

65975-8-1

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

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DOUG WALKER, an individual,

*Appellant,*

v.

QUALITY LOAN SERVICE CORP. OF WASHINGTON, a Washington Corporation, SELECT PORTFOLIO SERVICING, INC., a Utah Corporation, CREDIT SUISSE FINANCIAL CORPORATION, a Delaware Corporation; TICOR TITLE COMPANY, a Washington Corporation; REGIONAL TRUSTEE SERVICES CORPORATION, a Washington Corporation; AMERICAN BROKERS CONDUIT; and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation

*Respondents.*

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**OPENING BRIEF OF APPELLANT**

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in granting judgment on the pleadings and dismissing Appellant's claim for wrongful foreclosure when Respondents committed clear and multiple violations of the statutory procedures set forth in *RCW 61.24*.

2. The trial court erred in granting judgment on the pleadings and dismissing Appellant's claim for violation of the Washington Consumer Protection Act (*RCW 19.86*) where Respondents demonstrated a clear pattern of deception and misrepresentations concerning the legal status of a Appellant's debt and in the prosecution of their non-judicial foreclosure of Appellant's real property.

3. The trial court erred in granting judgment on the pleadings and dismissing Appellant's claim for violation of the Federal Fair Debt Collection Practices Act.

4. The trial court erred in granting judgment on the pleadings and dismissing Appellant's claim to Quiet Title where the Deed of Trust was invalid under Washington law.

**B. STATEMENT OF THE CASE**

The Amended Complaint of Appellant, DOUG WALKER (hereinafter "Mr. Walker") addresses causes of action pertaining to two separate properties. This appeal, brought against Respondents, QUALITY LOAN SERVICE CORP. OF WASHINGTON (hereinafter "QLS") and SELECT PORTFOLIO SERVICING, INC. (hereinafter "SELECT"),

pertain only to real property commonly known as 22306 56<sup>th</sup> Ave., West, Mountlake Terrace, Snohomish County, Washington (hereinafter “56<sup>th</sup> Avenue Property” or “subject property”) and does not concern Mr. Walker’s claims related to the property commonly known as 23207 La Pierre Dr., Mountlake Terrace, Snohomish County, Washington.

On or about February 28, 2007, Mr. Walker executed a Note, secured by a Deed of Trust encumbering the 56<sup>th</sup> Avenue property, in which Respondent, TICOR TITLE COMPANY (hereinafter “TICOR TITLE”) was designated as the trustee, Respondent, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (hereinafter “MERS”) was identified as the purported beneficiary, and Respondent, CREDIT SUISSE FINANCIAL CORPORATION (hereinafter “CREDIT SUISSE”) was identified as the Lender. This instrument was recorded March 6, 2007 under Snohomish County Recording Number 200703060946. CP 162-174. It is important to note that at no time relevant to this cause of action has a copy of the Promissory Note referred to in the subject Deed of Trust ever been presented to the trial court, either in Mr. Walker’s pleadings or in the pleadings filed by Respondents.

At no time relevant to this cause of action has Mr. Walker owed MERS any monetary or other obligation under the terms of any promissory note or other evidence of debt executed contemporaneously with the subject Deed of Trust and has made no payments to MERS at any time.

Although Mr. Walker made repeated attempts to negotiate modification of the subject loan, he was unable to identify or make contact with any party that may have actually owned or legally held the subject Note. Indeed, as noted above, no copy of the subject Note has ever been produced or has ever been presented to the trial court.

On May 22, 2009, SELECT, representing itself as “beneficiary” of the subject Deed of Trust, executed an Appointment of Successor Trustee, pursuant to *RCW 61.24.010*, nominating QLS as successor trustee of the security instrument. As of this date, MERS, not SELECT, was the purported legal beneficiary of the subject Deed of Trust. This Appointment of Successor Trustee was recorded May 28, 2009 under Snohomish County Recording Number 200905280731 on. CP 153-154.

On July 6, 2009, MERS executed a Corporate Assignment of Deed of Trust as nominee for CREDIT SUISSE. By this instrument, MERS purportedly assigned all of its interest in the subject Deed of Trust to SELECT. More significantly, this instrument purports to assign the underlying Note to SELECT as well. At no time relevant to this cause of action did MERS own the debt secured by the Deed of Trust at issue herein or obtain possession of the Promissory Note which secures the subject Deed of Trust. Moreover, no evidence of an express grant of authority from CREDIT SUISSE to MERS to effect the assignment from MERS to SELECT ever been produced or offered the trial court. From the record before the trial court, there was no authority issued to MERS to assign the subject Note and Deed of Trust to SELECT, whatsoever. The

Corporate Assignment of Deed of Trust was recorded July 16, 2009 under Snohomish County with recording number 200907160350. CP 156.

On July 17, 2009, Defendant QLS executed a Notice of Trustee's Sale in connection with the 56<sup>th</sup> Avenue Property. This instrument was recorded July 21, 2009 under Snohomish County under Recording Number 200907210605. CP 158-160.

On October 2, 2009, Mr. Walker filed a Complaint in Snohomish County Superior Court under cause number 09-2-09456-8. CP 206-273.

On October 19, 2009, Mr. Walker obtained a Temporary Restraining Order and Order to Show Cause barring Respondents from conducting a Trustee's Sale and setting a return hearing on November 5, 2009.

On October 28, 2009, Mr. Walker filed an Amended Complaint in this action. CP 124-182.

On November 5, 2009, the Honorable David A. Kurtz entered a second Temporary Restraining Order and set the hearing on show cause over to November 17, 2009. CP 119-121.

