

73908-5-I
THE COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

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Court of Appeals
Division I
State of Washington

DAVID AND ROBBIN MANNING, HUSBAND AND WIFE

Appellants,

v.

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
CERTIFICATES, SERIES 2004-5; REGIONAL TRUSTEE SERVICES
PACIFIC, INC. (“RTS”); RESIDENTIAL CREDIT SOLUTIONS, INC.;
JOHN DOES NOS. 1-20.

Appellees/Respondents

APPELLEE’S BRIEF

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Appellees and Respondents, RESIDENTIAL CREDIT SOLUTIONS, INC. (hereinafter “RCS”), THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWMBBS, INC., CHL MORTGAGE PASS-THROUGH TRUST 2004-5, MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2004-5 (*erroneously sued as* THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, SOLELY AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF CWMBBS, INC., CHL MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2004-5, (A NEW YORK REMIC TRUST) (hereinafter “BONY”), and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (hereinafter “MERS”) hereby submit the following Appellee’s Opening Brief. RCS, BONY and MERS shall be hereinafter collectively referenced as “Respondents.”

I. INTRODUCTION

The sole issue in this appeal is whether the Appellants’ Complaint was able to survive dismissal under Civil Rule (“CR”) 12(b)(6) with prejudice and without leave to amend. Appellants David M. Manning and Robbin L. Manning (“Appellants”) filed an Opening Brief (“AOB”) riddled with inaccuracies and red herring arguments, and the record contradicts all of their claims (*see* Appellant’s Clerk’s Papers (“CP”), generally). As a result, the Superior Court was correct in dismissing all of Appellant’s claims against Respondents, and that decision should be affirmed by this Court.

II. STATEMENT OF THE CASE

On or about February 13, 2004 Appellants financed real property known as 147 TINKHAM LANE, LOPEZ ISLAND, WASHINGTON 98261, (“Property”) by executing a Note in favor of Countrywide Home Loans, Inc. in the principal amount of \$495,000.00 (“Note”), as secured by a Deed of Trust against the Property (“Deed of Trust”) (CP, 104-110). The Deed of Trust was recorded February 27, 2004 as Instr. No. 2004-0227034 (CP, 111-124). The Note and Deed of Trust are collectively referenced as the “Loan.”

BONY was the assignee under an Assignment of Deed of Trust executed by MERS, in its capacity as nominee for Countrywide Home Loans, Inc. and its successors and assigns (“Assignment”); the Assignment was recorded March 7, 2012 as Instr. No. 2012-0307013 (CP, 125-127).

Appellants defaulted on their Loan starting with the monthly installment payment due July 1, 2012, and all subsequent months thereafter (CP, 62, 107). A Notice of Default was issued January 13, 2014 (CP, 107, 135-141). Appellants failed to cure the default (CP, 151), and a Notice of Trustee’s Sale was recorded September 17, 2014 (CP, 62, 142-149).

Appellants filed their Complaint, but never made an attempt to obtain a Temporary Restraining Order (“TRO”) or injunction to stop a foreclosure sale and Appellants never disputed their default on the Loan (CP, *generally*). A foreclosure sale was held January 15, 2015 (CP, 150-154).

In response to the Complaint, Respondents filed a Motion to Dismiss under CR 12(b)(6) (CP, 42-98¹); the trial court provided an opinion July 1, 2015 (CP, 590-591) and Respondents' motion was granted by entry of an order on July 31, 2015 (CP, 597-600). Appellants timely filed this appeal.

In their appeal, Appellants incorrectly contend that: **1)** the trial court based its entire decision to dismiss on case law allegedly not accepted in the Washington courts (with an extensive auxiliary argument on the claimed effect of Glaski v. Bank of America, N.A., 218 Cal.App.4th 1079 (2013) with respect to assignments) (AOB, 8-11) (case at CP, 250-264); **2)** the "trial court did not observe the procedural requirements of CR 12(b)(6) (AOB, 11-18); and **3)** that the doctrine of waiver did not apply to Appellants (AOB, 18).

Contrary to Appellants' contentions, the trial court clearly based its decision on *Washington case law* with respect to both the standard for dismissal under CR 12(b)(6) and Appellants' standing to challenge assignments; that the "procedural" arguments raised in the AOB would not justify reversal; that the waiver doctrine under Merry v. Northwest Trustee Services, Inc., 2015 WL 353922 (June 5, 2015) is clearly on-point with the facts here, and that amendment of the complaint would have been futile.

Accordingly the trial court's decision should be affirmed.

¹ Respondents filed a Request for Judicial Notice (CP, 99-154), Appendix of Federal Authorities (CP, 155-524) and Response to Opposition (CP, 567-89).

III. ARGUMENTS

1. STANDARD OF REVIEW.

When reviewing a trial court's ruling on a motion to dismiss under CR 12(b)(6), the standard of review is *de novo*. Gaspar v. Peshastin Hi-Up Growers, 131 Wash.App. 630, 634 (2006); FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 180 Wn.2d 954, 962 (2014). A 12(b)(6) motion challenges the legal sufficiency of the allegations in a complaint. Contreras v. Crown Zellerbach Corp., 88 Wn.2d 735, 742 (1977).

Either party may submit documents not included in the original complaint for the court to consider in evaluating a CR 12(b)(6) motion.² Bavand v. OneWest Bank, FSB, 176 Wn.App. 475, 485 (2013); Rodriguez v. Loudeye Corp., 144 Wn.App. 709, 726 (2008). These generally convert a CR 12(b)(6) motion into a motion for summary judgment.³ Bavand, 176 Wn.App. at 485. However, in a dismissal motion the court may take judicial notice of public documents if their authenticity cannot be reasonably contested, and the court may also consider documents alleged in a complaint but not physically attached to the pleadings. Rodriguez, 144 Wn.App. at 725-26.

² Respondents requested the trial court take judicial notice of documents that were public and the authenticity of could not be contested, and documents alleged throughout the complaint by Appellants themselves. *See*, CP 99-154.

³ The standard of review on a summary judgment motion is also *de novo*. Michael v. Mosquera-Lacy, 165 Wn.2d 595, 601 (2009).

