No.

IN THE

Supreme Court of the United States

KIM KERRIGAN

v.

BAYVIEW LOAN SERVICING LLC

On Petition For a Writ of Certiorari
To the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

SCOTT E. STAFNE
Counsel of Record
239 N. Olympic Avenue
Arlington, WA 98223
TEL: (360) 403-8700
Scott@StafneLaw.com

Attorney for Petitioner

January 14, 2018

QUESTIONS PRESENTED

When the standing of a removing defendant is challenged in the Court of Appeals must that Court directly address such standing challenge pursuant to its independent and *sua sponte* duty to establish that the presumption against lower federal courts subject matter jurisdiction has been rebutted?

Is the presumption against subject matter jurisdiction of federal courts rebutted by Washington procedural law?

PARTIES TO PROCEEDINGS

Kim Kerrigan, the Petitioner, was the Plaintiff in the state court action which was removed by Defendant Bayview Loan Servicing, LLC (Bayview) to the United States court for the Western District of Washington.

Defendant Qualstar, a Washington corporation, appeared thereafter and challenged the jurisdiction of the federal court in its attorney's appearance.

CORPORATE DISCLOSURE

Petitioner, Kim Kerrigan (Kerrigan) is a natural person and a citizen of Washington State.

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The Panel's Order Denying Kerrigan's appeal is not published, but is reported at *Kerrigan v. Qualstar Credit Union*, 728 F. App'x 787 (9th Cir. 2018). (Pet. App. 3a–6a).

The District Court's denial of Kerrigan's motion for post judgment relief is not published, but is reported at *Kerrigan v. Qualstar Credit Union*, No. C16-1528-JCC, 2017 U.S. Dist. LEXIS 11872 (W.D. Wash. Jan. 27, 2017). (Pet. App. 7a–11a).

The District Court's Order granting Bayview's motion to dismiss is not published, but is reported at *Kerrigan v. Qualstar Credit Union*, No. C16-1528-JCC, 2016 U.S. Dist. LEXIS 168597 (W.D. Wash. Dec. 6, 2016). (Pet. App. 12a–24a)

JURISDICTION

This Court has subject matter jurisdiction to review the Ninth Circuit Panel's assertion of subject matter jurisdiction pursuant to Article III and 28 U.S.C. 1254(1). *See also United States v. Corrick*, 298 U.S. 435, 440 (1936). 28 U.S.C. 1254(1).

The Ninth Circuit Panel affirmed the district court's order granting Bayview's motion to dismiss the merits of Kerrigan's claims on June 29, 2018. Kerrigan timely filed a motion for reconsideration or rehearing en banc, which was denied on October 4, 2018. Kerrigan timely filed a motion with Justice Kagan for an extension of time until January 14, 2019 to file this Petition, which was granted on December 27, 2018. This Petition is being filed with this Court on Monday, January 14, 2019.

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. III, § 1:

> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

U.S. Const. Art. III, § 2:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all

cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;–to controversies between two or more states;–between a state and citizens of another state;–between citizens of different states;-–between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state,

the trial shall be at such place or places as the Congress may by law have directed.

Statutory Provisions

28 U.S.C. § 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1359:

A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

28 U.S.C. § 1441(a)

(a) Generally.—

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of

the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1446:

(a) Generally.—

A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) Requirements; Generally.—

(1) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial

pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

(2)

(A) When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.

(B) Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.

(C) If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.

28 U.S.C. 1447 (c):

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

STATEMENT OF THE CASE

Kerrigan alleged in her complaint filed in a Washington State court of general jurisdiction that Respondent Bayview Loan Servicing Inc. (Bayview) had not alleged an interest in the mortgage loan sought to be nonjudicially foreclosed upon. *See* Complaint, ¶¶ 5.5-5.7, 6.33, & 6.41. Further, that if Bayview did have an interest in the deed of trust sufficient to foreclose, the right to enforce that interest had expired. *Id.*

Bayview filed a notice removing Kerrigan's case to the Federal District Court for Western Washington on September 30, 2016, alleging:

> This court has jurisdiction pursuant to 28 U.S.C § 1441(a) because a federal question appears on the face of the complaint; to wit, the alleged violation of a federal statute that creates a private right of action. (*Merrell Dow Pharmaceutical, Inc. v. Thompson,* 478 U.S. 804 (1986)).

On October 7, 2016 Bayview filed a motion to dismiss. That motion did not address the allegations and exhibits of Kerrigan's complaint alleging Bayview was a third party which had no interest in her loan or deed of trust.

Defendant Qualstar appeared on October 10, 2017 through attorney John A. McIntosh of RCO Legal. Qualstar did not consent to the district court's subject matter jurisdiction.

> "PLEASE TAKE NOTICE that John A. McIntosh of RCO Legal, P.S., without waiving defenses of lack of subject matter or personal jurisdiction, … hereby appears for Defendant Qualstar Credit Union in the above-entitled action."

Without ever addressing Kerrigan's standing arguments, *i.e.* that Bayview had no interest in the debt it sought to foreclose upon, or Qualstar's challenge to its subject matter jurisdiction, the district court proceeded directly to the merits and held Washington's statutes of limitation had been tolled and dismissed Kerrigan's Quiet Title action against Bayview and Qualstar.

Kerrigan moved for post judgment relief. In support thereof she submitted the declaration of Cyndee Rae Estrada, who is an expert in mortgage lending practices. After reviewing chain of title evidence, including exhibits attached to Kerrigan's complaint, Estrada supported Kerrigan's complaint allegations that Bayview had no interest in Kerrigan's loan.

