

69034-5

69034-5

NO. 69034-5-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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MICHAEL LEVITZ,

Appellant,

v.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,  
CAPITAL ONE, N.A., U.S. BANK NATIONAL ASSOCIATION, as  
Trustee for CHEVY CHASE FUNDING LLC MORTGAGE-BACKED  
CERTIFICATES SERIES 2005-1, U.S. BANK, N.A., as trustee for CCB  
LIBOR 2005-1 SERIES TRUST, DOES 1 through XX inclusive, and  
BISHOP WHITE MARSHALL & WEIBEL, PS, (f/k/a BISHOP WHITE  
AND MARSHALL, PS),

Respondents.

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BRIEF OF RESPONDENTS  
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,  
CAPITAL ONE, N.A., and U.S. BANK N.A.

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John A. Knox, WSBA #12707  
Daniel W. Ferm, WSBA #11466  
WILLIAMS, KASTNER & GIBBS PLLC  
Attorney for Respondents MERS, Capital  
One, N.A., U.S. Bank N.A.

Two Union Square  
601 Union Street, Suite 4100  
Seattle, WA 98101  
(206) 628-6600

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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

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## I. SUMMARY

Mr. Levitz is no homeowner beleaguered by foreclosure notices that leave him guessing who owns his loan or holds his promissory note. Mr. Levitz does not even hold title to the house he lives in. His ex-wife, who now lives in Hawaii, does. Mr. Levitz is not the defaulting borrower on a promissory note; his ex-wife is. Mr. Levitz has never disputed the delinquency or offered to cure it.

Mr. Levitz complains about various notices of default, foreclosure, and trustee's sale, focusing on respondent MERS's involvement and authority. But the evidence establishes that U.S. Bank, as trustee, owns the loan and holds Mr. Levitz's ex-wife's original, fully endorsed, promissory note. The April 2011 notices of foreclosure and trustee's sale that prompted Mr. Levitz to file this lawsuit correctly identify U.S. Bank as the holder of the note.

As holder of the note, U.S. Bank has the right to enforce the deed of trust that Mr. Levitz's ex-wife gave to secure payment. It does not matter that the deed of trust named MERS as beneficiary, because security in the form of a mortgage or deed of trust "follows" the obligation reflected by the note. Admittedly, there was a nonmaterial error in the foreclosure and trustee's sale notices that the trustee, Bishop White, issued in April 2009, but the 2009 sale was canceled, the error was subsequently

corrected, and Mr. Levitz suffered no monetary loss, detrimental change of position, or other harm. Mr. Levitz has lived in the house since 2009 without paying rent or making any loan payments.

Mr. Levitz has abandoned for appeal any claim of wrongful foreclosure based on alleged noncompliance with the Deed of Trust Act, RCW ch. 61.24. Mr. Levitz fails to demonstrate that he has standing to sue over alleged irregularities in the foreclosure notices that Bishop White issued because of his ex-wife's loan default. Even if Mr. Levitz has standing, however, all three claims against MERS, Capital One, and U.S. Bank that he seeks to revive on appeal were properly dismissed.

Mr. Levitz has never identified any legal duty that Capital One, the loan servicer, owed him and allegedly breached. Mr. Levitz acknowledges that a duty of good faith and fair dealing is "implied in every contract," but he is not a party to a contract with any defendant, and he does not demonstrate any factual basis for treating him as the assignee of his ex-wife's rights under a contract with any defendant or as a third-party beneficiary of such a contract. Mr. Levitz notably has not volunteered to assume any duties – such as to make loan payments – that his ex-wife has under her note. Mr. Levitz not only failed to plead fraud with particularity, but even in his opening brief fails to identify any false assertion of fact by any defendant on which he relied. Mr. Levitz does not

allege a practice by any defendant that was unfair or deceptive and has failed to articulate how he was “injured in [his] business or property” for purposes of a claim under the Consumer Protection Act.

## II. RESPONDENTS’ STATEMENT OF THE CASE

### A. Chronology.

In 2004, Inesa Levitz, M.D., borrowed \$560,000 from Chevy Chase Bank, F.S.B. She signed a promissory note, CP 99-104, secured by a deed of trust on a house at 3718 East Alder Street, Seattle, CP 143-57. First American Title Insurance Co. was named trustee under the deed of trust. CP 144. The deed of trust identified the Lender as Chevy Chase Bank, F.S.B., CP 143 (¶C), and the beneficiary as MERS, “a separate corporation that is acting solely as a nominee for Lender and Lender’s successors and assigns.” CP 144 (¶E).

Although Inesa Levitz had been married since 1993 to Michael Levitz, she took title to the East Alder Street house in 1999 in her name alone. CP 95. Mr. Levitz was a party to neither the note nor the deed of trust, which Inesa Levitz signed in 2004 as “a single woman as her sole and separate property.” CP 143.

### Events in 2008-09

Inesa Levitz became delinquent on the note in October 2008 and, by July 2009, the amount in default was \$33,780. CP 31. She and

Michael Levitz separated in June 2009. CP 106.

