

THE CIVIL MOTIONS JUDGE  
Hearing Date: November 1, 2013  
Hearing Time: 9:30 a.m.  
With Oral Argument

SUPERIOR COURT OF WASHINGTON  
COUNTY OF SNOHOMISH

JACOB D. BRADBURN, an individual,  
Plaintiff,

Case No.: 11-2-08345-2

v.

RECONTRUST COMPANY, N.A., a  
limited-purpose national trust bank;  
FIDELITY NATIONAL TITLE, a  
corporation; MORTGAGE  
ELECTRONIC REGISTRATION  
SYSTEMS, INC., a foreign corporation;  
BAC HOME LOANS SERVICING, LP  
FKP COUNTRYWIDE BANK HOME  
LOANS SERVICING LP, a foreign  
entity; BANK OF AMERICA, N.A., a  
national bank; BANK OF AMERICA  
CORPORATION, a foreign corporation;  
COUNTRYWIDE FINANCIAL  
CORPORATION, a foreign corporation,  
FEDERAL NATIONAL MORTGAGE  
ASSOCIATION, a federally chartered  
corporation; LINDA GREEN DOES 1-  
10, unknown persons; and QUICKDRAW  
REAL ESTATE SERVICES, INC b/d/a  
HOMESTAR LENDING, a domestic  
corporation; NATIONAL CITY  
MORTGAGE CO. d/b/a  
COMMONWEALTH UNITED  
MORTGAGE COMPANY, a foreign  
corporation; STEWART TITLE, a  
domestic corporation,

**DEFENDANTS' OPPOSITION TO  
BORROWER'S SECOND MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT**

Defendants.

COPY

1 **I. INTRODUCTION AND RELIEF REQUESTED**

2 In 2005, Plaintiff Jacob D. Bradburn (“Borrower”) obtained a \$200,900 loan to  
3 finance real property located in Snohomish County. Borrower defaulted on his loan, and the  
4 Property was sold at a trustee’s sale in May 2011. Four months later, Borrower filed this  
5 lawsuit against Defendants,<sup>1</sup> raising claims attacking the underlying loan transaction, the  
6 denial of his application for a loan modification, and the foreclosure.

7 Borrower has now filed a second<sup>2</sup> Motion for Partial Summary Judgment consisting of  
8 smoke screens and muddied waters in an effort to unravel the foreclosure. However, the  
9 evidence conclusively establishes that BAC Home Loans Servicing, LP (now Bank of  
10 America, N.A.) (“BANA”) was at all relevant times the holder of the Note and that all actions  
11 taken by Mortgage Electronic Registration Systems, Inc. (“MERS”) were done at BANA’s  
12 direction, in accordance with the servicing guidelines of Federal National Mortgage  
13 Association (“Fannie Mae”), the owner of the Note. Therefore, ReconTrust Company, N.A.  
14 (“ReconTrust”) was a valid trustee who was authorized to issue a Notice of Trustee’s Sale, to  
15 conduct the foreclosure, and to execute a Trustee’s Deed in favor of Fannie Mae. In addition,  
16 all of the foreclosure documents recorded by Defendants were in compliance with the Deed of  
17 Trust Act. Therefore, the foreclosure was proper, and Borrower’s second Motion for Partial  
18 Summary Judgment should be denied.

19 **II. FACTUAL BACKGROUND**

20 **The Loan, Note, and Deed of Trust**

21 On December 14, 2005, Borrower obtained a \$200,900 loan (the “Loan”) to refinance  
22 real property located at 4819 136<sup>th</sup> Place NE, Marysville, Washington 98271 (the “Property”).  
23

24 \_\_\_\_\_  
25 <sup>1</sup> Defendants are Defendants ReconTrust Company, N.A., Mortgage Electronic Registration Systems, Inc., Bank  
26 of America, N.A., successor by merger to BAC Home Loans Servicing, LP (also sued erroneously as  
27 “Countrywide Bank Homes Loans Servicing, LP” and as “Bank of America Corporation”), Countrywide Home  
Loans, Inc. (also sued erroneously as “Countrywide Financial Corporation”), and Federal National Mortgage  
Association.

<sup>2</sup> Borrower filed a “Motion for Partial Summary Judgment re ReconTrust Company, N.A. and Bank of America  
Corporation” on August 19, 2013. Defendants filed an Opposition to that motion on September 6, 2013.

1 Declaration of Abraham K. Lorber<sup>3</sup> (“Lorber Decl.”), Ex. A (Deed of Trust). The Deed of  
2 Trust lists Jacob D. Bradburn as the borrower, HomeStar Lending as the lender, Fidelity Title  
3 as the trustee, and MERS as the beneficiary, “as a nominee for Lender and Lender’s  
4 successors and assigns.” *Id.* Borrower admits signing the Note and Deed of Trust. Ex. H to  
5 Lorber Decl., Bradburn Deposition<sup>4</sup> (“Bradburn Dep.”), at 18:5-6, 18:14-15, 19:8-10, 38:1-2,  
6 39:15-19, Exs. 1, 2.

