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**IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

**No. 70062-6**

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MELANIE S. KELLER, an unmarried woman,

Appellant,

vs.

PROVIDENT FUNDING ASSOCIATES, L.P., a  
California Corporation; REGIONAL TRUSTEE SERVICES  
CORPORATION, a Washington Corporation; ROBINSON TAIT, P.S., a  
Seattle Law Firm; MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC. (MERS), a Virginia Corporation; NICOLAS DALUIO,  
a Robinson Tait Attorney and Resident of the State of Washington; and  
JOESPH TAMI, a Resident of the State of Pennsylvania  
Respondents,

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

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**BRIEF OF APPELLANT**

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MELANIE S. KELLER, PRO SE  
30476 – 154<sup>th</sup> PL. SE  
KENT, WA. 98042  
(253) 221-0190

## TABLE OF CONTENTS

	<u>Page</u>
<b>I. ASSIGNMENTS OF ERROR</b>	<b>8</b>
A. Assignments of Error	8
B. Issue Pertaining to Assignments of Error	9
<b>I. STATEMENT OF THE CASE</b>	<b>10</b>
A. Factual Background	10
B. Procedural History	11-15
1. Pursuit of Order Restraining Enforcement of Sale.	13-14
2. Attempt to Obtain Preliminary Injunction.	14-15
<b>III. SUMMARY OF ARGUMENT</b>	<b>15</b>
<b>IV. ARGUMENT</b>	<b>21</b>
A. STANDARD OF REVIEW	21
B. FREDDIE MAC IS THE OWNER OF THE NOTE	22
C. FREDDIE MAC IS THE BENEFICIARY OF OF THE DOT	23
D. UNDER THE WDTA, FOR FORE-CLOSURE TO BE LAWFUL, THE OWNER OF THE NOTE, HOLDER OF THE NOTE AND BENEFICIARY OF THE DOT MUST BE THE SAME PERSON.	23

1. RCW 61.24.005(2) and 61.24.030(7)(a), read together, Establish that the Beneficiary of the DOT that Secures the Debt Obligation Evidenced by the Note, Holder of the Debt Obligation Evidenced by the Note, and Owner of the Debt Obligation Evidenced by the Note Must be the Same Person. 23-24
  - a. Under RCW 61.24.005(2), the Beneficiary of the DOT that Secures the Debt Obligation Evidenced by the Note and the “Holder” of the Note that Evidences the Debt Obligation is the Same Person. 24
  - b. Under RCW 61.24.030(7)(a), the Beneficiary of the DOT that Secures Repayment of the Debt Obligation Evidenced by the Note and the “Owner” of the Debt Obligation Evidenced by the Note is the Same Person. 24
  - c. Since, under RCW 61.24 .005(2), the Beneficiary of the DOT is, by definition, the “Holder” of the Note, and, under RCW 61.24.030(7)(a), the Beneficiary of the DOT must be the “Owner” of the Note, the Holder of the Note and Owner of the Note must be the Same Person. 25
  - d. The Requirement that the Beneficiary, Note Holder and Note Owner be the same person is Precisely the result that should

	obtain in the real world.	26
e.	Freddie Mac, not Provident, was the Owner of the Note, Beneficiary of the DOT and Holder of the Note, If there was a Holder of the Note, when RTSC Commenced the Foreclosure Proceeding.	27
f.	RTSC was not authorized to Record, Transmit or Serve the NOTS until after It received a Declaration from Provident that met RCW61.24.030 (7)(a)'s "Proof of Ownership" Requirement.	28
g.	Provident's Beneficiary Declaration does not meet RCW 61.24.030(7)(a)'s "Proof of Ownership" requirement. Resultantly, RTSC was not authorized to Record, Transmit or Serve the NOTS after receiving the Declaration. Recording, Transmitting and Serving the NOTS after Receiving the Declaration, therefore, Violated RTSC's RCW 61.24.010(4) "Good Faith" Obligation.	29-30
E.	THE IDEA THAT THE BENEFICIARY, NOTE HOLDER AND NOTE OWNER ARE THE SAME PERSON PERMEATES THE WDTA.	31
F.	THE WASHINGTON SUPREME COURT AGREES THAT THE BENEFICIARY,	

	HOLDER OF THE NOTE AND OWNER OF THE NOTE MUST BE THE SAME PERSON.	34
G.	THE WASHINGTON ATTORNEY GENERAL AGREES THAT THE BENEFICIARY, HOLDER AND OWNER MUST BE THE SAME ENTITY.	36
H.	DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WAS BASED ON THE CLAIM THAT PROVIDENT, AS THE PERSON IN PHYSICAL POSSESSION OF A BLANK-ENDORSED NOTE, WAS THE PROPER PERSON TO COMMENCE THE FORECLOSURE.	37
V.	<b>SATISFACTION OF THE ELEMENTS OF MY CAUSES OF ACTION</b>	43
VI.	<b>CONCLUSION</b>	44

**APPENDIX 1**

Relevant Provisions of the RCW Chapter 61.24

**APPENDIX 2**

Relevant Provisions of RCW Chapter 62A.

**TABLE OF AUTHORITIES**

**Page**

**WASHINGTON CASES**

Bain v. Metropolitan Mortgage Group, Inc. No. 86206-1 (August 16, 2012)	34, 35, 36
Bryant v. Bryant, 125 Wn.2d 113, (1994)	19

Detention of Petersen, 145 Wn.2d. 789 (2002)	22
Harrington v. Spokane County, 128 Wn.App. 202 (2005)	21

**STATUTES**

**RCW Chapter 61.24**

RCW 61.24.005(2)	16, 20, 21, 24, 25, 26, 27, 33, 34, 35
RCW 61.24.005(7)	16, 31
RCW 61.24.010(4)	17, 28, 30
RCW 61.24.020	16, 31
RCW 61.24.030(7)(a)	16, 17, 25, 26, 28, 29, 32
RCW 61.24.030(7)(b)	17, 28
RCW 61.24.030(8)	13, 16, 32, 36
RCW 61.24.031(1)(a)	13
RCW 61.24.031(1)(c)(iv)	13
RCW 61.24.040(1)(a)	13, 16
RCW 61.24.040(2)	16, 32
RCW 61.24.070(2)	16, 32
RCW 61.24.163(5)(c)	16, 33