On December 16, 2009, the Honorable Joseph P. Wilson entered a Temporary Restraining Order during the pendency of the action and ordered Mr. Walker to make payments into the registry of the Court, pursuant to *RCW 61.24.130*. CP 117-118. These payment have been made regularly, as ordered.

On or about January 29, 2010, MERS answered Mr. Walker's Amended Complaint. CP 106-114.

On or about February 2, 2010, QLS and SELECT answered Mr. Walker's Amended Complaint. CP 83-105.

On or about April 1, 2010, an Order of Default, pursuant to CR 55, was entered against CREDIT SUISSE and TICOR TITLE. CP 70-71.

On or about July 29, 2010, QLS and SELECT moved for judgment on the pleadings concerning Mr. Walkers' claims regarding the 56<sup>th</sup> Avenue Property, pursuant to *CR 12(c)*. CP 54-69.

On August 6, 2010, the Honorable Michael T. Downes granted Respondents' Motion for Judgment on the Pleadings, pursuant to *CR 12(c)*. CP 4-5. It is from this Order that Mr. Walker brings his appeal. CP 1-3.

## C. ARGUMENT

### 1. Standard of Review

A dismissal of claims under *CR 12(c)* is appropriate only if “ ‘it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.’ ” *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wash.2d 107, 120, 744 P.2d 1032 (1987) (quoting *Bowman v. John Doe Two*, 104 Wash.2d 181, 183, 704 P.2d 140 (1985)). See also *North Coast Enters, Inc. v. Factoria P'Ship*, 94 Wn.App. 855, 858-59, 974 P.2d 1257 (1999). All allegations of the non-moving party are presumed to be true, although “a court may consider hypothetical facts not included in the record.” *Tenore v. AT & T Wireless Servs.*, 136 Wash.2d 322, 330, 962 P.2d 104 (1998).

Review of a dismissal of claims pursuant to *CR 12(c)* is conducted *de novo*. *Burton v. Lehman*, 153 Wash.2d 416, 422, 103 P.3d 1230 (2005).

It is Mr. Walker's contention that the trial court had sufficient facts set forth in his pleadings that, if proven at time of trial, would have entitled him to the relief requested in the Amended Complaint.

2. **SELECT and QLS have violated the provisions of RCW 61.24, et seq. entitling Mr. Walker to relief from improperly prosecuted trustee's sale**

a. ***The Deed of Trust failed to meet statutory requirements of RCW 61.24.***

*RCW 61.24.005(2)* provides as follows:

2) "Beneficiary" means the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.

(Emphasis added)

A beneficiary's authority to act depends upon the recording of the deed of trust or the recording of the beneficial interest in the deed of trust. Only a beneficiary defined under *RCW 61.24.005(2)* can appoint a successor trustee or declare a default in the underlying obligation. *RCW 61.24.010* and *RCW 61.24.030(7)(c)*. In the absence of judicial oversight there is an expectation that trustees, and the parties that have retained them, will act consistently with the procedural requirements which are meant to provide borrowers notice of the process and an opportunity to object to the process if necessary. *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985). Underlying all the procedures outlined in *RCW 61.24* is the assumption

that the borrower will have knowledge or have the ability to reach the holder of the obligation. TILA, RESPA and *RCW 61.24.030(7)(a)*.<sup>1</sup> There must be no uncertainty regarding which party the underlying obligation or covenant secured by a deed of trust is owed to, for the borrower or third party must have such knowledge if they are to take advantage of the right to cure as set forth in *RCW 61.24.090*.

Furthermore, the public policies underlying non-judicial foreclosures are not served by lenders and their agents engaging in uncertain and haphazard procedures. Those public policies include (1) the promotion of an efficient and inexpensive foreclosure process; (2) an adequate opportunity for interested parties to prevent a wrongful foreclosure, and (3) the promotion of stability in land titles. *Cox v. Helenius, supra*.

*RCW 61.24, et seq.* strips borrowers of many of the protections available under a mortgage. Therefore, lenders must strictly comply with the Deed of Trust statutes, and the statutes and Deeds of Trust must be strictly construed in favor of the borrower. *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 752 P.2d 385 (1988).

Turning to the facts of the present controversy, MERS was designated as beneficiary under the subject Deeds of Trust as “nominee

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<sup>1</sup> Recent amendments to *RCW 61.24*, effective July 22, 2011, require proof that the “entity claiming to be the beneficiary is the owner of any promissory note or obligations secured by the deed of trust.” This new language further supports Appellant’s contention that the language of *RCW 61.24.005(2)* was intended to refer to the owner of the underlying obligation. SSHB 1362, Section 7 (8)(b)(iii).

for Lender or Lender's successors and assigns." CP 162. Since no copy of the underlying Note has ever been produced or presented to the trial court, we must presume, for the purposes of this action that CREDIT SUISSE remains "the lender" under the terms of the subject Deed of Trust. But, at no time relevant to this cause of action did MERS have an interest in the underlying Note as required by statute. Accordingly, MERS was not a proper "beneficiary" under *RCW 61.24.005(2)*, which provides that the beneficiary must be "the holder of the instrument or document evidencing the obligations secured by the deed of trust," a use of language that is similarly found and used in the UCC. *RCW 62A.3-301* and footnote 1, above.

The true or current owner or holder of the subject Note is unknown, but as noted above, we must assume CREDIT SUISSE to be the "holder" of the underlying obligation for purposes of this appeal. However, this assumption is highly questionable in view of CREDIT SUISSE's default. CP 70-71.

