72506-8

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NO. 72506-8--I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

DAVID GUTTORMSEN and TERRY GUTTORMSEN, husband and wife,

Appellants,

v.

AURORA BANK, FSB, a federally chartered savings bank; AURORA LOAN SERVICES, LLC., a limited liability company; NATIONSTAR MORTGAGE LLC, a Texas Limited Liability Company, FEDERAL NATIONAL MORTGAGE ASSOCIATION, a United States government sponsored enterprise; QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington Corporation; HSBC Mortgage Services, Inc., a Delaware Corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation; and DOE DEFENDANTS 1-10,

Respondents.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Appellants, DAVID and TERRY GUTTORMSEN (hereinafter collectively "Guttormsen") executed and delivered a $200,000 Promissory Note secured by a residential Deed of Trust in favor of AIG Federal Savings Bank (hereinafter "AIG") as Lender, with Respondent, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (hereinafter "MERS"), nominated the beneficiary (solely as nominee for AIG), and Stewart Title the trustee. CP 949-969. That much is clear. However from that point on, nothing is.

The Deed of Trust was recorded twice with separate recording numbers, with subsequent assignments and transfers of the note, deed of trust and successor trustees diverging between numerous entities with whom Guttormsen had never dealt. Compare CP 954-969 with CP 971-986. See also CP 991 and 993. These documents were inconsistently distinguished, tracked divergent recording numbers, successor trustees, assignments, competing beneficiaries and owners of the original debt obligation, yielding questions of fact regarding the true ultimate beneficiary, trustee, and owner of the debt.[1]

Eventually Respondent, QUALITY LOAN SERVICE CORPORATION OF WASHINGTON (hereinafter "QLS") issued a Notice

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[1] The flow of documents related to both recorded Deeds of Trust is offered at ***Appendix "A"***. The trail of ownership claims is offered at ***Appendix "B"***.

of Default on the First Deed of Trust while it had only allegedly been appointed successor trustee of the Second Deed of Trust. CP 1005-1006 and CP 1008-1012. Essentially, Respondents confused and conflated both recorded Deeds of Trust to foreclose one.

While the Notice of Default identified "Fannie Mae" as the "current owner" of the obligation, the Debt Validation Notice identified "Aurora Bank FSB" as the creditor to whom the subject debt was owed. Compare CP 1008-1012 with CP 1018. Moreover while the Notice of Default claimed the beneficiary had declared Guttormsen in default, there was no evidence that Fannie Mae either declared that default or otherwise assigned that function to any other named Respondent.

Pursuant to the provisions of Washington's Deed of Trust Act (*RCW 61.24, et seq.*) (hereinafter "DTA"), which must be strictly construed in favor of the borrower, Guttormsen contested the non-judicial foreclosure of their home and sued for damages.

The DTA and the case law that construes its provisions outlines very specific requirements before a borrower's home can be non-judicially foreclosed. Under the DTA, only an eligible and duly authorized "beneficiary" may declare a default, *RCW 61.24.030*, or appoint a successor trustee, *RCW 61.24.010*. Only a lawfully appointed trustee has the legal authority to issue a notice of trustee's sale. See *Walker v. Quality Loan Service Corp.,* 176 Wn.App. 294, 308 P.3d 716 (2013) (hereinafter "*Walker*")

and *Bavand v. OneWest Bank FSB*, 176 Wn.App. 475, 309 P.3d 636 (2013) (hereinafter "*Bavand*"). Moreover before a notice of trustee's sale is recorded the trustee must have proof the beneficiary is the owner and holder of the promissory note. *RCW 61.24.030(7)(a)*. The trustee's duty extends even further to require that the information it relies upon to initiate and prosecute a non-judicial foreclosure is investigated and verified. *Lyons v. U.S. Bank, N.A.*, ---Wn.2d---, 336 P.3d. 1142 (2014) (hereinafter "*Lyons*").

None of the foregoing statutory requirements were met in this case and there remained material issues of fact in dispute on summary judgment. Absent resolution of these factual questions, without dispute, summary judgment is inappropriate and the trial court must be reversed.

II. ASSIGNMENTS OF ERROR

A. The trial court erred on March 28, 2014 dismissing by summary judgment Respondents, AURORA BANK, FSB, a federally chartered Savings Bank; AURORA LOAN SERVICES, LLC, a limited liability company (hereinafter collectively "AURORA"); NATIONSTAR MORTGAGE ASSOCIATION, a Texas Limited Liability Company (hereinafter "NATIONSTAR"), FEDERAL NATIONAL MORTGAGE ASSOCIATION, a United States government sponsored enterprise (hereinafter "Fannie Mae") and MERS and denying Plaintiff's motion for reconsideration of said summary judgment order on May 30, 2014.

Issues pertaining to this assignment of error:

1. These summary judgments of dismissal principally rely upon the Declaration of A. J. Loll. Does the A.J. Loll Declaration, and each of its factual claims, comply with the requirement of *CR 56(e)* that affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein?

2. Is the Declaration of A.J. Loll inadmissible hearsay by (1) failing to lay a proper foundation under the business records rule to admit attached documents and/or (2) testifying to events based on business records without offering the actual records?

3. Is the A.J. Loll testimony, insufficient, even if admissible, to support summary judgment?

4. Should summary judgment be denied absent providing Guttormsen the opportunity to depose A. J. Loll pursuant to *CR 56(f)?*

5. All Respondents rely on the Declaration of Ms. Herbert-West. Is her declaration inadmissible or insufficient under *CR 56(e)* for generally the same reasons as the A.J. Loll Declaration?

6. Is there evidence in the record that the DTA, as strictly construed against the lender, was violated because one other than the (a) true beneficiary of the Deed of Trust declared Guttormsen in default contrary to *RCW 61.24.030,* and/or (b) appointed a successor trustee contrary to *RCW*

61.24.010, and/or (c) the lawful owner and holder of the obligation did not authorized the foreclosure?

7. Under the DTA, must the beneficiary be both the "actual holder" and the "owner" of the Note?

8. Is there undisputed evidence in the record that QLS had proof that the beneficiary identified in the Notice of Trustee's Sale was the owner and holder of the Note and Deed of Trust?

9. Is there undisputed evidence in the record that QLS adequately informed itself of the purported beneficiary's right to foreclose?

10. Is there evidence in this record, construed most favorably to the non-moving party, that the Washington Consumer Protection Act (*RCW 19.86, et seq.*) (hereinafter "CPA") has been violated?

11. Is there evidence in this record that Respondents have tried to collect an unlawful debt contrary to *RCW 9A.82.045*?

B. The trial court erred on September 10, 2014 dismissing by summary judgment all claims against QLS.

Issues pertaining to this assignment of error:

Same as above.

III. STATEMENT OF THE CASE

On February 26, 2006, Guttormsen executed a Promissory Note in favor of AIG, as lender and the party entitled to payments according to its terms. CR 949-952. The Note specifically defines the term "Note Holder" as

"anyone who takes this Note by transfer and who is entitled to receive payments under this Note." This transaction was purportedly registered with MERS by AIG under MIN No. 100372406022138868. Respondents admit that MERS never owned or held the Note, nor did Guttormsen owe MERS any obligation (monetary or otherwise), thus making MERS an ineligible beneficiary within the terms of *RCW 61.24.005(2).* CP 894. *See Bain v. Metropolitan Mortgage Group,* 175 Wn.2d 83, 285 P.3d 34 (2012) (hereinafter *"Bain"*).

To secure repayment of the Promissory Note, Gutttormsen, as grantors, executed a Deed of Trust that encumbered their home dated February 23, 2006, naming Stewart Title Company as the trustee. MERS was named beneficiary, solely as a nominee for AIG, the Lender, and Lender's successors and assigns. Guttormsens' Deed of Trust was first recorded with the Snohomish County Auditor under Recording No. 200603230406 (hereinafter "First Deed of Trust"). CP 954-969. A second Deed of Trust was then wrongfully recorded against Guttormsens' property. CP 971-986. This second Deed of Trust was recorded consecutively after the first under Snohomish County Auditor Recordation No. 200603230407 (hereinafter "Second Deed of Trust"). The second Deed of Trust is apparently identical to the first Deed of Trust, but wrongfully creates a second lien against the property, thus doubling the amount of the security claimed by AIG. CP 971-986.

In response to a Qualified Written Request under *12 USC 2605(e),* AURORA provided Guttormsen a copy of an undated allonge allegedly executed by AIG that purportedly assigned the Promissory Note to the order of HSBC Mortgage Services, Inc. CP 521-523 and 991. Through the same means, Guttormsen obtained a copy of a second undated allonge, purportedly executed by HSBC Mortgage Services, Inc., in blank. CP 521-523 and 993.

Although there is conflict as to the exact date of Fannie Mae's purchase of the obligation, evidence suggests that Fannie Mae purchased the subject obligation some time in 2007. Also See Declaration of Tim Stephenson, CP 610-642, 995-996. But see CP 1000. Evidence suggests Fannie Mae may be the current true and lawful owner and holder of Guttormsens' Note or the trustee/guarantor of the entity to which Fannie Mae assigned the obligation. CP 610-642, 995-996.

