Circuit squarely rejected this theory and upheld the district court's dismissal of a putative class's first amended complaint for failure to state a claim. 2011 WL 3911031, *10. The reasoning and analysis of *Cervantes* is directly applicable to the present case. Exactly like the plaintiffs argued in *Cervantes*, Leipheimer argues here that "[t]he use of MERS as the foreclosing beneficiary was nothing

more than a sham meant to conceal the true ownership of the Note.” Br. of App. at 24. Again, like the plaintiffs in *Cervantes* argued, Leipheimer argues that under the MERS system, “the interest in the Deed of Trust has been effectively segregated from the interest in the Note, [so] the Deed of Trust is no longer a valid lien on Leipheimer’s property.” Br. of App at 34. Leipheimer’s arguments against MERS are essentially the same arguments that the Ninth Circuit rejected. Notably, the language quoted from the deeds of trust at issue in *Cervantes* is precisely the same language in Leipheimer’s Deed of Trust. CP 10-12. In rejecting the plaintiffs’ allegations that MERS is a “sham beneficiary” and that “MERS was used to hide who owned the loan,” the court pointed to the lack of any misrepresentations about MERS in the loan documents, the lack of any injury due to the designation of MERS as beneficiary, and the lack of factual allegations as to how the MERS system stymied any of their efforts. *Id.* at * 13-14. The court also pointed to the language of the deed of trust, which disclosed in plain terms that “MERS is acting ‘solely as a nominee for Lender and Lender’s successors and assigns’ and holds ‘only legal title to the interest granted by Borrower in this Security Instrument’ ... [and] that MERS has ‘the right to foreclose and sell the property.’” *Id.* at * 14-15. The court found that “[b]y signing the deeds of trust, the plaintiffs agreed to the terms and were on notice of the contents.” *Id.* at *15.

The Court of Appeals also upheld the trial court's denial of leave to amend the complaint to add a claim for wrongful foreclosure, reasoning that it would be "futile" because such a cause of action is not clearly recognized under state law, and in those states "that have recognized substantive wrongful foreclosure claims ... such claims typically are available after foreclosure and are premised on allegations that the borrower was not in default, or on procedural issues that resulted in damages to the borrower." *Id.* at *18. Notably, the Court also stated that "[e]ven if we were to accept the plaintiffs' premises that MERS is a sham beneficiary and the note is split from the deed, we would reject the plaintiffs' conclusion that, as a necessary consequence, no party has the power to foreclose." *Id.* at * 20.

The *Cervantes* decision is in accord with the numerous federal decisions that hold MERS may serve as a nominee beneficiary of a deed of trust and exercise a beneficiary's rights under Washington law. In *Vawter v. Quality Loan Service Corp.*, 707 F. Supp. 2d 1115 (W.D. Wash. 2010), the Court rejected essentially the same challenge to MERS's ability to appoint a successor trustee that Leipheimer makes here. The Court specifically concluded that the DTA allowed MERS to exercise the rights of a beneficiary and appoint a successor trustee:

The deed of trust act allows a beneficiary, such as MERS, to appoint a successor trustee, which MERS did in this case.

Plaintiff argues, however, that MERS cannot be a beneficiary and therefore MERS'[s] appointment of a new trustee was invalid. RCW 61.24.005(2) defines a beneficiary as "the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation." Plaintiff provides a printout from MERS'[s] website stating that it is an electronic registry that tracks the ownership of loans. Debtor argues that because MERS only registers documents it does not actually hold them. ***Plaintiff's argument is unconvincing.*** Simply because MERS registers documents in a database does not prove that MERS cannot be the legal holder of an instrument.

Vawter, 707 F. Supp. 2d at 1125-26 (quoting *Moon v. GMAC Mortgage Corp.*, 2008 WL 4741492, at *5 (W.D. Wash. 2008)) (emphasis added).

In *Daddabbo v. Countrywide Home Loans, Inc.*, 2010 WL 2102485 (W.D. Wash. 2010) (Slip op.), the court held that MERS had the ability to foreclose under Washington's DTA even though MERS does not hold the promissory note secured by the deed of trust: "The deed of trust grants MERS not only legal title to the interests created in the trust, but the authorization of the lender and any of its successors to take any action to protect those interests, including the right to foreclose and sell the Property." *Id.* at *5 (citations omitted); *see also Klinger v. Wells Fargo Bank, N.A.*, 2010 WL 5138478, *7 (W.D. Wash. 2010) (Slip op.) (rejecting the plaintiffs' assertion that MERS lacked the authority to act under the DTA); *Cebrun v. HSBC Bank USA, N.A.*, 2011 WL 321992 (W.D. Wash. 2011) at *3 (rejecting challenge to MERS' beneficiary status where borrowers assented to MERS' role when they executed deed of trust).

Relying on the same arguments the courts rejected in *Cervantes*, *Vawter* and numerous other decisions, Leipheimer attempts to claim that the MERS system is a “sham” and that MERS cannot be a beneficiary under the DTA. He argues that “[o]nly a beneficiary defined under *RCW 61.24.005(2)* can appoint a successor trustee or declare a default in the underlying obligation.” Br. of App. 11 (emphasis in original). Leipheimer also argues that “[t]here is no evidence of a legitimate assignment of the Note from Countywide to MERS.” Br. of App. 21. This is a “red herring” argument. There is no public record of an assignment of the Note (though there would be a record maintained in the MERS system) and there is absolutely no requirement that there be one. Promissory notes are negotiable instruments that are transferred via endorsement and delivery under the applicable provisions of the Uniform Commercial Code. *See, e.g.*, *RCW 62A.3-201; .3-203*.

Finally, Leipheimer claims that “*RCW 61.24* provides no specific remedies for violation of the statute in the context of pre-sale actions meant to prevent the wrongful foreclosure from occurring.” Br. of App. at 11 (*italics in original*). This is entirely false.⁶ *RCW 61.24.130(1)* specifically provides for restraining orders and injunctions “on any proper

⁶ Leipheimer also claims that the proper remedy for a contract in violation of the DTA “is likely rescission, which does not excuse Leipheimer from payment of any monetary obligation, but merely precludes non-judicial foreclosure.” Br. of App. at 20. Not only is this claim self-contradictory, it is unsupported by the DTA and DTA jurisprudence.

legal or equitable ground” to restrain a trustee’s sale. This statutory procedure is ‘the only means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure.’” *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 163, 189 P.3d 233 (quoting *Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985)).