**RCW Chapter 62A.**

RCW 62A.1-201(21)	18, 39
-------------------	--------

RCW 62A.1-201(35)	40
RCW 62A.3-201, Official Comment 1	19, 21
RCW 62A.3-203, Official Comment 1	21
RCW 62A.3-301	27
RCW 62A.9A.-102(7)	41
RCW 62A.9A.-102(12)	41
RCW 62A.9A.-102(12)(B)	41
RCW 62A.9A.-102(44)	42
RCW 62A.9A.-102(47)	42
RCW 62A.9A.-102(69)	41
RCW 62A.9A.-102(72)	41
RCW 62A.9A.-109(a)(1)	40
RCW 62A.9A.-109(a)(3)	40
RCW 62A.9A.-313(a)	41
RCW 62A.9A.-313(c)	41, 42
RCW 62A.9A.-313(c)(1)-(2)	19

**OTHER AUTHORITIES**

	<b><u>Page</u></b>
Brief of Amicus Curiae, Attorney General of State of Washington, in Support of Petitioner	36

Foreclosure Fairness Act of 2011.	32
Freddie Mac Seller/Servicer Guide, Former § 66.16	17
Freddie Mac Seller/ Servicer Guide, §18.4(e)	19
Freddie Mac Seller/Servicer Guide, § 18.6(e)	39-40
Freddie Mac Custodial Agreement	43
Freddie Mac Form 1036	39, 43

## **I. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The trial court erred in ruling that Provident Funding Associates, L.P. (Provident) was the holder of the promissory note (Note) that evidences the debt obligation.

2. The trial court erred in ruling that Provident was the beneficiary of the deed of trust (DOT) that secures the debt obligation evidenced by the Note.

3. The trial court erred by not recognizing that, under the Washington Deed of Trust Act (WDTA), the beneficiary must be the owner of the debt obligation that the note evidences to conduct a lawful non-judicial foreclosure sale.

4. The trial court erred in not recognizing that, under the WDTA, the holder of the note, owner of the note, and beneficiary of the deed of trust (DOT) must be the same person to conduct a lawful non-judicial foreclosure proceeding.

5. The trial court erred in ruling Regional Trustee Services Corporation (RTSC) is the successor trustee even though Provident appointed RTSC the successor trustee more than four years after Provident ceased to be the owner or holder of the Note or beneficiary of the DOT.

6. The trial court erred in dismissing each of Appellant's three causes of action on the basis the foreclosure proceeding was lawful because Provident was the beneficiary of the DOT and holder of the Note.

**B. Issues Pertaining to Assignments of Error**

1. Did the trial court commit reversible error when it found Provident the beneficiary of the DOT?

2. Did the trial court commit reversible error when it found Provident the holder of the Note?

3. Did the trial court commit reversible error by failing to rule that Provident eliminated itself as a potential beneficiary of the DOT entitled to foreclose under the WDTA by admitting it was not the owner of the Note?

4. Did the trial court commit reversible error by granting Defendants' motion for summary judgment on the basis that Provident was the beneficiary of the DOT and holder of the Note and therefore was entitled to foreclose?

5. Did the trial court commit reversible error by ruling the foreclosure proceeding was conducted lawfully even though RTSC never received proof that Provident was the owner of the Note before recording the NOTS?

## II. STATEMENT OF THE CASE

### A. **Factual Background**

Provident originated the mortgage loan on October 9, 2007. CP 2:8-9. As a standard part of the origination process, I was required to execute a number of documents, the most important of which were (1) the Note, which evidenced my obligation to repay the debt, and (2) the DOT, which secured to the lender (or anyone to whom the lender transferred ownership of the debt obligation) repayment of the debt obligation. *Id.*

The Note required me to repay the loan to Provident (the lender). CP 41: § 1 ¶ 1. But also authorized Provident, at its sole discretion, to transfer the Note. *Id.*: § 1 ¶ 2. Pursuant to the Note's terms, Provident, or anyone who took the Note by transfer and thereby became entitled to receive payments under the Note, would be called the "Note Holder." *Id.* The Note was in the principal amount of \$160,000 (*Id.*: § 1 ¶ 1), with interest payable at the rate of 6.5% per annum. *Id.*: § 2 ¶ 1. The DOT named MERS beneficiary of the DOT. CP 46: ¶ 3.

On October 24, 2007, Provident sold the debt obligation evidenced by the Note to the Federal Home Loan Mortgage Corporation (Freddie Mac). RP 9: 6-8. Upon sale, Provident endorsed the Note in blank and delivered it to Freddie Mac. *Id.*: 5-6. Pursuant to the Note's terms and

Washington law, therefore, Freddie Mac became the owner and holder of the debt obligation evidenced by the Note and beneficiary of the DOT on October 24, 2007. CP 41: § 1 ¶¶ 1-2. Upon sale, Provident retained the servicing rights. CP 46: 5-9.

The loan fell into default on July 1, 2011. CP 4: 5-7. On May 18, 2012, approximately four years and seven months after selling the Note to Freddie Mac, Provident, claiming to be the owner and holder of the Note and beneficiary of the DOT, executed an “Appointment of Successor Trustee” that appointed RTSC successor trustee. CP 24: ¶ 6 and 34-35.

At no time prior to the date on which RTSC sold the property at public auction, September 28, 2012, did any Defendant communicate to me, in any way, that Freddie Mac was the owner and holder of the Note and beneficiary of the DOT. From the commencement of the foreclosure proceeding through the date my home was sold at public auction, each of the Defendants consistently claimed Provident was the Note holder, Note owner and beneficiary of the DOT. *Id.*: 4: 5-20.

#### **B. Procedural History**

On September 27, 2012, my Motion for Temporary Restraining order was heard in the Ex-parte Department of the King County Superior Court. CP 2: 22-25. During the hearing, counsel for Defendants

represented to the court that Provident was the owner and holder of the Note---and, consequently, beneficiary of the DOT---and had been the owner and holder of the Note, uninterrupted, since October 9, 2007, the date Provident originated the loan. CP 53-54: 27-2. The Motion for TRO was denied. CP 15: 24-27.

One day later, on September 28, 2012, the property was sold to Provident at public auction. CP 54: 2.

