#69194-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

SCOTT C TOWNLEY and STEPHANIE A TASHIRO-TOWNLEY,
Defendants/Appellants

vs.

BANK OF NEW YORK MELLON, f/k/a BANK OF NEW YORK,
TRUSTEE FOR CERTIFICATE HOLDERS CWABS, INC. ASSET BACKED CERTIFICATES, 2005-10,
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AND OCWEN LOAN SERVICING
LLC
Plaintiffs/Respondents

SUPPLEMENTAL BRIEF OF APPELLANT

Appeal from King County Superior Court Case No: 12-2-06921-2 KNT
The Honorable LeRoy McCullough
The Honorable Hollis Hill

Stephanie A Tashiro-Townley
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Defendant / Appellant

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Issues

1. Is it proper to preclude and therefore this court to address properly the section of the 9th Circuit's decision with respect to the issues of waiver and dismissal, then remanding Townleys back to the [federal district] trial court so the court can reconsider [plaintiffs] Townleys' Consumer Protection Act (CPA) claims; given said section failed to correctly apply Washington law in light of Udall, Schroeder Albice, (infra), the undisputed facts submitted in this case (albeit submitted to the Federal Court or the State Court; that allow recovery to the point as defined under Sofie (infra) when facts form foundation of actionable fraud claims (inter alia) and given the irregularities had in this case of RCW 61.24. et seq.?

2. Was it reversible error for the Trial Court to hold it lacked jurisdiction, albeit the Court's view is contrary to case law, contrary to intent and purposed of a retrospective application of new statutory language of RCW 61.24 et seq., or contrary to the prohibitive language of the Constitution regarding Townleys' right to trial by denying Townleys' request for a jury trial (RCW

59.12.130), in light of facts, issues, and procedural tools used by Townleys that placed the Petition for Declaratory Judgment and claims or the question of the right of possession of the subject property properly before the Court when the said facts formed foundation of meritorious fraud (inter alia) claims and showed wrongful foreclosure and therefore, stood properly against eviction of Townleys out of their home?

3. Do the particular facts of Townleys' case form a "first impression" case of opportunity for this court to determine the issue of allowing Townleys' the right of re-possession of the subject property (their home and other similarly situated homeowners) because it involved an improper foreclosure and eviction when said particular facts, case law, and [possibly] this Court's retrospective application of new statutory language of RCW 61.24 et seq., to the instant case, when, [this particular facts] no bona fide purchaser exists (to wit, no parties questioning the right of possession excluding Townleys and Respondent)?

Statement of the Case

Appellant Townleys took possession/ownership of the subject property in

1997. On January 21, 2014 the 9th Circuit Court of Appeals issued its unpublished decision of case #11-35819. (See ***Exhibit A***)

The decision remanded the case back to federal trial court to address CPA claims. However, the decision stated Townleys waived claims and cited, as authority, Plein v. Lackey 67 P.3d 1061, 1067 (Wash. 2003). On February 4, 2014, Townleys filed a motion for reconsideration. (See, ***Exhibit B***). The motion addressed the plain error of the ruling and cited applicable case law; the motion was denied on June 9, 2014.

On July 28th, 2014, Townleys received a letter from this Court (Division I) requesting submission of a supplemental brief addressing the preclusive effect of the 9th Circuit decision on the Counter and Cross Complaint and whether those causes of action were brought up properly within the Unlawful Detainer action.

Respondents moved for unlawful detainer in the King County Superior Court. Townleys in objection presented undisputed facts that that challenged properly Respondents' right of possession. Townleys filed motion to change from limited to general proceedings (CP 41); a Petition for Declaratory Judgment with said facts (CP 11 and CP 40) and the Counter and Cross Complaint (CP 16). Townleys believed they submitted

proper procedures/vehicles for the court to address the facts that formed foundation sounding in fraud (inter alia); the issues were properly presented and therefore, preserved. The Trial Court ruled it lacked jurisdiction to ruling on said pleadings.

C. ARGUMENT

I. THE PRECLUSION OF THE 9TH CIRCUIT'S DETERMINATION OF UPHOLDING THE VIEW OF WAIVER FOR FAILING TO SEEK A STAY AND DISMISSAL OF TOWNLEYS' CASE BY THE 9th CIRCUIT STANDS CONTRARY WASHINGTON STATE LAW

Division 1 requested Townleys' address the preclusive effect of the 9th Circuit ruling in their decision of appeal #11-35819. (See, ***Exhibit A***)

The 9th Circuit Court's decision upheld the dismissal of Townleys' case and determined their failure to seek a stay was waiver to claims. This is contrary Washington Law. Also, remanding to reconsider Townleys CPA claims holds little substance given the Court's determination or is confusion, vague, and the ruling seems to toss the burden on this Court to clarify or properly apply Washington law to the particular facts of this case.

Part of the 9th Circuit's decision determined, quoted in relevant part,

> "The district court properly dismissed plaintiffs'

> post-sale claims for injunctive and declaratory relief because plaintiffs waived those claims by failing to bring an action to enjoin the foreclosure sale. See Plein v. Lackey, 67 P.3d 1061, 1067 (Wash. 2003)"

See ***Exhibit A***, page 2 LL 4-10

The above is contrary to Washington's case law, which holds failure to seek a stay does not waive claims. In addition, under the particular facts of this case upholding the dismissal is improper. As the court held in *Schroeder v. Excelsior Management Group*, quoted in relevant part,

> "We conclude that the respondents' reliance on Plein is misplaced. (Emphasis added) It is well settled that the trustee in foreclosure must strictly comply with the statutory requirements. *Albice, 174 Wash.2d at 568, 276 P.3d 1277* (citing *Udall, 159 Wash. 2D at 915-16, 154 P.3d 882*). A trustee in a non-judicial foreclosure may not exceed the authority vested by that statute. Id. As we have recently held, the borrower may not grant a trustee powers that the trustee does not have by contracting around provisions in the deed of trust statute. *Bain, 175 Wash.2d at 100, 285 P.3d 34.*"

Id. 177 Wash. 2d 94, 297 P.3d 677, (2013)

Schroeder and Udall (supra.) holds failing to enjoin the sale does not waive of any post-sale remedies. Of course, here the question of right

of possession is in play too. The decision of Bain (supra.) held MERS was not a legal beneficiary causing that assignment to MERS invalid; therefore, the foreclosure was void.

The following statutory language stands contrary to the 9th Circuit's view of waiver; quoted in relevant part,

> Failure to bring civil action to enjoin foreclosure — Not a waiver of claims.
>
> (1) The failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter may not be deemed a waiver of a claim for damages asserting:
>
> (a) Common law fraud or misrepresentation;
>
> (b) A violation of Title 19 RCW;
>
> (c) Failure of the trustee to materially comply with the provisions of this chapter; or
>
> 1. A violation of RCW 61.24.026.

Id. RCW 61.24.127 (Emphasis added)

The underlined (emphasized) portions of the above statute is contrary to the 9th Circuit decision—showing their view was an improper application. Plus, case law too, holds Townleys did not waive claims in their challenge to Respondents' foreclosure action.

As stated in "Issues 1" preclusions of 9th Circuit's decision that Townleys waived claims for failing to seek a stay is improper and

dismissal was proper is contrary to Washington law. In addition, under Washington law under particular facts, as is the case here forming foundation of fraud (inter alia) claims recovery is not limited. (Accord, Sofie (infra)).

II. PRE-EVICTION ACTIONABLE CLAIMS ARE PROPER IN THE CASE AND REMAND TO RECONSIDERATION CPA GIVEN THE HOLDING DISMISSAL WAS PROPER AND TOWNLEYS WAIVE REQUIRES THIS COURT INTERVENTION.

Quoting the Ninth Circuit's opinion in relevant part,

> "Because the district court did not have the benefit of *Bain* when it issued its order of dismissal, we remand to allow the court to reconsider plaintiffs' CPA claim."

See ***Exhibit A***, page 2 LL19 through page 3 LL 1-2; 9th Cir decision of Case #11-35819, dated January 27, 2014

The time lines of the original dismissal and subsequent appeal in light of the case law and new statutory language (which was submitted as additional authority to the 9th Circuit) seems to add to aspects of the Court's decision. However, the case law holding the foreclosure was improper was available to the court before it's decision. The preclusive of the majority of the Ninth Circuit's decision and the need for this Court's intervention is proper given the Ninth Circuit's decision rests with the one questionable benefit of stating the Federal Trial Court can reconsider

Townleys' CPA . The benefit is question given the substance of the 9th Circuit's holds dismissal was proper and Townleys waived claims by not seeking a stay of the foreclosure. Case law holding MERS was a not a valid beneficiary was the Law of Washington under the facts of this particular cases. As such, it stood to show Townleys' foreclosure was improper—void. For the convenience of the Court, Townleys' opening brief filed in the 9th Circuit case is included. (See, **Exhibit C**).

The expanded post-foreclosure CPA claims and fraud claims submitted in Townleys' Counter and Cross Complaint (CP 16)—show claims were properly preserved.

Direct evidence was submitted and establishes foundation of fraud, misrepresentation, deception, etc., which are valid actionable claims and if found admissible for submission to a jury are not limited in the amount of awards a jury made grant. Of note, Respondents and Does yet to be named form the second and third of the three causes of action submitted by Townleys.

For obvious reasons, the facts relating to post-foreclosure claims were not included and therefore, not reviewed by the 9th Circuit during their determination. The court can remand to the King County Superior

Court and allow Townleys their day in Court (a jury trial), given they requested a trial per RCW 59.12.130 and also Townleys moved to change form limited to a general proceeding (CP 41); this was also presented in order to hear the petition for declaratory judgment.

