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DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

THE BANK OF NEW YORK MELLON, FKA THE BANK OF NEW
YORK AS SUCCESSOR IN INTEREST TO JPMORGAN CHASE
BANK, NA AS TRUSTEE FOR STRUCTURED ASSET MORTGAGE
INVESTMENTS II INC. BEAR STEARNS ALT-A TRUST 2005-9,
MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-9,

Appellant

v.

SCOTTY'S GENERAL CONSTRUCTION, INC., A WASHINGTON
CORPORATION,

Respondent

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(HON. HOLLIS HILL)

REVISED BRIEF OF APPELLANT

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I. INTRODUCTION

This appeal concerns a recorded mortgage that has incontestable priority over a junior construction lien. Appellant the Bank of New York Mellon (BNY Mellon) holds the mortgage. The construction lien was foreclosed in a prior suit brought by respondent Scotty's General Construction, Inc. (Scotty's). BNY Mellon was not a party to the prior suit.

BNY Mellon is appealing from the Civil Rule 12(b)(6) dismissal of its complaint. The complaint seeks a declaratory judgment that the mortgage is first in time and first in right over the construction lien. In response to the suit, Scotty's contends BNY Mellon was bound by the prior suit. Apparently confused by Scotty's smoke and mirrors, the trial court granted a pre-answer dismissal motion. The dismissal was a clear and prejudicial error. There are three black letter rules of substantive law that are dispositive of the issues presented in this appeal.

The first dispositive rule is a foreclosure decree cannot bind a person who has an interest in the property and was not a party to the suit.¹ The rule conclusively applies in this case. BNY Mellon was assigned the mortgage. BNY Mellon was not joined as a party in the quasi in rem foreclosure suit, so it is not bound by the decree. Due process was also

¹*Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 859, 902-03, 251 P.3d 293, 308 (2011); *id.* at 902 & n. 2 (using the more inclusive title, construction liens, for mechanics' and materialmen's liens under Chapter 60.04 RCW).

denied when Scotty's failed to provide to the designated grantee of record notice of the suit.

The second dispositive rule relates to the first-in-time priority under the "race-notice" recording statute and the priority provision of the construction lien statute.² When a mortgage is recorded before the effective date of a construction lien, the mortgage is senior to the construction lien. In this case, the purchase money mortgage was recorded almost two years before the effective date of the construction lien. Therefore, the mortgage is first in time and first in right.

The third dispositive rule is "[a] mortgage having once obtained priority of record does not lose its place by being held by anyone under an unrecorded assignment."³ The mortgage did not lose its priority when it was transferred through the delivery of the note. The governing maxim is: the mortgage follows the note. Washington law has followed this maxim since 1908.⁴ Here, the assignment instrument was recorded four weeks before the judgment was entered in the lien foreclosure suit. The

² *Zervas Group Architects, P.S. v. Bay View Tower LLC*, 161 Wn. App. 322, 325 n. 7, 254 P.3d 895 (2011); RCW 60.04.061 (entitled "Priority of Lien").

³ *Miller v. Am. Savings Bank & Trust Co.*, 119 Wash. 243, 205 P. 388 (1922) ("a mortgage ... passes to the assignee by assignment of the debt without any formal assignment of the mortgage itself," quoting *Jones on Mortgages* (7th ed.), § 525, p. 828).

⁴ *Bartlett Estate Co. v. Fairhaven Land Co.*, 49 Wash. 58, 63, 94 P. 900 (1908); Restatement (Third) of Property, Mortgages § 5.4(a) (1997). See Reporters' Note to "Transfer of the obligation also transfers the mortgage" (citing *Bartlett Estate Co.*, 49 Wash. at 63 (1908)).

mortgage continues to have priority over the construction lien, just as in *Keltch v. Don Hoyt, Inc.*, 4 Wn. App. 580, 583, 483 P.2d 135 (1971).

BNY Mellon has both belt (the note) and suspenders (a formal assignment of the mortgage). With either the note or the assignment, BNY Mellon would have a prima facie claim for declaratory relief. Possessing both, BNY Mellon has an incontestable claim for declaratory relief.

The title records reflect the borrower defaulted on the mortgage. There is a foreclosed construction lien claiming priority over the mortgage. The priority dispute is ripe for declaratory relief. The dismissal was a clear and prejudicial error, which must be reversed. Because priority is an issue of law, BNY Mellon requests this Court to decide that legal issue on appeal to avoid further confusion upon remand.

For the purpose of this brief, the more general term (mortgage) will be used to include a deed of trust.

II. ASSIGNMENT OF ERROR

Assignment of Error

No. 1. Did the trial court err in granting a Civil CR 12(b) (6) dismissal?

Issues Pertaining to the Assignment of Error

No. 1. BNY Mellon holds the mortgage note and the recorded assignment of the mortgage.⁵ Does the holder of the mortgage note and transferee of the mortgage have standing to bring a declaratory action regarding the priority of the mortgage over a junior construction lien?

No. 2. The grantee and trustee of the mortgage were not named as parties in the construction lien foreclosure suit, a quasi in rem action. Is the transferee of the mortgage note and the mortgage bound by the default foreclosure decree?

No. 3. Scotty's failed to provide notice of the suit to the grantee of record for the mortgage, which is a clearinghouse that tracks the transfers of beneficial interests in the mortgage. Did the contractor comply with the due process requirement to provide notice to interested persons whose identities are reasonably ascertainable?

No. 4. The chain of title gave Scotty's constructive notice of the prior recorded mortgage and later of the recorded assignment of the mortgage. Does the assignment take the priority of the mortgage?

No. 5. The mortgage note was transferred to a lender. Does the status of MERS as the mortgage's original beneficiary, acting as the nominee for the lender and the lender's assigns, alter the effectiveness of the mortgage and its priority?

⁵ See Permanent Editorial Board of the UCC Committee Report *Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes* (Nov. 14, 2011) (using term, mortgage note), Appendix L.

No. 6. Scotty's was not involved in any part of the loan/mortgage transaction. Does a party that was not involved in any part of the loan/mortgage transaction have standing to assert a claim challenging the status of MERS as the mortgage's original beneficiary, acting as the nominee for the lender and its assigns?

No. 7. As a matter of law, does the deed of trust assigned to BNY Mellon have priority of record over any interest of Scotty's in Parcel 062205-9036-02?

III. STATEMENT OF THE CASE

When reviewing a 12(b)(6) dismissal, this Court may consider hypothetical facts. *See infra* at page 16. This Court may also take judicial notice of title records and other public records.⁶

Section A and B of the Statement of the Case sets forth how the county recorder's index designates specific grantees/associated names for the instruments at issue in this appeal. There are two parcels at issue. The reporter's index (by parcel number) for Parcel 9056 refers to Scotty's lien, but the index for Parcel 9036 does not refer to Scotty's lien. The latter parcel is the one encumbered by BNY Mellon's mortgage. A subsequent

⁶ *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725-26, 189 P.3d 168 (2008) (stating the general rule but also stating "the trial court may take judicial notice of public documents if their authenticity cannot be reasonably disputed in ruling on a motion to dismiss."); *see also* ER 201(b) (authorizes judicial notice of a fact "not subject to reasonable dispute in that it is ... capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

and separate appeal has been filed regarding the mortgage that WMC Mortgage originated and which encumbers both parcels.

A. When the property owner acquired two parcels, she granted three purchase money mortgages.⁷

The property owner, Gloria Pazooki, acquired two parcels in Kent, Washington.⁸ As part of the purchase of property for \$815,000,⁹ the property owner received three loans totaling \$739,270. The three loans were secured by three mortgages recorded on the same day in June 2005.¹⁰

First, the property owner received a \$321,270 loan from WMC Mortgage Corp secured by a mortgage encumbering both parcels. CP 67-86. The recorder's index lists WMC Mortgage as the associated person.¹¹ That listing satisfies the recorder's statutory duty to list grantees on the recorder's index. RCW 65.04.050 (requiring a recording index); RCW 65.04.015(5) (defining grantor/grantee as "the names of the parties involved in the transaction used to create the recording index.").

⁷ The Restatement (Third) of Property, Mortgages § 7.2 (1997) defines a "purchase money mortgage" as a "mortgage given to a vendor of the real estate or to a third party lender to the extent that the proceeds of the loan are used to: (1) acquire title to the real estate."

⁸ Parcels Nos. 062205-9036 and 062205-9056. The street address is 20541 92nd Ave. S., Kent, WA.

⁹ Instrument No. 20050607001225 (Parcel 9036 for \$440,000) and Instrument No. 20050607000348 (Parcel 9056 for \$375,000).

¹⁰ Instrument No. 20050607000349 (WMC deed of trust), Instrument No. 200506070001227 (MERS deed of trust); Instrument No. 20050607001228 (Central Bank deed of trust). See Def.'s 12(b)(6) Mot. to Dismiss at 3:20-4:24 (describing the parcels and three loans), CP 47-48.

¹¹ The King County recorder's electronic index searched by parcel number for the two parcels is Appendix A to this brief.
www.kingcounty.gov/business/Recorders/RecordsSearch.aspx.

Second, the property owner received a \$352,000 loan from CentralBanc Mortgage Company secured by mortgage encumbering one parcel. (This is the mortgage later assigned to BNY Mellon.) The mortgage names MERS as the beneficiary. CP 5-29, 48, 93-117. The form document is a “Fannie Mae/Freddie Mac Uniform Instrument – MERS.” Deed of Trust’s footer, CP 6. The mortgage at page 2 states: “MERS is a separate corporation that is acting solely as nominee for Lender and Lender’s successors and assigns. **MERS is the beneficiary under this Security Instrument.**” (Bold in original), CP 6. The mortgage’s first page identifies as the “Grantee ... MERS,” satisfying the statutory requirement that the grantee be identified on the first page of an instrument presented for recording. CP 5.¹² The recorder’s index also identifies MERS as the name associated with the mortgage.¹³

Third, the property owner received a \$66,000 junior loan from CentralBanc secured by a mortgage covering one parcel. CP 118-37. The mortgage at page 2 identifies “the Beneficiary, Mortgage Electronic Registration Systems, Inc. (“MERS”), (solely as nominee for Lender, as hereinafter defined, and Lender’s successors and assigns).” CP 119. The recording page, however, identifies as the “Grantee ... CENTRALBANC

¹² RCW 65.04.045(1)(e) (requiring grantee as defined under RCW 65.04.015 to be listed on the first page of the document presented for recording).

¹³ Appendix A.

...” CP 118. The recorder’s index lists CentralBanc as the name associated with the junior mortgage.¹⁴

B. More than four years after the recording of the mortgages, Scotty’s filed a lien foreclosure suit. The suit did not name as a party the grantee or the trustee of the mortgage at issue.

On December 29, 2008, Scotty’s recorded a construction lien. The first page of the lien referred to one parcel (Parcel 9056), but the legal description referred to both parcels.¹⁵ As stated above, the lien is not indexed under Parcel 9036,¹⁶ which is encumbered by BNY Mellon’s mortgage.

The lien claimed work was started in May 2007.¹⁷ In February 2009, Scotty’s sued to foreclose the lien. CP 145-151.¹⁸ Scotty’s did not record a lis pendens, so persons reviewing title records had no notice the lien was perfected through the filing of a lawsuit.¹⁹ The complaint identifies the lien but not particular instruments recorded against the property.²⁰ The complaint names the property owner and her spouse and another couple as defendants. CP 146. The complaint also names WMC Mortgage Corp. and Centralbanc

¹⁴ Compare Appendix A to this brief (index) with Appendix C (second mortgage to CentralBanc).

¹⁵ www.kingcounty.gov/business/Recorders/RecordsSearch.aspx. The lien is Appendix I to this brief.

¹⁶ Appendix A, recorder’s index.

¹⁷ Appendix I; see Def.’s 12(b)(6) Mot. to Dismiss at 4:25-5:19, CP 48-49.

¹⁸ Scotty’s was been paid approximately \$250,000. See Finding Nos. 12-13, Findings of Fact and Conclusions of Law in *Scotty’s v. Pazooki*, King County Case No. 09-2-07414-3, Dkt. No. 31, CP 140.

¹⁹ See Appendix A (recorder’s index for Parcel 9036).

²⁰ Compl. ¶ 4.1 (identifying recording number), CP 34.

as companies claiming interests in the property.²¹ The property owner stated she had insufficient information to answer the allegations regarding Centralbanc's interest in the property.²² The complaint "reserves the right to add additional parties who claim an interest in the real property as those parties become known," but it is uncontested those parties were never added.²³ The complaint does not name MERS, which was listed in the recorder's index as the grantee of the mortgage later assigned to BNY Mellon.²⁴ Nor does the complaint name the mortgage's trustee, Fidelity National Title.²⁵

Although Centralbanc never answered the complaint, Scotty's filed a case management pleading representing all mandatory pleadings had been filed.²⁶

C. Scotty's had constructive notice (if not actual notice) of the assignment of a mortgage to BNY Mellon – more than four weeks before judgment was entered in the foreclosure suit.

After BNY Mellon appealed the dismissal of this suit, WMC moved in the foreclosure suit to vacate the default judgment, which had

²¹ *Id.* ¶¶ 1.4, 1.5, 8.3.

²² Answer ¶¶ 1.5, 8.3, *Scotty's*, Case No. 09-2-07414-3, Dkt. 18 (04/02/2009)

²³ Compl. ¶¶ 1.2-1.6, 8.4, CP 32, 36.

²⁴ *Compare* complaint ¶¶ 1.2-1.6 (*Scotty's* complaint), CP 32, *with* Appendix A (recorder's index).

²⁵ Compl., CP 31; *see* CP 6 (deed of trust identifying Fidelity National Title as the trustee).

²⁶ Case No. 09-2-07414-3, Dkt. 21 (07/17/2009), KCLR 4.2(a)(2); *see also* *Parry v. Windermere Real Estate/East, Inc.*, 102 Wn. App. 920, 925-26, 10 P.3d 506 (2000) (construing prior version of local court rule; ruling party did not waive previously asserted insufficient service of process defense by signing KCLR 4.2(a)(2)).

been entered against it. In response to that motion, Scotty's submitted a letter as evidence in support of the default judgment. That letter is new evidence in this case, where the pre-answer dismissal denied BNY Mellon the opportunity to conduct any discovery.

The letter is dated July 14, 2010 and was sent by Scotty's counsel to the trustee and assignee of the WMC mortgage, Deutsche Bank National Trust Company. Appendix E.²⁷ Scotty's complained that, although it had a recorded lien, Deutsche Bank and its trustee had not given Scotty's notice of the trustee's sale. (That is ironic because this suit arises from Scotty's failure to give notice to MERS and BNY Mellon the foreclosure suit, although they had recorded interests in the property.) Explaining how Scotty's discovered the trustee's sale, counsel for Scotty's stated: "On July 13, 2010, I reviewed the county property records in preparation for trial and discovered that WMC Mortgage Corp.'s interest in the property was assigned to Deutsche Bank National Trust Company on February 22, 2010."²⁸

His letter also refers to the trustee's deed resulting from the foreclosure sale by Deutsche Bank. The trustee's deed was recorded June 25, 2010. CP 284-85 (Trustee's Deed). Four days after the recording of that deed, there was notification in the title record on June 29 of the prior assignment of a mortgage to BNY Mellon in the very same county

²⁷ Jul. 24, 2010 letter, Ex. J to Decl. of Hans P. Juhl in Supp. of Pl.'s Resp. to Def.'s Mot. to Set Aside and Vacate J. (Sept. 21, 2011), Appendix E.

²⁸ *Id.*

records. CP 30, Appendix D. The recorded assignment to BNY Mellon precedes the date of the letter from Scotty's counsel by two weeks. (There is a twenty-four hour lag between recording of a document and when a document is available for on-line viewing. Appendix F.²⁹) In short, when Scotty's reviewed the county's website on July 13, an instrument recorded fourteen days earlier would have been listed – namely the assignment to BNY Mellon, recorded on June 29.

This new evidence implies Scotty's had actual notice of the assignment of one mortgage – Deutsche Bank's mortgage -- and possibly had actual notice of the assignment of the other mortgage – BNY Mellon's mortgage. Once the assignment to BNY Mellon was recorded, Scotty's had notice that Centralbanc did not control the mortgage assigned to BNY Mellon. The declaration signed by Centralbanc's officer is dated July 19, six days after Scotty's review of the county's website and three weeks after the recording of the assignment to BNY Mellon. CP 30 (assignment); CP 344-45 (declaration by Centralbanc's officer).

Scotty's filed the declaration by Centralbanc's officer in its foreclosure suit. The trial court entered a default summary judgment, along with findings and conclusions drafted by Scotty's. J. Summ. And

²⁹Frequently asked questions, How long is the lag between when the document is recorded and when it is available for viewing. [www.kingcounty.gov/business/Recorders/FAQ.](http://www.kingcounty.gov/business/Recorders/FAQ/), Appendix F. *See also* RCW 65.08.070 (“An instrument is deemed recorded the minute it is filed for record.”).

Order on J., CP 38-41; Findings and Conclusions, CP 138-142 (Aug. 2, 2010). Those findings and conclusions make no reference at all to the recorded mortgages, the assignments, or even the recent trustee's deed conveying the property owner's interest in Parcel 9056 to Deutsche Bank. CP 284-85 (Trustee's deed 06/25/2010). The order provided that the Scotty's interest in the property was superior to the interest of all defendants and all parties which claim to have acquired an interest subsequent to May 7, 2007. . . ." CP 40. The judgment authorizes Scotty's to foreclose against "any right, title, and interest acquired by and person subsequent to May 7, 2007." CP 41.

D. BNY Mellon as the holder of the mortgage note and the assignee of the mortgage brought this suit for declaratory relief.

As stated above, the property owner was in default on the purchase money mortgages. Almost five months before the foreclosure judgment, Deutsche Bank caused a notice of trustee's sale for Parcel 9056 to be recorded.³⁰ BNY Mellon initiated a similar process, causing the recording of the assignment of the mortgage for Parcel 9036, Appendix D,³¹ and the notice

³⁰ See Trustee's Deed to Deutsche Bank National Trust Company (Jun. 25, 2010), CP 284-85.

³¹ Assignment of Deed of Trust (Jun. 29, 2010), CP 30.

of trustee's sale. Appendix G. The notice of trustee's sale was recorded eleven days before the default judgment was entered on August 2, 2010.³²

The recording of the trustee's notice of sale carries with it the presumption that the trustee "had proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust" RCW 61.24.030(7)(a) (requiring such proof "before the notice of trustee's sale is recorded, transmitted, or served"). When the property owner did not cure the default, the sale proceeded.³³ After the trustee's sale, the trustee issued a trustee's deed confirming BNY Mellon's possession of the note: "The Bank of New York Mellon ... being then the holder of the indebtedness secured by the Deed of Trust, delivered to said Grantor [the trustee] a written notice directing the Grantor to sell the Property ..." CP 286-87, Appendix H. These recorded documents refer to the history of the mortgage including an interest being placed in a mortgage-backed security in 2005.³⁴

³² Compare (Assignment from MERS to BNY Mellon), Ex. B to complaint, CP 30, with J. Summ. & Order of J., Ex. D to complaint, CP 38-42.

³³ Instrument No. 20101208000741 (Trustee's Deed to BNY Mellon for the sum of \$233,750).

³⁴ BNY Mellon is the successor in interest to JPMorgan Chase Bank, NA as Trustee for Structured Asset Mortgage Investments II Inc. Bear Stearns Alt-A Trust 2005-9, Mortgage Pass-Through Certificates, Series 2005-9 is a matter of record. Assignment of Deed of Trust, CP 30, 342.

Although not in the record below and not required to prove its case, public and business records indicate BNY Mellon held the mortgage note for years. In June 2005, CentralBanc sold the loan to Union Federal of Indianapolis, which was the servicer starting from the first payment. The loan was securitized in September 2005 in mortgaged based security with JP Morgan Chase as trustee. Bank of New York acquired

Six months after the default judgment was entered in the construction lien foreclosure suit, BNY Mellon brought this suit for a judgment declaring that its mortgage is superior to Scotty's interest and other relief. Compl. (attaching as exhibits the mortgage, assignment, complaint, and judgment), CP 1-4.

E. The trial court granted Scotty's pre-answer motion for dismissal.

Scotty's moved for dismissal. CR 45-63. The trial court signed Scotty's proposed order and dismissed the suit with prejudice. CP 442-43. This appeal timely followed. CP 444-46.

As stated above, after this appeal was filed, WMC Mortgage moved in the lien foreclosure suit to vacate the default judgment entered against it. The recorder's index listed WMC Mortgage as the name associated with its mortgage, Appendix A, although the mortgage names MERS as the beneficiary, Appendix J. In response to the motion to vacate, Scotty's raised the same argument it made in this case (MERS never had an interest in the property to convey to Deutsche Bank and was not a required party to foreclose the construction lien), along with other grounds -- WMC was a

JP Morgan Chase's corporate trust business in 2006. The Bank of New York merged with Mellon to become BNY Mellon in 2007. Centralbanc was never the servicer of the loan.

party in the prior suit and had been served.³⁵ The trial court denied the motion to vacate, and WMC timely appealed in early January 2012.³⁶

IV. ARGUMENT

A. Standard of Review.

A trial court's order of dismissal pursuant to CR 12(b)(6) is reviewed de novo. *Dave Robbins Const., LLC v. First Am. Title Co.*, 158 Wn. App. 895, 899, 249 P.3d 625, 626 (2010).

B. The Record Does Not Satisfy the Stringent Standards for a Pre-Answer Dismissal.

Civil Rule 12(b)(6) motions should only be granted "sparingly and with care." *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987) (citation omitted). The Washington court has a "system of notice pleading, which requires only 'a short and plain statement of the claim' and a demand for relief in order to file suit." CR 8(a). Under notice pleading, plaintiffs use the discovery process to uncover the evidence necessary to pursue their claims." *Waples v. Yi*, 169 Wn.2d 152, 159, 234 P.3d 187 (2010) (quoting *Putnam v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 983, 216 P.3d 374 (2009)). Dismissal under CR 12(b)(6) "weeds out complaints where, even if what the plaintiff alleges is true, the law does not provide a remedy." *McCurry*

³⁵ Pl.'s Opp'n to Def. WMC's Mot. to Set Aside Default and Vacate J. at 2:1-26, Case No. 09-2-07414-3, Appendix K.

³⁶ A notice of appeal by WMC Mortgage was recently filed in that case. Dkt. No. 49, Jan. 4, 2012

v. Chevy Chase Bank, FSB, 169 Wn.2d 96, 101, 233 P.3d 861 (2010). But the law does provide a remedy in this case. This is not a case where a claim is clearly barred by the statute of limitations “or the defendant has some other kind of ironclad defense as a matter of law.”³⁷

In *Bravo v. Dolsen*, 125 Wn.2d 745, 888 P.2d 147 (1995), the supreme court reversed a dismissal under Civil Rule 12(b)(6). The court summarized the stringent standards governing such dismissals:

A dismissal for failure to state a claim under CR 12(b)(6) is appropriate only if it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.... CR 12(b)(6) motions should be granted only sparingly and with care.... Any hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff's claim.... Hypothetical facts may be introduced to assist the court in establishing the conceptual backdrop against which the challenge to the legal sufficiency of the claim is considered We have held that in determining whether such facts exist, a court may consider a hypothetical situation asserted by the complaining party, not part of the formal record, including facts alleged for the first time on appellate review of a dismissal under the rule.....

Id. at 750 (citations omitted). Those stringent standards were not satisfied in this case.

If there had been any doubt regarding the sufficiency of the pleading, dismissal should have been denied or an opportunity for leave to

³⁷ 14 Karl B. Tegland *Washington Practice, Civil Procedure* § 12:24 at 494 (2d ed. 2009).

amend should have been granted.³⁸ “Dismissal without leave to amend is improper unless it is clear, upon de novo review that the complaint could not be saved by any amendment.” *Thinket Ink Info Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004).

Because the trial court did not make an oral ruling and did not alter Scotty’s spartan dismissal order, CP 442-43, BNY Mellon is speculating about the grounds for the dismissal.

1. **Three black letter rules of law are dispositive of the issues presented on appeal.** One proposed ground for dismissal was the trial court “should dismiss plaintiff’s claim because the interest it possesses, if any, was properly joined and adjudicated in the underlying action” – meaning in the prior lien foreclosure suit. Reply to Opp’n to Mot. to Dismiss at 4:6-7, CP 440. But this defense is completely meritless, as demonstrated below.

Another proposed ground for dismissal was that BNY Mellon, “standing in the shoes of Centralbanc as the actual holder of any obligation – would be deemed properly joined in the underlying suit” – meaning in the prior lien foreclosure suit. *Id.* at 4:2-6, CP 441. Yet, the recorded instruments, provided to the trial court by Scotty’s, refuted the

³⁸ See 3A Karl B. Teglund *Washington Practice, Rules Practice* CR 12 at (5th ed. 2006) (“The plaintiff should be freely allowed to amend the complaint, in lieu of granting a dismissal, if it appears that by amending the complaint the plaintiff may be able to state a cause of action.” *Id.* (citing CR 15(a) and *Caruso v. Local Union No. 690, Int’l Broth. of Teamsters*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983) (leave should be freely granted).

claim that BNY Mellon is bound by the actions of another lender -- the grantee of a separate mortgage.

As stated in the introduction to this brief, there are three black letter rules of law that are dispositive to this appeal. Those rules are set forth in subsection 1a, 1b, and 1c.

a. A foreclosure decree cannot bind a person who has an interest in the property and was not a party to the suit. The mortgage's grantee of record was not named as a defendant in the foreclosure suit. Therefore, the transferee of the mortgage (BNY Mellon) is not bound by the decree of foreclosure in the prior suit. *See* Pl.'s Resp. to Mot. to Dismiss at 8:16-9:6 (arguing MERS should have been joined in the suit because it had a recorded interest and RCW 60.04.171 does not specify what kind of recorded interest must be joined), CP 302-03.