Under *de novo* review, the Appellate Court “performs the same inquiry as the trial court.” Jones v. Allstate Ins. Co., 146 Wash.2d 291, 300, 45 P.3d 1068 (2002). “[D]ismissal is appropriate only if it is beyond doubt that the plaintiff can prove no facts that would justify recovery, considering even hypothetical facts outside the record.” Gaspar, 131 Wash.App. at 635.

2. THE TRIAL COURT BASED ITS DECISION FOR BOTH DISMISSAL AND ASSIGNMENT OF THE DEED OF TRUST ON WASHINGTON CASE LAW.

In their “Issues Pertaining to Assignments of Error” Appellants argue that the trial court “considered case law that is not recognized in Washington.” As discussed below, the record does not reflect that this occurred.

A. THE STANDARD OF DISMISSAL UNDER CR 12(b)(6).

A court's fundamental inquiry in the Rule 12(b)(6) context is "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).⁴ CR 12(b)(6) provides for dismissal of a complaint if it fails to state a claim upon which relief can be granted. Cutler v. Phillips Petroleum Co., 124 Wn.2d 749, 755 (1994); Rodriguez, 144 Wash. App. at 717-18. Dismissal under CR 12(b)(6) is proper where “it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.” Lawson v. State, 107 Wn.2d 444, 448 (1986) (citing

⁴ Abrogated on other grounds by Harlow v. Fitzgerald, 457 U.S. 800 (1982).

Bowman v. John Doe, 104 Wn.2d 181, 183 (1985)). “In general, when ruling on a CR 12(b)(6) motion to dismiss, the trial court may only consider the allegations contained in the complaint and may not go beyond the face of the pleadings.” Sebek v. City of Seattle, 172 Wash.App 273, 275 (FN2) (2012) (internal citations omitted). The gravamen of the court’s inquiry is whether the plaintiff’s claim is legally sufficient, which is answered by looking to the face of the pleadings. Gorman v. Garlock, Inc., 155 Wn.2d 198, 201 (2005); Rodriguez, 144 Wn.App at 725.

While a plaintiff’s factual allegations must be taken as true, legal issues presented by a plaintiff’s allegations are subject to full judicial analysis and need not be accepted as true. Howell v. Alaska Airlines, Inc., 99 Wn.App. 646, 648 (2000); Rodriguez, 144 Wash.App. at 717-18. Dismissal is proper where claims are legally insufficient even after considering hypothetical facts. Gorman, 155 Wn.2d at 201. “[I]f a judgment of the trial court can be sustained on any theory, such judgment will not be reversed on appeal.” Erickson v. Wahlheim, 52 Wash.2d 15, 18 (1950) (collecting cases).

In support of their argument that Respondents’ Motion to Dismiss relied on cases not accepted in Washington -- and that, therefore, reversal is warranted -- Appellants refer to only two of the several cases cited by Respondents in support of dismissal, ignoring the binding effect of the other,

Washington State cases, (CP 63-64).⁵ The record does not show the trial court placed any particular reliance on these two federal cases, and therefore no material error occurred. Accordingly, the trial court's decision was proper.

B. THE STANDARD OF DISMISSAL UNDER CR 9(b).

Appellants also had a burden to plead facts their claims of fraud with specificity: "the circumstances constituting fraud or mistake shall be stated with particularity." CR Rule 9(b); *see also*, Schreiner Farms, Inc. v. Am. Tower, Inc., 173 Wn.App. 154, 163 (2013); Elcon Const. Inc. v. E. Wash. Univ., 174 Wn.2d 157, 166 (2012). "Particularity requires that the pleading apprise the defendant of the facts that give rise to the allegation of fraud." Adams v. King County, 164 Wn.2d 640, 662 (2008). A plaintiff must plead nine specified elements of fraud with clear, cogent and convincing evidence. Kirkham v. Smith, 106 Wash.App. 177, 183 (2001).⁶

The trial court determined Appellants did not meet their heightened burden for pleading fraud: "the Court concludes that Petitioners have not met the particularity standard contemplated by CR9(b). While Plaintiffs give token

⁵ The two cases cited were Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) and Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009).

⁶ The nine elements of fraud are: (1) representation of an existing fact, (2) materiality, (3) falsity, (4) the speaker's knowledge of its falsity, (5) intent of the speaker that it should be acted upon by the plaintiff, (6) plaintiff's ignorance of its falsity, (7) plaintiff's reliance on the truth of the representation, (8) plaintiff's right to rely upon it, and (9) damages suffered by the plaintiff. Stiley v. Block, 130 Wn.2d 486, 505 (1996).

recognition to each of the nine required elements of a fraud cause of action, CR9(b) requires factual specificity that is markedly absent in Plaintiffs' recitation of the elements." CR 590-591. More to the point, Appellants' complaint completely failed to show reliance on the Assignment in their failure to tender monthly Loan payments, injury stemming therefrom, and any falsity resulting from MERS being named on the Deed of Trust.

As amendment of the complaint would be futile, as discussed *infra*, the trial court was correct and its decision should be affirmed.

C. APPELLANTS LACK STANDING TO CHALLENGE THE ASSIGNMENT OR TRANSFER OF THE LOAN TO A TRUST.

Ironically, given their arguments advocating reversal due to Respondents' putative citation of cases not accepted in Washington, Appellants blithely request this Court to render a decision based on cases that are in *contravention* with Washington law. In their opening brief, Appellants cite extensively to Glaski, supra (CP, 250-264) and the recent ruling in Yvanova v. New Century Mortgage Corp., 62 Cal.4th 919 (2016), and ask this Court to follow these limited rulings to provide a basis to challenge the Assignment. This attempt to resurrect their claims is doomed to failure.