The declaratory judgment addressed ownership (right of possession). The cross and counter claims addressed actionable claims after the issues of possession was resolved. The issues can be resolved here by remanding the case back to the King County with an order to allow Townleys to seek recovery for the actionable claims presented. That seems proper to Townleys. In addition, Townleys believe it is proper to place them in their pre-eviction status—repossession of their home.

III. RECOVERY OF DAMAGES IS THE PROVINCE OF A JURY

The Honorable Judge Leroy McCullough stated, on July 13, 2012, quoted in relevant part,

> "Now this does not mean that the fraud that's alleged will not be before a jury or before a court..... I have not been convinced that this plaintiff engaged in fraudulent behavior. But I think that there is proper information to go before a jury and a judge in a different proceeding."

VP Pg 41, LL 1-3 and LL 6-10 (hearing on July 13, 2012)

Respondent did not disputed the facts of fraud argued prior to eviction, post eviction, and throughout the appellate proceedings. Townleys believes a reasonable person would agree Respondents' intent was to obtain Townleys' property by whatever means; the facts show their means was illegal) (cf. 4. Dwyer V. J.I. Kislak Mortgage, 103 Wn. App. 542 (Div I, 2000)) Damage awards are determined by a jury. (Accord, Sofie v. Fibreboard Corp.,112 Wn.2d 636, (1989)).

Townleys' presented the facts in their Petition for Declaratory Judgment (CP 11 and CP 40), in their Counter and Cross Complaint (CP 16), and their Response to the Writ of Restitution (CP 65) The facts and actionable claims were properly before the Trial Court and never challenged or properly reviewed—Trial Court determined it lacked jurisdiction—facts showing fraud was worked on Townleys was presented by experts. The trial court was not an expert. No experts came forth disputing the facts presented. Of note, the main expert was Lynn Szymoniak; she who was on 60 minutes, awarded 14 million dollars as a whistle blower—she is a licensed attorney, yet, she appears in the instance case as an expert in mortgage fraud as that related to the mortgage crisis.

Townleys' actionable claims were preserved and soundly supported by admissible direct evidence and admissible relevant corroborative evidence in support show (inter alia) custom and practice of deception, false document production, etc., as opposed to other homeowners making nebulous allegations that Townleys read about in other cases.

Said facts were not reviewed by the 9th Circuit, as noted in the Opening Brief of case #11-35819. (see **Exhibit C**) Because the facts were never aired properly collateral estoppel by res judicata does not apply.

IV. REVIEW OF CASES

The Court asked Townleys to consider the cases of McNaughton v. Brock WL 941956 Nos. 53880-2, 53681-8, (2005) and Bank of New York Mellon v. Muresan WL 171677 Nos. 70111-8, 70292-1, (2014).

In Bank of New York v. Muresan (supra.), the Court found that Muresan focused on the underlying foreclosure and trustee sale. In contrast, the Townleys argued right of possession, presented direct evidence (that went undisputed) of facts of fraud, (inter alia), showed irregularities of RCW 61.24 se seq. (CP 11, Pg 7, LL 1-9). Townleys also filed irregularities and facts of fraud in the motion requesting to change from a Limited to General proceeding. (CP 41, Pg 4, LL 23 through Pg 6, LL 9) and their Counter and Cross Complaint (CP 16, Pg 10, LL 3-22 and

Pg 11, LL 7-13).

In McNaughton v. Brock (supra), McNaughton was determined to be the bona fide purchaser and Brock, having received notice, failed to avail himself of the remedies or to provide notice of the nature of the alleged defect prior to the sale. The court stated an exception exists in Washington when a defense is raised that goes to the issue of possession; yet, Brock's claims was unsupported by sufficient evidence and so determined.

Of relevance is the fact Brock raised facts that addressed the issue of possession and in McNaughton is was held there is an exception. The Trial Court in Townleys case held it lacked jurisdiction, yet, under McNaughton this view was invalid, the court did have jurisdiction under said exception. The Court cited Kelly v. Powell, 55 Wn.App. 143 776 P.2d 996 (1989).

Under McNaughton it proper to hold Townleys covered procedural issues and submitted sufficient facts addressing right of possession. Therefore, remanding to the King County Court to allow remedy, which can include trial and placement back to pre-eviction status is proper

ADDITIONAL GUIDANCE FROM COURT NEEDED

1. IT IS PROPER TO ADDRESS THE FORESEEABLE POST EVICTION DAMAGES IN STATE COURT

Respondents moved in King County Superior Court, therefore, placing Townleys in the State Court. The post-eviction damages were foreseeable to Respondents. In other words, Respondents started the "proverbial ball rolling" in State Court; as such, allowing Townleys to address the foreseeable consequences of post eviction damages worked on Townleys in State Court is proper. Even seeking post-eviction damages also. Remanding back to King County Court resolves the issue of the preclusion aspects in the 9th Circuit decision. King County Court is proper venue and Respondent set such venue, thus, potential to address the issues in King County Superior court was foreseeable.

It is well settled that no privileged business entity should benefit from fraud, deceptions etc. The damages worked on Townleys by Respondents holds elements tantamount to criminal acts albeit the fraudulent production of documents, then presenting said documents to the court, etc.

Fraud, by its nature, stands via the intrinsic character of being veiled. The undisputed facts present, as any reasonable person would

agree, white collar crime.

In addition, the manner of the production of the documents violated RCW Title 5's fixed business records mandates and violated business records standards and practices. (See, *Bainbridge Citizens United V. Dept Of Natural Res. 147 Wn. App. 365, Div II 2008).* The evidence of inadmissible documents and/or fraudulent business records is supported by two experts and address Townleys' mortgage documents—direct evidence.

A jury trial is proper for recovery of damages, which includes and is not limited to damages authorized of RCW 61.24.127.

E. CONCLUSION and Townleys' VIEW OF PROPER APPLICATIONS

Townleys believe this Court can provide clarity to the addressing the 9th Circuit's decision by ruling that upholding the Federal District Court dismissal of Townleys challenge to the foreclosure was improper, and that failure to seek stay was not fatal to their ability to seek recovery.

Allowing Townleys repossession of their home is proper under the particular facts of this case, when, as is the case here, no bona fide purchaser is involved—the issues of possession involves only Townleys and Respondent i.e. no innocent 3rd party would be prejudiced or bring claims against the issue of ownership of the subject property.

The recent Washington State Supreme Court Case decisions and in light of McNaughton's holding that there is an exception in eviction proceedings allowing the Court to address the right to possession as that relates to the King County Court's ruling that it lacked jurisdiction to hear Townleys challenge to ownership of their home (their right of possession versus Respondents).

As such, without a proper airing of said facts present in Townleys case, the King County Court's granting of Respondents' unlawful detainer action and subsequent eviction of Townleys was reversible error.

It is proper that Townleys be remanded back to King County Court for a jury trial and that they are allowed leave to amend the complaint to focus on the post-eviction CPA claims.

Further this Court clarifying that Townleys' pre-eviction claims are properly sought in the Federal fact finding Court as that relates to preclusion issues addressed herein.

Moreover, costs associated with this appeal per RAP 14.2 and RAP 14.3 are appropriate should the Townleys prevail.

Respectfully submitted this August 22, 2014.

Stephanie Tashiro-Townley, representing Appellants / Defendants

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEPHANIE TASHIRO-TOWNLEY; SCOTT C. TOWNLEY,

Plaintiffs - Appellants,

v.

BANK OF NEW YORK MELLON, as Trustee for the Certificateholders CWL, Inc. Asset Backed Certificates, Series 2005-10, FKA Bank of New York; et al.,

Defendants - Appellees.

No. 11-35819

D.C. No. 2:10-cv-01720-JCC

MEMORANDUM*

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

Submitted January 21, 2014**

Before: CANBY, SILVERMAN, and PAEZ, Circuit Judges.

Stephanie Tashiro-Townley and Scott C. Townley appeal pro se from the district court's judgment dismissing their action challenging the foreclosure sale of

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

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

their residence. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). We affirm in part, vacate in part, and remand.

The district court properly dismissed plaintiffs' post-sale claims for injunctive and declaratory relief because plaintiffs waived those claims by failing to bring an action to enjoin the foreclosure sale. *See Plein v. Lackey*, 67 P.3d 1061, 1067 (Wash. 2003) ("[W]aiver of any postsale contest occurs where a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale.").

However, Washington law provides an exception to the waiver doctrine for claims for damages alleging violations of the Washington Consumer Protection Act ("CPA"). *See* Wash. Rev. Code § 61.24.127(1)(b). After the district court dismissed plaintiffs' CPA claim, the Washington Supreme Court decided *Bain v. Metropolitan Mortgage Group, Inc.*, 285 P.3d 34, 51 (Wash. 2012), which held that a plaintiff may meet the public interest element of a CPA claim by alleging that Mortgage Electronic Registration System Inc. was unfairly or deceptively characterized as the beneficiary of a deed of trust. *See id.* at 49 (elements of a CPA claim). Because the district court did not have the benefit of *Bain* when it issued

its order of dismissal, we remand to allow the court to reconsider plaintiffs' CPA claim.

Defendants' request to strike portions of plaintiffs' excerpts of record, set forth in their answering brief, is denied. Defendants' request to strike plaintiffs' citations of supplemental authority, filed on November 8, 2013, is denied.

Each party shall bear its own costs on appeal.