Scotty's has contended the construction lien foreclosure suit "properly named all parties with an interest in the subject property as required by RCW 60.04.171 and this [second suit] should be dismissed." Def.'s 12(b)(6) Mot. to Dismiss at 13:13-15, CP 57. That argument rests on the false assumption that the prior suit was an in rem action, when it actually was a quasi in rem action affecting only the specific interests joined in the suit.

The construction lien foreclosure suit does not affect the interests of persons who are not joined as parties to the suit. *Diversified Wood Recycling*,

Inc. v. Johnson, 161 Wn. App. 859, 877, 251 P.3d 293, 308 (2011) (Diversified Wood I, as amended Jul. 11, 2011); *Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 891, 903, 251 P.2d 908 (2011) (Diversified Wood II, May 16, 2011). In *Diversified Wood II*, this Court reaffirmed: “Actions to foreclose construction liens are ‘quasi in rem,’ i.e., they determine interests of *certain defendants* in a thing in contrast to a proceeding in rem which determines the interests of all persons in the thing.” 161 Wn.2d at 902 (italics added). BNY Mellon was not one of those “certain defendants,” nor was its specific interest (the mortgage) joined in the suit. Therefore, as a matter of law its interest was not adjudicated. The law regarding the joinder of mortgagees has been clear and consistent since 1991.

In 1991 and 1992, there was “a comprehensive revision of the entire construction lien statute, chapter 60.04 RCW.” *Diversified Wood I*, 161 Wn. App. at 886. RCW 60.04.171 codifies the proposition “recognized in Washington decisions such as *Davis*, that the mortgagee’s interest cannot be affected by a lien foreclosure unless the foreclosing party joins the mortgagee as a party to the foreclosure.” *MB Constr. Co. v. O’Brien Comm. Center Assocs.*, 63 Wn. App. 151, 158, 816 P.2d 1274 (1991) (referring to *Davis v. Bartz*, 65 Wash. 395, 118 P. 334 (1911)). “*Davis* clearly stands for the proposition ... that foreclosure action which omits a mortgagee is void only as to the mortgagee.” 63 Wn. App. at 165.

RCW 60.04.171, entitled Foreclosure—Parties, states in pertinent part:

The court shall have the power to order the sale of the property. *In any action brought to foreclose a lien, the owner shall be joined as a party. The interest in the real property of any person who, prior to the commencement of the action, has a recorded interest in the property, or any part thereof, shall not be foreclosed or affected unless they are joined as a party.*

Diversified Wood I construes the italicized sentence as a “clarification and simplification of” the prior requirement of serving and joining “all necessary parties.” *Diversified Wood I*, 161 Wn. App. at 887-89. The new requirement is to serve merely the property owner with the suit but not necessarily join the owner as a party. *Id.* The former 60.04.120 also required the joinder of other construction lien holders,³⁹ but RCW 60.04.171 omits that requirement as part of the simplification of construction lien proceedings.

Another clarification and simplification is the underlined sentence in RCW 60.04.171 (preventing a “recorded interest ..., or any part thereof” from being “foreclosed or affected ... unless the [party] is joined”). It creates an optional remedy -- a suit *may* include a prior recorded interest but the prior “recorded interest in the property, *or* any part thereof, shall not be foreclosed or affected unless they are joined as a

³⁹ See *MB Constr.*, 63 Wn. App. at 154 (stating former “RCW 60.04.120 mandates the joinder of parties who have prior recorded ‘claims of lien,’” ruling the provision did not resolve whether a mortgagee must be joined, and ruling mortgagee is not a necessary party to the foreclosure suit).

party.” RCW 60.04.171. Construing RCW 60.04.171 in *Diversified Wood II*, this Court ruled: “The consequence of [nonjoinder] is that the aff interest of a person not joined may not be foreclosed or otherwise ected.” 161 Wn. App. at 903.

RCW 60.04.171’s plain terms mandate that BNY Mellon’s “recorded interest” was not affected, because BNY Mellon was not “joined as a party” in the prior suit. RCW 60.04.171. The trustee’s recorded interest was not “affected,” because the trustee was also not “joined as a party.” MERS’ recorded interest was not “affected” (nor was “any part thereof” affected), because MERS also was not “joined as party.” *Id.* The failure to join those three parties meant the prior suit had no legal effect whatsoever on the mortgage at issue. As *Diversified Wood II* observes: “This is consistent with what happens in a judicial foreclosure of a mortgage: Clearly, due process requires a ‘day in court’ before property interests can be extinguished.”⁴⁰ BNY Mellon did not receive its day in court. The lack of joinder and the lack of notice was a denial of due process. The holder of the mortgage note was a necessary party in any action determining rights relating to the security interest (mortgage). Notice was necessary to satisfy the due process

⁴⁰ 161 Wn. App. at 903 (“*Valentine v. Portland Timber & Land Holding Co.*, 15 Wn. App. 124, 128, 547 P.2d 912 cited in 27 Majorie Dick Rombauer, *Wash. Practice: Creditors’ Rights Remedies—Debtors Relief* § 3.2 at 138 n. 7”). *Id.* (citing 18 William B. Stoebuck & John W. Weaver *Wash. Practice., Real Estate Judicial Foreclosure* § 19.2 at 374).

requirement to apprise interested parties of the pendency of the action and their opportunity to be heard.

Due process requires notice be reasonably calculated under all circumstances, which includes notice to interested persons identifiable through “reasonably diligent efforts.”⁴¹ “Washington ... has what is called a ‘grantor-grantee’ index for its recording system. Since indexing will be by names of the parties, it is critical they appear clearly.”⁴² Here, the index specifies MERS as the grantee of record; MERS held legal title to some interest including one for notification and tracking purposes. CP 5, 7.⁴³ In a quasi in rem proceeding “to determine the claims of specifically identified persons,” “[a]t minimum what is required is a mailed notice addressed to the person at his last reasonably discoverable address ...”⁴⁴ But this minimal actual notice was not given to

⁴¹ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950) (“notice reasonably calculated, under all circumstance to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections” is an “elemental and fundamental requirement of due process.”); *id.* (written and mailed notice required to beneficiaries of trust estates where names and addresses were known or could be reasonably ascertained); *Herring v. Texaco, Inc.*, 161 Wn.2d 189, 196-98, 165 P.3d 4 (2007) (regarding notice to known creditors whose identities are reasonably ascertainable through a reasonably diligent search).

⁴² 18 Stoebeck & Weaver, *Washington Practice, Real Estate: Transactions* § 14.6 at 132, 134 (2004).

⁴³ Deed of Trust at page 2 (“DEFINITIONS ... (E) MERS ... is a separate corporation that is acting solely as the nominee for the Lender and Lender’s successors and assigns. MERS is the beneficiary under this Security Agreement.”), CP 6, Appendix A. *Id.* at page 4 (“Borrower understands and agrees that MERS holds only legal title to the interests granted by the Borrower in this Security Agreement, but if necessary to comply with law or custom, MERS (as nominee for Lender and Lender’s successors and assigns) has the right: take any action required of Lender ...”), CP 7.

⁴⁴ Restatement (Second) of Judgments § 6 cmt. a (1982).

MERS.⁴⁵ There was also a separate procedure for notifying other persons with interests in the property (the recording of a lis pendens) which was not followed.⁴⁶

This Court may resolve this appeal on the basis of the statute without reaching the due process issue. “Any person” means “any” in the context of RCW 60.04.171, whose purpose is not to extinguish property interests but merely to “give[] the court some latitude in deciding whether and when to allow joinder of other persons with ... an interest in the same property.” *Diversified Wood I*, 161 Wn. App. at 889. RCW 60.04.171’s broad language protects “any person” who has a recorded interest – including the now transferred interest of MERS, and most certainly the recorded interest of BNY Mellon (with its substantial property interest).⁴⁷ The failure to name them was Scotty’s election/option under the simplified process for the foreclosure of construction liens. If not an election/option, then it was a

⁴⁵ “MERS is a private electronic database, operated by MERSCORP, Inc., that tracks the transfer of the ‘beneficial interest’ in home loans, as well as any changes in loan servicers. After a borrower takes out a home loan, the original lender may sell all or a portion of its beneficial interest in the loan and change loan servicers.” *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1038 (9th Cir. 2011) “If the lenders sells or assigns the beneficial interest of the loan to another MERS member, the change is recorded only in the MERS database, not in the county records, because MERS continues to hold the deed on the new lender’s behalf.” *Id.* at 1039.

⁴⁶ *United Savings & Loan Bank, v. Pallis*, 107 Wn. App. 398, 405, 27 P.3d 629 (2001) (stating “[t]he purpose of lis pendens is to give notice of pending litigation affecting title to real property, and not give notice that anyone who subsequently deals with the affected party will be bound by the outcome of the action to the same extent as if he or she were a party to the action”).

⁴⁷ Courts should be wary of creating a windfall for the mortgagor, or for a third-party like Scotty’s, and the forfeiture of the security. Restatement (Third) of Property, Mortgages § 5.4 cmt. e.

mistake or irregularity in obtaining the judgment. The judgment is void or voidable due to the lack of adequate notice, the misrepresentation regarding joinder and mandatory pleadings.⁴⁸ Alternatively, it is no longer equitable that the judgment should have prospective relief, when the mortgage and grantee was not named in the suit, and there has been no foreclosure sale.

Scotty's likely has been around the block on this same very issue. Over the years, it has recorded more than 50 liens and other instruments in King County.⁴⁹ When the legislature amended the lien statutes, it made a title report a cost recoverable by a prevailing party.⁵⁰ Yet, Scotty's cost application in the prior suit did not seek the compensation for a litigation guaranty as a cost. But its attorney fee application refers to the review of a litigation guaranty and consideration of lien priority issues.⁵¹ The contents of this undisclosed litigation guaranty is likely more evidence that could demonstrate that Scotty's had actual knowledge of the recorded interests that were not joined in the suit.

⁴⁸ *Accord*, CR 60(b)(1), (4), (5), (6), (11) (grounds for relief from judgment or order).

⁴⁹ www.kingcounty.gov/business/Recorders/RecordsSearch.aspx.

⁵⁰ RCW 60.04.181(3) (allowing recovery of "costs of title report ..."); *Wash. Asphalt Co. v. Boyd*, 63 Wn.2d 690, 696-97, 388 P.2d 965 (1964) (reversing award of such costs).

⁵¹ Ex. A to Decl. of Hans P. Juhl in Supp. of Pl.'s Req. for Award of Fees (Aug. 2, 2010) (listing costs); Decl. at 4:1-16 (referring to Deutsche Bank notice of foreclosure sale, and tender of claim to Fidelity); Ex. A to Decl. at 1-2 (Jan. 29, Feb. 6, Feb. 10, Feb. 26, 2009; Apr. 9, 2009 referencing either a guaranty or lien priority issues), Appendix J. *See Diversified Wood II*, 161 Wn. App. at 897 & n. 4 (describing a litigation guarantee and comprehensive title report to ensure all persons and entities with an interest in the property are named in the suit).

Coincidentally, Scotty's counsel is the same construction law firm that prosecuted the *MB Construction* appeal in 1999, which confirmed a mortgagee's interest cannot be foreclosed unless joined as a party to a foreclosure suit.⁵² The dismissal of this case on the ground that the prior suit extinguished the mortgage is not supported by the facts and the decisions going back to *MB Construction*. Therefore, the dismissal should be reversed on the ground that the prior suit did not adjudicate BNY Mellon's interest. There is also a second independent ground for reversal.

b. BNY Mellon has first-in-time priority under the "race-notice" recording statute. An additional ground for reversal of the dismissal is because the mortgage has priority of record over the junior construction lien. A foreclosure sale to satisfy a junior lien will extinguish lesser liens and interests. But such a foreclosure sale will not extinguish a senior mortgage. BNY Mellon has such a senior mortgage and recorded a *lis pendens* to warn potential purchasers of its right. This declaratory suit is necessary to preserve its property right.

BNY Mellon argued below that construction lien was not prior to the recorded mortgage. Pl.'s Resp. to Mot. to Dismiss at 12:2-11, CP 306; Compl. ¶ 10, CP 3. RCW 60.04.061's first-in-time rule of priority requires that when a mortgage is recorded before the effective date of a

⁵² 63 Wn. App. at 152 "Barokas & Martin, ... for petitioner.").

contractor's lien, the mortgage is senior to the contractor's lien. *Zervas Group Architects, P.S. v. Bay View Tower LLC*, 161 Wn. App. 322, 325 n. 7, 254 P.3d 895 (2011) (construing RCW 60.04.061 (entitled "Priority of Lien")). In this case, the purchase money mortgage was recorded almost twenty months before the effective date of the construction lien. Therefore, the mortgage is senior to the construction lien.

RCW 60.04.061 provides:

The claim of lien created by this chapter upon any lot or parcel of land shall be prior to any lien, mortgage, deed of trust, or other encumbrance which attached to the land after or was *unrecorded at the time of commencement of labor or professional services or first delivery of materials or equipment by the lien claimant.*

(Underline and italics added). Its plain terms create the priority of a lien over a deed of trust that is "unrecorded at the time of commencement" of lienable services. RCW 60.04.061 (adding underline). But RCW 60.04.61 does not apply in this case -- there was a recorded deed of trust at the time of commencement of lienable services. Therefore, the construction lien is junior to mortgage. For these reasons, there should be an affirmative ruling in favor of BNY Mellon on the seventh issue presented for review above. Issue No. 7 ("As a matter of law, does the deed of trust held by BNY Mellon have priority of record over any interest

of Scotty's in Parcel 062205-9036-02?).⁵³ The assignment of the mortgage did not forfeit its priority of record.

c. A mortgage's priority of record is not lost when held by an unrecorded assignment. The third dispositive rule in this appeal is "[a] mortgage having once obtained priority of record does not lose its place by being held by anyone under an unrecorded assignment." *Miller v. Am. Savings Bank & Trust Co.*, 119 Wash. 243, 250, 205 P. 388 (1922) (quoting *Jones on Mortgages* (7th ed.), § 525, p. 828). The assignment takes the mortgage's priority of record over the construction lien.

The court of appeals reaffirmed this rule in *Keltch v. Don Hoyt, Inc.*, 4 Wn. App. 580, 583, 483 P.2d 135 (1971): "It is well established that a priority acquired by the recording of a mortgage is not lost because one holds it under an unrecorded assignment." *Id.* (citing *Miller*, 119 Wash. 243 and quoting *Jones on Mortgages*). In *Keltch*, the appellate court held the mortgage was superior to construction liens, even though the original lender assigned the mortgage in an assignment that was not recorded until two years *after* the commencement of the foreclosure suit.

⁵³ See RAP 12.2 ("The appellate court may ... take any other action as the merits of the case and the interests of justice may require.").

Id. at 580-82. The mortgage maintained its superiority even though it covered future advances. *Id.* at 580.⁵⁴

In this case, the assignment also takes the priority of the original mortgage. The confirmatory assignment instrument was recorded fourteen months after the commencement of the suit – a shorter period than in *Keltch*. The same principle of constructive notice to the junior lienholder governs. The recorded mortgage warned about the possible transfer of the note and the consequences of encumbering the property. The assignment takes the mortgage's priority, as in *Keltch* and prior decisions. The junior lienholder cannot leap frog ahead of the senior mortgage.

2. CentralBanc was not a representative of BNY Mellon in the foreclosure suit. Scotty's confabulates a claim that BNY Mellon was bound by something akin to the doctrine of virtual representation addressed in *Diversified Wood II*. 161 Wn. App. at 904-06. But as established *supra* in Section III.C and III.D, the title records conclusively eliminate any possible reasonable inference that Centralbanc somehow represented BNY Mellon. Centralbanc lost any authority over the mortgage, immediately after closing the loan five years earlier, when it transferred the note.

⁵⁴ See also *Liska v. Beckmann*, 168 Wash. 489, 492, 12 P.2d 599 (1932) (ruling mortgage recorded and assigned before mortgagee assigned new mortgage held first lien.) *Id.* at 494 (denying relief as to estoppel).

The declaration by Centralbanc's officer bound only Centralbanc. CP 344-45. If Scotty's goal was to have its suit determine the priority of its lien versus the mortgages against the property, then the officer's statement ("Centralbanc Mortgage Company no longer has an interest in the property") triggered inquiry notice for Scotty's to identify the person to whom Centralbanc's interest had been transferred and when the transfer occurred. With that information, Scotty's could decide whether to join that person in the suit. Also, the statement about Centralbanc's "interest in the property" might have merely referred to the "Second Mortgage" that was indexed with Centralbanc as grantee of record, and which was junior to the mortgage that had been already assigned to BNY Mellon. CP 118 ("Second Mortgage"), CP 30 (Assignment of Deed of Trust). The declaration has no indicia that the statements were made on behalf of BNY Mellon or MERS. The declaration bound only Centralbanc and cannot preclude BNY Mellon from seeking a declaratory judgment on its own behalf in this subsequent suit.

3. **BNY Mellon has incontestable standing to bring this suit.** The fact that the mortgage is a deed of trust does not alter the inevitable conclusion that the prior suit did not bind BNY Mellon and that its mortgage retains priority over the construction lien. "[A] deed of trust is subject to all laws relating to mortgages on real property," and "the parties may insert in such a mortgage any lawful agreement or condition."

RCW 61.24.020;⁵⁵ RCW 61.12.020. Here, the deed of trust names a trustee whose successor was the grantor of a later trustee's deed. CP 5. There had been no reconveyance by the trustee. RCW 61.24.110 (reconveyance "upon satisfaction of the obligation secured and written request for reconveyance made by the beneficiary or other person entitled thereto.").

The form deed of trust's uniform covenants notify anyone reviewing the title that the secured note may be sold and a loan servicer will collect the loan payments.⁵⁶ The mortgage note was transferred to BNY Mellon -- long before the construction lien foreclosure suit was commenced.⁵⁷ With that transfer, BNY Mellon received the right to enforce the note both under the Uniform Commercial Code⁵⁸ and the long-established real property law, previously cited. BNY Mellon as the holder

⁵⁵ *Bank of Am., N.A. v. Prestance Corp.*, 160 Wn.2d 560, 562 n. 1, 160 P.3d 17 (2007) ("[A] deed that contains or is accompanied by an agreement that it shall be cancelled or the land reconveyed upon payment of debt is a mortgage."); *id.* (citing 18 William B. Stoebuck & John W. Weaver, *Washington Practice, Real Estate: Transactions* § 20.2, at 405 (2d ed. 2004)).

⁵⁶ Uniform Covenant 20, Sale of Note, ..., Deed of Trust at page 13, CP 17.

⁵⁷ Trustee's Deed (stating BNY Mellon "being the holder of said indebtedness secured by the Deed of Trust, ..."), CP 286.

⁵⁸ See U.C.C. § 3-203 (Transfer of instruments; rights acquired by transfer), RCW 62A.3-203. "Transfer of an instrument, vests in the transferee any right of the transferor to enforce the instrument" § 3-203(b). Even if a servicer held the note, someone besides Centralbanc who had transferred the note had authority to enforce the note. See Official Comment 1 to UCC § 3-203 ("The right to enforce an instrument and ownership of the instrument are two different concepts."); Permanent Editorial Board of the UCC Committee Report *Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes* at 12-14 (Nov. 14, 2011) (addressing effect of transfer of mortgage note on the mortgage and actions to become assignee of record), Appendix L. *Id.* at 14 (transferee of note automatically has property right in mortgage).

of the note had rights under the mortgage's uniform covenant 6 authorizing the lender to protect its interest in the property "by appearing in court" when there is a legal proceeding affecting the lender's rights under the security agreement or when the borrower has abandoned the property.⁵⁹ Both of those conditions apply in this case: there was an earlier legal proceeding allegedly affecting the secured instrument and the hypothetical (and actual) situation is the property was abandoned.

Declaratory judgments are authorized by Civil Rule 57 and the Uniform Declaratory Judgment Act, RCW 7.24.010-.190. RCW 7.24.020 specifically authorizes: "A person interested under a deed, ... may have determined any question of construction or validity arising under the instrument, ... and obtain a declaration of rights, status or other legal relations thereunder." Here, BNY Mellon with two instruments (the note and the assignment of the mortgage) had standing to seek declaratory relief under the plain terms of the mortgage.

BNY Mellon has an actionable claim for a declaratory judgment. In *BNC Mortg., Inc. v. Tax Pros, Inc.*, 111 Wn. App. 238, 246, 46 P.3d 812 (2002), another commercial lender sought a similar judgment that its deed of trust was superior to a creditor's judgment lien. *Id.* As the appellate court in *BNC Mortg., Inc.* observed: "A deed of trust creates a

⁵⁹ Deed of Trust at 8, CP 12.

lien against the property it describes. The lien first in time is the lien first in right, unless the holder of the lien first in time voluntarily subordinates it.” 111 Wn. App. at 246.

In this case, there was no voluntary subordination. There is evidence of default on the mortgage note.⁶⁰ Scotty’s did not pay and extinguished the obligation secured by the mortgage. Scotty’s simply claims that BNY Mellon has no interest in the property and hopes this Court will uphold the erroneous forfeiture of the mortgage. Both the law and equity abhor a forfeiture. Scotty’s claims raise a controversy. BNY Mellon had standing to bring a declaratory suit. The pre-answer dismissal was a prejudicial error.

Scotty’s contentions about the issues before the supreme court regarding the beneficiary status of MERS and about the alleged conflicts of interest by the trustee are smoke and mirrors whose purpose is to conceal the substantial flaws in its defenses.

4. The MERS issues under review by the supreme court do not affect the determination of this appeal. Three questions are currently pending before the Washington Supreme Court regarding MERS: (1) if MERS can be a lawful beneficiary within the terms of the deed of trust act if it never held the promissory note secured by the a deed of trust; (2) if not,

⁶⁰ Notice of Trustee’s Sale, Appendix G; Trustee’s Deed, Appendix H.

what is the legal effect of MERS acting as an unlawful beneficiary under the terms of the Deed of Trust Act; and (3) does a homeowner possess a cause of action under the Consumer Protection Act, if MERS acts as an unlawful beneficiary under the terms of the Deed of Trust Act?⁶¹

The resolution of those questions does not affect the determination of the issues presented for review in this appeal. The questions before the supreme court flow from the premise of the first question: MERS never held the note. In contrast, the questions in this appeal flow from the premise of the first question presented: Centralbank transferred the note at closing and BNY Mellon possesses the note. *Compare* supreme court clerk's summary of issue ("Whether Mortgage Electronic Registration Systems, Inc., a corporation formed to provide a national electronic registry to track the transfer of ownership interests and servicing rights in mortgage loans, and nominated by many lenders as mortgagee of record and beneficiary under deeds of trust, may lawfully serve as beneficiary under the Washington Deed of Trust Act where it never held the underlying promissory note?")⁶² with *supra* Issue No. 1 ("BNY Mellon holds the mortgage note and a recorded assignment of the mortgage. Does

⁶¹ *Bain v. Metro. Mortg. Group, Inc.*, No. 86206-1 (Wash).
Selkowitz v. Litton Loan Servicing Co., No. 86207(Wash).

⁶² *Bain v. Metro. Mortg. Group Inc.*, No. C09-0149-JCC (W.D. Wash. June 27, 2011), (Coughenour, J.), *Bain v. Mortg. Elec. Registration Sys., et al.*; *Selkowitz v. Litton Loan Servicing, LP, et al.* (3/15/12) (Certified Question from U.S. District Court, for the Western District of Washington), supreme court commissioner's summary of issue, at www.courts.wa.gov/appellate_trial_courts/supreme/issues.

the holder of the mortgage note and assignee of the record have standing to bring a declaratory action ...?”). *See also supra* Issues No. 2-3 (regarding the effect of prior suit and the effect of the transfer of the note).

The remaining issues presented for review in this appeal relate to the effect of constructive notice on the contractor from recorded instruments, the contractor’s actual notice of those interests, the contractor’s failure to provide notice of the suit and joinder in compliance with due process, the retention of priority when a mortgage is assigned, and the uncontestable priority of the mortgage itself. Those issues are not affected in any way by the issues under review by the supreme court. This appeal is determined by aforementioned three black letter rules regarding the priority of the recorded mortgage over the junior construction lien.

5. The beneficiary status of MERS is a red herring.

Scotty’s argues that MERS transferred no interest to BNY Mellon and therefore BNY Mellon cannot state a claim upon which relief may be granted. That argument fails for three reasons.

a. The mortgage follows the note; BNY Mellon’s rights are vested from its possession of the note. BNY Mellon has a belt and suspenders. The mortgage was transferred once by delivery of an instrument (the note) and again by a conveyance document (the written assignment). “[T]he maxim [is] the mortgage follows the debt”

Fidelity & Deposit Co. of Maryland v. Ticor Title Ins. Co., 88 Wn. App. 64, 68, 943 P.2d 710 (1997). “A transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise.” Restatement (Third) of Property, Mortgages § 5.4(a) (1997).⁶³ BNY Mellon alone has standing to enforce the mortgage. “A mortgage may be enforced only by, on in the behalf of, a person entitled to enforce the obligation the mortgage secures.” § 5.4(c).