On or about October 1, 2012, Routh Crabtree Olson, P.S. sent me a letter. The letter informed me that Freddie Mac was now the owner of the property and offered me several thousand dollars if I would voluntarily relinquish possession of my house keys. CP 54: 3-6.

October 1, 2012, three days after my house was sold at public auction, was the first time any of the Defendants bothered to tell me that Freddie Mac was the owner and holder of the Note and beneficiary of the DOT. Because I did not know who the actual owner of my Note was until after my home had been sold, I was never given any opportunity to meet with Freddie Mac to try to work out an alternative to foreclosure.

Providing the debtor with an opportunity to meet with the beneficiary of the DOT (i.e., the owner of the debt obligation that the DOT

secures) is a prerequisite to the lawful issuance of a Notice of Default (NOD). *RCW 61.24.031(1)(a) and RCW 61.24.031(1)(c)(iv)*. Lawful issuance of a NOD, in turn, is a prerequisite to lawful issuance of a NOTS. *RCW 61.24.030(8)*. And lawful issuance of a NOTS, in turn, is a prerequisite to a lawful trustee's sale of the property. *RCW 61.24.040(1)(a)*.

Upon learning that Freddie Mac was involved, I conducted some basic research and learned that Freddie Mac had purchased my loan on October 24, 2007, almost four years and 11 months before Provident, with the other Defendants' assistance, sold my property at public auction. RP 9: 6-8.

**1. Pursuit of Order Restraining Enforcement of Sale**

After informing Defendants' counsel that I had learned that counsel had misinformed the trial court about Provident's status as the owner of the Note, and about the number of times the Note had previously been transferred; I went back to Ex-parte to attempt to restrain the enforcement of the sale of the property. CP 54: 3-24. Commissioner Hollis Holman refused to reconsider Commissioner Allred's earlier decision because, the court concluded, I had failed to give sufficient notice of the

Ex-parte hearing, even though Defendants' counsel was present and ready to argue. *Id.*: 25-28.

## **2. Attempt to Obtain Preliminary Injunction.**

I then moved for a preliminary injunction before the assigned judge, Judge Michael Heavey. He denied the motion, ruling that Provident was the beneficiary of the DOT and holder of the Note, and I had lived in my home rent free for more than one year. CP 5 and 19-20. I moved for reconsideration and was again denied. *Id.*: 20-23. This time on the basis that none of the legal requirements for a preliminary injunction had been met or presented.

The trial court had not mentioned the failure to meet the "legal requirements for a preliminary injunction" in its initial denial of the motion. I did not understand---and still don't---why the trial court expected me to address an issue in the motion for reconsideration that, in denying the original motion, it had given me no indication was an issue. In the motion for reconsideration, I addressed the only issues the trial court had raised in denying the original motion---the idea that Provident was the holder of the Note and beneficiary of the DOT.

On December 27, 2012, this case was re-assigned to Judge Suzanne Parisien. Then, on February 22, 2013, Defendants moved for

summary judgment (CP 1-13) and Judge Parisien, after finding that Provident was the holder of the Note and beneficiary of the DOT, granted Defendants' motion. CP 72-73.

### **III. SUMMARY OF ARGUMENT**

Defendants, acting in concert, were not entitled to foreclose non-judicially for three distinct reasons. Each of the reasons, standing alone, is sufficient to invalidate the sale of my home.

First, all parties to this litigation agree that Provident was not the "owner of the Note" at any point in time during the foreclosure proceeding. This fact is not in dispute. As such, Provident was not entitled to utilize the Washington Deed of Trust Act (WDTA) to foreclose.

Under the WDTA, the "beneficiary" of the deed of trust (DOT)---or the original or successor trustee acting at the beneficiary's request---is the only person authorized to initiate and conduct a non-judicial foreclosure. *RCW 61.24.031*. The DOT secures to the lender (i.e., the owner of the debt), or anyone to whom the lender sells the debt obligation, repayment of the debt.

Security for repayment of the debt is the "benefit" that the DOT confers on the "beneficiary" of the DOT. A person is eligible to receive

that benefit only if the person owns the debt that the DOT secures. This fact means the beneficiary of the DOT must always be the owner of the debt obligation that the DOT secures.

The requirement that the beneficiary be the owner of the debt that the DOT secures is the reason RCW 61.24.030(7)(a) requires the trustee to obtain proof that the person claiming to be the beneficiary of the DOT is the owner of the debt obligation that the note evidences. Without that proof, the trustee is not authorized to record, transmit or serve the Notice of Trustee's Sale (NOTS). *RCW 61.24.030(7)(a)*. And, in an owner-occupied-residential-property context, a lawful trustee's sale may not occur until at least 120 days after a NOTS has been lawfully recorded. *RCW 61.24.040(1)(a) and (f)*.

Numerous other WDTA provisions strongly reinforce the fact that the beneficiary of the DOT must be the owner of the debt obligation that the DOT secures. *RCW 61.24.020; 61.24.005(7); 61.24.040(2); 61.24.030(8)(l); 61.24.070(2); and 61.24.163(5) and (5)(c)*. In fact, nothing in the text, context, or legislative history of the WDTA indicates the Washington State Legislature intended the definition of "Beneficiary" contained in *RCW 61.24.005(2)* (i.e., "holder of the instrument evidencing

the obligations secured by the deed of trust”) to refer to anyone other than the person to whom the secured debt obligation is owed.

RCW 61.24.030(7)(a) permits the trustee to accept a declaration from the beneficiary stating that the beneficiary is the actual holder of the note as sufficient proof as required under subsection 7. The trustee is entitled to rely on the declaration as proof of ownership if it can do so without violating its RCW 61.24.010(4) duty of good faith. *RCW 61.24.030(7)(b)*.

In this case, Defendants knew or should have known Provident was not the owner of the Note before trustee commenced the foreclosure process. Trustee certainly knew Provident was not the owner before it recorded the NOTS. Former § 66.16 of Freddie Mac’s Guidelines required the Servicer (Provident in this case) to inform the trustee that the DOT was a Freddie Mac DOT upon initiating the foreclosure. Thus, Provident could not have offered its declaration for the purpose of proving it was the owner of the Note, and RTSC (the trustee) could not have accepted the declaration for that purpose.