However, on February 19, 2011, Nancy L. Walker, in her purported capacity as Assistant Vice President of AURORA, executed a Declaration of Ownership (*RCW 61.24.030(7)(a)*) wherein she falsely declared and represented under penalty of perjury that AURORA is the actual holder of the Promissory Note. CP 998. She further falsely stated that the subject Note had not been assigned or transferred to any other person or entity and that she understood that the trustee foreclosing the Deed of Trust which secures the loan will rely upon her declaration before issuing the Notice of Trustee's Sale. Ms. Walker's assertions were false and known to be false at the time

she executed the Declaration of Ownership as she knew or should have known that the subject loan had been sold and/or assigned to Fannie Mae in 2007. CP 610-642, 995-996. Ms. Walker provided this false Declaration of Ownership with the specific intent to wrongfully facilitate a non-judicial foreclosure of Guttormsens' home and to make it more difficult for Guttormsen to identify the real party in interest with whom Guttormsen must negotiate for a loan modification. See Declaration of David Guttormsen CP 522. No direct evidence was offered on summary judgment to establish AURORA's status as an "owner", "holder", "servicer" or agent of Fannie Mae, entitling AURORA to initiate foreclosure.

On August 16, 2011, Regina Lashley, in her official capacity as a Vice President of MERS, executed and recorded a Corporate Assignment of Deed of Trust from MERS to AURORA. CP 1003. Admittedly, MERS never held or owned the obligation. CP 894. It is significant to note that this Assignment of Deed of Trust purports to assign the Second Deed of Trust (200603230407) only. CP 971-986. No reference is made to the First Deed of Trust (200603230406). CP 954-969.

On June 13, 2012, Michele Rice, in her official capacity of Vice President of AURORA, executed and recorded an Appointment of Successor Trustee stating that AURORA was the beneficiary under said subject Deed of Trust and appointed QLS as the successor trustee. CP 1005-1006. This Appointment of Successor Trustee references the Second Deed of Trust

(200603230407) (CP 971-986), but not the first. Stewart Title apparently remained the trustee of the First Deed of Trust (200603230406) (CP 954-969). No direct evidence was offered on summary judgment that AURORA actually possessed or owned the subject Note and Deed of Trust at the time it appointed QLS's successor trustee.

On or about July 13, 2012, Kristine Canonizado, as Assistant Secretary of QLS, wrongfully issued a Notice of Default on behalf of the "beneficiary." CP 1008-1018. It is significant to note that this Notice of Default refers to the First Deed of Trust (200603230406) (CP 954-969) – not the Second Deed of Trust. Although QLS was appointed successor trustee of the Second Deed of Trust (200603230407) (CP 971-986), QLS was never appointed successor trustee under the First Deed of Trust (CP 954-969). Moreover, the information contained in the subject Notice of Default is contradictory as to the true and lawful owner and holder of the obligation, under *RCW 61.24.030(7).* While the Notice of Default identifies Fannie Mae as the "current owner" of the obligation, the Debt Validation Notice identifies AURORA as the creditor to whom the subject debt is owed. Compare CP 1008 to CP 1018. Nowhere does the Notice of Default identify the "beneficiary" of the Deed of Trust. Moreover, the subject Notice of Default wrongfully states that the "Beneficiary has declared [Guttormsen] in default." CP 1009. No evidence was offered on summary judgment that Fannie Mae,

as purported owner, either declared Guttormsen to be in default or otherwise assigned that function to any other respondent herein.

On September 26, 2012, Brady Nichaus, as Assistant Secretary for NATIONSTAR, as alleged attorney-in-fact for AURORA, executed and recorded a second Assignment of Deed of Trust, purporting to assign to itself the First Deed of Trust (200603230406) (CP 954-969). CP 1020-1022. However, AURORA was never assigned an interest in the First Deed of Trust (200603230406) – only the Second Deed of Trust (200603230407) (CP 971-986). Therefore, AURORA had nothing to assign to NATIONSTAR. Curiously, the recording cover sheet states that Aurora is the Assignor and that Fannie Mae – not NATIONSTAR - is the Assignee. CP1020. No direct evidence was offered on summary judgment to establish NATIONSTAR's status as an "owner", "holder", "servicer" or agent of Fannie Mae, entitling NATIONSTAR to initiate foreclosure.

On December 14, 2012, Michael Dowell, Assistant Secretary for QLS, executed and recorded a Notice of Trustee's Sale setting a trustee's sale of the subject Property for April 19, 2013. CP 1024-1027. This Notice of Trustee's Sale purports to foreclose the First Deed of Trust (200603230406) (CP 954-969). But QLS was only appointed successor trustee of the Second Deed of Trust (200603230407) (CP 971-986). QLS was never appointed successor trustee of the First Deed of Trust (200603230406) (CP 954-969). Again, the Notice of Trustee's Sale wrongfully identifies the

beneficiary of the subject obligation as AURORA and wrongfully declares that the beneficiary has declared a default in the obligation, in violation of *RCW 61.24.030.* No evidence was offered on summary judgment that Fannie Mae or any true and lawful owner and holder of the obligation either declared Guttormsen to be in default or otherwise assigned that function to any other Respondent herein.

As discussed below, while there are numerous issues of material fact in dispute, these undisputed facts are not: while AURORA was assigned an interest in the Second Deed of Trust (200603230407) (CP 971-986) and QLS was appointed successor trustee of the Second Deed of Trust (200603230407) (CP 971-986), AURORA attempted to assign to NATIONSTAR an interest in the First Deed of Trust (200603230406) (CP 954-969), that it never had and QLS issued a Notice of Default and Notice of Trustee's Sale to foreclose the First Deed of Trust (200603230406) (CP 954-969) that it was never appointed successor trustee to foreclose. No evidence was offered on summary judgment as to whether QLS ever investigated or verified these discrepancies or the information contained in its Notice of Default or Notice of Trustee's Sale.

Guttormsen brought suit on April 18, 2013, seeking injunctive relief, declaratory relief and damages for violation of the DTA, violation of the CPA and violation of *RCW 9A.82, et seq.*

All Respondents sought summary judgment of dismissal based entirely on the Declaration of A. J. Loll of February 27, 2014 (CP 842-877) and the Declaration of Sierra Herbert-West of July 31, 2014 (CP 340-346). The trial court granted summary judgment of dismissal to all Respondents in two separate orders, CP 7-8 and 14-15, based essentially on the same record and over Guttormsen's request to be provided an opportunity to conduct discovery under *CR 56(f)*. Although Guttormsen sought reconsideration of the trial court's summary judgment of March 28, 2014, that motion was denied on June 4, 2014. CP 9-11.

Guttormsen filed their Notice of Appeal on September 23, 2014. CP 1-15.

IV. ARGUMENT

A. Standard of Review

A trial court's summary dismissal of claims under *CR 56* is reviewed *de novo*, taking all inferences in the record in favor of the non-moving party. *State ex rel Bond v. State*, 62 Wn.2d 487, 383 P.2d 288 (1963) (hereinafter "*Bond*"); *Lilly v. Lynch,* 88 Wn.App. 306, 945 P.2d 727 (1997) (hereinafter "*Lilly*"); *Snohomish County v. Rugg*, 115 Wn.App. 218, 61 P.3d 1184 (2002) (hereinafter "*Rugg*"); *Schroeder v. Excelsior Management Group, LLC*, 117 Wn.2d 94, 297 P.3d 677 (2013) (hereinafter "*Schroeder*") (citing *Dreiling v. Jain,* 151 Wn.2d 900, 908, 93 P.3d 861 (2004)); *Bavand,* at page 485 and *Lyons,* at page 6. Summary judgment is only appropriate if there is no

genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Balise v. Underwood*, 62 Wn.2d 195, 381 P2d 966 (1963) (hereinafter "*Balise*"); *Schroeder*; *Bavand,* at page 485 and *Lyons,* at page 1147. The initial burden on summary judgment falls on the moving party to prove that no material issue is genuinely in dispute exists. *CR 56.*

If sworn statements on summary judgment are offered, they must be (1) made on personal knowledge, (2) setting forth facts as would be admissible in evidence and (3) showing affirmatively that the affiant is competent to testify to the matter stated in the sworn statement. *CR 56(e); Rugg*; *Blomster v. Nordstrom*, 103 Wn.App. 252, 11 P.3d 883 (2000) (hereinafter "*Blomster*"); *Lilly.*

Summary judgment is appropriate if reasonable persons can reach but one conclusion from all of the evidence, viewed in a light most favorable to the non-moving party. *Rugg; Doherty v. Municipality of Metro*, 83 Wn.App. 464, 921 P.2d 1098 (1996). In reviewing the evidence submitted on summary judgment, facts asserted by the non-moving party and supported by affidavits or other appropriate evidentiary materials must be taken as true. *Bond*; *Reid v. Pierce Co.,* 136 Wn.2d 195, 961 P.2d 333 (1998). When there is contradictory evidence or the moving parties' evidence is impeached, an issue of credibility is presented that the court cannot resolve on summary judgment. *Balise.*

Based upon the foregoing and the documentary evidence that was before the trial court, particularly the Declaration of A.J. Loll (CP 842-877), the Declaration of Sierra Herbert-West (CP 340-346), the Declaration of David Guttormsen (CP 519-609), the Declaration of Counsel (CP 24-153) and the Declaration of Tim Stephenson (CP 610-796), there were genuine issues of material fact before the trial court inconsistent with any summary dismissal of Guttormsens' claims.