BNY Mellon is enforcing the terms of the mortgage – not MERS. MERS’ function in this case was merely as a mechanism to notify the holder of the loan/note/mortgage and would have facilitated Scotty’s to satisfy the due process of reasonable notice as articulated in *Mullane v. Central Hanover Bank & Trust Co.* and its progeny. This fundamental and discrete issue of due process is not before the supreme court. There are also additional reasons why the beneficiary status of MERS is a red herring.

b. MERS transferred any rights it had under the mortgage. When MERS transferred its rights through signing the assignment instrument, MERS divested any rights it had to enforce the mortgage. As this Court said in the context of a security interest under the U.C.C.: “An absolute assignment divests the assignor of all control and

⁶³ See also Reporters’ Note to “Transfer of the obligation also transfers the mortgage” (citing *Bartlett Estate Co. v. Fairhaven Land Co.*, 49 Wash. at 63 (1908)).

right to a cause of action against the original debtor; the assignee is entitled to control and to receive the benefits of the contract between the original debtor and the assignor.”⁶⁴

The absolute assignment divested all rights of MERS as the mortgage’s original beneficiary (who was acting as the nominee for the lender and the lender’s assigns). BNY Mellon holds the mortgage note and thus is the “lender’s assign” with the right to enforce the mortgage. Therefore, the beneficiary status of MERS is a red herring diverting the court’s attention away from the relief sought in this case – a declaratory judgment regarding the priority of the mortgage over a junior construction lien.

c. Scotty’s lacks standing to raise a claim regarding MERS and NWTS or alternatively the mortgage’s severability clause would remedy any hypothetical anomalies. An alternative ground for why the status of MERS is a red herring is Scotty’s lack of standing and the availability of other remedies.

Scotty’s argued below that the instrument of assignment was invalid due to Jeff Steadman of Northwest Trustee Services (NWTS)’s alleged conflict of interest from executing the assignment on behalf of MERS and later the trustee’s deeds on behalf of NWTS. Def.’s 12(b)(6) Mot. to Dismiss

⁶⁴ *Uni-Com NW, Ltd. v. Argus*, 47 Wn. App. 787, 794, 737 P.2d 304 (1987).

at 13:16-16:26, CP 58-60. In response, BNY Mellon pointed to a federal decision;⁶⁵ a dual agency is permissible when disclosed.⁶⁶

Also, Scotty's lacks standing to allege a conflict of interest. Pl.'s Resp. to Mot. to Dismiss at 9:7-11:10, CP 303-05.⁶⁷ As demonstrated above, the validity of the instrument of assignment cannot alter the outcome of this case since BNY Mellon has a belt and suspenders (the note and the assignment). Also, there is no controversy regarding the note/mortgage transaction. For example, no one is claiming a payment was mistakenly made to Centralbanc after notice of the transfer of the mortgage. RCW 65.08.120 (stating the recording of assignment of mortgage is not notice to mortgagor and its assigns to invalidate payment made to prior holder); *see also* RCW 61.16.010 (addressing assignments and satisfactions by assignee).

The priority of the mortgage is unquestionable. The property would not have been acquired in the first place *but for* the purchase money mortgage, which is the reason why a purchase money mortgage is generally superior those acquiring encumbrances after it.

⁶⁵ *Bain v. Metro. Mortg. Group., Inc.*, 2010 WL 891585 *6 (W.D. Wash.), CP 304.

⁶⁶ *Brandt v. Koepnick*, 2 Wn. App. 671, 469 P.2d 189 (1970) (affirming dismissal of action for damages and cancellation of a real estate commission; stating "dual agency relationship, while extremely delicate is permissible, when ...").

⁶⁷ By way of analogy, the majority view is that only a current or former client of an attorney has standing to complain of conflicting representation of interests adverse to that current or former client." *Coyler v. Smith*, 50 F. Supp. 2d 966, 969 (C.D. Cal. 1999) (denying disqualification motion and ruling the moving party lacked standing). Even when a client raises a conflict interest, there is no presumption of prejudice. *Small Bus. Co. v. Intercapital Corp.*, 108 Wn.2d 324, 329-332, 738 P.2d 263 (1987).

In these circumstances, Scotty's cannot establish standing to raise a conflict of interest claim regarding the signing of the instrument of assignment. To have standing for declaratory relief, Scotty's must establish:

(1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.⁶⁸

Scotty's has not established those four requirements.

Scotty's never made a payment on the loan and was never a party to any part of loan transaction. As a result, Scotty's cannot establish the second element of standing (parties having genuine and opposing interests in the loan/mortgage transaction). Scotty's also cannot establish the third element of standing (a dispute with direct and substantial interests). Scotty's was not within the zone of interests protected by the mortgage such as someone making the loan payments. RCW 65.08.120 (regulating notice of payments made after assignment of mortgages); RCW 61.16.010 (satisfactions by assigns of mortgages). Further, Scotty's cannot establish any actions regarding the mortgage had injury-in-fact causation resulting in injury to Scotty's. BNY Mellon possesses the note and with the debt

⁶⁸ *Branson v. Port of Seattle*, 152 Wn.2d 862, 877, 101 P.3d 67 (2004) (citation omitted).

goes the mortgage.⁶⁹ Any putative injury to Scotty's was likely caused by its own misreading of the title index or of the litigation guaranty received in the prior suit.⁷⁰

Even if Scotty's could establish the requirements for standing and even if there were some anomaly regarding the status of MERS, the form security instrument's severability provision would come into play.⁷¹ The provision states: "In the event that any such provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect the other provisions of this Security Agreement or Note which can be given effect without the conflict provision."⁷² Washington courts enforce severability provisions.⁷³

In summary, the status of MERS and the conflict of interest claim against NWTs are wholly immaterial to the priority of record issues raised in this case. The secured obligation was not paid; the mortgage is not extinguished; the smoke and mirrors cannot change the facts.

⁶⁹ *Cervantes*, 656 F.3d at 1044-45 (stating the legality of MERS's role as beneficiary may be at issue where MERS initiates foreclosure in its own name or where plaintiffs allege a violation of state recording and foreclosure statutes based on the designation, but stating the case does not present either situation). Neither situation was at issue in this appeal. *Id.* (stating even if MERS were a sham beneficiary, the lenders would still be entitled to repayment of the loans).

⁷⁰ *Accord, Five Corners Family Farmers v. State*, -- P.3d --, 2011 WL 6425114, ¶¶ 8-10 (Wash. Dec. 22, 2011) (requiring injury-in-fact causation to the party seeking standing for declaratory relief regarding a statute).

⁷¹ Deed of Trust, Uniform Covenant 16, at page 12, CP 16.

⁷² Uniform Covenant 16, entitled Governing Law; Severability; Rules of Construction. Deed of Trust at page 12, CP 16.

⁷³ *Walters v. AAA Waterproofing, Inc.* 151 Wn. App. 316, 211 P.3d 454 (2009) (enforcing severability clause in employment contract), *review denied*, 107 Wn.2d 1019, 224 P.3d 773 (2010).

6. **Alternatively, the majority of state appellate and federal court decisions affirm the legitimacy of MERS.** In *Vawter v. Quality Loan Service Corp.*, the district court for the western district of Washington provides a persuasive conclusion that MERS can act as a beneficiary, stating:

[t]he 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' appointment of a new trustee was invalid. . . . Plaintiff provides a printout from MERS' website stating that it is an electronic registry that tracks the ownership of loans. Plaintiff argues that because MERS only registers documents it does not actually hold them. Plaintiffs' argument is unconvincing. Simply because MERS registers documents in a database does not prove that MERS cannot be the legal holder of an instrument.

707 F. Supp. 2d 1115, 1122 (Apr. 22, 2010)(quoting *Moon v. GMAC Mortg. Corp.*, 2008 WL 4741492, at *5 (W.D. Wash. 2008)).

The western district court reaffirmed the authority of MERS in *Daddabbo v. Countrywide Home Loans*, 2010 WL 2102485 (W.D. Wash. May 20, 2010), stating:

[t]he deed of trust, of which the court takes judicial notice, explicitly names MERS as a beneficiary. 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.'⁷⁴ [Citations omitted.]

⁷⁴ The citation to *Daddabbo* and other federal court decisions, *supra*, is made pursuant to Fed. R. App. P. 32.1, which permits the use of unpublished "opinions, orders, judgments, or other written dispositions" after January 1, 2007. *Cf.* GR 14.1(b).

The court in *Daddabbo* found that no fact the plaintiffs introduced “remotely supports Plaintiffs’ assertion that MERS somehow has been stripped of the power that the deed of trust grants.” *Id.*

In *Blau v. America’s Servicing Company*, the district court for Arizona considered a deed of trust that named MERS as “both the lender’s nominee and ‘beneficiary’ of the agreement.” 2009 WL 3174823 (D. Ariz. Sept. 29, 2009). The court found that “MERS, acting on behalf of the lender,” was entitled to transfer the lender’s interest to a subsequent beneficiary. *Id.*; see also *Pazmino v. LaSalle Bank, N.A.*, 2010 WL 2039163 (E.D. Va. May 20, 2010) (allowing the same).

In *McGinnis v. GMAC Mortg. Corp.*, the district court for the central district of Utah points out that:

[c]ourts have consistently held that [language naming MERS as a beneficiary in a security instrument] . . . gives MERS the authority to foreclose in behalf of the lender and that MERS need not possess the note in order to appoint a trustee in behalf of the lender who does hold the note.” 2010 WL 3418204 (C.D. Utah Aug. 27, 2010).

In *Burnett v. MERS, Inc.*, the district court for the northern district of Utah found that “MERS had authority to ‘take any action’ required of Lender. . . ,” which included appointing a successor trustee and even selling the property. 2009 WL 3582294 (N.D. Utah Oct. 27, 2009).

Recently, a federal court handling multidistrict litigation challenging numerous aspects of MERS’ conduct in non-judicial foreclosure states issued a decision that affirmed MERS’ ability, as a

specifically-named beneficiary, to make assignments, appoint trustees, or take other acts in connection with a foreclosure. *See In re MERS Litig.*, 2010 WL 4038788 (D. Ariz. Sept. 30, 2010); *see also Silvas v. GMAC Mortg., LLC*, 2009 WL 4573234 (D. Ariz. Jan. 5, 2010) (ruling MERS can foreclose where MERS is designated on a deed of trust as the beneficiary).

These jurisdictions follow other courts that have held MERS may hold legal title to the deed of trust as the beneficiary, has standing to assign the deed of trust, may substitute trustees, and can even foreclose to enforce the property interest granted to it in the mortgage or deed of trust.⁷⁵

At the trial court level, Scotty's cited *Landmark Nat'l Bank v. Kesler*, 289 Kan. 528, 216 P.3d 158 (2009), and argued that MERS had no interest in the deed of trust. But *Kesler* is distinguishable because the narrow issue was whether the trial judge abused his discretion upon refusing to vacate a default judgment against the lender in a judicial foreclosure action once the property had sold to a third party.

⁷⁵ *See, e.g., Saterbak v. MTC Fin., Inc.*, 2011 WL 484300 (D. Nev. Feb. 4, 2011) (rejecting plaintiffs argument that MERS was not a proper beneficiary or nominee); *Maxa v. Countrywide Loans, Inc.*, 2010 WL 2836958 (D. Ariz. Jul. 19, 2010) (rejecting assertion that MERS is not a valid beneficiary because it lacked possession of the note); *Ciardi v. Lending Co., Inc.*, 2010 WL 2079735 (D. Ariz. May 24, 2010) (deed of trust, freely entered into by plaintiff designates MERS as beneficiary with authority to foreclose and sell the property); *Wurtzberger v. Resmae Mortg. Corp.*, 2010 WL 1779972 (E.D. Cal. Apr. 29, 2010) (MERS had right to foreclose and assign beneficial interest under deed of trust); *Cervantes v. Countrywide Home Loans Inc.*, 656 F.3d 1034 (9th Cir. 2011) (affirming dismissal of class action suit for conspiracy to commit fraud through the MERS system and wrongful foreclosure).

The *Kesler* court emphasized the narrowness of its holding, expressly stating, “[w]hether MERS may act as a nominee for the lender, either to bring a foreclosure suit or for some other purpose, is not at issue. . . .” *Id.* at 180.⁷⁶ *Kesler* focused on Kansas law and civil procedure standards. Nothing in the decision states that MERS cannot possess an interest in a deed of trust.

Washington’s recording system has a grantor-grantee index.⁷⁷ In this case, MERS was the grantee of record until BNY Mellon became the grantee of record. Anyone searching the recorder’s index had notice of those interests. Yet, the quasi in rem suit simply did join the recorded interest assigned to BNY Mellon. That suit could not as a matter of law extinguish the mortgage held by BNY Mellon.

C. BNY Mellon Should Receive an Award of Attorneys’ Fees Upon Prevailing in This Appeal.

BNY Mellon respectfully requests the award of attorneys’ fees under the deed of trust’s provision for fees “in any action or proceeding to construe or enforce any term of this Security Agreement.” CP 19. BNY Mellon was assigned the beneficial interest in the deed of trust. CP 30, 342.

⁷⁶ After the *Kesler* decision, the Kansas Legislature completed a comprehensive overhaul of the Kansas Civil Procedure Code, which in part, requires the joining of any party in an action to determine title or affecting a security interest in real property if that party is a nominee of record on behalf of a beneficial owner.

⁷⁷ 18 Stoebuck & Weaver, *Washington Practice, Real Estate: Transactions* § 14.6 at 132, 134.

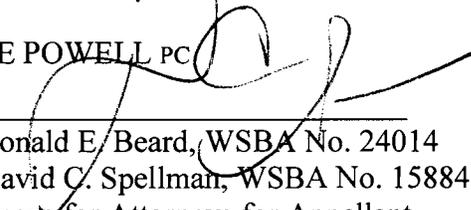
V. CONCLUSION

In summary, BNY Mellon is not bound by the foreclosure decree granted in the quasi in rem suit to which it was not a party. The failure of Scotty's to join MERS in the prior suit, or give written notice to MERS of the suit, results in a jurisdictional defect as to BNY Mellon and its interest in the property. BNY Mellon has standing to pursue a declaratory judgment that it was not bound by the prior suit and its mortgage has priority of record over the junior construction lien. The pre-answer dismissal order was clear and prejudicial error. The dismissal must be reversed.

The merits of this case and the interests of justice support an affirmative ruling on Issue No. 7 (the deed of trust held by BNY Mellon has priority of record over any interest of Scotty's in Parcel 062205-9036). BNY Mellon respectfully requests this determination.

RESPECTFULLY SUBMITTED this 10 day of February, 2012.

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Mortgage Pass-Through Certificates, Series
2005-9

**ATTACHMENT TO MOTION TO WITHDRAW OPENING BRIEF
OF APPELLANT AND REPLACE WITH REVISED BRIEF OF
APPELLANT**

No. 67370-0-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

THE BANK OF NEW YORK MELLON, FKA THE BANK OF NEW
YORK AS SUCCESSOR IN INTEREST TO JPMORGAN CHASE
BANK, NA AS TRUSTEE FOR STRUCTURED ASSET MORTGAGE
INVESTMENTS II INC. BEAR STEARNS ALT-A TRUST 2005-9,
MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-9,

Appellant

v.

SCOTTY'S GENERAL CONSTRUCTION, INC., A WASHINGTON
CORPORATION,

Respondent

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. HOLLIS HILL)

APPENDIXES TO APPELLANT'S REVISED BRIEF

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- Appendix A: King County Recorder's Index for Parcel 9036 (does not indicate the construction lien or a lis pendens).
Index for Parcel 9056 (indicating lien and lis pendens).
- Appendix B: Deed of Trust to MERS, shown as grantee on the recorder's index, recorded June 7, 2005. CP 5-8, 10-12, 17.
- Appendix C: Deed of Trust to MERS, showing CentralBanc as grantee on the recorder's index, recorded June 7, 2005. CP 118-19. Footer: "Washington Second Mortgage."
- Appendix D: Assignment of the Deed of Trust to BNY Mellon, recorded June 29, 2010.
- Appendix E: July 14, 2010 letter from Barokas, Martin, Tomlinson to Northwest Trustee Services and Deutsche Bank National Trust Company about trustee's deed for Parcel 9056
- Appendix F: King County Recorder's Frequently Asked Questions (lag between recording and availability on website – 24 hours).
- Appendix G: Notice of Trustee Sale for Parcel 9036, recorded July 22, 2010.
- Appendix H: Trustee's Deed against Parcel 9036.
- Appendix I: Scotty's Claim of Lien for work beginning May 7, 2007 and recorded December 29, 2008. Listing Parcel 9056, but includes Parcel 9036 on the legal description.
- Appendix J: Decl. of Hans P. Juhl in Supp. of Pl.'s Req. for Award of Fees (Aug. 2, 2010) in *Scotty's v. Pazooki, et al.*
- Appendix K: Pl's Opp'n to def. WMC's Mot to Set Aside Default and Vacate J. at 2:1-26, Case No. 09-2-07414-3
- Appendix L: Permanent Editorial Board of the UCC Committee's November 14, 2011 Report "Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes."

APPENDIX A

King County Recorder's Index for Parcel 9036 (does not
Indicate the construction lien or a lis Pendens). Index for
Parcel 9056 (indicating lien and lis pendens).

PARCEL 9036



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Displaying Records 1 to 8

Instrument Number	Book-Page	Date Filed	Document Type	Name (+) = More Names	Name Type	Associated Name (+) = More Names	Name Type	Legal Description	Index Status	Image
20030213001301		02/13/2003	DEED OF TRUST	FLEMING ERVIN E (+)	R	PRLAP INC TRUSTEE (+)	E	SEC 06 TWNSHP 22 RNG 05 0622059036	Perm	Not scanned or not available online
20050607001225	000 - 000	06/07/2005	WARRANTY DEED	FLEMING ERVIN (+)	R	PAZOOKI GLORIA	E	SEC 06 TOWN 22 RANGE 05 062205-9036	Perm	
20050607001226	000 - 000	06/07/2005	QUIT CLAIM DEED	PAZOOKI SIAVOOSH	R	PAZOOKI GLORIA	E	SEC 06 TOWN 22 RANGE 05 062205-9036	Perm	
20050607001227	000 - 000	06/07/2005	DEED OF TRUST	PAZOOKI GLORIA	R	MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC	E	SEC 06 TOWN 22 RANGE 05 062205-9036	Perm	Not scanned or not available online
20050607001228	000 - 000	06/07/2005	DEED OF TRUST	PAZOOKI GLORIA	R	CENTRALBANC MORTGAGE CORPORATION	E	SEC 06 TOWN 22 RANGE 05 062205-9036	Perm	Not scanned or not available online
20060831000415	000 - 000	08/31/2006	ORDINANCE	KENT OF CITY	R	PUBLIC	E	SEC 06 TOWN 22 RANGE 05 062205-9036 ...	Perm	
20100722001008	000 - 000	07/22/2010	NOTICE OF TRUSTEE SALE	NORTHWEST TRUSTEE SERVICES INC	R	PAZOOKI GLORIA	E	SEC 06 TOWN 22 RANGE 05 062205-9036	Perm	
20101208000741	000 - 000	12/08/2010	TRUSTEE DEED	NORTHWEST TRUSTEE SERVICES	R	BANK OF NEW YORK (+)	E	SEC 06 TOWN 22 RANGE 05 062205-9036	Perm	

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Criteria: Parcel # is 0622059056

Search Results - 16 matches

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Instrument Number	Book-Page	Date Filed	Document Type	Name (+) = More Names	Name Type	Associated Name (+) = More Names	Name Type	Legal Description	Index Status	Image
199703311396		03/31/1997	QUIT CLAIM DEED	ANGELL CARL	R	ANGELL ELSIE A	E	0622059056 STR 02 22 05	Perm	
199802131720		02/13/1998	WARRANTY DEED	ANGELL ELSIE A	R	MASCORO GUILLERMO (+)	E	0622059056 STR 6 22 5	Perm	
20030314002654		03/14/2003	WARRANTY DEED	MASCORO GUILLERMO (+)	R	DOWNING KIM E	E	SEC 06 TWNSHP 22 RNG 05 0622059056	Perm	
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20031015001428		10/15/2003	QUIT CLAIM DEED	DOWNING KIM E	R	MASCORO GUILLERMO	E	SEC 06 TWNSHP 22 RNG 05 0622059056	Perm	
20050607000348	000 - 000	06/07/2005	WARRANTY DEED	MASCORO GUILLERMO (+)	R	PAZOOKI GLORIA (+)	E	SEC 06 TOWN 22 RANGE 05 062205-9056	Perm	
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20060831000415	000 - 000	08/31/2006	ORDINANCE	KENT OF CITY	R	PUBLIC	E	SEC 06 TOWN 22 RANGE 05 062205-9056 ...	Perm	
20061013002279	000 - 000	10/13/2006	LIEN	PAZOOKI SIAVOOSH (+)	R	KENT CITY OF	E	LT 56 SEC 06 TOWN 22 RANGE 05 062205-9056	Perm	Not scanned or not available online
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King County, Washington

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Search Results - 16 matches

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Instrument Number	Book-Page	Date Filed	Document Type	Name (+) = More Names	Name Type	Associated Name (+) = More Names	Name Type	Legal Description	Index Status	Image
20070828001290	000 - 000	08/28/2007	DEED OF TRUST	PAZOOKI SIAVOOSH (+)	R	FARAMARZI PEADOR (+)	E	SEC 06 TOWN 22 RANGE 05 062205-9056	Perm	Not scanned or not available online
20071003001442	000 - 000	10/03/2007	LIEN	PAZOOKI SIAVOOSH (+)	R	KENT CITY OF	E	SEC 06 TOWN 22 RANGE 05 062205-9056	Perm	Not scanned or not available online
20081229000168	000 - 000	12/29/2008	LIEN	PAZOOKI GLORIA (+)	R	SCOTTYS GENERAL CONSTRUCTION INC	E	SEC 06 TOWN 22 RANGE 05 062205-9056	Perm	Not scanned or not available online
20100315001005	000 - 000	03/15/2010	NOTICE OF TRUSTEE SALE	NORTHWEST TRUSTEE SERVICES INC	R	PAZOOKI SIAVOOSH	E	SEC 06 TOWN 22 RANGE 05 062205-9056	Perm	
20100625001587	000 - 000	06/25/2010	TRUSTEE DEED	NORTHWEST TRUSTEE SERVICES INC	R	DEUTSCHE BANK NATIONAL TRUST COMPANY	E	SEC 06 TOWN 22 RANGE 05 062205-9056	Perm	
20100825001030	000 - 000	08/25/2010	DEED	DEUTSCHE BANK NATIONAL TRUST COMPANY TRUSTEE	R	SHIAD INVESTMENT LLC	E	SEC 06 TOWN 22 RANGE 05 062205-9056	Perm	

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APPENDIX B

Deed of Trust to MERS, shown as grantee on the
Recorder's index, recorded June 7, 2005.
CP 5-8, 10-12, 17.

(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(M) "Escrow Items" means those items that are described in Section 3.

(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(O) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(P) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(Q) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(R) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the

COUNTY

of

KING

[Type of Recording Jurisdiction]

[Name of Recording Jurisdiction]

SEE LEGAL DESCRIPTION ATTACHED HERETO AND MADE A PART HEREOF AS EXHIBIT "A".
A.P.N. #: 062205-9036-02

Public Record

EXHIBIT NO A
PAGE 2 OF 25

which currently has the address of 20541 92ND AVE. S.

[Street]

KENT
[City]

, Washington 98031 ("Property Address"):
[Zip Code]

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." 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 of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. **Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges.** Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

WASHINGTON-Single Family
Fannie Mae/Freddie Mac UNIFORM INSTRUMENT - MERS
Form 3048 1/01 Page 4 of 16

DocuMagic eForms 800-849-1382
www.documagic.com

Public Record

Order: Non-Order Search Doc: KC:2005 20050607001227

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Created By: cindystrada Printed: 6/14/2010 4:02:48 PM PST

EXHIBIT NO A
PAGE 4 OF 25

specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. **Charges; Liens.** Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. **Property Insurance.** Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

Public Record

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender

otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. 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. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

APPENDIX C

Deed of Trust to MERS, showing CentralBanc as grantee
on the recorder's index, recorded June 7, 2005. CP 118-19.
Footer: "Washington Second Mortgage"

20050607001228.001

After Recording Return To:
CENTRALBANC MORTGAGE CORPORATION
13810 SE EASTGATE WAY SUITE 190
BELLEVUE, WASHINGTON 98005
Loan Number: 200201716



20050607001228

FIDELITY NATIO DT 33.00
PAGE01 OF 014
08/07/2009 13:50
KING COUNTY, WA

[Space Above This Line For Recording Data]

DEED OF TRUST

MIN: 1000918-0500471703-9

Grantor(s) (Last name first, then first name and initials):

- 1. PAZOOKI, GLORIA
- 2.
- 3.
- 4.
- 5.
- 6.

Additional names on page of document.

Grantee(s) (Last name first, then first name and initials):

- 1. CENTRALBANC MORTGAGE CORPORATION
- 2.
- 3.
- 4.
- 5.
- 6.

Additional names on page of document.

Legal Description (abbreviated: i.e., lot, block, plat or section, township, range):

ptn SW 1/4 R-22-5

Full legal description on page 2 of document.

Assessor's Property Tax Parcel(s) or Account Number(s): 062205-9036-02

Reference Number(s) Assigned or Released:

Additional references on page of document.

INSURED BY
FIDELITY NATIONAL TITLE
102304

14/10/33

20050607001228.002

THIS DEED OF TRUST is made this 6th day of JUNE 2005, among the Grantor, GLORIA PAZOOKI, A MARRIED WOMAN AS HER SOLE AND SEPARATE PROPERTY

(herein "Borrower"), FIDELITY NATIONAL TITLE 3500 188TH ST. SW #300, LYNNWOOD, WASHINGTON 98036 (herein "Trustee"),

and the Beneficiary, Mortgage Electronic Registration Systems, Inc. ("MERS"), (solely as nominee for Lender, as hereinafter defined, and Lender's successors and assigns). MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.

CENTRALBANC MORTGAGE CORPORATION is organized and existing under the laws of CALIFORNIA and has an address of 13810 SE EASTGATE WAY SUITE 190, BELLEVUE, WASHINGTON 98005

(herein "Lender").