Estrada's declaration states in part:

9. Although it appears that the Deed of Trust was assigned at some point between December of 2014 and January 15th of 2015, when it was eventually recorded, the party claiming to assign the Deed of Trust (Chase) actually had absolutely no interest in the Deed of Trust to assign to Bayview. JP Morgan Chase (Chase) was claiming to be the servicer in their communications with Kerrigan, but there has been no evidence of a servicing agreement between Freddie Mac and Chase for the servicing of this loan. No documents were presented by Chase and no documents were presented by the FDIC giving Chase the servicing rights to this loan.

10. It is possible that Chase was a subservicer for another company, however, Chase has continually presented its position in this suit as "JPMorgan Chase Bank, National Association, successor in interest by purchase from the Federal Deposit Insurance Company as Receiver of Washington Mutual Bank F/K/A Washington Mutual Bank, FA." All of the evidence presented so far in this case lacks the documentation to prove this to be true. My investigation, in fact, continues to prove otherwise. As a matter of fact, Chase has been deceitfully

presenting its position to this court on recorded documents and in their briefs as an owner by purchase from the FDIC. This never happened. Freddie Mac has confirmed their ownership directly to me as of December 31, 2016.

* * *

20. The Kerrigan loan was not purchased by Chase from the FDIC. Besides the lack of required documents with this file, Freddie Mac always owned this loan by purchase from Washington Mutual in 2008 and will testify that they still own it today. This loan was never purchased by "JPMorgan Chase Bank, National Association, successor in interest by purchase from the Federal Deposit Insurance Company as Receiver of Washington Mutual Bank F/K/A Washington Mutual Bank, FA." Everything following this statement in the chain of title is fictitious and the documents are of no effect.

21. Freddie Mac states that even today they are the owners of the mortgage and the note, as indicated on their records page. This page can be accessed by anyone at any time. There is a "Loan Look-up Tool – Freddie Mac" at https://ww3.freddiemac.com/loanlookup.

> Therefore, both Chase and Bayview were merely the servicers for Freddie Mac. There is no reason to believe that Chase and Bayview could be mistaken about their role in the Kerrigan loan. The collateral file must contain the information that is so easily obtained without restriction.

Excerpts of Record (ER), pp. 124-126.

Presuming Estrada's declaration was only offered to prove fraud, and apparently not understanding that such fraud went to the issues of Bayview's standing, the district court held "[a] Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." Order, p.12 -Appendix, C pp. 10a, 11a, 1/27/2017.

On appeal, the first argument Kerrigan asserted was Bayview's lack of standing to remove the case. "[T]he complaint, including recorded documents [attached as exhibits] tend[ed] to prove Bayview did not acquire Chase's interest in Kerrigan's mortgage loan from the FDIC because Washington Mutual had sold the loan to Freddie Mac." Kerrigan's Opening Brief (OB), p.6. In her Opening Brief, Kerrigan also urged the Appellate Panel to require Bayview to show where "it is demonstrated in the record that the presumption against their standing has been affirmatively rebutted." OB, p.13.

Bayview's Answering Brief (AB) responded "that the doctrine of standing only applies to parties asserting a claim." AB, p.21. "Bayview is not asserting any claim - it did not file counterclaims, affirmative defenses, or cross appeals…Bayview is simply defending itself, and therefore need not prove standing." *Id*.

Bayview then asserted "[e]ven if Bayview needed to prove standing, which it does not, the record contains sufficient proof of Bayview's standing", AB p.22, citing to Chase's purported 2014 assignment of the deed of trust to Bayview, which was attached as an Exhibit to the complaint. However, Bayview's 2016 Notice of Foreclosure to Kerrigan, which was also attached to Kerrigan's complaint, identifies Freddie Mac as the owner of the obligation secured by the deed of trust and thus supports Kerrigan's allegation that Bayview had no interest in the loan through Chase as its owner. *See* Complaint exhibits at ER 40-44.

These contradictory exhibits document the allegations of Kerrigan's state law complaint that Bayview has no interest in her deed of trust and even if it did that interest had expired. *See e.g.* Complaint ¶6.41, ("... Even if Bayview was in fact the Lender, or

a Successive Note Holder, which is not conceded, foreclosure is barred by the statute of limitations.")

Significantly, Bayview has never disputed it has not identified the basis of its own standing. In its Answering Brief to the Court of Appeals Bayview argued:

> Indeed, there are no competing claims being presented to Kerrigan, and she is making a payment to Bayview that is being accepted, and no other lender is claiming an interest. So the interest between Bayview and Freddie Mac is wholly unknown, and irrelevant, to Kerrigan.

AB, p. 19.

Bayview also argued that Washington law allowed "servicers" to initiate foreclosure proceedings even though they had no injury-in-fact. *Id*. at 19.

In her reply brief Kerrigan pointed out to the Panel that she had brought her case under Washington's Quiet Title Statute, Chapter 7.28 Wash. Rev. Code, which required Bayview as a Defendant to allege in its answer any interest in Kerrigan's property which Bayview claimed. In this regard Wash. Rev. Code 7.28.130 provides in pertinent part:

> "The defendant shall not be allowed to give in evidence any estate in himself, herself, or another in the property, or any license

> or right to the possession thereof unless the same be pleaded in his or her answer. If so pleaded, the nature and duration of such estate, or license or right to the possession, shall be set forth with the certainty and particularity required in a complaint. …"

In *Allen v. Higgins*, 9 Wash. 446 (1894) the Supreme Court of Washington rejected the argument that a defendant could simply make a general denial in a Quiet Title case and require plaintiffs to prove their case.