First, Washington case law already established that Appellants lack standing to challenge the Assignment because they cannot establish a legally protected interest in the Assignment, are not a party to it, are not granted any rights thereunder, and are not a beneficiary thereof. *See, e.g., Lonsdale v.*

Chesterfield, 19 Wn.App. 27, 31 (1978); Brodie v. Northwest Trustee Servs., Inc., 579 Fed.Appx. 592, 593 (9th Cir. 2014) (borrower lacked standing because “[s]he is neither a party to nor a beneficiary of the assignment and transfer.”); Paatalo v. JPMorgan Chase Bank, N.A., 2012 WL 2505732, *7 (W.D. Wash. 2012) (“borrower does not have standing to challenge assignments and agreements to which it is not a party.”); Borowski v. BNC Mortgage, Inc., No. C12-5867RJB, 2013 WL 4522253, at *5 (W.D.Wash. Aug. 27, 2013) (Borrowers lack standing unless “they are at risk of paying the same debt twice if the assignment stands.”).

Second, the ruling in Yvanova is a California decision and has no precedential value in Washington; nor does it have any effect on the outcome of Appellants’ adverse trial court decision. The Yvanova ruling is also distinguished from the facts here; the Court in Yvanova specifically held:

Our ruling in this case is a narrow one. We hold only that a borrower who has suffered a nonjudicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly void assignment merely because he or she was in default on the loan and was not a party to the challenged assignment. We do not hold or suggest that a borrower may attempt to preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party's right to proceed.”

Yvanova, 62 Cal. 4th at 924. With respect to the specific issue upon which Appellants wrongly place reliance, whether the assignment at issue was void, the Yvanova Court took pains to point out: “We did not include in our order the question of whether a postclosing date transfer into a New York securitized

trust is void or merely voidable, and though the parties' briefs address it, *we express no opinion on question here.*" Id. at 931_(emphasis added).

New York and California cases published before and after Yvanova make clear that borrowers lack standing to challenge assignments made allegedly in violation of a PSA "because an act in violation of a trust agreement is voidable – not void – under New York law...."⁷ It is precisely such a "postclosing" argument Appellants upon rely here [CP, 12; AOB, 4].

Third, Appellants use of Glaski was to challenge the transfer of the loan to the trust under the Pooling and Servicing Agreement, not to challenge the Assignment. See, AOB at 4, CP at 6-7 and 535-536. *See also*, CP, 250-264.

Appellants are not a party to the Pooling and Servicing Agreement, and

⁷ Morgan v. Aurora Loan Services, LLC, 2016 WL 1179733 at *2 (9th Cir. March 28, 2016); *see also*, Saterbak v. JPMorgan Chase Bank, N.A., 2016 Cal.App. LEXIS 197 (Cal.4th March 16, 2016); Banares v. Wells Fargo Bank, N.A., 2014 WL 985532, at *4 (N.D. Cal. Mar. 7, 2014) (collecting New York state cases rejecting the argument that the later transfer would be "void") Indeed, Glaski based its decision on an unreported, New York State trial court decision, Wells Fargo Bank, N.A. v. Erobobo (Apr. 29, 2013) 39 Misc.3d 1220(A), 2013 WL 1831799, slip opn. p. 8, *which has since been overruled on appeal*. *See Wells Fargo Bank, N.A. v Erobobo* (2015) 127 AD3d 1176. Significantly, On November 2, 2015, the United States Supreme Court denied certiorari in Tran v. Bank of New York, ___ US ___, 136 S.Ct. 409, 193 L.Ed.2d 316 (2015), leaving intact the appellate court ruling [amended opinion at 610 Fed. Appx. 82 (2d. Cir. July 22, 2015)] affirming the district court's decision that Glaski and Erobobo "run counter to better-reasoned cases, which apply the rule that a beneficiary can ratify a trustee's ultra vires act." Tran v. Bank of New York, 2014 U.S. Dist. LEXIS 40261 at *18-21 (S.D.N.Y., Mar. 24, 2014), concluding that: "even assuming that the transfer of Plaintiffs' mortgages to their respective trusts violated the terms of their respective PSAs, the after-the-deadline transactions would merely be voidable at the election of one or more of the parties—not void."

case law determined that Appellants are not, and never were, intended third-party beneficiaries. *See e.g. Jenkins v. JP Morgan Chase Bank, N.A.*, 216 Cal.App.4th 497, 514-15 (2013) (*See*, CP, 320-347) (finding a defaulted borrower does not have standing to challenge any agreements relating to the securitization of his loan); *Kirk v. Wells Fargo Bank, N.A.*, 2013 WL 132519 (N.D. Cal. 2013) (*See*, CP, 384-386) (“Wells Fargo argues that Kirk does not have standing to assert a violation of the PSA, because he is neither a party to nor an intended beneficiary of that agreement. The Court agrees.”). Appellants also failed to plead how securitization of their Loan prejudiced them, caused them injury, or relieved them of their obligation to pay the Note. Appellants’ arguments fail due to lack of standing; as a result, they cannot challenge securitization of the Loan or the Assignment.

Fourth, a party’s possession of the Note, endorsed, either specially or in blank, makes that party a trust deed beneficiary as a matter of law, not any trust deed assignment from MERS; the recording of an Assignment is not necessary or sufficient to confer standing and, because the security follows the Note, it is not required in order to foreclose. *Fidelity & Dep. Co. v. Ticor Title Ins.*, 88 Wn.App. 64, 68-69 (1997); *see also, Carpenter v. Longan*, 83 U.S. 271, 275 (1872). “From these basic principles, it follows that a transfer of the obligation, by assignment, negotiation, transfer, or whatever form of transfer is sufficient to transfer it, should carry the mortgage along with it. This is indeed the universal result in American law.” Stoebuck & Weaver, §

18.20 at 340. *See also*, Nance v. Woods, 79 Wash. 188, 191 (1914), Spencer v. Alki Point Transp. Co., 53 Wash. 77, 90 (1909), and Bartlett Estate Co. v. Fairhaven Land Co., 49 Wash. 58, 63 (1908).

RCS filed a declaration, under penalty of perjury, stating RCS was in possession of the Note, had been in possession of it from the date the Loan was transferred to RCS from the prior servicer, and that it was in possession of the Note when all of the foreclosure acts occurred (CP, 105-107). A copy of the Note, endorsed in blank, was filed with this declaration (CP, 109-110).