On July 1, 2009, MERS, identifying itself as nominee for Chevy Chase Bank, F.S.B. and its successors and assigns, recorded a document, dated June 9, appointing Bishop White & Marshall, P.S., successor trustee to First American Title under Inesa Levitz's deed of trust. CP 199 (¶3), 202-03.

Chevy Chase Bank endorsed Inesa Levitz's note over to "U.S. Bank, NA as Trustee." CP 88 (¶2), 104. U.S. Bank thereupon became, and remains, the owner/holder of the note as trustee for the Chevy Chase Funding LLC Mortgage Backed Certificates Series 2005-1. CP 88 (¶3). On May 31, 2012, counsel for Mr. Levitz examined the original note at the office of counsel for U.S. Bank. *See* CP 318 (fn. 1); RP 12 ("I did view the Note, it did have an endorsement on the back that said ... I believe it said 'Pay to the order of U.S. Bank.' I don't know when that was stamped on there and by who. I think it's probably the original Note, although I didn't have an expert review it to confirm that"). U.S. Bank has acquiesced in Chevy Chase Bank's appointment of Bishop White as successor trustee to First American Title.

On July 17, 2009, Bishop White recorded and mailed a Notice of Trustee's Sale, CP 30-34, to Inesa Levitz and "John Doe Levitz, Spouse of Inesa Levitz," at the East Alder Street address, CP 34. No trustee's sale

ultimately occurred, but the notice identified MERS, “acting solely as nominee for Chevy Chase Bank, F.S.B. and its successors and assigns,” as the entity to which the borrower’s obligation was due. CP 30-31. The notice also stated, and Mr. Levitz has not denied, that Notice of Default had been given to the borrower (Inesa Levitz, not Michael) on May 28, 2009. CP 32 (¶VI). Mr. Levitz has not alleged or claimed that he took any action, or refrained from taking any action, because of the July 2009 Notice of Trustee’s Sale.

In a July 30, 2009 merger, Capital One, N.A., acquired Chevy Chase Bank. CP 131. Capital One, as agent for U.S. Bank, thereafter acted as servicer with respect to Inesa Levitz’s note. CP 221.<sup>1</sup>

Mr. Levitz filed to dissolve his marriage in August 2009. CP 105.

#### Events in 2010

On or about April 12, 2010, Bishop White<sup>2</sup> mailed notices of default to Inesa and John Doe Levitz at the East Alder Street address. CP 200(¶7), 223-29. The total amount of the loan delinquency was then

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<sup>1</sup>“Servicing” a loan refers to the administration aspect of a loan from the time the proceeds are disbursed until the loan is paid off. It includes sending monthly payment statements and collecting monthly payments, maintaining records of payments and balances, collecting and paying taxes and insurance (and managing escrow and impound funds), remitting funds to the note holder, and following up on delinquencies. See <http://www.consumerfinance.gov/askcfpb/198/whats-the-difference-between-a-mortgage-lender-and-a-servicer.html> (last visited May 29, 2013).

<sup>2</sup> Bishop White’s full name had changed by then to Bishop, White, Marshall & Weibel, P.S. CP 234.

\$74,384. CP 227. Mr. Levitz has not contested the fact or amount of default stated in that or any other notice.

Bishop White's default notice identified the note's owner as "U.S. Bank, NA as trustee for CCB Libor Series 2005-1 Trust, c/o MERS, as nominee for Capital One, NA Bank, F.S.B. and its successors and assigns," CP 229 (§8a), and directed tender of payoff monies to Bishop White, CP 228. The notice was inaccurate insofar as it identified U.S. Bank as trustee for CCB Libor Series 2005-1 Trust instead of as trustee for Chevy Chase Funding LLC Mortgage Backed Certificates Series 2005-1. CP 92 (§11). The April 2010 default notice identified Capital One as the servicer of the obligation secured by the deed of trust. CP 229 (§8b).

On May 12, 2010, Mr. Levitz, pursuant to RCW 26.16.100, prepared and recorded a document entitled Claim of Spouse in Community Real Property. CP 109-10.

Mr. Levitz has not alleged or claimed that he took any action or refrained from taking any action because the April 2010 default notice referred to "CCB Libor Series 2005-1 Trust."

Mr. Levitz alleged, CP 5 (§2.9), 239, and argues, *App. Br. at 10*, that Bishop White also issued a Notice of Foreclosure and Notice of Trustee's Sale on June 10, 2010. No copies of such documents are in the

record.<sup>3</sup> In any event, Mr. Levitz has not alleged or claimed that he took any action or refrained from taking any action because of the June 2010 notices he alleges were issued.

On October 27, 2010, Mr. Levitz obtained, by default (see CP 127 (¶13)), a Decree of Dissolution, CP 111-19, that, among other things, awarded him the East Alder Street house subject to all liens and encumbrances, CP 115 (¶1).