AFFIRMED in part, VACATED in part, and REMANDED.

US COURT OF APPEALS FOR THE NINTH CIRCUIT

SCOTT C. TOWNLEY STEPHANIE A. TASHIRO-TOWNLEY Appellants, vs. BANK OF NEW YORK MELLON, f/k/a BANK OF NEW YORK, TRUSTEE FOR CERTIFICATE HOLDERS CWL, INC. ASSET BACKED CERTIFICATES, 2005-10; and other unknown (at this juncture) parties, herein designated as DOES 1 through 100 Appellees.	APPEAL No. 11-35819 WD No. C10-1720 APPELLANT'S MOTION FOR RECONSIDERATION OF MEMORANDUM DATED JANUARY 21,2014 PURSUANT TO FRAP RULE 27-10

COMES NOW Appellants Scott C. Townley and Stephanie A. Tashiro-Townley (hereinafter Appellants) respectfully requesting the Court reconsider its Memorandum signed January 21, 2014—filed January 27, 2014. The instant motion is filed pursuant to FRAP 27-10 and FRCP 59. (See, attached Exhibit A, subject Memorandum, which Appellants seek reconsideration)

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INTRODUCTION

Appellants submit the instant Motion for Reconsideration showing the Court's determination stands as plain error (manifest error). The record in this case—key to the instant request is the facts—if proved at trial would show business fraud, deception, etc.,—Appellants presented were core to issues showing fraud, deceptive business practices, etc., and said facts were never disputed in the record by Defendants. Said facts, viewed in light of Washington's case law, which said cases were not available to the trial court at the time of the trial court's dismissal, under Washington law, hold Appellees' violated, (inter alia) Washington's Deed Trust Act (DTA) codified under Revised Code of Washington (RCW) Title 61.24.

This Court's failure to apply Washington law, in this case, given the facts viewed consistent with Washington case law form a valid basis for relief from the Court's ruling; namely, the failure of this Court to apply Washington case law to the issues presented stands as plain error and warranted reconsideration and reversal of the Court's failure to allow, Appellants an opportunity to regain possession of their home. Of relevance, the home sits vacant, no one purchased the home, i.e. no prejudiced worked on an innocent 3rd party—no one (or a family) made it their home, are raising their children, as Appellants were before they (Appellants: a working Mom and Dad, raising 4 children) were illegally evicted from their home.

These are the real life tangible effects of the rampant business deceptions, fraud, etc., worked on the American homeowner and yes, Appellants are one of many. Appellants apologize for bringing in this cold reality, yet, it seems, or Appellants pray, this reality must be core to our judicial system, it must hold a place, otherwise, the true intent, purpose and spirit of laws hold less substance.

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The facts show deceptive business practices (fraud) on the part of Appellees (business entities) in achieving the illegal taking of Appellants' home; to wit: Appellants are individuals (who were homeowners) who did (do) not reap benefits from doing business in Washington, as did Appellees.

The foreclosure was never legally commenced. In Washington this principle of law in viewing foreclosure actions stands as fixed law. Said case law fits the facts and preserved issues of this case. These Washington applicable cases were not available to the trial court, but were available to this Court; said applicable cases were accepted into the record by this Court, yet, not followed. This forms a valid basis for plain error in the Court's determinations and warrants the relief requested.

RELIEF REQUESTED

Appellants request the Court vacate the trial court's dismissal in its entirety and remand the case back to the trial court to allow Appellants discovery and their day in court to seek remedies for all the issues presented and potentially amend their complaint given additional facts of fraud and other facts establishing fraud, deceptive business practices, etc., which said facts were not available at the time of the trial court's ruling but are now available; remanding the case in its entirety is proper and therefore, requested.

Remanding the case in its entirety will allow Appellants the opportunity to present facts of fraud worked against Appellants and obtain remedies in common law—remedies that go beyond the limits of Washington's statutory schemes, such as emotional damages, costs not designated in statutory schemes, and other equitable remedies—allow a jury to decide what it deems proper and just after a proper airing of the facts.

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I. STATEMENT OF FACTS

Within an effort to be succinct, Appellants submit the Declaration of Stephanie Tashiro-Townley in Support of the [instant] Motion for Reconsideration, which is incorporated herein by reference and attached hereto.

On November 11, 2013, Appellants filed Supplemental Authorities of Washington State Supreme Court cases—decisions that are on point to the issues of Appellants' case. (Dockets 51, 52, 53)

On January 27, 2014, the Court filed the Memorandum decision signed on January 21, 2014, vacating the Federal District Court of Western Washington dismissal of the CPA claims and remanding for further proceedings. The Court's decision affirmed the dismissal of the case based on the procedural error of Appellants not seeking an injunction before the sale—this determination is contrary to Washington's case law that was rendered after the trial court's ruling. (Docket 63)

II. STATEMENT OF ISSUES

1. Is it proper for the Court to consider recent WA Supreme Court decisions as binding authorities made by the Washington's highest court addressing the interpretation of the strict compliance of the DTA (RCW 61.24)?

2. Is it proper for the Court to grant reconsideration when undisputed facts before the trial court show that Appellees had no legal authority to invoke the Deed of Trust Act (RCW 61.24 et al)?

3. Can the Court ignore that the entity Mortgage Electronic Registry System (MERS), as viewed by WA Supreme Court in *Bain v. Metropolitan Mortgage Group, Inc., 285 P.3d 34, 51 (Wash. 2013)* is an unlawful beneficiary failing to fulfill the requirement in the WA state Consumer Protection Act (CPA) **and** as an unlawful beneficiary in Washington DTA without creating a significant, material violation of the DTA and Washington Supreme Court holdings in these matters?

4. Does Washington's DTA allow Appellees, who are absent a valid interest in the subject property hold valid jurisdiction to obtain benefits from the Court through the use of an improper beneficiary (MERS) and violate DTA?

III. EVIDENCE RELIED ON

Declaration of Stephanie Tashiro-Townley in Support of the Motion for Reconsideration of the Memorandum dated January 21, 2014, the two Citations of Supplemental Authorities, and all other facts in the record—facts standing undisputed.

IV. ARGUMENT

Binding authority of Washington State Supreme Court

Plain error is defined and long held, "When a trial court [review court] makes an error that is so obvious and substantial that the appellate court should address it, even though the parties failed to object to the error at the time it was made" Accord nolo legal dictionary.

Of course here, Appellants objects to the Court's failure to apply applicable Washington cases rendered after 2003, to the facts and issues raised in the appeal.

As such, seeking review pursuant to plain error is a proper of a reconsideration request. The Courts transition of the term manifest error, plain error or manifest disregard stem from the principle (here) of the court's duty and obligation owed to apply the newer Washington case law. Here the facts address individuals' property interests in a legal battle to re-obtain their home taking, illegally, by business entities. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986)* (manifest disregard —clearly means more than error or misunderstanding with respect to law); *Wallace v. Buttar, 378 F.3d 182, 190 (2d Cir. 2004)* (an award should be enforced, despite a court's

disagreement with it on the merits, if there is a barely colorable justification for the outcome reached). The application to civil and criminal law apply.

Washington State Supreme Court's decisions are binding on federal courts—the following was cited in Appellants' opening Brief (Dkt #29-1, pg 27), which is a 9th Circuit, the Court held in *In re Kekauoha-Alisa in Hawaii*, quoted in relevant part,

> When interpreting state law, we are bound by the decisions of the highest state court. Absent a controlling state court decision, our duty is to predict how the highest state court would decide the issue.

Id. 675 F. 3d 1083 (9th Circuit, 2012)

The court held in Stolt-Nielsen SA v. AnimalFeeds Int"l Corp., 548 F.3d 85, 93 (2d Cir. 2008), reviewed on other grounds, 559 U.S. __, 130 S. Ct. 1758 (2010) (internal quotation marks and citation omitted), the error "is so obvious that it would be instantly perceived..." The case addressed an arbitrator's rulings by the review court's duty to review and apply the law stands and is applicable here because the error is so obvious that it would be instantly perceived; namely, new decisions of Washington law holds otherwise to the Court's application of a 2003 case as justification to deny remand of the whole case back to the trial court.

Therefore, it is proper for the Court to grant reconsideration. Washington law holds remanding cases for further proceedings where dismissal was based on a failure to seek a stay when the lender violated the DTA.

Washington State Supreme Court views on Plein v. Lackey and issues of waiver when lenders do not follow the Deed Trust Act, RCW 61.24 et seq.

The trial courts application and Circuit Courts sustaining the application of *Plein v. Lackey, 67 P.3d 1061, 1067 (2003)* in the trial court's dismissal is contrary to Washington's recent decisions, which are clear in addressing proper application of *Plein v Lackey,* (Id.). The WA Supreme Court stated in *Schroeder v. Excelsior Management Group,* quoted in relevant part,

> We conclude that the respondents' reliance on *Plein* is misplaced. ***It is well settled that the trustee in foreclosure must strictly comply with the statutory requirements.*** *Albice,* 174 Wash.2d at 568, 276 P.3d 1277 (citing *Udall,* 159 Wash.2d at 915-16, 154 P.3d 882). ***A trustee in a nonjudicial foreclosure may not exceed the authority vested by that statute. Id. As we have recently held, the borrower may not grant a trustee powers the trustee does not have by contracting around provisions in the deed of trust statute.*** *Bain,* 175 Wash.2d at 100, 285 P.3d 34.

Id. 297 P.3d 677, 177 Wash. 2d 94 (2013), (Emphasis added).