3. THE TRIAL COURT PROPERLY OBSERVED THE PROCEDURAL ASPECTS OF CR 12(b)(6).

Appellants incorrectly claim procedural irregularity on part of the trial court with respect to Appellants': 1) "wrongful foreclosure" claim; 2) their CPA claim under RCW 19.86.020 & 19.86.030; and 3) the claim for injunctive relief based on arguments MERS could not assign the Deed of Trust, RCS could not appoint a successor trustee, and that the Note was not a negotiable instrument (AOB, 11-18).⁸

In support of their argument Appellants cite to Handlin v. On-Site Manager, Inc., 187 Wash. App. 841 (2015).⁹ That case does not require reversal of the trial court's decision, though, because the trial court's record

⁸ Appellants appear to abandon their declaratory relief, slander of title, and quiet title claims.

clearly shows RCS provided information to Appellants when Appellants requested it. *See*, CR, 27, Exhibit A to Appellants' Complaint.

The only reason the trial court's decision in Handlin was reversed was because the defendants in that case specifically *withheld* information, and that withholding of information specifically resulted in an injury ("The element of injury to business or property in a consumer protection action is sufficiently pleaded when a consumer reporting agency unlawfully withholds information from a person who is entitled to receive it."). Handlin, 187 Wash. App. at 844. Appellants pleadings contradict this occurred here.

A. APPELLANTS COULD NOT PLEAD A "WRONGFUL FORECLOSURE" CAUSE OF ACTION.

There is no cause of action for "wrongful foreclosure" in Washington State if no foreclosure sale occurred and/or a plaintiff fails to allege it in the Complaint. *See e.g.*, Walker v. Quality Loan Serv. Corp. of Wash., 176 Wash. App. 294, 305 (2013) ("Although no foreclosure sale occurred, Walker labels this a 'wrongful foreclosure' claim. We consider it more accurate to characterize this as a claim for damages arising from DTA violations."); Jackson v. Quality Loan Serv. Corp., 186 Wash. App. 838, 850 (2015) ("the Supreme Court recently held that in the absence of a foreclosure, no viable DTA claims remain. ... Because there has been no foreclosure, Jackson has

⁹ Handlin, which Appellants encourage this Court to follow, relies heavily on Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) in evaluating a 12(b)(6)

no claims for violations of the DTA.”); Zalac v. CTX Mortgage Corp., No. C12-01474 MJP, 2013 WL 1990728, at *4 (W.D. Wash. May 13, 2013) (*See*, CP, 514-16) (“Here, the Court grants [the] motion to dismiss because under Washington law a foreclosure sale is a prerequisite to any DTA claim. Plaintiff does not allege a sale occurred. Additionally, Washington does not recognize a claim for wrongful *initiation* of foreclosure proceedings.”). Appellants’ demand for a determination on the “wrongful foreclosure” claim fails, and the ruling should be affirmed.

B. THE COURT PROPERLY FOUND APPELLANTS’ CPA CLAIMS WERE BARRED BY STATUTE.

A claim under the Consumer Protection Act (“CPA”), based on violations of the Deeds of Trust Act (“DTA”), must meet the same requirements applicable to any other CPA claim. Lyons v. U.S. Bank Nat. Ass’n, 181 Wn.2d 775, 785 (2014). Here, *all* of Appellants’ claims stem from MERS being named on the Deed of Trust and later executing an Assignment. Appellants use this to attempt to claim that all subsequent acts by Respondents were void and violated the CPA and DTA statutes.

The trial court properly found Appellants’ CPA claims are barred. There is a four-year statute of limitations period for claims arising under the CPA. *See*, RCW 19.86.120.

motion – one of the issues Appellants state should overturn the decision here.

An action is deemed to have accrued when there is discovery of the facts that give rise to the claim, and the party can look to the courts for relief. Shepard v. Holmes, 185 Wash.App 730, 739 (2014). Discovery occurs when a party could have ascertained the facts giving rise to claims “through the exercise of due diligence.” Id. A claim is not tolled if the plaintiff knew, or through the exercise of reasonable diligence, should have known all of the facts necessary to establish his or her claim. Crisman v. Crisman, 85 Wn.App. 15, 20 (1997). The statute starts to run from the moment facts upon which a plaintiff relies become matters of public record. Shepard, 185 Wash.App at 740. The world is put on notice when an instrument involving real property is recorded. Strong v. Clark, 56 Wn.2d 230, 232 (1960). The discovery rule does not provide additional time; Appellants knew, or are deemed to have known, these facts when the Deed of Trust was recorded in public record, even if the basis for their legal claims were not realized until later. Richardson v. Denend, 59 Wn.App. 92, 95-96 (1990).

The MERS Assignment similarly does not provide additional time under the discovery rule since the document relates back to the Deed of Trust. The Assignment does not give rise to an independent cause of action or “re-start” the statute of limitations. Smith v. Nw. Tr. Serv., Inc., 2014 WL 2439791 at *4 (E.D. Wash. 2014).

Appellants could have known all the facts necessary to establish their claims long before they initiated litigation; Appellants executed the Deed of

Trust, **in which MERS' role was clearly stated**, February 23, 2004 (CP, 28-38), which was *more than ten (10) years* before Appellants filed their Complaint (CP, 3-40). Moreover, any future assignment of the Deed of Trust was contemplated by the document (CP, 114); Appellants expressly consented to this condition by executing the document. Accordingly, Appellants' claims action arising from the Deed of Trust and Assignment are barred by statute.

C. MERS COULD ASSIGN THE DEED OF TRUST.

Appellants' dogged, and incorrect, assertion is that under Walker Defendants failed to comply with the Deed of Trust Act because MERS' was ineligible to execute the Assignment, and as a result BONY had no authority to foreclose or to "threaten" foreclosure (AOB, 12-14). The fact pattern in Walker is highly distinguishable from the issues claimed here; the Assignment by MERS alone does not act as a basis for Appellants to claim damages under the Deed of Trust Act as they contend.