If MERS, as a "nominee" for the lender, did not have express authority from the assumed lender and MERS' presumed principal, CREDIT SUISSE, MERS' assignment of its interest in the Deed of Trust to SELECT was a nullity. Thus, SELECT's untimely appointment of QLS as successor trustee was also a nullity.

Moreover, if MERS never had an interest in the underlying Note, it could never be a proper beneficiary under *RCW 61.24.005(2)*, and its purported assignment of the Note to SELECT was also a nullity.

Thus, upon the record before the trial court on August 6, 2010, the Corporate Assignment of Deed of Trust from MERS to SELECT and the Appointment of Successor Trustee from SELECT to QLS must fail as a matter of law.

No Washington appellate court has attempted to construe the limits of *RCW 61.24.005(2)*. However, the issue has been addressed in other courts across the nation.

The Supreme Court of Arkansas rejected the designation of MERS as a beneficiary under that states Deed of Trust statutes. (“MERS is not the beneficiary, even though it is so designated on the deed of trust”). *Mortgage Electronic Registration Systems, Inc. v. Southwest Homes of Arkansas*, 2009 Ark. 152 (2009). The relevant Arkansas laws closely mirror *RCW 61.24.005*, the Arkansas Code states in pertinent part: “Beneficiary” means the person named or otherwise designated in a deed of trust as the person for whose benefit a deed of trust is given or his successor in interest; *Arkansas Code § 18-50-101*.

The Supreme Court of Kansas ruled that MERS had no interest in either the property or the obligation it secured. A thoughtful review of and citation to the Kansas Supreme Court analysis in the matter of *Landmark Nat'l Bank v. Kesler*, 216 P.3d 158 (2009) reveals the sound logic finding MERS lacked sufficient legal standing to participate in proceedings:

Mortgage Electronic Registration Systems, Inc. (MERS) and Sovereign Bank seek review of an opinion by our Court of Appeals holding that a nonlender is not a contingently necessary party in a mortgage foreclosure action and that due process does not require that a nonlender be allowed to

intervene in a mortgage foreclosure action.

\* \* \*

Sovereign is a financial institution that putatively purchased the Kesler mortgage from Millennia but did not register the transaction in Ford County. The relationship of MERS to the transaction is not subject to an easy description. One court has described MERS as follows:

"MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members' interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members." *Mortgage Elec. Reg. Sys., Inc. v. Nebraska Depart. of Banking*, 270 Neb. 529, 530, 704 N.W.2d 784 (2005).

The second mortgage designated the relationships of Kesler, MERS, and Millennia and established payment and notice obligations. That document purported to define the role played by MERS in the transaction and the contractual rights of the parties.

The document began by identifying the parties:

"THIS MORTGAGE is made this 15th day of March 2005, between the Mortgagor, BOYD A. KESLER, (herein 'Borrower'), and the Mortgagee, Mortgage Electronic Registration Systems, Inc. ('MERS'), (solely as nominee for Lender, as hereinafter defined, and Lender's successors and assigns). MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS. MILLENNIA MORTGAGE CORP., A CALIFORNIA CORPORATION is organized and existing under the laws of CALIFORNIA and has an address of 23046 AVENIDA DE LA CARLOTA #100, LAGUNA HILLS, CALIFORNIA 92653 (herein 'Lender')."

\* \* \*

The mortgage instrument states that MERS functions "solely as nominee" for the lender and lender's successors and assigns. The word "nominee" is defined nowhere in the mortgage document, and the functional relationship between MERS and the lender is likewise not defined. In the absence of a contractual definition, the parties leave the definition to judicial interpretation.

What meaning is this court to attach to MERS's designation as nominee for Millennia? The parties appear to have defined the word in much the same way that the blind men of Indian legend described an elephant--their description depended on which part they were touching at any given time. Counsel for Sovereign stated to the trial court that MERS holds the mortgage "in street name, if you will, and our client the bank and other banks transfer these mortgages and rely on MERS to provide them with notice of foreclosures and what not." He later stated that the nominee "is the mortgagee and is holding that mortgage for somebody else." At another time he declared on the record that the nominee

\* \* \*

The legal status of a nominee, then, depends on the context of the relationship of the nominee to its principal. Various courts have interpreted the relationship of MERS and the lender as an agency relationship. See *In re Sheridan*, \_\_\_ B.R. \_\_\_, 2009 WL 631355, at \*4 (Bankr. D. Idaho March 12, 2009) (MERS "acts not on its own account. Its capacity is representative."); *Mortgage Elec. Registration System, Inc. v. Southwest*, 2009 Ark. 152, \_\_\_ S.W.3d \_\_\_, 2009 WL 723182 (March 19, 2009) ("MERS, by the terms of the deed of trust, and its own stated purposes, was the lender's agent"); *LaSalle Bank Nat. Ass'n v. Lamy*, 2006 WL 2251721, at \*2 (N.Y. Sup. 2006) (unpublished opinion) ("A nominee of the owner of a note and mortgage may not effectively assign the note and mortgage to another for want of an ownership interest in said note and mortgage by the nominee.")

The relationship that MERS has to Sovereign is more akin to that of a straw man than to a party possessing all the rights given a buyer. A mortgagee and a lender have

intertwined rights that defy a clear separation of interests, especially when such a purported separation relies on ambiguous contractual language. The law generally understands that a mortgagee is not distinct from a lender: a mortgagee is "[o]ne to whom property is mortgaged: the mortgage creditor, or lender." Black's Law Dictionary 1034 (8th ed. 2004). By statute, assignment of the mortgage carries with it the assignment of the debt. K.S.A. 58-2323. Although MERS asserts that, under some situations, the mortgage document purports to give it the same rights as the lender, the document consistently refers only to rights of the lender, including rights to receive notice of litigation, to collect payments, and to enforce the debt obligation. The document consistently limits MERS to acting "solely" as the nominee of the lender.