BORROWER, in consideration of the indebtedness herein recited and the trust herein created, irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the County of KING, State of Washington: SEE LEGAL DESCRIPTION ATTACHED HERETO AND MADE A PART HEREOF AS EXHIBIT "A". A.P.N. #: 062205-9036-02

THIS SECURITY INSTRUMENT IS SUBORDINATE TO AN EXISTING FIRST LIEN(S) OF RECORD. which has the address of 20541 92ND AVE. S.

KENT, Washington 98031 (herein "Property Address"); [City] [Street] [Zip Code]

TOGETHER with all the improvements now or hereafter erected on the property, and all easements, rights, appurtenances and rents (subject however to the rights and authorities given herein to Lender to collect and apply such rents), all of which shall be deemed to be and remain a part of the property covered by this Deed of Trust; and all of the foregoing, together with said property (or the leasehold estate if this Deed of Trust is on a leasehold) are hereinafter referred to as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Deed of Trust; 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 of Lender including, but not limited to, releasing or cancelling this Deed of Trust.

TO SECURE to Lender the repayment of the indebtedness evidenced by Borrower's note dated JUNE 6, 2005 and extensions and renewals thereof (herein "Note"), in the principal sum of U.S. \$ 66,000.00, with interest thereon, providing for monthly installments of principal and interest, with the balance of the indebtedness, if not sooner paid, due and payable on JULY 1, 2020; the payment of all other sums, with interest thereon, advanced in accordance herewith to protect the security of this Deed of Trust; and the performance of the covenants and agreements of Borrower herein contained.

APPENDIX D
Assignment of the Deed of Trust to BNY Mellon,
recorded June 29, 2010.

After Recording Return to:
Northwest Trustee Services, Inc.
Attention: Heather L. Smith
P.O. Box 997
Bellevue, WA 98009-0997



20100629001330

TITLE COURT SE ADT 14.00
PAGE-001 OF 001
06/29/2010 14:35
KING COUNTY, WA

7777.13138/PAZOOKI, GLORIA

1218088061

Assignment of Deed of Trust

For Value Received, the undersigned as Beneficiary, hereby grants, conveys, assigns and transfers to The Bank of New York Mellon, fka The Bank of New York as Successor in interest to JP Morgan Chase Bank NA as Trustee for Structured Asset Mortgage Investments II Inc. Bear Stearns ALT-A Trust 2005-9, Mortgage Pass-Through Certificates, Series 2005-9, whose address is c/o America's Servicing Company MAC # X7801-013, 3476 Stateview Blvd, Fort Mill, SC 29715 all beneficial interest under that certain deed of trust, dated 06/06/05, executed by Gloria Pazooki, a married woman as her sole and separate property, Grantors, to Fidelity National Title, Trustee, and recorded on 06/07/05, under Auditor's File No. 20050607001227, Records of KING County, Washington.

Together with note or notes therein described or referred to, the money due and to become due thereon, with interest, and all rights accrued or to accrue under said Deed of Trust.

Dated: June 17, 2010

Mortgage Electronic Registration Systems, Inc.

Title: Vice President

STATE OF WASHINGTON)

) ss.

COUNTY OF KING)

I certify that I know or have satisfactory evidence that Jeff Stenman is the person who appeared before me, and said person acknowledged that (he/she) signed this instrument, on oath stated that (he/she) was authorized to execute the instrument and acknowledged it as the Vice President of Mortgage Electronic Registration Systems, Inc. to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated: June 17, 2010

NOTARY PUBLIC in and for the State of Washington
Residing at Maple Valley
My commission expires 06/11/12

NEANG AVILA
STATE OF WASHINGTON
NOTARY PUBLIC
MY COMMISSION EXPIRES
06-11-12

EXHIBIT NO. B
PAGE 1 OF 1

APPENDIX E
July 14, 2010 letter from Barokas, Martin, Tomlinson to
Northwest Trustee Services and Deutsche Bank National
Trust Company about trustee's deed for Parcel 9056

LAW OFFICES

BAROKAS MARTIN & TOMLINSON

1422 BELLEVUE AVENUE
SEATTLE, WASHINGTON, 98122
(206) 621-1871
FAX (206) 621-9907
BMAT@BMATLAW.COM

HANS P. JUHL

HPJ@BMATLAW.COM

July 14, 2010

Winston Khan
Northwest Trustee Services, inc.
P.O. Box 997
Bellevue, WA 98009-0997

Deutsche Bank National Trust Company
c/o Litton Loan Servicing, LP
4828 Loop Central Drive
Houston, TX 77081

Re: *Scotty's General Construction v. Pazooki, et al.*
King County Superior Court Cause No. 09-2-07414-3 KNT

Dear Mr. Khan and Deutsche Bank National Trust Company:

I left Mr. Khan a message on July 13, 2010 requesting a return telephone call in order to convey the following information.

This office represents Scotty's General Construction, Inc. ("Scotty's") in the above referenced lawsuit against Gloria Pazooki, Siavoosh Pazooki, Omied Ryan Pazooki and Jane Doe Pazooki. Also named in the suit are WMC Mortgage Corp., Centralbanc Mortgage Corporation and Ira and Peador Faramarzi. The purpose of this letter is to advise you that Scotty's asserts that the trustee's sale should be set aside purportedly extinguishing its lien against the property should be set aside and the priority of its lien against the property should be recognized.

On June 7, 2005, WMC Mortgage Corp. recorded a deed of trust in King County against King County tax parcel number 062205-9056 (the "subject property"). Centralbanc Mortgage Corporation and the Faramarzi's recorded certain deeds of trust in 2005 and 2007 and Scotty's recorded a Claim of Lien in the amount of \$199,335.06. A copy of Scotty's Claim of Lien is enclosed. Scotty's commenced suit to foreclose its Claim of Lien on February 10, 2009. The Pazookis and Centralbanc both appeared through counsel. An Order of Default was taken against WMC Mortgage Corp. on April 16, 2009. See enclosed. Trial is set for August 2, 2009. Centralbanc Mortgage Corporation is prepared to sign a sworn affidavit that it has no interest in the property.

EXHIBIT "J"

On July 13, 2010, I reviewed the county property records in preparation for trial and discovered that WMC Mortgage Corp.'s interest in the property was assigned to Deutsche Bank National Trust Company on February 22, 2010, more than a year subsequent to the entry of default against WMC Mortgage Corp. The property was then foreclosed by Deutsche National Trust Company and deeded to them by a Trustee's Deed from Northwest Trustee Services, Inc. on June 23, 2010. No notice was provided to Scotty's of the Assignment nor was Scotty's provided with the statutory Notice of Trustee's Sale.

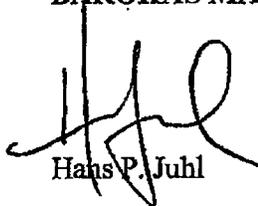
RCW 61.24.040 governs the procedure of conducting nonjudicial foreclosures of real property. In pertinent part, RCW 61.24.040 requires that the trustee provide the statutory Notice of Trustee's Sale to each junior lienholder whose interest it seeks to foreclose so that such junior lienholder can move to enjoin the sale or appear at the sale to bid to preserve its interest in the property. Neither this office nor Scotty's was provided the statutory notice. Unless it can be shown that the trustee and/or assignee beneficiary complied with the statutory notice, Scotty's intends to move forward at trial on August 2, 2010 and at or before the trial enter default judgment against WMC Mortgage Corp. It then intends to file a Complaint in King County Superior Court praying to the Court to set aside the trustee's sale of the property, recognize the default judgment, make an award of damages, costs and fees and adjudge Scotty's lien superior to WMC Mortgage Corp.'s assignee.

Please provide this office the Notice of Trustee's sale and proof of service on Scotty's General Construction, Inc. as soon as possible. If it is not received prior to August 2, 2010, Scotty's will authorize me to proceed to have the trustee's sale set aside.

Thank you for your attention to this matter.

Regards,

BAROKAS MARTIN & TOMLINSON



Hans P. Juhl

HPJ/

Enclosures

CC: Scotty's General Construction, Inc. (w/o enclosures)

APPENDIX F
King County Recorder's Frequently Asked Questions (lag
between recording and availability on website – 24 hours).



HOME NEWS SERVICES DIRECTORY CONTACT

Search

King County Recorder's Office

You're In: Home » Frequently asked questions (FAQ)

[SHARE](#) [PRINT](#) [SITEMAP](#)

- [Home](#)
- [Records search](#)
- [Recorder's office services](#)
- [Online forms and document standards](#)
- [Fees](#)
- [Frequently asked questions \(FAQ\)](#)
- [Contact Us](#)
- [Location and hours](#)
- [Site map](#)

King County Recorder's Office
 Administration Building
 Room 311
 500 4th Avenue
 Seattle WA 98104

206-296-1570
 206-205-8396 FAX

kcrocust@kingcounty.gov

Frequently asked questions

[I'm having problems connecting to the Records Search. Can you help me?](#)

[I keep trying to access the records search but it keeps not progressing to the next page, it just refreshes the current page and clears all entries after I click submit.](#)

[Does the records search web site require that I allow cookies on my computer?](#)

[Do you have any satellite offices?](#)

[What is your address, hours, and phone number?](#)

[Do you have birth and death records?](#)

[How do I get a copy of my deed? \(or any other recorded instrument\)](#)

[I tried to request a document from 1971 but got no results. Am I doing something wrong?](#)

[Do you have divorce records?](#)

[How long is the lag between the time a document is recorded and when it is available on the website?](#)

[Why do some records return more detail than others?](#)

[I am trying to print an Excise Tax Affidavit but it keeps printing 8 x 11 \(standard\). How do I change the size to 8 x 14 \(legal\)?](#)

[How can a person change names on a property title?](#)

[How long does it take for document recording and search requests to be returned by mail?](#)

[How do I get a document removed from public access?](#)

[How can one get and record a quit-claim deed, and long will it take?](#)

[What are some of the documents that the King County Recorder's Office restricts online?](#)

[Do you accept faxed requests or fax copies back?](#)

[Has the indexing of federal tax liens changed recently?](#)

[What are your fees?](#)

[How do I get a copy of my marriage certificate?](#)

[Are there any plans in the future to back scan older documents on microfilm?](#)

[In trying to retrieve a recorded document I got a message saying the doc was over 100 pages and therefore unavailable online.](#)

[I downloaded the editable excise tax affidavit and filled it out and printed it but the words are not separated by spaces and some of the boxes are not filled in.](#)

[There seems to be a problem when I access your site - when the disclaimer appears whether they select Accept or Decline they receive the Decline message.](#)

[Where can I purchase blank forms for recording?](#)

[Can I search property records to find the owner of a parcel if I have only the address? If so, how?](#)

[Why isn't your site open 24 hours?](#)

Helpful Links

- [Property Tax info](#)
- [Birth and Death Records](#)
- [Divorce Records](#)
- [Change your address](#)

How long is the lag between the time a document is recorded and when it is available on the website?

The website uses the same databases that our production application uses and indexing is available the second it is recorded using information that is entered at the time of recording. The image is available when the document is scanned sometime before the end of the day. Additional indexing information is available when the document has been through our indexing department.

[TO TOP](#)

Why do some records return more detail than others?

Over the past 25 years, recording data has been collected from various computer systems. The detail captured by each varies. All information from old systems was transferred to new systems as it was entered in the past.

[TO TOP](#)

I am trying to print an Excise Tax Affidavit but it keeps printing 8 x 11 (standard). How do I change the size to 8 x 14 (legal)?

This is a user selection the same as any word processing document or anything that is printed where you need to select the size of paper. Go to 'File;Print;Properties;Paper Size; Legal (8 1/2 X 14 in)' and then print. You need to have legal sized paper available in your printer.

[TO TOP](#)

How can a person change names on a property title?

When adding someone to title, or changing names on title, people will generally record a conveyance document/deed. You can get blank legal documents at stationary or office supply stores. It needs to be completed and notarized. In addition to that, you will need to complete a Real Estate Excise Tax Affidavit and depending on the type of transaction, you may also need an Excise Tax Supplemental Statement. These two forms can be downloaded from our website Please carefully review the Supplemental Statement which determines whether or not your transaction is taxable.

Once completed, you would bring these forms in to be processed and recorded. Our fees, hours of operation and location can be found on our website. If you need legal advice, please contact an attorney. You can also contact a title insurance company for some assistance.

If you have any further questions for our office, please contact us at 206-296-1570.

[TO TOP](#)

How long does it take for document recording and search requests to be returned by mail?

The turnaround time for recording is 1-2 weeks and for search requests 2-3 weeks.

[TO TOP](#)

How do I get a document removed from public access?

Once a document is recorded with the Recorder's Office, it is part of permanent public record. However, if a document is recorded with a personal identifier such as social security number, mother's maiden name, or driver's license number, it can be restricted from access on our website.

If you have a document with one of these personal identifiers in the body of the document, you can have its access restricted by filling out the "Remove Image from Webpage" form available from our Online Forms and Document Standards page located at <http://www.kingcounty.gov/business/Recorders/OnlineFormsandDocumentStandards.aspx>. We will then record the form and restrict access to that specific document from our website.

[TO TOP](#)

How can one get and record a quit-claim deed, and long will it take?

You can obtain blank Quit Claim Deed forms from office supply stores and some commercial websites. The fee for recording is \$62 for the first page and \$1 for each additional page. The turnaround time can vary depending on how the document is presented to us.

[TO TOP](#)

APPENDIX G

Notice of Trustee Sale for Parcel 9036, recorded July 22,
2010.

After Recording, Return to:
Heather L. Smith
Northwest Trustee Services, INC.
P.O. Box 997
Bellevue, WA 98009-0997



20100722001008

TITLE COURT SE NTS 65.00
PAGE-001 OF 004
07/22/2010 14:03
KING COUNTY, WA

File No.: 7777.13138 44
Grantors: Northwest Trustee Services, Inc.
The Bank of New York Mellon, fka The Bank of New York as Successor in interest
to JP Morgan Chase Bank NA as Trustee for Structured Asset Mortgage
Investments II Inc. Bear Stearns ALT-A Trust 2005-9, Mortgage Pass-Through
Certificates, Series 2005-9
Grantee: Gloria Pazooki, A married woman as her separate estate
Tax Parcel ID No.: 0622059036
Abbreviated Legal: PTN SW 1/4, 6-22-5

Notice of Trustee's Sale 4735

Pursuant to the Revised Code of Washington 61.24, et seq.

I.

On October 22, 2010, at 10:00 a.m. The northwest corner of the ground level parking area located under the Pacific Corporate Center building, 13555 SE 36th Avenue in the City of Bellevue, State of Washington, the undersigned Trustee (subject to any conditions imposed by the Trustee) will sell at public auction to the highest and best bidder, payable at time of sale, the following described real property "Property", situated in the County(ies) of KING, State of Washington:

THAT PORTION OF THE SOUTHEAST QUARTER OF THE SOUTHWEST QUARTER OF SECTION 6, TOWNSHIP 22 NORTH, RANGE 5 EAST, W.M., IN KING COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS: BEGINNING AT A POINT WHICH IS NORTH 0 DEGREES 42' 23" EAST 829.05 FEET FROM THE SOUTH QUARTER SECTION CORNER OF SECTION 6; THENCE SOUTH 0 DEGREES 42' 23" WEST 158 FEET; THENCE NORTH 89 DEGREES 53' 05" WEST 554.13 FEET; THENCE NORTH 1 DEGREES 35' 05" WEST 188.06 FEET, MORE OR LESS, TO A POINT FROM WHICH THE POINT OF BEGINNING BEARS SOUTH 89 DEGREES 53' 05" EAST; THENCE SOUTH 89 DEGREES 53' 05" EAST 560.45 FEET, MORE OR LESS, TO THE POINT OF BEGINNING; EXCEPT COUNTY ROAD. SITUATE IN THE COUNTY OF KING, STATE OF WASHINGTON.

Commonly known as: 20541 92ND AVENUE SOUTH
KENT, WA 98031

which is subject to that certain Deed of Trust dated 06/06/05, recorded on 06/07/05, under Auditor's File No. 20050607001227, records of KING County, Washington, from Gloria Pazooki, a married woman as her sole and separate property, as Grantor, to Fidelity National Title, as Trustee, to secure an obligation "Obligation" in favor of Mortgage Electronic Registration Systems, Inc. solely as nominee for Centralbank Mortgage Corporation, as Beneficiary, the beneficial interest in which was assigned by Mortgage

Electronic Registration Systems, Inc. to The Bank of New York Mellon, fka The Bank of New York as Successor in interest to JP Morgan Chase Bank NA as Trustee for Structured Asset Mortgage Investments II Inc. Bear Stearns ALT-A Trust 2005-9, Mortgage Pass-Through Certificates, Series 2005-9, under an Assignment/Successive Assignments recorded under Auditor's File No. 20100629001330.

The Tax Parcel ID number and Abbreviated Legal Description are provided solely to comply with the recording statutes and are not intended to supplement, amend or supersede the Property's full legal description provided herein.

II.

No action commenced by the Beneficiary of the Deed of Trust is now pending to seek satisfaction of the Obligation in any Court by reason of the Grantor's or Borrower's default on the Obligation.

III.

The Beneficiary alleges default of the Deed of Trust for failure to pay the following amounts now in arrears and/or other defaults:

		Amount due to reinstate by 7/18/2010
Monthly Payments		\$29,618.60
Late Charges		\$1,275.12
Lender's Fees & Costs		\$455.00
Total Arrearage	\$31,348.72	
Trustee's Expenses (Itemization)		
Trustee's Fee		\$607.50
Title Report		\$859.00
Statutory Mailings		\$19.12
Recording Costs		\$15.00
Postings		\$70.00
Total Costs	\$1,570.62	
Total Amount Due:		\$32,919.34

IV.

The sum owing on the Obligation is: Principal Balance of \$335,325.62, together with interest as provided in the note or other instrument evidencing the Obligation from 08/01/09, and such other costs and fees as are due under the Obligation, and as are provided by statute.

V.

The Property will be sold to satisfy the expense of sale and the Obligation as provided by statute. The sale will be made without representation or warranty, express or implied regarding title, possession, encumbrances or condition of the Property on October 22, 2010. The default(s) referred to in paragraph III, together with any subsequent payments, late charges, advances costs and fees thereafter due, must be cured by 10/11/10 (11 days before the sale date), to cause a discontinuance of the sale. The sale will be discontinued and terminated if at any time before the close of the Trustee's business on 10/11/10 (11 days before the sale date), the default(s) as set forth in paragraph III, together with any subsequent payments,

late charges, advances, costs and fees thereafter due, is/are cured and the Trustee's fees and costs are paid. The sale may be terminated any time after 10/11/10 (11 days before the sale date), and before the sale by the Borrower, Grantor, any Guarantor or the holder of any recorded junior lien or encumbrance paying the entire balance of principal and interest secured by the Deed of Trust, plus costs, fees, and advances, if any made pursuant to the terms of the obligation and/or Deed of Trust.

VI.

A written notice of default was transmitted by the Beneficiary or Trustee to the Borrower and Grantor at the following address(es):

NAME AND ADDRESS

Gloria Pazooki
20541 92nd Avenue South
Kent, WA 98031

Gloria Pazooki
14044 Southeast 44th Place
Bellevue, WA 98006

Unknown Spouse and/or Domestic
Partner of Gloria Pazooki
20541 92nd Avenue South
Kent, WA 98031

Unknown Spouse and/or Domestic
Partner of Gloria Pazooki
14044 Southeast 44th Place
Bellevue, WA 98006

by both first class and either certified mail, return receipt requested on 06/16/10; proof of which is in the possession of the Trustee; and on 06/17/10 Grantor and Borrower were personally served with said written notice of default or the written notice of default was posted on a conspicuous place on the real property described in paragraph I above, and the Trustee has possession of proof of such service or posting.

VII.

The Trustee, whose name and address are set forth below, will provide in writing to anyone requesting it a statement of all foreclosure costs and trustee's fees due at any time prior to the sale.

VIII.

The effect of the sale will be to deprive the Grantor and all those who hold by, through or under the Grantor of all their right, title and interest in the Property.

IX.

Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.

X.

NOTICE TO OCCUPANTS OR TENANTS - The 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. After the 20th day following the sale the purchaser has the right to evict occupants who are not tenants by summary proceedings under Chapter 59.12 RCW. For tenant-occupied property, the purchaser shall provide a tenant with written notice in accordance with RCW 61.24.060.

Trustee's Deed against Parcel 9036

APPENDIX H



20101208000741

TITLE COURT SE TD 63.00
PAGE-001 OF 002
12/08/2010 13:25
KING COUNTY, WA

After Recording Return To:
Post Sale Dept.
Northwest Trustee Services, Inc.
P.O. Box 997
Bellevue, WA 98009-0997

E2469641

12/08/2010 13:09
KING COUNTY, WA
TAX \$10.00
SALE \$0.00

PAGE-001 OF 001

File No.: 7777.13138/PAZOOKI, GLORIA

Trustee's Deed 3 r.c.

The GRANTOR, Northwest Trustee Services, Inc., as present Trustee under that Deed of Trust (defined below), in consideration of the premises and payment recited below, hereby grants and conveys, without representation or warranty, expressed or implied, to The Bank of New York Mellon, fka The Bank of New York as Successor in interest to JP Morgan Chase Bank NA as Trustee for Structured Asset Mortgage Investments II Inc. Bear Stearns ALT-A Trust 2005-9, Mortgage Pass-Through Certificates, Series 2005-9, as GRANTEE, all real property (the Property), situated in the County of KING, State of Washington, described as follows:

Tax Parcel No.: 0622059036

THAT PORTION OF THE SOUTHEAST QUARTER OF THE SOUTHWEST QUARTER OF SECTION 6, TOWNSHIP 22 NORTH, RANGE 5 EAST, W.M., IN KING COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS: BEGINNING AT A POINT WHICH IS NORTH 0 DEGREES 42' 23" EAST 829.05 FEET FROM THE SOUTH QUARTER SECTION CORNER OF SECTION 6; THENCE SOUTH 0 DEGREES 42' 23" WEST 58 FEET; THENCE NORTH 89 DEGREES 53' 05" WEST 554.13 FEET; THENCE NORTH 1 DEGREES 55' 05" WEST 188.06 FEET, MORE OR LESS, TO A POINT FROM WHICH THE POINT OF BEGINNING BEARS SOUTH 89 DEGREES 53' 05" EAST; THENCE SOUTH 89 DEGREES 53' 05" EAST 560.45 FEET, MORE OR LESS, TO THE POINT OF BEGINNING, EXCEPT COUNTY ROAD, SITUATE IN THE COUNTY OF KING, STATE OF WASHINGTON.

RECITALS:

1. This conveyance is made pursuant to the powers, including the power of sale, conferred upon the Beneficiary by that certain Deed of Trust between Gloria Pazooki, a married woman as her sole and separate property, as Grantor, to Fidelity National Title, as Trustee, and Mortgage Electronic Registration Systems, Inc, solely as nominee for Centralbank Mortgage Corporation, Beneficiary, dated 06/06/05, recorded 06/07/05, under Auditor's No. 20050607001227, records of KING County, Washington and subsequently assigned to The Bank of New York Mellon, fka The Bank of New York as Successor in interest to JP Morgan Chase Bank NA as Trustee for Structured Asset Mortgage Investments II Inc. Bear Stearns ALT-A Trust 2005-9, Mortgage Pass-Through Certificates, Series 2005-9 under KING County Auditor's No. 20100629001330.

2. The Deed of Trust was executed to secure, together with other undertakings, the payment of one or more promissory note(s) ("Note") in the sum of \$352,000.00 with interest thereon, according to the terms thereof, in favor of Mortgage Electronic Registration Systems, Inc, solely as nominee for Centralbank Mortgage Corporation and to secure any other sums of money which might become due and payable under the terms of said Deed of Trust.

3. The Deed of Trust provided that the Property is not used principally for agricultural or farming purposes and the Grantor has no actual knowledge that the Property is used principally for agricultural or farming purposes.

4. Default having occurred in the obligations secured and/or covenants of the Deed of Trust grantor, as set forth in Notice of Trustee's Sale described below, which by the terms of the Deed of Trust make operative the power to sell, the thirty-day advance Notice of Default was transmitted to the Deed of Trust grantor, or his successor in interest, and a copy of said Notice was posted or served in accordance with law.

5. The Bank of New York Mellon, fka The Bank of New York as Successor in interest to JP Morgan Chase Bank NA as Trustee for Structured Asset Mortgage Investments II Inc. Bear Stearns ALT-A Trust 2005-9, Mortgage Pass-Through Certificates, Series 2005-9, being then the holder of the indebtedness secured by the Deed of Trust.

delivered to said Grantor a written request directing Grantor to sell the Property in accordance with law and the terms of the Deed of Trust.

6. The defaults specified in the "Notice of Default" not having been cured, the Grantor, in compliance with the terms of the Deed of Trust, executed and on 07/22/10, recorded in the office of the Auditor of KING County, Washington, a "Notice of Trustee's Sale" of the Property under Auditor's File No. 20100722001008.

7. The Grantor, in the "Notice of Trustee's Sale", fixed the place of sale as The northwest corner of the ground level parking area located under the Pacific Corporate Center building, 13555 SE 36th Street, City of Bellevue, State of Washington a public place, at 10:00 o'clock a.m. and in accordance with the law caused copies of the statutory "Notice of Trustee's Sale" to be transmitted by mail to all persons entitled thereto and either posted or served prior to 90 days before the sale; further, the Grantor caused a copy of said "Notice of Trustee's Sale" to be published in a legal newspaper in each county in which the property or any part thereof is situated, once between the thirty-fifth and twenty-eighth day before the date of sale, and once between the fourteenth and the seventh day before the date of sale; and further, included with the Notice, which was transmitted to or served upon the Deed of Trust grantor or his successor in interest, a "Notice of Foreclosure" in substantially the statutory form, to which copies of the Note and Deed of Trust were attached.