7 Following the origination of the Loan, the Note was endorsed to Countrywide Bank,  
8 N.A, which endorsed the Note to Countrywide Home Loans, Inc., which subsequently  
9 endorsed the Note in blank. Declaration of Heather Dispenza<sup>5</sup> (“BANA Decl.”), ¶¶ 8, 9, Exs.  
10 A (Note), B (Allonge).

### 11 **The Relationship Between BANA and Fannie Mae**

12 Immediately following origination, Countrywide Home Loans Servicing, LP began  
13 servicing the Loan. *Id.*, ¶ 6. On or about January 3, 2006, Fannie Mae became the owner of  
14 the Loan. *Id.*, ¶ 7. BAC Home Loans Servicing LP fka Countrywide Home Loans Servicing  
15 LP (now BANA)<sup>6</sup> continued to service the Loan on behalf of Fannie Mae, pursuant to Fannie  
16 Mae’s servicing guidelines. *Id.*, ¶¶ 11-15, Ex. C to BANA Decl.; Ex. I to Lorber Decl. This  
17 arrangement was designed to allow BANA to take all actions necessary for the collection and  
18 enforcement of the Loan, including receiving and processing loan payments, communicating  
19 regarding the Loan, and, should such action be necessary, initiating foreclosure, consistent  
20 with the Note, Deed of Trust, and Fannie Mae’s servicing guidelines. *Id.*, ¶ 11.

21 Fannie Mae’s Servicing Guide “grants servicers, acting in their own names, the  
22 authority to represent Fannie Mae’s interests in foreclosure proceedings as holder of the  
23 mortgage note.” Ex. E to BANA Decl., at 1. Since January 3, 2006, the original, endorsed-

24 <sup>3</sup> The Declaration of Abraham Lorber is on file with the Court at Dkt. No. 36.

25 <sup>4</sup> The Deposition of Plaintiff Jacob D. Bradburn, conducted June 11, 2013, is attached to the Declaration of  
Abraham K. Lorber as Exhibit H.

26 <sup>5</sup> The Declaration of Heather Dispenza is on file with the Court at Dkt. No. 35.

27 <sup>6</sup> On July 1, 2011, BAC Home Loans Servicing, LP merged with BANA. *Id.*, ¶ 23; Ex. H to BANA Decl. For  
the sake of clarity and consistency with Borrower’s reference to the servicer as “BANA,” Defendants will  
hereafter refer to the servicer as “BANA,” regardless of the time period.

1 in-blank Note has been maintained by BANA and its predecessors in interest on behalf of  
2 Fannie Mae, pursuant to Fannie Mae's servicing guidelines. BANA Decl., ¶ 10, 18, 26.  
3 Since January 3, 2006, Fannie Mae has been the owner of the note. *Id.*, ¶¶ 7, 25; Ex. E to  
4 BANA Decl., at 1 ("Fannie Mae is at all times the owner of the mortgage note.").

5 The original, wet-ink Note is currently in the possession of Defendants' attorneys. *Id.*,  
6 ¶ 27.

### 7 **Borrower's Default and Foreclosure**

8 Borrower defaulted on his loan obligations beginning in March 2009. *Id.*, ¶ 16, Ex. D  
9 to BANA Decl. (Loan Payment History). On or about June 8, 2009, ReconTrust, as agent for  
10 the beneficiary under the Deed of Trust, issued a Notice of Default to Borrower by first class  
11 and certified or registered mail. Declaration of ReconTrust Company, N.A.<sup>7</sup> ("ReconTrust  
12 Decl."), ¶ 4, Ex. A to ReconTrust Decl. (Notice of Default). The Notice of Default was sent  
13 to Borrower by first class and certified or registered mail on June 8, 2009 and personally  
14 served on him or posted in a conspicuous place on the Property on June 9, 2009 *Id.*, ¶ 5, Ex.  
15 B to ReconTrust Decl., § VI (First Notice of Trustee's Sale).

16 Acting at the direction of BANA, the holder of the Note, MERS appointed ReconTrust  
17 as the successor trustee, pursuant to an Appointment of Successor Trustee recorded on  
18 June 17, 2009. BANA Decl., ¶ 21, Ex. F to BANA Decl. (Appointment of Successor  
19 Trustee). Again acting at BANA's direction, MERS then assigned its interest under the Deed  
20 of Trust to BANA, as reflected in a Corporation Assignment of Deed of Trust recorded on  
21 March 30, 2010. *Id.*, ¶ 22, Ex. G to BANA Decl.

22 On July 29, 2010, ReconTrust recorded a Notice of Trustee's Sale, indicating total  
23 arrearages of \$22,713.95 and scheduling a sale for October 29, 2010. ReconTrust Decl., ¶ 6,  
24 Ex. B to ReconTrust Decl. Prior to and at the time of recording the first Notice of Trustee's  
25 Sale, ReconTrust had proof that Fannie Mae was the owner of the Note. *Id.*, ¶ 7, Ex. C to  
26 ReconTrust Decl. (Declaration of Beneficiary). The sale was postponed, and ReconTrust

27 <sup>7</sup> The Declaration of ReconTrust Company, N.A. is on file with the Court at Dkt. No. 34.