> Appellant contends that a general denial puts in issue every material allegation contained in the complaint, and that under such denial plaintiffs must prove every fact essential to recovery, and defendant may prove any facts which defeat plaintiffs' right to recover. Under the provisions of our Code of Procedure, § 532, in an ejectment proceeding, "the defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer;" and "if so pleaded, the nature and duration of such estate or license or right to the possession shall be set forth with the certainty and particularity required in a complaint." Consequently the testimony offered in this

> case was inadmissible under the pleadings in this case by defendant to defeat the rights of the plaintiffs. The defendant in this action, then, so far as the pleading or the proof is concerned, was a trespasser without any right whatever, and if plaintiffs had any legal right at all it was a superior right.

Allen v. Higgins, 9 Wash. at 447 (1894).

Standing in Washington courts is different than in federal courts. "[I]n Washington a plaintiff's lack of standing is not a matter of subject matter jurisdiction." *Trinidad Universal Insurance Co. of Kansas v. Ohio Casualty Insurance Co.*, 176 Wn.App. 185, 199, 312 P.3d 976 (2013). Unlike U.S. Const. Article III, Washington's Constitution imposes no case or controversy requirement on its courts. Accordingly, "article IV, section 6 of the Washington Constitution does not exclude any sort of causes of action from the jurisdiction of its superior courts, leaving Washington courts, by contrast with federal courts, with few constraints on their jurisdiction." *Ullery v. Fulleton,* 162 Wn. App. 596, 604, 256 P.3d 406 (2011).

Notwithstanding Bayview's failure to plead or put evidence in the record demonstrating its standing (because it did not think it had to) the Panel held before Kerrigan's Reply brief had even been disseminated to the judges: "We reject as meritless

Kerrigan's assertion the district court lacked subject matter jurisdiction over this case. *See 28 U.S.C. 1331*."

Kerrigan timely filed a Petition for Rehearing en banc in which her counsel certified "that in his judgement the decision of the panel directly conflicts with *Spokeo, Inc., v. Robbins*, 136 S. Ct. 1540 (2016)."

REASONS FOR GRANTING PETITION

In *Spokeo, Inc. v. Robins, supra*, a consumer brought suit against an alleged consumer reporting agency for violating the Fair Credit Reporting Act 15 U.S.C. § 1681 et seq by disclosing inaccurate information. The district court held Robins had not properly pleaded "injury-in-fact" for purposes of establishing Article III standing.

The Ninth Circuit reversed based on Robins's allegation that "Spokeo violated his statutory rights" because Robins's "personal interest in the handling of his credit information …[was] individualized". *Id.* at 1544–45.

This Court reversed because the Ninth Circuit's injury-in-fact analysis elided the independent concreteness "requirement" necessary to establish a "case" or "controversy" within the meaning of Article III. *Id*. 1549-50. Accordingly, this Court vacated the decision of the Ninth Circuit Panel with instructions to do a complete standing analysis. *Id.*

On remand the Ninth Circuit Panel explained that it "must determine whether an alleged violation of a consumer's rights under the Fair Credit Reporting Act constitutes a harm sufficiently concrete to satisfy the injury-in-fact requirement of Article III …" *Robins*

v. Spokeo, Inc., 867 F.3d 1108, 1110 (9th Cir. 2017). The Panel held it did.

> Accordingly, while Robins may not show an injury-in-fact merely by pointing to a statutory cause of action, the Supreme Court also recognized that *some* statutory violations, alone, do establish concrete harm. As the Second Circuit has summarized, *Spokeo II* "instruct[s] that an alleged procedural violation [of a statute] can by itself manifest concrete injury where Congress conferred the procedural right to protect a plaintiff's concrete interests and where the procedural violation presents 'a risk of real harm' to that concrete interest." *Strubel v. Comenity Bank*, 842 F.3d 181, 190 (2d Cir. 2016) (quoting *Spokeo II*, 136 S. Ct. at 1549)…And we now agree that the Second Circuit's formulation in *Strubel* best elucidates the concreteness standards articulated by the Supreme Court in *Spokeo II*.

Id. at 867 F.3d at 113.

This Court denied Certiorari of this remand decision on January 22, 2018. *See Spokeo, Inc. v. Robins*, 138 S. Ct. 931 (2018).

Less than a year later in the appeal challenged here a Panel of the Ninth Circuit refused to consider any of the irreducible constitutional minima for standing after Kerrigan challenged the district court's subject matter jurisdiction. This elided the Panel's constitutional responsibility in far more ways than had occurred in the original *Spokeo* Court of Appeals decision because in that case the Panel considered all of the criteria for standing, except for the "concreteness" prong of the injury-in-fact analysis. Here the Panel elided consideration of all the elements necessary to establish Article III standing by simply stating Kerrigan's challenge lacked merit based on Bayview's claim it didn't have to demonstrate standing and if it did, standing was allowed by Washington law.

In the absence of anything in the pleadings, record, or decision of the Panel indicating the Court of Appeals had subject matter jurisdiction, this Court should conclude it did not. *See infra*.

Kerrigan seeks review of the Panel's decision because it "has so far departed from the accepted and usual course of judicial proceedings" and has so far "sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." *See* Supreme Court Rule 10.

If this Court wants to prevent lower federal courts from ignoring its Article III's "case or controversy" jurisprudence, it should instruct that where jurisdiction is challenged a federal court has a duty to explain how the presumption against its subject matter jurisdiction has been rebutted before proceeding to adjudicate the merits.

1. Removing party must invoke jurisdiction.

The party asserting federal jurisdiction has the burden of establishing it. *DaimlerChrysler v. Cuno,* 547 U.S. 332, 342, n.3 (2006). ("[B]ecause we presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record … the party asserting federal jurisdiction when it is challenged has the burden of establishing it"); *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178, 189 (1936) (The party invoking the jurisdiction of the federal courts must prove its standing.) *See also* 28 U.S.C. 1447(c) ("... If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. …"); 28 U.S.C. 1359 ("A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."); Fed.R.Civ.Pro. 12(h)(3) ("If the court

determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.")

