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**COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON**

DAVID AND ROBBIN MANNING, HUSBAND AND WIFE;

PLAINTIFFS-APPELLANTS

vs.

**MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.
("MERS"); THE BANK OF NEW YORK MELLON, F/K/A THE BANK OF
NEW YORK, SOLELY AS TRUSTEE FOR THE CERTIFICATE
HOLDERS OF CWMBS, INC., CHL MORTGAGE PASS-THROUGH
TRUST 2004-5, (A NEW YORK REMIC TRUST), MORTGAGE PASS
THROUGH CERTIFICATES, SERIES 2004-5; REGIONAL TRUSTEE
SERVICES PACIFIC, INC. ("RTS"); RESIDENTIAL CREDIT
SOLUTIONS, INC.; JOHN DOES NOS. 1 – 20;**

DEFENDANTS-APPELLEES

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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Appellants David and Robbin submit their Reply Brief as follows.

I. INTRODUCTION

The Appellee-Respondents (“respondents”) suggest the Opening Brief (“AOP”) was “riddled with inaccuracies and red herring arguments, and the record contradicts all of their arguments.” *Reply Brief* (“RB”) at p. 1. This Court is urged to revisit the trial court record in this action, in its *de novo* review¹, to find exactly the opposite of the respondents’ denigration of the AOP.

II. STATEMENT OF THE CASE

The facts found in the verified complaint, the Statement of the Case in the AOP, and the documents of record amply describe this appeal. In the following legal analysis the trial court record shall be referenced with particularity.

¹ The trial court’s actions are subject to *de novo* review. *Future Select Portfolio Management, Inc. v. Tremont Group Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014).

However, certain “facts” found in the RB Statement of the Case are more argument than fact, and also include erroneous conclusions of law:

(1) Bony was not a *bona fide* assignee by way of a deed of trust (“DOT”) assignment executed by MERS, in its capacity as nominee for Countrywide Home Loans, Inc. CP, 125-127. *Consider*: How could MERS be a “nominee” of a non-existent entity (Countrywide Home Loans) in 2012? Inspection of the year 2004 DOT, at page 2, reveals that MERS was the “**beneficiary under the Security Instrument.**” CP, 113. Yes, MERS is also identified as a “nominee” for the Lender (Countrywide), but note that the only emphasized text is the identification of MERS in **bold letters** as “**beneficiary.**” CP, 113.

The record is devoid of any evidence that MERS was ever a “holder” of any promissory note involved with the Mannings’ home. According to *Bain v. Metropolitan Mortgage Group, et al.*, 175 Wn.2d 83 (Wash. 2012), the Washington State Supreme Court (“WSSC”) found Mortgage Electronic Registration Systems, Inc.

("MERS") is not a beneficiary if it is not a noteholder (which it was not in this case) and could not therefore assign the beneficial interest, which is exactly what was attempted here.

(2) Since BONY as trustee of the securitized trust did not, and could not, receive the beneficial interest by the assignment of DOT (CP, 125-127), then it never did. The foreclosure action cannot be authorized by this non-beneficiary, as it has no standing. *Bavand v. OneWest Bank, FSB*, 176 Wn. App. 475, 309 P.3d 636 (2013).

Additionally, *Glaski v. Bank of America, N.A.*, 218 Cal. App. 4th 1079 (2013) is persuasive to conclude that even if MERS could have assigned the DOT to BONY, the lateness of the assignment destroyed the power of sale clause in the hands of BONY, because the assignment was eight years too late to be an allowable assignment for the securitized trust.

(3) The Mannings did dispute their default on the alleged loan, by filing a complaint. See CP, 3-26.

(4) The Mannings were not required to seek pre-sale injunctive relief, and the election to file the lawsuit without seeking such relief

cannot be construed as a waiver of claims in this case. *AOB*, at pp. 18-19, fn. 5.

III. ARGUMENT²

The standard of review in this appeal is *de novo*. *Future Select Portfolio Management, Inc. v. Tremont Group Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014).

The respondents devoted much of their analysis to the claim that as a “holder” of a note, the (*alleged*) beneficiary of the DOT could exercise the power of sale clause of the lien instrument to execute a nonjudicial foreclosure proceeding. *RB*, at pp.11-12. The respondents’ analysis concerning whether or not the note is an unconditional promise to pay is fatally flawed (the note is replete with conditions that could affect the obligation to pay the fixed amount). *CP*, 109-110³. The respondents glossed over the requirement that a

² The appellants do not address every issue presented by the respondents. This does not infer that the appellants concede any such issues, but merely that the Opening Brief adequately addressed those matters.