Between *Schroeder* and *Udall* (supra.) enjoining the sale did not produce a waiver of any post-sale remedies given the nature of the DTA violations in this case. One key relevant and applicable decision is *Bain* (supra.) holding MERS is not a legal/proper beneficiary thereby, making the failure to enjoin the sale (seek a stay) a moot issue. However, if *Bain* (Id.) did not so hold, *Udall* (supra) applies, which holds failure to enjoin a sale is not grounds to deny relief or is a waiver as this Court hold in justifying denial of relief for Appellants.

Since the mortgage crisis started (after 2003), exposure of wholesale fraud, deception, and unethical to illegal business practice that were contrary to fixed business principle was defined by newer case law as the cases slowly caught up with the facts that lead to the mortgage crisis.

The simplicity of *Bain* (supra) stands showing the Court failed to properly apply Washington law because if a legal beneficiary did not exist in Appellants' foreclosure then the foreclosure was never legally commenced. Appellees held duty and obligations owed to strictly comply with the DTA and the mere fact they did not possess a legal beneficiary is sufficient to void the foreclosure and subsequent sale (Appellees purchased Appellants' home).

This court, by its own rulings; namely, *In re Kekauoha-Alisa in Hawaii* (supra) holds this Court is bound by state law and to start *Bain* and *Udall* (supra) control, making *Plein v. Lackey* (supra) a 2003 decision that is inapplicable and explained the case was inapplicable in *Schroeder v. Excelsior Management Group* (supra).

The WA Supreme Court case, first referenced in Appellant's Opening brief (Dkt. 29-1, pg 16), of *Albice v. Premier Mortg. Servs. Of Wash., Inc., 174 Wn2d 560 at 569, 276 P. 3d 1277 (2012),* stated, in relevant part,

> Waiver, however, cannot apply to all circumstances or types of post-sale challenges. RCW 61.24.040(1)(f)(IX) provides that "failure to bring ... a lawsuit **may** result in waiver of any proper grounds for invalidating the Trustee's sale". **The word "may" indicates that the legislature neither requires nor intends for courts to strictly apply waiver. Under the statute, we apply waiver only where it is equitable under the circumstances and where it serves the goals of the act.**

Id, 174 Wn2d 560 at 569, 276 P. 3d 1277 (2012) (Emphasis added)

Therefore, waiver is not a valid reason to deny relief where, as what the case here, the trustee's were unlawful. Since waiver cannot be applied where violations exist in the lenders' failure to follow the statutory requirements of the DTA, a ruling contrary to these cases holdings stands as plain error because it contrary to Washington law.

As the court held in *Schroeder v. EXCELSIOR MANAGEMENT GROUP,* quoted in relevant part,

> This is not the first time we have confronted the argument that statutory requirements of the deeds of trust act may be waived contractually. In *Bain v. Metropolitan Mortgage Group,* 175 Wash.2d 83, 285 P.3d 34 (2012), we held the statutory requirement that the beneficiary hold the note or other instrument of indebtedness could not be waived. *Id.* at 108, 285 P.3d 34. In *Bain,* we followed the reasoning of other cases in which we have held other statutory requirements could not be contractually waived. *Id.* at 107-08, 285 P.3d 34 (citing *Godfrey v. Hartford Cas. Ins. Co.,* 142 Wash.2d 885, 16 P.3d 617 (2001); *Nat'l Union Ins. Co. of Pittsburgh v. Puget Sound Power & Light,* 94 Wash.App. 163, 177, 972 P.2d 481 (1999); State ex rel. Standard Optical Co. v. Superior Court, 17 Wash.2d 323, 329, 135 P.2d 839 (1943)).

Id, 297 P.3d 677, 177 Wash. 2d 94 (2013).

In other words, the citation assists in understanding the seriousness of the lender's failure to strictly comply with the language of Washington's DTA. Appellees should not benefit from utilizing the DTA improperly and obtain financial gain by said failure. In *Albice*, (supra) WA Supreme Court clarified that RCW 61.24 is a strict compliance statute and the failure to properly invoke DTA voids any procedural flaws had during the foreclosure. This makes perfect sense; namely, if the foreclosure was improperly invoked (used to prefect an alleged interest claim in a note) then matters had during the foreclosure cannot apply because the foreclosure was never legally started/invoked/commenced.

If the lender, as is the case here, never started the foreclosure procedure legally and ignored strict compliance duties and obligations owed and the facts clearly show such, then the absence of enjoining the sale cannot be used to warrant denial of remedy for Appellants (homeowners).

Undisputed violations of RCW 61.24 in the record

WA Supreme Court cases cited in this motion show that it is proper, valid and an equitable interpretation of the duty and obligation owed to strictly comply with DTA language in order to foreclose.

> Because the DTA dispenses with many protections commonly enjoyed by borrowers, ***"lenders must strictly comply with the statutes, and courts must strictly construe the statutes in the borrower's favor."*** *Amresco Independence Funding, Inc. v. SPS Props., LLC*, 129 Wash.App. 532, 537, 119 P.3d 884 (2005).

Accord, *Rucker v. NOVASTAR MORTGAGE, INC.*, No. 67770-5-I (Wash. Ct. App. Oct. 2, 2013).

With many cases like this persuasive case out of Division I and the binding case law in the WA Supreme Court, it is clear that, at least in Washington state, lenders must follow the law in order to foreclose successfully.

Violation 1: Sale took place 10 days before statutory time frame of 90 days contrary to RCW 61.24.040(1) - Among many of the documented undisputed facts in the record, Appellants' attorney highlighted a significant violation of the DTA in the Amended Complaint, CP #68 and Appellants' Opening Brief, #29-1, pg 21-22, focusing on the language of RCW 61.24.040(1) which states that "A deed of trust foreclosed under this chapter shall be foreclosed as follows: (1) At least **ninety days** before the sale". The undisputed facts, documents from the Appellees are evidence to the sale was held **80 days** after the Amended Trustee's Sale was issued by the trustee,

> Defendants BONYTE and MERS have admitted, in their filings in this matter that their agent Northwest Trustee's Services recorded its Amended Notice of Trustee's Sale on September 14, 2010, and conducted a Trustee's Sale on December 3, 2010, which is less than 90 days after the Notice was recorded thus constituting an absolute violation of RCW 61.24.040.

Amended Complaint, CP #68, pg 6, #17

Violation 2: MERS not a beneficiary therefore, trustee was not properly appointed per RCW 61.24.010(2); sale is void - Documents produced by MERS, including the Appointment of Successor Trustee, are void and invalid as a matter of law due to MERS' improper status as a beneficiary according to RCW 61.24.005. This is a material violation of the DTA. Without the trustee, the Appointment of Deed of Trust signed is also invalid and void as a matter of law; the Appellee Bank of New York Mellon has never been the holder of the Deed of Trust and did not have the legal authority come out of nowhere, stake a claim in a home they did not have any affiliation with and utilize the Court to "steal" from the Appellants though they had no right to do so.

> ***... our Supreme Court has explained that "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 nonjudicial foreclosure on real property."*** *Bain*, 175 Wash.2d at 89, 285 P.3d 34. ***"[W]hen an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice of trustee's sale."*** *Walker v. Quality Loan Serv. Corp.*, Wash.App. 308 P.3d 716 (2013). ***Such actions by the improperly appointed trustee, we have explained, constitute "material violations of the DTA."*** *Walker v. Quality Loan Serv. Corp.*, Wash.App. 308 P.3d 716 (2013).. Because NovaStar had no "power to appoint a trustee to proceed with a nonjudicial foreclosure," *Bain*, 175 Wash.2d at 89, 285 P.3d 34, the company could not lawfully appoint QLS to foreclose on Rucker's property. And, because QLS was not a proper successor trustee vested with the power to conduct a nonjudicial foreclosure sale, ***the subsequent sale of the property was improper.***

Accord, *Rucker v. NOVASTAR MORTGAGE, INC.*, No. 67770-5-I (Wash. Ct. App. Oct. 2, 2013). (Emphasis added)

.

Given Washington law's fixed language, the recent decisions clarify that waiver is not valid when DTA violations. As stated in Appellants' Reply Brief (Docket #48, pg 9) the WA Supreme Court *Udall v.T.D. Escrow Servs., Inc case.*, quoted in relevant part,

> "**The Act must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests** and the lack of judicial oversight in conducting non-judicial foreclosure sales. (Queen City Sav. & Loan Ass'n v. Mannhalt, 111 Wn.2d 503, 514, 760 P.2d 350 (1988)(Dore, J., dissenting); Koegel v. Prudential Mut. Sav. Bank, 51 Wn. App. 108, 111, 752 P.2d 385, review denied, 111 Wn.2d 1004 (1988))."