B. Declarations of A.J. Loll and Sierra Herbert-West are legally insufficient to support summary judgment.

On summary judgment, Respondents and the trial court relied primarily on the Declarations of A.J. Loll and Sierra Herbert-West. However, the testimony of these individuals failed to demonstrate sufficient personal and testimonial knowledge of the facts they offered the trial court to support Respondents' contentions on summary judgment.[2] Moreover, no proper foundation for the admission of the documents offered by these individuals was laid under *RCW 5.45.020* and their testimony, based on reviewed business records not attached to their Declarations, was inadmissible. Accordingly, summary judgment cannot be based on this inadmissible

[2] A detailed analysis of the sort of testimony offered by Respondents in this matter was provided by Judge Robert Lasnik in *McDonald v. OneWest Bank, FSB,* 929 F.Supp.2d 1079 (2013) ("Rather than obtain declarations for individuals with personal knowledge of the facts asserted or locate the source documents underlying its computer records, defendants chose to offer up what can only be described as a 'Rule 30(b)(6) declarant' who regurgitated information provided by other sources."). See also *Knecht v. Fidelity National Title Insurance Co.* (2014 U.S. Dist. LEXIS 113131).

evidence. *RCW 5.45.020; State v. DeVries*, 149 Wn.2d 842, 72 P.3d 748 (2003).

i. Declaration of A.J. Loll.

A.J. Loll identifies himself/herself as an officer of NATIONSTAR. No evidence is offered of A.J. Loll's specific duties or responsibilities for NATIONSTAR, so it is impossible to determine if A.J. Loll's information is based upon work based experience or was provided to him/her at the time the subject Declaration was prepared by counsel. All A.J. Loll says about the basis of his/her knowledge is that he/she has "personal knowledge of the matters set forth herein" and has reviewed "Nationstar's business records, which records were made by myself or from information transmitted by a person with knowledge of the event described therein." But who is he/she referring to? What information is he/she referring? A.J. Loll doesn't say. Indeed, A.J. Loll fails to provide the Court facts that would establish (1) what specific documents he is referring to and obtained his information from; (2) how the documents he/she refers to or relies on are maintained, whether in hard copy or electronic;[3] (3) if the records are maintained by electronic means, whether the computer document retrieval equipment used by NATIONSTAR is standard; (4) the original source of the materials maintained; (5) the identity of person who compiled the information

[3] A.J. Loll refers to NATIONSTAR "systems" which seems to refer to an electronic data system, but that is mere conjecture.

contained in the files or computer printouts; (6) when the entries were made and whether they were made at or near the time of the happening or event; and (7) how NATIONSTAR relies on these records; or (8) any means by which the trial court could evaluate the authenticity of the documents provided and the reliability of A.J. Loll's testimony. See *RCW 5.45.020*; *State v. Smith*, 16 Wn.App. 425, 558 P.2d 265 (1976) and *State v Kane*, 23 Wn.App. 107, 594 P.2d 1357 (1979). Absent establishment of each of these elements, the information A.J. Loll provides is unverifiable, unreliable and inadmissible. *CR 56(e); RCW 5.45.020; ER 803.*

The business record must be identified by an employee of the company who created the document, a records custodian or the person who supervised the documents' creation to be admissible. *State v. Meyer,* 27 Wn.2d 759, 226 P.2d 204 (1951); *Fies v. Story*, 21 Wn.App. 413, 585 P.2d 190 (1978) (overruled on different grounds *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984)); *State v. Alexander*, 64 Wn.App. 147, 822 P.2d 1250 (1992). The "business record" exception to the hearsay rule does not extend to records and information compiled and received from third parties. *State v. Weeks,* 70 Wn.2d 951, 425 P.2d 885 (1987). See generally, Tegland, *Washington Practice: Evidence* § 803.39 (5th Ed. 2007).

Moreover, conclusory statements or "mere averment" that the affiant has personal knowledge are insufficient to support a motion for summary judgment. *CR 56(e); Blomster* at page 260; Editorial Commentary to *CR 56*

(citing *Antonio v. Barnes*, 464 F2d 584, 585 (4th Cir. 1972)). Indeed, the contents of a business record cannot be established by a witness' oral testimony, the actual document must be offered. *ER 803(a)(6) and (7); ER 1002; State v. Fricks*, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979) ("In this case the State failed to produce the document or to make any showing of its unavailability. Under these circumstances the testimony of a manager as to its contents was not an acceptable method of proof.")

With these requirements in mind, A.J. Loll's specific factual allegations must be critically considered.

A.J. Loll asserts that "AIG subsequently endorsed the Note to HSBC Mortgage Services, Inc. (HSBC) in connection with HSBC's purchase of the loan on or about April 22, 2006." (Emphasis added). But, how does he know? A.J. Loll does not assert that he/she was present when this purchase took place six years before NATIONSTAR assigned the First Deed of Trust to itself, and does not cite and offer a specific business record for this assertion. CP 843 and CP 1020-1022. Characteristic of one who has no knowledge of what they are testifying to, A.J Loll refers in Paragraph 5 of his/her Declaration to the First Deed of Trust (200703230406) (CP 954-969), but attaches as Exhibit "B" the Second Deed of Trust (200703230407). CP 807, 855-871. Moreover, this alleged "purchase" of the obligation by HSBC in April of 2006 is contradicted by MERS own records, that suggest that the only interest in the subject obligation that ever got transferred to HSBC was

"servicing rights." CP 995-996. Finally, A.J. Loll suggests that AIG indorsed the Note to HSBC "on or about April 22, 2006", but offers no document or business record to support this assertion.

The only "record" A.J. Loll's offers in support of his allegation that HSBC purchased Guttormsen's loan is a copy of an allonge. CP 851. A.J. Loll does not assert that he/she was present when this allonge was executed, was the documents record custodian at any time relevant to this cause of action or supervised its creation. The allonge purporting to transfer of the Note to HSBC is not dated, so we do not know when the allonge was actually prepared and executed. This is important, because AIG ceased to exist in September of 2008. A.J. Loll does not indicate who provided this information to NATIONSTAR or how it obtained a copy of the subject allonge or what steps were taken to verify the authenticity of the document. *Lyons.* We don't even know if this allonge was ever affixed to the Note as is required under *RCW 62A.3-204* for it to be enforceable.

A.J. Loll asserts that NATIONSTAR's "business records reflect that or about August 28, 2007, Fannie Mae purchased the loan."[4] But, A.J. Loll does not identify or offer the specific business record he/she relies upon for this assertion. A.J. Loll does not assert that he/she was present when this purchase by Fannie Mae took place, which is relevant because the alleged

[4] This is not entirely consistent with Fannie Mae's Answer herein, in which it is alleged that "Fannie Mae was the owner of the subject note on February 19, 2011." CP 897. This creates a material disputed issue of fact.

"purchase" of the obligation by Fannie Mae allegedly occurred five years before NATIONSTAR assigned the First Deed of Trust to itself. CP 843 and CP 1020-1022. Whether Fannie Mae actually owns the obligation is relevant in view of the fact that there are competing claims regarding ownership and possession of the obligation that must be vetted by the trustee before a non-judicial sale can proceed. *Lyons*.

However, there was evidence before the trial court contradicting the testimony of A.J. Loll that was apparently ignored by the court. The alleged "purchase" of the obligation by Fannie Mae in August of 2007 is memorialized in MERS' own records, but it appears Fannie Mae purchased the obligation from AURORA – not HSBC. CP 995-996. A.J. Loll is silent as to how AURORA obtained an ownership interest in the subject obligation. No documents evidencing this purchase were offered to the trial court. One would expect such documentation to be in NATIONSTAR's "business records," but A.J. Loll offers no documents to verify the transfers of the obligation from AIG to HSBC to AURORA to Fannie Mae. Absent such a chain of ownership, on what authority was AURORA acting and who had authority to initiate a non-judicial foreclosure of the Guttormsen's home? See *Bain*, at page 111.

A.J. Loll does offer a second allonge to the Note executed by HSBC in blank, but offers nothing about its history or its authenticity. CP 852. A.J. Loll does not assert that he/she was present when this allonge was executed,

is the documents record custodian or supervised its creation. The allonge purporting transfer of the Note is not dated and the signature purports to be "created by the signer electronically", so we don't even have an original signature on the document, making it possible it was counterfeited. CP 993. Certainly, there is no way to verify the authenticity of the instrument based on A.J. Loll's testimony. A.J. Loll does not indicate how NATIONSTAR obtained a copy of the subject allonge or what steps were taken to verify the document. Indeed, we don't even know if this allonge has ever been affixed to the Note as is required under *RCW 62A.3-204* for it to be enforceable.

A.J. Loll asserts that after HSBC's execution of the second allonge, whenever that occurred, the Note and Deed of Trust "remained in the physical possession of Aurora's authorized document custodian from the date of Fannie Mae's purchase of the loan until August 20, 2011." But A.J. Loll does not identify the specific document or business record he/she bases this assertion on, who the "custodian" may be or the agency relationship, if any, between AURORA and this purported custodian. This is important because under *RCW 61.24.030(7)(a),* only the "*actual holder*" of the promissory note or other instrument evidencing the obligation may be a beneficiary with the power to appoint a trustee to proceed with a non-judicial foreclosure on real property. See *Bain,* at page 111. As argued below, this eliminates those who claim "constructive possession" of the Note or an agency relationship with

the owner. See *Central Washington Bank v. Mendelson-Zeller,* 113 Wn.2d 346, 358, 779 P.2d 697 (1989) (hereinafter "*Central Washington Bank*").