Defendants belatedly admit Provident is not the owner of the debt obligation. Consequently, Provident was not the beneficiary of the DOT, as that term is defined in the WDTA, and therefore was not entitled to

utilize the WDTA to foreclose. Consequently, the sale of my home was unlawful.

Second, Provident, its claims to the contrary notwithstanding, was not the “holder of the Note” at any point in time during the foreclosure proceeding.

Defendants claim Provident was the holder of the Note---as the word “Holder” is defined in the RCW 62A.1-201(21)--- throughout the foreclosure process because Provident maintained physical custody of the Note throughout that process. CP 4: 9-20. Defendants’ claim is meritless.

The UCC defines the word “Holder” as: “The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession[.]” *RCW 62A.1-201(21)*. For the sake of this argument, I assume Provident maintained physical custody of the Note throughout the foreclosure process. But the question is not whether Provident had physical custody of the Note. The question is whether Provident had legal “possession” of the Note during the foreclosure process.

To answer the question correctly, it is necessary to review several provisions of RCW Chapter 62A (UCC), the law of agency and to examine a few provisions of Freddie Mac's Guidelines (Guidelines).

Under the law of agency, RCW Chapter 62A and the Guidelines, if a person holds a note in trust for the sole benefit of a third party, the third party, not the person, has lawful "possession" of the note. *See RCW 62A.3-201*, Official Comment 1; *See generally, Bryant v. Bryant*, 125 Wn.2d 113 (1994). This is true even though the person has physical custody of the note. *RCW 62A.9A.313(c)(1)-(2)*.

Under Section 18.4(e) of the Freddie Mac Guidelines, the Servicer (Provident) can obtain physical custody of the note only by completing a Form 1036. The form makes it clear that the Servicer receives the note in trust for the sole benefit of Freddie Mac. Under such facts, RCW 62A.9A.313(c)(1)-(2) is clear that Freddie Mac retains possession of the note and the servicer merely has temporary physical custody.

Since October 24, 2007, Freddie Mac has always had "possession" of the Note, even during those brief periods of time during which Provident had physical custody of the Note. As such, on this wholly separate ground, during the entire foreclosure proceeding, Freddie Mac

was the only person entitled to utilize the WDTA to foreclose non-judicially.

Third, even if Provident had been the holder of the Note, it would not have been entitled to foreclose non-judicially because it was not the beneficiary of the DOT. The beneficiary of the DOT must be the owner of the note. That the beneficiary of the DOT must be the owner of the note is the position of the WDTA, the Washington Supreme Court and the Attorney General of the State of Washington.

Defendants admit Provident has not been the holder of the Note since October 24, 2007.

Because RCW 61.24.005(2) defines the “beneficiary” as the “holder of the instrument or document evidencing the obligations secured by the deed of trust,” it seems impossible that Provident could be the holder of the Note yet not be the beneficiary of the DOT. It merely seems that way.

As Defendants correctly assert, one can be the holder of a note without being the owner of the note. CP 9: 23-26. The only examples of non-owner note holders provided in the UCC and the Official Comments thereto are thieves, persons who obtain notes by other illegal means, and

persons who find lost notes. *RCW 62A.3-203, Official Comment 1; and RCW 62A.3-201, Official Comment 1*. In almost all other cases, the holder and owner of the note are the same person.

Clearly, therefore, the UCC contemplates two distinct groups of note holders: (1) note holders who own the debt obligations evidenced by the notes they hold (Group A); and (2) note holders who do not own the debt obligations evidenced by the notes they hold (Group B). Since the beneficiary of the DOT must always be the owner of the note the DOT secures, the definition of “beneficiary” contained in RCW 61.24.005(2) refers to only note holders in Group A. If Provident had been a note holder, it would have been a Group-B note holder. Consequently, even if Provident had been a note holder, it could not have utilized the WDTA to foreclose non-judicially.

#### **IV. ARGUMENT**

##### **A. STANDARD OF REVIEW**

A summary judgment is reviewed by an appellate court de novo. The court engages in the same inquiry as the trial court under CR 56(c), viewing the facts of the case and the reasonable inferences from those facts in the light most favorable to the nonmoving party. *Harrington v. Spokane County*, 128 Wn. App. 202 (2005). When the appellate record

consists entirely of written materials, the appellate court is in the same position as the trial court and reviews the record de novo. *Id.*

Questions of law are reviewed de novo. *Detention of Petersen*, 145 Wn.2d 789 (2002)

In this case, the key issues to be decided are whether, under the WDTA, Provident is the “holder” of the Note, “beneficiary” of the DOT and “owner” of the Note. These are purely legal determinations. The appropriate standard of review, therefore, is de novo.

Additionally, I was the non-moving party.

**B. FREDDIE MAC IS THE OWNER OF THE NOTE**

After origination, the original Note was sent to a Custodial Depository for safekeeping. (citation omitted).

Subsequently, the Note was purchased by Freddie Mac and endorsed, in blank, by Provident. After the purchase by Freddie Mac, Provident remained the servicer of the loan for Freddie Mac under the Freddie Mac Seller/Servicer Guidelines and MERS remained as beneficiary of the Deed of Trust. (cite omitted).

CP 3: 26 - 4: 4.

In the above quotation, Defendants admit Freddie Mac is the owner of the Note.

**C. FREDDIE MAC IS THE BENEFICIARY OF THE DOT**

The DOT always follows the debt obligation that the Note evidences because the DOT's primary purpose is to ensure repayment of the debt obligation. This—security for repayment of the debt obligation evidenced by the Note—is the “benefit” the DOT confers on the receiver of the benefit—the “beneficiary” of the DOT. Only the owner of the debt obligation is entitled to this benefit because the owner of the debt obligation is the only person entitled to repayment of the debt. Hence, the “owner” of the debt obligation evidenced by the note is always the “beneficiary” of the DOT.

All parties to this litigation admit Freddie Mac became the owner of the Note on October 24, 2007 and has remained the owner, uninterrupted, ever since. Thus, Freddie Mac was the beneficiary of the DOT throughout the foreclosure process.