Id., 159 Wn.2d 903, 914, 154 P.3d 882 (2007) (Emphasis added)

The WA Supreme Court views DTA irregularities as fatal to sustaining a foreclosure sale, to wit, the sale is void. The relevant quote below is from Appellants' Reply Brief, Docket #48, pg 11, based on a violation in RCW 61.24.040 in *Albice (infra)*, quoted in relevant part,

> "The trustee held the sale 161 days after the date set forth in the Notice of Trustee Sale, **well beyond the statutorily mandated 120-day limit**. Accordingly, **the sale was void.**"

Id, *In Albice v. Premier Mortage Servs. of Wash., Inc.,* 174 Wn.2d 560, 569, 276 P.3d 1277 (2012) (Emphasis added)

The WA Supreme Court also noted that violations in RCW 61.24.050 voids the sale (from Appellants' Reply Brief, Docket #48, pg 12), quoted in relevant part,

> "We hold that RCW 61.24.050 mandates that a trustee deliver the deed of trust to the purchaser following a non-judicial foreclosure sale, **absent procedural irregularity that voids the sale.**"

Id., *Udall v. T.D. Escrow Servs., Inc.,* 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007) (Emphasis added)

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Washington law stands in remanding cases for further proceedings where dismissal was based on a failure to seek a stay, especially when the lender violated the DTA from the start. Therefore, because (in this case) MERS is not a legal/proper beneficiary, per RCW 61.24.010 (2), thus, MERS cannot assign a trustee to carry out the foreclosure sale. Any actions undertaken by a trustee assigned by MERS (as is the case here) is void of legal authority to commence the foreclosure. It is proper to rule MERS' participation in the invocation of the Appellants' DTA is a "material violation" that renders the foreclosure illegally commenced or most favorable to Appellees improperly commenced and therefore void. In short, and consistent with Washington law, Appellants cannot be punished for failing to enjoin a sale from a foreclosure improperly (illegally) commenced.

The participation of MERS in a foreclosure case before the Bain decision still holds the foreclosure was improper because it was commenced without a proper beneficiary, etc.—therefore, the foreclosure was illegal. A proper beneficiary is required in order to legally commence a foreclosure as notice in RCW 61.24.020 (1), the manner due to its deceptive practices satisfies the first element of a Washington CPA claim. Such a ruling is plain error. Allowing facts to support CPA claims for damages when one realm of CPA is fraud is improper. A per se unfair trade practice exists when a statute which has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce has been violated. Accord *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 787–93, 719 P.2d 531 (1986).*

Conclusion

The law is well-settled as it pertains to individuals' (this family) possession of their home versus privileged business entities doing business in Washington who obtain benefits from their business activities and owe duties and

obligations from said benefits. The facts stand unopposed (undisputed), true, correct, and applicable to justify overturning the Court's dismissal of Appellants' claims.

A proper airing of the undisputed facts and evidence obtained via discovery, when allowed given evidence that's come to light all across America, warranted allowance for Appellants' to have their day in court; let the jury address Appellees' custom and practices of falsifying documents (document factory), attempts to submit documents void of any normal course of business affiliated with the handling of the documents, and so much more—the pre *Bain* view of the Mortgage business practices and what Appellees and like entities did to avoid the truth and exposure of this wide spread fraud, deceptions that involved creating documents out of thin air in order to create the illusion of the documents held (inter alia) normal course of business in the handling of said falsified documents, etc.

There is no middle ground. The only proper ruling, when addressing a fact finding court's CR 12 dismissal is to remand the whole case back. The remedies denied Appellants by viewing their case as void of any facts to support claims, given Washington law stands clear that invoking foreclosure in this case was improper (illegal), therefore, if the foreclosure was never legally commenced, this Court cannot hold failure to seek a stay as sufficient to deny relief for an illegally commenced foreclosure. In other words, legally and factually, under Washington law, the foreclosure never started, therefore, not seeking a stay cannot form a basis to deny relief.

As privileged entities, Appellees **must** follow the DTA strictly or risk the sale being voided regardless of whether homeowner enjoined the sale or not. This is the law; it is not open for further interpretation.

In other words, it is plain error for this Court to hold CPA damages claims are allowed, when the facts supporting the CPA damages include fraud, etc. In addition, when the ruling is viewed in light of Washington's newer case law, which would hold, for one thing, Appellants failure to enjoin the sale as insufficient to justify dismissal of their claim, insufficient to support eviction and show taking Appellants' home was an illegal; contrary to law. Furthermore, under the facts, Appellants will seek remedies beyond statutory scope as mentioned previously.

As such, it was plain error for this Court not to grant relief by vacating the entire fact finding court's dismissal and remanding the entire case for further proceedings.

This motion is being filed timely in good faith and for good cause according to date of Memorandum, signed January 21, 2014 and filed January 27, 2014.

Respectfully submitted,
Signed this 4th day of February, 2014,
By,

/s/ Stephanie A Tashiro-Townley
STEPHANIE A. TASHIRO-TOWNLEY
On behalf of Appellants

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Appeal No. 11-35819
WWD Case No. C10-1920

SCOTT C TOWNLEY
STEPHANIE A TASHIRO-TOWNLEY,
Appellants

vs

THE BANK OF NEW YORK MELLON, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (MERS) AND LITTON LOAN SERVICING
Appellees

Appeal from the United States District Court of Western Washington

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Initial Brief for Appellants
Scott C Townley and Stephanie A Tashiro-Townley

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Dated: September 21, 2012

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STATEMENT OF APPELLATE JURISDICTION

The United States Appeals Court of the Ninth Circuit has jurisdiction to review the Order Denying the Reconsideration (CP# 90) of the Order of Dismissal and Judgment filed on June 29, 2011 (CP#86 and #87), the Order Denying Reconsideration was filed on September 23, 2011. The Ninth Circuit Court of Appeals has jurisdiction to review this appeal according to 28 U.S.C. Sec. 158.

The Appellants were compelled to file the instant appeal because the Court's Order (inter alia) denied Appellants' request for relief on September 23, 2011. Appellants filed the Notice of Appeal timely on September 30, 2011.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Court err when ordering a dismissal of the Federal District Case on the grounds the foreclosure was proper and alleging Appellants waived defenses while stating that Appellants filed a complaint and served it to the trustee as well seven days prior to the first foreclosure date?

2. Did the Court error in its understanding (or ignore) of the strict compliance requirement of RCW 61.24 and the facts in the record showing irregularities within the application of RCW 61.24 et seq?

3. Did the cumulative effect of these errors result in the wrongful dismissal of this case?

STATEMENT OF THE CASE

On October 22, 2010, Townleys filed a complaint in US District Court of Western Washington under case #C10-1720 one week prior to the October 29, 2010 foreclosure sale; thus, contesting the sale per RCW 61.24.040(2). In order to inform the Trustee, Townleys also had an independent party serve Northwest Trustee. Townleys did all of this to show they were not waiving any defenses regarding the foreclosure on the subject property at 23639 SE 267th Place, Maple Valley, WA 98038.

Bank of New York Mellon's attorney (hereafter known as BONYM) filed a Notice of Appearance on November 3, 2010. The Townleys received two letters on November 8, 2010 from Litton Loan Servicing (hereafter LITTON) and BONYM stating that the foreclosure sale was on hold. BONYM filed a motion to dismiss the complaint on November 18, 2010 referencing an Exhibit 6 "Beneficiary Declaration". No such exhibit or any exhibits supporting the motion to dismiss, were filed in the cold record by defendants. Townleys filed a Judicial Notice regarding the absence of the exhibit on December 9, 2010. Townleys understood that "Beneficiary Declaration" is required by the strict statutory language of RCW 61.24.031(9), found in the Deed Trust Act of Washington State (hereafter referred to as Revised Code of Washington, RCW 61.24 et seq).

Townleys filed a Lis Pendens on the property communicating in good faith that the property is in litigation and was faxed to BONYM and the trustee, Northwest Trustee on November 30, 2010 after which BONYM sent a letter via email to Townleys stating that the sale would go through as scheduled on December 3, 2010. The property was reverted back to the bank on December 3, 2010 and a Trustee's Deed was dated December 4, 2010.

Townleys have maintained since the very first complaint that BONYM is not the noteholder and that BONYM improperly commenced foreclosure. Townleys stated within the record that the Deed of Trust and Note were separated, the Note in favor of Countrywide Mortgage and the Deed of Trust in favor of the beneficiary MERS. This separation of the Note and the Deed of Trust creates a nullification of the debt underlying the obligation, as the Townleys stated.

In addition to those facts, Townleys pled other irregularities filing evidence into the cold record. Due to the irregularities and recent decisions out of the Washington State Supreme Court, Townleys present the facts and decisions by the highest court in the state showing that the basis for the dismissal of their case is not valid and that it is proper to remand the case for further review after voiding transfer of property to BONYM.

The certified questions posed by the Court (Honorable John C Coughenour) in Washington State in June 2011 was whether MERS is a beneficiary per definitions in RCW 61.24 et seq. The Washington State Supreme Court decision stated that **MERS is NOT a legal beneficiary per Washington State Deed Trust Act** and thus any foreclosure as a result of **MERS assignments are wrongful.** Townleys continue to seek judicial remedy from the wrongful foreclosure that, per recent case law, was improperly commenced from the Assignment of the Deed of Trust or even prior to that.

Therefore, Townleys believe, as the Court does, that remedy is found within Washington State case law and statutes. Recent case law, from June 2012 and August 2012, from Washington State Supreme Court show similarly situated individuals remanded to trial court after the title transfer is voided. Townleys have preserved the facts and issues consistent with the

new decisions having been filed in the Washington State Supreme Court and find their relief within these decisions.

STATEMENT OF THE FACTS

1. Townleys received an unsigned Notice of Default from Northwest Trustee dated July 8, 2009 on our garage door. This was the first time Townleys had knowledge of any entity other than Countrywide, the original Note Holder, had affiliation with the property. (Clerk's papers (***CP***) ***#14-5***). The Notice of Default also stated Bank of New York Mellon is a trustee for trust named CWL, Inc. Asset Backed Certificates, Series 2005-10. No contact information for the trust or Bank of New York Mellon was provided for purposes of contact.