2. Federal Courts Independent and Sua Sponte Jurisdictional Duties

Upon challenge every federal court has an independent and *sua sponte* duty to assure itself of its subject matter jurisdiction before adjudicating the merits of a "case or controversy" within the meaning of Article III. *See e.g. Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) ("Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it."); *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 95 (1998) ("If the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it."; *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541, 89 L. Ed. 2d 501, 106 S. Ct. 1326 (1986) ("[E]very federal court has a special obligation to satisfy itself not only of its jurisdiction, but also that of the lower courts in a cause under review."); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152, 53 L. Ed. 126, 29 S. Ct. 42 (1908) ("Neither party has questioned that jurisdiction, but it is the duty of this court to see to it that the jurisdiction of the circuit court, which is defined and limited by statute, is not exceeded."; *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884) (This question [of subject matter jurisdiction] the court is bound to ask and answer for itself, even when not otherwise suggested, and

without respect to the relation of the parties to it."); *Ex parte Smith*, 94 U.S. 455, 455 (1876) ("The facts upon which the jurisdiction of the courts of the United States rests must, in some form, appear in the record of all suits prosecuted before them. To this rule there are no exceptions."); *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 126-27 (1804) ("Here it was the duty of the Court to see that they had jurisdiction, for the consent of parties could not give it.") *See also* 28 U.S.C. 1447(c); 28 U.S.C. 1359. Fed.R.Civ.Pro. 12(h)(3).

The Panel had a duty to evaluate Kerrigan's standing challenge. Instead, the Panel ignored its judicial duties and performed them in such a way as to shield them from review by this court. *See supra.*

3. The Presumption Against Federal Court's Subject Matter Jurisdiction.

This Court has long held there is a presumption against federal courts' subject matter jurisdiction. *See e.g. DaimlerChrysler v. Cuno,* 547 U.S. 332, 342 & n.3 (2006) ("We presume that federal courts lack jurisdiction unless the contrary appears from the record."); *Renne v. Geary*, 501 U.S. 312, 316, 111 S. Ct. 2331, 2336 (1991) (same); *Bender v. Williamsport Area Sch. Dist.,* 475 U.S. 534, 546-547 (1986) (same); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (same); *Miller & Lux, Inc. v. E. Side Canal & Irrigation Co.,* 211 U.S. 293, 302 (1908) ("But when the inquiry involves the jurisdiction of a Federal court -- the presumption in every stage of a cause being that it is without the jurisdiction of a court of

the United States, unless the contrary appears from the record."); *Thomas v. Bd. of Trs.*, 195 U.S. 207, 210-11 (1904)(same); *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, 337 (1895)(same); *King Bridge Co. v. Otoe Cty.*, 120 U.S. 225, 226-27 (1887)(same); *Grace v. Am. Cent. Ins. Co.*, 109 U.S. 278, 283-84 (1883) (same); *Robertson v. Cease*, 97 U.S. 646, 649 (1878)("As the jurisdiction of the Circuit Court is limited in the sense that it has none except that conferred by the Constitution and laws of the United States, the presumption now, as well as before the adoption of the Fourteenth Amendment, is, that a cause is without jurisdiction unless the contrary appears."); *Turner v. President, Dirs., & Co. of Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 11 (1799) ("And the fair presumption is (not as with regard to a Court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without its jurisdiction til the contrary appears.")

Here, by not applying the presumption against its jurisdiction the Ninth Circuit Panel completely elided consideration of any of this Court's standing criteria and Washington's requirement that the facts relating to any interest in land must be pleaded in the answer to a Quiet Title action.

Had the Panel applied the presumption against subject matter jurisdiction it would have had to have found Bayview had not demonstrated the "irreducible constitutional minimum" of standing because it never

alleged facts or presented evidence that it had standing. See *Spokeo, Inc. v. Robins*, 136 S. Ct. at 1548 (2016). At best, it argued to the Court of Appeals that Washington statutes allowed servicers to foreclose regardless of whether they had sustained an injury-in-fact. This was error because Washington statutes are not laws of the United States. *See* 28 U.S.C. 1331.

Bayview has consistently refused to follow this Court's standing requirements and the United States Court of Appeals for the Ninth Circuit, through the decision being challenged here, encourages this conduct to continue.

Accordingly, Kerrigan believes this Court should grant certiorari of this appeal to instruct federal courts that 1) state laws cannot alter federal case or controversy requirements; and 2.) upon challenge federal courts must articulate facts sufficient to rebut the presumption against their subject matter jurisdiction.

4. Bayview is a Third Party

The presumption against Bayview's subject matter jurisdiction is especially strong in this case because it is a third party to the lending transaction between Kerrigan and Washington Mutual.

Third parties who sue on behalf of others must comply with Article III standing requirements, particularly with regard to alleging an injury-in-fact.

See Hollingsworth v. Perry, 133 S. Ct. 2652, 2667 (2013); *Sprint Communs. Co., LP v APPCC Servs.*, 554 U.S. 269 (2008).

In *Sprint*, *supra.*, the Supreme Court held that assignees for collection, such as the aggregators in that case, could properly sue on assigned claims where they presented adequate proof of their relationship with assignors and showed the assignors had been harmed. Here, Bayview erroneously asserts that it does not have to provide this same type information in this case. *Sprint* holds Bayview and the Panel are wrong in this regard.