**D. UNDER THE WDTA, OWNER OF THE NOTE, HOLDER OF THE NOTE AND BENEFICIARY OF THE DOT MUST BE THE SAME PERSON.**

- 1. RCW 61.24.005(2) and 61.24.030(7)(a), read together, Establish that the “Beneficiary” of the DOT, “Holder” of the Debt Obligation Evidenced by the Note, and “Owner” of the Debt Obligation Evidenced by the Note Must be the same person.**

Under the WDTA, the “beneficiary of the deed of trust,” “holder of the note” and “owner of the note” must be the same person. The remainder of this Section C establishes this fact beyond reasonable dispute. After this fact has been fully absorbed, the appropriateness of reversing the trial court’s summary judgment ruling is apparent.

- a. **Under RCW 61.24.005(2), the Beneficiary of the DOT that Secures the Debt Obligation Evidenced by the Note and the “Holder” of the Note that Evidences the Debt Obligation are the Same Person.**

The word “Beneficiary” is defined in RCW 61.24.005(2). Thereat, the “Beneficiary” is defined as: “the holder of the instrument or document evidencing the obligations secured by the deed of trust[.]” In *Bain v. Metropolitan Mortgage Group, Inc.*, et al, No. 86206-1, the Washington Supreme Court, agreeing with the Attorney General of the State of Washington, stated the “instrument” referred to in RCW 61.24.005(2) is the “promissory note” secured by the deed of trust. *Bain*, No. 86206-1, at p. 17. When the phrase “promissory note” is substituted for the word “instrument” in RCW 61.24.005(2), the definition of the word “Beneficiary” contained in RCW 61.24.005(2) becomes the holder of the ‘promissory note’ secured by the deed of trust. Ergo, by definition, the “beneficiary” of the DOT that secures the debt obligation evidenced by the

Note and the “holder” of the Note that evidences the debt obligation are the same person.

- b. Under RCW 61.24.030(7)(a), the Beneficiary of the DOT that Secures Repayment of the Debt Obligation Evidenced by the Note and the “Owner” of the Debt Obligation Evidenced by the Note are the Same Person.**

RCW 61.24.030(7)(a) provides: “That, for residential real property, before the notice of trustee’s sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust.” This being the case, pursuant to RCW 61.24.030(7)(a), the “beneficiary of the deed of trust” and the “owner of the note secured by the deed of trust” are the same person.

- c. Since, Under RCW 61.24.005(2), the Beneficiary of the DOT is, by definition, the “Holder” of the Note, and, Under RCW 61.24.030(7)(a), the Beneficiary of the DOT Must Be the “Owner” of the Note, the “Holder” of the Note, “Owner” of the Note and Beneficiary of the DOT must be the Same Person.**

We have previously determined that, pursuant to RCW 61.24.005(2), the “beneficiary of the DOT,” by definition, must be the “holder of the promissory note secured by the DOT.” And under RCW 61.24.030(7)(a), the “beneficiary of the DOT” must be the “owner of the

promissory note secured by the DOT.” It is inescapable, therefore, that, under the WDTA, the “beneficiary” of the DOT also must be, simultaneously, both the “holder” of the promissory note secured by the DOT (RCW 61.24.005(2)) and the “owner” of the promissory note secured by the DOT (RCW 61.24.030(7)(a)). Hence, the “beneficiary of the DOT,” “holder of the Note” and “owner of the Note” must be the same person.

**d. The Requirement that the Beneficiary, Note Holder and Note Owner be the Same Person is Precisely the Result that should obtain in the Real World.**

The requirement, under the WDTA, that the beneficiary of the DOT, holder of the Note and owner of the Note be the same person is not bizarre. Admitting Provident was not the “owner” of the debt obligation, while simultaneously claiming Provident was the “beneficiary of the DOT” is bizarre. Provident being permitted to bid the amount of my debt at the trustee’s sale while simultaneously admitting it did not own my debt is bizarre. Submitting a declaration that is required to be submitted only if you are the owner of the Note, when you know you are not the owner of the Note is bizarre. Requiring the person claiming to be the beneficiary of the DOT to prove it is the owner of the note secured by the DOT is merely requiring persons to adhere to the Washington law.

Under the UCC, the holder of a note, whether the owner of the underlying debt obligation or not, is entitled to enforce the note. RCW 62A.3-301. However, only note holders who own the debt obligations their notes evidence are entitled to repayment of the debt. Since the beneficiary of the DOT is always the person entitled to repayment of the debt, the words used in RCW 61.24.005(2) to define the word “beneficiary”---holder of the instrument . . . evidencing the obligations secured by the deed of trust--- refer to only that group of note holders who own the debt obligations evidenced by the notes they hold. In the **Summary of Argument** that group of note holder is described as Group A note holders. Had it been a note holder, Provident would have been a Group B note holder. Consequently, even if Provident had been a note holder, it would not have been entitled to foreclose non-judicially.

**e. Freddie Mac, not Provident, was the Owner of the Note, Beneficiary of the DOT and Holder of the Note, throughout the Foreclosure Proceeding.**

From the day Freddie Mac purchased the Note, October 24, 2007, until today, without interruption, Freddie Mac has been the owner of the Note secured by the DOT. This fact is undisputed.

Under Washington law, the DOT that secures repayment of the debt obligation follows the debt obligation that the DOT secures. In other

words, the owner of the debt obligation is the only person that can possibly be entitled to receive the primary benefit that the DOT provides: repayment of the debt. Consequently, since October 24, 2007, Freddie Mac, not Provident, has been the beneficiary of the DOT.

The requirement that the beneficiary of the DOT always be the owner of the note is the most practical reason for RCW 61.24.030(7)(a)'s requirement that the trustee have proof that the person claiming to be the beneficiary of the DOT is the "owner" of the debt obligation that the DOT secures.

**f. RTSC was not Authorized to Record, Transmit or Serve the NOTS until after It received a Declaration from Provident that Met RCW 61.24.030(7)(a)'s "Proof of Ownership" Requirement.**

Pursuant to the second sentence of RCW 61.24.030(7)(a), "A declaration by the beneficiary . . . stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient 'proof as required under this subsection.'" RCW 61.24.030(7)(b) uses almost the exact same language, "proof required under this subsection," in authorizing the trustee to rely on the beneficiary's declaration if doing so will not violate the trustee's "good faith" obligation under RCW 61.24.010(4).