\* \* \*

What stake in the outcome of an independent action for foreclosure could MERS have? It did not lend the money to Kesler or to anyone else involved in this case. Neither Kesler nor anyone else involved in the case was required by statute or contract to pay money to MERS on the mortgage. See *Sheridan* ("MERS is not an economic 'beneficiary' under the Deed of Trust. It is owed and will collect no money from Debtors under the Note, nor will it realize the value of the Property through foreclosure of the Deed of Trust in the event the Note is not paid."). If MERS is only the mortgagee, without ownership of the mortgage instrument, it does not have an enforceable right. See *Vargas*, 396 B.R. 517 ("[w]hile the note is 'essential,' the mortgage is only 'an incident' to the note" [quoting *Carpenter v. Longan*, 16 Wall. 271, 83 U.S. 271, 275, 21 L. Ed 313 (1872)]).

\* \* \*

One such problem is that having a single front man, or nominee, for various financial institutions makes it difficult for mortgagors and other institutions to determine the identity of the current note holder.

"[I]t is not uncommon for notes and mortgages to be assigned, often more than once. When the role of a servicing agent acting on behalf of a mortgagee is thrown into the mix, it is no wonder that it is often difficult for unsophisticated borrowers to be certain of the identity of

their lenders and mortgagees." *In re Schwartz*, 366 B.R. 265, 266 (Bankr. D. Mass. 2007).

"[T]he practices of the various MERS members, including both [the original lender] and [the mortgage purchaser], in obscuring from the public the actual ownership of a mortgage, thereby creating the opportunity for substantial abuses and prejudice to mortgagors..., should not be permitted to insulate [the mortgage purchaser] from the consequences of its actions in accepting a mortgage from [the original lender] that was already the subject of litigation in which [the original lender] erroneously represented that it had authority to act as mortgagee." *Johnson*, 2008 WL 4182397, at \*4.

The *amicus* argues that "[a] critical function performed by MERS as the mortgagee is the receipt of service of all legal process related to the property." The *amicus* makes this argument despite the mortgage clause that specifically calls for notice to be given to the *lender*, not the putative mortgagee. In attempting to circumvent the statutory registration requirement for notice, MERS creates a system in which the public has no notice of who holds the obligation on a mortgage.

The Arkansas Supreme Court has noted:

"The only recorded document provides notice that [the original lender] is the lender and, therefore, MERS's principal. MERS asserts [the original lender] is not its principal. Yet no other lender recorded its interest as an assignee of [the original lender]. Permitting an agent such as MERS purports to be to step in and act without a recorded lender directing its action would wreak havoc on notice in this state." *Southwest Homes*, 2009 Ark. at 152.

This Court should adopt the reasoning of the Kansas Supreme Court. The language of the subject Deed of Trust is identical to the language used in the *Landmark* instrument.

As cited above, the *Landmark* court ruled that MERS had no interest in either the property or the obligation it secured. The Kansas

Supreme Court is not the only court to question the role of MERS in matters such as these. *In re Vargas*, 396 BR 511 (Bankr. C.D. Cal 2008) ("MERS presents no evidence as to who owns the note or any authorization to act on behalf of the present owner"); *Saxon Mortgage Servs. v. Hillery*, 2008 WL 5170180 at \*5 (N.D. Cal 2008) ("there is no evidence of record that establishes that MERS either held the promissory note or was given the authority by New Century [the original lender] to assign the note"); *In re Mitchell*, 2009 WL 1044368 at 2-6 (Bankr.D. Nev. 2009); *In re Kang Jin Hwang*, 396 BR 757 (Bankr. C.D. Cal 2008).

Furthermore, as noted, no documentation has been provided demonstrating to whom the subject obligation is actually owed. No copy of the Note was presented to the trial court. To the best of Plaintiff's knowledge, CREDIT SUISSE, the Lender, still remains the holder in due course under the Note because there is no evidence of assignment from CREDIT SUISSE to any other entity or other evidence to the contrary. However, this is a mere presumption. Given the recent financial crisis related to the securitization of mortgages it is likely the true identity of the Note holder may never be revealed. If proper assignments of the Note have been made, they should be presented. Certainly, a diligent search of the public record maintained by the Snohomish County Auditor's Office fails to reveal any assignments of the Note from the Lender to any entity. Requiring foreclosing parties to produce even a minimum of proof establishing the identity of their principal is not an unreasonable request in advance of losing possession and all investment in a residence, and is now

statutorily required. *RCW 61.24.030(7)*. That it is also a requirement for purposes of foreclosure under *RCW 61.24.020*.

Respondents' argued to the trial court that since Mr. Walker agreed to MERS designation as the "beneficiary" under the Deed of Trust that he ratified the role of MERS even if it violates the provisions of *RCW 61.24*. However, this argument is simply wrong. A contract that violates a specific statute is illegal and void under the public policy doctrine. *Mills v. Western Washington University*, 150 Wash. App. 260, 208 P.3d 13, 244 Ed. Law Rep. 821 (2009), review denied, 167 Wash. 2d 1020, 225 P.3d 1011 (2010); *Parker v. Tumwater Family Practice Clinic*, 118 Wash. App. 425, 76 P.3d 764 (2003). The proper remedy for a contract directly in violation of *RCW 61.24, et. seq.* is likely rescission, which does not excuse Mr. Walker from payment of any monetary obligation, but merely precludes non-judicial foreclosure. Moreover, if the subject Deed of Trust is void, Mr. Walker should be entitled to quiet title to his property.