1 recorded a second Notice of Trustee's Sale on February 17, 2011, scheduling a sale for  
2 May 20, 2011. *Id.*, ¶ 8, Ex. D to ReconTrust Decl. (Second Notice of Trustee's Sale). Prior  
3 to and at the time of recording the second Notice of Trustee's Sale, ReconTrust had proof that  
4 Fannie Mae was the owner of the Note. *Id.*, ¶ 9, Ex. C to ReconTrust Decl. The second  
5 Notice of Trustee's Sale was mailed to Borrower by first class and certified mail on  
6 February 17, 2011 and was posted in a conspicuous place on the Property on February 18,  
7 2011. *Id.*, ¶¶ 10, 11, Ex. E to ReconTrust Decl. (Declarations of Mailing), Ex. F to  
8 ReconTrust Decl. (Declaration of Posting); Bradburn Dep., at 46:3-5 (admitting that  
9 photographs in Declaration of Posting are of the Property), 47:22-48:2 (admitting that  
10 Borrower has no reason to dispute statement in Declaration of Posting that the Notice of  
11 Trustee's Sale was posted on the Property on February 18, 2011). The Second Notice of  
12 Trustee's Sale advised: "Anyone having any objection to the sale on any grounds whatsoever  
13 will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to  
14 restrain the sale. . . Failure to bring such a lawsuit may result in a waiver . . ." *Id.*, Ex. D to  
15 ReconTrust Decl.. § IX.

16 Borrower did not bring a lawsuit to restrain the sale, and the Property was sold on  
17 May 20, 2011 to Fannie Mae, as evidenced by the Trustee's Deed, recorded on June 9, 2011.  
18 Ex. G to Lorber Decl. (Trustee's Deed). BANA assigned the interest under the Deed of Trust  
19 to Fannie Mae pursuant to a Corporation Assignment of Deed of Trust recorded on June 9,  
20 2011, immediately prior to the recording of the Trustee's Deed. Ex. F to Lorber Decl.  
21 (Corporation Assignment of Deed of Trust).

### 22 **III. ISSUE**

23 Should Borrower's Motion for Partial Summary Judgment be denied because the  
24 evidence establishes that BANA was at all relevant times the holder of the Note and that all  
25 actions taken by MERS were done at BANA's direction, in accordance with the servicing  
26 guidelines of Fannie Mae, the owner of the Note, such that the foreclosure was proper and  
27 there were no violations of the Deed of Trust Act or the Consumer Protection Act?

1 **IV. EVIDENCE RELIED UPON**

2 This Opposition relies upon the pleadings and papers on file with the Court in this  
3 matter, the Declaration of Abraham K. Lorber and exhibits thereto, the Declaration of Heather  
4 Dispenza and exhibits thereto, and the Declaration of ReconTrust Company, N.A. and  
5 exhibits thereto.

6 **V. ARGUMENT**

7 **A. Summary Judgment Standard**

8 Summary judgment is proper only if, after viewing all facts and reasonable inferences  
9 in the light most favorable to the nonmoving party, no genuine issues exist as to any material  
10 fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Torgerson v.*  
11 *North Pac. Ins. Co.*, 109 Wn. App. 131, 136, 34 P.3d 830 (2001). The initial burden on  
12 summary judgment is on the moving party to prove that no material issue is genuinely in  
13 dispute. *Id.* In reviewing the evidence submitted on summary judgment, the trial court must  
14 consider the material facts and all reasonable inferences from them in the light most favorable  
15 to the nonmoving party. *State ex rel. Bond v. State*, 62 Wn.2d 487, 490, 383 P.2d 288 (1963).

16 Summary judgment is appropriate if reasonable persons can reach only one conclusion  
17 from all of the evidence, viewed in a light most favorable to the non-moving party. *Doherty*  
18 *v. Municipality of Metro. Seattle*, 83 Wn. App. 464, 468, 921 P.2d 1098 (1996).

19 **B. Defendants Complied with the Deed of Trust Act**

20 Borrower asserts various violations of the Deed of Trust Act. Borrower's Motion at 6-  
21 17. As discussed below, none of his assertions has any merit.

22 **1. MERS Was Authorized to Appoint ReconTrust as the Successor Trustee**

23 Borrower asserts that MERS was not a lawful beneficiary, such that it could not  
24 appoint ReconTrust as successor trustee. Borrower's Motion, at 7-8. However, the evidence  
25 conclusively establishes that BANA and its predecessors in interest were at all relevant times  
26 the holder of the Note and that all actions taken by MERS, including the appointment of  
27

1 ReconTrust as successor trustee, were done at BANA's direction and as its agent, in  
2 accordance with the servicing guidelines of Fannie Mae, the owner of the Note.

3 **a. BANA Was the Holder of the Note and Beneficiary**

4 Since 1998, the Deed of Trust Act has defined a "beneficiary" as "the holder of the  
5 instrument or document evidencing the obligations secured by the deed of trust, excluding  
6 persons holding the same as security for a different obligation." *Bain v. Metro. Mortg. Grp.,*  
7 *Inc.*, 175 Wn.2d 83, 98-99, 285 P.3d 34 (2012) (quoting RCW 61.24.005(2)) (emphasis  
8 added). The Washington U.C.C. defines the "Holder" of a negotiable instrument in relevant  
9 part as "[t]he person in possession of a negotiable instrument that is payable . . . to bearer.  
10 RCW 62A.1-201(21); *Bain*, 175 Wn.2d at 104. A negotiable instrument is payable to bearer  
11 if it is indorsed in blank. *See* RCW 62.A.3-205(b) ("When indorsed in blank, an instrument  
12 becomes payable to bearer and may be negotiated by transfer of possession alone until  
13 specially indorsed.").