³ The Mannings concede that the *Anderson* case examined an ARM note, which is different than the Mannings’ note. But the Mannings’ note is not an unconditional promise to pay, as the note contains

“holder” must hold a negotiable instrument (note), which is fatal to the respondents’ arguments, suggesting that to adopt the AOB’s argument would result in an “absurd precedent.” *RB*, at p. 21. Actually, the result would simply recognize the requirement to strictly construe the Washington Deeds of Trust Act, R.C.W. 61.24. *Schroeder v. Excelsior Mgmt. Group, LLC*, 177 Wn.2d 94, 105, 297 P.3d 677 (2013) (quoting *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007); *Bain*, 175 Wn.2d at 93 (quoting *Udall*, 159 Wn.2d at 915-16)).

R.C.W. 61.24.005(2) *ostensibly* allows a note holder to become a beneficiary of a DOT even if the DOT has been assigned elsewhere, but this begs the question: what is a “holder?” Clearly, if the note is nonnegotiable, then UCC Article III does not apply and BONY cannot be a “holder,” and neither can any of the other respondents. The nonnegotiable instrument (note) is controlled by UCC Article IX, and R.C.W. 61.24.005(2) is inapposite. The respondents cannot be holders, and therefore cannot be beneficiaries, which means none of

several material conditions, that can be discussed in oral argument. *Anderson v. Hood*, 63 Wn.2d 290, 387 P.2d 73 (1963)

the respondents had authority to exercise the power of sale clause of the DOT. CP, 121.

The waiver doctrine is inapposite to the facts in this case. *See* AOB, at pp. 18-19, fn.5.

Finally, the trial court concluded the statute of limitations had expired for any Consumer Protection Act claims. However, it was only after the respondents sought nonjudicial foreclosure of the appellants' residence, that the wrongful, deceptive acts occurred. These respondents are strangers to the Mannings' loan obligations, and therefore the unfair and deceptive acts occurred when the trustee sale occurred, based upon the rogue documents where the respondents did not have authority to exercise a DOT power of sale clause.

IV. CONCLUSION

Appellants David and Robbin Manning seek a reversal of the trial court's dismissal, with prejudice, of all their claims. The trial court did not even give the Mannings an opportunity to amend their cause of action for fraud, concluding that the fraud claim was not pleaded with particularity. But the Mannings could have pleaded their

fraud claim with more specificity, given the chance to do so. The same applies to the CPA claims.

The trial court pigeon-holed the reasons for the Mannings to elect *not* to seek pre-sale injunctive relief into a narrow scope where waiver did apply, and ignored the more relevant cases, where waiver should not be imposed. *AOB*, at pp. 18-19, fn. 5.

Appellants respectfully request this Court to reverse the trial court's dismissal of the Mannings' case under CR 12(b)(6) and remand the case to the trial court for further proceedings.

Respectfully submitted this 23rd day of June, 2016.

SANDLIN LAW FIRM



J.J. SANDLIN, WSBA #7392, for Appellants Manning

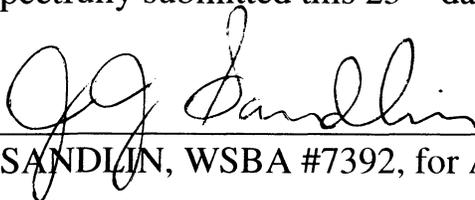
Certificate of Service:

J.J. SANDLIN declares under penalty of perjury of the laws of the State of Washington as follows:

1. On June 23, 2016, I mailed a copy of the above Reply Brief to opposing counsel, Reneé M. Parker, SBN 36995, Attorney for Defendants-Appellees, at WRIGHT, FINLAY & ZAK, LLP, 4665 MacArthur Boulevard, Suite 200, Newport Beach, California 92660 [tel. 949-477-5050; email/ rmparker@wrightlegal.net]; and

2. I mailed/delivered the appellants' Reply Brief to the Clerk of the Court, Washington State Court of Appeals, Division I, One Union Square, 600 University St., Seattle, WA 98101-1176 [fax: 206-389-2613] on June 23, 2016.

Respectfully submitted this 23rd day of June, 2016.



J.J. SANDLIN, WSBA #7392, for Appellants Manning