An agreement that violates a statute or municipal ordinance is void, except where the agreement is not criminal or immoral and the statute or ordinance contains an adequate remedy for its violation. *Sienkiewicz v. Smith*, 97 Wash.2d 711, 716, 649 P.2d 112 (1982). However, *RCW 61.24* provides for no specific remedies for violation of the statute in the context of pre-sale actions meant to prevent the wrongful foreclosure from occurring. Presumably, by providing a basis to block a

sale under the statute for statutory violations the legislature did not intend for a sale to subsequently proceed in contravention of the statute.

***b. Subsequent Assignment of Deed and Appointment of Trustee invalid***

*RCW 61.24.010(2)*, provides as follows:

(2) The trustee may resign at its own election or be replaced by **the beneficiary**. The trustee shall give prompt written notice of its resignation to the beneficiary. The resignation of the trustee shall become effective upon the recording of the notice of resignation in each county in which the deed of trust is recorded. If a trustee is not appointed in the deed of trust, or upon the resignation, incapacity, disability, absence, or death of the trustee, or the election of the beneficiary to replace the trustee, **the beneficiary shall appoint a trustee or a successor trustee**. 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

(Emphasis added)

There is no evidence of a legitimate assignment of the Note from CREDIT SUISSE to SELECT. SELECT has not proved that it actually purchased or held the subject debt, and, as noted above, only the holder of the debt may foreclose. Accordingly, like the argument against MERS, there is no proof that SELECT has ever been entitled to act as “beneficiary” under the subject Deed of Trust to act in any capacity, much less to appoint a successor trustee under *RCW 61.24.010*. The entire foreclosure process engaged in by MERS, SELECT, QLS, and the other named Respondents, was illegitimate and was prosecuted in violation of state and federal law.

Even assuming the validity of the Corporate Assignment of Deed of Trust, which Mr. Walker does not concede, the appointment of QLS

was improper. On May 22, 2009, SELECT purportedly appointed QLS as successor trustee, pursuant to *RCW 61.24.010*. CP 153. However, the record reveals that MERS did not execute the Corporate Assignment of Deed of Trust until July 7, 2009. Since MERS was the purported beneficiary under the Deed of Trust on May 22, 2009, SELECT had no authority whatsoever to appoint QLS as successor trustee. Thus, SELECT's appointment of QLS as successor trustee was untimely and must fail. It is Mr. Walker's contention that SELECT and QLS knew, or should have known, they had no authority to act in the capacity they did.

On top of the procedural deficiencies of the actions taken by SELECT, QLS, and purportedly by MERS, there is an additional statutory violation committed by QLS. Under *RCW 61.24.010(4)*, QLS, as successor trustee, had a fiduciary duty to act in good faith in its dealings with Plaintiff, but instead recorded and relied upon documents it knew, or should have known, to be false and misleading. Under the fiduciary standard set out in *Cox v. Helenius, supra*, QLS should have requested some form of proof from SELECT regarding possession of the underlying obligation. Because SELECT did not hold the underlying obligation at any time relevant to this cause of action and QLS has provided no evidence that any inquiry was ever made regarding the issue, the fiduciary obligation owed to Mr. Walker was violated (or in the alternative the statutory requirement was violated). In this case, QLS failed to take any action to satisfy its fiduciary duty to ensure SELECT was, in fact, the holder of the Note secured by the Deeds of Trust and otherwise assure that

the non-judicial foreclosure process was not compromised. The beneficiary according to the public record at the time the Appointment of Successor Trustee was executed and recorded was MERS and not SELECT. If QLS had engaged in a cursory investigation, well below the sort of investigation a fiduciary duty would require, this fact would easily have been discovered. A hypothetical scenario in which an as yet unknown entity is the current holder of the original Note would mean all the actions taken by QLS and SELECT are without basis in law and entirely fraudulent.

If QLS intends to foreclose a property non-judicially it is obligated to have evidence that it is doing so on a legitimate and legal basis and not simply acting at the behest of a party that may or may not have the legal right to conduct such an action. There is no evidence that QLS's actions related to the appointment or assignment referenced above were anything other than wrongful and fraudulent. QLS has not provided adequate documentation to support their contention that MERS or SELECT are beneficiaries entitled to foreclose under *RCW 61.24*. Based upon the foregoing QLS has knowingly and recklessly violated *RCW 61.24*.

Based upon the foregoing, Mr. Walker's Amended Complaint presented facts that, if proven at time of trial, would have entitled him to relief under *RCW 61.24, et seq.*, including claims for wrongful foreclosure and quiet title. Accordingly, the trial court erred in dismissing Mr. Walker's claims under *RCW 61.24, et seq.*, on August 6, 2010.

3. **QLS and SELECT violated the Federal Fair Debt Collections Practices Act.**

QLS claims that the Federal Fair Debt Collections Practices Act (FDCPA) does not apply to them because it is not a “debt collector.” Since the FDCPA is a federal statute, it is entirely appropriate to look to federal case law to determine if there is any merit in QLS’ contention.

When federal case law is reviewed, the arguments made by QLS were explicitly rejected by the 4<sup>th</sup> Circuit Court of Appeals, which reasoned that a debt remained a debt even after foreclosure proceedings commence. See *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4<sup>th</sup> Cir. 2006). The logic behind the 4<sup>th</sup> Circuit decision is unassailable as the Notice of Default contain demands for payment of sums then due and the foreclosure itself is meant to recover an underlying debt. Accordingly, the FDCPA may also apply to SELECT, through its own actions and the actions of its agent QLS if SELECT cannot demonstrate it held the note prior to any alleged default.

