NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SANFORD A. MOHR; TINA A. MOHR, Individually and as Co-Trustees of their October 15, 1996 unrecorded Revocable Trust, Plaintiffs-Appellants, v. MLB, SUB I, LLC; et al., Defendants-Appellees.	No. 20-15895 D.C. No. 1:16-cv-00493-ACK-WRP MEMORANDUM* (Filed Jul. 9, 2021)

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Submitted July 6, 2021**
Honolulu, Hawaii

Before: NGUYEN, OWENS, and FRIEDLAND, Circuit Judges.

Sanford and Tina Mohr ("the Mohrs") appeal from the district court's order granting summary judgment and issuing a decree of foreclosure in favor of MLB, SUB I, LLC ("MLB"). We review a grant of summary

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

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

judgment de novo. *L.F. v. Lake Wash. Sch. Dist. #414*, 947 F.3d 621, 625 (9th Cir. 2020). As the parties are familiar with the facts, we do not recount them here. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Under Hawaii law, a party seeking a foreclosure decree must demonstrate (1) the existence of a promissory note, mortgage, or other debt agreement, (2) the terms of such agreement, (3) default by the debtor under the terms of the agreement, and (4) that the debtor was given sufficient notice of default. *See Bank of Am., N.A. v. Reyes-Toledo*, 390 P.3d 1248, 1254 (Haw. 2017) ("*Toledo I*"). There is no genuine dispute that MLB has established the four factors. The Lost Note Affidavit and copy of the original promissory note—with the Mohrs' signatures or initials on nearly every page—clearly prove the existence and terms of the debt agreement, and there is ample evidence that the Mohrs are in default under the agreement's terms. MLB also provided copies of the notices of default that were sent to the Mohrs, satisfying the fourth requirement.

A foreclosing lender must also demonstrate it has standing as someone "entitle[d] to enforce" the agreement. *Id.* The standing requirements are governed by statute. *See* Haw. Rev. Stat. §§ 490:3-301, -309.[1]

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[1] Section 490:3-309, which governs the "[e]nforcement of lost . . . instrument[s]," provides that:

> A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in rightful possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of

Because the original promissory note is lost, we must determine whether MLB is entitled under section 490:3-309 to enforce the debt agreement using the Lost Note Affidavit, a copy of the original note, and an allonge affixed to the note containing a blank indorsement. We conclude that it is.

Given the lack of Hawaii cases interpreting section 490:3-309, we must "use [our] own best judgment in predicting how the state's highest court would decide the case." *Fast Trak Inv. Co. v. Sax*, 962 F.3d 455, 465 (9th Cir. 2020) (order) (internal quotation marks and citation omitted). We can "look[] to well-reasoned decisions from other jurisdictions" as a guide. *Takahashi v. Loomis Armored Car Serv.*, 625 F.2d 314, 316 (9th Cir. 1980). Here, the district court relied on *In re Allen*, 472 B.R. 559 (B.A.P. 9th Cir. 2012), which interpreted a nearly identical Washington statute and concluded that an assignee of a lost promissory note can still enforce the note based on the lost note affidavit and blank indorsement, *id.* at 567.[2] The Ninth

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> possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

Haw. Rev. Stat. § 490:3-309(a).

[2] The Washington statute is nearly identical in language to Hawaii's section 490:3309:

> A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it

Circuit Bankruptcy Appellate Panel reasoned that the affidavit and blank indorsement were "sufficient to replace the original [n]ote" because the blank indorsement makes the note a "bearer instrument . . . negotiable by transfer of possession alone." *Id.* In light of *Allen*, the district court similarly concluded that the Lost Note Affidavit in this case became the "substitute" for the note, and that MLB's continuous possession of the affidavit and the allonge containing the blank indorsement thus gave it the right to enforce the lost note.

We see no error in the district court's conclusion or reliance on *Allen.* The Hawaii and Washington statutory provisions are nearly identical; the question presented is meaningfully similar; and, to the extent that the Hawaii Supreme Court may be concerned about "widespread documentation problems" in the mortgage industry, *Toledo I*, 390 P.3d at 1256, there are already statutory protections in place to prevent multiple parties from enforcing the same lost note, *see* § 490:3-309(b). Furthermore, at least in this case, the district court noted that "the foreclosure would be conditioned on MLB's agreement to indemnify the Mohrs in the

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> when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

Wash. Rev. Code § 62A.3-309(a).

event they are faced with enforcement of the same promissory Note by another party."

The Mohrs' arguments to the contrary are not persuasive. First, they contend that the district court erred by relying on *Allen* because the trial court was required to apply Hawaii law.[3] But as noted above, "[i]n the absence of controlling forum state law, [we] . . . may be aided by looking to well-reasoned decisions from other jurisdictions." *Takahashi*, 625 F.2d at 316. Second, the Mohrs make numerous conclusory allegations disputing the facts underlying this litigation, contending, for example, that their mortgage was actually paid off in 2006; that MLB is not the true owner of their mortgage; and that various instances of fraud have rendered their mortgage and any subsequent assignments void. They base their allegations largely on a report from their private investigator. We agree with the district court that the investigator's report does not create a genuine dispute as to the material facts underlying this litigation. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) (when an expert report is "not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable," the report cannot create a genuine dispute); *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

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[3] The Mohrs also argue that the district court's error violated their constitutional rights. "[B]ecause this argument was not coherently developed in [their] briefs on appeal, we deem it to have been abandoned." *United States v. Kimble*, 107 F.3d 712, 715 n.2 (9th Cir. 1997); *see also* Fed. R. App. P. 28(a)(8)(A).

242, 249-50 (1986) ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party. . . . If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (internal citations omitted)).

For the above reasons, we affirm the district court's order granting summary judgment and issuing a decree of foreclosure in favor of MLB.

AFFIRMED.[4]

[4] We need not reach the district court's conclusion that the Mohrs' fraud claims are barred by res judicata. Even if the allegations were not barred, the Mohrs still fail to demonstrate a genuine dispute as to fraud or forgery.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

SANFORD A. MOHR and TINA A. MOHR, Individually and as Co-Trustees of their October 15, 1996 unrecorded revocable trust, **Plaintiffs,** **vs.** **MLB SUB I, LLC; JOHN DOES 1-20; JANE DOES 1-20; DOE PARTNERSHIPS 1-20; DOE CORPORATIONS 1-20; and DOE ENTITIES 1-20,** **Defendants.**	**Civ. No. 16-00493 ACK-WRP**

ORDER GRANTING DEFENDANT MLB SUB I'S MOTION FOR SUMMARY JUDGMENT AND ISSUING DECREE OF FORECLOSURE

(Filed Apr. 13, 2020)

The dispute underlying this litigation dates back to 2005. Plaintiffs-Counterdefendants Sanford A. Mohr and Tina A. Mohr (the "Mohrs") stopped making payments on a loan, and the original lender sought to foreclose shortly thereafter. Several assignments of the loan later, and following the Chapter 11 bankruptcy proceedings of now-dismissed defendant and prior owner BNC Mortgage, Inc. ("BNC"), the dispute came to a head before this Court in mid-2019 in the

form of a motion for summary judgment filed by BNC and a corresponding joinder motion filed by Defendant-Counterclaimant MLB Sub I, LLC ("MLB"). After the Court granted summary judgment to the Defendants on most of the Mohrs' claims, the Mohrs were granted leave to amend their complaint, which they did on October 30, 2019. MLB counterclaimed, and now before the Court is MLB's motion for summary judgment (the "Motion"), ECF No. 128, in which it asserts that it is the current holder and owner of the Note and Mortgage and seeks a decree of foreclosure.

For the reasons discussed below, the Court GRANTS Defendant-Counterclaimant MLB's Motion for Summary Judgment. The Court hereby issues a decree of foreclosure in favor of MLB, the holder of the underlying mortgage loan. Likewise, the Court's holding necessarily disposes of Plaintiff's remaining claims, as further explained in this Order.

BACKGROUND

Unless otherwise indicated, the following facts are undisputed. They are principally drawn from the parties' concise statements of facts ("CSFs") and the evidentiary exhibits attached thereto. See MLB's CSF, ECF No. 129; Mohrs' CSF, ECF No. 135.

I. The 2004 Mortgage Transaction and Subsequent Default

The mortgage transaction at issue took place in 2004 when, to refinance their home mortgage, the Mohrs executed a promissory note (the "Note") in favor of Finance America, LLC ("Finance America") in the amount of $467,500. MLB's CSF ¶ 1; Mohrs' CSF ¶ 1 (admitting). The note was secured by a mortgage (the "Mortgage") executed in favor of Mortgage Electronic Registration Systems, Inc. ("MERS") as sole nominee for Finance America. MLB's CSF ¶ 2; Mot. Ex. 2, ECF No. 128-7. The parties executed the loan documents memorializing the transaction on April 16, 2004. MLB's CSF ¶¶ 1-2.

The Mohrs have not made any payments on the loan since late 2004. MLB's CSF ¶ 5. They have been notified by various owners throughout the years of the default, but they have disputed the validity of the debt. MLB's CSF ¶ 6; Mohrs' CSF at p.1 (admitting to ¶ 5 of MLB's CSF but noting that they "disputed liability on the claimed mortgage loan and debt").

II. Reassignments of the Mortgage

Based on the evidence and recorded documents submitted by MLB, the following tracks the various changes in ownership and recorded assignments since the Mortgage and Note incepted:

1. On April 16, 2004, the Mohrs executed the Note and Mortgage, with Finance

America as the original lender and MERS as the sole nominee for Finance America.

2. In 2005, BNC merged with Finance America.

3. On July 25, 2013, MERS as nominee for Finance America (which had merged with BNC) assigned the Mortgage to BNC's parent company, Lehman Brothers Holding, Inc. ("Lehman Brothers"). Mot. Ex. 3, ECF No. 128-8, ECF No. 128 (the "MERS-Lehman Brothers Assignment"). The MERS-Lehman Brothers Assignment was recorded on April 22, 2014.

4. On September 9, 2013, Lehman Brothers entered into a Mortgage Loan Sale and Warranties Agreement (the "Mortgage Sale Agreement") to sell its interest in the Note and Mortgage to MLB or one of its affiliates.[1] Mot. Ex. 7, ECF No. 128-12.

5. On April 22, 2014, Lehman Brothers assigned the Mortgage to MLB, and that assignment was recorded the same day. Mot. Ex. 4, ECF No. 128-9 (the "Lehman Brothers-MLB Assignment").

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[1] In its memorandum (ECF No. 128-1, "Mot."), MLB acknowledges a discrepancy with the ultimate purchaser, which appears to be MLB, but the Mortgage Sale Agreement was signed by Mariners LB Holdings, LLC. See Mot. at 11; see also Mot. Ex. 10, ECF No. 128-15, at p. 13 of 20. The Lehman Brothers-MLB Assignment ultimately reflects MLB as the assignee. See Mot. Ex. 4.

The existence of these recorded assignments is undisputed. The Mohrs simply allege that the original Mortgage and each of these assignments was fraudulent, and that the Note was satisfied back in 2006. See Mohrs' CSF ¶¶ 3-4, 6-10.