Leipheimer’s reliance on *Landmark Nat’l Bank v. Kesler*, 289 Kan. 528, 216 P.3d 158 (2009) is misplaced. App. Br. 15-18. In *Kesler*, Landmark National Bank instituted a judicial foreclosure of Kesler’s property against Kesler and Millennia Mortgage Corp., the original mortgagee of a second mortgage on Kesler’s property. *Kesler*, 216 P.3d at 161. Neither Kesler nor Millennia responded, and Kesler’s property was sold following their default. *Id.* Subsequently, MERS, the nominee of Sovereign Bank, which had purchased Millennia’s second mortgage, unsuccessfully moved to set aside the default judgment on the basis that it was a necessary party. *Id.*, at 161-62. The only questions decided by the *Kesler* court were: (1) “whether the district court abused its discretion in refusing to set aside the default judgment and in refusing to join MERS as a contingently necessary beneficiary,” and (2) whether this decision violated MERS’s due process rights. *Kesler*, 216 P.3d at 162, 169. Although the court answered the questions in the negative, it based its reasoning on the fact that MERS did not have direct property interests at stake and would not suffer a monetary loss if

not allowed to intervene. Neither of these two issues are present present in this case, and they do not bear on whether MERS had the authority to take the actions at issue. *See id.*

Leipheimer's apparent reliance on *Mortgage Electronic Registration Systems, Inc. v. Southwest Homes of Arkansas*, 301 S.W.3d 1 (Ark. 2009) is similarly misplaced. In *Southwest Homes*, the sole issue was whether MERS qualified as a necessary party in a judicial foreclosure. *Id.* In holding that MERS did not qualify as a necessary party, the court based its decision solely on Arkansas law, which defined the term "beneficiary" as the lender under the deed of trust who receives payment on the debt, and stating further that legal title passes automatically to the trustee in a deed of trust. *See id.* at 4 (noting that, under Arkansas law, "naked legal title" passes to the trustee in a deed of trust, and that the beneficiary in this case under the deed of trust was the lender because it "receives payments on the debt"). In contrast, the case before this Court involves a non-judicial foreclosure, and Washington's DTA contains a different definition for the term "beneficiary" than that articulated in the Arkansas court. *See* RCW 61.24.005(2) (defining "beneficiary" as the "holder of the instrument or document evidencing the obligations secured by the deed of trust"). Moreover, the ultimate issues here – whether MERS can exercise the rights

of a beneficiary, and if not, the resulting consequences – are different than those presented in *Southwest Homes of Arkansas*.

Leipheimer's theories on the MERS's alleged inadequacy fail under Washington law. His Complaint does not state actionable claims against Defendants based on his theories and unsupported allegations regarding MERS and the MERS system. All of the claims in his Complaint are contingent on these theories. The trial court properly dismissed the Complaint and its order should be affirmed.

3. ReconTrust's Ability to Serve as a Trustee Under Leipheimer's Deed of Trust Is a Moot Issue Because it Will Not Conduct any Trustee's Sale of the Property. Leipheimer's Complaint alleges that because MERS was an improper beneficiary, its appointment of ReconTrust was invalid, and thus any action taken by ReconTrust is also invalid. CP 4, 7. For all of the reasons in the preceding section, MERS can exercise the rights of a beneficiary and thus this argument fails. The Complaint also alleges that ReconTrust did not comply with (unidentified) statutory requirements, and that this caused injury to Leipheimer. CP 7. These allegations fail to state a claim upon which relief can be granted, and thus it was proper for the trial court to dismiss the Complaint.

a. This Court Should Decline to Reach Any Issues Related to ReconTrust Because They Are Moot. A case is moot if the

court can no longer provide effective relief. *West v. Reed*, 170 Wn.2d 680, 682, 246 P.3d 548 (2010). A court typically will not review a moot issue unless it is an issue of continuing and substantial public interest that will likely reoccur. *State v. Ross* 152 Wn.2d 220, 228, 95 P.3d 1225 (2004).

Here, ReconTrust recorded the Notice of Sale at issue in this case on June 24, 2009. CP 30. Under this Notice of Sale, the original sale date was September 25, 2009. *Id.* A trustee may continue a sale no more than 120 days from the date specified in the notice of sale. RCW 61.24.040(6). If a sale is continued beyond this 120-period, the trustee must record a new notice of sale. *See* RCW 61.24.040(1)(a). Thus, because the most recent notice of sale recorded against the property has expired, a new notice must issue before a sale could take place.

Because ReconTrust cannot conduct a sale pursuant to the notice at issue and the file has been transferred to a different trustee, it will not be recording a new notice, and a new trustee must be appointed pursuant to RCW 61.24.010(2). Because there is no cause of action for damages for initiation of wrongful foreclosure under the DTA and *Vawter* and because ReconTrust will not be the trustee foreclosing Leipheimer's Deed of Trust, this Court need not reach any of the issues related to ReconTrust raised by this appeal.

b. Leipheimer's Argument That ReconTrust Fails to Meet the "Physical Presence Requirements of the DTA Should Not Be Considered Because He Raises Them for the First Time on Appeal. This Court generally will not consider issues raised for the first time on appeal and it does not consider theories that are not presented to the trial court. *Wilson Son Ranch, LLC v. Hintz* 162 Wn. App. 297, 303, 253 P.3d 470 (2011). Leipheimer's Complaint does not allege that ReconTrust fails to comply with the DTA's physical presence requirements in RCW 61.24.030(6), and he did not raise the issue in his opposition to Respondents' motion to dismiss. *See* CP 1-8; 298-323. Leipheimer's argument that ReconTrust does not comply with the physical presence requirements of the DTA is made for the first time on appeal and should not be considered. *See* Br. of App. at 23-24.