A.J. Loll asserts that AURORA obtained and maintained "actual" possession of the Note and Deed of Trust from "August 20, 2011 to March 10, 2013," but offers no documentary evidence of this transfer beyond his/her conclusory statement. A.J. Loll's testimony regarding AURORA's possession of the Note and Deed of Trust appears to conflict with his/her statement that Fannie Mae purchased the loan "on or about August 28, 2007," four years before AURORA purportedly obtained "actual" possession of the Note. CP 843. If Fannie Mae was the owner the obligation from August 28, 2007, on what basis did AURORA possess the obligation? A.J. Loll does not say.

A.J. Loll states that on March 10, 2013, NATIONSTAR's business records indicate that it came into possession of the "Note endorsed in blank and the Deed of Trust," but does not identify, much less offer the specific businesses records upon which he/she relies, why possession transferred and the terms and conditions of the transfer. A.J. Loll states that NATIONSTAR is "a Fannie Mae approved servicer of residential mortgages," but does not indicate how he/she knows this and failed to provide the trial court any documentary evidence to establish agency relationships between AURORA, NATIONSTAR and Fannie Mae. Does possession of the Note with a blank

endorsement mean NATIONSTAR is the "holder"? No, not necessarily. See *Bavand,* at page 499, and *Central Washington Bank.*

It is relevant to point out that if NATIONSTAR relies on the Assignment of Deed of Trust of September 26, 2012 (CP 1020-1022), for possession and any right to enforce the Note and Deed of Trust, it is mistaken. NATIONSTAR, as purported attorney in fact for AURORA, assigned AURORA's interest in the First Deed of Trust (200703230406) (CP 954-969) to itself. Unfortunately, AURORA was only assigned an interest in the Second Deed of Trust (200703230407) (CP 971-986). AURORA, even under a power of attorney, cannot assign something it never had. Accordingly, the Assignment of Deed of Trust of September 26, 2012, is a nullity.

A.J. Loll asserts "Aurora, as the holder of the Note, directed MERS to execute that assignment [of Deed of Trust] in favor of Aurora Bank, FSB," but does not specifically identify, much less provide, the business records upon which he/she relies, so the claim is inadmissible hearsay. See *infra* at pages 16-17. This assertion is apparently based and contingent upon adequate proof that AURORA was the "holder" of the Note, about which A.J. Loll does not have any apparently personal or testimonial knowledge.

To evaluate A.J. Loll's testimony regarding the MERS Assignment, it is important to note that under Washington law, the security follows the Note. *Bain,* at page 104. If Fannie Mae purchased the obligation in August of 2007,

it would arguably have had the right to the security. If any other entity obtained possession of the Note, absent out-right theft, that other entity would necessarily need to be the agent of Fannie Mae. One of the *indices* of such a relationship is the principal's right to control the agent. *Bain,* at page 107. Thus, the question naturally arises: did AURORA contact or otherwise get approval from Fannie Mae to obtain an assignment of Fannie Mae's security? And for whom did AURORA obtain the Assignment? Surely not for itself, but it's principal. A.J. Loll doesn't address these issues. If NATIONSTAR has documentary evidence that would shed light on AURORA's authority to request MERS to assign the Deed of Trust to itself, neither NATIONSTAR nor A.J. Loll has provided it. Again, it should be noted that this Assignment only affected the Second Deed of Trust (200703230407) (CP 971-986) – not the First Deed of Trust (CP 954-969)

The most perplexing statement made by A.J. Loll is the statement that NATIONSTAR assigned the Deed of Trust to Fannie Mae. CP 844 This is simply false. The actual attached assignment is referred to above and does not assign the First Deed of Trust (200703230406) (CP 954-969) to Fannie Mae. Rather, NATIONSTAR, as purported attorney in fact for AURORA, assigns the First Deed of Trust (200703230406) (CP 954-969) to itself.[5] A.J. Loll's confusion and conflation of the two Deeds of Trust and the effect of

[5] No recorded power of attorney was ever offed the trial court to support NATIONSTAR's authority as attorney in fact.

the Assignment of Deed of Trust of September 26, 2012, reflects a manifest lack of knowledge of the transaction and raises material questions of credibility.

In sum, it is apparent that A.J. Loll is merely parroting what he/she has seen on someone's computer screen, without personal and testimonial knowledge of the statement he makes, and fails to comply with the business record exception to the hearsay rule, rendering his testimony all by inadmissible hearsay. *RCW 5.45.020, CR 56(e), ER 802,* and *ER 803.* See also *Loss v. DeBord,* 67 Wn.2d 318, 407 P.2d 421 (1965).

ii. Sufficiency of Declaration of Sierra Herbert-West.

Like the testimony of A.J. Loll, Ms. Herbert-West's testimony is woefully incompetent for many of the same reasons. Ms. Herbert-West identifies herself as a "Trustee Sales Officer" for QLS. No evidence is offered of Ms. Herbert-West's specific duties or responsibilities for QLS, so it is impossible to determine if Ms. Herbert-West's information is based upon work experience or was provided to her at the time the subject Declaration was prepared by counsel. Indeed, like the testimony of A.J. Loll, Ms. Herbert-West's Declaration fails to demonstrate sufficient personal and testimonial knowledge of the facts offered this Court beyond conclusory statements. All Ms. Herbert-West's says about the basis of her knowledge is that she has "has reviewed the foreclosure file and am competent to testify to its contents." Once again testimony regarding the contents of documents not

received into evidence is inadmissible. See *infra* at pages 16-17. Moreover, Ms. Herbert-West fails to lay a proper foundation for admission of the documents she doesn't identify or offer under *RCW 5.45.020*. See *infra,* at pages 16-17. Ms. Herbert-West offered the court a Declaration of Beneficiary, purportedly dated on December 5, 2012, alleging that "Aurora was the 'actual holder' of the Note." CP 340 and 343. Unfortunately, this Declaration of Beneficiary, relied upon by QLS to initiate foreclosure, refers to the First Deed of Trust (200603230406) (CP 954-969), but the Appointment of Successor Trustee upon which QLS purportedly derived authority to foreclose was issued on the Second Deed of Trust (200603230407) (CP 971-986). QLS was never appointed to foreclose the First Deed of Trust (200603230406) (CP 954-969) and had no authority to do so. As noted above, Stewart Title apparently remains the trustee under the First Deed of Trust (200603230406) (CP 954-969) to which the Declaration of Beneficiary refers. Clearly, there was no reasonable basis for QLS to rely on the Declaration of Beneficiary that refers to the First Deed of Trust (200603230406) (CP 954-969) to initiate foreclosure of the Second Deed of Trust (200603230407) (CP 971-986) given the requirement the provisions of the DTA be strictly complied with.

This confusion/conflation of the two recorded Deeds of Trust could have been remedied prior to initiation of foreclosure had QLS any procedures in place to verify the information it received from its "client". But it didn't.

In fact, in testimony offered in another matter, Ms. Herbert-West testified that during this time frame, QLS had no procedures in place to verify the information provided by its "clients", such as NATIONSTAR and AURORA. See CP 34 (page 34, lines 17-25). In view of the existence of two recorded deeds of trust, contradictory assignments of the same, and competing claims of ownership and possession of the obligation, QLS had a duty to investigate and verify the information it relied upon before issuing its Notice of Trustee's Sale, but failed to do so, in violation of its fiduciary duty of good faith to Guttormsen. See *RCW 61.24.010; Klem v. WaMu,* 176 Wn2d 771, 792, 295 P.3d 1179 (2013) (hereinafter "*Klem*"); *Lyons*.

Ms. Herbert-West's testimony fails to provide the sort of personal and testimonial knowledge required by *CR 56(e),* does not set forth competent admissible evidence and cannot be considered by this Court.

In sum, neither A.J. Loll nor Ms. Herbert-West provided the trial court reliable and competent evidence to support Respondents' Motions for Summary Judgment. Moreover, the evidence they did provide proved nothing germane to actual issues before the trial court.

C. Summary Judgment Improper Without Allowing Guttormsen Leave to Conduct Discovery.

Respondents' Motions for Summary Judgment were untimely to the extent that there remained discovery that needed to be done to address the issues of fact outlined above. Little discovery outside of Guttormsens'

Qualified Written Request had been conducted and none was allowed to challenge the declarations relied upon by Respondents. (CP 521-523).

CR 56(f) provides:

> **(f) When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Based upon the clear need for additional discovery to flesh out the ownership of the subject Note and Deed of Trust and the agency relationships, if any, among the Respondents and the possible assignment of the subject obligation to a mortgage backed security trust, Guttormsen requested a continuance of the motion to permit Guttormsen to obtain additional discovery, pursuant to *CR 56(f)*. But the motion was denied.

Without full and complete discovery, including *CR 30(b)* depositions, Guttormsen could not adequately defend, rebut and impeach Respondents' allegations on summary judgment. Summary judgment without adequate opportunity for discovery is error. Justice demanded no less.

D. Strict Compliance with DTA Required.

As noted above, the Washington Supreme Court has often stated that the DTA must be strictly construed in the borrower's favor. *Albice v. Premier Mortgages Services of Washington, Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012) (hereinafter "*Albice*") (citing *Udall v. T.D. Escrow*

Services, Inc., 159 Wn.2d 903, 915-916, 154 P.3d 882 (2007) (hereinafter "*Udall*")). Substantial compliance with the statutory provisions is not enough.