14 Applying the plain language of the statutes and case cited above, the evidence  
15 establishes that BANA was the holder of the Note. Following the Loan's origination, the  
16 Note was endorsed to Countrywide Bank, N.A, which endorsed the Note to Countrywide  
17 Home Loans, Inc., which endorsed the Note in blank. BANA Decl., ¶¶ 8, 9, Exs. A, B to  
18 BANA Decl. Since January 3, 2006, when Fannie Mae became the owner of the Note, the  
19 original, endorsed-in-blank Note has been maintained by BANA and its predecessors in  
20 interest on behalf of Fannie Mae, pursuant to Fannie Mae's servicing guidelines. *Id.*, ¶ 10, 18,  
21 26, Ex. E to BANA Decl.

22 Because it was the holder of the Note, BANA had the right to foreclose and to take  
23 any necessary steps to foreclose. *See Zalac v. CTX Mortg. Corp.*, Case No. C12-01474 MJP,  
24 2013 WL 1990728, at \*3 (W.D. Wn. May 13, 2013) (granting motion to dismiss where  
25 "Defendant [] asserts that it is the true *holder* of the note, even if Fannie Mae is the *owner* of  
26 the note.") (emph. in original); *Corales v. Flagstar Bank*, FSB, 822 F. Supp. 2d 1102, 1107-  
27 08 (W.D. Wn. 2011) (granting motion to dismiss in functionally identical circumstances

1 where lender sold loan to Fannie Mae but then proceeded to foreclose in its own name –  
2 “Thus, even if Fannie Mae has an interest in Plaintiffs' loan, [Defendant] has the authority to  
3 enforce it.”).

4 **b. MERS, as the Agent of the Beneficiary, Was Authorized to Appoint**  
5 **ReconTrust**

6 Borrower asserts that “ReconTrust was never lawfully appointed trustee as MERS was  
7 not a lawful beneficiary or acting on behalf of a lawful beneficiary and therefore had no  
8 authority to appoint a successor trustee.” Borrowers’ Motion, at 8. However, this assertion  
9 ignores the fact that MERS was acting as an agent of and at the direction of BANA, the  
10 beneficiary.

11 In *Bain*, the Washington Supreme Court held that MERS cannot be a valid beneficiary  
12 if it does not hold the Note. *Bain*, 175 Wn.2d at 110. However, the Court concluded that it  
13 could not decide the legal effect of MERS’s acting as an unlawful beneficiary. *Id.* at 110-14.  
14 In addition, the Court noted that “nothing in this opinion should be construed to suggest an  
15 agent cannot represent the holder of the note.” *Id.* at 106. The Court further noted that  
16 “Washington law, and the deed of trust act itself, approves of the use of agents.” *Id.*<sup>8</sup> The  
17 Court declined to find that MERS was acting as the agent of the beneficiary only because  
18 there was no evidence in either of the cases it was reviewing showing that MERS was acting  
19 on behalf of identifiable beneficiaries. *Id.* at 107.

20 In the present case, by contrast, the evidence establishes both BANA as the  
21 beneficiary (as the holder of the Note) and MERS acting as BANA’s agent when it appointed  
22 ReconTrust as the successor. BANA Decl., ¶ 21, Ex. F to BANA Decl. BANA, as the holder  
23 of the Note, directed MERS to appoint ReconTrust. *Id.* It did so in compliance with Fannie  
24 Mae’s servicing guidelines which “grant[] servicers, acting in their own names, the authority  
25 to represent Fannie Mae's interests in foreclosure proceedings as holder of the mortgage  
26 note.” Ex. E to BANA Decl., at 1.

27 <sup>8</sup> See RCW 61.24.031 (stating that beneficiary can act through an authorized agent); RCW 61.24.050 (same).



1           Therefore, it is entirely irrelevant whether MERS was a valid beneficiary. Because it  
2 acted as the agent of the beneficiary, it properly appointed ReconTrust as successor trustee.  
3 As the authorized trustee, ReconTrust had the power to issue the Notices of Trustee's Sale, to  
4 carry out the foreclosure sale, and to issue the Trustee's Deed transferring the property to  
5 Fannie Mae.

6           **2. ReconTrust Did Not Violate RCW 61.24.010(3) By Being a Subsidiary of**  
7           **BANA**

8           Borrower asserts that because ReconTrust is a wholly-owned subsidiary of BANA, it  
9 owes BANA a fiduciary duty, in violation of RCW 61.24.010(3).<sup>9</sup> However, this assertion,  
10 which relies on flimsy legal authority,<sup>10</sup> completely ignores controlling Washington case law.