c. To the Extent the Court Considers Issues Related to ReconTrust's "Physical Presence", It Should Affirm the Trial Court's Dismissal of ReconTrust. To the extent Leipheimer argues that ReconTrust violated the DTA's physical requirements, he is simply wrong. Both the Notice of Default and the Notice of Trustee's Sale recorded on the Property identifies ReconTrust's agent for service of process as "Corporation Service Company, 202 North Phoenix Street, Olympia, WA 98506." CP 25, 33. This is sufficient under the law. *See*,

e.g., *Ramirez-Melgoze v. Countrywide Home Loan Servicing, LP*, No. CV-10-0049-LRS, 2010 WL 4641948, *7 (E.D. Wash. 2010) (recognizing information of registered agent for service of process to be evidence of compliance with RCW 61.24.030); *see also* *Mikhay v. Bank of Am., N.A.*, 2:10-CV-01464 RAJ, 2011 WL 167064 at *8-9 (W.D. Wash. Jan. 12, 2011) (rejecting plaintiff's argument that ReconTrust was not a qualified trustee because it did not maintain a street address, physical presence, or telephone service pursuant to RCW 61.24.030(6) and finding no authority to support cause of action under RCW 61.24.030(6)). Thus, Leipheimer's new argument regarding the presence of ReconTrust is without merit.

d. Even If ReconTrust Does Not Satisfy RCW 61.24.030(6), Its Obligation To Do So Is Preempted By the National Bank Act. Even if the Court finds ReconTrust does not comply with the DTA's physical presence requirements, its obligation to do so is preempted by the National Bank Act ("NBA"). In areas where there is a history of significant federal presence, such as national banking, the typical presumption against preemption does not apply. *Bank of America v. City and County of San Francisco*, 309 F.3d 551 (9th Cir. 2002); *see also* *Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949, 956 (9th Cir. 2005). Federal law governs national banks. *M. Nahas Co., Inc. v. First National Bank of Hot Springs*, 930 F.2d 608, 610 (8th Cir. 1991). Congress created a

national banking system that is intended to be national in scope and uniform in application. *See, e.g.*, 12 C.F.R. § 9.7 (recognizing that a national bank may act in a fiduciary capacity in any state); 12 U.S.C. § 92a (discussing trust powers).

ReconTrust is a federally chartered national banking association regulated by the Office of the Comptroller of the Currency (“OCC”) and subject to the National Bank Act (“NBA”).⁷ The business activities of national banks such as ReconTrust are controlled by the NBA, 12 U.S.C. § 1 *et seq.*, and the regulations promulgated thereunder by the OCC. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 9-10, 127 S. Ct. 1559, 167 L. Ed. 2d 389 (2007) (NBA and OCC regulations apply equally to divisions of national banks).

Section 92a of the NBA permits national banks such as ReconTrust to exercise fiduciary powers with the OCC’s approval:

The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefore, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates

⁷ ReconTrust’s status as a national bank is undisputed. *See, e.g.*, CP 2; Br. of App, Appendix D at 1, ¶ 2.1 (stating “ReconTrust is a...nondepository, uninsured, limited purpose national trust bank”). To the extent Leipheimer incorrectly and belatedly attempts to dispute that ReconTrust is a national banking association, Respondents respectfully request that this Court judicially notice the OCC’s national bank list pursuant to ER 201, maintained at <http://www.occ.treas.gov/topics/licensing/national-bank-lists/index-national-bank-lists.html> (last visited October 10, 2011).

of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

12 U.S.C. § 92a(a). The OCC's implementing regulations state in pertinent part:

(a) *Acting in a fiduciary capacity in more than one state.* Pursuant to 12 U.S.C. 92a and this section, a national bank may act in a fiduciary capacity in any state. If a national bank acts, or proposes to act, in a fiduciary capacity in a particular state, the bank may act in the following specific capacities:

(1) Any of the eight fiduciary capacities expressly listed in 12 U.S.C. 92a(a), unless the state prohibits its own state banks, trust companies, and other corporations that compete with national banks in that state from acting in that capacity; and

(2) Any other fiduciary capacity the state permits for its own state banks, trust companies, or other corporations that compete with national banks in that state.

(b) *Serving customers in other states.* While acting in a fiduciary capacity in one state, a national bank may market its fiduciary services to, and act as fiduciary for, customers located in any state, and it may act as fiduciary for relationships that include property located in other states. The bank may use a trust representative office for this purpose.

12 C.F.R. § 9.7(a), (b) (italics in original).

Under the OCC's regulations, "[e]xcept for the state laws made applicable to national banks by virtue of 12 U.S.C. 92a, state laws limiting or establishing preconditions on the exercise of fiduciary powers are not applicable to national banks." 12 C.F.R. § 9.7(e)(2). The state laws

applicable to a national bank's fiduciary duties by virtue of 12 U.S.C. § 92a are the "laws of the state in which the bank acts in a fiduciary capacity." 12 C.F.R. § 9.7(e)(1). A bank "acts in a fiduciary capacity" in the state in which it accepts its fiduciary appointment, executes the documents that create the fiduciary relationship, and makes discretionary decisions regarding the investment or distribution of fiduciary assets. 12 C.F.R. § 9.7(d).

ReconTrust processes Washington foreclosures at its California offices, and it does not maintain an office in Washington (except for its registered agent). Here, ReconTrust executed the Notice of Trustee Sale in California. CP 353. There can be no dispute that the state in which ReconTrust acted in its fiduciary capacity is California.

Thus, California law, not Washington law, governs the scope of ReconTrust's fiduciary powers in this case. *See* 12 C.F.R. § 9.7(d)-(e). Nothing in California's nonjudicial foreclosure statutory scheme prevents a national banking association such as ReconTrust from acting as a trustee and exercising a power of sale granted under a Deed of Trust. *See* Cal. Civ. Code §§ 2924-2924l; 2932 ("A power of sale may be conferred by a mortgage upon the mortgagee or any other person, to be exercised after a breach of the obligation for which the mortgage is a security"); *Nguyen v.*

Calhoun, 105 Cal. App. 4th 428, 438, 129 Cal. Rptr.2d 436, 445 (2003).⁸

Thus, under federal law ReconTrust may process Washington foreclosures from its offices in California without regard to Washington's physical presence requirements.

Moreover, 12 C.F.R. § 7.4009, states in pertinent part:

(a) Authority of national banks. A national bank may exercise all powers authorized to it under Federal law, including conducting any activity that is part of, or incidental to, the business or banking, subject, to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any applicable Federal law.

(b) Applicability of state law. Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its powers to conduct activities authorized under Federal law do not apply to national banks.