The 9<sup>th</sup> Circuit has not specifically addressed the issues of whether mortgagees and their assignees are “debt collectors” and whether non-judicial foreclosure actions constitute debt collection under the FDCPA. However, other Courts have held that the FDCPA treats assignees as debt collectors if the debt sought to be collected was in default when acquired by the assignee, and as creditors if it was not. *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7<sup>th</sup> Cir. 2003); See also *Bailey v. Security Nat’l Servicing Corp.*, 154 F.3d 384, 387 (7<sup>th</sup> Cir. 1998);

*Whitaker v. Ameritech Corp.*, 129 F.3d 952, 958 (7<sup>th</sup> Cir. 1997); *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 403-404 (3d. Cir. 2000); *Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 106-107 (6<sup>th</sup> Cir. 1996). Accordingly, the purchaser of a debt in default is a “debt collector” for purposes of the FDCPA, even though it owns the debt and is collecting for itself. See *McKinney v. Cadleway Properties, Inc.*, 548 F.3d 496, 501 (7<sup>th</sup> Cir. 2008); *FTC v. Check Investors, Inc.*, 502 F.3d 159, 171-74 (3d Cir. 2007).

The representations of SELECT and QLS and their actions were made in connection with the purported collection of a debt and constitute a clear violation of §807 of the Fair Debt Collection Practices Act (“FDCPA”):

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

\* \* \*

(2) The false representation of -

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

\* \* \*

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

\* \* \*

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

\* \* \*

(Emphasis added)

Moreover, the misstatements of fact regarding a debt owed to SELECT constitute an unfair practice under §808 of the FDCPA:

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

\* \* \*

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if -

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(Emphasis added)

Applying the foregoing to the facts of the present case, the Corporate Assignment of Deed of Trust, assuming its validity, and the assignment of Mr. Walker's debt was executed by MERS on July 6, 2009.

The subject Notice of Trustee's Sale, executed by QLS on behalf of SELECT, was dated July 17, 2009 and described defaults well in advance of that date. Thus, it appears that Mr. Walker's loan was in default at the time of alleged assignment to SELECT, which means SELECT was/is a debt collector pursuant to *15 U.S.C. § 1692a(6)(F)(iii)*, because the debt was in default at the time the debt was allegedly assigned to SELECT. At the very least, there is an issue of material fact as to whether the subject loan obligation was in default at the time of assignment. If SELECT was a "debt collector" within the terms of the FDCPA at the time of its assignment of the debt, its agent, QLS, would certainly be one.

Based upon the foregoing, Mr. Walker presented facts that, if proven at time of trial, would have entitled him to relief under the FDCPA. Accordingly, the trial court erred in dismissing Mr. Walker's FDCPA claims on August 6, 2010.

4. **QLS and SELECT violated the Washington Consumer Protection Act.**

The elements of a valid claim under Washington State Consumer Protection Act (WCPA)(*RCW 19.86, et seq.*) 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 Wash.2d 778, 719 P.2d 531 (1986). The WCPA should be "liberally construed that its beneficial purposes may be served." *RCW 19.86.920; Short v. Demopolis*, 103 Wash.2d 52, 691 P.2d 163 (1984).

Determining whether a particular act is an unfair or deceptive act within the terms of the WCPA is a question of law for the court, if there is no factual dispute. Leingang v. Pierce County Med. Bureau, Inc., 131 Wash.2d 133, 930 P.2d 288 (1997). Of importance to the facts of the present controversy, 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).

Panag stands for the proposition that violation of statutes related to the collection of a debt are *per se* unfair and constitute a deceptive act under the first element of the WCPA claim. It is undisputed that SELECT retained the services of QLS to represent its alleged interest in the non-judicial foreclosure of the 56<sup>th</sup> Avenue Property. The actions of SELECT, and its agent QLS in asserting that they were acting in accordance with the provision of *RCW 61.24, et seq.*, and specifically asserting by their actions that SELECT was a proper “beneficiary” to act under *RCW 61.24.005(2)* and *RCW 61.24.010*, were materially false or misleading to the extent that the purported transactions were not consistent with laws of the State of Washington and therefore failed to meet the legal standards entitling SELECT or QLS to take the actions they did. The execution of the Appointment of Successor Trustee by SELECT, in violation of *RCW 61.24.010*, constituted a materially false and misleading act in violation of the WCPA. Finally, the assignment of the Note and Deed of Trust by

MERS, in violation of RCW 61.24.005 and its lack of interest in the Note, constituted a materially false and misleading act in violation of the WCPA. As argued elsewhere in this brief, there are numerous violations of RCW 61.24 that are cited that give rise to Mr. Walker's WCPA claim. Simply put, at no time relevant to this cause of action did SELECT have the right to possession of the 56<sup>th</sup> Avenue Property at the time QLS threatened Mr. Walker with non-judicial foreclosure of the subject property.

Whether an act occurs in trade or commerce is an issue of whether the act "directly or indirectly affect[s] the people of the State of Washington." RCW 19.86.010(2). Misrepresentations concerning the legal status of a debt related to real property and the party to whom the debt is owed clearly affects the people of Washington. The court in *Panag* interpreted the WCPA broadly in order to give maximum effect to the Act in circumstances similar to those alleged in this matter. Additionally, both QLS and SELECT are companies engaged in similar transactions across the State of Washington and nationally.