11           While RCW 61.24.020 states that “[n]o person, corporation, or association may be  
12 both trustee and beneficiary under the same deed of trust . . . ,” Washington law recognizes  
13 that an employee, agent or subsidiary of a beneficiary may serve as trustee. *See Cox v.*  
14 *Helenius*, 103 Wn.2d 383, 390, 693 P.2d 683 (1985) (“the Legislature specifically amended  
15 the statute in 1975 to allow *an employee, agent or subsidiary of a beneficiary* to also be a  
16 trustee”) (citing Laws of 1975, 1st Ex. Sess., ch. 129, § 2) (emph. added); *Meyers Way*  
17 *Development Ltd. Partnership v. University Sav. Bank*, 80 Wn. App. 655, 666, 910 P.2d 1308  
18 (1996) (“Neither does the high fiduciary duty prevent a trustee from serving simultaneously as  
19 the creditor's attorney, agent, employee or subsidiary. . . . In 1975, the Legislature deleted that  
20 portion of 61.24.020 which read, ‘nor may the trustee be an employee, agent, or subsidiary of  
21 a beneficiary of the same deed of trust.’”). Thus, even though it is a subsidiary of BANA,  
22 ReconTrust is still qualified to serve as trustee under Washington law.

23           Borrower claims that *Klem v. Washington Mut. Bank*, 175 Wn.2d 771, 295 P.3d 1179  
24 (2013), “prohibit[s] the appointment of a trustee who is incapable or unwilling to act as a fair  
25 and impartial judicial substitute.” Borrower’s Motion, at 12. However, *Klem* is inapplicable

26 <sup>9</sup> RCW 61.24.010(3) provides: “The trustee or successor trustee shall have no fiduciary duty or fiduciary  
27 obligation to the grantor or other persons having an interest in the property subject to the deed of trust.”

<sup>10</sup> See Borrower’s Motion, at 8-9. Neither legal authority cited by Borrower supports his assertion that a wholly-  
owned subsidiary owes its parent a fiduciary duty.

1 to the present case, as there is absolutely no evidence that ReconTrust was ever called upon to  
2 stop the sale.

3 **3. ReconTrust Did Not Violate Any Duty of Good Faith or RCW**  
4 **61.24.030(7)(a)**

5 Borrower asserts that “a DTA trustee is required to do a cursory investigation to  
6 determine the identity of the beneficiary and note owner. . . . Here, the evidence is undisputed  
7 that the trustee was informed and believed Fannie Mae owned the loan, but nonetheless  
8 advised Bradburn first MERS then BANA were the beneficiary and owner of the note entitled  
9 to nonjudicially foreclose under the DTA.” *Id.* at 11 (citation and emphasis removed); *see*  
10 *also id.* at 13-14 (claiming that ReconTrust violated RCW 61.24.030(7)(a) by having proof  
11 that BANA was not the beneficiary). These assertions are without merit.<sup>11</sup>

12 The evidence establishes that when ReconTrust issued the Notices of Trustee’s Sale, it  
13 had a Declaration of Beneficiary that complied with the Deed of Trust Act. RCW  
14 61.24.030(7)(a) provides “[t]hat, for residential real property, before the notice of trustee’s  
15 sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the  
16 owner of any promissory note or other obligation secured by the deed of trust.” Here, the  
17 Declaration of Beneficiary accurately identifies Fannie Mae as the owner of the Note. Ex. C  
18 to ReconTrust Decl.; *see* BANA Decl., ¶¶ 7, 25. While Borrower may contend that the  
19 Declaration does not identify BANA, the beneficiary, as the owner of the Note, it would be  
20 inaccurate for the Declaration to so state because BANA was the *holder* of the Note. Any  
21 claimed inconsistency is the result of ambiguity in the language of RCW 61.24.030(7)(a), i.e.,  
22 that it fails to take into account the rather common scenario where the holder of the Note and  
23 the owner of the Note are not one and the same. The Western District has recognized the  
24 reality that when Fannie Mae is the owner of the Note, the holder of the Note can foreclose in  
25 its own name. *See Zalac*, 2013 WL 1990728, at \*3 (granting motion to dismiss where

26 \_\_\_\_\_  
27 <sup>11</sup> Borrower also asserts that ReconTrust breached a duty of good faith to him by virtue of its being a wholly-  
owned subsidiary of BANA. *Id.* at 10. However, as discussed above, Washington law specifically allows a  
creditor’s subsidiary to serve as a trustee. *See supra* Section V.B.2.

1 “Defendant [] asserts that it is the true *holder* of the note, even if Fannie Mae is the *owner* of  
2 the note.”) (emph. in original); *Corales*, 822 F. Supp. at 1107-08 (granting motion to dismiss  
3 in functionally identical circumstances where lender sold loan to Fannie Mae but then  
4 proceeded to foreclose in its own name – “Thus, even if Fannie Mae has an interest in  
5 Plaintiffs' loan, [Defendant] has the authority to enforce it.”); *see also In re Veal*, 450 B.R.  
6 897, 912 (9th Cir. BAP 2011) (“[O]ne can be an owner of a note without being a ‘person  
7 entitled to enforce.’ The converse is also true: one can be a ‘person entitled to enforce’  
8 without having any ownership interest in the negotiable instrument. This distinction may not  
9 be an easy one to draw, but it is one the UCC clearly embraces. While in many cases the  
10 owner of a note and the person entitled to enforce it are one and the same, this is not always  
11 the case.”).