In its Interpretive Letter No. 866, dated October 8, 1999, the OCC stated the following when addressing the ability of a Michigan-based national bank to engage in fiduciary activities from its Michigan office:

Once a national bank is authorized under section 92a to act in a fiduciary capacity, section 92a imposes no limitations on where the bank may market its services or where the bank's fiduciary customers may be located.

* * *

Illustrative of the types of laws that you believe are preempted is a statute in Utah that completely prohibits the Bank from engaging

⁸ Washington's DOTA expressly authorizes domestic corporations, title insurance companies, Washington attorneys, Washington professional corporations, partnerships, limited liability companies and other entities to serve as trustees. *See* RCW 61.24.010(1)(a)-(e). Notably, the DOTA also expressly allows national banks to serve as trustees. RCW 61.24.010(1)(f).

in fiduciary activities. A statute in Virginia prohibits a common way of doing trust business (i.e., soliciting business and acting as a trustee without having an office in the state). Statutes in Virginia, Wisconsin, New Jersey, and Minnesota impose a reciprocity condition on an out-of-state bank's authority to conduct trust business in the state or to have trust offices in the state. Statutes in Wisconsin and Minnesota could have the effect of prohibiting an out-of-state bank from using trust representative offices to conduct its trust business in those states. To the extent that these statutes conflict with the authority to engage in fiduciary activities under section 92a, they are, in our opinion, preempted.

Similarly, state laws that would require the Bank to obtain a certificate of authority, approval, or other license requirement from the state before soliciting and engaging in the proposed trust arrangements with customers in those states conflict with the Bank's federal authority under section 92a, and so are preempted. If a national bank is authorized under federal law to exercise a granted power, it does not require; the additional permission of a state to exercise that power. To conclude otherwise would run counter to the paramount authority of the federal government over national banks, including the OCC's exclusive visitorial power over national banks.

* * *

In summary, the Bank, which is authorized to exercise fiduciary powers through its offices in Michigan, is authorized under section 92a to market its services as trustee to, and act as trustee for, customers residing in other states. The Bank may also maintain trust, representative offices in those other states. State laws that prohibit or restrict the Bank, from exercising its federal powers to act as trustee, to solicit trust business, and to maintain trust representative offices, or that require state approval or license to do so, or that impose securities pledging requirements in addition to those imposed by section 92a conflict with federal law and are preempted by section 92a.

OCC Interpretive Letter No. 866, dated October 8, 1999 (Emphasis added). Furthermore, in *Watters*, the United States Supreme Court held

that licensing and registration requirements are preempted for national banks and their operating subsidiaries. In broadly addressing preemption for national banks the Supreme Court in *Watters* stated:

We have “interpreted grants of both enumerated and incidental ‘powers’ to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law.” *Barnett Bank of Marion Cty., N. A. v. Nelson*, 517 U.S. 25, 32, 116 S. Ct. 1103, 134 L. Ed. 2d 237 (1996). *See also Franklin Nat. Bank of Franklin Square v. New York*, 34 U.S. 373, 375-379, 4 S. Ct. 550, 98 L. Ed. 767 (1954). States are permitted to regulate the activities of national banks where doing so does not prevent, or significantly interfere with the national bank’s or the national bank regulator’s exercise of its powers. But when state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State’s regulations must give way.

Watters, 550 U.S. at 12. In specifically addressing preemption of state registration and licensing requirements, the Supreme Court in *Watters* said:

While conceding that Michigan’s licensing, registration, and inspection requirements cannot be applied to national banks, *see, e.g.*, Brief for Petitioner 10, 12, *Watters* argues that the State’s regulatory regime survives preemption with respect to national banks’ operating subsidiaries. Because such subsidiaries are separately chartered, under some State’s law, *Watters* characterizes them simply as “affiliates” of national banks, and contends that even though they are subject to OCC’s superintendence, they are also subject to multistate control. *Id.*, at 11-22. We disagree.

Id., at 15.

The OCC’s interpretation of the regulations set forth in 12 C.F.R. Part 9 in similar cases confirms that the physical presence requirements in Washington’s DTA do not apply to ReconTrust. *See, e.g.*, OCC Interpretive Letter No. 1106 (October 10, 2008) (national bank authorized

to conduct fiduciary duties in Georgia and South Carolina notwithstanding state law that purported to require a physical presence in state); OCC Interpretive Letter No. 973 (August 12, 2003) (confirming that a national bank's trust powers are governed by federal law and derive from 12 U.S.C. § 92a and 12 C.F.R. Part 9); OCC Corporate Decision 98-16, 99 OCC QJ LEXIS 22 (March 4, 1998) (Missouri statutes prohibiting an out-of-state national bank from exercising fiduciary powers in Missouri are preempted); OCC Corporate Decision 97-33, 98 OCC QJ LEXIS 6 (June 1, 1997) (same for Wisconsin). Accordingly, the physical presence and other requirements of RCW 61.24.030(6), are preempted with respect to ReconTrust because, if applied, these requirements would limit or precondition the exercise of its powers as successor trustee, in direct contravention of 12 C.F.R. § 9.7(e)(2). Plaintiffs' claim regarding any violation of a physical presence requirement therefore should be dismissed

e. The Court Should Not Consider Leipheimer's Argument That ReconTrust's Status as a "Subsidiary" of Bank of America Prevents It From Serving as a Foreclosure Trustee, but if It Does, It Should Reject It. Leipheimer's apparent argument that ReconTrust cannot serve as trustee because it is a "subsidiary" of Bank of America is also improperly raised for the first time on appeal and the Court should not

consider it. *See* CP 1-8; 298-323; Br. of App. at 24. In any event, the argument is without merit.

Although the DTA states that “the trustee ... has a duty of good faith to the borrower, beneficiary, and grantor,” it makes clear that the trustee does not owe the grantor of a deed of trust a fiduciary duty. RCW 61.24.010(3), (4) (the trustee “shall have no fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust”). Additionally, case law and statutory authority clearly permit an agent of the beneficiary to act as trustee. *Cox v. Helenius*, 103 Wn.2d 383, 390, 693 P.2d 683 (1985) (“the Legislature specifically amended the statute in 1975 **to allow an employee, agent or subsidiary** of a beneficiary to also be a trustee”) (citing Laws of 1975, 1st Ex. Sess., ch. 129, § 2) (emphasis added); *Meyers Way Development Ltd. Partnership*, 80 Wash. App. 655, 666, 910 P.2d 1308 (1996) (nothing prevents a trustee from “serving simultaneously as the creditor’s attorney, agent, employee or subsidiary”).