Washington law recognizes MERS' authority to assign a trust deed as an agent of the note-holder. *See e.g., McAfee v. Select Portfolio Serv.*, 2016 Wash. App. LEXIS 392 at *8; Wilson v. Bank of Am., N.A., 2013 WL 275018, at *8 n.9 (W.D.Wash. Jan. 23, 2013). *See also, Myers v. Mortgage Elec. Registration Sys., Inc.*, No. 11-CV-05582 RBL, 2012 WL 678148, at *3 (W.D. Wash. Feb. 24, 2012) *aff'd*, 540 F.App'x 572 (9th Cir. 2013):

The Deed of Trust Act states "parties may insert in [a] mortgage any lawful agreement or condition," including the agreement that MERS serve as an agent. Wash. Rev.Code § 61.12.020; *see also*

Salmon v. Bank of Am. Corp., 2011 WL 2174554, at *8 (E.D.Wash.2011) (finding no issue where deed of trust expressly allowed for MERS to serve as nominee); *Klinger v. Wells Fargo Bank, N.A.*, 2010 WL 5138478, at *7 (W.D.Wash. Dec.9, 2010) (dismissing argument that MERS assignment is invalid); *Daddabbo v. Countrywide Home Loans, Inc.*, 2010 WL 2102486 (W.D. Wash.2010 (same)); *Yawter*, 707 F.Supp.2d at 1125–26 (same). ... “[T]he disclosures in the deed indicate that MERS is acting ‘solely as nominee for Lender and Lender's successors and assigns.’ ... By signing the deeds of trust, the plaintiffs agreed to the terms and were on notice of the contents.” *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034 (9th Cir.2011).

Knowing this, Appellants instead attempt to obfuscate the facts by falsely claiming MERS “assigned” the Note.¹⁰ Nothing in the trial court’s record indicates MERS ever “assigned” the Note, or even claimed to do so, and in fact Respondents disavowed that MERS was ever considered a ‘noteholder’ (CP, 76-77).¹¹ Regardless, there is no legitimate dispute that the

¹⁰ The Assignment states “For value received, [MERS]...does hereby grant, sell, assign, and convey... all beneficial interest under that certain Deed of Trust described below together with the note(s) and obligations therein described and the money due and to become due with interest and all rights to accrue or to accrue under the Deed of Trust.” This language does not invalidate an otherwise valid assignment of MERS’ interest in the Deed of Trust to an assignee. *See, In re Henry Lopez E.D. Mass (Bankr.) No. 09-10346 (fn. 34); Fontenot v. Wells Fargo, Cal. App. 1st District No. A130478; Herrera v. Federal National Mortgage Association, Cal. App. 4th District No. E052943; Coleman v. BAC Servicing, LLC, No. 2100453 (Ala. Ct. App. June 22, 2012); and Connell v CitiMortgage, No. 11-443 (S.D. Ala. Nov. 13, 2012).* While MERS was beneficiary of the Deed of Trust as nominee for the lender and its successors and/or assigns, MERS was not a party to the Note. Therefore, the Note was held by each servicer, not MERS.

¹¹ Respondents’ motion stated: “MERS is not a party to the Note and does not take possession of original loan documents. MERS is not a mortgage loan originator, lender or servicer; MERS’ role is to act as record beneficiary on deeds of trust as nominee (agent) for the beneficial owner of the mortgage loan secured by the MERS deed of trust. MERS was the nominee for Countrywide Home Loans, Inc.

properly endorsed Note was in the possession of Respondent RCS, who thus is and was entitled to enforce it as the holder.

D. RCS COULD APPOINT A SUCCESSOR TRUSTEE.

Appellants rely on the bizarre argument that the Note was non-negotiable as ‘support’ for their argument that RCS was technically not in possession of the Note when the Appointment of Successor Trustee was executed, which resulted in violation of the DTA (AOB, 17).

The noteholder can appoint a successor trustee. Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 89 (2012). The record shows RCS’ obtained possession of the Note December 16, 2013 (CP, 107 at ¶ 8), was in possession of the Note when the first Appointment of Successor Trustee was executed by RCS (as attorney-in-fact to BONY), and was in possession of the Note when it changed the trustee from Regional Trustee Services Corp. to RTS Pacific, Inc. (CP, 128-134). Therefore, Appellants’ contentions fail.

E. THE NOTE WAS A NEGOTIABLE INSTRUMENT.

Appellants argue Respondents violated the DTA because the Note is not a “negotiable instrument” and is therefore outside the purview of RCW 62A (AOB, 14-18). The only case upon which Appellants rely is Anderson v. Hood, 63 Wn.2d 290, 291 (1963) (AOB, 16-17). Appellants insist Anderson is controlling because in Anderson the note did not state a “fixed amount of

and its successors and/or assigns in interest, and had a limited agency relationship

principal” and payments would be applied first to escrow and other items, with application to principal and interest last, thus rendering the principal amount as indiscernible, which resulted in a ruling the note was not a negotiable instrument (AOB, 16). Appellants’ further argue the Note cannot ever have a “fixed amount” because it incorporates additional fees, which results in never “truly” knowing the full amount that will be due (AOB, 16).

First, the fact pattern in Anderson is not even remotely comparable to Appellants’ situation. The Note executed by Plaintiffs clearly and plainly states an unconditional promise to pay a fixed amount of principal. *See*, CP, 109 (“I promise to pay U.S. \$495,000.00 (this amount is called “Principal”), plus interest, to the order of the Lender.”). There is no uncertainty in the amount of principal. The Note unambiguously states a fixed interest rate of 5.875% (CP, 109), and identifies late charges where Plaintiffs fail to tender payments timely (CP, 109-110).

Second, the Note incorporates the Deed of Trust (CP, 110). Not only does the Deed of Trust prove the Note had a stated amount of principal (*see*, CP, 113 at ¶ (F)), it clearly states monthly installment payments will be applied *first to interest, then principal, and then escrow items* (CP 114-115 at ¶2, emphasis added), which is obviously different from the circumstances in Anderson. The Deed of Trust is the instrument that governs additional fees

with each note owner since origination.” CP, 76-77, 574.

and costs a borrower would be required to pay in addition to the Note's stated amount of principal and interest, and the majority of these are contingent upon some default (i.e., CP, 114 at ¶ 1 states the monthly installment may include principal, interest, escrow items, prepayment charges, and late charges; CP, 115-119 at ¶¶ 4, 5, 7, 9, 10, and 14 addresses fees and costs for items such as insurance, tax, HOA dues, other assessments, or lien defense).