Here, without limitation, the fundamental problem in this non-judicial foreclosure is this: while AURORA was assigned an interest in the Second Deed of Trust (200603230407) (CP 1003) and QLS was appointed successor trustee of the Second Deed of Trust (200603230407) (CP 1005), AURORA, through a power of attorney, attempted to assign to NATIONSTAR an interest in the First Deed of Trust (200603230406) (CP 1020-1022), that it never had and QLS issued a Notice of Default and Notice of Trustee's Sale to foreclose the First Deed of Trust (200603230406) that it was never appointed trustee to foreclose. And, as noted above, the Declaration of Beneficiary relied upon by QLS to initiate foreclosure refers to the First Deed of Trust (200603230406) (CP 343) – not the Second Deed of Trust (200603230407) upon which QLS' Appointment of Successor Trustee was issued. CP 1005-1006. Clearly, QLS's issuance of a Notice of Default and Notice of Trustee's Sale under these circumstances, constitutes "irregularities in the proceedings" and a material violation of its fiduciary duties of good faith under the DTA, particularly in the absence of any evidence QLS engaged in any investigation and verification of the records it relied upon. See *Bain, Klem, Walker, Bavand and Lyons.*

E. Actual "Beneficiary" Entitled to Initiate Foreclosure is a Disputed Question of Fact.

Under the DTA, only the duly authorized "beneficiary" has the right to declare a default, under *RCW 61.24.030*, or appoint a successor trustee, under *RCW 61.24.010.* However here there are competing claims of beneficial ownership and status as holder which must preclude summary judgment.

i. The evidence before trial court was conflicting as to Respondents' status.

In reviewing the documentation before the trial court on summary judgment, the only direct evidence of the chain of ownership of the obligation is the original Note (CP 949-952), and if they can be authenticated, the allonge to HSBC (CP 991) and the allonge from HSBC (CP 993). There the chain of title to the Note ends.

Respondents claim that Fannie Mae "owns" the Note, but this claim is based essentially on hearsay. See CP 897, 995-996, 1000 and 1008. However, in the Debt Validation Notice attached to the Notice of Default, AURORA claims to be the entity to which the debt was owed on July 13, 2012. CP 1018.

As to the holder of the obligation, the Declaration of Ownership represents that on February 11, 2011 "Aurora Loan Services LLC is the actual holder of the Promissory Note," but A.J. Loll declares, under penalty of perjury, that on February 19, 2011, the Note was held by a custodian and that

AURORA didn't physically take possession of the Note until August 20, 2011. CP 844 and CP 998.

In the Appointment of Successor Trustee of June 13, 2012, AURORA claims to be the beneficiary of the obligation, but this is based MERS' wrongful assignment of obligation by MERS, an ineligible beneficiary. See *Bain.* CP 1003 and CP 1005-1006. Moreover, A.J. Loll testifies that AURORA was merely the servicer of the loan from "the time of Fannie Mae's purchase and continued . . . until on or about July 2, when Nationstar acquired the right to service the loan on behalf of Fannie Mae." CP 843.

Finally, neither of the Assignments of Deed of Trust assigns anything more than the beneficial interest in the two recorded Deeds of Trust. Neither of the Assignments purports to assign an interest in the Note. CP 1003 and CP 1020-1022.

On the basis of the evidence before the trial court on summary judgment there was no clear evidence of who the true and lawful owner and holder ("beneficiary") of the obligation was on the date the Notice of Default and Notice of Trustee's Sale were issued. Although there is substantial doubt as to whether Fannie Mae is the real holder of the Note and true beneficiary under the Deed of Trust, it is quite clear that neither AURORA nor NATIONSTAR were actual "holders" of the obligation, as the term is defined under *RCW 61.24.005(2),* and entitled to prosecute a non-judicial foreclosure against Guttormsen's home at any time relevant to this cause of action. The

best that can be said of AURORA and NATIONSTAR is that they are merely servicers and agents of Fannie Mae based on undisclosed agency agreements and not otherwise entitled to receive payments under the Note. CP 848.

ii. Contractual definition of "Note Holder" in Note should control.

The identity of the "actual holder" of the obligation for purposes of the DTA could be simplified by looking to the terms in the Guttormsen Note, which contains a specific definition of note holder: the "Note Holder" is defined as the party "*entitled to receive payments* under [the] Note." CP 949. Paragraph 10 of the Note specifies that the accompanying security instrument, the Deed of Trust, "protects the *Note Holder* from possible losses which might result if I do not keep the promises which I make in this Note." CP 951. The Note does not contain the term "loan servicer" or "loan servicing." Guttormsen did not contract for an alternative basis by which someone who did not take it for value and who is not entitled to the stream of payments from the them, could affect their rights as borrowers. Thus, for Respondents to suggest, as they did on summary judgment, that the fundamental *indicia* of ownership of a note, the right to enforce and to "hold" can be separated, is simple erroneous.

Since the "Note Holder" is specifically defined within the parties' contract (the Note), the trial court did not need to analyze any other body of law, including the DTA or the UCC for the definition of "Note Holder."

Hawk v. Branjes, 97 Wn. App. 776, 780, 986 P.2d 841 (1999) *Walji v. Candyco, Inc.,* 57 Wn. App. 284, 288, 787 P.2d 946 (1990); *Mut. Of Enumclaw Ins. Co. v. USF Ins. Co.,* 164 Wn.2d 411, 425, 191 P.3d 866 (2008); *Vadheim v. Cont'l Ins. Co.*, 107 Wn.2d 836, 734 P.2d 17 (1987). Although NATIONSTAR alleges to have custody of the Note and is "receiving and crediting payment" for another, there was no evidence before the trial court to establish that any named Respondent was ever "entitled to receive payments" under the Note in its own right. See CP 844.

iii. Agents of the owner are not "holders".

Whoever it turns out actually owns the subject obligation, it is clearly not AURORA and NATIONSTAR, who were merely acting as agents for Fannie Mae or the true and lawful owner and holder of the Note and Deed of Trust. CP 842-845, 897. Under Washington law, a party who accepts an instrument as an agent for the owner of the instrument cannot qualify as a holder. *Central Washington Bank v. Mendelson-Zeller,* 113 Wn.2d 346, 358, 779 P.2d 697 (1989) (hereinafter "*Central Washington Bank*").

iv. Custody is not legal possession of the obligation.

While NATIONSTAR may have had temporary physical custody of the Note, there is no evidence that NATIONSTAR ever obtained "legal possession" of the obligation. *See* 18 William B. Stoebuck & John W. Weaver, W*ashington Practice: Real Estate Transactions* § 18.31 at 365 (2d ed. 2004) (discussing mortgage notes and the role of loan servicers as

collection agents, emphasizing that the owner of the mortgage note, and not the servicer, is "the mortgage holder"). Certainly there was no credible evidence of transfer of the obligation from Fannie Mae to NATIONSTAR before the trial court on summary judgment – only NATIONSTAR's self-serving and apparently unauthorized Assignment of the Deed of Trust to itself. CP 1020-1022. Moreover, equating temporary physical custody of a note with legal possession does not make commercial sense because should physical possession equate to legal possession, anyone who touches the note for any purpose, including the lawyer holding it for the temporary purpose of litigation, or the carrier who transports it from one place to another, or the custodian who maintains the note and deed of trust for safekeeping, can arguably initiate non-judicial foreclosure.

Clearly, on this record the trial court did not and could not, without ignoring disputed facts, distinguish between NATIONSTAR's physical custody of the subject Note and legal possession of the Note, with right to foreclose, declare a default and appoint a successor trustee under the DTA. The trial court erred and this matter should be remanded.

v. The beneficiary must be both the actual holder and the owner of the Note to foreclose.

This issue runs deeper. Under Washington law, it is not enough for the "beneficiary" to be merely a "holder" of the obligation secured by a deed of trust. The "beneficiary" must also be the "actual holder" and "owner" of

the promissory note. This contention is not only based on *Bain, Walker* and *Bavand,* but is supported by a plain reading of other sections of the DTA, including *RCW 61.24.030(7)(a), RCW 61.24.030(8)(l)* and *RCW 61.24.040(2).* These are "requisites" of the statute and cannot be waived. *Albice,* at page 568 (citing *Udall,* at 915-916)*; Schroeder, Klem* and *Lyons.* There is no reasonable way to read *Bain* and the statutory provision cited above in any other manner except to conclude that being the holder is a necessary, but not a sufficient condition to conducting a non-judicial foreclosure: the "holder" must also be the "owner" of the obligation.[6] This is particularly so once the sale is challenged and supports the competing interests of the Act as stated in *Cox v. Helenius,* 103 Wn.2d 383, 387, 693 P.2d 683 (1985): to ensure that the non-judicial foreclosure process should remain efficient and inexpensive, should provide an adequate opportunity for interested parties to prevent wrongful foreclosures, and should promote the stability of land titles.

In sum, there were material issues of fact in dispute on the record that was before the trial court on summary judgment regarding NATIONSTAR's and AURORA's status as a "holder" of the Note with authority to foreclose.

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[6] It is important to note that in this case, the provisions of *RCW 61.24.030(7)* requiring the trustee "have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust" were in effect at the time the subject Notice of Trustee's Sale was issued on December 14, 2012, unlike the situation addressed by the court in *Walker*, where the notice of trustee's sale was issued on July 21, 2009 and apparently prior to the effective date of the current statutory requirements.

Indeed, there was no evidence before the trial court on summary judgment that the purported owner, Fannie Mae, either knew or approved of its agent's foreclosure activities. Certainly, there was no evidence before the trial court the QLS ever investigated or verified NATIONSTAR's authority to initiate a non-judicial foreclosure.