D. The Trial Court Properly Dismissed Leipheimer's FDCPA Claims.⁹

Congress enacted the FDCPA “to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.” 15 U.S.C. § 1692(e). In furtherance of this goal, the FDCPA requires and prohibits certain activities by “debt collectors” that are done “in connection with the collection of any debt.” 15 U.S.C. §§ 1692c (prohibits certain communications), 1692d (prohibits harassment or abuse), 1692e (prohibits false or misleading representations), 1692f (prohibits unfair practices) & 1692g (requiring validation of debts).¹⁰

⁹ In his Complaint, Leipheimer attempted to state FDCPA claims against only ReconTrust, Countrywide, and BANA. CP 5. On appeal however, Leipheimer abandons his FDCPA claim against Countrywide and impermissibly attempts to assert a new FDCPA claim against MERS. Br. of App. 24. This Court should therefore only consider Leipheimer's claims against BANA and ReconTrust. If, however, the Court chooses to consider an FDCPA claim against either MERS or Countrywide, the law is clear that Leipheimer cannot state a claim against either of these parties. It is undisputed that Countrywide was Leipheimer's original creditor and is therefore exempt from the FDCPA. See CP 3; 10; 15 U.S.C. § 1692a(6), (6)(F). MERS also does not meet the definition of “debt collector” for FDCPA purposes. *Stewart v. Mortgage Electronic Registration System*, 2010 WL 1054384, at *9 (D. Or. 2010).

¹⁰ Respondents note that the Notices of Default and Sale contain statements identifying them as attempts to collect a debt. See CP 24-25; 33. However, such statements “do[] not automatically trigger the protections [of the] FCDPA, just as the absence of such language does not have dispositive significance.” *Gburek v. Litton Loan Servicing, LP*, 614 F.3d 380, 386 n. 3 (7th Cir.2010) (citing *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 400 (6th Cir.1998)).

Here, Leipheimer alleges that BANA and ReconTrust¹¹ violated 15 U.S.C. §§ 1692e and 1692f(6). CP 5. The former subsection prohibits a “debt collector” from using a “false, deceptive, or misleading representation or means in connection with the collection of a debt.” 15 U.S.C. § 1692e. The latter prohibits, in pertinent part, “[t]aking or threatening to take any nonjudicial action to effect dispossession ... of property if ... there is no present right to possession of the property claimed as collateral through an enforceable security interest.” 15 U.S.C. § 1692f(6)(A). For the following reasons, Leipheimer cannot state an FDCPA claim against ReconTrust, BANA or any other Respondent under either of these subsections.

1. Leipheimer Cannot State an FDCPA Claim Based on § 1692(e) Because the Conduct of Nonjudicial Foreclosure Proceedings Does Not Constitute Debt Collection for Purposes of that Subsection of the FDCPA. The FDCPA does not apply to parties who are not “debt collectors” within the meaning of the Act. *Reed v. Am. Honda Finance Corp.*, 2005 WL 1398214, 3 (D. Or., June 10, 2005). A “debt collector” under the FDCPA is “any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of

¹¹ Respondents acknowledge that Leipheimer attempts to assert FDCPA arguments against MERS as well, but an FDCPA claim against MERS was not part of his complaint below and such a claim fails as a matter of law.

which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.” 15 U.S.C. § 1692a(6). The statute also specifically excludes from the definition of “debt collector:”

[A]ny person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts.

15 U.S.C. § 1692a(6)(B). Loan servicers such as BANA and the original lender are typically exempt from the definition of “debt collector.” *See Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir.1985) (holding that FDCPA's definition of debt collector “does not include the consumer’s creditors, a mortgage servicing company, or any assignee of the debt, so long as the debt was not in default at the time it was assigned.”); *see also Montgomery v. Huntington Bank*, 346 F.3d 693, 698 (6th Cir. 2003); *LAL v. Am. Home Serv.*, 680 F. Supp. 2d 1218, 1224 (E.D. Cal. 2010); *Nool v. Homeq Servicing*, 653 F.Supp.2d 1047 (E.D. Cal. 2009).

Here, Leipheimer alleges that he obtained the loan at issue in January 2006 and acknowledges the default referred to in a Notice of Default dated May 20, 2009. CP 3. Leipheimer’s pleadings are, however, completely devoid of the necessary allegation that he had defaulted on his loan before BANA began servicing it, and his FDCPA claim against

BANA was properly dismissed for this reason alone. *See, e.g., Reynoso v. Paul Fin., LLC*, No. 09-3225, 2009 WL 3833298, at *10 (N.D. Cal. 2009) (dismissing FDCPA claim because loan servicer was not a “debt collector” and plaintiff failed to allege when servicer began its relationship with the loan.); *Pineda v. Saxon Mortgage Servicing, Inc.*, No. SACV 08-1187, 2008 WL 5187813, at *3 (C.D. Cal. 2008) (holding that a plaintiff’s FDCPA claim against servicer failed because it was not a “debt collector” and the plaintiff failed to allege that the debt was in default at the time it was assigned to servicer).