III. The Lost Note Affidavit

The original Note was lost at some point since it was executed back in 2004 and before it was sold to MLB. MLB's CSF ¶ 7. MLB has presented a "Lost Note Affidavit" in place of the original Note. See Mot. Ex. 1, ECF No. 128-6. The Lost Note Affidavit was executed on April 4, 2013, and identifies American Home Mortgage Corp. d/b/a American Home Mortgage ("AHM") as the owner of the Note. See id. The Lost Note Affidavit is signed by David Mitchell, an authorized Officer of AHM "by its attorney in fact" Homeward Residential, Inc., f/k/a American Home Mortgage Servicing, Inc. ("AHM Servicing"). Id. Based on evidence in the record, AHM or AHM Servicing appears to have at some point been the owner or servicer of the loan. See infra, footnote 14. The Lost Note Affidavit states that "[t]he original Note could not be located after a thorough and diligent search, which consisted of searching through such records of [AHM] as were appropriate and reasonably accessible." Id. The Lost Note Affidavit also confirms that it "is intended to be relied on by the purchaser of the Note from the Company or from affiliate of the Company and such purchaser's successors and assigns." Id. A photocopy of the original Note is attached to the Lost Note Affidavit, and with the Note is

an allonge[2] containing an indorsement in blank.[3] See Mot. Ex. 1.

MLB has submitted evidence in the form of declarations showing that it, through its custodian and counsel, has had and maintained possession of the original Mortgage and Lost Note Affidavit (which includes a photocopy of the Note and the allonge) since 2014, after it purchased the loan from Lehman Brothers. MLB's CSF ¶¶ 9-10; see also Mot. Ex. 10; Mot. at 9. In addition, each page of the Note and Mortgage—including the adjustable rate rider—has been initialed by the Mohrs, the only exception being the prepayment rider page.[4] See ECF No. 128-6 (Note); ECF No. 128-7 (Mortgage).

IV. Procedural Background

This case began in state court back in 2005. Its procedural history is thus long and complex, involving multiple defendants and a bankruptcy. Rather than

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[2] An allonge is a slip of paper sometimes attached to a negotiable instrument for the purpose of writing indorsements, often when there is no space on the instrument itself. See Black's Law Dictionary (11th ed. 2019).

[3] If an instrument is indorsed in blank (and the indorsement was properly affixed to the note), it would be a bearer instrument and therefore enforceable by the party in physical possession. See Haw. Rev. Stat. § 490:3-205(b).

[4] As addressed infra, the Mohrs dispute that the version they actually initialed is the same as the recorded version of the Mortgage.

reciting this history in detail, the Court focuses on those events relevant to the Motion before it now.[5]

The Mohrs filed their initial complaint in Hawai'i state court on April 19, 2005, and their first amended complaint several months later, against Finance America, MERS, and other entities. See ECF No. 38-4 (initial complaint); ECF No. 38-14 (first amended complaint). The Mohrs sought, inter alia, rescission of the Mortgage and damages under TILA, damages under Hawai'i's unfair or deceptive acts or practices ("UDAP") law, and to quiet title. ECF No. 38-14. BNC—the successor by merger with Finance America—filed for bankruptcy a few years later, putting the state-court proceedings on hold.[6] See ECF No. 94 ("Prior MSJ Order") at 4-5. While the stay was in place, the Mohrs filed a proof of claim in the bankruptcy proceedings, ECF No. 52-5, seeking the same relief sought in their state-court lawsuit: rescission and damages under TILA and UDAP. See id. Lehman Brothers filed objections on BNC's behalf, and the bankruptcy court ultimately granted those objections and disallowed and expunged the Mohrs' claims, with prejudice. See id. at 5-6; ECF No. 52-8 (bankruptcy order).

MLB intervened in the state-court action in 2016 and then removed it to federal court. See Prior MSJ Order at 6; see also ECF No. 1. The bankruptcy stay

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[5] The Court's prior order ruling on BNC's summary judgment motion and MLB's joinder contains a detailed factual and procedural history as well. See ECF No. 94 at 2-7.

[6] The bankruptcy proceedings were consolidated with those of BNC's parent company, Lehman Brothers.

was eventually lifted and this Court heard arguments on a motion for summary judgment filed by BNC, ECF No. 51, as well as a substantive joinder motion filed by MLB, ECF No. 53. On June 13, 2019, the Court granted summary judgment to BNC. See Prior MSJ Order at 22. In large part, the Court held that res judicata barred the Mohrs' claims because they had already been litigated and decided in the bankruptcy proceedings. See id. at 9-20. The Court also granted MLB's joinder motion to the extent that it sought the same relief as BNC and denied the joinder motion to the extent that it went beyond the scope of BNC's corresponding motion. Id. The Court recognized MLB's privity with BNC, but expressly declined to decide the validity and ownership of the Mortgage and Note because doing so would exceed the relief sought by BNC in its motion. Id.

After the Prior MSJ Order disposed of the majority of their claims, the Mohrs sought leave to amend their complaint, which Magistrate Judge Porter granted in part. ECF Nos. 106 & 114. Meanwhile, the parties had stipulated to dismiss the action against BNC with prejudice. ECF No. 112. The Mohrs then filed their second amended complaint (the "Amended Complaint"),[7] ECF No. 115, on October 30, 2019,

[7] The Court acknowledges MLB's observation that ECF No. 115, the document labeled "First Amended Complaint" on the docket is actually the second amended complaint. See Mot. 3 n.1; see also ECF No. 38-4 (complaint filed in state court) & ECF No. 38-14 (first amended complaint filed in state court). For consistency, the Court will simply refer to the operative complaint—that is, ECF No. 115—as the "Amended Complaint."

asserting four causes of action against MLB: (1) wrongful foreclosure, (2) declaratory relief under Haw. Rev. Stat. ("HRS") § 632-1, (3) quiet title, and (4) damages under UDAP.[8] Am. Compl. ¶¶ 9-19. MLB counterclaimed, seeking judicial foreclosure, as well as equitable and declaratory relief. ECF No. 116 (the "Counterclaim").

MLB filed the instant Motion and CSF on January 20, 2020, seeking summary judgment on "its Counterclaim's first claim for relief for judicial foreclosure under Haw. Rev. Stat. § 667-1.5. . . ." ECF No. 128 at 2. Specifically, MLB seeks a ruling that it is entitled to a decree of foreclosure, which it says would then by extension dispose of the Mohrs' remaining claims. See Mot. at 1. The Mohrs filed their Opposition to MLB's Motion, ECF No. 136, and their separate CSF, ECF No. 135, on February 4. In their Opposition, the Mohrs allude to cross-moving for summary judgment in their favor on the claims in their Amended Complaint. Opp. at 1. MLB filed its Reply, ECF No. 138, and responsive CSF, ECF No. 137, on February 11, and the Court heard oral arguments on February 25.

At the hearing, the Court directed the parties to file supplemental briefing calculating the outstanding amount of the loan with interest. MLB properly filed its brief containing detailed calculations of the loan

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[8] Because the Amended Complaint no longer named MERS, Deutsche Bank National Trust Company, and HomeQ Servicing Corporation—all of whom had been named as defendants in the prior complaints—those parties were terminated and MLB is the sole remaining named defendant.

balance. See ECF No. 142. The Mohrs responded not by addressing the validity of those calculations, but by rehashing the same arguments they made in their Opposition and by presenting entirely new factual evidence not presented to the Court in the original motions briefing. See ECF No. 143. In light of that new evidence, the Court provided MLB with a final opportunity to respond, which it did on April 6, 2020. See ECF No. 146.

STANDARD

Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Federal Rule of Civil Procedure 56(a) mandates summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986); see also Broussard v. Univ. of Cal., 192 F.3d 1252, 1258 (9th Cir. 1999).

"A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact." Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007) (citing Celotex, 477 U.S. at 323, 106 S. Ct. at 2553); see also Jespersen v. Harrah's Operating Co., 392 F.3d

1076, 1079 (9th Cir. 2004). "When the moving party has carried its burden under Rule 56[(a)] its opponent must do more than simply show that there is some metaphysical doubt as to the material facts [and] come forward with specific facts showing that there is a genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356 (1986) (citation and internal quotation marks omitted and emphasis removed); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2509-10 (1986) (stating that a party cannot "rest upon the mere allegations or denials of his pleading" in opposing summary judgment).

"An issue is 'genuine' only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute is 'material' only if it could affect the outcome of the suit under the governing law." In re Barboza, 545 F.3d 702, 707 (9th Cir. 2008) (citing Anderson, 477 U.S. at 248, 106 S. Ct. at 2510). When considering the evidence on a motion for summary judgment, the court must draw all reasonable inferences on behalf of the nonmoving party. Matsushita Elec. Indus. Co., 475 U.S. at 587, 106 S. Ct. at 1356; see also Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1126 (9th Cir. 2008) (stating that "the evidence of [the nonmovant] is to be believed, and all justifiable inferences are to be drawn in his favor" (internal citation and quotation omitted)).

DISCUSSION

At issue in this case is whether MLB is entitled to a decree of foreclosure. The Mohrs argue that MLB has failed to prove the requisite judicial-foreclosure elements. Their primary arguments are that the Note was paid off (though they do not say by whom) and that MLB cannot establish the chain of title showing that it is the lawful owner of the Note and Mortgage. The Court disagrees and holds that MLB has proven the requisite foreclosure elements and that it has standing to foreclose on the Mohrs' property. The Mohrs' conclusory claims of fraud and attempts to impose a nonexistent requirement that MLB prove the validity of each transfer of title are unpersuasive. Accordingly, as discussed below, the Court GRANTS summary judgment to MLB and enters a decree of foreclosure as stated. To the extent that the Mohrs cross-move for summary judgment on their claims in the Amended Complaint, such motion is DENIED.

I. MLB has Established the Foreclosure Elements and that it has Standing to Foreclose

In general, there is no federal foreclosure law; rather, state law serves as the law of decision in foreclosure actions. See Whitehead v. Derwinski, 904 F.2d 1362, 1371 (9th Cir. 1990), overruled on other grounds by Carter v. Derwinski, 987 F.2d 611 (9th Cir. 1993). Under Hawai'i law, a foreclosure decree is appropriate if all four of the following material facts have been established: (1) the existence of a promissory note,

mortgage, or other debt agreement; (2) the terms of the promissory note, mortgage, or other debt agreement; (3) default by the borrower under the terms of the promissory note, mortgage, or other debt agreement; and (4) the giving of sufficient notice of default and that payment of the debt is due and owning. IndyMac Bank v. Miguel, 117 Haw. 506, 520, 184 P.3d 821, 835 (Ct. App. 2008); see also McCarty v. GCP Mgmt., LLC, Civ. No. 10-00133 JMS/KSC, 2010 WL 4812763, at *8 (D. Haw. Nov. 17, 2010); Bank of Honolulu, N.A. v. Anderson, 3 Haw. App. 545, 551, 654 P.2d 1370, 1375 (Ct. App. 1982).

The foreclosing party's burden to prove its entitlement to enforce the note overlaps with the requirements of standing. Bank of Am., N.A. v. Reyes-Toledo, 139 Haw. 361, 367-68, 390 P.3d 1248, 1254-55 (2017) ("Toledo I"); see also Bank of Am., N.A. v. Reyes-Toledo, 143 Haw. 249, 264-65, 428 P.3d 761, 776-77 (2018) ("Toledo II"). The "underlying 'injury in fact' to a foreclosing [party] is the mortgag[or]'s failure to satisfy its obligation to pay the debt obligation to the note holder." Id. at 368, 390 P.3d at 1255. Thus, to establish standing, the foreclosing party "must necessarily prove its entitlement to enforce the note as it is the default on the note that gives rise to the action." Id. (citing HRS § 490:9-601).