#### Events in 2011

In March 2011, Capital One, as authorized agent for U.S. Bank, sent Bishop White a Declaration of Ownership with respect to Inesa Levitz's deed of trust. The declaration identified the original beneficiary of the deed of trust, accurately, as MERS as nominee for Chevy Chase Bank and its successors and assigns. It identified the current owner of Ms. Levitz's note, accurately, as U.S. Bank as trustee relating to the Chevy Chase Funding LLC Mortgage Backed Certificates, Series 2005-1 (rather than, incorrectly, as trustee for CCB Libor Series 2005-1 Trust). CP 231.<sup>4</sup>

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<sup>3</sup> Mr. Levitz's brief's citations are to allegations in his complaint (CP 5) and in his Response to respondents' summary judgment motion (CP 239), but Capital One's answer denied the allegation for lack of information, CP 59 (¶15), and MERS and U.S. Bank did not answer the complaint before moving for summary judgment because Mr. Levitz had not claimed to have served process on them.

<sup>4</sup> Mr. Levitz did not purport to show that assignment of the deed of trust was unauthorized but, even if he had done so, it would have been the note holder, not the borrower, or the borrower's ex-spouse, who might have standing to complain.

In April, 2011, Bishop White mailed, to Inesa and John Doe Levitz at the East Alder Street address, an Amended Notice of Foreclosure, CP 133-36, and an Amended Notice of Trustee's Sale to occur on June 10, 2011, CP 137-41, 200 (§9), 234-36. The foreclosure notice stated that the amended notice of sale "is a consequence of default(s) in the obligation to U.S. Bank, NA as trustee relating to the Chevy Chase Funding LLC Mortgage Backed Certificates, Series 2005-1, the beneficiary of your deed of trust." CP 134. Both notices characterized the deed of trust as securing "an obligation in favor of [MERS], "a separate corporation that is acting solely as a nominee for Chevy Chase Bank, F.S.B., and its successors and assigns," and stated that the deed of trust

. . . was assigned on March 25, 2011 to U.S. Bank, NA as trustee relating to the Chevy Chase Funding LLC Mortgage Backed Certificates, Series 2005-1.

CP 134, 138, 235.<sup>5</sup>

Mr. Levitz did not allege in his complaint, or testify, that he ever contacted, or ever tried to, or wished he could, contact or tender payment to MERS, U.S. Bank, Chevy Chase Bank, Capital One, Bishop White, First American Title, or any other company with reference to his ex-wife's

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<sup>5</sup> While it is true, as Mr. Levitz's opening brief asserts at page 11, that MERS's membership rules changed to prohibit members from foreclosing in its name, that rule change did not become effective until July 2011 and, furthermore, Mr. Levitz would lack standing to claim a violation of MERS membership rules because the borrower is not a party to the membership agreements between MERS and its members and Mr. Levitz is not even the borrower.

note, deed of trust, or default. His counsel admitted at the summary judgment hearing that he was and had been living in the house rent-free. RP 10.

B. This Lawsuit.

On May 11, 2011, Mr. Levitz filed his Complaint, seeking a temporary restraining order and injunction against the June 10 trustee's sale and damages under various legal theories. CP 1-12. The trustee continued the sale to September 9, 2011, and thereafter canceled it. CP 71 (lines 2-3). No hearing was ever held and no ruling was made on Mr. Levitz's requests for TRO or injunctive relief, CP 71 (lines 8-9).

Capital One was served with copies of the summons and complaint on June 8, 2011. CP 345. On June 13, 2011, an appearance of counsel was filed on behalf of defendants MERS, Capital One, and U.S. Bank. The notice was without waiver of defenses and objections as to insufficiency of process, insufficiency of service of process, venue, or jurisdiction. CP 346-48, 93 (¶15). Capital One filed an answer to the complaint on July 11, 2011. CP 56-64.

On July 14, 2011, in the Levitz dissolution case, the Superior Court entered findings of fact, conclusions of law, and an order, CP 120-30, vacating the October 2010 decree (the one that had awarded the East Alder Street house to Mr. Levitz) except to the extent that the Decree had

dissolved the Levitz's marriage, CP 127 (lines 25-26). Mr. Levitz appealed that order. CP 279 (lines 9-10). Mr. Levitz sought, CP 273-84, and on January 24, 2012 was granted, CP 272, a stay of the trial of his dissolution case pending appeal, but neither sought nor obtained a stay of the order vacating the October 2009 default decree.<sup>6</sup> Mr. Levitz admits that the Court of Appeals "upheld the order to vacate." *App. Br. at 27*.

#### Events in 2012

On April 19, 2012, MERS, Capital One and U.S. Bank moved for dismissal based on CR 12 and CR 56. CP 67-85. This lawsuit had then been pending for 14 months. Mr. Levitz had conducted no discovery. CP 71 (line 16). No foreclosure was pending. CP 67-68, 71.