Third, the Note is negotiable because it is a contract between Appellants and the original lender, and the document allows the Note to be transferred (*see* CP, 109 at ¶ 1: "I understand that Lender may transfer this Note. Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.'").¹² This means the trial court should rely on contract law to not only determine the definition of a "note holder" but that BONY, by and through its attorney-in-fact RCS, was the holder of the Note executed by Appellants. *See, Hawk v. Branjes*, 97 Wn.App. 776, 780, 986 P.2d 841 (1999); *Walji v. Candyco, Inc.*, 57 Wn.App. 284, 288, 787 P.2d 946 (1990); *Mut. Of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 425, 191 P.3d 866 (2008); *Vadheim v. Cont'l Ins. Co.*, 107 Wn.2d 836, 734 P.2d 17 (1987).

Appellants raise no legitimate issue, outside of frivolous arguments that

¹² Paragraph 20 of the Deed of Trust allows sale of the Note ("**Sale of Note; Change of Loan Servicer; Notice of Grievance.** The Note or a partial interest in the Note ... can be sold one or more times without prior notice to Borrower."). CP, 120.

a mortgage Note can *never* be a negotiable instrument, an argument Appellants never pled in their Complaint. Instead, they urge this Court to overturn a plethora of case law, statutes, Section 3 of the UCC, and RCW 62A in deeming the Note “nonnegotiable.” This would result in an absurd precedent; under this argument no Note would ever be negotiable.

The trial court properly decided that the Note was a negotiable instrument, and that holding must be affirmed.

4. THE WAIVER DOCTRINE IS APPLICABLE HERE.

Failure to obtain pre-sale remedies under the Washington Deed of Trust Act results in waiver of the right to object to a property sale. *See*, RCW 61.24.130; *see also*, Merry v. Northwest Trustee Services, Inc., 188 Wash.App 174 (2015); Plein v. Lackey, 149 Wn. 2d 214 (2003).

Washington Courts have consistently held that post-sale challenges to a nonjudicial foreclosure are waived when a party: “(1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale.” Steward v. Good, 51 Wash. App. 108, 114, 752 P.2d 385 (1988) (*Denied*, 111 Wn.2d 1004 (1988)); Peoples Nat’l Bank of Wash. V. Ostrander, 6 Wash. App. 28, 491 P.2d 1058 (1971). Even when a party has legitimate grounds to restrain a sale, by failing to take action the party waives its dispute. Carlson v. Gibraltar Sav. Of Washington, F.A., 50 Wn.App. 424 (1988). Post-sale claims for damages are also waived by failing

to request a preliminary injunction or restraining order enjoining a nonjudicial foreclosure sale at least five days prior to the sale date. Brown v. Household Realty Corp., 146 Wn.App 157, 160 (2008).

Here the trial court specifically relied on Merry to determine that the waiver doctrine applied to Appellants' claims. Appellants received notice of the right to enjoin the foreclosure sale, and, in filing their Complaint, demonstrated a belief in an actual defense prior to the sale occurring. Also like Merry, a foreclosure sale was held after the complaint was filed because Appellants took no steps to obtain a TRO or Injunction.¹³

RCW §61.24.127 sets forth certain statutory exceptions to the waiver rule. While failure to bring a civil action to enjoin a nonjudicial foreclosure does not necessarily waive a borrower's ability to bring forth a claim post-sale, the DTA is explicit in limiting the nature of such post-sale claims, which are limited to (1) common law fraud or misrepresentation (2) CPA violations, (3) failure of the trustee to materially comply with the DTA, and (4) violation of RCW §61.24.026. *See* RCW §61.24.127(1). Notably the claims cannot seek non-monetary relief: "The claim may not seek any remedy at law or in equity other than monetary damages." §61.24.127(2)(b).

Despite this, and despite the fact Merry is on-point with the facts at

¹³ Further, "[s]imply bringing an action to obtain a permanent injunction will not forestall a trustee's sale that occurs before the end of the action is reached." Plein v. Lackey, 149 Wn. 2d 214, 227 (2003).

issue here, Appellants ask this Court to ignore its own case law by claiming Merry is “a narrow case, inapposite to the Mannings’ issues” (AOB, 18).

Appellants instead argue that the trial court determined Respondents violated the DTA. *See*, AOB, 18 which states “The trial court used the same language used in *Merry*, describing the Mannings’ claims as those that were ‘*only formal technical violations of the DTA.*’” Appellants patently misconstrue the trial court’s opinion, which *actually* read: “But to the extent Plaintiffs claims identify only formal technical violations of the DTA, with no suggestion that any such violations could not have been corrected if they had been timely raised under RCW 61.24.130, Plaintiffs have waived their right to raise them.” (CP, 595). Here the trial court correctly determined Appellants waived their right any post-sale challenges, and the ruling must be affirmed.

5. AMENDING THE COMPLAINT WOULD BE FUTILE.

The court can grant dismissal without leave to amend where amendment of a complaint would be futile. Doyle v. Planned Parenthood, 31 Wn. App. 126, 132, 639 P.2d 240 (1982).

**A. EVEN IF THE CPA CLAIMS WERE NOT
STATUTORILY BARRED, APPELLANTS COULD NOT
PROVE RESPONDENTS VIOLATED THE ACT.**

“To successfully bring an action under the CPA, a plaintiff must prove five elements: ‘(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; [and] (5) causation.’” Johnson v. Camp Auto., Inc., 148

Wn. App. 181, 185 (2009). Failure to prove every required element means the entire CPA claim fails; “[t]he failure to establish any of the elements is fatal to a CPA claim.” Schnall v. AT & T Wireless Servs., Inc., 171 Wn.2d 260, 278 (2011) (citing Holiday Resort Cmty. Ass’n v. Echo Lake Assocs., LLC, 134 Wn. App. 210, 226 (2006)). “Acts performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law.” Perry v. Island Sav. & Loan Ass’n, 101 Wn.2d 795, 810, 684 P.2d 1281 (1984).