Further, the Ninth Circuit's own decision in *DRK Photo v McGraw Hill Global Educ.Holdings, LLC*, 870 F.3d 978 (9th Cir. 2017) confirms the Panel should not have overlooked Bayview's failure to allege or demonstrate in the record the factual basis for its federal standing. In *DRK Photo* after reviewing assignment contracts designed to confer standing on a third party the Ninth Circuit held the agreements were invalid attempts to transfer only the bare right to sue and that this was not sufficient to invoke Article III standing notwithstanding *Sprint*.

This Court should take a long hard look at what is going on here. In one fell swoop a Panel of the Ninth Circuit has undermined both the "case or controversy" component of the Separation of Powers as well as the

federalism structure of our government. Through this decision the Panel has allowed a state law to establish "injury-in-fact" under Article III and at the same time eliminated the need for Bayview to plead its interest in Kerrigan's title as required by Washington's Quiet Title Act.

CONCLUSION

Respectfully, this Court should grant Kerrigan's Petition for Writ of Certiorari because the Ninth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers.

Date: January 14, 2019

SCOTT E. STAFNE WSBA #6964

Counsel of Record

STAFNE LAW Advocacy & Consulting
239 N. Olympic Avenue
Arlington, WA 98223
(360) 403-8700
Scott@StafneLaw.com

APPENDIX

APPENDIX A – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED OCTOBER 4, 2018

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CASE NO. 17 - 35174
D.C. No. 2:16-cv-01528-JCC
Western District of Washington, Seattle

KIM KERRIGAN,

Plaintiff-Appellant,

v.

QUALSTAR CREDIT UNION, et al.,

Defendants-Appellees.

ORDER

Before: RAWLINSON, CLIFTON, and NGUYEN, Circuit Judges.

Appendix A

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P.35.

Kerrigan's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 41) are denied.

No further filings will be entertained in this closed case

APPENDIX B – MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT,

FILED JUNE 29, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASE NO. 17 - 35174
D.C. No. 2:16-cv-01528-JCC
Western District of Washington, Seattle

KIM KERRIGAN,

Plaintiff-Appellant,

v.

QUALSTAR CREDIT UNION, et al.,

Defendants-Appellees.

MEMORANDUM*

Submitted June 12, 2018**

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1 * This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

2 ** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Appendix B

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Before: RAWLINSON, CLIFTON, and NGUYEN,

Circuit Judges.

Kim Kerrigan appeals from the district court's judgment dismissing her action alleging fair Debt Collection Practices Act and Washington state law claims arising from foreclosure proceedings.

We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Thompson v. Paul*, 547 F.3d 1055, 1058 (9th Cir. 2008). We affirm.

The district court properly dismissed Kerrigan's quiet title claim because Kerrigan failed to allege facts sufficient to show that the statute of limitations bars any threatened foreclosure action. *See* Wash. Rev. Code § 7.28.300 (providing for quiet title action by record owner of real estate where an action to foreclose on a mortgage or deed of trust on the real estate would be barred by the statute of limitations); *Edmundson v. Bank of Am., N.A.*, 378 P.3d 272,276-77 (Wash. Ct. App. 2016) (stating that "the deed of trust foreclosure remedy is subject to a

six-year statute of limitations" and "when recovery is sought on an obligation payable by installments, the statute of limitations runs against each installment from the time it becomes due"); *Bingham v. Lechner*, 45 P.3d 562, 566-68 (Wash. Ct. App. 2002) (holding that the commencement of a nonjudicial foreclosure tolls the statute of limitations).

The district court did not abuse its discretion by denying Kerrigan's request for certification to the Washington Supreme Court because Kerrigan failed to show that Washington law regarding whether a nonjudicial foreclosure tolls the statute of limitations for reinstituting foreclosure "has not been clearly determined." Wash. Rev. Code § 2.60.020; see *Thompson*, 547 F.3d at 1059 (standard of review); *Bingham*, 45 P.3d at 566-68.

The district court did not abuse its discretion by denying Kerrigan's request for leave to amend the complaint because amendment would be futile. See *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) (setting forth standard of review and explaining that dismissal without leave to amend is permitted when amendment would be futile).

Appendix B

The district court did not abuse its discretion by denying Kerrigan's Federal Rule of Civil Procedure 59(e) and 60(b) motion because Kerrigan did not establish any basis for relief. *See Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc., 5 F.3d 1255, 1262-63 (9th Cir. 1993) (setting forth standard of review and grounds for relief under Rule 59(e) and Rule 60(b)).*

We reject as meritless Kerrigan's contention that the district court lacked subject matter jurisdiction over this case. *See* 28 U.S.C. § 1331 (granting jurisdiction over civil actions arising under federal law).

AFFIRMED.

APPENDIX C – ORDER OF THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON ORDER DENYING PLAINTIFF'S MOTION FOR POST-JUDGMENT RELIEF, FILED JANUARY 27, 2017

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

CASE NO. C16-1528-JCC

KIM KERRIGAN,

Plaintiff,

v.

QUALSTAR CREDIT UNION, *et al.*,

Defendants.

ORDER DENYING PLAINTIFF'S MOTION FOR POST-JUDGMENT RELIEF

Appendix C

Before: Judge John C. Coughenour

This matter comes before the Court on Plaintiff Kim Kerrigan's motion for post-judgment relief (Dkt. No. 27). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES the motion for the reasons explained herein.