As discussed in detail below, the record shows that MLB has established as a matter of law all four factors necessary for a foreclosure decree, and that it has standing to enforce the loan documents.

a. MLB Has Established the Existence and Terms of the Note and Mortgage, the Mohrs' Default Thereunder, and the Notice of Default

First, MLB has established all four of the foreclosure factors as a matter of law. As to the first two factors, the existence of the Note and Mortgage is undisputed. MLB has offered evidence showing that on April 16, 2004, the Mohrs executed the promissory Note in favor of Finance America for $467,500, and, to secure payment on the Note, the Mohrs executed the Mortgage, which was recorded in the Bureau of Conveyances on April 27, 2004. MLB's CSF ¶¶ 1-2.

The Mohrs admit to executing the Note and Mortgage, but they maintain that the recorded version of the Mortgage is not the same version they signed, rendering it void. Mohrs' CSF ¶¶ 1-2; Mohr Decl. ¶¶ 8-13, 24-32. This Court already held in the Prior MSJ Order that such allegations of fraud and forgery could have been raised in the bankruptcy action and are thus barred by res judicata. See Prior MSJ Order at 12 ("If anything, these allegations are merely an 'extension of facts' already presented in the bankruptcy action, or facts that could have been raised in the bankruptcy action."). Accordingly, the Court will not rehash the Mohrs' allegations of fraud or forgery in the Mortgage, when they surely have had in their possession copies of the recorded Mortgage and the version they allege signing all this time. The Court reiterates its prior observation that the Mohrs have offered no explanation

for failing to raise these allegations earlier. See Prior MSJ Order at 11-13.

The terms of the Mortgage and Note do not appear to be in dispute anyway.[9] The Mohrs have not challenged the terms of the original Note at all; they only allege that it was satisfied in 2006 and that, regardless, MLB is not the proper party to now enforce payment of the Note (which they inexplicably say is no party at all, other than themselves as the owners of the property). And their challenges to the Mortgage are focused not on the terms of the loan documents they admit signing, but on the validity of the recorded documents. Although they argue that the recorded version of the Mortgage is not the same as the one they admit to signing, the Mohrs have not pointed to any material differences. As discussed throughout this Order, their assertions of forgery and fraud are simply not supported by the evidence. They have not shown that there was any misrepresentation of any party's obligations under the Mortgage, or any reliance on such misrepresentations. Because there is no genuine dispute regarding the existence or terms of the Note and Mortgage, MLB has satisfied the first and second of the foreclosure requirements.

MLB has also shown—and the Mohrs have not disputed—that the Mohrs defaulted on the loan and were notified of such default, thus satisfying the third and fourth foreclosure factors. Roughly six months

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[9] In fact, the Mohrs initialed each page of the Note and Mortgage, signaling their review of the terms.

after executing the Note and Mortgage, the Mohrs stopped making the scheduled payments and have remained in default ever since.[10] After the Mohrs became delinquent in their payments, written notice was provided concerning the default and the intention to accelerate the loan and foreclose the mortgage if the default was not cured.[11] See Exs. 5 & 15 to MLB's CSF. Despite receiving notice, the Mohrs neglected to cure the default. Accordingly, there is no genuine dispute regarding the Mohrs being in default or having received notice of such default, and MLB has thus satisfied the third and fourth requirements to foreclose. See Anderson, 3 Haw. App. at 550, 654 P.2d at 1375.

In sum, MLB has met its burden of proving all four of the foreclosure prongs, and the Mohrs have failed to "set forth specific facts showing that there is a genuine issue for trial." See Porter v. Calif. Dep't of Corrections, 419 F.3d 885, 891 (9th Cir. 2005). The Court now turns to the overlapping question of whether MLB has standing as the "person entitled to enforce" the Note and Mortgage.

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[10] The Mohrs claim that they cannot have been in default when the Mortgage and Note were paid off in 2006. As discussed in detail in this Order, the Mohrs have offered no persuasive evidence in support of their assertion that the note was paid off and satisfied.

[11] The Mohrs do not contest this. They simply assert that they disputed the validity of the debt and that the debt was mysteriously paid off after the loan was securitized.

b. MLB Has Established That It Has Standing to Enforce the Note and Mortgage

As mentioned, the burden of proving entitlement to a foreclosure decree overlaps with the burden of establishing standing to foreclose. Whether a party has standing as a "person entitled to enforce" a promissory note is governed by statute:

> "Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 490:3-309 or 490:3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

HRS § 490:3-301. In other words, when a person is not the original payee identified on the note, there are three ways for a person to establish that it is the "person entitled to enforce" the note: It can show that it is (1) a holder of the note, (2) a nonholder in possession of the note with the rights of a holder, or (3) not in possession of the note but entitled to enforce it pursuant to the cross-referenced statutes.

Here, MLB's standing arguments hinge on it being either or both a "holder" of the note and a person not in possession of the instrument but entitled to enforce it under HRS § 490:3-309, which governs enforcement of "lost, destroyed, or stolen" instruments. This latter

concept allows a party to enforce a lost instrument if it can prove the terms of the instrument and its right to enforce the instrument. HRS § 490:3-309(a) lists three requirements for a person to enforce a lost instrument:

> (i) the person was in rightful possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

HRS § 490:3-309(a). If a person successfully proves the right to enforce the instrument under HRS § 490:3-309(a), the person is treated as having produced the original instrument. Id. § 490:3-309(b); see also id. § 490:3-308. Simply put, the plain meaning of HRS § 490:3-309 is that a person not in possession of an original instrument is entitled to enforce it so long as the person was in possession and entitled to enforce it when the loss of possession occurred.

The Ninth Circuit has concluded that even where a person was not the party in possession of the note when it was lost, the rights to a lost note may still be enforced by a downstream assignee of the note. See In re Allen, 472 B.R. 559, 565-66 (9th Cir. B.A.P. 2012) (collecting cases and affirming the bankruptcy court's holding that "rights under a lost note may be

assigned"). To establish a right to enforce a lost note under HRS § 490:3-309, courts rely on lost note affidavits, which are "used to establish a party's right to enforce a note even without possession of the original instrument." Specialized Loan Serv. LLC, Civ. No. RDB-16-3743, 2017 WL 1001257, at *2 n.3 (D. Md. Mar. 15, 2017).

There is very little case law interpreting Hawai'i's statute on enforcing lost instruments. MLB has offered one Ninth Circuit case in which a bankruptcy appellate panel held that an assignee of a lost note had standing to enforce the lost note under a Washington statutory scheme identical to the one at issue here. See In re Allen, 472 B.R. at 565-66. In In re Allen, the panel affirmed the bankruptcy court's finding that a lost note affidavit was an acceptable substitute for the original note because the affidavit complied with the statutory requirements for enforcement of lost instruments, identical to those requirements in HRS § 490:3-309. Id. Although the party seeking to enforce the note was not the one in possession of the original note when it was lost, the panel agreed that it held the rights in the lost note pursuant to a subsequent assignment and its possession of the lost note affidavit. Id. at 566.

The panel went on to hold that, because the original note was indorsed in blank, it was a "bearer instrument," meaning it could be negotiated by transfer of possession alone. Id. at 567. Thus, the foreclosing party's showing that it had in its possession the lost note affidavit and a copy of the note indorsed in blank—which it had purchased from the prior owner—

was sufficient to give it the "status of a holder and a 'person entitled to enforce' the instrument. . . ." Id.

To unpack the holding in In re Allen, a summary of the law concerning a "holder" of a negotiable instrument is useful. A "negotiable instrument" is an "unconditional promise or order to pay a fixed amount of money" if it, among other things, is "payable to bearer or to order at the time it is issued or first comes into possession of a holder." HRS § 490:3-104. If an instrument is indorsed in blank, it "becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed." Id. § 490:3-205(b). "Negotiation" is defined as "a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder." Id. § 490:3-201(a). In turn, "Holder" is defined as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." HRS § 490:1-201(b); see also In re Tovar, Nos. CC-11-1696-MkDKi, LA-10-41664-BR, LA-10-03016-BR, 2012 WL 3205252, at *5 (9th Cir. B.A.P. Aug. 3, 2012) (explaining the circumstances where a party is a "holder" of a negotiable instrument). In other words, like the court held in In re Allen, once a note indorsed in blank is negotiated, the subsequent party becomes a holder and, thereby, a person entitled to enforce the note. See id. § 490:3-201; see also In re Allen, 472 B.R. at 565-67.

Here, because it is undisputed that the original Note is lost and all that MLB has produced is the Lost

Note Affidavit with a photocopy of the Note (showing the Mohrs' initials) and the allonge, the Court must decide whether MLB's possession of these items provides it with the present right to enforce the Note. The Court holds that it does.

i. MLB's Right to Enforce the Note Based on the Lost Note Affidavit

MLB has submitted evidence showing that (1) a loan was made and secured by the Note and Mortgage in favor of Finance America in April 2004; (2) the Note contained an allonge with an indorsement in blank; (3) the original Note was lost and a Lost Note Affidavit was signed in April 2013; and (4) MLB bought the Note and Mortgage from Lehman Brothers in September 2013, through the Mortgage Sale Agreement.[12] MLB has also submitted evidence establishing that it obtained possession of the Lost Note Affidavit in connection with its purchase of the loan. MLB now relies on the Lost Note Affidavit as evidence of the terms of the original Note.

The Lost Note Affidavit produced by MLB is signed by "a duly authorized Officer" of AHM "by its attorney in fact" AHM Servicing. See Lost Note Affidavit. In this regard, the Lost Note Affidavit characterizes AHM as the lawful owner of the Note at the time the Note was lost and the affidavit sworn. See id. The

[12] The Mortgage Sale Agreement expressly lists—among other loan purchases—the transfer of the Mortgage and Note on the Mohrs' property, with reference to the Lost Note Affidavit.

Lost Note Affidavit confirms that it may also be relied on by the purchaser and successors and assigns. Id. In turn, the Lost Note Affidavit encloses a photocopy of the original Note with each page initialed by the Mohrs, as well as a photocopy of the allonge with an indorsement in blank.

Evidence in the record indicates that at some point AHM indeed came to own or service the mortgage.[13] Still, a few months after the Lost Note Affidavit was signed, the Mortgage and Note were sold and assigned from MERS (on behalf of the original lender, Finance America) to Lehman Brothers and then from Lehman Brothers to MLB. MLB has submitted evidence showing that it purchased the rights under the Mortgage and Note for $466,737[14] through the

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[13] See ECF No. 52-5 at pp. 71-72 (letter dated June 10, 2008, advising the Mohrs that a new loan servicer, AHM Servicing, would be handling their payments); ECF No. 52-5 at p. 76 (December 2, 2008 letter sent by the Mohrs' attorney noting, "We are informed that the mortgage was assigned to American Home Mortgage"). Strangely, the latter correspondence was sent along with the Mohrs' signatures on a release of Mortgage, which was to be signed by BNC—presumably understood to be the owner of the Mortgage at the time—in connection with a settlement arrangement. See id. That settlement ultimately fell apart, and the release the Mohrs and BNC had signed was rescinded on February 4, 2009 (reestablishing BNC as the owner). See Mot. at 10; Prior MSJ Order at 3-4; see also ECF No. 52-7 (recorded rescission).

[14] The Court understands that this is the amount MLB paid based on the copy of the Mortgage Sale Agreement submitted as an exhibit by MLB. See Mot Ex. 7. The Agreement lists the purchase price for each asset as the amount listed in the asset

Mortgage Sale Agreement. MLB has also provided evidence that it, through its custodian and counsel, has had and maintained possession of the original Lost Note Affidavit—which includes a photocopy of the original Note and allonge—since MLB purchased the loan.[15] MLB's CSF ¶¶ 9-10; see also Mot. at 9.