2. Townleys received a copy of the Deed of Trust stating MERS as the beneficiary of the Deed of Trust ***CP#16-1***, Assignment of Deed of Trust ***CP#90-1***, and Appointment of Successor Trustee. ***CP#14-4***

3. Assignment of Deed of Trust, assigning the mortgage from MERS to Bank of New York Mellon was dated July 17, 2009, signed by Denise Bailey and filed in King County Records on July 24, 2009. ***CP# 90-1***

4. Appointment of Successor Trustee, appointing trustee duties from Landsafe title to Northwest Trust and as appointed by Bank of New York Mellon was dated July 20, 2009, signed by Micall Bachman and filed in King County Records on July 24, 2009. ***CP# 14-4***

5. In order to avoid the foreclosure sale, Townleys filed for Chapter 13 bankruptcy protection in November 2009.

6. BONYM filed a Motion for Relief of Stay in May 2010 stating BONYM as the trustee for CWABS, Inc. Asset Backed Certificates, Series 2005-10. This trust name does not match the name of the trust on all foreclosure documents filed previously. ***CP# 14-15***

7. During the bankruptcy, Townleys received a letter dated June 23, 2010 from Bank of America stating that the same first mortgage being foreclosed on was in force with Bank of America. ***CP# 16-2***

8. Attached to this exhibit was a copy of a Note, different than the Note attached to the Motion for Relief of Stay. ***CP# 14-15 (Motion only)***

9. Townleys requested that a certified copy of the Note showing transfer from Countrywide to Bank of New York Mellon. Judge Karen Overstreet agreed. No such Note was ever sent to Townleys by BONYM bankruptcy counsel and no Note appears in the record after the June 11, 2010 hearing when Judge Overstreet ordered counsel to send the Note to Townleys in open court (transcript not in this record).

10. An affidavit was filed by Richard Williams of Litton Loan stating that Litton did not possess the note but was having the Note transferred to them. The affidavit also stated the incorrect trust name as well, CWABS, Inc. Asset-Backed Certificates, Series 2005-10. ***CP# 14-16.***

11. Townleys verified on California Attorney General corporation search webpage that CWL, Inc. and CWABS, Inc. are two separate entities. ***CP# 14-13 and 14-14***

12. Townleys checked for a registered agent for Bank of New York or Bank of New York Mellon and found no listing for either permitting them to do business in Washington State. ***CP #14-17 and 14-18***

13. The Chapter 13 case was dismissed in August 2010 without order of Judge Overstreet being addressed by that bankruptcy trial court. An Amended Trustee Sale document was filed on or about September 14, 2010. The sale date stated was October 29, 2010. ***CP #14-7***

14. Townleys filed a complaint in person with the Federal District Court on October 22, 2010 with an application to proceed **informa pauperis** (IFP). The complaint was filed on October 22nd in order to be seven days prior to the October 29th sale date. The trustee, Northwest Trustee, was served a courtesy copy although not a part of the action also on October 29th. The IFP was approved and the complaint entered into the record on November 16, 2010. ***CP# 10***

15. The sale date was moved to December 3, 2010, **less than 90 days** after the Amended Notice of Sale. ***CP# 46-8***

16. Townleys filed a forensic audit and securitization audit and affidavit on December 7, 2010 showing that there is no trust by the name of CWL, Inc. Asset Backed Certificates, Series 2005-10 listed on the Notice of Default. ***CP# 15-1***

17. On or about November 3, 2010, Bank of New York Mellon's attorney (hereafter referred to as BONYM) entered in a Notice of Appearance.

18. On November 8, 2010, BONYM and Litton Loan (not a defendant at the time), sent Townleys letters stating the sale date of December 3, 2010 was on hold. ***CP# 46-2 and 46-9***

19. On November 30, 2010, Townleys faxed a Lis Pendens to be filed in the county records in good faith to Northwest Trustee and BONYM while assuming that the sale was still on hold. On November 30, 2010, Townleys received a letter via email from BONYM stating that the sale would proceed as scheduled. ***CP#14-10*** (attached to letter from BONYM dated Nov 30, 2010 is copy of Lis Pendens filed with King County)

20. On November 18, 2010, BONYM filed a Motion to Dismiss the complaint stating that it had an exhibit filed with their motion, "Beneficiary Declaration". ***CP#11, pg 10 , ll 18-21***

21. On December 3, 2010, Townleys talked with the auctioneer and informed all investors on site that we were contesting the sale. Townleys also went up to speak with Jeff Stedman of Northwest Trustee to serve him with a request for documentation and to remind him of our contest of the sale found within the US District Court complaint. He acknowledged the complaint but did not stop the sale.

22. On December 7, 2010, Townleys filed an Amended Complaint naming Litton Loan (hereafter known as LITTON) and Mortgage Electronic Systems Inc. (hereafter known as MERS) as Defendants with Bank of America and BONYM. ***CP# 13***

23. On December 8, 2010, Townleys file a Response to the Motion to Dismiss with the Deed of Trust showing MERS as the beneficiary and Bank of America stating the same first mortgage loan is in force with them. ***CP# 16-1 and 16-2***

24. On December 9, 2010, Townleys filed a Response to the Motion to Dismiss and a Judicial Notice regarding the absence of the "exhibit" mentioned in the Motion to Dismiss. The cold record is void of the document "Beneficiary Declaration" mentioned as an exhibit in CP# 11) which is required by the strict statutory law governing foreclosures, RCW 61.24.031(9). ***CP# 22-2***

25. On January 18, 2011, BONYM attorney filed a Notice of Appearance on behalf of MERS and LITTON. ***CP# 30***

26. On February 9 and 10, 2011, Townleys filed a Motion to Amend the Complaint allowing for new counsel to file his own pleading.

Townleys stated good cause including the absence of the CWL, Inc. Asset-Backed Certificates, Series 2005-10 in IRS Form 938 showing all REMIC (Real Estate Management Investment Conduit) trusts filed in 2005 and 2006. The trust BONYM filed in the Notice of Default was not found filed with the IRS. ***CP# 48-12 and 48-13***

27. On March 25, 2011, the Amended Complaint was filed against defendants BONYM, MERS and Litton Loan with Jury Demand. ***CP# 68***

28. On April 29, 2011, Townleys responded to Motion to Dismiss requesting an Oral Argument. ***CP# 77***

29. On May 12, 2011, Townleys attorney filed a late reply when they discovered there would be no oral argument. ***CP# 81***

30. On May 12, 2011, BONYM filed a Motion to Strike which was granted on June 29, 2011. ***CP# 83 and CP#87 respectfully***

31. Court filed the order and judgment dismissing the case on June 29, 2011. ***CP# 86 and 87***

32. Townleys timely responded with Motion for Reconsideration on July 13, 2011. ***CP# 90***

33. On September 23, 2011, Townleys received order denying reconsideration. ***CP# 92***

34. On September 30, 2011, Townleys timely filed Notice of Appeal. ***CP# 93***

SUMMARY OF ARGUMENT

The relevant wording in the Order dismissing Townleys' [Townleys] case stated:

> - failure to restrain the trustee's sale - all claims unrelated to WCPA waived;
>
> - failure to allege a public interest impact, WCPA claims are dismissed
>
> - request for injunctive relief also dismissed

Washington State's non-judicial foreclosure statutory scheme is a strict compliance statutory scheme. Washington courts construe any irregularities in favor of the homeowner. Recent decision relevant to the facts of this case, cited herein, place homeowners back in their homes. The issue of seeking (stay) injunction relief is not a factor when, as is the case here, the foreclosure was improperly commenced because the foreclosing party failed to hold (possess) a legal beneficiary in said foreclosure—as a matter of law that fact is sufficient to void the foreclosure in the instant case.

The determination that Mortgage Electronic Registration Systems (MERS) is not a legal beneficiary of RCW 61.24 is a matter now clarified by the recent Washington Supreme Court decision. Either retroactive or retrospective application of Washington recent decision regarding the ruling MERS is not a lawful beneficiary is warranted in the case.

In other words, the instant foreclosure action that resulted in the Townleys losing their home was void of a legal beneficiary. If the foreclosure action was missing a legal beneficiary then the foreclosure was unlawful, improper, etc., and subsequently, the transfer of the title out of Townleys' name is void. Townleys' ownership and possession of their home must be restored. To hold otherwise is contrary to Washington law.

In short, proceeding unlawfully, without compliance to the language of the RCW 61.24 in the subject foreclosure voids any title transfer of the subject property (Townleys' home). Moreover, Washington State Consumer Protection Act (WCPA) remedies are available to a homeowners, who, as Townleys, were removed from their home by way of a wrongful foreclosure, whether remedies, under WCPA, are or are not available to Townleys.

The record is clear, Townleys consistently disputed and contested the foreclosure action against their home prior to the sale. Furthermore, Townleys, through out their pleadings, highlighted irregularities in the foreclosure process worked on them as well as the issues of the improper nature of MERS. Remedy voiding of the foreclosure sale and transfer of the title of Townleys' home is proper.

ARGUMENT I - FAILURE TO RESTRAIN SALE IS NOT ADEQUATE TO DENY REMEDY IN AN IMPROPER FORECLOSURE IN LIGHT OF TOWNLEYS' CONSISTENT OBJECTION TO THE FORECLOSURE

Recent decisions in the Washington State Appellate and Supreme Court hold strict compliance with the statutory language of RCW 61.24 and allow post sale remedies. The fact finding Court addressed the issue of Townleys not properly restraining the sale. However, recent Washington State decisions (infra) hold MERS is an unlawful beneficiary, therefore, the foreclosure in this case was improper; never legally commenced.