On December 6, 2016, the Court granted Defendants Bayview and Qualstar's motions to dismiss and dismissed Plaintiff's complaint with prejudice. (Dkt. Nos. 25, 26.) In response to the motions to dismiss, Plaintiff argued that the Washington Supreme Court has not decided the issue of whether nonjudicial foreclosures toll the statute of limitations on foreclosure actions and that, therefore, the Court should certify the question to the Washington Supreme Court instead of granting the motion to dismiss. (Dkt. No. 22 at 7.) The Court denied Plaintiff's request because there is no controlling authority that overrules *Bingham v. Lechner*, 45 P.3d 562, 566 (Wash. Ct. App. 2002), which held that nonjudicial foreclosures toll the statute of limitations, and there is no indication from the Washington Supreme Court that *Bingham* was wrongly decided. (Dkt. No. 25 at 5–6.) Relying on

Bingham, the Court found that the claims should be dismissed with prejudice. (*Id.* at 7.)

Plaintiff now asks the Court to amend or alter its judgment pursuant to Federal Rule of Civil Procedure 59(e) or Federal Rule of Civil Procedure 60(b)(3) and 60(b)(6). A judgment should not be amended "absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (internal quotations omitted). Plaintiff claims that the Court "abused its discretion in refusing to follow controlling precedent requiring the Court to predict how the Supreme Court would rule" on Plaintiff's claims. (Dkt. No. 27 at 4–9.) Plaintiff also argues that her newly submitted expert report demonstrates new evidence that the nonjudicial foreclosures were fraudulent. (*Id.* at 9–10.) Finally, Plaintiff asks that the Court allow her to amend her complaint after altering the judgment. (*Id*. at 10–11.)

Plaintiff's first argument is without merit. Although the court is only bound by the decision of a state's highest court when considering state law claims, "where there is no binding precedent from the

state's highest court, [courts] 'must predict how the highest state court would decide the issue *using intermediate appellate court decisions,* decisions from other jurisdictions, statutes, treatises, and restatements as guidance.'" *In re NCAA Student-Athlete Name & Likeness Licensing Litig.,* 724 F.3d 1268, 1278 (9th Cir. 2013) (quoting *In re Kirkland,* 915 F.2d 1236, 1239 (9th Cir. 1990)) (emphasis added). Therefore, the Court's reliance on and adoption of

Bingham as persuasive authority to dismiss Plaintiff's claims was proper and not a clear error. The Court reasonably relied on a 14 year-old intermediate appellate court decision that has neither been overturned nor questioned by the Washington Supreme Court and this does not entitle Plaintiff to an amended judgment.

Second, neither Plaintiff's new expert report nor any of Plaintiff's supporting declarations make any indication that the evidence of alleged fraud was not previously available when she filed the complaint or her response to the motion to dismiss. This attempt to create an entirely new liability is improper and does not warrant an amended judgment. *See Kona Enterprises*, 229 F.3d at 890 ("A Rule 59(e) motion may *not* be used to raise

arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.").

Therefore, the Court DENIES Plaintiff's request to amend the judgment (Dkt. No. 27). The Court also DENIES Plaintiff's request to amend the complaint because Plaintiff has failed to show there is a legitimate reason to amend the judgment.

DATED this 27th day of January 2017.

/s/ John C. Coughenour

John C. Coughenour

UNITED STATES DISTRICT JUDGE

APPENDIX D – ORDER OF THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS, FILED DECEMBER 6, 2016

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

CASE NO. C16-1528-JCC

KIM KERRIGAN,

Plaintiff,

v.

QUALSTAR CREDIT UNION, *et al.*,

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

Appendix D

Before: Judge John C. Coughenour

United States District Judge

This matter comes before the Court on Defendant Qualstar Credit Union's motion to dismiss (Dkt. No. 16) and Defendant Bayview Loan Serving's [*sic*] motion to dismiss (Dkt. No. 10). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motions for the reasons explained herein.

I. BACKGROUND

A. The Parties and Deeds

Plaintiff Kimberly Kerrigan was the owner of the residential property at issue. (Dkt. No. 1-1 at ¶ 4.) In February 2008, Plaintiff obtained a loan from Washington Mutual Bank secured by the residential property. (Dkt. No. 1-2 at 12; Dkt. No. 1-3 at 10). She also executed a Multistate Fixed Rate Note with the original lender, Washington Mutual. (Dkt. No. 1-2 at 10). The Note was secured by a Deed of Trust (the Deed), listing Plaintiff as the borrower and Washington Mutual as the lender. (Dkt. No. 1-2 at 12). The Deed was assigned to Defendant Bayview and the transfer was recorded on January 15, 2014. (Dkt. No. 1 -4 at 8.) Bayview appointed Defendant Quality Loan Corporation as a successor trustee on

March 12, 2015. (Dkt. 1 -4 at 5.) The Deed is payable by installments and matures in 2038. (Dkt. No. 1-3 at 10.) Defendant Qualstar is a beneficiary of a different, second-position deed of trust (second Deed) on the same residential property owned by Plaintiff (Dkt. No. 16-1.) The second Deed is payable by installments, repayment of the principal balance does not start until 2023, and the loan matures in 2038. (Dkt. No. 16-1 at ¶ 5.)

B. Nonjudicial Foreclosures

On October 31, 2012, Northwest Trustee Services, the prior trustee, recorded a Notice of Trustee's Sale (NOTS) and scheduled the sale for March 1, 2013. (Dkt. No. 1-4 at 17.)

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[1] Qualstar requests that the Court take judicial notice of the second Deed. (Dkt. No. 16 at 2.) Judicial notice may be taken where a document is not attached to the complaint, but "incorporated by reference: in the complaint. *U.S. v Ritchie*, 342 F. 3d, 903, 908 (9th Cir. 2003). The incorporation by reference doctrine has been extended "to situations in which the plaintiff's claim depends on the contents of the document, the defendant attaches the document to it's motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of the document in the complaint." *Kneivel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). This is exactly what happened in this case. Therefore, the Court takes judicial notice of the second Deed, (Dkt. No. 16-1).