However, at hearing on summary judgment, QLS argued that "ownership" was irrelevant, drawing the trial court's attention to *Trujillo v. Northwest Trustee Services Inc., et al.*,181 Wn.App. 484, 326 P.3d 768, 2014 (LEXIS 1343, 2014 WL 2453092) (hereinafter "*Trujillo*") (petition for review pending and deferred pending further proceedings in *Lyons*, 2014 Wash LEXIS 985). But, as to the issue concerning the trustee's fiduciary duty of good faith regarding compliance with the provisions of *RCW 61.24.030(7)(a), Trujillo* has largely been made irrelevant by the Supreme Court's ruling in *Lyons.*

At most, application of *Trujillo* to this case should be limited. In order to arrive at its conclusion that the trustee did not violate its duty of good faith, the *Trujillo* court suggested that the first sentence of the section should be ignored in its entirety: "the required proof is that the beneficiary must be the holder of the note. It need not show that it is the owner of the note." *Trujillo*, at page 776. In an apparent disregard of long standing rules of statutory construction, the *Trujillo* court justified its holding by noting that the first sentence of *RCW 61.24.030(7)(a)* was a "legislative error" and

should be disregarded in its entirety: "Better still, the legislature could have eliminated any reference to 'owner' of the note of the note in the provision because it is the 'holder' of the note who is entitled to enforce it, regardless of ownership." *Trujillo*, at page 776. While writing the first sentence of *RCW 61.24.030(7)*(a) out of the statute, the *Trujillo* court failed entirely to address the provisions of *RCW 61.24.030(8)(l)* and *RCW 61.24.040(2),* which now conflict with the re-written provisions of *RCW 61.24.030(7)(a).* This sort of judicial legislation and re-write of statutes adopted by the legislature invites this Court to limit the application of *Trujillo. See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous") (citing *Davis v. Dept. of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) and *Whatcom Co. v. City of Bellingham*, 128 Wn.2d 537, 909 P.2d 1303 (1996)) and *G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 310-311, 237 P.3d 256 (2012).

Following the Supreme Court's mandate set out in *State v. J.P.*, *supra*, the plain reading of *RCW 61.24.030(7)(a)* requires that the two provisions be harmonized and read together, where the conclusion is certain: **where A [Owner] = B [Beneficiary] and B [Beneficiary] = C [Actual Holder]; A [Owner] should equal C [Actual Holder].** This is incontrovertible logic.

It follows that only the owner and actual holder of the obligation can be the "beneficiary" entitled to declare a default and appoint a successor trustee under *RCW 61.24.030(8)I* and *RCW 61.24.010.* However, there was no credible evidence the true and lawful owner and actual holder of the Guttormsen loan ever took these actions. In part, this is the result of Respondents contradictory assertions of status. MERS assigns the Second Deed of Trust (200603230407) (CP 971-986) to AURORA in 2011, but Fannie Mae owned the Note, together with the security, at that time. CP 843 and 1003. Then AURORA, as "beneficiary" appoints QLS successor trustee of the Second Deed of Trust (200603230407) (CP 971-986). But then, QLS issues a Notice of Default, seeking to foreclose the First Deed of Trust (200603230406) (CP 954-969). The Notice of Default includes a Debt Validation Notice that attached to the Notice of Default identified AURORA as the party to whom the "debt/loan is currently owed", but the Notice of Default identifies Fannie Mae as "owner of the Note" and that AURORA is merely the "servicer". CP 1008-1009. There is no way to reconcile these statements. If the security follows the note, the only true and lawful owner of the subject obligation is Fannie Mae. *Bain,* at page 104. Absent the existence of an express delegation of authority, for which there is absolutely no evidence, only Fannie Mae had the right and authority to declare a default under *RCW 61.24.030(8)(l)* and appoint QLS successor trustee under *RCW 61.24.010.* But there was no credible evidence before the trial court that

Fannie Mae took either action. Accordingly, Respondents' actions violated the DTA.

F. QLS' violation of duty of good faith.

Although Guttormsen have identified several violations of the DTA above, the most significant is QLS' violation of its fiduciary duty of good faith under *RCW 61.24.010. Klem* at page 790.

Under current Washington law, private trustees, such as QLS, are obligated by common law and equity to be evenhanded to both sides and to strictly follow the provisions of the DTA. See *Cox; Albice,* at page 934; *Lyons,* at page 1149. This is a fiduciary duty. *Klem* at page 790.

Notwithstanding serious doubts regarding whether any named Respondent had standing as a true and lawful owner or actual holder of the subject obligation to initiate a non-judicial foreclosure against Guttormsen, and the lawfulness of AURORA's appointment of QLS as successor trustee, QLS engaged in an unethical process of unreasonably relying upon documents it knew or should have known to be false and misleading. By failing to verify any of the records it was provided by Respondents to initiate a non-judicial foreclosure; relying on an Assignment of Deed of Trust executed by an ineligible "beneficiary" (CP 1003); relying on an Appointment of Successor Trustee executed by an entity that had sold the Note and Deed of Trust to Fannie Mae without verifying its authority (CP 1005-1006); relying on a Declaration of Ownership that failed to identify the

true and lawful owner of the obligation and failed to comport with *RCW 61.24.030(7)(a)* (CP 998); relying on a Debt Validation Notice that failed to identify the true and lawful owner of the obligation and failed to comport with *RCW 61.24.030(7)(a)* (CP 1080); and otherwise failing to verify the ownership of the obligation, QLS breached the "fiduciary duty of good faith" by attempting to prosecute a non-judicial foreclosure on Respondents' behalf without strictly complying with all requisites of sale. As noted by the Washington Supreme Court in *Lyons*, at page 1149:

> A foreclosing trustee must "adequately inform" itself regarding the purported beneficiary's right to foreclose, including, at a minimum, a "cursory investigation" to adhere to its duty of good faith. *Walker*, 176 Wn.App. at 309-10. A trustee does not need to summarily accept a borrower's side of the story or instantly submit to a borrower's demands. But a trustee must treat both sides equally and investigate possible issues using its independent judgment to adhere to its duty of good faith. See *eg., Cox v Helenius,* 103 Wn.2d 383, 388, 693 P.2d 683 (1985). A trustee's failure to act impartially between note holders and mortgagees, in violation of the DTA, can support a claim for damages under the CPA. *Klem,* 176 Wn.2d at 792.

Specifically, under *RCW 61.24.030(7(a)* a trustee must ensure that the beneficiary is the **owner and holder** of any promissory note or other obligation secured by the deed of trust before a notice of trustee's sale is recorded, transmitted, or served. *RCW 61.24.030(7)(a), RCW 61.24.030(8)(l)* and *RCW 61.24.040(2). Lyons,* page 10. Despite *Trujillo*, a trustee's violation of obtaining proof of ownership violates the trustee's fiduciary duty of good faith and remains a viable basis of trustee liability under the CPA. See *Lyons,* at pages 1148-1150:

> The allegedly improper acts of NWTS are intertwined but can be generally categorized as violations of two DTA statutes – violation of the duty of good faith under RCW 61.24.010(4) and noncompliance with RCW 61.24.030(7)(a), which instructs that a trustee must have proof the beneficiary is the owner prior to initiating a trustee's sale. . .
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> . . . .If Lyons' alleged violations are true, NWTS' actions would likely be considered unfair acts. . . .
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> . . . If Lyons' allegations are true and NWTS knew about the conflicting information regarding their right to initiate foreclosure but did not look into this matter, there are issues regarding whether this indicates deferral to Wells Fargo and therefore lack of impartiality. These issues of fact regarding NWTS' actions must be resolved before a court can determine if they have violated the duty of good faith. Considering the evidence in the light most favorable to Lyons, this claim (proof of ownership and status as beneficiary) should have survived summary judgment.
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> . . . Lyons claims NWTS did not have proper proof that Wells Fargo was the owner of the note and could not direct NWTS to foreclose. Thus, Lyons alleges that NWTS violated RCW 61.24.030(7)(a), which requires that "before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust." The trial court determined there were no issues of material fact and granted summary judgment. We disagree. . . .[7]

With regard to QLS' compliance with its duty to investigate and verify, it is important to note that during this period of time, QLS had no procedures in place to verify any of the information it received from its "clients", such as AURORA and NATIONSTAR. (CP 35, page 34, lines 1-16). Clearly, QLS blindly accepted whatever information was provided by its

[7] It is significant to note that in its discussion of Ms. Lyons' claims regarding NWTS' violation of *RCW 61.24.030(7)(a)* – specifically, the claim that NWTS failed to obtain proof of ownership of the obligation prior to issuance of a notice of trustee's sale – the *Lyons* court unanimously ignored the ruling in *Trujillo.*

"clients" and failed to engage in the sort of investigation necessary to verify the information QLS relied upon to initiate non-judicial foreclosures and its duties of good faith described in *Lyons*. QLS' compliance with its fiduciary duties of good faith and the disputed issues of fact associated therewith were completely ignored by the trial court.

G. Violation of CPA.

While damages for pre-sale violations of the DTA are not recoverable, a CPA claim may maintained regardless of the status of the property. *Frias v. Asset Foreclosure Services, Inc.,* 181 Wn.2d 412,417, 334 P.3d 529 (2014), *Lyons*.

The elements of a claim under the CPA include the following: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation. *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wn.2d 778, 719 P.2d 531 (1986). The CPA should be "liberally construed that its beneficial purposes may be served." *RCW 19.86.920; Short v. Demopolis,* 103 Wn.2d 52, 691 P.2d 163 (1984).