The recent appellate decision in Tamara Frizzell v. Barbara Murray and Gregory Murray, No. 42265-4-II (August 28, 2012), reversed the court's summary judgment determination that Frizzell waived her right to post-sale relief because she failed to actually restrain the trustee's sale. The Frizzell court held, in relevant part,

> Waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of relinquishment of such right, and it may result from an express agreement or may be inferred from circumstances indicating an intent to waive. Lande v. S. Kitsap Sch. Dist. No. 402, 2 Wn. App. 468, 474, 469 P.2d 982 (1970) (citing Bowman v. Webster, 44 Wn.2d 667, 669, 269 P.2d 960 (1954)). Waiver is also an equitable principle that defeats someone's legal rights where the facts support an argument that a party relinquished its rights by delaying in asserting or failing to assert an otherwise available adequate remedy. Albice v. Premier Mortg. Servs. of Wash., Inc., 174 Wn2d 560, 569, 276 P.3d 1277 (2012).

Id *Frizzell v. Murray, No. 42265-4-II (August 28, 2012)*

It further states in the Albice v. Premier Mortg. Servs., opinion, that,

> Waiver, however, cannot apply to all circumstances or types of post-sale challenges. RCW 61.24.040(1)(f)(IX) provides that "failure to bring ... a lawsuit may result in waiver of any proper grounds for invalidating the Trustee's sale". The word "may" indicates that the

> legislature neither requires nor intends for courts to strictly apply waiver. Under the statute, we apply waiver only where it is equitable under the circumstances and where it serves the goals of the act.

Id Albice v. Premier Mortg. Servs. of Wash., Inc., 174 Wn2d 560 at 569, 276 P.3d 1277 (2012).

Relevant is the fact a review of the letters from BONYM and LITTON on November 8, 2010, stating "the sale is on hold", (which was not followed) shows bad faith—an intent to mislead—by LITTON and BONYM (CP#46-2 and 46-9). Moreover note, the email that was by BONYM sent on November 30, 2010 stating the sale was not stopped. (CP#46-10) This notice was (4) four days before the sale, which is insufficient under the statute to seek a stay; the facts show a manner of tricking Townleys into thinking they could seek stay, yet, it appears as a calculated move by BONYM removing Townleys good faith attempts to resolve the matter in getting a Temporary Restraining Order because four days is not enough time under the 5 days limit of RCW 61.24.

The court in Cox v Helenius, shows the legislative intent of RCW 61.24, quoted in relevant part,

> First, the non-judicial foreclosure process should remain efficient and inexpensive. PEOPLES NAT'L BANK v. OSTRANDER, 6 Wn. App. 28, 491 P.2d 1058 (1971). Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, the process should promote the stability of land titles.
>
> The act contains several safeguards to ensure that the nonjudicial foreclosure process is fair and free from surprise. Prior to initiating foreclosure, it is required that a default has occurred, RCW 61.24.030(3), and that no action is pending on an obligation secured by the deed of trust, RCW 61.24.030(4). Only after giving 30 days' notice and an opportunity to cure, may the trustee begin the foreclosure process. RCW 61.24.030(6).
>
> If the grantor chooses not to cure, the grantor may take one or more of the following actions. The grantor may contest the default, RCW

> 61.24.030(6)(j), RCW 61.24.040(2); restrain the sale, RCW 61.24.130; or contest the sale, RCW 61.24.040(2).

Id Cox v. Helenius, *103 Wn.2d 383, 693 P.2d 683 (1985)*

Additionally, in Cox, (Id) like Townleys' case, Cox had not restrained the sale and filed the request for injunctive relief in their amended complaint. The action filed by Cox met RCW 61.24.040(2) and it was noted by the Supreme Court that the trial judge properly interpreted the impact of the lawsuit within the context of RCW 61.24 et seq. Cox v Helenius quoted in relevant part,

> Using these rules of statutory construction, we conclude that an action contesting the default, filed after notice of sale and foreclosure has been received, does not have the effect of restraining the sale. RCW 61.24.130 sets forth the only means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure. That section allows the superior court to issue a restraining order or injunction to halt a sale on any proper ground. The Coxes failed to apply for an order restraining the sale, although they requested that relief in their amended complaint. ***Here, however, the trial judge properly determined that the lawsuit the Coxes filed after receiving the notice of default but prior to initiation of foreclosure constituted an action on the obligation. Therefore, one of the statutory requisites to nonjudicial foreclosure was not satisfied.***
>
> In some situations, a trustee may be unaware that an action on the obligation exists at the time foreclosure proceedings are initiated. Helenius, however, had actual notice of the action underlying the debt. He filed a notice of appearance in the case for the defendant beneficiary on the same day it was filed. He later represented the beneficiary at a motion hearing.
>
> ***Even if the statutory requisites to foreclosure had been satisfied and the Coxes had failed to properly restrain the sale, this trustee's actions,*** along with the grossly inadequate purchase price, would ***result in a void sale***. SEE LOVEJOY v. AMERICUS, 111 Wash. 571, 574, 191 P. 790 (1920); MIEBACH v. COLASURDO, 102 Wn. 2D 170, 685 P.2d 1074 (1984). Because the deed of trust foreclosure process is conducted without review or confirmation by a court, the fiduciary duty imposed upon the trustee is exceedingly high.

Id Cox v. Helenius, *103 Wn.2d 383, 693 P.2d 683 (1985)*

In Albice and Frizzell (supra) the Court's statement regarding the lack of restraining the sale is not fatal, therefore, it is proper for this review court to vacate the order and judgment of dismissal and remand this case back to the trial court to follow Washington's new rulings.

Argument II - IRREGULARITIES IN DEED OF TRUST ACT INVALIDATE AND VOID SALE PER WASHINGTON SUPREME COURT RULINGS EVEN WITH BONA FIDE PURCHASERS

Given recent Washington State rulings focused on foreclosures with irregularities in a foreclosure process resulting in voiding of any transfers or post foreclosure sales of the property, as such, these cases provide Townleys with post-sale remedies.

The spirit and intent of RCW 61.24 et seq., is to streamline the foreclosure process, quoting Cox (supra), in relevant part,

> The non-judicial foreclosure process authorized under RCW 61.24, the deeds of trust statute, is intended to be inexpensive and efficient while providing an adequate opportunity for preventing wrongful foreclosures and promoting the stability of land titles.

Id Cox v. Helenius, 103 Wn.2d 383, 693 P.2d 683

The Deed of Trust Act is a strict compliance statute requiring the foreclosing party to follow the law strictly from beginning through to the purchase by a bona fide purchaser or it will be construed the foreclosure in favor of the borrow.

In Albice (supra), the Washington Supreme Court affirmed the Court of Appeals reversal of a quieting title by a "bona fida purchaser" due to lack of adherence to RCW 61.24 by the foreclosing party.

> This case involves interpretation of the deeds of trust act, chapter 61.24 RCW, and the statutory procedural requirements for non-judicially foreclosing on an owner's interest. This case also involves whether, under the facts here, the property owner waived the right to challenge the sale and whether the purchaser of the nonjudicial foreclosure sale statutorily qualifies as a bona fide purchaser (BFP).
>
> The trial court ruled that despite procedural noncompliance, the purchaser was a BFP under the statute and quieted title in the purchaser. The Court of Appeals reversed, holding that failure to comply with the statutory requirements was reason to set the sale

aside and that factually, the purchaser did not qualify as a BFP. We affirm the Court of Appeals.
Id. *Albice v. Premier Mortg. Servs. of Wash., Inc., Washington Supreme Court, No. 85260-0*

A review of the record here shows irregularities and evidence of non-compliance with the language of RCW 61.24. For the sake of the irregularities are enumerated below:

CP #14-5 - Notice of Default - The ***unsigned*** Notice of Default delivered by Northwest Trustee on **July 8, 2009** stated that Bank of New York Mellon is the owner of the property and a trustee for trust named CWL, Inc. Asset Backed Certificates, Series 2005-10. However, Northwest Trustee did not have the authority to act as trustee until it was appointed on **July 20, 2009 (CP #16-1)**, 12 days after the Notice of Default was delivered. Contrary to RCW 61.24.010(2) - "Only upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee."

CP #14-5 - Notice of Default - Assignment of Deed of Trust, (**CP #90-1**) was wholly improper as MERS, an improper beneficiary according to *Bain (Kristin), et al. v. Mortg. Elec. Registration Sys., et al., Washington Supreme Court, No. 86206-1*, had no authority to assign the deed of trust to Bank of New York Mellon. In addition, Bank of New York Mellon was assigned the deed of trust on **July 17, 2009**, 9 days after the Notice of Default was delivered. Contrary to the commencement of RCW 61.24 and RCW 61.24.030.

CP #46-8 - Amended Notice of Sale and Actual Sale date of December 3, 2010 - Contrary to RCW 61.24.040(1), the Amended Notice of Sale was dated September 14, 2010 with a rescheduled sale date of December 3, 2010 does not satisfy the "at least 90 days" time requirement prior to a sale.

CP #11 - Motion to Dismiss Complaint - No Beneficiary Declaration required by RCW 61.24.031(9) provided as stated in Motion to Dismiss as Exhibit 6 (***CP#11, pg 10, ll 18-21)***.

CP #10 and 10-1 - Complaint - Complaint filed contesting the foreclosure sale on October 22 and served to Northwest Trustee as well 7 days prior to October 29 sale date. Trustee rescheduled sale for December 3 and stated the sale would occur though an action questioning legal affiliation of BONYM was active and a Lis Pendens had been filed in King County (***CP #14-10***).