The “subsection” to which the phrase “proof as required under this subsection” refers is the subsection in which the phrase is found: subsection 7 of RCW 61.24.030. The only “proof” required in any subpart of subsection 7 is “proof” that the entity claiming to be the “beneficiary” of the DOT is the “owner” of the Note that the DOT secures. Proof of “ownership of the note,” therefore, is the “proof” to which the phrase “proof as required under this subsection” refers. Given this fact, under RCW 61.24.030(7)(a), a declaration provided to the trustee which states the beneficiary is the actual “holder” of the promissory note does not satisfy RCW 61.24.030(7)(a)’s “proof” requirement unless the declaration is provided for the purpose of proving the beneficiary is the actual “owner” of the note.

Accordingly, the trustee is not authorized by the WDTA to record, transmit or serve a NOTS if it receives a declaration from a declarant who claims to be the beneficiary of the DOT unless the declaration is offered for the purpose of proving the declarant is the “owner” of the Note that the DOT secures. Provident did not provide its Declaration of Note holder for the purpose of proving it was the owner of the Note.

- g. Provident’s Beneficiary Declaration Does Not Meet RCW 61.24.030(7)(a)’s “Proof of Ownership” Requirement. Resultantly, RTSC was not authorized to Record, Transmit or**

**Serve the NOTS after Receiving the Declaration.  
Recording, Transmitting and Serving the NOTS  
after Receiving Provident's Declaration,  
therefore, Violated RTSC's RCW 61.24.010(4)  
"Good Faith" Obligation.**

It is undisputed that Provident is not the owner of the Note. It is undisputed that RTSC knew Provident was not the owner of the Note before RTSC recorded the NOTS. And, since Provident sold the Note to Freddie Mac on October 24, 2007 and has serviced the loan on Freddie Mac's behalf since that date, Provident obviously knew, long before the foreclosure proceeding commenced, that it was not the owner of the Note on the day it submitted the Declaration to RTSC. Thus, unless Provident admits a deceptive intent, it cannot claim the declaration was submitted to RTSC to prove ownership of the Note.

RTSC knew Provident was not the owner of the debt obligation secured by the DOT before it recorded, transmitted and served the NOTS. Consequently, RTSC was not authorized by the WDTA to record the NOTS. As a result, by recording, transmitting and serving the NOTS, RTSC violated its RCW 61.24.010(4) duty to act in "good faith."

**E. THE IDEA THAT THE BENEFICIARY, NOTE HOLDER AND NOTE OWNER ARE THE SAME PERSON PERMEATES THE WDTA.**

The idea that the “beneficiary” of the DOT, “owner” of the debt obligation that the note evidences and “holder” of the debt obligation that the note evidences are the same person permeates the WDTA. The idea is present:

(1) in the definition of the term “Trust Deed”: “a deed conveying real property to a trustee in trust to secure the performance of an obligation of the grantor or another “to the beneficiary,” RCW 61.24.020. (Remember, the “beneficiary” is the person who is entitled to the benefit the DOT confers. The benefit that the DOT confers is the repayment of the debt.);

(2) in the definition of “Grantor”: “a person, or its successors, who executes a deed of trust to encumber the person’s interest in property as security for the performance of all or part of the borrower’s obligations[.]” RCW 61.24.005(7). (Remember, pursuant to the definition of “trust deed,” the borrower’s obligation is owed to the person who “benefits” from the security that the DOT provides (the beneficiary): the owner of the debt);

(3) in RCW 61.24.030(7)(a): “That, for residential real property, before the notice of trustee’s sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust;”

(4) in the statement to the borrower that is mandated by the WDTA: “The attached Notice of Trustee’s Sale is a consequence of default(s) in the obligation to . . . , the Beneficiary of your Deed of Trust and owner of the obligation secured thereby.” RCW 61.24.040(2), ¶ 2.;

(5) in RCW 61.24.030(8)(1)’s requirement that beneficiary or trustee provide the borrower with the owner’s name and address in the NOD;

(6) in the WDTA provision, RCW 61.24.070(2), that spells out who may bid at the trustee’s sale and the unique way the beneficiary is permitted to bid at the sale: “The trustee shall, at the request of the beneficiary, credit toward the beneficiary’s bid all or any part of the monetary obligations secured by the deed of trust[.]” (This type of bid would not be possible if the “beneficiary” of the DOT was not the “owner” of the debt obligation secured by the DOT); and

(7) in WDTA subsection RCW 61.24.163, subparts (5) and (5)(c), that details the timelines and procedures for the Foreclosure Mediation Program mandated by the Foreclosure Fairness Act of 2011: “Within twenty days of the beneficiary’s receipt of the borrower’s documents, the beneficiary shall transmit the documents required for mediation to the mediator and the borrower. The required documents include, “Proof that the entity claiming to be the beneficiary is the owner of any promissory note or obligation secured by the deed of trust[.]”

Nothing in the text, context, or legislative history of the WDTA indicates the Washington State Legislature intended the definition of “Beneficiary” contained in RCW 61.24.005(2) (i.e., “holder of the instrument evidencing the obligations secured by the deed of trust”) to refer to anyone other than the person to whom the secured debt obligation is owed. As demonstrated in (1) through (7) immediately above, everything in the text and context of the WDTA indicates the Washington State Legislature intended the definition of Beneficiary to refer only to the ‘owner’ of the debt obligation secured by the DOT. It is that person, and that person alone, that has the right to foreclose non-judicially.

In this case, all parties to this litigation agree Freddie Mac owned the debt obligation long before the foreclosure proceeding was initiated

and continued to own it, uninterrupted, throughout the entire foreclosure proceeding. Freddie Mac was the only entity, therefore, that had the right to foreclose non-judicially. Freddie Mac, however, did not foreclose; Provident did. The foreclosure proceeding was therefore unlawful.

**F. THE WASHINGTON SUPREME COURT AGREES THAT THE BENEFICIARY OF THE DOT, HOLDER OF THE NOTE AND OWNER OF THE NOTE MUST BE THE SAME PERSON.**

In *Bain* the Washington Supreme Court announced, implicitly, that, under the WDTA, the beneficiary must simultaneously be both the holder and owner of the debt obligation secured by the DOT and evidenced by the note.