8. During foreclosure, no action by the Beneficiary, its successors or assigns was pending on an obligation secured by the Deed of Trust.

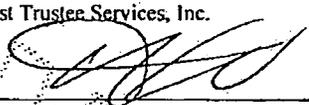
9. All legal requirements and all provisions of said Deed of Trust have been complied with, as to acts to be performed and notices to be given, as provided in chapter 61.24 RCW.

10. The defaults specified in the "Notice of Trustee's Sale" not having been cured ten days prior to the date of Trustee's Sale and said obligation secured by said Deed of Trust remaining unpaid, on November 29, 2010, the date of sale, which was not less than 190 days from the date of default in the obligation secured, the Grantor then and there sold the Property at public auction to said Beneficiary, the highest bidder therefore, for the sum of \$233,750.00. Beneficiary then directed Grantor to issue this Trustee's Deed directly to Grantee.

This conveyance is made without representations or warranties of any kind, expressed or implied. By recording this Trustee's Deed, Grantee understands, acknowledges and agrees that the Property was purchased in the context of a foreclosure, that the trustee made no representations to Grantee concerning the Property and that the trustee owed no duty to make disclosures to Grantee concerning the Property, Grantee relying solely upon his/her/their/its own due diligence investigation before electing to bid for the Property.

DATED: December 3, 2010

GRANTOR
Northwest Trustee Services, Inc.

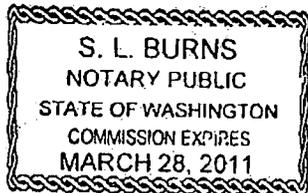
By: 
Assistant Vice President
Northwest Trustee Services, Inc.

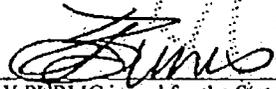
STATE OF WASHINGTON)

COUNTY OF KING)

I certify that I know or have satisfactory evidence that Heather Westfall is the person who appeared before me, and said person acknowledged that (he/she) signed this instrument, on oath stated that (he/she) was authorized to execute the instrument and acknowledged (he/she) as the Assistant Vice President of Northwest Trustee Services, Inc. to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated: December 3, 2010


S. L. BURNS
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
MARCH 28, 2011


NOTARY PUBLIC in and for the State of
Washington, residing at King Co.
My commission expires: 03/28/2011

After Recording Return to:
Northwest Trustee Services, Inc.
Attention: Heather L. Smith
P.O. Box 997
Bellevue, WA 98009-0997



20100629001330

TITLE COURT SE ADT 14.00
PAGE-001 OF 001
06/29/2010 14:35
KING COUNTY, WA

7777.13138/PAZOOKI, GLORIA

1218088061

Assignment of Deed of Trust

For Value Received, the undersigned as Beneficiary, hereby grants, conveys, assigns and transfers to The Bank of New York Mellon, fka The Bank of New York as Successor in interest to JP Morgan Chase Bank NA as Trustee for Structured Asset Mortgage Investments II Inc. Bear Stearns ALT-A Trust 2005-9, Mortgage Pass-Through Certificates, Series 2005-9, whose address is c/o America's Servicing Company MAC # X7801-013, 3476 Stateview Blvd, Fort Mill, SC 29715 all beneficial interest under that certain deed of trust, dated 06/06/05, executed by Gloria Pazooki, a married woman as her sole and separate property, Grantors, to Fidelity National Title, Trustee, and recorded on 06/07/05, under Auditor's File No. 20050607001227, Records of KING County, Washington.

Together with note or notes therein described or referred to, the money due and to become due thereon, with interest, and all rights accrued or to accrue under said Deed of Trust.

Dated: June 17, 2010

Mortgage Electronic Registration Systems, Inc.

Title: Vice President

STATE OF WASHINGTON)

) ss.

COUNTY OF KING)

I certify that I know or have satisfactory evidence that Jeff Stenman is the person who appeared before me, and said person acknowledged that (he/she) signed this instrument, on oath stated that (he/she) was authorized to execute the instrument and acknowledged it as the Vice President of Mortgage Electronic Registration Systems, Inc. to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated: June 17, 2010

NOTARY PUBLIC in and for the State of Washington
Residing at Maple Valley
My commission expires 06/11/12

NEANG AVILA
STATE OF WASHINGTON
NOTARY PUBLIC
MY COMMISSION EXPIRES
06-11-12

EXHIBIT NO B
PAGE 1 OF 1

APPENDIX I

Scotty's Claim of Lien for work beginning May 7, 2007 and recorded December 29, 2008. Listing Parcel 9056, but includes Parcel 9036 on the legal description.



20081229000168

MARTIN L 44.00
PAGE 001 OF 003
12/29/2008 09:33
KING COUNTY, WA

RETURN ADDRESS:

Dale R. Martin
Barokas Martin & Tomlinson
1422 Bellevue Avenue
Seattle, WA 98122

CLAIM OF LIEN

Reference # _____	
Grantor(s) (Owner): (1) _____ (2) _____	Add'l on pg _____
Grantee(s) (Claimants): _____	Add'l on pg _____
Legal Description (abbreviated): _____	Add'l legal on pg _____
Assessor's Property Tax Parcel / Account # <u>062205-9056</u>	

Scotty's General Construction, Inc.,

Claimant,

vs.

Gloria Pazooki and Siavoosh Pazooki, husband
and wife, Individually and the marital community
comprised thereof,

Debtor(s).

Notice is hereby given that the person named below claims a lien pursuant to Chapter 60.04 RCW.
In support of this lien, the following information is submitted:

1. NAME OF LIEN CLAIMANT: Scotty's General Construction, Inc.
TELEPHONE NUMBER: (253) 631-3477
ADDRESS: 20405 SE 344th Street, Auburn, WA 98092
2. DATE ON WHICH THE CLAIMANT BEGAN TO PERFORM LABOR, PROVIDE PROFESSIONAL SERVICES, SUPPLY MATERIAL OR EQUIPMENT, OR THE DATE ON WHICH THE EMPLOYEE BENEFIT CONTRIBUTIONS BECAME DUE: May 7, 2007
3. NAME OF PERSON INDEBTED TO THE CLAIMANT: Gloria Pazooki and Siavoosh Pazooki.
4. DESCRIPTION OF THE PROPERTY AGAINST WHICH A LIEN IS CLAIMED (street address, legal description, or other information that will reasonably describe the property): 20541 92nd Avenue South, Kent, WA 98031, legal description attached.

- 5. NAME OF THE OWNER OR REPUTED OWNER (if not known, state "unknown"): Gloria and Siavoosh Pazooki. TELEPHONE NUMBER: (206) 229-7001. ADDRESS: 14044 SE 44th Place, Bellevue, WA 98006.
- 6. THE LAST DATE ON WHICH LABOR WAS PERFORMED, PROFESSIONAL SERVICES WERE FURNISHED, CONTRIBUTIONS TO AN EMPLOYEE BENEFIT PLAN WERE DUE, OR MATERIAL OR EQUIPMENT WAS FURNISHED: October 16, 2008
- 7. PRINCIPAL AMOUNT FOR WHICH THE LIEN IS CLAIMED IS: \$199,335.06.
- 8. IF THE CLAIMANT IS THE ASSIGNEE OF THIS CLAIM, SO STATE HERE: N/A.

BAROKAS MARTIN & TOMLINSON
Attorneys for Scotty's General Construction, Inc.

By: _____
Dale R. Martin, WSBA 1216
Address: 1422 Bellevue Avenue
Seattle, WA 98122

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

Dale R. Martin, being first duly sworn, on oath deposes and states: I am the attorney for the claimant above-named; I have read the foregoing claim, know the contents thereof, and believe the same to be true and correct and that the claim of lien is not frivolous and is made with reasonable cause, and is clearly not excessive under penalty of perjury.



Dale R. Martin

SUBSCRIBED AND SWORN to before me this 24th day of December, 2008.





NOTARY PUBLIC in and for the State of Washington,
residing at Seattle, Washington.
My Appointment Expires: 4-1-09

LEGAL DESCRIPTION

PARCEL NO. 062205-9056

BEGINNING AT A POINT WHICH IS N 0°32'33" E 829.05 FEET FROM THE SOUTH QUARTER SECTION CORNER OF SECTION 6, TOWNSHIP 22 NORTH, RANGE 5 EAST, W.M., IN KING COUNTY, WASHINGTON, SAID POINT BEING ON THE NORTH AND SOUTH CENTERLINE OF SAID SECTION 6;

THENCE N 0 ° 42'33" E 301.83 FEET;

THENCE N 89 ° 53'55" W 572.54 FEET;

THENCE S 1°35'05" E 302.02 FEET;

THENCE S 89°53'05" W 560.45 FEET, MORE OR LESS, TO THE POINT OF BEGINNING;

EXCEPT THE NORTH 135.02 FEET, MORE OR LESS;

AND EXCEPT 92ND AVENUE SOUTH.

PARCEL NO. 062205-9036

THAT PORTION OF THE SOUTHEAST QUARTER OF THE SOUTHWEST QUARTER OF SECTION 6, TOWNSHIP 22 NORTH, RANGE 5 EAST, W.M., IN KING COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT WHICH IS N 0°42'23" E 829.05 FEET FROM THE SOUTH QUARTER SECTION CORNER OF SECTION 6;

THENCE S 0°42'23" W 158 FEET;

THENCE N 89°53'05" W 554.13 FEET;

THENCE N 1°35'05" W 158.06 FEET, MORE OR LESS, TO A POINT FROM WHICH THE POINT OF BEGINNING BEARS S 89°53'05" E;

THENCE S 89°53'05" E 560.45 FEET, MORE OR LESS, TO THE POINT OF BEGINNING;
EXCEPT COUNTY ROAD

APPENDIX J

Decl. of Hans P. Juhl in Supp. of Pl.'s Req. for Award of
Fees (Aug. 2, 2010) in *Scotty's v. Pazooki, et al.*

FILED
KING COUNTY, WASHINGTON

AUG 02 2010

SUPERIOR COURT CLERK
BY GINGER BARBER
DEPUTY

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

SCOTTY'S GENERAL
CONSTRUCTION, INC., a Washington
corporation

Plaintiff,

vs.

GLORIA PAZOOKI and SIAVOOSH
PAZOOKI, husband and wife and the
marital community comprised thereof;
and OMIED RYAN PAZOOKI and
JANE DOE PAZOOKI, husband and
wife and the marital community
composed thereof; WMC MORTGAGE
CORP., a California corporation,
CENTRALBANC MORTGAGE
CORPORATION, a California
Corporation, IRA FARAMARZI and
PEADOR FARAMARZI, husband and
wife and the marital community
composed thereof,

Defendants.

NO. 09-2-07414-3 KNT

**DECLARATION OF HANS P.
JUHL IN SUPPORT OF
PLAINTIFF'S REQUEST FOR
AWARD OF FEES AND COSTS**

I, Hans P. Juhl, declare and state as follows:

1. I am over the age of 18 years old, have personal knowledge of all facts
recited herein and am competent to testify the same.

1 2. I am one of the attorneys for the Plaintiff, Scotty's General Construction,
2 Inc. ("Scotty's").

3 3. In order to determine the amount of attorney's fees to which Scotty's is
4 entitled as part of its judgment against the Defendants Siavoosh and Gloria Pazooki and
5 Omied Pazooki, I directed our firm's bookkeeper to provide me with the Scotty's
6 General Construction, Inc.'s Detail Transaction File List which would illustrate fees and
7 costs incurred by the Plaintiff and invoiced to it by Barokas Martin & Tomlinson. I
8 have attached hereto as Exhibit "A" a true and correct copy of this Detail Transaction
9 File List, created and provided to me on July 29, 2010.

10 Our office uses this document in order to record all time incurred by any attorney
11 or paralegal that performs work related to an individual matter, or group of matters, as
12 well as costs which are advanced by this office, and invoiced to our client. This
13 particular Transaction File List is for our office file number 1493.004, Scotty's General
14 Construction v. Pazooki. All of the hours and costs incurred relative to the litigation
15 with Defendants Pazooki were recorded under this file number and every task performed
16 by an attorney or paralegal related to this matter for which Scotty's was charged is
17 explained on the Exhibit as it would be on the client's invoice.

18 4. Scotty's fees were calculated based on our office's agreement to invoice
19 for our work based on an hourly rate in increments of one quarter hour. As is evident
20 from the attached Exhibit, Scotty's was charged my hourly rate of \$250.00 per hour, and
21 Dale R. Martin's hourly rate of \$350.00 per hour. Our office bases the rates which it
22 charges to its clients upon the experience and skill of the timekeeper required to perform
23 the legal work, the complexity of the issues involved in the matter upon which work is
24 being performed, the extent to which the work being performed will preclude the
25 performance of work on other matters, and the rates being billed by other offices for
26 work by similarly experienced counsel on similarly complex matters.

27 5. Mr. Martin bills at the hourly rate of \$350.00 per hour. He has been
28 admitted to the Washington Bar for more than forty six (46) years and has practiced as a
trial lawyer throughout Washington and Alaska, and in various other jurisdictions. Mr.
Martin maintains an active construction litigation practice, representing clients of all

1 types and sizes in real estate, construction and development related disputes. Mr. Martin
2 was our office's partner responsible for this matter. After January, 2009, I became
3 primarily responsible for the matter, and Mr. Martin served in primarily a supervisory
4 role.

5 6. My hourly rate of \$250.00 per hour is based on almost (8) years of
6 practice during the first four (5) years of which, I represented clients in all types of
7 litigation, and tried criminal as well as civil cases before a number of Washington
8 courts. In November, 2007, I joined Barokas Martin & Tomlinson in order to focus my
9 practice exclusively on construction and development matters which occupy the
10 majority of my practice, though I continue to represent clients in more general business
11 litigation and a select number of general civil litigation matters which are referred to me
12 or performed for existing clients. Under Mr. Martin's supervision, I was primarily
13 responsible for all aspects of the case subsequent to the filing of Scotty's claim of lien,
14 including the majority of the work necessary to complete ultimately unsuccessful
15 settlement negotiations, discovery, and trial preparation, and the presentation of the case
16 to the Court.

17 7. In order to determine the total fees Scotty's incurred in this litigation
18 which should be awarded to Scotty's as judgment against the Defendants Pazooki, I
19 assumed the reasonableness of the fees charged by each timekeeper based on the reasons
20 set forth above. I subtracted from the total fees incurred, first amounts which were not
21 billable to the client regardless of what matter they were related to. Secondly, I
22 subtracted time which was related to matters that did not relate to the prosecution of
23 Scotty's claim for lien foreclosure against the Defendants and/or breach of contract
24 against the Defendants Pazooki. Then, I added the time that I have incurred since June
25 30, 2010 and anticipate incurring in August, 2010. Finally, I added costs advanced by
26 our office on behalf of Scotty's. The calculation I performed is illustrated below:

27 Total fees billed to file no. 3398.001 as of June 30, 2010 \$4,787.97
28 Fees incurred June 30, 2010 to July 29, 2010

1-Jul	Scotty's General Construction, Inc. v. Pazooki - 1493.004	Preparation of stipulated judgment, letter to Pazookis	1.5
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1		Scotty's General Construction, Inc. v. Pazooki - 1493.004	Preparation of witness and exhibit list, foreclosure research	
2	12-Jul			1.25
3		Scotty's General Construction, Inc. v. Pazooki - 1493.004	Foreclosure research, telephone conference with client regarding notice of foreclosure sale	
4	14-Jul			0.5
5		Scotty's General Construction, Inc. v. Pazooki - 1493.004	Letter to Khan, Deutsche	
6	15-Jul			0.75
7		Scotty's General Construction, Inc. v. Pazooki - 1493.004	Telephone conference with Damon Platis regarding Centralbanc, preparation of declaration of John Delaney	
8	16-Jul			0.75
9		Scotty's General Construction, Inc. v. Pazooki - 1493.004	Telephone conference with Winston Khan regarding tender of claim to Fidelity, email to Rodger Scott regarding title claim, email to Marcia McCarthy regarding trial date.	
10	19-Jul			0.5
11		Scotty's General Construction, Inc. v. Pazooki - 1493.004	Preparation of findings of fact and conclusions of law	
12	27-Jul			1.25
13		Scotty's General Construction, Inc. v. Pazooki - 1493.004	Motion for Default and Declaration of Counsel, email to bailiff, preparation of judgment and decree	
14	28-Jul			3.5
15		Scotty's General Construction, Inc. v. Pazooki - 1493.004	Preparation of Judgment and Judgment Summary and Declaration in support of award of fees	
16	29-Jul		13 hours x \$250.00/hr.	3 \$3,250

17	Fees reasonably anticipated to be incurred subsequent to July 29, 2010	\$1,000.00
18	Total fees	\$9,037.97
19		
20	<u>Total costs and expenses advanced on behalf of client</u>	<u>\$902.00</u>
21	Total fees and costs	\$9,939.97

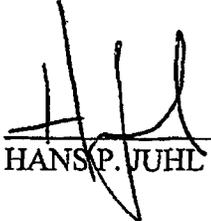
22 Based on this calculation, assuming the reasonableness of the various hourly
 23 rates charged by the two attorneys who worked on this matter, Scotty's should be
 24 awarded a total of **\$9,939.97** as judgment against Defendants Pazooki for the fees and
 25 costs it incurred in prosecuting this matter.

26 8. In this matter, Scotty's submits that all of the expenses it is requesting to
 27 be awarded were necessary in light of the Pazookis' refusal to pay even amounts it did
 28 not dispute owing, the necessity of filing a claim of lien and lawsuit to secure payment

1 of amounts owed, Pazookis' refusal to reach a settlement in order to avoid trial, and the
2 amount of hours of preparation and trial necessary to present this matter to the Court.

3
4 I declare under penalty of perjury under the laws of the State of Washington that
5 the foregoing is true and correct to the best of my knowledge.

6 DATED this 29th day of July, 2010 at Seattle, Washington.

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11 _____
12 HANS P. JUHL

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Fees	Client	Trans Date	Inkr	H Code/ P Task Code	Rate	Hours to Bill	Amount	Ref #
1493.004	12/22/2008	7 A	1	350.00	0.25	87.50	Conference with client regarding Valley View lien/account. Scotty's General Construction Scotty's v. Pazooki, et al	ARCH
1493.004	12/22/2008	7 A	1	350.00	0.25	87.50	Review client materials; Prepare Mechanic's Lien. Scotty's General Construction Scotty's v. Pazooki, et al	ARCH
1493.004	12/23/2008	7 A	1	350.00	0.25	97.50	Conference with client regarding project, mechanic's lien. Scotty's General Construction Scotty's v. Pazooki, et al	ARCH
1493.004	12/24/2008	7 A	1	350.00	0.50	175.00	Review, preparation of mechanic's lien; Conference with LLB, dictate demand to Pazooki. Scotty's General Construction Scotty's v. Pazooki, et al	ARCH
1493.004	01/09/2009	7 A	1	350.00	0.25	87.50	Conference, letter, email regarding foreclosure. Scotty's General Construction Scotty's v. Pazooki, et al	ARCH
1493.004	01/29/2009	7 A	1	350.00	0.25	87.50	Conference with LLB; Call client; Check file; Brief HPJ. Scotty's General Construction Scotty's v. Pazooki, et al	ARCH
1493.004	01/29/2009	6 A	1	250.00	2.00	500.00	Email to title company regarding litigation guarantee; Preparation of complaint for breach of contract and for foreclosure of lien. Scotty's General Construction Scotty's v. Pazooki, et al	ARCH
1493.004	01/30/2009	7 A	1	350.00	0.25	87.50	Conference with HPJ; Strategy regarding personal judgment, etc. Scotty's General Construction Scotty's v. Pazooki, et al	ARCH
1493.004	01/30/2009	6 A	1	250.00	0.50	125.00	Revision of complaint to name Omid Pazooki. Scotty's General Construction Scotty's v. Pazooki, et al	ARCH
1493.004	02/06/2009	6 A	1	250.00	0.50	125.00	Telephone conference with Rodger Scott regarding litigation guarantee; Telephone conference with Dick Cays regarding litigation guarantee. Scotty's General Construction Scotty's v. Pazooki, et al	ARCH
1493.004	02/10/2009	6 A	1	250.00	1.50	375.00	Receipt and review of litigation guarantee; Revision of complaint; Email to client; Telephone conference with client regarding priority of lien. Scotty's General Construction Scotty's v. Pazooki, et al	ARCH
1493.004	02/11/2009	6 A	1	250.00	0.25	62.50	Review and execution of summonses. Scotty's General Construction Scotty's v. Pazooki, et al	ARCH
1493.004	02/18/2009	6 A	1	250.00	0.25	62.50	Review and execution of out of state summons for Faramarzis. Scotty's General Construction Scotty's v. Pazooki, et al	ARCH
1493.004	02/26/2009	6 A	1	250.00	0.50	125.00	Telephone conference with Damon Platis regarding Centralbanc lien satisfaction and dismissal; Telephone conference with client regarding Centralbanc lien. Scotty's General Construction Scotty's v. Pazooki, et al	ARCH
1493.004	03/03/2009	6 A	1	250.00	0.25	62.50	Receipt of notices of appearance from Platis and Schermer. Scotty's General Construction Scotty's v. Pazooki, et al	ARCH
1493.004	03/05/2009	6 A	1	250.00	0.25	62.50	Telephone conference with client regarding Pazooki's counsel's notice of appearance. Scotty's General Construction Scotty's v. Pazooki, et al	ARCH
1493.004	03/23/2009	6 A	1	250.00	0.50	125.00	Preparation of motion; Declaration and order of default. Scotty's General Construction Scotty's v. Pazooki, et al	ARCH
1493.004	03/24/2009	6 A	1	250.00	0.50	125.00	Preparation of motion, declaration and order of default against WMC. Scotty's General Construction Scotty's v. Pazooki, et al	ARCH
1493.004	03/25/2009	6 A	1	250.00	0.25	62.50	Telephone conference with Damon Platis regarding motion for default. Scotty's General Construction Scotty's v. Pazooki, et al	ARCH

EXHIBIT "A"

Client	Trans Date	Trkr	H	Code/ P Task Code	Rate	Hours to Bill	Amount	Ref #
1493.004	03/26/2009	6	A	1	250.00	0.50	125.00	ARCH
							Telephone conference with James Schermer regarding motion for default; Email to James Schermer. Scotty's General Construction Scotty's v. Pazooki, et al	
1493.004	04/06/2009	6	A	1	250.00	0.25	62.50	ARCH
							Telephone conference with Damon Platis regarding Centralbanc lien. Scotty's General Construction Scotty's v. Pazooki, et al	
1493.004	04/07/2009	6	A	1	250.00	0.25	62.50	ARCH
							Telephone conference with client regarding letter from Amar Pazooki. Scotty's General Construction Scotty's v. Pazooki, et al	
1493.004	04/14/2009	6	A	1	250.00	0.25	62.50	ARCH
							Telephone conference with Jim Schermer regarding amount of claim disputed, claim security. Scotty's General Construction Scotty's v. Pazooki, et al	
1493.004	04/17/2009	6	A	1	250.00	0.50	125.00	ARCH
							Letter to client. Scotty's General Construction Scotty's v. Pazooki, et al	
1493.004	04/21/2009	6	A	1	250.00	0.25	62.50	ARCH
							Telephone conference with client regarding claim against Pazookis. Scotty's General Construction Scotty's v. Pazooki, et al	
1493.004	04/22/2009	6	A	1	250.00	0.50	125.00	ARCH
							Telephone conference with Jim Schermer regarding Friday conference with clients; Telephone conference with Marcia McCarthy regarding Friday conference with clients. Scotty's General Construction Scotty's v. Pazooki, et al	
1493.004	04/23/2009	6	A	1	250.00	0.25	62.50	ARCH
							Telephone conference with Jim Schermer regarding client meeting. Scotty's General Construction Scotty's v. Pazooki, et al	
1493.004	04/28/2009	6	A	1	250.00	0.25	62.50	ARCH
							Telephone conference with client regarding settlement proposal. Scotty's General Construction Scotty's v. Pazooki, et al	
1493.004	05/07/2009	6	A	1	250.00	0.25	62.50	ARCH
							Telephone conference with client regarding valuation of property. Scotty's General Construction Scotty's v. Pazooki, et al	
1493.004	05/13/2009	6	A	1	250.00	2.00	500.00	ARCH
							Preparation of settlement agreement; Email to client. Scotty's General Construction Scotty's v. Pazooki, et al	
1493.004	05/19/2009	6	A	1	250.00	0.75	187.50	ARCH
							Email to client. Scotty's General Construction Scotty's v. Pazooki, et al	
1493.004	06/03/2009	6	A	1	250.00	0.25	62.50	ARCH
							Email to client. Scotty's General Construction Scotty's v. Pazooki, et al	
1493.004	11/20/2009	6	A	1	250.00	0.25	62.50	ARCH
							Telephone conference with Rodger Scott regarding collapse of retaining wall; Letter to Humphrey. Scotty's General Construction Scotty's v. Pazooki, et al	
1493.004	05/13/2010	6	A	1	250.00	0.50	125.00	ARCH
							Telephone conference with James Schermer regarding discovery deadline, settlement; Confirming email to Jim Schermer; Email to Jim Schermer regarding appearances by other parties. Scotty's General Construction Scotty's v. Pazooki, et al	
1493.004	05/14/2010	6	A	1	250.00	0.25	62.50	ARCH
							Telephone conference with client regarding requests for admission, confession of judgment. Scotty's General Construction Scotty's v. Pazooki, et al	
1493.004	06/30/2010	6	A	1	250.00	1.50	375.00	ARCH
							Preparation of stipulated judgment; Letter to Pazookis. Scotty's General Construction Scotty's v. Pazooki, et al	
Total For Fees					Billable	18.00	4700.00	
Expenses								
1493.004	12/31/2008	21	A	112			2.50	ARCH
							Messenger expense - Washington Legal Messengers (#174832) Scotty's General Construction Scotty's v. Pazooki, et al	
1493.004	12/31/2008	21	A	117			5.73	ARCH
							Postage Scotty's General Construction Scotty's v. Pazooki, et al	