12 Indeed, it is fairly typical for Fannie Mae to require, under its servicing guidelines,  
13 that the servicer hold the Note and foreclose in its own name. ReconTrust would certainly  
14 have been familiar with that accepted practice. In addition, Borrower did not know of the  
15 Declaration of Beneficiary until after the sale, so he can hardly claim that he relied on it or  
16 was prejudiced by it. It is not as if a stranger to the Loan foreclosed on the Property; the  
17 holder of the Note and loan servicer did so, as expressly required by the servicing guidelines  
18 of the owner of the Note. In the end, any claimed contradiction or claimed ambiguity in who  
19 was the beneficiary is no more than a red herring. BANA was the holder of the Note and,  
20 thus, was entitled to foreclose, and ReconTrust was authorized to proceed with the  
21 foreclosure.

#### 22 **4. The Notice of Default Complied with RCW 61.24.030(8)**

23 Borrower asserts that the Notice of Default does not comply with RCW 61.24.030(8)<sup>12</sup>  
24 because when ReconTrust issued it, MERS was not the beneficiary and ReconTrust was not  
25 yet appointed as trustee. Borrower’s Motion, at 14. Borrower is confused.

26 <sup>12</sup> RCW 61.24.030(8) provides in part: “That at least thirty days before notice of sale shall be recorded,  
27 transmitted or served, written notice of default shall be transmitted by the beneficiary or trustee to the borrower  
and grantor at their last known addresses by both first-class and either registered or certified mail, return receipt

1 Both the Notice of Default itself and the ReconTrust Declaration state that ReconTrust  
2 issued the Notice of Default “as agent for the beneficiary.” ReconTrust Decl., ¶ 4, Ex. A to  
3 ReconTrust Decl. The evidence conclusively establishes that BANA was the holder of the  
4 Note and the beneficiary at the time. *See supra* Section V.B.1.a. Thus, the evidence  
5 establishes that the beneficiary, BANA, acting through its agent, ReconTrust, issued the  
6 Notice of Default in compliance with RCW 61.24.030(8).

7 **5. There Was No Violation of RCW 61.24.030(8)(I)**

8 Borrower claims that the Notice of Default does not comply with RCW  
9 61.24.030(8)(I) because it does not provide “the name and address of the owner of any  
10 promissory notes or other obligations secured by the deed of trust.” Borrower’s Motion, at 15.  
11 However, the version of RCW 61.24.030 that was in effect in June 2009 when the Notice of  
12 Default was issued did not include such a requirement. *Compare* 2008 Wash. Legis. Serv.  
13 Ch. 153 (S.S.B. 5378) *with* RCW 61.24.030(8)(I). Thus, there was no violation.

14 **6. The Notices of Trustee’s Sale Complied with RCW 61.24.040(1)(f)**

15 Borrower claims that the Notices of Trustee’s Sale violate RCW 61.24.040(1)(f)  
16 because the statement that “the beneficial interest in [that certain Deed of Trust securing an  
17 obligation in favor of BANA] which was assigned by” MERS is false, as neither MERS nor  
18 BANA was the beneficiary. Borrower’s Motion, at 15-16. This assertion ignores the  
19 undisputed evidence.

20 First, the evidence shows that BANA was the beneficiary because it was the holder of  
21 the Note. *See supra* Section V.B.1.a. In addition, the evidence shows that MERS assigned  
22 the interest under the Deed of Trust to BANA at BANA’s direction, in compliance with  
23 Fannie Mae’s servicing guidelines. BANA Decl., ¶ 22, Ex. G to BANA Decl. Moreover, the  
24 assignment to BANA was recorded merely as a formality and was irrelevant to BANA’s  
25 status as the beneficiary. *See Corales v. Flagstar Bank, FSB*, 822 F. Supp. 2d 1102, 1109

26  
27 requested, and the beneficiary or trustee shall cause to be posted in a conspicuous place on the premises, a copy  
of the notice, or personally served on the borrower and grantor.”

1 (W.D. Wn. 2011) (“Washington State does not require the recording of such transfers and  
2 assignments. . . . The purpose of recording the assignment is to put parties who subsequently  
3 purchase an interest in the property on notice of which entity owns a debt secured by the  
4 property.”); *In re United Home Loans*, 71 B.R. 885, 891 (Bankr. W.D. Wn. 1987), *aff’d*, 876  
5 F.2d 897 (9th Cir. 1989) (“An assignment of a deed of trust ... is valid between the parties  
6 whether or not the assignment is ever recorded. . . . Recording of the assignments is for the  
7 benefit of the parties.”) (internal citations omitted).

8 Accordingly, there was no violation of RCW 61.24.040(1)(f).

9 **7. The Foreclosure Was Not Continued for More Than 120 Days**

10 Borrower asserts that “ReconTrust continued the sale of Bradburn’s Property from  
11 October 29, 2010 until May 20, 2011 when the sale was executed, a span of 203 days,” in  
12 violation of RCW 61.24.040(6). Borrower’s Motion, at 16. This assertion is simply  
13 incorrect, as the evidence establishes that the sale was not continued for more than 120 days.