In the process of finding Mortgage Electronic Registration Systems, Inc. (MERS) could not be a beneficiary as that term is defined in RCW 61.24.005(2), the *Bain* Court made the following statement:

Since 1998, the deed of trust act has defined a “beneficiary” as “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.” Laws of 1998, ch. 295, § 1(2), codified as RCW 61.24.005(2). (fn. omitted). Thus, in the terms of the certified question, if MERS never “held the promissory note” then it is not a “lawful ‘beneficiary.’”

*Bain*, No. 86206-1, at p. 14.

The above quote establishes that the Supreme Court understands the “beneficiary of the DOT” must be the “holder of the note” secured by the DOT. Indeed, in RCW 61.24.005(2) the term “beneficiary” is defined as the “holder” of the note secured by the DOT. Therefore, all that remains to be proven is that the Court has previously concluded the “beneficiary of the DOT” and the “owner of the note” secured by the DOT are the same person.

In a different section of the *Bain* decision, the Court reaches that conclusion: “[A] trustee of a deed of trust is a fiduciary for both the mortgagee and mortgagor and must act impartially between them.”). (fn. omitted). Among other things, “the trustee shall have proof the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust . . . .” *Bain*, No. 86206-1., at p. 8.

Remember, RCW 61.24.005(2) defines the “beneficiary” of the DOT as the “holder of the note” that the DOT secures. Accordingly, by concluding the trustee must have proof that the “beneficiary of the DOT” is the “owner of the note” that the DOT secures, the Court has concluded, implicitly, the “beneficiary of the DOT,” “holder of the note” and “owner of the note” must be the same entity. Since it is undisputed that Provident is not the owner of the Note, consistent with the WDTA’s requirements,

Provident cannot be the “beneficiary of the DOT” or “holder of the Note” as those terms are defined in the WDTA.

**G. THE WASHINGTON ATTORNEY GENERAL AGREES THAT THE BENEFICIARY, HOLDER AND OWNER MUST BE THE SAME ENTITY.**

The Attorney General of the State of Washington wrote an Amicus Brief on behave of Kristin Bain in *Bain*. In that brief, the AG made the following statement:

It is not just decades of case law that rely on the note and the security instrument transferring together. The Deed of Trust Act (DTA) assumes it throughout its provisions. The DTA states that “the trustee shall have proof that the beneficiary is the owner of any promissory note” prior to foreclosing. The DTA also requires the trustee to disclose in the Notice of Default the name and address of the owner of the promissory note. RCW 61.24.030(8)(l).

*Br. of Amicus Att’y General at p. 4.*

Since the “beneficiary” is, by definition, the “holder of the note” secured by the DOT, the quote establishes the AG’s agreement with the proposition that the “beneficiary of the DOT,” “holder of the note” and “owner of the note” must be the same entity.

Again, Freddie Mac is the owner of the Note. Accordingly, under the WDTA, Freddie Mac, not Provident, is the beneficiary of the DOT and holder of the Note, if there is a Note holder. Resultantly, Provident was

not the beneficiary of the DOT, RTSC was not authorized to record the NOTS after it received Provident's declaration, and the sale of my home was unlawful.

**H. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WAS BASED ON THE CLAIM THAT PROVIDENT, AS THE PERSON WITH PHYSICAL CUSTODY OF A BLANK-ENDORSED NOTE, WAS THE PROPER PERSON TO COMMENCE THE FORECLOSURE.**

In his moving papers, Defendants' counsel argued that because Provident was in possession of a note that contained a blank endorsement, making the Note "bearer paper," Provident was the holder of the Note and beneficiary of the DOT and was therefore entitled to foreclose under the WDTA. Further, since each of my causes of action was based on the claim that Provident was not the Beneficiary of the DOT or holder of the Note, all of my claims failed and must be summarily dismissed:

As I indicated - - I believe, as we indicated in our underlying Motion for Summary Judgment, Provident is in actual and physical possession of the Note and, in fact, my client, Provident has provided me with the original Note, and I have brought it here for the Court's review if the Court chooses to review it in camera.

The Note is endorsed in blank. What this means is that there's been an endorsement, a stamp on the Note that instructs that the Note be payable to no one essentially; to a blank recipient. That turns the Note from payable to the identified entity on the Note to payable to that individual who has actual possession of the Note. That's set forth clearly in the UCC provision regarding who is a holder of

the Note and what is bearer paper. The Note is now bearer paper. Provident is in physical possession of that Note. So what does that mean in light of the recent Bain decision?

Well, the Bain decision says that the beneficiary under the Deed of Trust, the party that is entitled to induce the Trustee to go to foreclosure sale, is the holder of the Note. So the holder of the Note in this case is Provident by way of possession of bearer paper; of the original Note made by Ms. Keller.

The rest of the arguments fall away as a result of the possession of the Note.

RP 3: 11 – 4: 11.

The trial court accepted this argument:

I have reviewed everything and have reviewed the case law and the RCW as well as the Bain case. The Court is prepared to sign Defendants' Order Granting Summary Judgment. The evidence, the declarations in this case and the law lead the Court to conclude that the Defendants have met their burden of establishing that the holder of the Note in this case is Provident, and that they're also the beneficiary under 61.24.005.

And the other causes of action, the Criminal Profiteering claim, the claim for Consumer Protection Act violations and the intentional infliction of Emotional Distress claims are all - - come from - - are derivative of the Plaintiff's allegations of the unlawful foreclosure. And because the unlawful foreclosure action, as I've said, is denied because of the RCWs and the law that Provident has proven that they are the holder of the Note, these claims must fall as well.

So at this point, I would enter Defendants' Order on Summary Judgment dismissing all of Plaintiff's claims.

RP 16: 9 – 17: 4.

It is clear that the trial court's denial of the underlying causes of action was based on its ruling that Provident was the holder of the Note and beneficiary of the DOT. Thus, if that ruling is incorrect, and, with respect, it is unquestionably incorrect, the summary judgment order should be overturned, and the causes of action reinstated.

Defendants argue that the Note is bearer paper and therefore, since Provident is in possession of the Note, under RCW 62A.1-201(21), Provident is the holder of the Note. Even if this argument was correct, however, Provident would not be entitled to foreclose non-judicially because it would not be a note holder who owned the note it held.

Under RCW 62A.1-201(21), the word "Holder" is defined, in relevant part, as a person who is in "possession" of a bearer instrument. Understanding when a person is or is not in "possession," therefore, is critical to knowing whether that person is the "holder" of an instrument.