The sale did not occur and a "Notice of Discontinuance of Trustee's Sale" was recorded on October 9, 2014.[2] (Dkt. No. 11 at 7.)

On June 1, 2015, Quality recorded a second NOTS and scheduled the sale for October 2, 2015. (Dkt. No. 11 at 9.) The sale also did not occur and a "Notice of Discontinuance of Sale" was continued to October 13, 2015. (Dkt. No. 11 at 14.)

On April 20, 2016, Quality recorded the present NOTS and set the sale date for August 15, 2016, which was continued to September 9, 2016. (Dkt. No. 1-3 at 27.)

C. Procedural History

Plaintiff filed this matter in King County Superior Court on August 29, 2016 (Dkt. No. 1-1.) Defendants

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[2] Bayview requests that the Court take judicial notice of three documents. (Dkt. No. 10 at 2.) Judicial notice may be taken of factual matters that are either generally known or "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Ritchie, 342, F.3d at 908-09; Fed. R. Evid. 201 (b). All three documents contained in Docket Number 11 are documents that were recorded and the State of Washington. Therefore, their accuracy cannot be reasonably questioned, and the Court takes judicial notice of all three documents (Dkt. No. 11).

removed the case to this Court. (Dkt. No. 1.)Plaintiff alleges that Defendants Quality and Bayview (1) violated Washington's Collection Agency Act (WCAA); (2) violated the federal [sic] Fair Debt Collection Practices Act (FDCPA); and (3) violated Washington's Consumer Protection Act (CPA). (Dkt. No. 1-1.) Essentially, Plaintiff alleges that because she has not made payments pursuant to the Deed for more than six years, the NOTS is unenforceable due to the statute of limitations. (Dkt. No. 1-1 at ¶ 6.29.) Therefore, she alleges Defendants violated the WCAA, FDCPA, and CPA by initiating an allegedly unenforceable NOTS. These first three claims seem to be against only Bayview and Quality, as Qualstar is not attempting to foreclose or otherwise enforce the claims in the second Deed. Plaintiff also brings a claim for quiet title against all Defendants. (Dkt. No. 1-2 at ¶¶ 6.30–6.45.) Defendants Bayview and Qualstar now bring motions to dismiss. (Dkt. Nos. 10 and 16). claim for relief that is plausible on its face.

II. DISCUSSION

A. Federal Rule of Civil Procedure 12(b)(6)

A defendant may move for dismissal when a plaintiff "fails to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009).

A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 678. Although the Court must accept as true a complaint's well-pleaded facts, conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper Rule 12(b)(6) motion. *Vasquez v. L.A. Cty.,* 487 F.3d 1246, 1249 (9th Cir. 2007); *Sprewell v. Golden State Warriors,* 266 F.3d 979, 988 (9th Cir. 2001). The plaintiff is obligated to provide grounds for his entitlement to relief that amount to more than labels and conclusions or a formulaic recitation of the elements of a cause of action. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. A dismissal under Federal Rule of Civil Procedure 12(b)(6) "can [also] be based on the lack of a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

B. Qualstar's Motion to Dismiss (Dkt. No. 16)

Plaintiff alleges that although Qualstar is not attempting to foreclose on or otherwise enforce

claims in the second Deed, Qualstar's claim is subject to being quieted under Washington Revised Code section 7.28.300. (Dkt. No. 1-1 at ¶¶ 4.3, 6.42–6.43.) Section 7.28.300 allows a real estate owner to "maintain an action to quiet title against the lien of a mortgage or deed of trust on the real estate where an action to foreclose such mortgage or deed of trust would be barred by the statute of limitations." A deed of trust foreclosure remedy is subject to a six-year statute of limitations. *Edmundson v. Bank of Am.*, 378 P.3d 272, 276 (Wash. Ct. App. 2016) (citing Wash. Rev. Code § 4.16.040). "[W]hen recovery is sought on an obligation payable by installments, the statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it." *Id.* at 277 (citing *Herzog v. Herzog*, 161 P.2d 142, 144–45 (Wash. 1945)).

Qualstar argues that the statute of limitations does not bar a future action for foreclosure because there are still payments that have become due in the last six years and there are future payments that will become due for the next 22 years. (Dkt. No. 16 at 3.) Plaintiff filed a response to Bayview's motion to dismiss and did not address any of Qualstar's arguments. (*See* Dkt. No. 22.) Therefore, pursuant to

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Local Civil Rule 7(b)(2) "if a party fails to file papers in opposition to a motion, such failure may be considered by the court as an admission that the motion has merit." The Court agrees with Qualstar that the statute of limitations does not bar future foreclosure at this point. Therefore, Plaintiff does not have a cause of action against Qualstar for quiet title under section 7.28.300. The Court finds that these claims should be dismissed with prejudice. "Dismissal without leave to amend is improper unless it is clear upon *de novo* review, that the complaint could not be saved by any amendment." *Krainski v. Nev. ex rel. Bd. of Regents of Nev. Sys. of Higher Educ.*, 616 F.3d 963, 972 (9th Cir. 2010). Plaintiff cannot save her claim against Qualstar because payments are still due until 2038. As such, Plaintiff's claim against Qualstar is DISMISSED WITH PREJUDICE.

The same analysis applies to the quiet title claims against Bayview and Quality. The Deed does not mature until 2038 so there are still future payments that will become due. The trial court may *sua sponte* dismiss claims for failure to state a claim without notice or an opportunity to respond where "the plaintiffs cannot possibly win relief." *Sparling v. Hoffman Const. Co.,* 864 F.2d 635, 638 (9th Cir. 1988). Therefore, for the same reasons as above,

Plaintiff's quiet title claims against Bayview and Quality are DISMISSED WITH PREJUDICE.