The Mohrs have offered nothing to dispute these facts. Their only responses to MLB's reliance on the Lost Note Affidavit are that the Note was "in a REMIC [real estate mortgage investment conduit] and paid in 2006" and that "MLB cannot be a lawful beneficiary of a mortgage if it lacked possession of the promissory note." Opp. ¶ 36. On their first point, it is not clear to the Court why exactly the REMIC matters. Cf. Klohs v. Wells Fargo Bank, N.A., 901 F. Supp. 2d 1253, 1259-60 (D. Haw. 2012) (explaining that "[s]ecuritization does not alter the relationship or rights of the parties to the loan" and "does not modify the terms of the underlying obligations"). And the Mohrs' position that the Note was paid off and satisfied in 2006 is unpersuasive. The

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schedule, and the amount listed for the Mohrs' property is the unpaid principal balance, $466,737. Id.

[15] In its supplemental brief meant to address interest calculations, the Mohrs raise for the first time the argument that AHM was in Chapter 11 bankruptcy since August 2007, which—according to the Mohrs—is further evidence that the Lost Note Affidavit is "a fraud on the Court." ECF No. 143 ¶ 8. The Mohrs fail to allege the particulars of any such "fraud," nor do they explain how the prior owner's bankruptcy would impact MLB's current status as the possessor of the Lost Note Affidavit. Without such particulars, the Court sees no genuine issue of material fact raised by the Mohrs' unproven assertion that AHM was previously in bankruptcy.

Mohrs' only support for this argument is a declaration made by their private investigator William J. Paatalo, who opined that the "chain of title for the Mohr Mortgage is clouded and cannot be verified" and that the Note appears to have been "paid off" sometime in 2006. See ECF No. 135-3 ("Paatalo Decl."). This declaration—which was previously before the bankruptcy court and then this Court in connection with BNC's motion for summary judgment—does not create any dispute as to the material facts: whether the Mohrs defaulted on the loan and whether MLB is the party with standing to enforce Note and Mortgage.[16] The Mohrs have simply provided no evidence that they or anyone on their behalf paid off the loan.[17]

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[16] Paatalo's only "proof" that the loan has been paid off is a notation in an electronic database of a trust showing a blank space for the "current loan balance." See Ex. 8 to Paatalo Decl. The database contains several blank spaces for what might be relevant information about the loan, and the Mohrs have offered no evidence of any payment, including the amount, date, or payor. Not to mention, the "release" that Paatalo relies on to opine that the Mortgage was satisfied was expressly rescinded after the settlement that led to the initial release failed. See Mot. at 5-6 & n.5 & n.6 (discussing rescission based on failed TILA settlement); Reply at 8 & n.5 (same); see also ECF No. 94 (prior order discussing the recording of the document rescinding and cancelling the release, ECF No. 52-7).

[17] The Court also cannot help but wonder why the Mohrs would possibly have agreed to enter into settlement discussions with BNC in 2008—two years after they say the loan was paid off. The settlement terms would have had the Mohrs paying $463,394.32 to the prior lender, the amount of the original loan less some bank charges and interest payments made, when the loan had purportedly already been satisfied. Faced with this question at the hearing, counsel for the Mohrs indicated that they

The Mohrs' second point regarding MLB lacking possession of the original Note fares no better. The statutory scheme plainly provides for alternatives to enforcing an instrument when a party seeking to enforce lacks possession of the original document. Here, MLB has offered into evidence the Lost Note Affidavit, which establishes that a prior owner or servicer had possession of the Note and affirmed under oath that the Note was lost and its whereabouts could not be determined, and that affiliates, successors, and assigns could rely on the Affidavit as proof of the lost Note. Likewise, MLB submitted evidence that it purchased the Note and Mortgage and, in doing so, took possession of the original Lost Note Affidavit and allonge. From that point on, the Lost Note Affidavit became the substitute for the Note.

Applying the analysis in In re Allen, the Lost Note Affidavit—standing in for the Note—is a bearer instrument, which may "be negotiated by the transfer of possession alone. . . ." See HRS §§ 490:3-204(a) & 490:3-205(b); see also In re Allen, 472 B.R. at 567 ("As a bearer instrument, the Note was negotiable by transfer of possession alone."). Like the instrument in In re Allen, the Note here contains an indorsement in blank. Although the indorsement in blank is on an allonge rather than on the face of the instrument like in In re

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were not aware that the loan had been paid by some unknown party within the trust until they hired Paatalo to investigate the title in 2018. Their phantom-payment theory defies common sense. And the Mohrs have offered no factual evidence of such a payment.

Allen, that distinction is irrelevant because the undisputed evidence in the record shows that the allonge was "affixed to" the original Note.[18] Cf. In re Allen, 472 B.R. at 567 (discussing In re Weisband, 427 B.R. 13 (D. Ariz. Bankr. 2010), which held that GMAC failed to establish that it was a holder of the note because the evidence did not demonstrate that the allonge was affixed to the note). The allonge is thus treated as being made on the face of the Note. See HRS § 490:3-204(a) ("For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument.").

Accordingly, because the Note is indorsed in blank, it is a bearer instrument enforceable by a showing of

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[18] Plaintiff has not challenged the validity of the allonge or whether it was "affixed to" the original Note. Regardless, the evidence submitted by MLB establishes it was. A review of the record shows that the allonge has been together with the copies of the Note submitted previously to this Court and to the bankruptcy court. The allonge also references the correct loan number, and MLB's custodian has attested that the Note and allonge have been together in its possession since it purchased the loan. Moreover, the photocopy of the original Note and allonge (both attached to the Lost Note Affidavit) have consistent facial markings showing staple marks in the top left corner and two-hole punches at the top center of the papers, which indicates that the allonge was affixed to the Note. See Lost Note Affidavit. Compare In re Tovar, 2012 WL 3205252 at *6 (holding that bankruptcy court did not clearly err in holding that allonge was affixed to note even though document did not contain consistent hole-punch marks), with U.S. Bank, N.A. v. Miller, 2013 WL 12114100, at *7 (C.D. Cal. Sept. 30, 2013) (holding that evidence failed to show that allonge was "affixed to" the note because the documents were attached as separate exhibits and there was no indication that the allonge was physically attached).

possession. MLB has established its uninterrupted possession of the Lost Note Affidavit since late 2014, which entitles it to enforce the terms of the Note. Under these circumstances, MLB has demonstrated that it has standing to pursue rights under the Note and Mortgage as a holder and person not in possession of the Note but entitled to enforce it pursuant to HRS § 490:3-309.[19]

ii. The Mohrs' Arguments in Opposition

The Mohrs assert three main arguments in opposition, none of which the Court finds persuasive. See Opp. ¶ 1. They argue that (1) MLB "never invested in the mortgage loan nor paid anything to the Mohrs," id. ¶¶ 17, 24; (2) the Note and Mortgage have been satisfied, id. ¶ 4; and (3) the original Mortgage and subsequent assignments are all void, id. ¶¶ 2, 5, 19-23. The Court rejects these arguments and will address each in turn.

The Mohrs' first two arguments are easily disposed of. The Mohrs have not cited any Hawai'i law to support their argument that MLB could not have an interest in the Mortgage merely because it never "paid

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[19] Because Hawai'i follows the common-law rule that a transfer of an obligation secured by a security interest (here, the Note) also transfers the security interest (here, the Mortgage on the property), HRS § 490:9-203(g), that MLB has established its interest in the Note is sufficient to also establish its ownership of the Mortgage, regardless of the Mohrs' claims of fraudulent assignments. Cf. Toledo I, 139 Haw. at 372 n.17, 390 P.3d at 1259 n.17.

anything to the Mohrs." Opp. ¶ 17. MLB has submitted evidence of the Mortgage Sale Agreement with Lehman Brothers, through which the latter agreed to assign the Mortgage to MLB in exchange for payment. Payment to the mortgagor is not a condition of foreclosing on mortgage. On the Mohrs' second point—that the Note and Mortgage have been satisfied—the Court already rejected this argument above. The Mohrs have not provided sufficient evidence to create a genuine issue of material fact as to whether the Note has been satisfied.

The Mohrs' third argument is the crux of their Opposition. The Mohrs claim that the original Mortgage and subsequent assignments are all fraudulent and invalid. In this regard, their Opposition makes sweeping allegations of fraud and forgery to contend that the original Mortgage and subsequent assignments are all void.

Not only does this argument fly in the face of the fact that the Mohrs' initials appear on each page of the Mortgage and Note, but as the Court alluded to above and discussed in its Prior MSJ Order, these arguments are largely barred by the doctrine of res judicata. See Prior MSJ Order at 11-12. The Mohrs' claims were or could have been raised in BNC's bankruptcy proceedings or in the prior summary judgment proceedings before this Court. And while the Mohrs have attempted to now clarify some of their past fraud allegations—including by listing the apparent "differences" between the recorded version of the Mortgage and the version the Mohrs claim they actually signed, Mohr

Decl. ¶ 8—they have provided no indication for why these arguments were not raised before the bankruptcy court and then this Court in connection with BNC's motion for summary judgment and MLB's associated joinder.

Regardless, the Mohrs at best point out clerical errors or immaterial differences that have absolutely no impact on the terms of the agreement that they themselves admit to signing. See Paik-Apau v. Deutsche Bank Nat'l Tr. Co., Civ. No. 10-00699 SOM/RLP, 2012 WL 6569289, at *3-4 (D. Haw. Dec. 14, 2012) (rejecting arguments that clerical errors rendered mortgage void when the mortgagor failed to show "that the substance of any of her own loan obligations [wa]s misrepresented or altered"); U.S Bank Nat'l Ass'n v. Benoist, 136 Haw. 373, 362 P.3d 806 (Table) (Ct. App. 2015) (rejecting arguments of fraud because the mortgagors failed to cite facts or law showing how supposed irregularities "caused them any harm of damages"). The Court holds that Mohrs have not raised any genuine issue of material fact with respect to the validity of the Mortgage.

As to the Mohrs' attempts to challenge the assignments of the Mortgage, res judicata would also apply because they raised or could have raised these challenges before the bankruptcy court after the assignments were made. Nonetheless, the Court will briefly address the Mohrs' arguments on this point. The Mohrs primarily argue that some entities lacked the power and authority to transfer the Mortgage, and therefore MLB is without good title to enable it to

foreclose on the secured property. In essence, the Mohrs suggest that MLB must prove the validity of each and every transfer in the chain of title before it can foreclose on the property.[20] While MLB must prove it has standing to foreclose, "this court has never required a lender to go back and establish that every person or entity who assigned a note and mortgage had the power to do so." Deutsche Bank Tr. Co. v. Beesley, Civ. No. 12-00067 SOM/KSC, 2012 WL 5383555, at *4 (D. Haw. Oct. 30, 2012) (collecting cases); see also Paik-Apau, 2012 WL 6569289 at *4 ("There is simply no requirement that a lender go back through the chain of title before foreclosing on a loan to prove that every assignment of the loan was valid.").

Moreover, Hawai'i law is well settled that borrowers like the Mohrs generally lack standing to challenge the assignments of their loans. See Beesley, 2012 WL 5383555 at *4 (collecting cases). The Mohrs cannot show that they were parties to any of the assignments and, therefore, they cannot dispute the validity of those contracts. The Mohrs would only have authority to challenge the assignments as void, not merely as voidable. Igarashi v. Deutsche Bank Nat'l Tr. Co., Civ. No. 19-00083 JAO/KJM, 2019 WL 6689882, at *6 (D. Haw. Dec. 6, 2019); U.S. Bank N.A. v. Mattos, 140 Haw. 26, 35, 398 P.3d 615, 624 (2017); see Paik-Apu, 2012

[20] The Mohrs list "3 known fraudulent mortgage assignments involved in this case." Opp. ¶ 19. As MLB points out in its Reply, it is unclear what third assignment the Mohrs are referring to. See Reply at 11-12. The two relevant assignments are MERS-Lehman Brothers and Lehman Brothers-MLB.