The *Bain* court specifically held that a homeowner might have a CPA claim against MERS if MERS acts as an ineligible beneficiary. *Bain* at pages 115-120. The *Bain* court specifically ruled that the unfair and deceptive act or practice element can be presumed based upon MERS' business model and the

manner in which it has been used.[8] *Bain* at pages 115-117; *Klem,* at pages 784-788. See also *Walker,* at pages 318-319 and *Bavand,* at pages 504-506. Indeed, the improper assignment of the obligation by MERS (CP 1003) and appointment of QLS based upon that assignment (CP 1005-1006), among other violations of the DTA alleged herein, can constitute unfair and deceptive acts or practices. *Walker*, at pages 319-320, and *Bavand*, at page 505.

The *Bain* court specifically ruled that the public interest impact element can also be presumed based on the number of mortgages that utilized MERS as a nominee for an undisclosed principal. *Bain,* at page 118; *Bavand,* at pages 506-507.

Although the *Bain* court did not specifically address the trade or commerce element, that could also be presumed from the court's analysis of the public interest element. See *Walker,* at page 318. All of the named Respondents are in the business of making or servicing loans for hundreds, if not thousands, of businesses and residents in the State of Washington. See *Bain*, at page 118. In sum, the only elements that cannot be presumed in a typical MERS case on summary judgment are the fourth and fifth elements: the elements of damages/injury and causation. Thus, on summary judgment,

[8] This is in accord with other case law in Washington. An unfair or deceptive act can include misrepresentations of facts related to the legal status of a debt. *Panag v. Farmers Ins. Co. Of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009) (deceptive methods used by a collection agency to recover money on behalf of an insurance company). See also *Klem.*

Plaintiff needed only to allege facts regarding the fourth and fifth elements of a CPA claim by asserting her claims of injury/damages and causation.

As to the damages/injury and causation elements of a CPA claim, the analysis set forth in *Panag v. Farmers Insurance Co.*, 166 Wn.2d 27, 204 P.3d 885 (2009) is the most useful to the present case, because it also involved improper efforts to collect on a debt. There the Washington Supreme Court held that:

> Monetary damages need not be proved; unquantifiable damages may suffice. *Id.* (loss of goodwill); *NW. Airlines, Inc. v. Ticket Exch., Inc.,* (proof of injury satisfied by "stowaway theory" where damages are otherwise unquantifiable in case involving deceptive brokerage of frequent flier miles); *Fisons,* (damage to professional reputation); *Sorrel v. Eagle Healthcare, Inc.,* (injury by delay in refund of money); *Webb v. Ray,* (loss of use of property).

Panag at pages 58. (internal citations omitted). The *Panag* analysis was cited with approval by the court in *Walker*, at page 320, *Bavand,* at pages 508-509; and *Lyons*, at page 1149, ftn. 4.

Thus, "investigation expenses and other costs" establish injury and are compensable under a CPA claim. *Panag* at page 62. Other injuries may include injury to financial reputation or professional goodwill. *Physicians Insurance Exchange & Association v. Fisons, Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993), citing to *Nordstrom, Inc, v. Tampourlos*, 107 Wn.2d 735, 733 P.2d 208 (1987), *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 792 P.2d 142 (1990), and *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 554 P.2d 1041 (1976) (holding that injury to one's credit reputation constitutes injury).

In addition to their claims for declaratory relief, injunctive relief and damages, Guttormsen have a claim that Respondents deceived and prevented them from meaningfully pursuing their options under the federal Home Affordable Modification Program (HAMP). Specifically, Respondents violated *RCW 61.24.030(8)(l)* by failing to provide contact information for Fannie Mae in the Notice of Default. The address and phone number provided belonged to AURORA – not Fannie Mae. (CP 1008-1009). Accordingly, Guttormsen had no meaningful way of contacting the owner of their obligation. Had they been given the proper contact information, Guttormsen could have pursued Fannie Mae sponsored programs that might have provided them a modification of their loan. Fannie Mae borrowers are eligible to a modification of the loan when: (1) you are ineligible to refinance; (2) you are facing a long-term hardship; (3) you are behind on your mortgage payments or likely to fall behind soon; (4) your loan was originated on or before January 1, 2009 (i.e., the date you closed your loan)' and (5) your loan is owned by Fannie Mae or Freddie Mac – or is serviced by a participating mortgage company.[9]

Guttormsen did not become aware of Fannie Mae's involvement until well after they were allegedly tens of thousands of dollars in arrears, making any modification at that time problematic. Respondents all participated in

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[9] http://www.knowyouroptions.com/modify/home-affordable-modification-program

concealing Fannie Mae's involvement in Guttormsens' Note and Deed of Trust and colluded in leading Guttormsens to believe they did not have options under the federal programs, when, in fact, the opposite was true.

As a direct and proximate result of Respondents' misconduct, Guttormsen identify their damages as follows:

> 14. As a direct and proximate result of [respondents'] misconduct, my wife and I have been injured and damaged.
>
> a. First, my wife and I have had our financial reputation injured by Defendants' wrongful foreclosure and collection effort through the reporting of their efforts to credit reporting agencies, together with loss of professional goodwill. Our credit was also adversely impacted by the wrongful filing of the Notice of Trustee's sale with the Snohomish County Auditor to foreclose a Deed of Trust that AURORA was never assigned and to which QLS was never appointed the successor trustee – an obligation in which they have no interest. My wife and I have attempted to obtain loans for personal and/or business purposed since Defendants' declared default and filed and served their Notice of Trustee's Sale, and been denied because of the adverse report on their credit report. To that extent, I have been injured. But for Defendants' misconduct, my wife and I might have been able to refinance our home. However, even if Defendants had not wrongfully filed the Notice of Trustee's Sale, my wife and I would not have been able to refinance our property because Defendants' wrongfully filed a second Deed of Trust on my home.
>
> b. Second, my wife and I have incurred investigative expenses; we have taken time from work, incurred travel expenses and attorney's fees in our efforts to determine who our lender is and to save our home.
>
> c. Third, there are injuries intrinsic to wrongful foreclosure that cannot be calculated monetarily. Foreclosure or the prospect of foreclosure is almost *per se* an emotional harm. Thus, we may have a basis to claim damages for outrage based on Defendants' irregularities in these foreclosure proceedings which was not previously plead.

> d. Moreover, my wife and I seek to enjoin Defendants' foreclosure effort until the true and lawful owner and holder of our Note and Deed of Trust is identified and for the Court to declare MERS to be an ineligible beneficiary and declare the identity of the true and lawful owner and holder of our obligation. This declaratory relief is necessary to assure a clear title to our property when we resolve all outstanding issues concerning our loan.
>
> CP 526-528.

In addition to the foregoing, Guttormsen have necessarily suffered damages through (1) the threat of losing all of their equity in their property without compensation; (2) a substantial reduction of their ability to sell the house as a result of the recording of the Notice of Trustee's Sale and the recording of two separate Deeds of Trust for twice the value of the Note and the security bargained for, (3) a substantial reduction in any equity to borrow against as a result of the recording of the Notice of Trustee's Sale and the recording of two separate Deeds of Trust for twice the value of the Note and the security bargained for; (4) damages to their credit as a result of Defendants' unlawful acts, (5) the inability to take full advantage of the protections of the federally mandated HAMP program and the FFA mediation process (*RCW 61.24.163*); and (6) consequential damages arising by the wrongful foreclosure action. As to this last item the expenditure of out-of-pocket expenses for postage, parking, and consulting an attorney are sufficient proof of an injury under *Hangman Ridge*. *Panag* at page 902.[10]

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[10] See also *In re John Patrick Keahev*, BAP No. WW-08-1151.

Injury to a person's business or property is broadly construed and in some instances, where "no monetary damages need be proven, and that non-quantifiable injuries, such as loss of goodwill would suffice for this element of the *Hangman Ridge* test." *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987); *Klem. Lyons,* at page 9, ftn 4. The expenditure of out-of-pocket expenses for postage, parking, and consulting an attorney are sufficient proof of an injury under *Hangman Ridge*. *Panag,* at pages 59-65. Here, Guttormsen had to repeatedly take time off from work at a loss of wages and incurred travel expenses to consult with an attorney to dispel uncertainty regarding the ownership of their Note, prepare and incur the expense of submitting Qualified Written Reqeusts to address Respondents' misconduct. (CP 519-529z) Such damages have been recently found to be compensable under Washington law. See *Lyons* and *In re Meyer.*

All of the injuries and damages alleged by Guttormsen were the direct and proximate cause of respondents' misconduct, including QLS, and viewing the evidence in a light most favorable to the non-moving party, all five elements for a private cause of action under the CPA have been met.

H. Violation of *RCW 9A.82.*

RCW 9A.82.045 provides as follows:

> It is unlawful for any person knowingly to collect any unlawful debt. A violation of this section is a class C felony.

RCW 9A.82.100(1)(a), provides as follows:

> (1)(a) A person who sustains injury to his or her person, business, or property by an act of criminal profiteering that is part of a pattern of criminal profiteering activity, or by an offense defined in RCW 9A.40.100, 9.68A.100, 9.68A.101, or 9A.88.070, or by a violation of RCW 9A.82.060 or 9A.82.080 may file an action in superior court for the recovery of damages and the costs of the suit, including reasonable investigative and attorney's fees.