14 The first Notice of Trustee’s Sale scheduled a sale for October 29, 2010. ReconTrust  
15 Decl., ¶ 6, Ex. B to ReconTrust Decl. A second Notice of Trustee’s Sale was recorded on  
16 February 17, 2011, only 111 days later. ReconTrust Decl., ¶ 8, Ex. D. Borrower spuriously  
17 claims that the second Notice of Trustee’s Sale “may have been an attempt to revive a dying  
18 sale at the 111th day but it cannot be permitted to have that effect. This ‘Notice of Trustee’s  
19 Sale’ was not but a Notice of Postponement of Trustee’s Sale.” Borrower’s Motion, at 17.  
20 There is nothing to support this claim. In fact, the second Notice of Trustee’s Sale is just that,  
21 and it says nothing about “postponing” the sale.

22 Borrower next asserts that because a second Notice of Default was not issued, a  
23 second Notice of Trustee’s Sale could not legally be issued. *Id.* Borrower does not and  
24 cannot cite any legal authority to support this false assertion. In fact, the Deed of Trust Act  
25 imposes no such limitation.

26 In short, there was no violation of RCW 61.24.040(6).  
27

1           **8. Borrower Waived Any Complaint Regarding Non-Material Errors in the**  
2           **Foreclosure**

3           Borrower asserts that any violation of the Deed of Trust Act will void a foreclosure  
4           sale. Opp. at 17-18. However, as established by the evidence, BANA, as the holder of the  
5           Note, was authorized to foreclose, and proper foreclosure procedures were followed. *See*  
6           *supra* at 3-5, 7-8. Even if there had been errors in following the Deed of Trust Act, Plaintiff  
7           cannot show any prejudice to himself, and he waived any complaint regarding any claimed  
8           errors because he knew of the foreclosure sale but failed to try to stop it.

9           Case law establishes that a non-material violation of the Deed of Trust Act does not  
10          require the avoidance of a non-judicial foreclosure sale where the error was non-prejudicial  
11          and where the borrower could have tried to enjoin the sale but failed to do so. *See, e.g.,*  
12          *Colorado Structures, Inc. v. Blue Mountain Plaza, LLC*, 159 Wn. App. 654, 666, 246 P.3d  
13          835 (2011) (claims that the deed was wrongly dated, that the record did not establish that the  
14          buyer paid enough, and that the buyer did not establish it was a successor in interest were  
15          waived where there was no prejudice from the claimed errors and where the borrower failed  
16          to try to enjoin the sale); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 114-15, 752  
17          P.2d 385 (1988) (inaccurate description of property to be foreclosed in trustee's notice of  
18          default was non-prejudicial error that did not require avoidance of non-judicial sale, as debtor  
19          was notified of amount of arrears and of his default and could have invoked judicial  
20          protection prior to sale); *Steward v. Good*, 51 Wn. App. 509, 514-15, 754 P.2d 150 (1988)  
21          (affirming summary judgment to purchasers although trustee failed to record notice of sale 90  
22          days prior to foreclosure where owners failed to show any prejudice due to technical  
23          violations and where they received timely notice of sale); *see also* RCW 61.24.040(f)(IX)  
24          (notice of trustee's sale must state, "Failure to bring such a lawsuit may result in a waiver of  
25          any proper grounds for invalidating the Trustee's sale.").

26          This is to be contrasted with situations involving material violations of the Deed of  
27          Trust Act, where courts have held that post-sale claims were not waived. *See, e.g., Klem v.*

1 *Washington Mut. Bank*, 176 Wn.2d 771, 295 P.2d 1179 (2013) (holding that failure to enjoin  
2 sale did not waive post-sale claims where there was evidence that notary had falsely notarized  
3 the notice of sale to expedite the sale, that the trustee had failed to exercise independent  
4 discretion to delay the sale, and that the plaintiff was prejudiced by the defendants' actions);  
5 *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 112, 297 P.3d 677 (2013) (property  
6 owner did not waive claims by failing to enjoin sale because trustee had no authority under  
7 Deed of Trust Act to proceed with non-judicial foreclosure of agricultural land); *Albice v.*  
8 *Premier Mortg. Servs.*, 174 Wn.2d 560, 571-72, 276 P.3d 1277 (2012) (reversing sale where  
9 trustee lacked statutory authority to hold a non-judicial foreclosure sale 161 days after the  
10 date stated in the notice of sale).

11 Here, Borrower had statutory notice of the foreclosure sale scheduled for May 20,  
12 2011, as the Second Notice of Trustee's Sale was mailed to him by first class and certified  
13 mail on February 17, 2011 and was posted in a conspicuous place on the Property on February  
14 18, 2011. ReconTrust Decl., ¶¶ 10, 11, Exs. E, F to ReconTrust Decl.; Bradburn Dep., at  
15 46:3-5 (admitting that photographs in Declaration of Posting are of the Property), 47:22-48:2  
16 (admitting that Borrower has no reason to dispute statement in Declaration of Posting that the  
17 Notice of Trustee's Sale was posted on the Property on February 18, 2011). The Second  
18 Notice of Trustee's Sale advised: "Anyone having any objection to the sale on any grounds  
19 whatsoever will be afforded an opportunity to be heard as to those objections if they bring a  
20 lawsuit to restrain the sale. . . Failure to bring such a lawsuit may result in a waiver . . ." Ex.  
21 D to ReconTrust Decl., § IX. Borrower did not bring a lawsuit to restrain the sale.