Client	Trans Date	Task	H Code/ Task Code	Rate	Hours to Bill	Amount	Ref #
Expenses							
1493.004	02/28/2009	7 A	129			72.96	ARCH
						Reproduction Expense	
						Scotty's General Construction	
						Scotty's v. Pazooki, et al	
1493.004	04/30/2009	7 A	117			2.25	ARCH
						Postage	
						Scotty's General Construction	
						Scotty's v. Pazooki, et al	
1493.004	03/31/2010	7 A	106			1.60	ARCH
						Telecopier	
						Scotty's General Construction	
						Scotty's v. Pazooki, et al	
1493.004	06/30/2010	7 A	117			1.93	ARCH
						Postage	
						Scotty's General Construction	
						Scotty's v. Pazooki, et al	
1493.004	06/30/2010	7 A	129			2.60	ARCH
						Reproduction Expense	
						Scotty's General Construction	
						Scotty's v. Pazooki, et al	
Total for Expenses				Billable	0.00	87.97	
				Non-billable	0.00	1.60	
				Total	0.00	89.57	
Advances							
1493.004	02/28/2009	7 A	115			59.00	ARCH
						Process service fee - Washington	
						Legal Messengers (#178561) service	
						upon WMC Mortgage Corp	
						Scotty's General Construction	
						Scotty's v. Pazooki, et al	
1493.004	02/28/2009	7 A	115			59.00	ARCH
						Process service fee - Washington	
						Legal Messengers (#178560) service	
						upon Centralbanc Mortgage Company	
						Scotty's General Construction	
						Scotty's v. Pazooki, et al	
1493.004	02/28/2009	7 A	112			5.00	ARCH
						Messenger expense - Washington Legal	
						Messengers (#178655)	
						Scotty's General Construction	
						Scotty's v. Pazooki, et al	
1493.004	02/28/2009	7 A	115			157.00	ARCH
						Process service fee - Washington	
						Legal Messengers (#178944) service	
						upon Gloria and Siavoosh Pazooki	
						Scotty's General Construction	
						Scotty's v. Pazooki, et al	
1493.004	02/28/2009	7 A	115			59.00	ARCH
						Process service fee - Washington	
						Legal Messengers (#178802) service	
						upon Omied Ryan Pazooki and Jane Doe	
						Pazooki	
						Scotty's General Construction	
						Scotty's v. Pazooki, et al	
1493.004	02/28/2009	7 A	105			200.00	ARCH
						Filing fee - King County Court Clerk	
						(#20590)	
						Scotty's General Construction	
						Scotty's v. Pazooki, et al	
1493.004	02/28/2009	7 A	112			35.00	ARCH
						Messenger expense - Washington Legal	
						Messengers (#178114)	
						Scotty's General Construction	
						Scotty's v. Pazooki, et al	
1493.004	03/31/2009	7 A	112			170.00	ARCH
						Messenger expense - Washington Legal	
						Messengers #180149 out of state	
						forwarding on Peador Faramarzi & Ira	
						Faramarzi	
						Scotty's General Construction	
						Scotty's v. Pazooki, et al	
1493.004	03/31/2009	7 A	112			40.00	ARCH
						Messenger expense - Washington Legal	
						Messengers #181249	
						Scotty's General Construction	
						Scotty's v. Pazooki, et al	
1493.004	03/31/2009	7 A	112			5.00	ARCH
						Messenger expense - Washington Legal	
						Messengers #181079	
						Scotty's General Construction	
						Scotty's v. Pazooki, et al	
1493.004	03/31/2009	7 A	112			7.00	ARCH
						Messenger expense - Washington Legal	
						Messengers #181082	
						Scotty's General Construction	
						Scotty's v. Pazooki, et al	
1493.004	03/31/2009	7 A	112			37.00	ARCH
						Messenger expense - Washington Legal	
						Messengers #181083	
						Scotty's General Construction	
						Scotty's v. Pazooki, et al	
1493.004	01/31/2010	7 A	105			69.00	ARCH
						Filing fee - King County Auditor	
						#21690 deed of trust	
						Scotty's General Construction	
						Scotty's v. Pazooki, et al	
Total for Advances				Billable	0.00	962.00	

Detail Transaction File List
Barokas, Martin & Tomlinson

24. 07/29

Client	Trans Date	Trkr	H P	Toode/ Task Code	Rate	Hours to Bill	Amount	Ref #
GRAND TOTALS								
				Billable		18.00	5689.97	
				Non-billable		0.00	1.60	
				Total		18.00	5691.57	

APPENDIX K
Pl's Opp'n to def. WMC's Motion to Set Aside Default
and Vacate J. at 2:1-26, Case No. 09-2-07414-3

FILED

11 SEP 21 AM 11:29

KING COUNTY
SUPERIOR COURT CLERK
E-FILED

CASE NUMBER: 09-2-07414-3 KNT

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8 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
9 **IN AND FOR THE COUNTY OF KING**

10 SCOTTY'S GENERAL CONSTRUCTION,
11 INC., a Washington corporation

12 Plaintiff,

13 vs.

14 GLORIA PAZOOKI and SIAVOOSH
15 PAZOOKI, husband and wife and the marital
16 community comprised thereof; and OMIED
17 RYAN PAZOOKI and JANE DOE PAZOOKI,
18 husband and wife and the marital community
19 composed thereof; WMC MORTGAGE CORP.,
20 California corporation, CENTRALBANC
21 MORTGAGE CORPORATION, a California
22 Corporation, IRA FARAMARZI and PEADOR
23 FARAMARZI, husband and wife and the marital
24 community composed thereof,

25 Defendants.

NO. 09-2-07414-3 KNT

**PLAINTIFF'S OPPOSITION TO
DEFENDANT WMC'S MOTION TO
SET ASIDE DEFAULT AND VACATE
JUDGMENT**

26 **I. INTRODUCTION**

27 Following service on WMC Mortgage Corp. ("WMC") of a Complaint filed by Scotty's
28 General Construction, Inc. ("Scotty's") whereby Scotty's requested that the Court adjudge its lien
position in certain real property located in King County superior to WMC's, WMC failed to plead

PLAINTIFF'S OPPOSITION TO DEFENDANT WMC'S
MOTION TO SET ASIDE DEFAULT AND VACATE
JUDGMENT - 1

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1 or appear. An Order of Default against WMC was entered on April 19, 2009. Over a year later,
2 Scotty's discovered that WMC had, after service of the Complaint and the entry of the Order of
3 Default, purported to assign its interest in the property to another bank and that that bank had
4 scheduled a foreclosure sale without notice to Scotty's. Scotty's contacted the purported assignee,
5 reasserted its lien rights, and advised the assignee that Scotty's intended to foreclose its lien at a
6 bench trial on August 2, 2010. No one but Scotty's appeared at the trial, WMC was adjudged in
7 default and Scotty's was adjudged the superior lienholder.
8

9 WMC now comes to Court over thirteen (13) months since the Default Judgment against it
10 was entered, and more than two (2) years since the Court's Order of Default, and asks the Court to
11 set aside the Court's Order of Default and Default Judgment, and asserts that Scotty's Construction
12 improperly served WMC's common law agent, rather than WMC, an argument which this Court
13 has already rejected. WMC's motion should be dismissed in its entirety and Scotty's Construction
14 should be awarded its fees incurred in making its response pursuant to RCW 60.04.181.
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17 **II. RELIEF REQUESTED**

18 Scotty's requests that this court deny WMC's Motion to Set Aside Default and Vacate
19 Judgment as: (1) WMC has not provided the required affidavit stating a concise statement of the
20 facts or errors upon which the motion is based and the facts constituting a defense to the action or
21 proceeding; (2) WMC has been adjudged in default for more than one (1) year and was served with
22 the Summons and Complaint 31 months ago; and (3) MERS never had an interest in the property
23 described as Parcel 062205-9056 and 062205-9036 and was therefore not a required party to
24 foreclose the mechanic's lien. Scotty's further requests award of its actual fees and costs incurred
25 herein pursuant to RCW 60.04.181.
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III. EVIDENCE RELIED UPON

Scotty's Construction relies upon the Declaration of Hans P. Juhl in Support of Plaintiff's Response to Defendant's Motion to Set Aside Default and Vacate Judgment ("Juhl Decl.") and the Exhibits attached thereto.

IV. STATEMENT OF FACTS

A. Background of the Property Legally Described as Parcel 062205-9056 and Parcel 062205-9036.

On May 31, 2005, Gloria Pazooki obtained a residential mortgage loan in the amount of \$332,500. Ms. Pazooki secured the May 31, 2005 promissory note with a Deed of Trust on property she owned known by the King County tax assessor as Parcels No: 062205-9056 and 062205-9036. The May 31, 2005 Deed of Trust was filed on June 7, 2005. Juhl Decl., **Exhibit "A"**, (King County Recording Document 20050607000349); Juhl Decl., **Exhibit "B"**, (King County Parcel Map for 20514 92nd Avenue South, Kent, Washington 98031). The Deed of Trust defines Gloria Pazooki and Siavoosh Pazooki as the "Borrower"; WMC as the "Lender"; and MERS as "a separate corporation that is acting solely as nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument."

Apparently, on June 6, 2005, Ms. Pazooki obtained a second residential mortgage loan in the amount of \$352,000. Ms. Pazooki secured the June 6, 2005 promissory note with a second Deed of Trust on Parcel No: 062005-9036. The June 6, 2005 Deed of Trust was filed on June 7, 2005. Juhl Decl., **Exhibit "C"**, (King County Recording Document 20050607001227). The Deed of Trust defines Gloria Pazooki as "Borrower"; Centralbanc Mortgage Corporation ("Centralbanc")

1 as "Lender"; and MERS as "a separate corporation that is acting solely as nominee for Lender and
2 Lender's successors and assigns. MERS is the beneficiary under this Security Instrument."

3 On June 6, 2005, Ms. Pazooki obtained a third residential mortgage loan in the amount of
4 \$66,000. Ms. Pazooki secured the June 6, 2005 promissory note with a Deed of Trust on her real
5 property commonly known as Parcel No: 062205-9036 (these second and third deeds of trust
6 describe *only* Parcel 062205-9036 and *not* Parcel 062205-9056). The June 6, 2005 Deed of Trust
7 was filed on June 7, 2005. Juhl Decl., **Exhibit "D"**, (King County Recording Document
8 20050607001228). The Deed of Trust defines Gloria Pazooki as "Borrower"; Centralbanc
9 Mortgage Corporation as "Lender"; and "MERS" as "the Beneficiary ... solely as nominee for
10 Lender, as hereinafter defined, and Lender's successors and assigns."

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13 At all times relevant to WMC's Motion, WMC maintained an interest only in Parcel
14 062205-9056. Centralbanc's interest was only in Parcel No. 062205-9036.

15 **B. Background of Scotty's Claim and Subsequent Judgment**

16
17 On May 31, 2007, Omied Pazooki executed a contract with Scotty's whereby Scotty's
18 would furnish labor and materials necessary to improve real property owned by Gloria and
19 Siavoosh Pazooki and their marital community located at 20541 92nd Avenue South, King County,
20 Kent, Washington. See Juhl Decl., **Exhibit "E"**, (Legal Description of the Property known as
21 20541 92nd Avenue South, describing *both* Parcel 062205-9036 and Parcel 062205-9056 (these two
22 Parcels will hereinafter be referenced as "9036" and "9056")). The price of the original contract
23 was \$261,353.00 plus sales tax. Juhl Decl., **Exhibit "F"**, (Findings of Fact and Conclusions of
24 Law, dated August 2, 2010 filed in King County Superior Court Cause No. 09-2-07414-3 KNT).
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27 On or about July 25, 2008, Omied Pazooki executed another contract with Scotty's whereby
28 Scotty's would furnish labor and materials necessary to improve the Property (Parcel No. 062205-

1 9036 and Parcel No. 062205-9056). The price of the contract was \$127,681.00 plus sales tax. Juhl
2 Decl., **Exhibit "F"**.

3 Scotty's completed all work which it agreed to perform pursuant to the May 31, 2007 and
4 July 25, 2008 contracts with Omied Pazooki on our about October 16, 2008. Scotty's had furnished
5 labor and materials to improve both Parcel No. 062205-9036 and Parcel No. 062205-9056. The
6 Pazookis have failed to pay \$199,335.06, which remains due and owing. Juhl Decl., **Exhibit "F"**.

8 On December 29, 2008, within ninety (90) days of the last date that it furnished labor and
9 materials to the Property, Scotty's caused to be filed and served its Claim of Lien for amounts owed
10 pursuant to the parties' contracts plus interest, permissible costs, and attorney's fees. The legal
11 description contained in **Exhibit "E"** was used as the legal description in Scotty's Claim of Lien
12 and Complaint for Breach of Contract and for Lien Foreclosure filed to recover the unpaid balance
13 due from the Pazookis on February 2, 2009. Juhl Decl., **Exhibit "G"** (Complaint for Breach of
14 Contract and for Lien Foreclosure, dated February 2, 2009 filed in King County Superior Court
15 Cause No. 09-2-07414-3 KNT).

18 Scotty's Complaint for Breach of Contract and for Foreclosure of Mechanic's Lien was filed
19 on February 10, 2009, within eight (8) months of the filing of its Claim of Lien. Scotty's
20 Complaint for Breach of Contract and for Foreclosure of Mechanic's Lien sought a money
21 judgment against Gloria and Siavoosh Pazooki and Omied Pazooki in the principal amount of
22 \$199,335.06, prejudgment and post-judgment interest, and attorney's fees and costs. Scotty's
23 Complaint for Breach of Contract and for Foreclosure of Mechanic's Lien further requested
24 foreclosure of its lien against the Property and against all other interests in the Property. Scotty's
25 Complaint for Breach of Contract and for Foreclosure of Mechanic's Lien alleged that, besides the
26 Pazookis, WMC, Centralbanc and Peador Faramarzi and Ira Faramazi each had an interest in the
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1 Property. Scotty's Complaint for Breach of Contract and for Foreclosure of Mechanic's Lien
2 further sought foreclosure of its lien in its favor and against the interest of each of the other lien
3 holders with a valid claim to an interest in the Property and each of them as they existed, at the time
4 of commencing of the work and the furnishing of the material under said contract, in and to the
5 Property, and against the interest of any person or person claiming under them, and against right,
6 title and interest subsequently acquired by the other lien holders or any of them, and for an order
7 declaring its interest in the Property superior to all other interests, by sale and the manner provided
8 by law, application of the proceeds there to the payment of such lien, interest, attorney's fees and
9 costs. Juhl Decl., **Exhibit "G"**.

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12 Centralbanc was served with Scotty's Summons and Complaint on February 19, 2009.
13 Centralbanc appeared through counsel on March 4, 2009. Centralbanc's President, John Delaney
14 then testified by declaration that Centralbanc had no interest in the Property and had no objection to
15 Scotty's request for relief. Juhl Decl., **Exhibit "F"**.

16
17 WMC was served with Scotty's Summons and Complaint for Breach of Contract and for
18 Foreclosure of Mechanic's Lien on February 19, 2009. On April 16, 2009, the Court entered an
19 Order of Default against WMC. Juhl Decl., **Exhibit "F"**.

20
21 Omied Pazooki was served with Scotty's Summons and Complaint for Breach of Contract
22 and for Foreclosure of Mechanic's Lien on February 22, 2009. Each of the Pazookis appeared
23 through counsel on March 3, 2009. Their counsel withdrew effective May 24, 2010. Juhl Decl.,
24 **Exhibit "F"**.

25
26 In the beginning of July, 2010, in preparation for trial, counsel for Scotty's discovered that
27 in April, 2010, about a year after the Court had entered its Order of Default against WMC, WMC
28 transferred title to Deutsche Bank National Trust ("Deutsche"). WMC had, without notice to

1 Scotty's, conducted a foreclosure sale on June 23, 2010. Juhl Decl., **Exhibit "I"**. On July 15,
2 2010, Scotty's counsel wrote to Northwest Trustee's Service and Deutsche, reasserting it lien rights
3 advising that it would seek to foreclose those rights at trial on August 2, 2010, and demanding that
4 the trustee's sale be set aside. Juhl Decl., **Exhibit "J"**. On August 2, 2010, only Scotty's appeared
5 at trial. The court entered a Judgment Summary and Order of Judgment in favor of Scotty's,
6 ordering "that the interest of Plaintiff Scotty's General Construction, Inc. in the property ... is
7 superior to the interest of all Defendants and the Plaintiff Scotty's General Construction, Inc. is
8 entitled to foreclosure of its interest as against such property...." Juhl Decl., **Exhibit "H"**,
9 (Judgment Summary and Order of Judgment, dated August 2, 2010 filed in King County Superior
10 Court Cause No. 09-2-07414-3 KNT). On August 12, 2010, Deutsche sold Parcel No. 062205-
11 9056 to Shiad Investments, LLC. Juhl Decl., **Exhibit "I"**.

14 In December, 2010, counsel for Scotty's was contacted by Fidelity National Title who
15 assigned the claim to local counsel on behalf of Northwest Trustee's Service and Litton Loan
16 Servicing which appears to be an assignee of WMC's successor in interest. The same counsel has
17 now appeared herein for WMC. Counsel for Scotty's and counsel for WMC/Northwest Trustee
18 Service/Litton Loan Servicing maintained contact from that December 2010 to the present. Juhl
19 Decl., **Exhibit "K"**.

22 In February, 2011, Centralbanc's successor in interest, Bank of New York Mellon, filed a
23 separate action to quiet title to Parcel 062205-9036. The only basis of that action was that Scotty's
24 had failed to name Centralbanc's common law agent, MERS, in its Summons and Complaint for
25 Breach of Contract and for Foreclosure of Mechanic's Lien. Juhl Decl., **Exhibit "L"**. WMC
26 makes the same argument in its Motion to Set Aside Default and Vacate Judgment. The Bank of
27

1 New York Mellon action was dismissed by Judge Hill on Scotty's CR 12(b)(6) motion for
2 dismissal. Juhl Decl., Exhibit "M".

3 **V. ARGUMENT AND AUTHORITY**

4 **A. Standards for Setting Aside a Default and Vacating a Judgment.**

5 WMC's statement "The Court has two primary methods by which it can undo a default"
6 confuses two (2) separate and distinct provisions of the Washington State Superior Court Civil
7 Rules. The first, CR 55(c)(1) relates only to setting aside an *order of default* and CR 60(b) relates
8 only to vacating a *default judgment*. In fact, one of WMC's cited cases, *In re Estate of Stevens*, 94
9 Wn. App. 20, 28 (1999), specifically states, "The Superior Court Civil Rules provide different
10 standards for setting aside orders of default and default judgment."
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12
13 In the present case, CR 55 would have applied had WMC sought to set aside the April 16,
14 2009 Order of Default *prior to the entry of the Judgment*. However, CR 60 is now the only
15 pertinent rule which could be applied to vacate the August 2, 2010 Judgment. Or, as another of
16 WMC's cited cases so aptly stated, "In contrast with CR 60 (e), which requires that a defendant
17 seeking to vacate a default judgment show a meritorious defense to the action, a party seeking to set
18 aside an order of default under CR 55 (c) *prior to the entry of the judgment* need only show good
19 cause." *Canam Hambro Systems, Inc. v. Horbach*, 33 Wn. App. 452, 458 (1982)(emphasis added).
20 These are two (2) distinct rules for two (2) distinct proceedings which WMC improperly argues
21 should be applied as one convoluted conjunction of the two rules in order to "undo a default."
22

23
24 **B. CR 60 Relief from Judgment.**

25 In order to vacate the Default Judgment, WMC must demonstrate to the Court the
26 applicability of one of the eleven (11) enumerated exceptions provided in CR 60(b). CR 60
27 *additionally* requires that:
28

1 Application shall be made by motion filed in the cause stating the grounds upon which relief
2 is asked, **and supported by the affidavit of the applicant or his attorney** setting forth a
3 concise statement of the facts or errors upon which the motion is based, and if the moving
4 party be a defendant, the facts constituting a defense to the action or proceeding.

CR 60(e) (emphasis added).

5 The strict requirement of a CR 60(b) affidavit has been repeatedly upheld by the
6 Washington courts. In *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*,
7 95 Wn. App. 231, 239 (1999), the Court stated, "To establish a prima facie defense, affidavits
8 supporting motions to vacate default judgments must set out the facts constituting a defense and
9 cannot merely state allegations and conclusions. A court hearing a motion to vacate decides
10 whether the affidavits presented set forth substantial evidence to support a defense to the claim."

11 In the present case, WMC did not provide an affidavit or sworn declaration of any kind, let
12 alone one setting forth the facts or errors upon which is Motion is based and further failed to
13 provide an affidavit or sworn declaration setting forth the facts constituting a defense to the action
14 or proceeding. While WMC claims that "WMC has a prima facie defense and meritorious case ..."
15 (Motion to Set Aside Default and Vacate Judgment, p. 9, l. 19.), it has provided no affidavit that
16 would establish a prima facie defense. In the absence of an affidavit or sworn declaration which
17 would articulate WMC's defense, the below is Scotty's best attempt to determine what WMC
18 would have likely argued in its affidavit, had one been supplied, and respond thereto.
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22 1. *None of the 11 exceptions apply.*

23 WMC claims that its neglect was excusable and it performed due diligence by responding to
24 the action as soon as reasonably possible and is "asking the court to vacate the Judgment under CR
25 60(b)(9) and (11), which do not fall under any time limits." (Motion to Set Aside Default and
26 Vacate Judgment, p. 8, l. 2.) Therefore, in order to avoid the one (1) year time limit for bring a
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1 motion to vacate a judgment, WMC has to show that it could not defend the judgment as it suffered
2 an "Unavoidable casualty or misfortune preventing the party from prosecuting or defending." CR
3 60(b)(9).

4 WMC was served with the Summons and Complaint on February 19, 2009. WMC
5 apparently mailed the Summons and Complaint to Goldman Sachs but took no action to appear.
6 The Order of Default was entered against WMC on April 16, 2009. Thereafter, WMC's successor
7 became aware of the Order of Default no later than July 13, 2010. Still, neither WMC, nor any of
8 its successors or assigns took any action. Judgment was entered on August 2, 2010. The current
9 motion (dated some 31 months after the Complaint) is the first formal "response" of any kind that
10 WMC has entered in this action, even though Deutsche Bank was aware that the matter would
11 shortly go to trial in July of 2010, and WMC's counsel has known of the default judgment for more
12 than nine (9) months. The Court, in considering whether to vacate a motion for default is further
13 required to evaluate the due diligence with which WMC acted once it had notice of the default.
14 *Shepard Ambulance, Inc.*, 95 Wash.App. at 242, citing *White v. Holm*, 73 Wash.2d 348, 352, 438
15 P.2d 581 (1968).

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19 The only "unavoidable casualty or misfortune" of any kind that WMC argues in excuse of
20 its apparently willful neglect appears in two offhanded sentences in its Motion (not in the required
21 affidavit), which state that after WMC received the summons and complaint: "At that point, WMC
22 was in wind down, yet still followed through to learn that the loan had been sold to Goldman. With
23 that knowledge, WMC immediately forwarded the Summons and Complaint to Goldman." (Motion
24 to Set Aside Default and Vacate Judgment, p. 10, 11. 17-22.). This statement simply does not meet
25 the established standard of "unavoidable casualty or misfortune." See *Stanley v. Cole*, 157 Wn.
26 App. 873 (2010) (finding that plaintiff's attorney's need to care for ill and elderly parents during the
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1 timeline of the proceedings was not an unavoidable casualty or misfortune); *Thibert v. Thibert* 120
2 Wn. App. 1020 (2004) (unpublished opinion) (finding that being held in jail is not an unavoidable
3 casualty or misfortune). The only conclusion that can be reached from this statement is that WMC
4 should be seeking the indemnity from Goldman Sachs of which its letter advised, not from Scotty's.

5
6 2. *Meritorious Defense.*

7 It would appear that WMC is basing its potential defense and meritorious case on the fact
8 that MERS has an alleged beneficial interest in the property and should have been added as an
9 interested party.

10 RCW 60.04.171 (Foreclosure) states, "In any action brought to foreclose a lien, the owner
11 shall be joined as a party. The interest in the real property of any person who, prior to the
12 commencement of the action, has a recorded interest in the property, or any part thereof, shall not
13 be foreclosed or affected unless they are joined as a party."

14
15 Contrary to WMC's assertion, this particular issue (whether MERS has an interest in the
16 property that requires notice of a foreclosure proceeding) has not yet been resolved in Washington.
17 WMC cites to *Vawter v. Quality Loan Service Corporation of Washington*¹ and *Moon v. GMAC*
18 *Mortgage Corp*² for the proposition that this issue has been squarely addressed by Washington
19 courts. WMC's contention is spurious considering that neither of these decisions deal with the
20 issue presented to this Court. Rather, in *Vawter*, the Court dismissed a claim against MERS
21 because the plaintiff had relied solely on legal conclusions in their complaint and such legal
22 conclusions were not sufficient to withstand MERS' motion to dismiss. The *Moon* case is similarly
23 inapplicable. The *Moon* case simply stands for the proposition that MERS *could* be a beneficiary.
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27 ¹ 707 F.Supp. 2d 1115 (W.D. Wash. 2010).

28 ² No. C08-969 Z 2008 WL 4741492 at *5 (W.D. Wash. Oct. 24, 2008).