First, Appellants cannot establish the “trade or commerce” prong because, in its capacity as an agent for the noteholder, MERS’ assignment is a “ministerial act” that did not occur in trade or commerce. Bain v Metropolitan Mortg. Group, Inc., 2010 WL 891585, *4 n.5 (W.D. Wash. 2010).

Second, Appellant cannot establish the “public interest” prong because the Assignment executed by MERS involves private transactions between Respondents in the normal course of business. Acts impacting only a plaintiff or a limited group do not have the capacity to deceive a substantial portion of the public as a matter of law, “no matter how misleading.” Henery v. Robinson, 67 Wn. App. 277, 291 (1992), *abrogated on other grounds*; *see also* Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc., 86 Wn. App. 732, 744-45 (1997) (the challenged acts were not directed at the public).

Third, Appellants cannot show the required causal link between their alleged CPA claim, the Deed of Trust or Assignment, and the injury suffered.

Schmidt v. Cornerstone Invs., Inc., 115 Wash.2d 148, 167, 795 P.2d 1143 (1990). In order to meet this standard, Appellants are required to show that “but-for” Respondents’ actions, Appellant would not have suffered any injury. Indoor Billboard v. Integra Telecom, 162 Wash.2d 59, 84 (2007). To satisfy the causation element, a “plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury.” Id. This requires “a causal link between the misrepresentation and the plaintiff's injury.” Id. at 83. “A CPA claim must show there is a causal link between the alleged misrepresentation or deceptive practice and the purported injury. Hangman, 105 Wn.2d at 793. ‘[T]he term proximate cause’ means a cause which in direct sequence unbroken by any superseding cause, produces the injury [or] event complained of and without which such injury [or] event would not have happened.” Schnall, 171 Wn.2d at 278 (quoting 6 Washington Practice: Washington Pattern Jury Instructions; Civil 15.01 at 181 (5th ed.2005). Without a demonstration of direct harm a CPA claim fails. Frias v. Asset Foreclosure Svcs., Inc., 957 F.Supp2d 1264, 1270 (W.D.Wash. 2013), *see also* Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 917 (2001).

Similarly, Appellants failed to show that any act by MERS was the proximate cause of, or reason for, their failure to tender payments.

I can’t find any but-for causal relationship between what MERS did and didn’t do and the harm that wasn’t suffered. Because even if the filing of foreclosure actions is an injury, and I don’t think the showing has been made that there was any injury here, I’ll point out that it’s also clear that MERS didn’t initiate those

foreclosure proceedings, lend money, make representations to plaintiff, send plaintiff any default notice or initiate the foreclosure.... if you can't make the showing under prong four injury, its impossible to make the showing under prong five causation.

Bain v. Metropolitan Mortg. Corp., 2013 WL 6193887 at *6 (Wash. Sup. Ct. 2013) (CP, 158-164). See also Hangman, 105 Wn.2d at 780 (plaintiff must demonstrate MERS took an unfair or deceptive act in trade or commerce that caused identifiable injury).

Failure to tender payments is the sole proximate cause of Appellants' injury, and foreclosure would be the expected result Western Community Bank v. Helmer, 48 Wash.App. 694, 700-701 (1987) ("The second prong...is not met as Ms. Helmer was directly liable on the mortgage and her nonpayment of the mortgage led to the foreclosure action.").

Moreover, an assignment is not required under Washington law, the Assignment was not the operative document that commenced foreclosure, and is therefore not the cause of Appellants' claimed injury: "Appellants fail, however, to plausibly allege any injury proximately resulting from the MERS Assignment. The alleged injury ... is not plausibly related to the MERS Assignment. The legal threat and the possibility of losing her home could only relate to the Notice of Default, not the MERS Assignment." In re Brown, 2013 WL 6511979 at *13 (BAP 9th Cir., 2013). See also, Knecht v. Fid. Nat. Title Ins. Co., No. C12-1575RAJ, 2015 WL 3618358, at *7 (W.D. Wash. June 9, 2015) ("The execution and recording of the MERS Assignment caused no

injury to Mr. Knecht. Even if it had, and Mr. Knecht could tie that injury to a statutory or common law right of action, Mr. Knecht suffered no compensable damage as a result of the MERS Assignment.”); Wilson v. Bank of Am., N.A., 2013 WL 275018, at *8 n.9 (W.D. Wash. Jan. 23, 2013) (same).

Fourth, in order to make a per se CPA claim Appellants were required to show “the alleged act constitutes a per se unfair trade practice.” Saunders v. Lloyd’s of London, 113 Wn.2d 330, 334, 779 P.2d 249 (1989), and must have also proved: “(1) the existence of a pertinent statute; (2) its violation; (3) that such violation was the proximate cause of damages sustained; and (4) that they were within the class of people the statute sought to protect.” Dempsey v. Joe Pignataro Chevrolet, Inc., 22 Wn.App. 384, 393, 589 P.2d 1265 (1979). Only the Washington Legislature can establish a per se CPA violation, and it can do so only by making a specific legislative declaration to that effect. Hangman, 105 Wn.2d at 787-791 (“it has become clear that the Legislature, not this court, is the appropriate body to establish ... a *per se* unfair trade practice”).

Appellants’ argument that naming MERS on the Deed of Trust constitutes a per se violation of the CPA, without more, has been rejected by the Washington Courts.¹⁴ “Bain is clear that there is no automatic cause of action under the CPA simply because MERS acted as an unlawful beneficiary

¹⁴ Not to mention any cause of action pertaining to the Deed of Trust is barred by statute.

under the Deed of Trust Act.” Mickelson v. Chase Home Finance, 901 F. Supp. 2d 1286, 1288 (W.D. Wash. 2012), *aff’d*, 579 F.App’x 598 (9th Cir. 2014). *See also*, Bain, 175 Wash.2d at 120, 285 P.3d 34 (‘the mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury’).