Moreover, although the “Ninth Circuit Court of Appeals has not decided the issue, the majority of district courts in [the Ninth] Circuit hold that the FDCPA does not apply to the enforcement of a security interest such as a non-judicial foreclosure proceeding. *Armacost v. HSBC Bank USA*, 2011 WL 825151 (D. Idaho 2011), at *4 (citing, *inter alia*, *Hulse v. Ocwen Federal Bank, FSB*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002); *Izenberg v. ETS Servs., LLC*, 589 F. Supp. 2d 1193, 1999 (C.D. Cal. 2008); *Mansour v. Cal-Western Reconveyance Corp.*, 618 F. Supp. 2d 1178, 1182 (D. Ariz. 2009)); *see also Thepvongsa v. Regional Trustee Services Corp.* 2011 WL 307364, at *8 (W.D. Wash. 2011) *Hamilton v. U.S. Bank, N.A.*, No. 11-CV-977 DMS, 2011 U.S. Dist. LEXIS 88140 (S.D. Cal. Aug. 8,

2011) *12-13 (“the FDCPA does not apply to collection efforts related to mortgage loans and the nonjudicial foreclosure process”).¹²

Thus, the proper view is that “initiating nonjudicial foreclosure proceedings by filing notices of default and filing notices of trustee’s sale does not constitute debt collection activity within the scope of § 1692e.” *Gwin v. Pacific Coast Financial Services* 2010 WL 1691567, at *6 (S.D. Cal. 2010). In *Hulse*, the Court held that foreclosing on real property pursuant to a deed of trust was not the collection of a “debt” within the meaning of FDCPA, reasoning as follows:

Foreclosing on a trust deed is distinct from the collection of the obligation to pay money. The FDCPA is intended to curtail objectionable acts occurring in the process of collecting funds from a debtor. But, foreclosing on a trust deed is an entirely different path. Payment of funds is not the object of the foreclosure action. Rather, the lender is foreclosing its interest in the property.

Id. at 1204. Accordingly, the district court in *Hulse* held that the plaintiff could not maintain a claim under the FDCPA “based on alleged actions made in pursuit of the actual foreclosure.” *Id.* Thus, it is proper to conclude under *Hulse* and its progeny that nonjudicial foreclosure activity

¹² *But see Allen v. United Financial Mortgage Corp.*, 2010 WL 1135787 (N.D.Cal. 2010) (noting disagreement among courts and declining to dismiss claim for FDCPA on motion to dismiss where defendant failed to acknowledge or address contrary position); *Albers v. Nationstar Mortg. LLC* 2011 WL 43584, 2 (E.D.Wash.) (E.D. Wash. 2011) (declining to follow *Hulse* where plaintiff alleged defendant began servicing loan after default and took the position that the loan was in default despite plaintiff’s tender of funds).

does not fall within the ambit of subsections 1692(e) or (f)(1) of the FDCPA.¹³

2. Even if Subsection § 1692f(6) of the FDCPA Applies to the Initiation of Nonjudicial Foreclosure Proceedings, Leipheimer Has Not Pled a Viable Claim. When evaluating a borrower's FDCPA claim in the context of nonjudicial foreclosure proceedings, some decisions distinguish between claims based on §§ 1692(e) or (f)(1) from those based on § 1692(f)(6) of the FDCPA. *See, e.g., Armacost*, 2011 WL 825151, at *6; *Montgomery v. Huntington Bank*, 346 F.3d 693, 700-01 (6th Cir. 2003) (stating that "except for purposes of § 1692f(6), an enforcer of a security interest ... does not meet the statutory definition of a debt collector under the FDCPA"). This subsection prohibits taking or threatening to take any nonjudicial action to effect dispossession of property if there is no present right to possession of the property claimed as collateral through an enforceable security interest. 15 U.S.C. § 1692f(6)(A). Respondents do not concede that a trustee's sale and related acts automatically fall within the ambit of 15 U.S.C. § 1692f(6), but assuming that they do, Leipheimer still has not stated a valid claim under this subsection of the FDCPA.

¹³ Leipheimer's reliance on *Wilson v. Draper & Goldberg P.L.L.C.*, 443 F.3d 373 (4th Cir.2006) is misplaced because in that case, the foreclosure-related conduct alleged to have violated the FDCPA was a letter from an attorney to the debtor demanding payment. In dispositive contrast, under the majority view, "filing a notice of default or filing a notice of trustee's sale does not amount to debt collection actionable under § 1692e." *Gwin*, 2010 WL 1691567, at *6.

..

First, when he signed the Deed of Trust, Leipheimer granted to the original and any properly appointed successor trustee legal title to the Property and an irrevocable power to sell the Property if he defaulted. CP 11. There is no dispute Leipheimer defaulted. CP 4, 22-25. Because ReconTrust and the beneficiary for whom it acted had present right to enforce the deed of trust and sell or obtain possession of the Property, Leipheimer cannot show the absence of a “present right to possession” required for a claim under 15 U.S.C. § 1692(f)(6).

Second, as is the case with each of his other causes of action, Leipheimer’s FDCPA claim is based on his underlying legal theory that MERS cannot serve as a nominee beneficiary of Deeds of Trust under the DTA and that, as consequence, ReconTrust cannot be a valid foreclosure trustee. *See* CP 5; Br. of App. 24-26. For all of the reasons set forth above, this legal theory is without merit. As such, it cannot serve as the basis for any type of FDCPA claim against any Respondent. Moreover, Leipheimer fails to allege any facts demonstrating how Respondents’ actions rose to the level of an FDCPA violation. *See Reese v. JPMorgan Chase & Co.*, 686 F. Supp. 2d 1291, 1309 (S.D. Fla. 2009) (dismissing FDCPA claim with prejudice where plaintiff failed to “plead sufficient facts to show how the alleged misconduct was unfair or unconscionable”).

E. The Trial Court Properly Granted Defendants' Motion to Dismiss Because the Complaint Fails to Allege Facts That Support the Elements of a CPA Violation.

A CPA plaintiff must allege, with sufficient factual support, conduct by the defendant that was: (1) unfair or deceptive, (2) occurred in trade or commerce, (3) impacted the public interest, and (4) caused (5) injury to the plaintiff's business or property. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). The failure to establish even one of these elements is fatal to a plaintiff's claim. *Id.* at 793. To establish the unfair or deceptive act or practice element of a private CPA claim, a plaintiff must show that the act or practice in question has the capacity to deceive a substantial portion of the public. *Burns v. McClinton*, 135 Wn. App. 285, 302, 143 P.3d 630 (2006) (accountant's longstanding practice of charging client more than agreed-upon fee not capable of deceiving substantial portion of the public). Whether a defendant's conduct is an unfair or deceptive act or practice is a question of law. *Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 438, 40 P.3d 1206 (2002). Leipheimer's Complaint fails to allege facts that could satisfy each of these elements, making it proper for the trial court to dismiss the WCPA claims.