WL 6569289 at *3 (holding that assignee had standing to foreclose even though a transfer to it may technically have been "voidable by one of the parties to the transfer"). None of the Mohrs' arguments support a finding that the Mortgage is void.[21] Accordingly, the Mohrs lack standing to challenge—and MLB is not burdened with proving—the validity of each of the assignments.

The Mohrs' arguments also fail on the merits. The Mohrs argue in part that the MERS-Lehman Brothers Assignment is void because MERS lacked the agency and authority to transfer the Note and Mortgage. Their argument is that MERS's agency ended when Finance America was dissolved following its merger with BNC. Opp. ¶ 5. Thus, they say, MERS's interest in the Note and Mortgage had "expired" and it was not authorized

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[21] See Lowther v. U.S. Bank N.A., Civ. No. 13-00235 LEK-BMK, 2014 WL 2452598, at *7 (D. Haw. May 30, 2014) (noting that allegations that a prior assignor lacked authority to assign a loan would "make the assignments voidable, not void, and thus do not support mortgagor standing"); see also Igarashi, 2019 WL 6689882 at *6-7 (collecting cases on void versus voidable). The only exception would be their argument under Hawai'i's UDAP law. Courts in this district have held that a contract formed in violation of UDAP laws is void. See, e.g., Bateman v. Countrywide Home Loans, Civ. No. 12-00033 SOM/BMK, 2013 WL 2181131, at *1 (D. Haw. May 20, 2013). This argument holds no weight, however, because the Court has already dismissed the Mohrs' UDAP claims as barred by res judicata and conclusory allegations of UDAP violations would not create a material factual dispute. Cf. Igarashi, 2019 WL 6689882 at *7 ("Plaintiffs' conclusory claim that Defendants have engaged in unfair or deceptive trade practices is also insufficient to demonstrate standing to challenge the assignment.").

to assign any interest to Lehman Brothers (who in turn assigned the Mortgage to MLB). Id. ¶ 19. These arguments are inconsistent with Hawai'i law.[22] See In re Tyrell, 528 B.R. 790, 794 (D. Haw. Bankr. 2015) (holding that indorsements on a promissory note by out-of-business payees did not raise a genuine issue that the indorsements were forged); Bank of Am. v. Hill, 136 Haw. 372, 362 P.3d 805 (Table) (Ct. App. 2015) (rejecting a similar argument that MERS had improperly assigned a mortgage on behalf of the principal entity, which no longer existed at the time of the assignment). Regardless, the plain language of the Mortgage here clearly granted MERS the authority to act on behalf of Finance America and its successors and assigns. See Mortgage ("MERS is a separate corporation that is acting solely as nominee for Lender and Lender's assigns").

In sum, the Mohrs have failed to present sufficient evidence to contradict MLB's showing that its purchase through the Mortgage Sale Agreement and possession of the Lost Note Affidavit made it the holder or

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[22] The Mohrs cite Toledo II as authority for their argument that the MERS-Lehman Brothers Assignment was a sham because MERS was acting as a "strawman." Yet Toledo II barely discusses the issue of MERS's authority or its position in the loan process. The court merely lists the homeowner's argument that a prior assignment was a sham because "MERS was not the mortgagee" and "acted only as a strawman" as one of several arguments that survived the motion to dismiss stage under the relaxed state-law pleading standard. See Toledo II, 143 Haw. at 265, 428 P.3d at 777 (noting that "it does not appear beyond doubt that Homeowner could not prove a set of facts entitling her to relief").

person not in possession but entitled to enforce the Note.[23] MLB has presented evidence that the Note and Mortgage were conveyed and delivered, with the right to enforce the terms of the original Note intact, from prior owner Lehman Brothers to MLB, and the Mohrs have provided no evidence to the contrary. The Mohrs' concocted arguments for avoiding foreclosure while it remains undisputed that they have not made any payments since 2004 are insufficient to preclude summary judgment on MLB's Counterclaim. Accordingly, to the

[23] The evidence the Mohrs raised for the first time in their supplemental briefing, ECF No. 143, likewise does not present any material factual disputes. The Mohrs challenge MLB's standing based on (1) an assignment recorded just before the instant Motion was filed purporting to assign the loan from MLB to MCH SUB I, LLC ("MCH"); (2) evidence that, in the course of the dissolution of MLB and winding up its affairs, MLB cancelled its authority to transact business in Hawai'i; and (3) a loan-servicing document MLB submitted with its Motion that the Mohrs suddenly contend is evidence of the loan's zero balance. ECF No. 143 ¶¶ 1-4, 10-11. First, the loan document still provides no proof of payment and any disputes the Mohrs have with respect to MLB's specific balance or tax calculations can be taken up at a later time. Second, as MLB explains in its response, the assignment from MLB to MCH was subsequently rescinded, as was MLB's apparently erroneously-filed cancellation of authority. ECF Nos. 146-2 (rescission of assignment) & 146-3 (correction of cancellation). Regardless, none of these facts impact the Court's above analysis and conclusion that MLB has standing as the party entitled to enforce the Note. See McCarty v. GCP Mgmt., LLC, 495 F. App'x 836, 837 (9th Cir. Nov. 7, 2012) (explaining that entity without a certificate of authority may still maintain a counterclaim if it does not qualify as "transacting business" in the state (citing HRS §§ 428-1008, 428-1003)). As explained throughout this Order, MLB has established that it continues to possess the Lost Note Affidavit and there is no genuine issue of material fact as to it being the proper party to enforce the Note.

extent that MLB seeks summary judgment on its Counterclaim seeking a decree of foreclosure, the Motion is GRANTED.

II. The Mohrs' Remaining Claims are Dismissed

In their Opposition and at oral arguments, the Mohrs cross-moved for summary judgment on the claims in their Amended Complaint. See Opp. at 1. Because the Court has already held that MLB is entitled to summary judgment on its Counterclaim, the Mohrs' claims necessarily fail as well.

Counts I through III of the Amended Complaint allege wrongful foreclosure, and seek a declaratory judgment and to quiet title. Having held that MLB is entitled to a decree of foreclosure as the "person entitled to enforce" the Note and Mortgage, the Mohrs' claims for wrongful foreclosure, declaratory judgment, and quiet title based on the same material facts also fail.

Count IV of the Mohrs' Amended Complaint must also be dismissed pursuant to res judicata and the law of the case doctrine. Count IV of the Mohrs' Amended Complaint asserts UDAP violations:

> The acts and conduct of Defendant MLB Sub I, LLC, its agents, predecessors, constitute an unfair or deceptive trade practice in the conduct of their trade or commerce as either or both mortgage lenders, mortgage servicers, mortgage holders, or claimants, debt collectors, and/or finance companies.

Am. Compl. ¶ 17. In its Prior MSJ Order addressing, in part, MLB's joinder motion, the Court unequivocally granted summary judgment to MLB on the Mohrs' UDAP claims. The Mohrs have offered no reason to stray from its prior holding on this point. See Thomas v. Bible, 983 F.2d 152, 154 (9th Cir. 1993) ("[A] court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case."); see also United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997) (discussing circumstances where a court has discretion to depart from law of the case). The Court thus declines to disturb its prior ruling that MLB is entitled to summary judgment for the UDAP claim. That claim remains barred by res judicata.

For these reasons, MLB's Motion is GRANTED to the extent that it seeks summary judgment on all four counts of the Amended Complaint. To the extent that the Mohrs seek summary judgment in their favor on the claims in the Amended Complaint, such relief is DENIED.

III. MLB is Entitled to a Decree of Foreclosure

Because MLB has met the four prongs necessary for a decree of a foreclosure and shown that it has standing to foreclose, and because the Mohrs have failed to present any genuine issue of material fact, the Court holds that summary judgment in MLB's favor is

appropriate.[24] The Court hereby orders an interlocutory decree of foreclosure.[25]

In view of the ongoing COVID-19 pandemic, the government shutdown and stay-at-home order, the common-law duty to obtain the best price for the property as enunciated in Hungate v. Law Office of David B. Rosen, 139 Haw, 394, 408, 391 P.2d 1, 15 (2017), and the fact that the real estate market is inactive and Hawai'i has temporarily halted evictions, the Court

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[24] The Court notes that it has considered the requirement in HRS § 490:3-309(b) that judgment not be entered in favor of MLB unless the Court finds that the Mohrs are "adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument." The Mohrs have not offered any alternative party who may stake a claim in ownership of the Note and Mortgage, and the Court does not see any danger of double enforcement of the security interest. At the hearing, MLB's counsel also represented and agreed that the foreclosure would be conditioned on MLB's agreement to indemnify the Mohrs in the event they are faced with enforcement of the same promissory Note by another party.

[25] At the hearing, counsel for MLB indicated that MLB was not seeking a deficiency judgment, even in the event the sale of the property is less than the outstanding loan balance. Further, at the Court's request, MLB submitted proof of its calculation of the outstanding amount of the loan balance. See Decl. of S. Lisby, ECF No. 142-1. According to MLB, the outstanding principal balance is $466,737.39, and the interest at the adjustable rate through January 31, 2020, is $600,294.34. Id. ¶ 4. The Court hereby reserves the question of the exact amount (including interest) of the indebtedness secured by the Mortgage until after the confirmation of the sale. See United States v. Guerette, Civ. No. 09-00133-ACK-KSC, 2010 WL 3260191, at *6, 10 (D. Haw. Aug. 13, 2010) (reserving the question of the exact amount owed until after the confirmation of sale) (citing Anderson, 3 Haw. App. at 550, 654 P.2d at 1375).

finds that it would be inequitable and not in the interest of either party to proceed with the foreclosure sale under the existing conditions. The Court thus finds and so orders that the Commissioner may not commence any actions to foreclose on the Mohrs' property until further ordered by this Court. Either party may petition the Court to authorize proceeding with the sale when it appears that the foregoing conditions have ended and the real estate market is once again active; and the other party will have an opportunity to respond.

It is hereby ORDERED, ADJUDGED, and DECREED for the reasons stated herein that:

1. MLB's Motion for summary judgment, ECF No. 128, is hereby GRANTED.

2. The Mohrs are in default under the terms of the Note and Mortgage, which are currently held by MLB.

3. The Mortgage currently held by MLB shall be and is hereby foreclosed as prayed, and the property described in Exhibit 2 to MLB's Concise Statement of Facts shall be sold at public auction or by private sale, without an upset price. Such sale of the subject property shall not be final until approved and confirmed by the Court. The Court hereby reserves the question of the exact amount (including interest) of the indebtedness secured by the Mortgage.

4. The Commissioner as appointed herein by the Court shall sell the property within four (4) months

after the Commissioner is notified of a separate and forthcoming order issued by this Court in which the Court recognizes that the COVID-19 threat has passed and that the foreclosure sale may commence. The Commissioner shall hold all proceeds of the sale of the property in an interest-bearing account to the credit of this cause subject to the directions of this Court. Upon payment according to such directions, the Commissioner shall file an accurate accounting of the Commissioner's receipts and expenses.