The trial court granted summary judgment to MERS, Capital One, and U.S. Bank, CP 355-58, and, separately, to Bishop White, CP 370-72. In granting summary judgment to MERS, Capital One, and U.S. Bank, the court ruled that "the misidentification of CCB Libor 2005-1 Series Trust as the holder of the subject Note in 2010 or before did not cause Plaintiff

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<sup>6</sup> Per GR 14.1(a), respondents are prohibited from citing to this court any unpublished decision of the Court of Appeals. The decision in Mr. Levitz's appeal is unpublished. The record in this case discloses that the appeal case number was 67550-8-I. CP 272. To the extent GR 14.1(a) does not preclude this Court taking judicial notice of its own unpublished decisions in related cases to establish or confirm parties' assertions of fact, respondents have no objection to the Court doing so here, or to the Court ascertaining the subsequent history of that appeal.

any harm or give rise to a claim for relief in his favor, and . . . there is no genuine issue of material fact as to each of the claims against defendants Capital One, N.A., MERS, and U.S. Bank N.A., as Trustee.” CP 368.

Mr. Levitz timely filed a notice of appeal. CP 359-69.

### III. STANDARD OF REVIEW

Review is *de novo* because Mr. Levitz appeals from an order granting summary judgment. *E.g., Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013). *Young v. Key Pharms, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989), and other decisions provide that a defendant may move for summary judgment by pointing out that there is “an absence of evidence to support the nonmoving party’s case,” in response to which the plaintiff must respond with supporting evidence or have the lawsuit dismissed. *See also Boyce v. West*, 71 Wn. App. 657, 665, 862 P.2d 592 (1993) (“A defendant who can point out to the trial court that the plaintiff lacks competent evidence to support an essential element of the plaintiff’s case is entitled to summary judgment because a complete failure of proof concerning an element necessarily renders all other facts immaterial”).

An appellate court may affirm a grant of summary judgment on any theory established by the pleadings and supported by the proof. *Mt. Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994).

#### IV. ARGUMENT

A. Mr. Levitz Has Expressly Abandoned Any Claim for Gross Negligence or for Wrongful Foreclosure.

Mr. Levitz states that he is “only seeking review of the dismissal” of his Consumer Protection Act, fraud/misrepresentation, and good faith/fair dealing claims, and not of the dismissal of his wrongful foreclosure and gross negligence claims. *Appellant's Brief (“App. Br.”) at 7, fn.1*. The dismissal of the claims Mr. Levitz asserted in his complaint for wrongful foreclosure, CP 8, and gross negligence, CP 11, should thus be affirmed outright.

B. Mr. Levitz Has Not Specified Any Legal Duty that Capital One Owed Him and Allegedly Breached.

Mr. Levitz uses the term “respondents” throughout his brief, but at no point does he articulate what legal duty or duties he contends Capital One, specifically, owed him and what he alleges Capital One, specifically, did or failed to do in breach of such a duty. Whether a legal duty exists is a question of law. *E.g., Folsom v. Burger King*, 135 Wn.2d 658, 671, 958

P.2d 301 (1998); *Tortes v. King Cy.*, 119 Wn. App. 1, 7, 84 P.3d 252 (2003), *rev. denied*, 151 Wn.2d 1010 (2004).

Mr. Levitz's complaint made only two allegations concerning Capital One by name. It alleged that Capital One is incorporated in West Virginia and acquired the assets and liabilities of Chevy Chase Bank by merger effective July 30, 2009. CP 2-3 (¶1.3). Regardless of the accuracy of those allegations, they are not germane to what Mr. Levitz claims Capital One (or its predecessor by merger, Chevy Chase Bank) did to incur liability to him.

The complaint also alleged that Bishop White issued a Notice of Foreclosure and Notice of Trustee's Sale on or about June 10, 2010 stating that there was a default in an obligation to MERS as a nominee for Capital One and its successors and assigns. CP 5 (¶2.8). Mr. Levitz offered no evidence of such notices, and the complaint did not allege what is actionable about that statement and why Capital One is liable *to him* for making it, and does not allege that the statement prompted him to take or refrain from taking any action or that it otherwise caused him any harm or injury. Inasmuch as no trustee's sale occurred, it should be incumbent upon Mr. Levitz to articulate how any such June 2010 notice(s) caused actionable harm to him. Neither his complaint nor his brief on appeal does

that. Mr. Levitz thus has not offered this Court a basis for reinstating any claim against Capital One.

Even if one looks beyond what Mr. Levitz's brief argues, the record indicates that the only involvement Capital One has had with Inesa Levitz's loan has been as loan servicer. The record reflects that in March 2010, as loan servicer, Capital One sent Bishop White the Foreclosure Loss Mitigation Form, CP 221, that RCW 61.24.031 requires a trustee to have before issuing a Notice of Default with respect to owner-occupied residential real property.<sup>7</sup> The form Capital One sent Bishop White correctly identified "U.S. Bank, NA, as trustee" as holder of the note, but inadvertently identified U.S. Bank as trustee "for CCB Libor Series 2005-1 Trust." CP 221. Capital One corrected the misstatement in March 2011, by identifying the relevant trust as Chevy Chase Funding LLC Mortgage Backed Certificates, Series 2005-1. CP 231.