1 Further, both cases involved MERS' attempt to foreclose on a property, at the direction of MERS'
2 principal (the lender). This case does not involve a lender directing MERS to foreclose on a
3 property; rather, it involves the principal lender receiving notice and claiming that MERS (the
4 agent) was also required by Washington law to receive notice of a foreclosure proceeding. WMC
5 ignores MERS' role in this case as an agent of WMC. MERS occupied a position no greater than
6 its principal. In this instance, MERS' principal (WMC) undisputedly received notice from Scotty's
7 of its intent to foreclose. To the extent that MERS successfully assigned anything from WMC, it
8 was assigning WMC's rights as they existed. WMC was properly served with notice in the
9 underlying action and MERS— standing in the shoes of WMC as the holder of any obligation —
10 would be deemed to have been properly joined in the underlying lawsuit.
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13 Though this issue is not yet settled in Washington, the vast majority of states' Courts that
14 have encountered MERS have found that MERS does not have an interest in the properties that it
15 tracks. The landmark case on determining MERS' status is aptly entitled *Landmark National Bank*
16 *v. Kesler*, 289 Kan. 528, 216 P.3d 158 (2009). In *Landmark*, the Supreme Court of Kansas
17 reviewed a Kansas Court of Appeals decision which held that a non-lender was not a contingently
18 necessary party in a mortgage foreclosure action. *Id.* at 530, 216 P.2d 161. MERS and Sovereign
19 Bank sought review of the ruling. *Id.* Apparently, on March 15, 2005, Mr. Kesler secured a second
20 mortgage on his property in the amount of \$93,100 from Millennia Mortgage Corp. *Id.* The Court
21 described the second mortgage document, stating:
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24 The mortgage was made between Kesler-the "Mortgagor" and "Borrower"-and MERS,
25 which was acting "solely as nominee for Lender, as hereinafter defined, and Lender's
26 successors and assigns." The document then identified Millennia as "Lender." At some
27 subsequent time, the mortgage may have been assigned to Sovereign.

28 *Id.*

1 On July 27, 2006, after Mr. Kesler filed for bankruptcy, Landmark (the first position
2 Lender) filed a petition to foreclose on its mortgage. *Id.* at 530-31, 216 P.2d 161. Landmark named
3 and served Defendants Kesler and Millennia. *Id.* at 531, 216 P.2d 161. The trial court subsequently
4 entered default judgment against Kesler and Millennia as both parties failed to answer. *Id.* The trial
5 court then filed an order of sale on September 29, 2006. *Id.*
6

7 On November 14, 2006, Sovereign filed an answer to the foreclosure petition asserting
8 interest in the real property as the successor in interest to Millennia's second mortgage. *Id.*
9 Sovereign then filed a motion to set aside or vacate the default judgment. *Id.* The motion asserted
10 that MERS was a contingently necessary party and Landmark failed to name or serve MERS. *Id.* at
11 531, P.2d 162. The trial court ruled that MERS was not a real party in interest that was required to
12 be named in the foreclosure action. *Id.* at 532, 216 P.2d 162. The Court of Appeals upheld the trial
13 court's decision. *Id.* The Supreme Court of Kansas granted review and stated it would determine
14 the issue of "whether the district court abused its discretion in refusing to set aside the default
15 judgment and in refusing to join MERS as a contingently necessary party." *Id.* at 533, 216 P.2d
16 163.
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19 The Supreme Court of Kansas stated regarding MERS' purported interest in the property:

20 What stake in the outcome of an independent action for foreclosure could MERS have? It
21 did not lend the money to Kesler or to anyone else involved in this case. Neither Kesler nor
22 anyone else involved in the case was required by statute or contract to pay money to MERS
23 on the mortgage.

24 *Id.* at 541, 216 P.2d 163, 167.

25 In fact, as the Court noted, MERS has repeatedly denied it has any interest in the property it
26 services:
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1 Counsel for MERS explicitly declined to demonstrate to the trial court a tangible interest in
2 the mortgage. Parties are bound by the formal admissions of their counsel in an action.
3 *Dick v. Drainage District No. 2*, 187 Kan. 520, 525, 358 P.2d 744 (1961). Counsel for
4 MERS made no attempt to show any injury to MERS resulting from the lack of service; in
5 fact, counsel insisted that it did not have to show a financial or property interest.

6 MERS argued in another forum that it is *not* authorized to engage in the practices that would
7 make it a party to either the enforcement of mortgages or the transfer of mortgages. In
8 *Mortgage Elec. Reg. Sys. V. Nebraska Dept. of Banking*, 270 Neb. 529, 704 N.W.2d 784
9 (2005), MERS challenged an administrative finding that it was a mortgage banker subject to
10 license and registration requirements.

11 The Nebraska Supreme Court found in favor of MERS, noting that “MERS has no
12 independent right to collect on any debt because MERS itself has not extended credit, and
13 none of the mortgage debtors owe MERS any money.” 270 Neb. At 535, 704 N.W.2d 784.
14 The Nebraska court reached this conclusion based on the submission by counsel for MERS
15 that

16 **“MERS does not take applications, underwrite loans, make decisions on
17 whether to extend credit, collect mortgage payments, hold escrows for taxes and
18 insurance, or provide any loan servicing functions whatsoever. MERS merely
19 tracks the ownership of the lien and is paid for its services through membership fees
20 charged to its members. MERS does not receive compensation from consumers.”**
21 270 Neb. At 534, 704 N.W.2d 784.

22 *Id.* at 541-42, 216 P.3d 167-68 (emphasis added).

23 As it did in Kansas and Nebraska, MERS has gone out of its way to repeatedly argue in
24 litigation proceedings across the country that it has no interest in the mortgages it tracks. Rather,
25 MERS’ position is that “MERS merely tracks the ownership of the lien.” *Nebraska Dept. of
26 Banking*, 270 Neb. 529, 534, 704 N.W. 784.

27 The Kansas *Landmark* decision finding that MERS is simply an agent and has no interest in
28 the mortgages it tracks has been upheld by courts throughout the country. The Superior Court of
New Jersey recently opined:

[The *Landmark*] analysis of the role MERS plays as nominee, however, supports the
conclusion reached by this court with respect to that issue. *MERS, as nominee, does not
have any real interest in the underlying debt, or the mortgage which secured that debt. It
acts simply as an agent or “straw man” for the lender.* It is clear to this court that the

1 provisions of the mortgage describing the mortgagee as MERS "as nominee" were not
2 intended to deprive American Home Acceptance of its right to security under the mortgage
or to separate the note and mortgage.

3 *Bank of New York v. Raftogianis*, ---A.2d---, 2010 WL 5829240 (N.J. Super. Ct. 2010) (emphasis
4 added).

5 The United States District Court of Oregon also agreed stating, "MERS [is] 'more akin to
6 that of a **straw man** than to a party possessing all the rights given to a buyer.'" *Rinegard-Guirma v.*
7 *Bank of America, National Assoc.*, 2010 WL 3945476 (D. Or. 2010) (citing *In re Allman*, 2010 WL
8 3366405 (Bankr. D. Or. 2010)) (emphasis added).

9
10 More recently, when faced with precisely the same argument, Judge Hollis dismissed a quiet
11 title action brought against Scotty's by the Bank of New York Mellon. Notably, the case was
12 dismissed on Scotty's Motion for CR 12(b)(6) Dismissal. Juhl Decl., **Exhibits "L" and "M"**.
13 Scotty's is aware that the King County Superior Court is not a source of precedent.

14
15 In the present case, MERS was simply WMC's common law agent. Scotty's properly
16 named WMC on the February 10, 2009 Complaint. Scotty's properly notified WMC of the pending
17 action and then re-notified its successor in interest. After WMC and its successors failed to defend
18 the foreclosure action, the court entered a Judgment Summary and Order of Judgment in favor of
19 Scotty's on August 2, 2010. Juhl Decl., **Exhibit "H"**. WMC cannot possibly now present any facts
20 that MERS (as WMC's agent) had a separate interest in Parcel 9056 or was a necessary party to the
21 foreclosure action.

22
23 MERS has gone out of its way to establish that *MERS does not have any real interest in the*
24 *debt*. As MERS itself has repeatedly argued, "MERS does not take applications, underwrite loans,
25 make decisions on whether to extend credit, collect mortgage payments, hold escrows for taxes and
26 insurance, or provide any loan servicing functions whatsoever." *Nebraska Dept. of Banking*, 270
27
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1 Neb. 529, 534, 704 N.W. 784. MERS is simply the “common law agent” of its customers,
2 including WMC. MERS has no argument, and can assert no set of facts, that it was required to be
3 joined in Scotty’s Complaint as a person with a “recorded interest in the property” as required by
4 RCW 60.04.171. Scotty’s provided notice to WMC. MERS, as WMC’s agent, was not required to
5 receive notice of the foreclosure proceedings as a “person with interest in the real property.” RCW
6 60.04.171. Therefore, Scotty’s February 10, 2009 Complaint and subsequent August 2, 2010
7 Judgment should be found to have properly named all parties with an *interest* in the subject
8 property as required by RCW 60.04.171 and this Motion should be dismissed.
9

10 VI. CONCLUSION

11 WMC has seemingly attempted to introduce a new rule in Washington in which the CR 55
12 standards are combined with the CR 60 standards in order to “undue a default,” while not requiring
13 an affidavit setting forth the facts or errors upon which the motion is based and the facts
14 constituting a defense, and further allowing such new rule to be used by a moving party more than a
15 year after the judgment has been entered. Unfortunately for WMC, CR 60 has separate standards
16 from CR 55 which apply once a judgment has been entered, an affidavit is required to vacate a
17 default judgment, and the motion is required to be made not more than a year after the judgment
18 was entered. The fact is that WMC was willfully negligent.
19

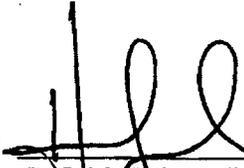
20 Even entertaining WMC’s argument that its neglect was due to “unavoidable casualty or
21 misfortune,” WMC was served with the Summons and Complaint 31 months ago. The judgment
22 was entered August 2, 2010. Though WMC’s knew of the default, WMC did nothing whatsoever
23 in response to this action until filing the current motion. There is nothing excusable about letting a
24 Summons and Complaint of which one admits it received service go without response for 31
25 months. There is no casualty or misfortune in simply “winding down” and sending the Complaint
26
27
28

1 and Summons to some other entity.

2 Secondly, entertaining WMC's argument that it has a meritorious defense, MERS does not
3 have any interest whatsoever in any of the mortgages that it tracks in its mortgage tracking system.
4 MERS, as an agent, provides the tracking system as a benefit to its principals. Scotty's
5 Construction named WMC in the Foreclosure Complaint and provided proper service and notice of
6 the Complaint. No set of facts can be presented which demonstrate that MERS, as WMC's agent,
7 had an interest in the subject property. Accordingly, WMC's Motion should be dismissed.
8

9
10
11 DATED this 21 day of September, 2011.

12
13 BAROKAS MARTIN & TOMLINSON

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16 By: 
17 Hans P. Juhl, WSBA # 33116
18 Attorneys for Defendant
19 Scotty's General Construction, Inc.
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APPENDIX L.
Permanent Editorial Board of the UCC Committee's
November 14, 2011 Report "Application of the Uniform
Commercial Code to Selected Issues Relating to Mortgage
Notes."

**REPORT OF THE PERMANENT EDITORIAL BOARD
FOR THE
UNIFORM COMMERCIAL CODE**

**APPLICATION OF THE UNIFORM COMMERCIAL CODE TO
SELECTED ISSUES RELATING TO MORTGAGE NOTES**

NOVEMBER 14, 2011

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PREFACE

In 1961, the American Law Institute and the Uniform Law Commission, the organizations that jointly sponsor the Uniform Commercial Code, established the Permanent Editorial Board for the Uniform Commercial Code (PEB). One of the charges of the PEB is to issue commentaries “and other articulations as appropriate to reflect the correct interpretation of the [Uniform Commercial] Code and issuing the same in a manner and at times best calculated to advance the uniformity and orderly development of commercial law.” Such commentaries and other articulations are issued directly by the PEB rather than by action of the American Law Institute and the Uniform Law Commission.

This Report of the Permanent Editorial Board is such an articulation, addressing the application of the Uniform Commercial Code to issues of legal, economic, and social importance arising from the issuance and transfer of mortgage notes. A draft of this Report was made available to the public for comment on March 29, 2011, and the comments that were received have been taken into account in preparing the final Report.

**REPORT OF THE PERMANENT EDITORIAL BOARD
FOR THE
UNIFORM COMMERCIAL CODE**

**APPLICATION OF THE UNIFORM COMMERCIAL CODE TO SELECTED ISSUES
RELATING TO MORTGAGE NOTES**

Introduction

Recent economic developments have brought to the forefront complex legal issues about the enforcement and collection of mortgage debt. Many of these issues are governed by local real property law and local rules of foreclosure procedure, but others are addressed in a uniform way throughout the United States by provisions of the Uniform Commercial Code (UCC).¹ Although the UCC provisions are settled law, it has become apparent that not all courts and attorneys are familiar with them. In addition, the complexity of some of the rules has proved daunting.

The Permanent Editorial Board for the Uniform Commercial Code² has prepared this Report in order to further the understanding of this statutory background by identifying and explaining several key rules in the UCC that govern the transfer and enforcement of notes secured by a mortgage³ on real property. The UCC, of course, does not resolve all issues in this field. Most particularly, as to both substance and procedure, the enforcement of real estate mortgages by foreclosure is primarily the province of a state's real property law (although determinations made

¹ The UCC is a uniform law sponsored by the American Law Institute and the Uniform Law Commission. It has been enacted in every state (as well as the District of Columbia, Puerto Rico, and the United States Virgin Islands) in whole or significant part. This Report is based on the current Official Text of the UCC. Some states have enacted some non-uniform provisions that are generally not relevant to the issues discussed in this Report. Of course, the enacted text of the UCC in the state whose law is applicable governs. See note 6, *infra*, regarding the various different versions of Article 3 of the UCC in effect in the states.

²In 1961, the American Law Institute and the Uniform Law Commission, the organizations that jointly sponsor the UCC, established the Permanent Editorial Board for the Uniform Commercial Code (PEB). One of the charges of the PEB is to issue commentaries "and other articulations as appropriate to reflect the correct interpretation of the [Uniform Commercial] Code and issuing the same in a manner and at times best calculated to advance the uniformity and orderly development of commercial law."

³ This Report, like Article 9 of the UCC, uses the term "mortgage" to include a consensual interest in real property to secure an obligation whether created by mortgage, trust deed, or the like. See UCC § 9-102(a)(55) and Official Comment 17 thereto and former UCC § 9-105(1)(j). This Report uses the term "mortgage note" to refer to a note secured by a mortgage, whether or not the note is a negotiable instrument under UCC Article 3.

pursuant to the UCC are typically relevant under that law). Accordingly, this Report should be understood as providing guidance only as to the issues the Report addresses.⁴

Background

Issues relating to the transfer, ownership, and enforcement of mortgage notes are primarily governed by two Articles of the UCC:

- In cases in which the mortgage note is a negotiable instrument,⁵ Article 3 of the UCC⁶ provides rules governing the obligations of parties on the note⁷ and the enforcement of those obligations.
- In cases involving either negotiable or non-negotiable notes, Article 9 of the UCC⁸ contains important rules governing how ownership of those notes may be transferred, the effect of the transfer of ownership of the notes on the ownership of the mortgages securing those notes, and the right of the transferee, under certain circumstances, to record its interest in the mortgage in the applicable real estate recording office.

This Report explains the application of the rules in both of those UCC Articles to provide guidance in:

- Identifying the person who is entitled to enforce the payment obligation of the maker⁹ of a mortgage note, and to whom the maker owes that obligation; and

⁴ Of course, the application of the UCC rules to particular factual circumstances depends on the nature of those circumstances. Facts raising legal issues other than those addressed in this Report can result in different rights and obligations than would be the case in the absence of those facts. Accordingly, this Report should not be read as a statement of the total legal implications of any factual scenario. Rather, the Report sets out the UCC rules that are common to the transactions discussed so as to provide a common basis for understanding the application of those rules. The impact of non-UCC law that applies to other aspects of such transactions is beyond the scope of this Report.

⁵ The requirements that must be satisfied in order for a note to be a negotiable instrument are set out in UCC § 3-104.

⁶ Except for New York, every state (as well as the District of Columbia, Puerto Rico, and the United States Virgin Islands) has enacted either the 1990 Official Text of Article 3 or the newer 2002 Official Text (the latter having been adopted in ten states as of the date of this Report). Unless indicated to the contrary all discussions of provisions in Article 3 apply equally to both versions. Much of the analysis of UCC Article 3 in this Report also applies under the older version of Article 3 in effect in New York, although many section numbers differ. The Report does not address those aspects of New York's Article 3 that are different from the 1990 or 2002 texts.

⁷ In this Report, such notes are sometimes referred to as "negotiable notes."

⁸ Unlike Article 3 (which has not been enacted in its modern form in New York), the current version of Article 9 has been enacted in all 50 states, the District of Columbia, and the United States Virgin Islands. Some states have enacted non-uniform provisions that are generally not relevant to the issues discussed in this Report (but see note 31 with respect to one relevant non-uniformity). A limited set of amendments to Article 9 was approved by the American Law Institute and the Uniform Law Commission in 2010. Except as noted in this Report, those amendments (which provide for a uniform effective date of July 1, 2013) are not germane to the matters addressed in this Report.

⁹ A note can have more than one obligor. In some cases, this is because there is more than one maker (in which case they are jointly and severally liable; see UCC § 3-116(a)). In other cases, there may be an indorser. The obligation

- Determining who owns the rights represented by the note and mortgage.

Together, the provisions in Articles 3 and 9 of the UCC (along with general principles that appear in Article 1 and that apply to all transactions governed by the UCC) provide legal rules that apply to these questions.¹⁰ Moreover, these rules displace any inconsistent common law rules that might have otherwise previously governed the same questions.¹¹

This Report does not, however, address all of the rules in the UCC relating to enforcement, transfer, and ownership of mortgage notes. Rather, it reviews the rules relating to four specific questions:

- Who is the person entitled to enforce a mortgage note and, correspondingly, to whom is the obligation to pay the note owed?
- How can the owner of a mortgage note effectively transfer ownership of that note to another person or effectively use that note as collateral for an obligation?
- What is the effect of transfer of an interest in a mortgage note on the mortgage securing it?
- May a person to whom an interest in a mortgage note has been transferred, but who has not taken a recordable assignment of the mortgage, take steps to become the assignee of record in the real estate recording system of the mortgage securing the note?¹²

of an indorser is different from that of a maker in that the indorser's obligation is triggered by dishonor of the note (see UCC § 3-415) and, unless waived, indorsers have additional procedural protections (such as notice of dishonor; see UCC § 3-503)). These differences do not affect the issues addressed in this Report. For simplicity, this Report uses the term "maker" to refer to both makers and indorsers.

¹⁰ Subject to limitations on the ability to affect the rights of third parties, the effect of these provisions may be varied by agreement. UCC § 1-302. Variation by agreement is not permitted when the variation would disclaim obligations of good faith, diligence, reasonableness, or care prescribed by the UCC or when the UCC otherwise so indicates (see, e.g., UCC § 9-602). But the meaning of the statute itself cannot be varied by agreement. Thus, for example, private parties cannot make a note negotiable unless it complies with UCC § 3-104. See Official Comment 1 to UCC § 1-302. Similarly, parties may not avoid the application of UCC Article 9 to a transaction that falls within its scope. See *id.* and Official Comment 2 to UCC § 9-109.

¹¹UCC § 1-103(b). As noted in Official Comment 2 to UCC § 1-103:

The Uniform Commercial Code was drafted against the backdrop of existing bodies of law, including the common law and equity, and relies on those bodies of law to supplement its provisions in many important ways. At the same time, the Uniform Commercial Code is the primary source of commercial law rules in areas that it governs, and its rules represent choices made by its drafters and the enacting legislatures about the appropriate policies to be furthered in the transactions it covers. Therefore, while principles of common law and equity may *supplement* provisions of the Uniform Commercial Code, they may not be used to *supplant* its provisions, or the purposes and policies those provisions reflect, unless a specific provision of the Uniform Commercial Code provides otherwise. In the absence of such a provision, the Uniform Commercial Code preempts principles of common law and equity that are inconsistent with either its provisions or its purposes and policies.

¹² The Report does not discuss the application of common law principles, such as the law of agency, that supplement the provisions of the UCC other than to note some situations in which the text or comments of the UCC identify such principles as being relevant. See UCC § 1-103(b).

Question One – To Whom is the Obligation to Pay a Mortgage Note Owed?

If the mortgage note is a negotiable instrument,¹³ Article 3 of the UCC provides a largely complete set of rules governing the obligations of parties on the note, including how to determine who may enforce those obligations and, thus, to whom those obligations are owed. The following discussion analyzes the application of these rules to that determination in the context of mortgage notes that are negotiable instruments.¹⁴

In the context of mortgage notes that have been sold or used as collateral to secure an obligation, the central concept for making that determination is identification of the “person entitled to enforce” the note.¹⁵ Several issues are resolved by that determination. Most particularly:

- (i) the maker’s obligation on the note is to pay the amount of the note to *the person entitled to enforce the note*,¹⁶
- (ii) the maker’s payment to *the person entitled to enforce the note* results in discharge of the maker’s obligation,¹⁷ and
- (iii) 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.¹⁸

Thus, a person seeking to enforce rights based on the failure of the maker to pay a mortgage note must identify the person entitled to enforce the note and establish that that person has not been paid. This portion of this Report sets out the criteria for qualifying as a “person entitled to enforce” a mortgage note. The discussion of Question Two addresses how ownership of a mortgage note may be effectively transferred from an owner to another person.

¹³ See UCC § 3-104 for the requirements that must be fulfilled in order for a payment obligation to qualify as a negotiable instrument. It should not be assumed that all mortgage notes are negotiable instruments. The issue of the negotiability of a particular mortgage note, which requires application of the standards in UCC § 3-104 to the words of the particular note, is beyond the scope of this Report.

¹⁴ Law other than Article 3, including contract law, governs this determination for non-negotiable mortgage notes. That law is beyond the scope of this Report.

¹⁵ The concept of “person entitled to enforce” a note is not synonymous with “owner” of the note. See Official Comment 1 to UCC § 3-203. 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. Rules that address transfer of ownership of a note are addressed in the discussion of Question 2 below.

¹⁶ UCC § 3-412. (If the note has been dishonored, and an indorser has paid the note to the person entitled to enforce it, the maker’s obligation runs to the indorser.)

¹⁷ UCC § 3-602. The law of agency is applicable in determining whether a payment has been made to a person entitled to enforce. See *id.*, Official Comment 3. Note that, in states that have enacted the 2002 Official Text of UCC Article 3, UCC § 3-602(b) provides that a maker is also discharged by paying a person formerly entitled to enforce the note if the maker has not received adequate notification that the note has been transferred and that payment is to be made to the transferee. This amendment aligns the protection afforded to makers of notes that have been assigned with comparable protection afforded to obligors on other payment rights that have been assigned. See, e.g., UCC § 9-406(a); Restatement (Second), Contracts § 338(1).

¹⁸ See UCC § 3-502. See also UCC § 3-602.

UCC Section 3-301 provides only three ways in which a person may qualify as the person entitled to enforce a note, two of which require the person to be in possession of the note (which may include possession by a third party that possesses it for the person)¹⁹:

- The first way that a person may qualify as the person entitled to enforce a note is to be its “holder.” This familiar concept, set out in detail in UCC Section 1-201(b)(21)(A), requires that the person be in possession of the note and either (i) the note is payable to that person or (ii) the note is payable to bearer. Determining to whom a note is payable requires examination not only of the face of the note but also of any indorsements. This is because the party to whom a note is payable may be changed by indorsement²⁰ so that, for example, a note payable to the order of a named payee that is indorsed in blank by that payee becomes payable to bearer.²¹
- The second way that a person may be the person entitled to enforce a note is to be a “nonholder in possession of the [note] who has the rights of a holder.”
 - How can a person who is not the holder of a note have the rights of a holder? This can occur by operation of law outside the UCC, such as the law of subrogation or estate administration, by which one person is the successor to or acquires another person’s rights.²² It can also occur if the delivery of the note to that person constitutes a “transfer” (as that term is defined in UCC Section 3-203, see below) because transfer of a note “vests in the transferee any right of the transferor to enforce the instrument.”²³ Thus, if a holder (who, as seen above, is a person entitled to enforce a note) transfers the note to another person, that other person (the transferee) obtains from the holder the right to enforce the note even if the transferee does not become the holder (as in the example below). Similarly, a

¹⁹ See UCC § 1-103(b) (unless displaced by particular provisions of the UCC, the law of, *inter alia*, principal and agent supplements the provisions of the UCC). See also UCC § 3-420, Comment 1 (“Delivery to an agent [of a payee] is delivery to the payee.”). Note that “delivery” of a negotiable instrument is defined in UCC § 1-201(b)(15) as voluntary transfer of possession. This Report does not address the determination of whether a particular person is an agent of another person under the law of agency and the agency law implications of such a determination.

²⁰ “Indorsement,” as defined in UCC § 3-204(a), requires the signature of the indorser. The law of agency determines whether a signature made by a person purporting to act as a representative binds the represented person. UCC § 3-402(a); see note 12, *supra*. An indorsement may appear either on the instrument or on a separate piece of paper (usually referred to as an *allonge*) affixed to the instrument. See UCC § 3-204(a) and Comment 1, par. 4.