5. Carol Monahan Jung, Esq. of Jung & Vassar PC is hereby appointed by this Court as Commissioner, and as Commissioner she shall henceforth sell the property at foreclosure sale to the highest bidder at the Commissioner's sale by public auction or by private sale, without an upset price, after first giving notice of such sale by publication in at least one newspaper regularly issued and of general circulation in the District of Hawai'i. Said notice shall be published once a week for at least three (3) consecutive weeks, with the auction to take place no sooner than fourteen (14) days after the appearance of the third advertisement. Said notice shall give the date, time, and place of the sale and an intelligible description of the property, including any improvements, and shall follow the format described in HRS § 667-20. The Commissioner shall have further authority to continue the sale from time to time at the Commissioner's discretion. Any change in the time, place, or terms specified in the original notice of sale requires that MLB ensure that the Commissioner publishes a new notice of postponed sale with

the new terms, and such notice shall follow the format described in HRS § 667-20.1. The public sale shall take place no sooner than fourteen (14) days after the date of the notice of postponed sale, and not less than fourteen (14) days before the rescheduled date a copy of the new notice of postponed sale shall be posted on the mortgaged property and delivered to the Mohrs, MLB, and any other person entitled to receive such notifications.

6. No bond shall be required of the Commissioner.

7. In the event that the Commissioner refuses, or becomes unable, to carry out her duties set forth herein, the Court shall appoint another without further notice of hearing.

8. The Commissioner shall sell the subject property by foreclosure sale in its "AS IS" condition, without any representations or warranties whatsoever as to title, possession, or condition.

9. The Commissioner and all persons occupying the subject property shall allow reasonable access to view the subject property, a minimum of two separate days prior to the sale of the subject property, by means of an open house or other reasonable means.

10. The fee of the Commissioner shall be such as the Court deems just and reasonable, together with actual and necessary expenses incurred with the sale of the subject property.

11. The sale so made and confirmed shall perpetually bar the Mohrs and all persons and parties claiming by, through or under the Mohrs, except governmental authorities enforcing liens for unpaid real property taxes, from any and all right, title and interest in the subject property or any part thereof.

12. MLB is hereby authorized to purchase the subject property at the foreclosure sale. The successful bidder at the foreclosure sale shall be required at the time of such sale to make a down payment to the Commissioner in an amount not less than ten percent (10%) of the highest successful price bid, such payment to be in cash, certified check or cashier's check, provided that should MLB be the high bidder, it may satisfy the down payment by way of offset up to the amount of its secured debts. The balance of the purchase price must be paid in full at the closing of the sale, which shall take place 35 days after entry of the order confirming the sale. If the bidder fails to fulfill this requirement, the deposit shall be forfeited and applied to cover the cost of sale, including the Commissioner's fee, with distribution of any amount remaining to be determined by the Court. Such payment is to be in cash, certified check, or cashier's check, provided that, should MLB be the high bidder at the confirmation of sale, it may satisfy the balance of the purchase price by way of offset up to the amount of its secured debts, as discussed above, as appropriate. Costs of conveyancing, including preparation of the conveyance document, conveyance tax, securing possession of such mortgage property, escrow services, and recording of

such conveyance, shall be at the expense of such purchaser.

13. Pending the sale of the mortgaged property, the Mohrs shall take all reasonable steps necessary to preserve the real property (including all buildings, improvements, fixtures, and appurtenances on the property) in its current condition. The Mohrs shall not commit waste against the property, nor shall they cause or permit anyone else to do so. The Mohrs shall not do anything that tends to reduce the value or marketability of the property, nor shall they cause or permit anyone else to do so. The Mohrs shall not record any instruments, publish any notice, or take any other action (such as running newspaper advertisements or posting signs) that may directly or indirectly tend to adversely affect the value of the property or that may tend to deter or discourage potential bidders from participating in the public auction or private sale, nor shall they cause or permit anyone else to do so.

14. All persons occupying the mortgaged property shall leave and vacate the property permanently within sixty (60) days of the date of the Court's order finding that the COVID-19 threat has passed and the foreclosure may commence, each person taking with them their personal property (but leaving all improvements, buildings, and appurtenances to the property). If any person fails or refuses to leave and vacate the property by the time specified in this Decree, the Commissioner is authorized and directed to take all actions that are reasonably necessary to bring about the ejectment of those persons, including obtaining a judgment

for possession and a writ of possession. If any person fails or refuses to remove his or her personal property from the premises by the time specified herein, any personal property remaining on the property thereafter is deemed forfeited and abandoned, and the Commissioner is authorized to remove it and dispose of it in any manner the Commissioner sees fit, including sale, in which case the proceeds of the sale are to be applied first to the expenses of sale and the balance to be paid into the Court for further distribution.

15. The sale can be supplemented with the practices and procedures in the State of Hawai'i and Section 667 of the Hawai'i Revised Statutes.

16. The Court reserves jurisdiction to determine the party or parties to whom any surplus shall be awarded herein.

CONCLUSION

For the foregoing reasons, the Court GRANTS MLB's Motion for Summary Judgment, ECF No. 128, and DENIES the Mohrs' counter-motion for summary judgment, ECF No. 136. Accordingly, MLB is entitled to, and the Court hereby issues, a decree of foreclosure on the subject property as outlined above.[26]

IT IS SO ORDERED.

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[26] On April 8, 2020, the Mohrs filed a motion to continue the trial date and pretrial deadlines, ECF No. 147, which MLB does not oppose, ECF No. 148. In view of this Order and Decree, that motion is denied as moot.

DATED: Honolulu, Hawai‘i, April 13, 2020.

/s/ Alan C. Kay
Alan C. Kay
Sr. United States District Judge

[SEAL]

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

SANFORD A. MOHR and TINA A. MOHR, Individually and as Co-Trustees of their October 15, 1996 unrecorded revocable trust,

Plaintiff(s),

vs.

MLB SUB I, LLC; JOHN DOES 1-20; JANE DOES 1-20; DOE PARTNERSHIPS 1-20; DOE CORPORATIONS 1-20; and DOE ENTITIES 1-20,

Defendant(s).

JUDGMENT IN A CIVIL CASE

Case: CIVIL NO. 16-00493 ACK-WRP

(Filed Apr. 13, 2020)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[✓] **Decision by Court.** This action came for hearing before the Court. The issues have been heard and a decision has been rendered.

On April 13, 2020, the Court issued its Order, ECF 150: "ORDER GRANTING DEFENDANT MLB SUB I'S MOTION FOR SUMMARY JUDGMENT AND ISSUING DECREE OF FORECLOSURE" ("April 13, 2020 Order),

IT IS ORDERED AND ADJUDGED that Summary Judgment is granted as to Defendant MLB SUB I, LLC and a Decree of Foreclosure is

hereby issued pursuant to and in accordance with the April 13, 2020 Order.

April 13, 2020	SUE BEITIA
Date	Clerk

[SEAL]

/s/ Sue Beitia by J.I.
(By) Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SANFORD A. MOHR; TINA A. MOHR, Individually and as Co-Trustees of their October 15, 1996 unrecorded Revocable Trust, Plaintiffs-Appellants, v. MLB, SUB I, LLC; et al., Defendants-Appellees.	No. 20-15895 D.C. No. 1:16-cv-00493-ACK-WRP District of Hawaii, Honolulu ORDER (Filed Aug. 12, 2021)

Before: NGUYEN, OWENS, and FRIEDLAND, Circuit Judges.

The panel has voted to deny Appellants' petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellants' petition for rehearing en banc is DENIED.

RELEVANT STATUTES

Hawai'i Revised Statute § 428-1003
Activities not constituting transacting business

(a) The activities of a foreign limited liability company that do not constitute transacting business in this State within the meaning of this part include:

(1) Maintaining, defending, or settling an action or proceeding;

(2) Holding meetings of its members or managers or carrying on any other activity concerning its internal affairs;

(3) Maintaining bank accounts;

(4) Maintaining offices or agencies for the transfer, exchange, and registration of the foreign limited liability company's own securities or maintaining trustees or depositories with respect to those securities;

(5) Selling through independent contractors;

(6) Soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside this State before they become contracts;

(7) Creating or acquiring indebtedness, mortgages, or security interests in real or personal property;

(8) Securing or collecting debts or enforcing mortgages or other security interests in property

securing the debts, and holding, protecting, and maintaining property so acquired;

(9) Conducting an isolated transaction that is completed within thirty days and is not one in the course of similar transactions of a like manner; or

(10) Transacting business in interstate commerce.

(b) For purposes of this part, the ownership in this State of income-producing real property or tangible personal property, other than property excluded under subsection (a), constitutes transacting business in this State.

(c) This section does not apply in determining the contacts or activities that may subject a foreign limited liability company to service of process, taxation, or regulation under any other law of this State.

Hawai'i Revised Statute § 428-1008
Effect of failure to obtain certificate of authority

(a) A foreign limited liability company transacting business in this State may not maintain an action or proceeding in this State unless it has a certificate of authority to transact business in this State.

(b) The failure of a foreign limited liability company to have a certificate of authority to transact business in this State does not impair the validity of a contract or act of the company or prevent the foreign limited

liability company from defending an action or proceeding in this State.

(c) Limitations on the personal liability of managers, members, and their transferees are not waived solely by transacting business in this State without a certificate of authority.

(d) If a foreign limited liability company transacts business in this State without a certificate of authority, service of process may be made upon the company as set forth in section 428-110(b) at any address used by the company as its address for purposes of its business transactions.

(e) A foreign limited liability company which transacts business in this State without a certificate of authority, shall be liable to the State in an amount equal to all fees and penalties which would have been imposed by this chapter upon that foreign limited liability company had it obtained such a certificate and filed all records and reports required by this chapter. The attorney general may bring proceedings to recover all amounts due this State under the provisions of this section.

Hawai'i Revised Statute § 490:3-309
Enforcement of lost, destroyed, or stolen instrument

(a) A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in rightful possession of the instrument and entitled to

enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(b) A person seeking enforcement of an instrument under subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, section 490:3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SANFORD A. MOHR and TINA A. MOHR, Individually and as Co-Trustees of their October 15, 1996 unrecorded Revocable Trust, Plaintiffs-Appellants, vs. MLB, SUB I, LLC; et al., Defendants-Appellees. 2021-July 15-1 Appellants' petition en banc	No. 20-15895 D.C. No.1: 16-cv-00493-ACK-WRP U.S. District Court for Hawaii, Honolulu PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING EN BANC (Filed Jul. 15, 2021)

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Individually and as Co-Trustees of their
October 15, 1996 unrecorded Revocable Trust

PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING EN BANC

Come now Plaintiffs-Appellants, hereafter Mohrs, and pursuant to Rule 35 of the Federal Rules of

Appellate Procedure (FRAP) and petition this Honorable Court for rehearing en banc of this appeal of the Panel's 9 July 2021 memorandum decision, a copy of which is appended, being Document #33-1 in the Court's electronic file.

INTRODUCTION

In the undersigned counsel's judgment this case involves one or more questions of exceptional importance or consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions in mortgage foreclosure actions involving homeowner's claims for quiet title, wrongful foreclosure, unfair and deceptive trade practices under Hawaii law, as listed herein below.

REASONS WHY THIS PETITION SHOULD BE GRANTED

1. The Courts' decisions deprive Mohrs of due process and equal protection of the laws in violation of U.S. Constitution.

2. BNC did not merge with Finance America, it was just the reverse in 2005 and then later, Finance America ceased to exist in 2007 per Paatalo's Declaration in ECF 86-1. Therefore MERS agency died in 2007 making its purported mortgage assignments void. This makes the further purported mortgage assignments to and by Lehman Brothers void too.