Among the factors set forth in *Hangman Ridge* in determining if the public interest element is met are: (1) were the alleged acts committed in the course of defendant's business? (2) are the acts part of a pattern or generalized course of conduct? (3) were repeated acts committed prior to the act involving plaintiff? (4) is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? *Hangman Ridge v. Safeco, supra*. For disputes more private in nature,

courts will consider whether (1) the acts alleged were committed in the course of defendant's business? and (2) whether plaintiff and defendant occupy unequal bargaining positions? The answer to most of these questions is an unequivocal "Yes." The misconduct alleged herein was done in the normal course of SELECT's and QLS' businesses and has been repeated in the foreclosure of other properties throughout the State of Washington.

Regardless of the ultimate answer to the above questions, the *Hangman Ridge* court stated that the "*per se* method requires a showing that a statute has been violated which contains a specific legislative declaration of public interest impact." *RCW 61.24.127* specifically references *RCW 19.86* among the claims that are preserved and available to Plaintiffs seeking relief for violations of *RCW 61.24*.

Additionally, the FDCPA states as a declaration of purpose that is designed to "protect consumers" across the nation. *15 USC 1692* provides as follows:

(a) Abusive practices

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

\* \* \*

(e) Purposes

It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt

collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses  
(Emphasis added)

This is analogous, if not synonymous, with the public interest declaration as described in *Hangman Ridge*. The court in *Panag* stated that “[w]hen a violation of debt collection regulations occurs, it constitutes a *per se* violation of the WCPA and the FTCA under state and federal law, reflecting the public policy significance of this industry.” *Panag*, at page 897.

The acts that QLS and SELECT committed in the course of their foreclosure efforts that give rise to Mr. Walker’s claim under the WCPA are : (1) QLS sent to Mr. Walker a Notice of Default despite not meeting the requirements of a successor trustee under *RCW 61.24.010(2)* which QLS and SELECT knew or should have known at the time the Notice of Default was issued; (2) QLS and SELECT facilitated a deceptive and misleading effort to wrongfully execute and record documents QLS and SELECT knew or should have known contained false statements related to the Appointment of Successor Trustee and Assignment of Deed of Trust; (3) QLS and SELECT sent to Mr. Walker, executed and recorded Notice of Trustee’s Sale that QLS and SELECT knew contained false statements in that no obligation of the Plaintiff was ever owed to SELECT, the purported “beneficiary”; and (4) that as a result of this conduct, QLS and SELECT knew that its conduct amounted to wrongful foreclosure and was further in violation of the FDCPA.

The injury to Mr. Walker's business or property occurred in the necessity for investigation and consulting with professionals to address Respondents' wrongful foreclosure and collection practices and violation of *RCW 61.24, et seq.* 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. Here, Plaintiff had to take time off from work and incurred travel expenses to consult with an attorney to address the misconduct of the Defendants.

Additionally, injury to 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). All of the injuries outlined were the direct and proximate result of the misconduct of SELECT and QLS.

Clearly, Mr. Walker presented facts in his Amended Complaint that, if proven at time of trial, would have entitled him to relief under the WCPA. Accordingly, the trial court erred in dismissing Mr. Walker's CPA claims on August 6, 2010

**5. Mr. Walker's Claim for Quiet Title Lies as a Matter of Law.**

At all times relevant to this cause of action, Mr. Walker has been the owner of the 56<sup>th</sup> Avenue Property in fee simple and uninterrupted possession of the property. As MERS was never a legitimate beneficiary

under *RCW 61.24.005* and the interest in the Deed of Trust has been effectively segregated from the interest in the Note, the Deed of Trust is no longer a valid lien upon Mr. Walker's property.

The Corporate Assignment of Deed of Trust purportedly executed by MERS states: "Assignor hereby assigns unto the above named Assignee, the said Deed of Trust together with the Note." CP 156. Even if MERS had authority to transfer the beneficial interest of the Deed of Trust, which Mr. Walker asserts it did not, the Deed of Trust does not contain any grant of authority to MERS to transfer the Note and MERS attempt to assign the Note to SELECT was a nullity.

This is relevant to the underlying title as the separation of the Note from the Deed of Trust renders the subject Deed of Trust unenforceable. In other words, separation of the Note from the Deed of Trust results in the Note being unsecured. *Restatement (Third) of Property (Mortgages)* Section 5.4, Comment e (1997) ("in general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation").

This reasoning has been adopted by various courts and should be adopted by this Court. This reasoning was recognized as authority in the *Landmark* case and was cited by a Missouri court in finding that an assignment of deed of trust (which also purported to assign the underlying note) was of no force or effect. *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619 (Mo. App. 2009). When the obligation underlying the subject Deed of Trust has been divorced from the Deed of Trust, the Deed of Trust secures nothing and is an inappropriate cloud on the owner's title.

This reasoning has long standing acceptance across the country. The United States Supreme Court addressed this issue in Carpenter v. Longan, 83 U.S. 271 (1872) and stated succinctly:

“The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.”

Carpenter at 274.

The Supreme Court of California arrived at the same conclusion in Kelley v. Upshaw, 39 Cal.2d 179 (1952)(“purported assignment of the mortgage without an assignment of the debt which is secured was a legal nullity”).

The Kansas Court in Landmark similarly explained the consequences of such scenarios:

Indeed, in the event that a mortgage loan somehow separates interests of the note and the deed of trust, with the deed of trust lying with some independent entity, the mortgage may become unenforceable.

"The practical effect of splitting the deed of trust from the promissory note is to make it impossible for the holder of the note to foreclose, unless the holder of the deed of trust is the agent of the holder of the note. [Citation omitted.] Without the agency relationship, the person holding only the note lacks the power to foreclose in the event of default. The person holding only the deed of trust will never experience default because only the holder of the note is entitled to payment of the underlying obligation. [Citation omitted.] The mortgage loan becomes ineffectual when the note holder did not also hold the deed of trust." Bellistri v. Ocwen Loan Servicing, LLC, 284 S.W.3d 619, 623 (Mo. App. 2009).