Leipheimer's Complaint alleges that ReconTrust, Land Safe, MERS, and Countrywide violated the CPA by "recording and relying

upon” documents that those entities “knew or should have known to be false that have the capacity to deceive a substantial portion of the public.” CP 4. However, the alleged falsity of such documents stems solely from the faulty argument that MERS could not appoint ReconTrust as successor trustee. *See* CP 3-4 (alleging that MERS “never owned the debt secured by the Deed of Trust” and thus ReconTrust “was not effectively or properly acting as foreclosing trustee” when it executed the Notice of Trustee’s Sale). Moreover, although the Complaint alleges generally that Leipheimer “suffered injury,” the Complaint fails to allege how the Defendants’ alleged actions *caused* such injuries.

Leipheimer’s Complaint also alleges that Countrywide and BANA¹⁴ fraudulently induced him to “expend time and fees to pursue loan modification” when Countrywide and BANA “possessed information and inflexible criteria precluding any such modification.” CP 5. These allegations, even if true, do not give rise to a duty on the part of any Defendant to extend Plaintiff a loan modification. *See Badgett v. Security State Bank*, 116 Wn.2d 563, 572, 807 P.2d (1991) (implied duty of good faith and fair dealing does not give rise to duty by Bank to consider borrower’s proposal to restructure loan). For these reasons, Leipheimer’s

¹⁴ As explained above, the Revised Appellant’s Brief only argues that ReconTrust, BANA, and MERS violated the CPA. Thus, the CPA claims against LandSafe and Countrywide must be considered abandoned and their dismissal must be affirmed. *See Huebner*, 38 Wn. App. at 73.

Complaint failed to state a CPA cause of action and the trial court's dismissal of this claim was proper.

F. The Trial Court Properly Dismissed Leipheimer's Quiet Title Claim Because He Cannot Show That He Satisfied the Obligation Secured by the Deed of Trust.

In an action to quiet title, the plaintiff must plead and allege facts that would entitle him or her to the sought-after property interests. Indeed, it is a statutory requirement for quiet title actions. RCW 7.28.120 ("The plaintiff in such action shall set forth in his complaint the nature of his estate, claim or title to the property, ..."). It is well settled in Washington law that "[t]he plaintiff in an action to quiet title must succeed on the strength of his own title and not on the weakness of his adversary." *Desimone v. Spence*, 51 Wn.2d 412, 415, 318 P.2d 959 (1957); *see also Wash. State Grange v. Brandt*, 136 Wn. App. 138, 153, 148 P.3d 1069 (2006). To maintain a quiet title action against a mortgagee, a plaintiff must first pay the outstanding debt on which the subject mortgage is based. *See Evans v. BAC Home Loans Servicing LP*, No. CV-10-0656-RSM, 2010 WL 5138394, at *3 (W.D. Wash. 2010) ("Plaintiffs cannot assert an action to quiet title against a purported lender without demonstrating they have satisfied their obligations under the Deed of Trust."). In *Evans*, Judge Martinez explained why a plaintiff may not use a quiet title action to void a lien:

The logic of such a rule is overwhelming. Under a deed of trust, a borrower's lender is entitled to invoke a power of sale if the borrower defaults on its loan obligations. As a result, the borrower's right to the subject property is contingent upon the borrower's satisfaction of loan obligations... it would be unreasonable to allow a borrower to bring an action to quiet title against its lender without alleging satisfaction of those loan obligations.

Id., at *4. This approach is also consistent with Washington's Deed of Trust Act, under which a property subject to a deed of trust is only to be reconveyed upon the request of the beneficiary or full satisfaction of the obligation secured. *See* RCW 61.24.110. Here, because Leipheimer admits that he has not satisfied his obligation to repay his loan, he cannot state a claim for quiet title and the trial court properly dismissed it.

Leipheimer also attempts to argue that an assignment of the Deed of Trust, dated August 25, 2010¹⁵, "segregates" the Note from the Deed of Trust and "renders the subject Deed of Trust a nullity." *Rev. App. Br.*, p. 38. Like his other arguments, this argument is contingent on a finding that MERS is an improper beneficiary, and it fails because the facts alleged in the Complaint and the law do not support it.

Additionally, as he states it in his Complaint, Leipheimer's claim for quiet title is contingent on the success of his other causes of action. Because his other purported causes of action, as alleged in the Complaint,

¹⁵ As argued above, this Assignment of Deed of Trust was not part of the record before the trial court and was improperly added as an appendix to the Revised Appellant's Brief. Nonetheless, this Assignment of Deed of Trust does not improve Leipheimer's inadequately pled Complaint and does not support his claim for quiet title.

demonstrably fail to state claims on which he could be entitled to relief, it follows that his Complaint fails to state how he could be entitled to quiet title. Accordingly, it was entirely proper for the trial court to dismiss this cause of action.

G. Leipheimer has Abandoned His Claims for Defamation of Title and for Malicious Prosecution and Certain Statutory Claims, and Improperly Attempts to Argue That New Claims Should Be Considered by the Court.¹⁶

A party’s failure to assign error to or provide argument and citation to authority in support of an assignment of error precludes appellate consideration of an alleged error. *Emmerson v. Weilep*, 126 Wn. App. 930, 940, 110 P.3d 214, 218 (2005). And this Court typically “will not

¹⁶ The following table identifies the causes of action Leipheimer has abandoned, those which he improperly attempts to state for the first time on appeal, and those claims that remain at issue on appeal:

Cause of Action	Asserted in Complaint Against	Argued on Appeal	At Issue on Appeal
CPA	All Defendants	ReconTrust, BANA, MERS	ReconTrust, BANA, MERS
FDCPA	ReconTrust, BANA, Countrywide,	ReconTrust, BANA, MERS	ReconTrust, BANA
Defamation of Title	ReconTrust, MERS, Countrywide	<i>Not Appealed</i>	<i>None</i>
Malicious Prosecution	ReconTrust, MERS, BANA, Countrywide	<i>Not Appealed</i>	<i>None</i>
Wrongful Foreclosure	ReconTrust, MERS	ReconTrust, MERS, BANA	ReconTrust, MERS
Quiet Title	MERS and “several defendants”	MERS	MERS

review an issue, theory or argument not presented at the trial court level.”
Demelash v. Ross Stores, Inc. 105 Wn. App. 508, 527, 20 P.3d 447
(2001). *See also* RAP 2.5(a).