3. The Courts' discussion on pages 4-6 of ECF 150 and in Dkt Entry 331 at pages 2-5 about the lost promissory note missed the point that if the note was at some point possessed or owned by American Home Mortgage or Servicing, that entity and series of related entities filed for Chapter 11 protection on 6 August 2007 in Delaware Bankruptcy Court. Thus, there is no evidence by MLB Sub I, LLC (hereafter as MLB) that the court-appointed Plan Trustee assigned or endorsed the lost note thereby creating more genuine issues of material fact requiring MLB's motion for summary judgment to be denied.

4. The same reasoning applies to the purported mortgage assignments by or thru Lehman Brothers Holdings, Inc., etc. as it was in Chapter 11 Bankruptcy too since 2008 and continuing in 2014. Thus there is no proper evidence that April Smith was authorized to sign for the bankrupt Lehman Holdings in 2014 nor was it approved by the bankruptcy court trustee, if one existed.

5. The decisions disregarded Mohrs' evidence of forgery making the disputed documents void per *Palau v. Helemano Land Co.*, 22 Haw. 357 (Haw. Terr. 1914).

6. The decisions disregarded Mohrs' proof that the mortgage documents claimed by MLB were altered.

7. The decision disregarded Mohrs' proof that MLB's claims are based on fraud so therefore the Court should not reward that but punish it.

8. The decision that Mohrs are precluded by *res judicata* from raising these issues here because of the Lehman Brothers bankruptcy is wrong because the bankruptcy court lacked subject matter jurisdiction to decide a quiet title claim on land in Hawaii. When a court lacks subject matter jurisdiction, any decision by that court is void. *Amantiad v. Odum*, 90 Haw. 152, 159, 977 P.2d 160,167 (1999).

9. The 13 April 2020 order, decree and judgment violate *Bank of America v. Reyes-Toledo*, 139 Haw. 361, 360 P.3d 1248 (2017) ("*Toledo I*") and *Bank of America v. Reyes-Toledo*, 143 Haw. 249, 428 P.3d 761 (2018) ("*Toledo II*") as Mohrs proved they have valid claims against MLB.

10. MLB's proof failed to comply with *U.S. Bank v. Mattos*, 140 Haw. 26, 398 P.3d 615 (2017). MLB failed to prove that it is the current trustee of the REMIC Trust identified ECF # 135 & 136 by Mohrs and in MLB's motion for summary judgment where MLB's counterclaim does not allege nor did MLB prove that it is suing in a representative capacity as the current trustee of an existing REMIC trust Mohrs identified as being the FAMLT 2004-2. Therefore, MLB lacks standing to counterclaim for mortgage foreclosure.

11. The decisions dismissing Mohrs' argument that the MERS agency died when Finance America, LLC ceased to exist when it merged into BNC Mortgage, Inc. and was dissolved in 2007 are contrary to the law and the evidence because any purported mortgage assignments by MERS after its dissolution are void.

12. Mohrs' supplemental memorandum filed 16 March 2020 in ECF # 143 proved that MLB ceased to exist on 30 December 2019 so lacks standing proving the judges' decisions violated *Toledo I and II*, failing to apply and follow Hawaii law.

13. The judges erroneously held MLB had standing to counterclaim seeking foreclosure when it failed to prove it was the owner of Mohrs' note and mortgage that Mohrs proved were paid in 2006 and transferred into the FAMLT 2004-2 on 6 August 2004 and the MLB is not the current trustee of said trust.

The following lists what Mohrs contend were the pertinent and relevant facts opposing MLB's Motion for Summary Judgment in **2 ER @135**:

No.	**Petitioners Mohrs' Facts**	**Evidence Source**
1	Mohrs as co-trustees of their revocable trust own the subject land in Kailua-Kona, Hawaii	Mohrs' Decl. ¶1-5
2	Mohrs are consumers with respect to the mortgage and note involved in this case.	Mohrs's Decl. ¶ 5
3	The mortgage document Mohrs signed before recording is shown in Exhibit A to their declarations.	Ex. A to Mohrs' Decl. and ¶ 8
4	The mortgage document Mohrs signed was altered before it was recorded.	Mohrs' Decl. ¶ 8-9 & Exh. A to their Decl.

No.	Petitioners Mohrs' Facts	Evidence Source
5	The contested Mohr mortgage and note were securitized into the FAMLT 2004-2 Trust in 2004 and paid by 31 May 2006.	Paatalo's Decl. pgs. 4-15 & attached his exhibits 8 & 9 to Decl.
6	MERS' agency for Finance America, LLC expired in February 2007, when it was dissolved in California.	Ex. 8 to Paatalo's Decl. & pages 7-15 of his Decl.; Mohrs' Decl. ¶ 12-13.
7	Mohrs' promissory note was paid in May 2006.	Mohrs' Decl. ¶21 & Paatalo's Decl. Pg 4 & his Exh. 8 & 9.
8	MLB's conduct amounts to an unfair trade practice so it is liable to Mohrs for over $633,000 plus attorney fees and costs.	Mohrs' Decl. ¶18-22
9	MLB never paid any money to Mohrs so not entitled to any equitable lien nor remedy.	Mohrs' Decl. ¶ 23
10	MLB's claimed ownership of Mohrs' mortgage and note is based on fraudulent and void mortgage assignments.	Mohrs' Decl. ¶27-41

Mohrs' arguments in the trial court and on appeal are summarized below:

a. The purported assignment by Lehman Brothers, Inc. by MLB Sub I, LLC as attorney-in-fact to MLB recorded March 25, 2014 is void.

b. The purported assignment by MERS to Lehman Brothers Holdings, Inc., recorded April 22, 2014 is likewise void because MERS was just a recording system in an electronic database and was nothing more than a fraud and a strawman as a fraud on the public. MERS was not the mortgagee when the mortgage was sold and transferred to FAMLT 2004-2 in 2004.

c. The purported assignment by Lehman Brothers Holdings, Inc. by MLB Sub I LLC as attorney in fact, recorded April 25, 2014, is likewise void, because MERS agency died when Finance America, LLC ceased to exist when it merged into BNC Mortgage, Inc. and further when it was dissolved in 2007.

d. Lehman Brothers Holdings, Inc. filed for bankruptcy thereby ending the purported agency for Finance America, LLC on or about September 15, 2008, thereby rendering any purported transfers by Lehman Brothers Holdings, Inc. thereafter void.

e. On or about December 2, 2008 BNC Mortgage Inc., purported successor by merger with Finance America, LLC released the mortgage involved in this case and therefore it has been released of record and paid. Upon merger of Finance America LLC into BNC Mortgage, Inc. as successor automatically as a matter of law caused Finance America, LLC to cease to exist and it disappeared thereafter upon the merger per California Corporation Code §1107, and Finance America, LLC was dissolved in 2007.

Mohrs proved the affirmative defense that MLB cannot prove compliance with Hawaii cases, in particular

Toledo I and is therefore subject to liability to Mohrs' amended complaint under *Toledo II*.

Contrary to the judges' decisions, Mohrs proved the following facts by competent evidence at least creating genuine issues of material fact involving credibility determination thus requiring MLB's summary judgment to be denied per *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986); and *His and Her Corp. v. Shake-N-Go Fashion, Inc.*, 572 Fed. Appx. 517 (9th Cir. 2014):

1. The defense that the notary public on the mortgage claimed by MLB is a fraud and void as the notary public goes by 2 different names and did not personally take Mohrs' acknowledgment.

2. MLB's Exhibit 3 purported mortgage assignment is void because Finance America, LLC ceased to exist and was dissolved in California in 2007, therefore the purported mortgage assignment contained in Exhibit 3 is void, phony, and may be a forgery making it void per *Palau v. Helemano Land Co.*, 22 Haw. 357 (Haw. Terr. 1914).

3. MLB's Exhibit 4 purported mortgage assignment is void as Lehman Brothers was not the assignee of the mortgage in 2014 and no documents are attached to the counterclaim proving how Lehman Brothers Holding, Inc. owned the mortgage in 2014 when it was still in Chapter 11 bankruptcy proceedings. In addition, there is no showing that April Smith was authorized to sign Exhibit 4 on behalf of Lehman Brothers Holdings, Inc. in April of 2014, almost 6 years after Lehman

Brothers Holdings, Inc. filed for Bankruptcy protection.

4. The defense that MLB did not invest in the mortgage loan so is not entitled to any equitable lien nor constructive mortgage nor declaratory relief.

5. The defense of MLB's assumption of risk and contributory negligence based on the facts opposing MLB's motion for summary judgment.

6. The defense of fraud, in that Mohrs proved that MLB is not the real party-in-interest per FRCP Rule 17 and owner of both the note and mortgage through any claimed valid assignments to and/or through MERS and Lehman Brothers Holding, Inc., so not entitled to a foreclosure decree.

7. The defense of illegality, in that MLB is trying to foreclose a mortgage and note which it does not own.

8. The defenses that there are no valid interim assignments of the mortgage to MLB nor any valid negotiation for value to MLB of the Mohrs' promissory note that was lost before MLB got the lost note affidavit.

9. The defense that MLB is not a holder in due course of Mohrs' promissory note.

The **Declaration** of private investigator, William J. Paatalo, appears in **2 ER 135-3 @ pages 1-32**, (Volume 2 of the excerpt of record @ pages cited) which is not simply his report per the Panel's opinion but **his testimony** per his **declaration** supported by documents summarized as follows:

1. He is an Oregon licensed private investigator with 17 years of combined law enforcement and mortgage industry experience, having worked for eight years investigating foreclosure fraud, titles and issues related to securitization of such mortgage loans. He has performed such analyses in all of the Western states and including the states of Florida, Ohio, Montana, New Jersey and Illinois. He testified at trial as an expert witness on August 6, 2018 in the California Superior Court in San Diego.

2. He has been deemed qualified by courts concerning his knowledge of the Pooling and Servicing Agreements and various Securities and Exchange Commission filings, and all chain of title analysis concerning publicly recorded documents.

3. He was retained by Mohrs to learn what defects, if any, and discrepancies or fraud existed regarding the mortgage involved in their case. He looked into the Pooling and Servicing Agreement for Finance America Mortgage Loan Trust 2004-2, and in doing so he found that the original lender, Finance America, LLC, sold the Mohrs loan/debt to undisclosed securitization participants on or about August 6, 2004 concerning the Finance American Loan Trust 2004-2 Trust.

4. He determined that the subject loan of about $457,732 was paid off within that Trust (FAMLT 2004-2 Trust) on May 31, 2006. He further learned that fraudulent assignments of the subject mortgage were recorded after the mortgage lien was released in an effort to hide and conceal the sale and pay off of the mortgage loan/debt to the FAMLT 2004-2 Trust.

5. In determining the foregoing, he ran a securitization check of the subject loan and determined that it was paid off within the Trust because the data showing in the securitization research showed that the current balance owed the investors was $0.00 in the FAMLT 2004-2 Trust.