22 In the absence of any evidence of prejudice to Borrower from any claimed errors in  
23 the foreclosure process, Borrower waived any claims based on alleged violations of the Deed  
24 of Trust Act.

25 **C. Defendants Did Not Violate the Consumer Protection Act**

26 Borrower claims Defendants violated the Consumer Protection Act ("CPA") by  
27 recording false and misleading documents and conducting an unlawful foreclosure sale of the

1 Property. Borrower's Motion, at 19-22. However, the evidence establishes otherwise, and  
2 Borrower cannot prove the elements of a CPA claim.

3 As noted by Borrower, to prevail on a CPA claim, a plaintiff must prove: (1) an unfair  
4 or deceptive act or practice; (2) that occurs in trade or commerce; (3) an impact on the public  
5 interest; (4) injury to the plaintiff in his or her business or property; and (5) a causal link  
6 between the unfair or deceptive act and the injury suffered. *Hangman Ridge Training Stables,*  
7 *Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986). The failure to  
8 establish even one of these elements is fatal to a plaintiff's claim. *Id.* at 793.

9 It is evident that Borrower's CPA claim is derivative of his other failed claims, such  
10 that it too fails. As discussed above, Borrower cannot show a single violation of the Deed of  
11 Trust Act. Moreover, he fails to show that he suffered any injury that was not the result of his  
12 own failure to make his loan payments. *See, e.g., Thepvongsa v. Regional Trustee Servs.*  
13 *Corp.*, Case No. 2:10-cv-01045-RSL, at 13 (W.D. Wn. Sept. 25, 2013) ("In the absence of  
14 injury causally related to the misrepresentation of MERS status as beneficiary, plaintiff's CPA  
15 claim against MERS fails); *Butler v. One West Bank FSB*, Adversary Case. No. 12-01209-  
16 MLB, at 6 (Bankr. W.D. Wn. Oct. 2, 2013) (confirming dismissal of CPA claim where  
17 plaintiff failed to plead adequate facts to suggest that defendants were cause of alleged  
18 harms). While he claims that "the property itself, and personal property inside, was damaged  
19 upon the unlawful possession" (Borrower's Motion, at 22), such a claim rests upon the  
20 underlying assumption that he still owns the property or did at the time a Fannie Mae  
21 representative allegedly entered the property and removed or altered various objects.  
22 However, Borrower did not own the Property where he failed to make the necessary  
23 payments, and the Property was sold to Fannie Mae. BANA Decl., ¶ 16, Ex. D to BANA  
24 Decl.; Ex. G to Lorber Decl.

25 Because Borrower cannot establish an unfair or deceptive practice by Defendants or  
26 any resulting harm to himself, he cannot establish a claim for violation of the CPA.



1 **VI. CONCLUSION**

2 There is no genuine issue of material fact that BANA was at all relevant times the holder of  
3 the Note, as required by the servicing guidelines of Fannie Mae, the owner of the Note. Thus,  
4 BANA was the beneficiary and was entitled to foreclose. MERS's appointment of  
5 ReconTrust as the successor trustee and MERS's execution of the Corporation Assignment of  
6 Deed of Trust were both directed by BANA as the beneficiary. Therefore, both were valid.  
7 Moreover, the latter simply put on the land records the pre-existing fact that BANA was the  
8 beneficiary. Because ReconTrust was a valid trustee, it was authorized to issue a Notice of  
9 Trustee's Sale, to conduct the foreclosure, and to execute a Trustee's Deed in favor of Fannie  
10 Mae. Moreover, the various documents recorded by Defendants were in compliance with the  
11 Deed of Trust Act. In short, the foreclosure was proper. Therefore, Defendants respectfully  
12 requests that Borrower's second Motion for Partial Summary Judgment be denied.

13 DATED: October 21, 2013

14 LANE POWELL PC

15 

16 By \_\_\_\_\_  
17 John S. Devlin III, WSBA No. 23988  
18 Abraham Lorber, WSBA No. 40668  
19 Attorneys for Defendants ReconTrust Company, N.A.,  
20 Mortgage Electronic Registration Systems, Inc., Bank  
21 of America, N.A., successor by merger to BAC Home  
22 Loans Servicing, LP (also sued erroneously as  
23 "Countrywide Bank Homes Loans Servicing, LP" and  
24 as "Bank of America Corporation"), Countrywide  
25 Home Loans, Inc. (also sued erroneously as  
26 "Countrywide Financial Corporation"), and Federal  
27 National Mortgage Association

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**CERTIFICATE OF SERVICE**


In certify that on the date indicated below, I caused the foregoing document to be served on the following persons via email and legal messenger:

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

SIGNED October 21, 2013 at Seattle, WA.

  
\_\_\_\_\_  
Debi Wollin