If Capital One owed a legal duty to Bishop White to provide it with accurate information, whether Capital One complied with that duty is a matter between it and Bishop White. Mr. Levitz has never alleged or

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<sup>7</sup> The Loss Mitigation Form certifies efforts the servicer has made to contact the borrower (who is Inesa Levitz, not Michael Levitz). The statutory certification requirement applies only to deeds of trust recorded against owner-occupied real property. RCW 61.24.031(7)(a). Mr. Levitz has never alleged or contended that Capital One's certification of its efforts to contact the borrower (Inesa Levitz) were false, and would lack standing to complain if he were so alleging, because he is not the borrower.

contended that Capital One breached a legal duty it owed *to him* when providing information to Bishop White. Mr. Levitz presents no argument or legal authority for the proposition that a company that services a note for the holder owes a legal duty to the borrower's ex-husband or to a tenant that occupies a house subject to foreclosure under a deed of trust given to secure the loan. Mr. Levitz thus identifies no act or omission by Capital One that he claims was wrongful as to him, or that has caused him any harm or change of position.

The Court thus should dismiss all of Mr. Levitz's claims against Capital One for failure identify the alleged wrong(s). Respondents explain below why Mr. Levitz's appeal from the dismissal of his implied covenant, CPA, and fraud claims against all three respondents lack merit even if he had articulated how Capital One owed a legal duty to him.

C. All Three of the Causes of Action Mr. Levitz Is Asking This Court to Reinstate Were Properly Dismissed Because Mr. Levitz Failed to Come Forward with Evidence to Support One or More Elements of Each.

1. The claim for breach of the implied contractual covenant of good faith and fair dealing was properly dismissed because Mr. Levitz is party to no contract with any defendant.

In his brief, at page 25, Mr. Levitz acknowledges that “[g]ood faith and fair dealing are implied in every contract.” Respondents argued below that Mr. Levitz was party to no contract(s) with any of them. CP 80-82. In his Response, Mr. Levitz did not identify any contract between him and

MERS, Capital One, or U.S. Bank. CP 247-48. He asserted, instead, that a *trustee* under a deed of trust – which none of the respondents filing this brief is – has a duty of good faith to the borrower, beneficiary, and grantor, CP 247 (lines 4-5), and that he had “a rightful claim of interest in” the house because of the Decree of Dissolution and the Claim of Spouse he recorded, CP 247 (lines 15-21). With respect to MERS, Capital One, and U.S. Bank, Mr. Levitz’s brief asserts what is no more than breach of a free-floating duty of good faith. That is not good enough.

Although there is a duty of good faith and fair dealing implied in all existing contracts, we have consistently held there is no “free-floating” duty of good faith and fair dealing that is unattached to an existing contract. . . . The duty exists only “in relation to performance of a specific contract term.”

*Keystone Land & Dev. v. Xerox Corp.*, 152 Wn.2d 171, 177, 94 P.3d 945 (2004) (quoting *Badgett v. Security State Bank*, 116 Wn.2d 563, 569-70, 807 P.2d 356 (1991)). Mr. Levitz neither cites evidence nor argues that he was or became a party to any note, deed or trust, or other contract with MERS, Capital One, or U.S. Bank, and cites no “specific contract term” in relation to which any defendant acted in bad faith when providing notices of the admitted default on his ex-wife’s promissory note and of the trustee’s sale that the default entitled the holder of the note to initiate.

Mr. Levitz did file, in 2010, a Claim of Spouse in Community Property pursuant to RCW 26.16.100. CP 109-10. Neither that statute nor any authority Mr. Levitz's brief cites provides that recording such a document made him party to any contract. Even if recording the Claim of Spouse entitled Mr. Levitz, under the Deed of Trust Act, to notices to which he had not theretofore been entitled, Mr. Levitz makes no complaint that he did not receive any such notices.

Mr. Levitz argues that "respondents made a bad faith attempt to foreclose on property. . . in violation of court orders [*i.e.*, the October 2010 Decree of Dissolution, CP 111-19] that were in place at the time the foreclosure proceeding was initiated." *App. Br. at 27*. But the Decree of Dissolution did not forbid foreclosure; in fact, it expressly recognized that foreclosure proceedings were pending. CP 115 (¶1). Mr. Levitz argues that respondents "engaged in bad faith by attempting to foreclose when they had no legal right to do so" because the Appointment of Successor Trustee was not recorded. But the Appointment of Successor Trustee *was* recorded, as Mr. Levitz's own Complaint alleged, CP 5 (¶2.6), and as the record shows, CP 24 (¶6), 28-29, 199 (3), 202-03.