6. The cut off date for transferring loans into that Trust was August 1, 2004 and the closing date was August 6, 2004. His research also proved that the Trustee of that Trust is Deutsche Bank National Trust Co. His research further shows that the assignor of the assignment recorded April 25, 2014 to MLB Sub I, LLC, a Delaware limited liability company, was dated September 9, 2013. He further proved that the first assignment of the mortgage of record was on March 25, 2014 in which the assignor was Lehman Brothers Holdings by MLB Sub I, LLC, a Delaware limited liability company, by its attorney in fact, assigning the mortgage to MLB Sub I, LLC. His research proves that the second assignment was recorded April 22, 2014 in which Mortgage Electronic Registration Systems, Inc. was the assignor and Lehman Brothers Holdings, Inc. was the assignee. The third mortgage assignment was recorded April 25, 2014 in which Lehman Brothers Holdings, Inc. was the assignor, executed by MLB Sub I, LLC, a Delaware Limited Liability Company, by virtue of a power of attorney, and the assignee was to itself, MLB Sub I, LLC. In his opinion all such assignments are fraudulent because of the following.

7. From his experience and knowledge in reviewing thousands of security instruments with MERS ID numbers, MERS is deactivated in the chain of

> ownership after the mortgages are sold into Trusts. In this case, Lehman Brothers Holdings, Inc. filed for bankruptcy on September 15, 2008, and therefore its relationship with MERS ended and in particular did so also upon the sale and transfer of the Mohr loan into FAMLT 2004-2 Trust on or about August 6, 2004. Therefore, the purported listed mortgage assignments are fraudulent.

On 16 March 2020, Mohrs' supplemental memorandum opposing the declarations of Mr. Kikawa and Ms. Lisby has Tina Mohr's **declaration, [2 ER @ 143]**, proves the following undisputed facts:

A. She had never seen the document that MLB claimed it sent to Mohrs on 9 January 2020, being Exhibit 17, but that document proves that Mohrs were told to make the checks payable to **MCH** Sub I LLC and to remit the payments to **MCH** Sub I. **[not MLB]**

B. She ran an internet Google search on **MCH** Sub I LLC, and learned that it was a Delaware corporation in which April Smith was listed as a manager, and that it was incorporated about 3 months before March of 2020, on or about January of 2020.

C. She bought a certified copy of the authority in Hawaii for **MCH** Sub I LLC as a foreign limited liability company to do business in the state of Hawaii, in which April Smith was listed as a manager.

D. She found in the Hawaii Bureau of Conveyances a document proving that the Mohr purported mortgage was purportedly assigned from MLB Sub I

LLC to **MCH** Sub I LLC, notarized on 15 December 2019 and recorded in the Bureau of Conveyances on 16 January 2020 per Exhibit C to her declaration.

E. She discovered from the Department of Commerce and Consumer Affairs in Hawaii that on 25 November 2019, MLB's last annual filing for registration to transact business in Hawaii was filed per Exhibit D to her declaration. On 6 September 2019, MLB applied to cancel its Hawaii registration effective on 9 December 2019, which certificate of cancellation was signed by the Vice President of MLB, being April Smith, all of which is further shown in Exhibit E attached to her declaration.

F. She proved that based upon her research from the Delaware Secretary of State that MLB **ceased to exist** as a Delaware corporation on 30 December 2019, which was 21 days before MLB filed its motion for summary judgment, all as proved by Exhibit F to her Declaration.

G. She also proved that April Smith was purportedly the Vice President of Lehman Brothers Holding, Inc. in April of 2014. **[2 ER @ 143].**

ARGUMENT

The trial court and the Panel, by refusing to follow Hawaii case and statutory law, the U.S. Supreme Court and 9th Circuit cases in deciding the cross motions for summary judgment, denied Mohrs their Constitutional rights to due process and equal protection.

Constitutional issues are reviewed on appeal de novo. *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681, 684 (9th Cir. 1988). Accord

Rosenbaum v. City and County of San Francisco, 484 F.3d 1142, 1152 (9th Cir. 2007).

District Court's decisions in granting summary judgment are reviewed on appeal de novo. *Florer v. Congregation Pidyon Shevuyim, NA*, 639 F.3d 916, 921 (9th Cir. 2011). Accord *Oswalt v. Resolute Industries, Inc.*, 642 F.3d 856, 859 (9th Cir. 2011).

Mohrs' rights to due process are guaranteed to them by the Fourteenth Amendment to the United States Constitution, and Article I, Section 5 of the Hawaii Constitution. Those constitutional provisions prohibit courts from depriving persons of their life, liberty, or property without due process of law. *Romero vs. Star Markets, Ltd.*, 82 Haw. 405, 412, 922 P.2d 1018, 1025 (1996). Where a court acts in a manner inconsistent with due process, the judgment that follows is void. *In re Genesys Data Technologies, Inc.*, 95 Haw. 33, 38, 18 P.3d 895, 900 (2001).

Also of constitutional import are the equal protection provisions of the Fourteenth Amendment to the United States Constitution and Article I, Section 5 of the Hawaii Constitution prohibiting courts from depriving litigants of their equal protection of the laws. *Brescia vs. North Shore Ohana*, 115 Haw. 477, 501-503, 168 P.3d 929, 953-955 (2007); *Aloha Care vs. D.H.S.*, 127 Haw. 76, 88-90, 276 P.3d 645, 657-659 (2012). By granting summary judgment to MLB, the District Court violated Mohrs' constitutional rights to due process and equal protection by denying their property, possession, and ownership interests. *KNG Corp. vs. Kim*, 107 Haw. 73, 80-83, 110 P.3d 397, 404-407 (2005). The strict-scrutiny test applies here under the equal protection clause argument. *Nakano vs. Matayoshi*, 68 Haw. 140, 151-152, 706 P.2d 814, 821 (1985); *Baehr vs. Lewin*, 74 Haw. 530, 570-575, 852 P.2d 44, 63-65 (1993).

With all due respect to the judges, they relied upon cases from other jurisdictions rather than Hawaii in reaching the conclusion that MLB was entitled to foreclose on a mortgage that it in fact did not own and a lost promissory note that MLB never possessed. In doing so, Judge Kay and the Panel violated the case of *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 823 (9th Cir., 1974) for the simple reason that the trial court and this Court are obligated to apply Hawaii law in this case, not federal law, in this removed foreclosure case per 28 USC § 1332 and 1441. Here, Judge Kay and the Panel relied upon *In re Allen*, 472 B. R. 559 (9th Cir. BAP 2012) on the lost note issue when Mohrs proved that the note had been paid because it

was in a REMIC trust and not owned by nor possessed by MLB. Also, **MLB proved it did not possess the note when it was lost**. Therefore, HRS § 490:3-309(a &b) **did not apply** to assist MLB in its claimed proof of complying with *Toledo I*, but proved Mohrs' complaint per *Toledo II*. A REMIC is defined as a Real Estate Mortgage Investment Conduit per *Beverly v. Bank of New York Mellon*, 751 Fed. Appx. 1011, 1012 (9th Cir. 2018). Therefore, according to the *Beverly* case, the standard of review in this case is *de novo* where the trial judge decides that *res judicata* bars Mohrs' claims. *Id. @1013*. Here, Mohrs proved that the mortgage was in a REMIC Trust and clearly MLB failed to prove that it was the current trustee of that REMIC Trust and whether it and the REMIC Trust **still existed**. Instead, Mohrs proved that the promissory note and the mortgage had been paid in that Trust when it was securitized into the REMIC Trust in 2006. Therefore, MLB could not be a holder of Mohrs' paid promissory note per HRS § 490:3-309(a) and (b) **because MLB was not ever in possession of Mohrs' promissory note** since it was lost before it had the lost note affidavit per its own evidence. MLB claimed it acquired the lost note affidavit on 17 April 2014 per **Doc.# 128-15** and **128-23 & 24**; also per **Doc. # 129 @ pages 3-4, all in 2 ER**. The *Allen* case is not based on Hawaii law because the statute is no help to MLB. The record proves that MLB supposedly bought the note and mortgage from Lehman Bros. in September of 2013. **[1 ER 150 @ 22]**. So **MLB never possessed the original note, only a copy and the affidavit of the lost note**. Also, it is clear that MERS claimed to sell and

assign the mortgage and the note to Lehman Brothers **after the date of the lost note affidavit**. Therefore, clearly *Allen* does not apply to support Judge Kay's and the Panel's decision. Instead, Judge Kay erroneously decided that the Mohrs were not disputing the Lost Note Affidavit but reasoned that the Mohrs' evidence of the Note being paid in 2006 was not persuasive. In doing so, that violated the standard of review on summary judgment motions. *Anderson*, *supra. & His and Her Corp. supra.* That was clearly erroneous and generated at least genuine issues of material fact created by Paatalo's Declaration per footnotes 16 & 17 at **1 ER 150 @ p. 25**. *In re Weisband*, 427 B.R. 13 (Bankr. D. Ariz. 2010) held GMAC lacked standing as it was not a holder of the note. Judge Kay cited *Weisband*, but misapplied it. What's even worse is Judge Kay forgot or intentionally omitted to discuss *Wells Fargo Bank v. Behrendt*, 142 Haw. 37, 414 P.3d, 89 (2018) which held that a purchaser of the property subject to a mortgage to which the buyer was not a party had **standing** to challenge the foreclosing bank's entitlement to enforce the promissory note. If a buyer of the subject property has standing to challenge the validity of the note and the entitlement to enforce it, clearly Mohrs had such standing because they were seeking to quiet title as against the claimed mortgagee, MLB, when Mohrs proved that MLB **didn't even exist any more**. The Panel failed to apply *Toledo I*, *supra.*, holding that the claimed mortgage and note holder had the burden of proving that it had **standing** at the start of the case to sue for foreclosure, and *Toledo II*, *supra.*, holding that homeowners in foreclosure actions have four

counterclaims that can be asserted concurrently against foreclosure plaintiffs, to wit: wrongful foreclosure, quiet title, declaratory judgment and a treble damage claim under the Hawaii Unfair Deceptive Trade Practice Act (UDAP) in HRS §480-2 & 13 Mohrs' Amended Complaint pled the *Toledo II* claims, but the judges erroneously and reversibly decided Mohrs didn't even have standing to assert such claims. Clearly that is reversible error and of constitutional dimension.

Judge Kay's reliance upon HRS § 428-1003 and 1008 for the reasoning that MLB still had standing because it didn't matter to him that it had been **dissolved** in Delaware effective 9 December 2019, six days before the purported mortgage assignment by MLB to **MCH** Sub I, LLC, all as proven in Mohrs' 16 March 2020 supplemental memorandum opposing the declarations of attorney Kikawa and Lisby per **2 ER Doc No. 143**. In fact, Mohrs' proved that April Smith was acting as Vice President of MLB Sub I LLC in 2019 when it applied to cancel the existence of MLB Sub I LLC, and she was also supposedly the manager of **MCH** LLC on the purported assignment of the mortgage involved to **MCH** Sub I LLC by the **defunct** MLB Sub I, LLC. Clearly, at least those documents and proof by Mohrs in **2 ER @ 143** generated at least genuine issues of material fact requiring denial MLB's summary judgment motion. Judge Kay reversibly erred granting it and then dismissed the Mohrs' Amended Complaint in violation of *Toledo II* and failed to follow *Behrendt*, *supra.* Affirming those decisions was reversible error.

On summary judgment motions, trial and appellate courts are not to decide credibility issues. *Anderson*, *supra. & His and Her Corp.*, *supra.* That is exactly what happened here by the judges rejecting Mohrs' competent proof of their complaint and that MLB lacked standing per the *Toledo* cases and *Behrendt*, *supra.* The Panel's cases cited on pages 3 & 5 do not apply here for all of the foregoing reasons.

CONCLUSION

The Panel and trial court clearly erred therefore this Petition should be granted for rehearing en banc to correct the cited errors.

DATED: Honolulu, Hawaii, this 15th day of July, 2021.

/s/ R. Steven Geshell
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[Certificate Of Compliance Omitted]