Leipheimer does not assign error to the trial court’s dismissal of his defamation of title and malicious prosecution causes of action, nor does he argue them in his brief. *See* Br. of App. at 6. Thus, because the dismissal of the defamation of title claims and malicious prosecution claims are uncontested, they should be considered abandoned, and their dismissal affirmed. Additionally, Leipheimer does not contest and has waived appeal of the dismissal of the CPA cause of action against Countrywide and Land Safe, and such claims should also be considered abandoned and their dismissal affirmed. *See Huebner v. Sales Promotion, Inc.*, 38 Wn. App. 66, 73, 684 P.2d 752 (1984) (deeming claims not argued in appellate brief to be “abandoned”). Finally, Leipheimer’s appellate brief fails to identify the dismissal of the FDCPA claim against Countrywide as an error. Thus, Leipheimer does not contest and has waived appeal of the dismissal of the FDCPA claim against Countrywide, so it must be considered abandoned and the dismissal confirmed. *Id.*

Leipheimer’s appellate brief also improperly adds claims not made in the Complaint. First, his Complaint alleges violation of the FDCPA by ReconTrust, Countrywide, and BANA; but his appellate brief alleges for

the first time that MERS also violated the FDCPA. This new allegation against MERS is improper because claims not raised in the trial court will not be considered on appeal. RAP 2.5(a). Second, his Complaint alleges wrongful foreclosure against ReconTrust and MERS; but his appellate brief also alleges for the first time wrongful foreclosure against BANA. This new allegation against BANA is improper because Leipheimer raises it for the first time on appeal. *Id.*

In the event the Court wishes to examine the dismissal of the defamation of title claim, it is clear that it was inadequately pled in the Complaint. A defamation claim requires: (1) a statement, (2) made by the defendant, (3) falsity of the statement, (4) lack of privilege, (5) fault on the part of the defendant, and (6) the statement proximately caused damages. *Kauzlarich v. Yarborough*, 105 Wn. App. 632, 641, 20 P.3d 946 (2001). Leipheimer's Complaint simply fails to allege facts that support these elements.

Leipheimer's Complaint asserts merely that ReconTrust made a "false and defamatory" statement against the title to the Property by recording and publishing the Notice of Trustee's Sale "when it had no legal right to do so." CP 6. First and foremost, this Notice is no longer operative. Moreover, Leipheimer fails to establish any allegedly false statements made in that Notice. The Notice merely states that the

“Beneficiary alleges default of the Deed of Trust” and that the Property “will be sold to satisfy the expense of the sale and the obligation secured by the Deed of Trust as provided by statute.” CP 23. Leipheimer does not dispute that he was in default on his loan payments. Further, the Notice contains no statement regarding the Trustee’s ability to sell the property. In fact, the Notice states that “[a]nyone having any objections to the sale on any grounds whatsoever” may be heard upon bringing a lawsuit to restrain the sale. CP 24.

To the extent that the Notice could be interpreted as a “statement” that the Trustee has the legal right to sell the property, Leipheimer’s Complaint fails to establish any basis for the falsity of that statement. As explained above, MERS legally qualifies as the nominee beneficiary under the Deed of Trust, and as such, it was entitled to appoint ReconTrust as successor trustee. Therefore, any statement regarding ReconTrust’s ability to foreclose cannot be false as a matter of law, and Leipheimer’s cause of action for defamation was properly dismissed for failure to state a claim.

Finally, because Leipheimer fails to assign error and argue against the trial court’s dismissal of his claim for malicious prosecution, it must be considered abandoned and its dismissal should be affirmed. *See Huebner*, 38 Wn. App. at 73. In the event the Court wishes to examine the dismissal of the malicious prosecution claim, a simple analysis demonstrates that it was

inadequately pled in the Complaint. To successfully state a claim for malicious prosecution in a civil case, a plaintiff must allege the following seven elements:

(1) that the prosecution claimed to have been malicious was instituted or continued by the defendant; (2) that there was want of probable cause for the institution or continuation of the prosecution; (3) that the proceedings were instituted or continued through malice; (4) that the proceedings terminated on the merits in favor of the plaintiff, or were abandoned; (5) that the plaintiff suffered injury or damage as a result of the prosecution; ... (6) arrest or seizure of property; and (7) special injury (meaning injury which would not necessarily result from similar causes of action).

Clark v. Baines, 150 Wn.2d 905, 911–912, 84 P.3d 245 (2004) (citations omitted); *see also* 16A Washington Practice, § 21.2 (setting forth malicious prosecution elements). Leipheimer’s malicious prosecution cause of action is fatally flawed because his Complaint failed to allege any underlying factual allegations about Defendants that, if true, would be sufficient to establish each of these elements. For example, the Complaint does not allege any facts by which the a court could infer that Defendants acted with malice toward Leipheimer, and the Complaint does not allege that any proceedings have ended in Leipheimer’s favor or been abandoned. In addition, the Complaint contains no allegation that any Defendant could (or did) cause Leipheimer a “special” injury (i.e., one he would not normally have sustained in an action of this type). Even assuming for purposes of a motion to dismiss that the Complaint correctly

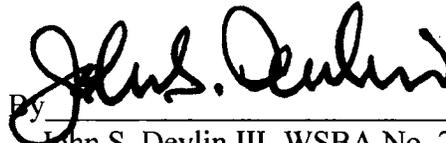
asserts damage to Leipheimer's reputation and ability to negotiate with others, such an injury falls within the realm of injury that one would normally suffer from an improper foreclosure process. Accordingly, the trial court properly dismissed the malicious prosecution cause of action.

V. CONCLUSION

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

RESPECTFULLY SUBMITTED this 24TH day of October, 2011.

LANE POWELL PC

By 

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

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2011, I caused to be served a copy of the foregoing on the following person(s) in the manner indicated below at the following address(es):

Richard Llewelyn Jones	<input type="checkbox"/>	by Electronic Mail
Attorney at Law	<input type="checkbox"/>	by Facsimile Transmission
2050 – 112 th Avenue, N.E., Suite	<input type="checkbox"/>	by First Class Mail
230	<input checked="" type="checkbox"/>	by Hand Delivery
Bellevue, WA 98004	<input type="checkbox"/>	by Overnight Delivery

Signed this 24th day of October, 2011 at Seattle, Washington.


Leah Burrus

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 OCT 24 PM 4:32