The Missouri court found that, because MERS was not the original holder of the promissory note and because the

record contained no evidence that the original holder of the note authorized MERS to transfer the note, the language of the assignment purporting to transfer the promissory note was ineffective. "MERS never held the promissory note, thus its assignment of the deed of trust to Ocwen separate from the note had no force." 284 S.W.3d at 624; see also *In re Wilhelm*, 407 B.R. 392 (Bankr. D. Idaho 2009) (standard mortgage note language does not expressly or implicitly authorize MERS to transfer the note); *In re Vargas*, 396 B.R. 511, 517 (Bankr. C.D. Cal. 2008) ("[I]f FHM has transferred the note, MERS is no longer an authorized agent of the holder unless it has a separate agency contract with the new undisclosed principal. MERS presents no evidence as to who owns the note, or of any authorization to act on behalf of the present owner."); *Saxon Mortgage Services, Inc. v. Hillery*, 2008 WL 5170180 (N.D. Cal. 2008) (unpublished opinion) ("[F]or there to be a valid assignment, there must be more than just assignment of the deed alone; the note must also be assigned.... MERS purportedly assigned both the deed of trust and the promissory note.... However, there is no evidence of record that establishes that MERS either held the promissory note or was given the authority... to assign the note.").

In the case of *In Re: Wilhelm et al.*, BAP Case No. 08-20577-TLM (9<sup>th</sup> Cir) (opinion of Hon. Terry L. Myers, Chief U.S. Bankruptcy Judge, July 9, 2009), Judge Myers analyzed the decisional law as to MERS' purported standing to assign the Note where MERS was nothing more than the "nominal beneficiary" under the Deed of Trust. The Court concluded that even if MERS is granted authority to foreclose if required by "custom or law" (as set forth in the Deed of Trust), this language does not, either expressly or by implication, authorize MERS to transfer promissory notes.

The *Wilhelm* court cited to the cases of *Saxon Mortgage Services v. Hillery*, 2008 WL 5170180 (N.D. Cal., Dec. 9, 2008) and *Bellistri* as being in accord, holding that MERS presents no evidence as to who owns the

note or of any authorization to act on behalf of the present owner of the note. Both cases were effectively dismissed (*Hillery* by outright dismissal; *Bellistri* by summary judgment), finding that there was no standing as there was no authority for the MERS assignment of the note. The *Wilhelm* Court quoted the pertinent portion of the Bellistri opinion:

“The record reflects that BNC was the holder of the promissory note. There is no evidence in the record or the pleadings that MERS held the promissory note or that BNC gave MERS the authority to transfer the promissory note. MERS could not transfer the promissory note; therefore the language in the assignment of the deed of trust purporting to transfer [the] promissory note is ineffective.”

Clearly, the segregation of the Note from the Deed of Trust through the assignment of the Deed of Trust from MERS to SELECT without a valid assignment of the Note renders the subject Deed of Trust a nullity and an improper lien against Mr. Walker’s property. Accordingly, this improper cloud on Mr. Walker’s property should be cleared and Mr. Walker’s title quieted.

Mr. Walker presented facts in his Amended Complaint that, if proven at time of trial, would have entitled him to quiet title to his property. Accordingly, the trial court erred in dismissing Mr. Walker’s quiet title claims on August 6, 2010

**6. Attorney Fees and Costs on Appeal.**

Finally, Mr. Walker respectfully requests an award of taxable costs and reasonable attorney’s fees on appeal, pursuant to *RAP 18.1*. Mr. Walker

is entitled to attorney's fees pursuant to the terms of Paragraph 26 of the parties' Deed of Trust of February 28, 2007. CP 162-174

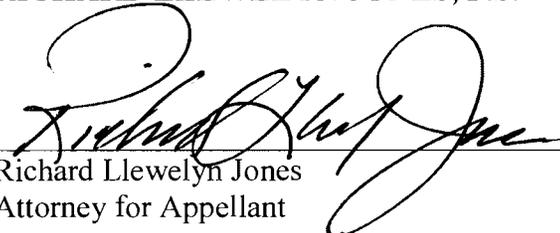
**.D. CONCLUSION**

Based upon the foregoing, Mr. Walker's Amended Complaint contained sufficient factual allegations to establish claims for Quiet Title, violation of *RCW 61.24, et seq.*, Wrongful Foreclosure, Defamation of Title, violation of *RCW 19.86, et seq.*, and violation of the FDCPA, when viewed in a light most favorable to Mr. Walker. Certainly, the trial court could have considered hypothetical facts, as counsel for Mr. Walker has done above, that would have established claims that would have entitled Mr. Walker to relief. Accordingly, the trial court erred in dismissing Mr. Walker's claims related to the 56<sup>th</sup> Avenue Property on August 6, 2010, pursuant to *CR 12(c)*, and Mr. Walker requests this Court vacate the trial court's Order of August 6, 2010 and remand the matter back to the trial court for a trial on the merits. Justice demands no less.

Furthermore, Mr. Walker respectfully request an award of his costs and reasonable attorney's fees incurred on appeal, pursuant to *RAP 18.1*

**REPECTFULLY SUBMITTED** this 20<sup>th</sup> day of June, 2011.

**RICHARD LLEWELYN JONES, P.S.**

  
Richard Llewelyn Jones  
Attorney for Appellant

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

That on June 20, 2011, I arranged for service of the forgoing Initial

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**DATED** this 20<sup>th</sup> day of June, 2010

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