Townleys show irregularities throughout the record. It is therefore proper to reverse the order and judgment of dismissal of the case and remand the case consistent with Washington's new rulings cited herein. It is also proper that the sale be voided and the ownership and possession of the subject property be placed back to Townleys.

Argument III - FORECLOSURES DEEMED WRONGFUL WHERE MERS IS LISTED AS BENEFICIARY PER WASHINGTON SUPREME COURT RULING

On August 16, 2012, the Washington State Supreme Court answered three certified questions filed by Judge John C. Coughenour regarding two cases before his Court. The questions for review were MERS and if MERS legally met the requirements to be a beneficiary per RCW 61.24.030,

> MERS then appointed trustees who initiated foreclosure proceedings. The primary issue is whether MERS is a lawful beneficiary with the power to appoint trustees within the deed of trust act if it does not hold the promissory notes secured by the deeds of trust. A plain reading of the statute leads us to conclude that 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. ***Simply put, if MERS does not hold the note, it is not a lawful beneficiary.***

Id. Bain (Kristin), et al. v. Mortg. Elec. Registration Sys., et al., Washington Supreme Court, No. 86206-1

The Washington State Supreme Court's decision in *Bain, et al. v. Mortg. Elec. Registration Sys., et al., No. 86206-1, File Date 8/16/2012* stated its decision,

> MERS is an ineligible "beneficiary' within the terms of the Washington Deed of Trust Act," if it never held the promissory note or other debt instrument secured by the deed of trust.

Id *Bain (Kristin), et al. v. Mortg. Elec. Registration Sys., et al., No. 86206-1*

MERS' ineligiblity to be a beneficiary holds MERS cannot assign interest to any successor, such as BONYM.

A review of the Townleys' Deed of Trust shows MERS was listed as the beneficiary of the Deed of Trust. (CP# 16-1) Townleys objected consistently within this aspect; namely, that MERS did not act properly, etc.

The record also shows two versions of the Note: one was provided by BONYM in the Motion for Relief of Stay in the US Bankruptcy Court in Seattle, Washington case #09-22120 in May 2010 and one was provided by Bank of America in June 2010 (CP#16-2, pg 9-11). Neither of these Notes name MERS or BONYM as the Noteholders.

Townleys challenged the separation of the Note from the Deed of Trust in all complaints starting on October 22, 2010, arguing this act voided the document and voided any security obligation that existed (CP#10, pg 8, ll 14-26 through pg 9, ll 1-11). This separation, etc., were addressed by the Washington State Supreme Court involving foreclosure with MERS; deeming those foreclosures wrongful. Townleys have preserved all of these issues addressed in Albice and Bain in the cold record.

Clearly, MERS was an improper beneficiary and therefore MERS had no legal right to transfer the Deed of Trust to BONYM. With the certified question regarding MERS in the Bain decision filed and the decision beneficial to Townleys it shows the dismissal of the case error.

It is proper, therefore, due to MERS presence on Townleys' Deed of Trust and an improper Assignment of the Deed of Trust to void the sale of the property and place ownership and possession of the home back to Townleys.

Argument IV - WASHINGTON CONSUMER PROTECTION CLAIMS EXIST IN CASE DUE TO WRONGFUL FORECLOSURE

In the recent Bain vs. Mortgage Electronic Registration Systems et al., the Washington Supreme Court stated, in relevant part,

> Finally, we are asked to determine if a homeowner has a Consumer Protection Act (CPA), chapter 19.86 RCW, claim based upon MERS representing that it is a beneficiary. We conclude that a homeowner may, but it will turn on the specific facts of each case.

Id Bain (Kristin), et al. v. Mortg. Elec. Registration Sys., et al., No. 86206-1

Washington State's CPA (hereafter WCPA) provides that unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful. In RCW 19.86.020 and *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, it holds,

> To prevail in a private action based on a CPA violation, a party must establish five distinct elements: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) public interest impact, (4) injury to the party in his business or property, and (5) causation.

Id Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778 at 780, 719 P.2d 531 (1986)

Whether a particular action or conduct gives rise to a WCPA violation is a question of law that needs to be reviewed de novo. *Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 150, 930 P.2d 288 (1997); State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003).*

Although the WCPA does not define the term "unfair," we consider three criteria from the Federal Trade Commission Act to determine whether a practice or act is unfair. As the Court held in *Blake v. Fed. Way Cycle Ctr*, quoted in relevant part,

> (1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law or otherwise-whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness;
> (2) Whether it is immoral, unethical, oppressive, or unscrupulous;
> (3) Whether it causes substantial injury to consumers (or competitors or other business men).

Id *Blake v. Fed. Way Cycle Ctr 40 Wn. App. 302 at 310, 698 P.2d 578 (quoting Fed. Trade Comm?n v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n.5, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972)), review denied, 104 Wn.2d 1005 (1985).*

It could be stated that it remains that Townleys only need to show a likelihood that additional plaintiffs have been or will be injured in exactly the same fashion, for their private dispute to be one that affects the public interest. (See *Hangman Ridge, 105 Wn.2d at 790*, supra). However, the first element of a WCPA claim is met as stated from Bain below,

> We agree that characterizing MERS as the beneficiary has the capacity to deceive and thus, for the purposes of answering the certified question, presumptively, the first element [of the Washington CPA] is met.

Id *Bain (Kristin), et al. v. Mortg. Elec. Registration Sys., et al., No. 86206-1*

The remaining elements of a WCPA are listed in record, are shown in the facts of this case, and are advanced (on going) by the act of the eviction experienced by Townleys in May 2012—to date.

It is proper to grant the Townleys ability to bring at least one Washington Consumer Protection Act (WCPA) claim before the trial court given the light of the Washington State Supreme Court Bain decision and the facts of this case. Townleys request the Court reverse the order and judgment dismissing the case and a remand to case back to the trial court for a jury trial to review the WCPA claims.

Argument V - NINTH CIRCUIT OF APPEAL RECORD REGARDING WRONGFUL FORECLOSURE CASES INVOLVING MERS and IRREGULARITIES

In re Kekauoha-Alisa (Court of Appeals, 9th Circuit 2012), it clearly states that,

> When intepreting state law, we are bound by the decision of the highest state court. Absent a controlling state court decision, our duty is to predict how the highest state court would decide the issue.

Id *In re Kekauoha-Alisa, 674 F. 3d 1083 - Court of Appeals, 9th Circuit 2012*

The Washington State Supreme succinctly determined that no irregularities may exist and MERS role as beneficiary is improper leading to the conclusion a wrongful foreclosure was worked on Townleys.

Based on the new decisions from Washington State Supreme Court, it is proper to void the title transfer of the property, place the ownership and possess of the subject property (their home) back Townleys. Moreover, allowing Townleys to seek WCPA remedies or other applicable relief as is proper.

CONCLUSION / RELIEF SOUGHT

In light of the very recent Washington State Supreme Court Decisions and due to the fact that the same issues discussed in these decisions have been preserved in the cold record of this case, the Ninth Circuit of Appeals should:

- Reverse the trial court's Order Denying Reconsideration of the Case, Order of Dismissal of Case and Vacate the Judgment
- Remand for jury trial to determine damages incurred by Appellants from the wrongful foreclosure, wrongful eviction and WCPA claims

In addition, due to the irregularities and MERS involvement in The instant wrongful foreclosure, the sale and title transfer to the non-Bona Fide Purchaser; namely, BONYM, should be voided.

Appellants' remedies is found within recent Washington State Supreme Court decisions and are consistent with the relief Appellants seek in this direct appeal. It is proper to remand consistent with Washington's new determination in subject matter of this nature.

Respectfully Submitted,

/s/ Scott C Townley — September 21, 2012
Scott C Townley Appellant — Date

/s/ Stephanie A Tashiro-Townley — September 21, 2012
Stephanie A Tashiro-Townley Appellant — Date

CERTIFICATES OF COMPLIANCE

Pursuant to 9th Circuit FRAP 32, Appellants state that the brief adheres to requirements for a proportional brief with double spacing, 10.5 size Courier New (monotype) font and with 1-inch margins on top, bottom, and sides. The number of words in the brief are 6,539 (under the 14,000 word limit) within compliance and in compliance with the 30 page limit.

CERTIFICATE OF INTERESTED PARTIES

Appellants certify the following are interested parties in this matter:

- Robert W. Norman Jr. (Houser & Allison) for Bank of New York Mellon, Mortgage Electronic Registration Systems Inc. (MERS) and Litton Loan Servicing (Appellees)

STATEMENT OF RELATED CASES

Appellant is aware of the following related cases:

US Bankruptcy Court in Seattle, Washington case #09-22120 / US Bankruptcy Appellate Panel of the Ninth Circuit case #12-60001 - Scott C Townley and Stephanie A Tashiro-Townley vs K. Michael Fitzgerald, US Bankruptcy Trustee.

King County Superior Court case #12-2-06921-2 KNT / Division I Appeal No. 69194-5I

Respectfully submitted,

/s/ Scott C Townley — September 21, 2012
Scott C Townley Appellant — Date

/s/ Stephanie A Tashiro-Townley — September 21, 2012
Stephanie A Tashiro-Townley Appellant — Date

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Stephanie Tashiro-Townley <zoemom4@gmail.com>

#691945l - Tashiro-Townley v. Bank of New York Mellon - Supplemental Brief Service

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Good morning Mr. Norman:

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Stephanie Tashiro-Townley
For #691945 Appellants Townleys

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- **Exhibit B - 11-35819 Motion for Reconsideration.pdf**
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