²¹ UCC Section 3-205 contains the rules concerning the effect of various types of indorsement on the party to whom a note is payable. Either a “special indorsement” (see UCC § 3-205(a)) or a “blank indorsement” (see UCC § 3-205(b)) can change the identity of the person to whom the note is payable. A special indorsement is an indorsement that identifies the person to whom it makes the note payable, while a blank indorsement is an indorsement that does not identify such a person and results in the instrument becoming payable to bearer. When an instrument is indorsed in blank (and, thus, is payable to bearer), it may be negotiated by transfer of possession alone until specially indorsed. UCC § 3-205(b).

²² See Official Comment to UCC § 3-301.

²³ UCC § 3-203(b).

subsequent transfer will result in the subsequent transferee being a person entitled to enforce the note.

- Under what circumstances does delivery of a note qualify as a transfer? As stated in UCC Section 3-203(a), a note is transferred “when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.” For example, assume that the payee of a note sells it to an assignee, intending to transfer all of the payee’s rights to the note, but delivers the note to the assignee without indorsing it. The assignee will not qualify as a holder (because the note is still payable to the payee) but, because the transaction between the payee and the assignee qualifies as a transfer, the assignee now has all of the payee’s rights to enforce the note and thereby qualifies as the person entitled to enforce it. Thus, the failure to obtain the indorsement of the payee does not prevent a person in possession of the note from being the person entitled to enforce it, but demonstrating that status is more difficult. This is because the person in possession of the note must also demonstrate the purpose of the delivery of the note to it in order to qualify as the person entitled to enforce.²⁴
- There is a third method of qualifying as a person entitled to enforce a note that, unlike the previous two methods, does not require possession of the note. This method is quite limited – it applies only in cases in which “the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.”²⁵ In such a case, a person qualifies as a person entitled to enforce the note if the person demonstrates not only that one of those circumstances is present but also demonstrates that the person was formerly in possession of the note and entitled to enforce it when the loss of possession occurred and that the loss of possession was not as a result of transfer (as defined above) or lawful seizure. If the person proves those facts, as well as the terms of the note, the person is a person entitled to enforce the note and may seek to enforce it even though it is not in possession of the note,²⁶ but the court may not enter judgment in favor of the

²⁴ If the note was transferred for value and the transferee does not qualify as a holder because of the lack of indorsement by the transferor, “the transferee has a specifically enforceable right to the unqualified indorsement of the transferor.” See UCC § 3-203(c).

²⁵ UCC § 3-309(a)(iii) (1990 text), 3-309(a)(3) (2002 text). The 2002 text goes on to provide that a transferee from the person who lost possession of a note may also qualify as a person entitled to enforce it. See UCC § 3-309(a)(1)(B) (2002). This point was thought to be implicit in the 1990 text, but was rejected in some cases in which the issue was raised. The reasoning of those cases was rejected in Official Comment 5 to UCC § 9-109 and the point was made explicit in the 2002 text of Article 3.

²⁶ To prevail the person must establish not only that the person is a person entitled to enforce the note but also the other elements of the maker’s obligation to pay such a person. See generally UCC §§ 3-309(b), 3-412. Moreover, as is the case with respect to the enforcement of all rights under the UCC, the person enforcing the note must act in good faith in enforcing the note. UCC § 1-304.

person unless the court finds that the maker is adequately protected against loss that might occur if the note subsequently reappears.²⁷

Illustrations:

1. Maker issued a negotiable mortgage note payable to the order of Payee. Payee is in possession of the note, which has not been indorsed. Payee is the holder of the note and, therefore, is the person entitled to enforce it. UCC §§ 1-201(b)(21)(A), 3-301(i).
2. Maker issued a negotiable mortgage note payable to the order of Payee. Payee indorsed the note in blank and gave possession of it to Transferee. Transferee is the holder of the note and, therefore, is the person entitled to enforce it. UCC §§ 1-201(b)(21)(A), 3-301(i).
3. Maker issued a negotiable mortgage note payable to the order of Payee. Payee sold the note to Transferee and gave possession of it to Transferee for the purpose of giving Transferee the right to enforce the note. Payee did not, however, indorse the note. Transferee is not the holder of the note because, while Transferee is in possession of the note, it is payable neither to bearer nor to Transferee. UCC § 1-201(b)(21)(A). Nonetheless, Transferee is a person entitled to enforce the note. This is because the note was transferred to Transferee and the transfer vested in Transferee Payee's right to enforce the note. UCC § 3-203(a)-(b). As a result, Transferee is a nonholder in possession of the note with the rights of a holder and, accordingly, a person entitled to enforce the note. UCC § 3-301(ii).
4. Same facts as Illustrations 2 and 3, except that (i) under the law of agency, Agent is the agent of Transferee for purposes of possessing the note and (ii) it is Agent, rather than Transferee, to whom actual physical possession of the note is given by Payee. In the facts of Illustration 2, Transferee is a holder of the note and a person entitled to enforce it. In the context of Illustration 3, Transferee is a person entitled to enforce the note. Whether Agent may enforce the note or mortgage on behalf of Transferee depends in part on the law of agency and, in the case of the mortgage, real property law.
5. Same facts as Illustration 2, except that after obtaining possession of the note, Transferee lost the note and its whereabouts cannot be determined. Transferee is a person entitled to enforce the note even though Transferee does not have possession of it. UCC § 3-309(a). If Transferee brings an action on the note against Maker, Transferee must establish the terms of the note and the elements of Maker's obligation on it. The court may not enter judgment in favor of Transferee, however, unless the court finds that Maker is adequately protected against loss that might occur by reason of a claim of another person (such as the finder of the note) to enforce the note. UCC § 3-309(b).

²⁷ See *id.* UCC § 3-309(b) goes on to state that "Adequate protection may be provided by any reasonable means."

Question Two – What Steps Must be Taken for the Owner of a Mortgage Note to Transfer Ownership of the Note to Another Person or Use the Note as Collateral for an Obligation?

In the discussion of Question One, this Report addresses identification of the person who is entitled to enforce a note. That discussion does not address who “owns” the note. While, in many cases, the person entitled to enforce a note is also its owner, this need not be the case. The rules that determine whether a person is a person entitled to enforce a note do not require that person to be the owner of the note,²⁸ and a change in ownership of a note does not necessarily bring about a concomitant change in the identity of the person entitled to enforce the note. This is because the rules that determine who is entitled to enforce a note and the rules that determine whether the note, or an interest in it, have been effectively transferred serve different functions:

- The rules that determine who is entitled to enforce a note are concerned primarily with the maker of the note, providing the maker with a relatively simple way of determining to whom his or her obligation is owed and, thus, whom to pay in order to be discharged.
- The rules concerning transfer of ownership and other interests in a note, on the other hand, primarily relate to who, among competing claimants, is entitled to the economic value of the note.

In a typical transaction, when a note is issued to a payee, the note is initially owned by that payee. If that payee seeks either to use the note as collateral or sell the note outright, Article 9 of the UCC governs that transaction and determines whether the creditor or buyer has obtained a property right in the note. As is generally known, Article 9 governs transactions in which property is used as collateral for an obligation.²⁹ In addition, however, Article 9 governs the sale of most payment rights, including the sale of both negotiable and non-negotiable notes.³⁰ With very few exceptions, the same Article 9 rules that apply to transactions in which a payment right is collateral for an obligation also apply to transactions in which a payment right is sold. Rather than contain two parallel sets of rules – one for transactions in which payment rights are collateral and the other for sales of payment rights – Article 9 uses nomenclature conventions to apply one set of rules to both types of transactions. This is accomplished primarily by defining the term “security interest” to include not only an interest in property that secures an obligation

²⁸ See UCC § 3-301, which provides, in relevant part, that “A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument”

²⁹ UCC § 9-109(a)(1).

³⁰ With certain limited exceptions not germane to this Report, Article 9 governs the sale of accounts, chattel paper, payment intangibles, and promissory notes. UCC § 9-109(a)(3). The term “promissory note” includes not only notes that fulfill the requirements of a negotiable instrument under UCC § 3-104 but also notes that do not fulfill those requirements but nonetheless are of a “type that in ordinary business is transferred by delivery with any necessary indorsement or assignment.” See UCC §§ 9-102(a)(65) (definition of “promissory note”) and 9-102(a)(47) (definition of “instrument” as the term is used in Article 9).

but also the right of a buyer of a payment right in a transaction governed by Article 9.³¹ Similarly, definitional conventions denominate the seller of such a payment right as the “debtor,” the buyer as the “secured party,” and the sold payment right as the “collateral.”³² As a result, for purposes of Article 9, the buyer of a promissory note is a “secured party” that has acquired a “security interest” in the note from the “debtor,” and the rules that apply to security interests that secure an obligation generally also apply to transactions in which a promissory note is sold.

Section 9-203(b) of the Uniform Commercial Code provides that three criteria must be fulfilled in order for the owner of a mortgage note effectively to create a “security interest” (either an interest in the note securing an obligation or the outright sale of the note to a buyer) in it.

- The first two criteria are straightforward – “value” must be given³³ and the debtor/seller must have rights in the note or the power to transfer rights in the note to a third party.³⁴
- The third criterion may be fulfilled in either one of two ways. Either the debtor/seller must “authenticate”³⁵ a “security agreement”³⁶ that describes the note³⁷ or the secured party must take possession³⁸ of the note pursuant to the debtor’s security agreement.³⁹

³¹ See UCC § 1-201(b)(35) [UCC § 1-201(37) in states that have not yet enacted the 2001 revised text of UCC Article 1]. (For reasons that are not apparent, when South Carolina enacted the 1998 revised text of UCC Article 9, which included an amendment to UCC § 1-201 to expand the definition of “security interest” to include the right of a buyer of a promissory note, it did not enact the amendment to § 1-201. This Report does not address the effect of that omission.) The limitation to transactions governed by Article 9 refers to the exclusion, in cases not germane to this Report, of certain assignments of payment rights from the reach of Article 9.

³² UCC §§ 9-102(a)(28)(B); 9-102(a)(72)(D); 9-102(a)(12)(B).

³³ UCC § 9-203(b)(1). UCC § 1-204 provides that giving “value” for rights includes not only acquiring them for consideration but also acquiring them in return for a binding commitment to extend credit, as security for or in complete or partial satisfaction of a preexisting claim, or by accepting delivery of them under a preexisting contract for their purchase.

³⁴ UCC § 9-203(b)(2). Limited rights that are short of full ownership are sufficient for this purpose. See Official Comment 6 to UCC § 9-203.

³⁵ This term is defined to include signing and its electronic equivalent. See UCC § 9-102(a)(7).

³⁶ A “security agreement” is an agreement that creates or provides for a security interest (including the rights of a buyer arising upon the outright sale of a payment right). See UCC § 9-102(a)(73).

³⁷ Article 9’s criteria for descriptions of property in a security agreement are quite flexible. Generally speaking, any description suffices, whether or not specific, if it reasonably identifies the property. See UCC § 9-108(a)-(b). A “supergeneric” description consisting solely of words such as “all of the debtor’s assets” or “all of the debtor’s personal property” is not sufficient, however. UCC § 9-108(c). A narrower description, limiting the property to a particular category or type, such as “all notes,” is sufficient. For example, a description that refers to “all of the debtor’s notes” is sufficient.

³⁸ See UCC § 9-313. As noted in Official Comment 3 to UCC § 9-313, “in determining whether a particular person has possession, the principles of agency apply.” In addition, UCC § 9-313 also contains two special rules under which possession by a non-agent may constitute possession by the secured party. First, if a person who is not an agent is in possession of the collateral and the person authenticates a record acknowledging that the person holds the collateral for the secured party’s benefit, possession by that person constitutes possession by the secured party. UCC § 9-313(c). Second, a secured party that has possession of collateral does not relinquish possession by delivering the collateral to another person (other than the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor’s business) if the delivery is accompanied by instructions to that person to hold possession of the collateral for the benefit of the secured party or redeliver it to the secured party. UCC § 9-313(h).

- Thus, if the secured party (including a buyer) takes possession of the mortgage note pursuant to the security agreement of the debtor (including a seller), this criterion is satisfied even if that agreement is oral or otherwise not evidenced by an authenticated record.
- Alternatively, if the debtor authenticates a security agreement describing the note, this criterion is satisfied even if the secured party does *not* take possession of the note. (Note that in this situation, in which the seller of a note may retain possession of it, the owner of a note may be a different person than the person entitled to enforce the note.)⁴⁰

Satisfaction of these three criteria of Section 9-203(b) results in the secured party (including a buyer of the note) obtaining a property right (whether outright ownership or a security interest to secure an obligation) in the note from the debtor (including a seller of the note).⁴¹

Illustrations:

6. Maker issued a mortgage note payable to the order of Payee.⁴² Payee borrowed money from Funder and, to secure Payee's repayment obligation, Payee and Funder agreed that Funder would have a security interest in the note. Simultaneously with the funding of the loan, Payee gave possession of the note to Funder. Funder has an attached and

See also Official Comment 9 to UCC § 9-313 ("New subsections (h) and (i) address the practice of mortgage warehouse lenders.") Possession as contemplated by UCC § 9-313 is also possession for purposes of UCC § 9-203. See UCC § 9-203, Comment 4.

³⁹ UCC §§ 9-203(b)(3)(A)-(B).

⁴⁰ As noted in the discussion of Question One, payment by the maker of a negotiable note to the person entitled to enforce it discharges the maker's obligations on the note. UCC § 3-602. This is the case even if the person entitled to enforce the note is not its owner. As between the person entitled to enforce the note and the owner of the note, the right to the money paid by the maker is determined by the UCC and other applicable law, such as the law of contract and the law of restitution, as well as agency law. See, e.g., UCC §§ 3-306 and 9-315(a)(2). As noted in comment 3 to UCC § 3-602, "if the original payee of the note transfers ownership of the note to a third party but continues to service the obligation, the law of agency might treat payments made to the original payee as payments made to the third party."

⁴¹ For cases in which another person claims an interest in the note (whether as a result of another voluntary transfer by the debtor or otherwise), reference to Article 9's rules governing perfection and priority of security interests may be required in order to rank order those claims (and, in some cases, determine whether a party has taken the note free of competing claims to the note). In the case of notes that are negotiable instruments, the Article 3 concept of "holder in due course" (see UCC § 3-302) should be considered as well, because a holder in due course takes its rights in an instrument free of competing property claims to it (as well as free of most defenses to obligations on it). See UCC §§ 3-305 and 3-306. With respect to determining whether the owner of a note has effectively transferred a property interest to a transferee, however, the perfection and priority rules are largely irrelevant. (The application of the perfection and priority rules can result in the rights of the transferee either being subordinate to the rights of a competing claimant or being extinguished by the rights of the competing claimant. See, e.g., UCC §§ 9-317(b), 9-322(a), 9-330(d), and 9-331(a).)

⁴² For this Illustration, as well as Illustrations 7-11, the analysis under UCC Article 9 is the same whether the mortgage note is negotiable or non-negotiable. This is because, in either case, the mortgage note will qualify as a "promissory note" and, therefore, an "instrument" under UCC Article 9. See UCC §§ 9-102(a)(47), (65).

enforceable security interest in the note. UCC § 9-203(b). This is the case even if Payee's agreement is oral or otherwise not evidenced by an authenticated record. Payee is no longer a person entitled to enforce the note (because Payee is no longer in possession of it and it has not been lost, stolen, or destroyed). UCC § 3-301. Funder is a person entitled to enforce the note if either (i) Payee indorsed the note by blank indorsement or by a special indorsement identifying Funder as the person to whom the indorsement makes the note payable (because, in such cases, Funder would be the holder of the note), or (ii) the delivery of the note from Payee to Funder constitutes a transfer of the note under UCC § 3-203 (because, in such case, Funder would be a nonholder in possession of the note with the rights of a holder). See also UCC §§ 1-201(b)(21)(A), 3-205(a)-(b), and 3-301(i)-(ii).

7. Maker issued a mortgage note payable to the order of Payee. Payee borrowed money from Funder and, in a signed writing that reasonably identified the note (whether specifically or as part of a category or a type of property defined in the UCC), granted Funder a security interest in the note to secure Payee's repayment obligation. Payee, however, retained possession of the note. Funder has an attached and enforceable security interest in the note. UCC § 9-203(b). If the note is negotiable, Payee remains the holder and the person entitled to enforce the note because Payee is in possession of it and it is payable to the order of Payee. UCC §§ 1-201(b)(21)(A), 3-301(i).
8. Maker issued a mortgage note payable to the order of Payee. Payee sold the note to Funder, giving possession of the note to Funder in exchange for the purchase price. The sale of the note is governed by Article 9 and the rights of Funder as buyer constitute a "security interest." UCC §§ 9-109(a)(3), 1-201(b)(35). The security interest is attached and is enforceable. UCC § 9-203(b). This is the case even if the sales agreement was oral or otherwise not evidenced by an authenticated record. If the note is negotiable, Funder is also a person entitled to enforce the note, whether or not Payee indorsed it, because either (i) Funder is a holder of the note (if Payee indorsed it by blank indorsement or by a special indorsement identifying Funder as the person to whom the indorsement makes the note payable) or (ii) Funder is a nonholder in possession of the note (if there is no such indorsement) who has obtained the rights of Payee by transfer of the note pursuant to UCC § 3-203. See also UCC §§ 1-201(b)(21)(A), 3-205(a)-(b), and 3-301(i)-(ii).
9. Maker issued a mortgage note payable to the order of Payee. Pursuant to a signed writing that reasonably identified the note (whether specifically or as part of a category or a type of property defined in the UCC), Payee sold the note to Funder. Payee, however, retained possession of the note. The sale of the note is governed by Article 9 and the rights of Funder as buyer constitute a "security interest." UCC § 1-201(b)(35). The security interest is attached and is enforceable. UCC § 9-203(b). If the note is negotiable, Payee remains the holder and the person entitled to enforce the note (even though, as between Payee and Funder, Funder owns the note) because Payee is in

possession of it and it is payable to the order of Payee. UCC §§ 1-201(b)(21)(A), 3-301(i).

Question Three – What is the Effect of Transfer of an Interest in a Mortgage Note on the Mortgage Securing It?

What if a note secured by a mortgage is sold (or the note is used as collateral to secure an obligation), but the parties do not take any additional actions to assign the mortgage that secures payment of the note, such as execution of a recordable assignment of the mortgage? UCC Section 9-203(g) explicitly provides that, in such cases, the assignment of the interest of the seller or other grantor of a security interest in the note automatically transfers a corresponding interest in the mortgage to the assignee: “The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.” (As noted previously, a “security interest” in a note includes the right of a buyer of the note.)

While this question has provoked some uncertainty and has given rise to some judicial analysis that disregards the impact of Article 9,⁴³ the UCC is unambiguous: the sale of a mortgage note (or other grant of a security interest in the note) not accompanied by a separate conveyance of the mortgage securing the note does not result in the mortgage being severed from the note.⁴⁴

It is important to note in this regard, however, that UCC Section 9-203(g) addresses only whether, as between the seller of a mortgage note (or a debtor who uses it as collateral) and the buyer or other secured party, the interest of the seller (or debtor) in the mortgage has been correspondingly transferred to the secured party. UCC Section 9-308(e) goes on to state that, if the secured party’s security interest in the note is perfected, the secured party’s security interest

⁴³See, e.g., the discussion of this issue in *U.S. Bank v. Ibanez*, 458 Mass. 637 at 652-53, 941 N.E.2d 40 at 53-54 (2011). In that discussion, the court cited Massachusetts common law precedents pre-dating the enactment of the current text of Article 9 to the effect that a mortgage does not follow a note in the absence of a separate assignment of the mortgage, but did not address the effect of Massachusetts’s subsequent enactment of UCC § 9-203(g) on those precedents. Under the rule in UCC § 9-203(g), if the holder of the note in question demonstrated that it had an attached security interest (including the interest of a buyer) in the note, the holder of the note in question would also have a security interest in the mortgage securing the note even in the absence of a separate assignment of the mortgage. (This Report does not address whether, under the facts of the *Ibanez* case, the holder of the note had an attached security interest in the note and, thus, qualified for the application of UCC § 9-203(g). Moreover, even if the holder had an attached security interest in the note and, thus, had a security interest in the mortgage, this would not, of itself, mean that the holder could enforce the mortgage without a recordable assignment of the mortgage to the holder. Whatever steps are required in order to enforce a mortgage in the absence of a recordable assignment are the province of real property law. The matter is addressed, in part, in the discussion of Question 4 below.)

⁴⁴ Official Comment 9 to UCC § 9-203 confirms this point: “Subsection (g) codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien.” Pursuant to UCC § 1-302(a), the parties to the transaction may agree that an interest in the mortgage securing the note does not accompany the note, but such an agreement is unlikely. See, e.g., Restatement (3d), Property (Mortgages) § 5.4, comment a (“It is conceivable that on rare occasions a mortgagee will wish to disassociate the obligation and the mortgage, but that result should follow only upon evidence that the parties to the transfer so agreed.”).

in the mortgage securing the note is also perfected,⁴⁵ with result that the right of the secured party is senior to the rights of a person who then or later becomes a lien creditor of the seller of (or other grantor of a security interest in) the note. Neither of these rules, however, determines the ranking of rights in the underlying real property itself, or the effect of recordation or non-recordation in the real property recording system on enforcement of the mortgage.⁴⁶

Illustration:

10. Same facts as Illustration 9. The signed writing was silent with respect to the mortgage securing the note and the parties made no other agreement with respect to the mortgage. The attachment of Funder's interest in the rights of Payee in the note also constitutes attachment of an interest in the rights of Payee in the mortgage. UCC § 9-203(g).

Question Four – What Actions May a Person to Whom an Interest in a Mortgage Note Has Been Transferred, but Who Has not Taken a Recordable Assignment of the Mortgage, Take in Order to Become the Assignee of Record of the Mortgage Securing the Note?

In some states, a party without a recorded interest in a mortgage may not enforce the mortgage non-judicially. In such states, even though the buyer of a mortgage note (or a creditor to whom a security interest in the note has been granted to secure an obligation) automatically obtains corresponding rights in the mortgage,⁴⁷ this may be insufficient as a matter of applicable real estate law to enable that buyer or secured creditor to enforce the mortgage upon default of the maker if the buyer or secured creditor does not have a recordable assignment. The buyer or other secured party may attempt to obtain such a recordable assignment from the seller or debtor at the time it seeks to enforce the mortgage, but such an attempt may be unsuccessful.⁴⁸

Article 9 of the UCC provides such a buyer or secured creditor a mechanism by which it can record its interest in the realty records in order to conduct a non-judicial foreclosure. UCC Section 9-607(b) provides that “if necessary to enable a secured party [including the buyer of a mortgage note] to exercise ... the right of [its transferor] to enforce a mortgage nonjudicially,” the secured party may record in the office in which the mortgage is recorded (i) a copy of the security agreement transferring an interest in the note to the secured party and (ii) the secured

⁴⁵ See Official Comment 6 to UCC § 9-308, which also observes that “this result helps prevent the separation of the mortgage (or other lien) from the note.” Note also that, as explained in Official Comment 7 to UCC § 9-109, “It also follows from [UCC § 9-109(b)] that an attempt to obtain or perfect a security interest in a secured obligation by complying with non-Article 9 law, as by an assignment of record of a real-property mortgage, would be ineffective.”

⁴⁶ Similarly, Official Comment 6 to UCC § 9-308 states that “this Article does not determine who has the power to release a mortgage of record. That issue is determined by real-property law.”

⁴⁷ See discussion of Question Three, *supra*.

⁴⁸ In some cases, the seller or debtor may no longer be in business. In other cases, it may simply be unresponsive to requests for execution of documents with respect to a transaction in which it no longer has an economic interest. Moreover, in cases in which mortgage note was collateral for an obligation owed to the secured party, the defaulting debtor may simply be unwilling to assist its secured party. See Official Comment 8 to UCC § 9-607.

party's sworn affidavit in recordable form stating that default has occurred⁴⁹ and that the secured party is entitled to enforce the mortgage non-judicially.⁵⁰

Illustration:

11. Same facts as Illustration 10. Maker has defaulted on the note and mortgage and Funder would like to enforce the mortgage non-judicially. In the relevant state, however, only a party with a recorded interest in a mortgage may enforce it non-judicially. Funder may record in the relevant mortgage recording office a copy of the signed writing pursuant to which the note was sold to Funder and a sworn affidavit stating that Maker has defaulted and that Funder is entitled to enforce the mortgage non-judicially. UCC § 9-607(b).

Summary

The Uniform Commercial Code provides four sets of rules that determine matters that are important in the context of enforcement of mortgage notes and the mortgages that secure them:

- First, in the case of a mortgage note that is a negotiable instrument, Article 3 of the UCC determines the identity of the person who is entitled to enforce the note and to whom the maker owes its payment obligation; payment to the person entitled to enforce the note discharges the maker's obligation, but failure to pay that party when the note is due constitutes dishonor.
- Second, for both negotiable and non-negotiable mortgage notes, Article 9 of the UCC determines whether a transferee of the note from its owner has obtained an attached property right in the note.
- Third, Article 9 of the UCC provides that a transferee of a mortgage note whose property right in the note has attached also automatically has an attached property right in the mortgage that secures the note.
- Finally, Article 9 of the UCC provides a mechanism by which the owner of a note and the mortgage securing it may, upon default of the maker of the note, record its interest in the mortgage in the realty records in order to conduct a non-judicial foreclosure.

As noted previously, these UCC rules do not resolve all issues in this field. The enforcement of real estate mortgages by foreclosure is primarily the province of a state's real property law, but legal determinations made pursuant to the four sets of UCC rules described in this Report will, in many cases, be central to administration of that law. In such cases, proper application of real property law requires proper application of the UCC rules discussed in this Report.

⁴⁹ The 2010 amendments to Article 9 (see fn. 8, *supra*) add language to this provision to clarify that "default," in this context, means default with respect to the note or other obligation secured by the mortgage.

⁵⁰ UCC § 9-607(b) does not address other conditions that must be satisfied for judicial or non-judicial enforcement of a mortgage.