MERS made no misrepresentations or misstatements to Appellants and, to the contrary, MERS’ role was fully described through the very contract documents Appellants signed. Everything was fully disclosed and agreed to by Appellants. Even if, *arguendo*, the Court ruled that MERS incorrectly concluded that it was a legal beneficiary under the Washington Deeds of Trust Act, MERS fully disclosed its role to Appellants and did not affirmatively misrepresent or knowingly misstate anything to them.

B. APPELLANTS DID NOT PLEAD A CLAIM FOR INJUNCTIVE RELIEF.

Appellants improperly pled “Injunctive Relief” as a cause of action (CP, 19-20); injunctive relief is a remedy and not a cause of action:

Plaintiff has again asserted a claim for injunctive relief. ...In its original order of dismissal, the court dismissed Plaintiff’s count for injunctive relief because “a claim for ‘injunctive relief’ standing alone is not a cause of action.”

Kwai Ling Chan v. Chase Home Loans, Inc., 2012 WL 1576164 at *7, (W.D.Wash., 2012) (internal citations omitted) (*See*, CP, 393-398).

C. APPELLANTS DID NOT PLEAD A CLAIM FOR DECLARATORY RELIEF.

Appellants seem to believe that they stated a viable cause of action for declaratory relief merely because they claimed there was a ripe claim and that

the court needed to protect the Appellants (CP, 20). This is not enough to establish a declaratory relief claim.

Declaratory judgment cannot be claimed when other remedies are available: “a plaintiff is not entitled to relief by way of a declaratory judgment if, otherwise, he has a completely adequate remedy available to him.” Reeder v. King Cnty., 57 Wash. 2d 563, 564 (1961). Appellants’ cause of action was duplicative of other remedies because it requested cancellation of the Loan documents under their Slander of Title and Quiet Title causes of action.

D. APPELLANTS DID NOT PLEAD A CLAIM FOR SLANDER OF TITLE.

Appellants never pled the required elements to establish a slander of title claim. “Slander of title is defined as: (1) false words; (2) maliciously published; (3) with reference to some pending sale or purchase of property; (4) which go to defeat plaintiff’s title; and (5) result in plaintiff’s pecuniary loss.” Rorvig v. Douglas, 123 Wash. 2d 854, 859-60 (1994).

Appellants failed to properly plead, let alone establish, the “malice” element, which “can be supplied *either* by [showing] 1) reckless disregard for the rights of the plaintiff; or 2) improper or wrongful motive.” Peterson v. Littlejohn, 56 Wash. App. 1, 14, 781 P.2d 1329, 1336 (1989).

Appellants also did not show how recordation of the Deed of Trust or any foreclosure-related documents could be maliciously false, or would act to defeat Appellants’ title. Washington is a lien theory state, and a deed of trust

does not affect title to real property. Kezner v. Landover Corp., 87 Wn.App. 458, 463 (1997). Deeds of trust create only secured liens on real property and do not convey an ownership interest or right to a pre-foreclosure possession. *See* RCW 7.28.230(1); State v. Superior Court for King Cnty., 170 Wash. 463, 467 (1932). There was no competing claim of ownership of the Property by Respondents. Therefore the claim failed.

E. APPELLANTS DID NOT PLEAD A CLAIM FOR QUIET TITLE.

In their Complaint Appellants simply requested that all documents related to the Deed of Trust be cancelled under a quiet title claim. In order to “maintain a quiet title action against a mortgagee, a plaintiff must first pay the outstanding debt on which the subject mortgage is based.” Kwai Ling Chan, 2012 WL 1252649 (*See*, CP, 393-398). *See also*, Rispoli v. Bank of Am., N.A., 2011 WL 3207425, *3 (W.D. Wash. 2011) (*See*, CP, 468-471) (“Rispoli does not contend that he has paid his outstanding debt; instead, he acknowledges he has been in default since December 1, 2009. Thus Mr. Rispoli cannot bring a claim for quiet title.”).

Moreover, the mere mention of MERS in the Deed of Trust is not enough to quiet title. “He offers no authority in his opening brief for the suggestion that listing an ineligible beneficiary on a deed of trust would render the deed void and entitle the borrower to quiet title.” Bain, 175 Wn.2d at 112.

The record is devoid of any proof Appellants paid their Loan debt to

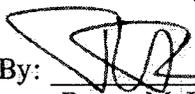
RCS or any other party, and no other facts were presented that would support striking Respondents' documents from public record. Accordingly the trial court's decision must be affirmed.

IV. CONCLUSION

Appellants have been living in the Subject Property over four years without tendering a single payment. Foreclosure resulted from Appellants' unexcused failure to make their required installment payments, and for no other reason. This is not a case where there are competing claimants for enforcement of the Note, nor where the entity seeking to enforce the Loan is not intended to have the right to do so. Rather, Appellants seek to rely on what they misperceive to be a temporal glitch—the date of the recording of the Assignment—to excuse performance under the Loan and to get a free house. The trial court properly granted Respondents' Motion to Dismiss, and the ruling should be affirmed in entirety.

Dated: April 26, 2016

Respectfully submitted,
WRIGHT, FINLAY & ZAK, LLP

By: 

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CHL MORTGAGE PASS-THROUGH TRUST
2004-5, MORTGAGE PASS THROUGH
CERTIFICATES, SERIES 2004-5, and
MORTGAGE ELECTRONIC REGISTRATION

DECLARATION OF SERVICE

The undersigned declares as follows:

On April 26, 2016, I served the foregoing document: **APPELLEE'S BRIEF** on interested parties in this action as shown below as follows:

- [X] **(BY UNITED STATES MAIL)** I placed such envelope(s) for collection and mailing, following our ordinary business practices.
- [X] **(BY ELECTRONIC SERVICE)** Based on an agreement of the parties to accept service electronically, at the time of 4:15 p.m., I caused the document(s) to be transmitted electronically from to the e-mail address(es) indicated below. To the best my knowledge, the transmission was reported as complete, and no error was reported that the electronic transmission was not completed.

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I declare under penalty of perjury under the laws of the United states of America and the State of Washington that the foregoing is true and correct.

DATED: this 26th day of April, 2016


Steven E. Bennett