Mr. Levitz asserts that the October 2009 Decree of Dissolution, which awarded him ownership of the house, CP 115 (¶1), and/or the Claim of Spouse, CP 109-10, gave him a "rightful claim of interest in the

[house],” *App. Br. at 26*, but does not even attempt to explain how that made him a party to any 2004 contract between Inesa Levitz and MERS, U.S. Bank or Capital One. Furthermore, even if the decree gave Mr. Levitz rights under the deed of trust along with rights of ownership in the house, such that he had standing, as of May 2011, to file a complaint that asserted claims based on a contract between Inesa Levitz and a defendant, the fact is that the decree was vacated two months later, in July 2011. CP 127 (line 25). Thus, the decree had been null and void for nine months by the time MERS, Capital One, and U.S. Bank moved for summary judgment in April 2012, and Mr. Levitz admits that the Court of Appeals “upheld the order to vacate.” *App. Br. at 27*. By the time the trial court heard the motions for summary judgment, Mr. Levitz was not entitled to rely on the vacated decree as a basis for asserting a claim against MERS, Capital One, or U.S. Bank for violation of an implied contractual covenant of good faith and fair dealing.

Mr. Levitz’s claim for breach of the implied contractual covenant of good faith and fair dealing was properly dismissed as to MERS, Capital One, and U.S. Bank, and the dismissal should be affirmed as to all three respondents.

2. Mr. Levitz's fraud claim was properly dismissed because he did not identify, in his complaint or in response to summary judgment, any false statement of material fact that a defendant knowingly made, that he did not know was false, and on which he relied.

Mr. Levitz recites the elements of fraud at page 28 of his brief.<sup>8</sup>

Respondents argued in their summary judgment motion both that he had failed to *plead* fraud with the particularity required by CR 9(b) and that he could not present evidence that they “knowingly misrepresented an existing fact, that he relied upon the truth of the representation, that he was entitled to rely upon it, and that he suffered damages as a result.” CP 80. Mr. Levitz responded that he was alleging that “Defendants made a fraudulent appointment and a fraudulent assignment to unauthorized and/or illegal parties,” that he had “reason to believe that the signatures verifying the assignment and appointment may also be fraudulent,” and that “Defendants have provided no evidence whatsoever that Jeffrey R. Huston<sup>9</sup> and Monica Hadley<sup>10</sup> . . . are even natural persons.” CP 244. The lawsuit was Mr. Levitz’s. Defendants were not obliged to prove the existence of anything or anyone. Although the complaint had been filed in

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<sup>8</sup> Mr. Levitz lists eight elements, combining reliance and right to rely, which some decisions list as two of nine elements. *See Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996). Mr. Levitz’s header says “Fraud and Misrepresentation,” but he offers no argument or authority concerning negligent misrepresentation.

<sup>9</sup> See CP 203.

<sup>10</sup> See CP 221 and CP 231.

May 2011, Mr. Levitz had not done any discovery by the time MERS, Capital One, and U.S. Bank moved for summary judgment in April, 2012, nor did he seek a CR 56(f) continuance in response to their motion.

Mr. Levitz's summary judgment response went on to make rambling arguments about the Deed of Trust Act being a "plenary statute" that "expresse[s] . . . public policy," and that precluded MERS from "creating a deed of trust that uses a third party 'nominee' as the beneficiary." CP 244. His response failed to explain what bearing such assertions had on his *fraud* claim. The trial court dismissed Mr. Levitz's complaint pursuant to CR 56. CP 356.

Mr. Levitz renews the same flawed assertions in his brief on appeal. *App. Br. at 28-29 and 31-32*. In the fraud section of his brief, he also adds a new argument that "[a]ccording to the SEC, no such entity or security known as 'CCB Libor Series 2005-1 Trust' is registered with that federal agency, which is a requirement for all publicly traded securities." *Id. at 29*. Mr. Levitz so alleged below, in his complaint, CP 6-7 (¶2.16), but he did not raise such an argument in opposing summary judgment and offered no *evidence* to support such an allegation. Nor does his brief on appeal cite any authority for the implied contention that a trustee for owners of mortgage-backed securities can be the holder of a note and/or beneficiary of a deed of trust only if the securities are publicly traded and

registered with the SEC.<sup>11</sup> Mr. Levitz then cites *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 108, 285 P.3d 34 (2012), for the propositions that parties may not contract to vary nonjudicial foreclosure procedures prescribed by RCW ch. 61.24 and that “MERS did not become a beneficiary [of the deed of trust at issue in *Bain*] by contract or under agency principals [sic].” *Id.* at 30.