RCW 9A,82.010(4) defines 'criminal profiteering" as follows:

> 4) "Criminal profiteering" means any act, including any anticipatory or completed offense, committed for financial gain, that is chargeable or indictable under the laws of the state in which the act occurred and, if the act occurred in a state other than this state, would be chargeable or indictable under the laws of this state had the act occurred in this state and punishable as a felony and by imprisonment for more than one year, regardless of whether the act is charged or indicted, as any of the following:
>
> * * *
>
> (k) Extortion, as defined in RCW 9A.56.120 and 9A.56.130;
>
> * * *
>
> (p) Collection of an unlawful debt, as defined in RCW 9A.82.045;

There is little Washington law construing the civil limits of *RCW 9A.82*, but the statute has been applied to misconduct associated with the DTA. *Bowcutt v. Delta North Star Corp.*, 95 Wn.App. 311, 976 P.2d 643 (1999). .

While Guttormsens expect Respondents and perhaps the Court to respond incredulously at the suggestion that well-heeled banks, mortgage lending and servicing companies could be accused of "racketeering", the allegations contained in the Declaration of David Guttormsen, Plaintiffs' verified Complaint, Plaintiffs' Request for Judicial Notice and the Declaration of Tim Stephenson, which the Court is obliged to accept as true

under *CR 56,* clearly establish such a claim. Proof that these unscrupulous lending behaviors, particularly the utilization of MERS to conceal ownership of mortgage loans and assignment of the same to entities with no interest for the sole purpose of foreclosure for gain, is being pursued by these Respondents, including MERS, and others in the mortgage lending industry in hundreds of cases, as is amply documented in the cases offered by Guttormsen herein: *Bain, Klem, Schroeder, Walker, Bavand, Rucker, v. Novastar,* 177 Wn.App. 1, 311 P.3d 31 (2013), *Trujillo, Frias, Lyons,* etc. The facts plead in *Bain, Klem, Walker* and *Bavand* are enough to establish a pattern of felonious misconduct with these lending practices, had the claim been plead, to fulfill *RCW 9A.82.010* and *RCW 9A.82.100,* and are present in this case.

First, QLS and its co-respondents attempt to collect a debt for which they have no lawful interest which constitutes a violation of *RCW 9A.82.045.*

Second, QLS and its co-respondents are demanding payment on a debt to which they have no lawful interest and threatening to take Guttormsens' property by non-judicial means constitutes extortion, within the terms of *RCW 9A.56.120* and *RCW 9A.56.130.* See also *RCW 9A.04.110(27)(j).*

The pattern of misconduct alleged herein is the similar to what others in the State of Washington in Guttormsens' position suffer. The pervasiveness of MERS transactions in the mortgage lending marketplace

were noted by the *Bain* court. See *Bain* at page 118. The misconduct of the servicers takes on fairly predictable patterns as they are intentionally transacted as "cookie cutter" transactions to lower costs and speed the process. See *Bain, Klem, Schroeder, Walker, Bavand, Lyons,* etc.

There are at least issues of material fact that preclude summary judgment on this claim.

V. CONCLUSION

The trial court's summary judgment was based on disputed factual claims. It was based on declarations that contained inadmissible evidence which could have been challenged through discovery, had it been allowed. The trial court misread the requirements of the DTA and excused Respondents from their responsibility to clearly establish their factual and legal entitlement to summary judgment and to foreclose on the Guttormsen's home. Reversal is the remedy.

Finally, Appellants should be awarded taxable costs and attorney's fees on appeal, pursuant to *RAP 18.1,* based on the terms of the subject deeds of trusts.

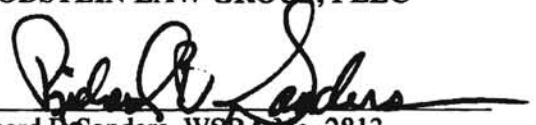
REPECTFULLY SUBMITTED this 5th day of January, 2015.

KOVAC & JONES, PLLC.

Richard Llewelyn Jones, WSBA No. 12904
Attorney for Appellant

Attorney for Appellant

GOODSTEIN LAW GROUP, PLLC



Richard B Sanders, WSBA No. 2813
Attorney for Appellant

CERTIFICATE OF MAILING

The undersigned declares under penalty of perjury under the laws of the state of Washington that the following is true and correct. On January 5, 2015, I arranged for service of the foregoing Initial Brief of Appellant on the following parties in the manner(s) indicated:

Robert W. McDonald, WSBA No. 43842 Joseph W. McIntosh, WSBA No. 39470 McCARTHY & HOLTHUS, LLP 108 1st Avenue South, Suite 300 Seattle, WA 98104 *Attorneys for Quality Loan Service Corporation of Washington*	_____ _____ **X** _____ **X**	Facsimile Messenger U.S. 1st Class Mail Overnight Courier Electronically
Mary Stearns, WSBA No. 42543 McCARTHY & HOLTHUS, LLP 108 1st Avenue South, Suite 300 Seattle, WA 98104 *Attorneys for NationStar Mortgage LLC and Quality Loan Service Corporation of Washington*	_____ _____ **X** _____ **X**	Facsimile Messenger U.S. 1st Class Mail Overnight Courier Electronically
Andrew Yates, WSBA No. 34239 Kristin Beneski, WSBA No. 45478 Joseph P. Corr, WSBA No. 36584 LANE POWELL PC 1420 Fifth Avenue, Suite 4100 Seattle, WA 98101 *Attorneys for Aurora Loan Services, LLC; Aurora Bank FSB; Federal National Mortgage Association, and Mortgage Electronic Registration Systems, Inc.*	_____ _____ **X** _____ **X**	Facsimile Messenger U.S. 1st Class Mail Overnight Courier Electronically

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_____Overnight Courier
_____Electronically

SIGNED this 5th day of January, 2015, at Bellevue, Washington.

Susan L. Rodriguez
Legal Assistant

TABLE OF APPENDICES

APPENDIX "1"

TALE OF TWO DEEDS OF TRUST

Promissory Note for **$200,000.00** debt to AIG Federal Savings Bank

1st DEED OF TRUST (DOT)
3/23/06
(200603230406)
$200,000.00
(CP 954-969)

2nd DEED OF TRUST (DOT)
3/23/06
(200603230007)
$200,000.00
(CP 971-986)

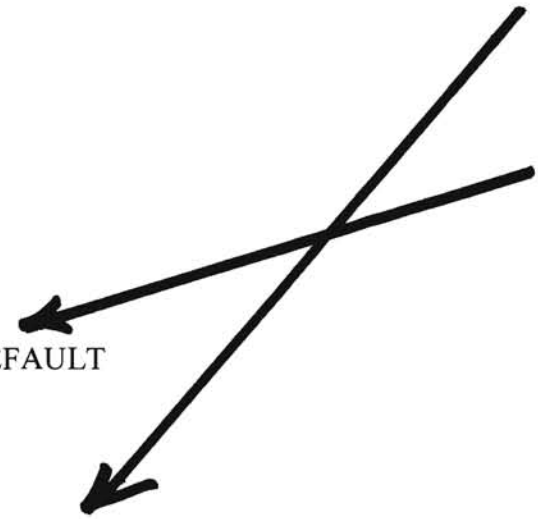
$400,000.00 total in security

DOT 1 Documents:

DOT 2 Documents:

ASSIGNMENT OF DOT
8/16/11
(201111300356)
(MERS → AURORA
(CP 1003)

APPOINTMENT OF SUCCESSOR TRUSTEE
6/13/12
(201206210440)
(AURORA → QLS)
(CP 1005-1006)



NOTICE OF DEFAULT
7/13/12
(CP 1008-1018)

ASSIGNMENT OF DOT
9/26/12
(201210110416)
(NATIONSTAR as POA FOR AURORA →NATIONSTAR)
(CP 1020-1022)

NOTICE OF TRUSTEE'S SALE
12/14/12
(201212170474)
(CP 1024-1027)

APPENDIX "2"

TRAIL OF OWNERSHIP CLAIMS

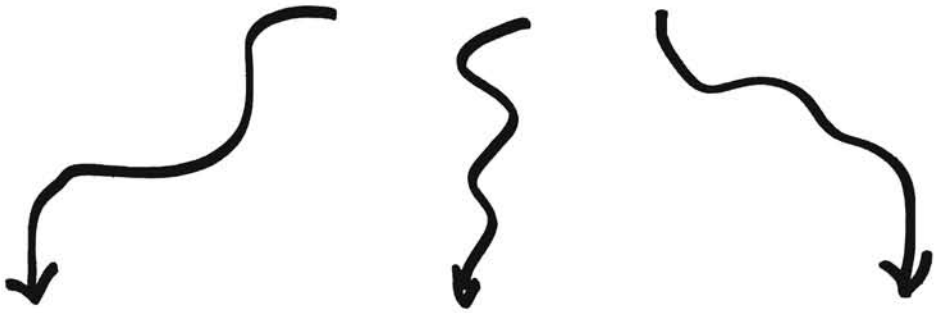
Promissory Note for **$200,000.00** debt to AIG (CP 949-951)

Allonge from AIG to HSBC Mortgage Services (CP 991)

Allonge from HSBC Mortgage Services, in Blank (CP 993)

NO FURTHER ENDORSEMENTS OR ALLONGES

PARTIES CLAIMING BENEFICIAL INTEREST
("Actual Holder"/"Beneficiary"/POA/Cusodian)



Fannie Mae
(CP 995-996)
(CP 1008)

AURORA
(CP 998)
(CP 1003)
(CP 1005)
(CP 1018)

NATIONSTAR
(CP 1020-1022)