C. Bayview's Motion to Dismiss (Dkt. No. 10)

Plaintiff alleges that because she has not made payments pursuant to the Bayview Deed for more than six years, the most recent NOTS/nonjudicial foreclosure is unenforceable due to the six-year statute of limitations. (Dkt. No. 1-1 at ¶ 6.29.) Defendant argues that Plaintiff's allegation fails because nonjudicial foreclosures toll the statute of limitations based on the holding in *Bingham v. Lechner,* 45 P.3d 562,566 (Wash. Ct. App. 2002). (Dkt. No. 10 at 1,4.) In response, Plaintiff asks the court to certify Bayview's motion to the Washington Supreme Court or deny Bayview's motion to dismiss. (Dkt. No. 22 at 7.)

1. Certification of Bayview's Motion to the Washington Supreme Court

Plaintiff request that the Court certify Bayview's motion to dismiss to the Washington Supreme Court "because this case involves unsettled issues of law, which if clarified definitively, would have 'far-reaching effects' on those persons who are not subject to foreclosure of their property because of staleness." (Dkt. No. 22 at 7.) Plaintiff argues that there is no controlling authority by the Washington

Supreme Court that nonjudicial foreclosures toll the statute of limitations and that the Court should not rely on *Bingham*, a state court of appeals case for this assertion. (*Id.* at 9.)

"Certification of questions of state law to the highest court of the state 'provides a means to obtain authoritative answers to unclear questions of state law.'" *Micomonaco v. State of Wash.,* 45 F.3d 316, 322 (9th Cir. 1995) (quoting *Toner v. Lederle Lab.,* 779 F. 2d 1429, 1432 (9th Cir. 1986)). Revised Code of Washington section 2.60.020 provides the standard for certifying a question to the Washington Supreme Court:

> When in the opinion of any federal court before whom a proceeding is pending, it is necessary to ascertain the local law of this state in order to dispose of such proceeding and the local law has not been clearly determined, such federal court may certify to the supreme court for answer the question of local law involved and the supreme court shall render its opinion in answer thereto.

However, the "Washington Supreme Court does not operate as a court of appeals for decisions of [district courts]." *Hann v. Metro. Cas. Ins. Co.*, 2012 WL 3098711, at *3 (W.D. Wash. July 30, 2012). "There is a presumption against certifying a question to a state supreme court after the federal district

court has issued a decision." *Thompson v. Paul*, 547 F.3d 1055, 1065 (9th Cir. 2008) (internal quotation marks omitted). The decision to certify a question rests in the discretion of the district court. *Micomonaco*, 45 F.3d at 322.

Here, Plaintiff cites no controlling authority that has overruled *Bingham* and no Washington Supreme Court cases that indicate *Bingham* was wrongly decided. Plaintiff merely argues that *Bingham* was wrongly decided and adoption of the case will lead to many problems in Washington. (Dkt. No. 22 at 14–25.) However, another court in the Western District of Washington, considering similar facts, very recently adopted *Bingham* to find that commencement of a nonjudicial foreclosure tolls the statue [*sic*] of limitations. (*Fujita v. Quality Loan Serv. Corp. of Wash.*, 2016 WL 4430464, at *2 (W.D. Wash. Aug. 22, 2016). Moreover, the Court concludes there is no indication from the Washington Supreme Court that *Bingham* was wrongly decided. Therefore, the Court DENIES Plaintiff's request for certification to the Washington Supreme Court because there is no unclear question of law. Further, there is a presumption against certifying a question to a state supreme court after the federal district court has issued a decision.

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2. Motion to Dismiss

Bayview argues that payments made in February 2010 through April 2010 do not invalidate the most recent nonjudicial foreclosure because the previous nonjudicial foreclosures tolled the statute of limitations. (Dkt. No. 10 at 4.) (citing *Bingham*, 127 P 3d at 566). Plaintiff does not dispute the holding and application of *Bingham*, but merely seeks certification of the question of whether nonjudicial foreclosures toll the statute of limitations because there is no Washington Supreme Court decision on the matter. (See Dkt. No. 22.) Therefore, as the Court has already declined to certify the question , the Court concludes that *Bingham* is persuasive authority and agrees with Defendant and the other Western District of Washington court that has also applied *Bingham* to a similar set of facts: nonjudicial foreclosures toll the statute of limitations. As such, the pending foreclosure is timely and Plaintiff cannot sustain any claims on the basis that the statue [*sic*] of limitations has run.

Plaintiff bases all of her alleged Bayview and Quality violations of the WCAA, FDCPA and CPA on the statute of limitations issue. Therefore, because the statute of limitations was tolled by the

previous nonjudicial foreclosures, Plaintiff fails to state a claim upon which relief can be granted on all three causes of actions against both Defendants. Bayview and Quality did not act unlawfully by initiating the most recent NOTS. Bayview's motion to dismiss is GRANTED. The Court finds that these claims should be dismissed with prejudice. Under these facts, this complaint cannot be saved because the statute of limitations has been tolled. All of Plaintiff's claims against Bayview and Quality for violations of the WCAA, FDCPA, and CPA by initiating the most recent NOTS are DISMISSED WITH PREJUDICE.

III. CONCLUSION

For the foregoing reasons, Defendants Bayview and Qualstar's motions to dismiss (Dkt. Nos. 10 and 16) are GRANTED. Plaintiff's entire complaint is DISMISSED WITH PREJUICE.[*sic*]

DATED this 6th day of December 2016.

/s/ John C. Coughenour

John C. Coughenour

UNITED STATES DISTRICT JUDGE