For purposes of *fraud* claim analysis, none of Mr. Levitz’s assertions explain what evidence he contends supports allegations that MERS, Capital One, or U.S. Bank falsely stated any existing facts. That a security is not registered with the SEC is immaterial absent an explanation as to why it *is* material and, in any event, no one stated to Mr. Levitz that any particular thing or security *is* registered with the SEC. Moreover, Mr. Levitz does not claim to have done anything – detrimental or otherwise – in reliance upon notices of default, foreclosure, or trustee’s sale. He certainly did not vacate the house or send payments to the wrong place. He does not claim even to have known about the 2009 Appointment of Successor Trustee until 2011, much less to have relied on it to his detriment. Thus, even if he could cite something in that document that was false – which he has not done – Mr. Levitz’s assertions in support of

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<sup>11</sup> Nor is there such a requirement. Moreover, the incorrect reference to “CCB Libor Series 2005-1 Trust” was in notices pursuant to which no trustee’s sale occurred and was corrected by the time of the April 2011 notices that prompted Mr. Levitz to file this lawsuit.

his fraud claim are nonsequiturs. Regardless of how the notice documents he complains about characterized a respondent's relationship to his ex-wife's delinquent loan, Mr. Levitz has never articulated what statement(s) of fact in the documents were *false* and why a jury could find that a defendant made the statement(s) with knowledge of their falsity and for the purpose of inducing *his* reliance, or what he did or did not do in reliance on them.

3. Mr. Levitz has never identified an unfair or deceptive practice for purposes of his Consumer Protection Act claim, and has never specified the "injury to business or property" for which he sought damages under the CPA.

As Mr. Levitz correctly acknowledges at page 21 of his brief, the elements that a plaintiff must prove to recover on a claim for violation of the Consumer Protection Act are: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Unless Mr. Levitz can point to evidence that would support findings in his favor on all five elements, the dismissal of his CPA claim must be affirmed. *Boyce*, 71 Wn. App. at 665 (a failure of proof concerning one element "necessarily renders all other facts immaterial").

Mr. Levitz offers the following as practices by MERS, Capital One, and U.S. Bank that he claims were unfair or deceptive: he thinks unspecified documents *may* have been “robo-signed”; there was “an unauthorized Assignment of the Deed of Trust”; there was “an unauthorized Appointment of Successor Trustee”; there were “untimely” notices of default and of trustee’s sales; and MERS was named as a beneficiary under the deed of trust “when MERS has given nothing for value and is not the lender.” *App. Br.at 23-24*. Whether a particular action constitutes an unfair or deceptive practice for purposes of a CPA claim is a question of law. *Bain*, 175 Wn.2d at 116; *Columbia Phys. Therapy, Inc. v. Benton Franklin Ortho. Assocs.*, 168 Wn.2d 421, 442, 228 P.3d 1260 (2010).

Mr. Levitz fails to explain what he means by “robo-signing,” and cites no *evidence* that any document relevant to this case was “robo-signed,” much less that a document was “robo-signed” at the instance of a particular defendant or defendants. Nor does he explain why it would matter, for purposes of a claim *by him*, if a foreclosure-related document *was* “robo-signed.” Mr. Levitz is not the borrower, did not execute any note or deed of trust, and has never contested the fact or amount of the default(s) in payment on his ex-wife’s note.

Publicity over so-called “robo-signing” has tended to relate to foreclosures allegedly undertaken in error, such as when the issuer of a notice of default or foreclosure did not confirm that the borrower was actually in default or owed the amount stated as delinquent. Mr. Levitz has never so much as suggested that any notice he has ever received has incorrectly asserted a default on his ex-wife’s note or misstated the amount of her delinquency. Thus, even if notices Mr. Levitz received had been “robo-signed,” it would not matter.<sup>12</sup>

Mr. Levitz also offers “untimely” notices of default and of trustee’s sales as supposed unfair or deceptive practices. He neglects, however, to explain what was “untimely” about any specific notice(s).

Mr. Levitz cites MERS being named as beneficiary on the deed of trust, MERS’s “unauthorized Appointment of Successor Trustee,” and “an unauthorized Assignment of the Deed of Trust” as his other claimed

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<sup>12</sup> Mr. Levitz does not acknowledge or seek to distinguish decisions holding that even the borrower (here, Inesa Levitz) would lack standing to challenge foreclosure-initiating documents as “robo-signed.” See *Ukpoma v. United States Bank Nat’l Ass’n*, 2013 U.S. Dist. LEXIS 66576 \*13-14 (E.D. Wash. May 9, 2013) (citing decisions so holding); *Orzoff v. Bank of Am., N.A.*, 2011 U.S. Dist. LEXIS 44408, 2011 WL 1539897 \*2-3 (D. Nev. Apr. 22, 2011) (holding that plaintiff failed to state a claim that trustee breached its duty by “robosigning” documents related to her loan where she did not dispute that she was in default on her mortgage or that she received required notices); *Javaheri v. JPMorgan Chase Bank, N.A.*, 2012 U.S. Dist. LEXIS 114510, 2012 WL 3426278 \*6 (C.D. Cal. Aug. 13, 2012) (allegations of robo-signing, even if true, were not actionable where borrower suffered no injury arising from the robo-signing itself).

deceptive practices. Aside from the fact that Mr. Levitz offers no argument as to how he suffered injury to his “business or property” due to MERS’s role or to an assignment of the deed of trust, he ignores the law. The deed of trust named MERS as beneficiary but was not deceptive because it identified MERS as “acting solely as a nominee for the Lender and Lender’s successors and assigns,” *and identified the Lender as Chevy Chase Bank*, the entity from which Inesa Levitz had borrowed \$560,000. CP 143-44.

The April 2011 foreclosure notices also identified the deed of trust beneficiary as U.S. Bank, which it was. (So did the April 2010 notices, albeit with the nonmaterial error in identifying the entity for which U.S. Bank was Trustee). Concerns that the *Bain* court expressed, 175 Wn.2d at 117-18, and held *could* amount to deceptive practices for CPA purposes – MERS *foreclosing* in its name, or borrowers being subject to multiple foreclosures by different entities claiming to be beneficiaries, or situations where homeowners under foreclosure are unable to ascertain who holds their notes and who they must pay or negotiate with to stop a foreclosure – are not implicated in this case. This case does not involve a “MERS foreclosure” or a foreclosure where a homeowner cannot tell from notices he receives who holds his note and/or what entity he needs to deal with regarding his loan default. MERS did not foreclose. What company Mr.

Levitz would have had to pay if he had wished to cure the default on a note he did not sign was specified in the notices, as was the name of the note holder, U.S. Bank, so no deceptive practice occurred. Furthermore, Mr. Levitz failed even to articulate in the trial court, much less offer evidence proving, how any alleged act or omission by a respondent or respondents caused any “injury in his business or property.”

Chevy Chase Bank endorsed Inesa Levitz’s note over to U.S. Bank, NA as Trustee, which Mr. Levitz does not deny Chevy Chase Bank had the right to do. Under Washington law, the security represented by the deed of trust “follows,” and may be enforced by, the holder of the note. *Fid. & Dep. Co. of Maryland v. Ticor Title Ins. Co.*, 88 Wn. App. 64, 68-69, 943 P.2d 710 (1997) (recognizing “the maxim that the mortgage follows the debt”). As holder of the note, U.S. Bank has the legal right to enforce the deed of trust no matter whom the deed of trust identified as the original beneficiary.<sup>13</sup> Mr. Levitz does not argue, much less cite authority for the proposition, that the deed of trust was unenforceable *ab initio* because it named MERS as beneficiary, and to so hold – particularly for the benefit of someone who is not the borrower and

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<sup>13</sup> See *In re Jacobsen*, 402 B.R. 359, 367 (Bankr. W.D. Wash. 2009) (“In Washington, only the holder of the obligation secured by the deed of trust is entitled to foreclose. . . Having an assignment of the deed of trust is not sufficient, . . . because the security follows the obligation secured, rather than the other way around. This principle is neither new nor unique to Washington [Citations omitted]”).

who has not paid a dime toward curing an admitted delinquency on the note – would plainly be inequitable.

V. CONCLUSION

Mr. Levitz is trying to exploit stories of homeowners being evicted based on notices issued by MERS that do not disclose who the holders of their notes are. This is not such a case. U.S. Bank holds Mr. Levitz's ex-wife's 2004 note. There has been no trustee's sale. Mr. Levitz neither moved out of the house nor tendered payment because of any notice a defendant issued. Mr. Levitz has no colorable, much less triable, claims against any of these respondents. Mr. Levitz's damages claims against defendants/respondents MERS, Capital One, and U.S. Bank were properly dismissed on summary judgment. This Court should affirm.

RESPECTFULLY SUBMITTED this 29th day of May, 2013.

WILLIAMS, KASTNER & GIBBS PLLC

By   
John A. Knox, WSBA #12707  
Daniel W. Ferm, WSBA #11466

Attorney for Respondents MERS, Capital  
One, N.A., U.S. Bank N.A.

Two Union Square  
601 Union Street, Suite 4100  
Seattle, WA 98101  
(206) 628-6600

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 29th day of May, 2013, I caused a true and correct copy of the foregoing document, "Brief of Respondents Mortgage Electronic Registration Systems, Inc., Capital One, NA, and U.S. Bank NA," to be delivered in the manner indicated below to the following counsel of record:

Counsel for Appellant:

Jill J. Smith, WSBA #41162  
Natural Resource Law Group, PLLC  
2217 NW Market St Ste 27  
Seattle WA 98107-4062  
Ph: (206) 227-9800  
Email:  
[jill.smith@naturalresourcelawgroup.com](mailto:jill.smith@naturalresourcelawgroup.com)

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Counsel for Respondent Bishop White  
Marshall & Weibel :

Barbara L Bollero, WSBA #28906  
David A. Weibel, WSBA #24031  
Bishop White Marshall & Weibel PS  
720 Olive Way Ste 1201  
Seattle WA 98101-3809  
Ph: (206) 622-5306  
Email: [bbollero@bwmlegal.com](mailto:bbollero@bwmlegal.com)  
[dweibel@bwmlegal.com](mailto:dweibel@bwmlegal.com)

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

DATED this 29th day of May, 2013, at Seattle, Washington.

  
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Carrie A. Custer, Legal Assistant