Provident was not in "possession" of the Note. It simply held the Note in trust for Freddie Mac's benefit. As such, all of the laws relevant to this discussion indicate Freddie Mac was in possession of the Note during the brief period the Note was in Provident's custody.

To obtain release of the note, Provident had to provide Freddie Mac's Document Custodian with a 1036 Release form. *Guide, Section*

*18.6(e)*. The form clearly states that a Freddie Mac note that is released to a servicer is held in trust by that servicer solely for Freddie Mac's benefit. Article 9 of the UCC agrees with that assessment.

It should be understood that Article 9 generally governs transactions in which property is used as collateral for an obligation. RCW 62A.9A.-109(a)(1). But it also governs the sale of notes. RCW 62A.9A.-109(a)(3). The same Article 9 rules that apply to transactions in which a payment right is used as collateral apply to transactions in which payment rights are sold. The Article uses the same nomenclature for both types of transactions. This is primarily accomplished by defining the term "security interest" to include not only an interest in property that secures an obligation but also the right of a buyer of a payment right in a transaction governed by Article 9. *RCW 62A.1-201(35)*. Hence, for purposes of Article 9, the buyer of a promissory note is a "secured party" that has acquired a "security interest" in the note from the "debtor," and the rules that apply to security interests that secure an obligation also apply to transactions in which a promissory note is sold.

With these facts in mind, it is possible to conduct an intelligent analysis of the question whether Provident was in "possession" of the Note at any time after it obtained temporary physical custody of the Note.

In pertinent part, RCW 62A.9A.-313(a) and (c) read as follows:

(a) **Perfection by possession or delivery.** Except as otherwise provided in subsection (b) of this section, a secured party may perfect a security interest in . . . instruments, . . . by taking possession of the collateral.

....

(c) **Collateral in possession of person other than debtor.** With respect to collateral other than certificated securities and goods covered by a document, a “secured party” takes possession of collateral in the possession of a person other than the debtor, the secured party, or a lessee of the collateral from the debtor in the ordinary course of the debtor's business, when:

(1) The person in possession “authenticates” a “record” acknowledging that it holds possession of the collateral for the secured party's benefit; or

(2) The person takes possession of the collateral after having authenticated a record acknowledging that it will hold possession of collateral for the secured party's benefit. (Quotation marks added).

The key words in the above quotation are defined in RCW 62A.9A.-102. The word “Authenticate” is defined at RCW 62A.9A.-102(7). Authenticate means “to sign.” At RCW 62A.9A.-102(12) the word “Collateral” is defined as property subject to a security interest (a security interest includes a sale); and, at (12)(B), “promissory notes” are included within the definition of the word “Collateral.” The word “Record” is defined at (69). It means “information that is inscribed on a tangible medium.” The term “Secured Party” is defined at (72). As indicated

above, it means, among other meanings, a person to whom a promissory note has been sold.

RCW 62A.9A.-313(c), in pertinent part, describes when the secured party takes “possession” of the promissory note:

**(c) Collateral in possession of person other than debtor.** With respect to collateral other than certificated securities and goods covered by a document, a secured party takes possession of collateral in the possession of a person other than the debtor, the secured party, or a lessee of the collateral from the debtor in the ordinary course of the debtor's business, when:

(1) The person in possession authenticates a record acknowledging that it holds possession of the collateral for the secured party's benefit; or

(2) The person takes possession of the collateral after having authenticated a record acknowledging that it will hold possession of collateral for the secured party's benefit.

Freddie Mac is the secured party. And my Note is not a “certificated security” or “goods covered by a document.” By definition, a promissory note is not a “good.” *RCW 62A.9A.-102(44) (Goods) and (47) (Instruments)*. Additionally, Provident is a person other than the debtor (me), the secured party (Freddie Mac), or a lessee of the collateral (i.e., the Note) from the debtor (me) in the ordinary course of my business.

Under the above-quoted provision therefore, Freddie Mac (the secured party) took possession of the Note (the collateral) when the person

in possession (Provident) authenticated (signed) a record (the Custodial Agreement) acknowledging that Freddie Mac's Document Custodian would hold the collateral (Note) for the secured party's (Freddie Mac's) benefit. And Freddie Mac retained "possession" of the Note when the person (Provident) temporarily retook possession of the collateral (the Note) after having authenticated (signed) a record (the Custodial Agreement and Form 1036) acknowledging that it would hold possession of the collateral (the Note) for the secured party's (Freddie Mac's) benefit.

Since Provident relinquished possession of the Note on October 24, 2007 when it sold the Note to Freddie Mac, and did not regain possession when it temporarily took custody of the Note to foreclose, Provident, since October 24, 2007, has never been the holder of the Note. As such, Provident, on this wholly separate ground, was not the "beneficiary" of the DOT when it commenced the foreclosure proceeding. The foreclosure proceeding was invalid, therefore, and the sale of my home was unlawful.

#### **V. SATISFACTION OF THE ELEMENTS OF MY CAUSES OF ACTION**

The trial court never engaged in a detailed analysis of the causes of action enumerated in the complaint. It never ruled on those causes of action, other than to dismiss them because each cause of action was based

on the claim that Provident was not the beneficiary of the DOT or holder of the Note. Because the trial court did not address the substance of the claims, I will not attempt to do so here. Those claims deserve a full hearing. If the Court reverses the trial court ruling, that will happen.

## VI. CONCLUSION

The trial court's summary judgment order should be overturned, enforcement of the foreclosure sale should be permanently enjoined, and this case should be returned to the trial court for trial of my causes of action.

DATED this 30<sup>th</sup> day of June, 2013.

By: Melanie S. Keller

A handwritten signature in cursive script that reads "Melanie S. Keller". The signature is written in black ink and is positioned above the printed name and address.

Melanie S. Keller, Appellant Pro se  
30476 – 154<sup>th</sup> Pl. SE  
Kent, WA 98042  
(253) 221-0190

**APPENDIX 1**  
**Cited Provisions of RCW Chapter 61.24**

## CITED RCW CHAPTER 61.24 PROVISIONS

1. **RCW 61.23.005(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.
2. **RCW 61.24.005(7)** --- "Grantor" means a person, or its successors, who executes a deed of trust to encumber the person's interest in property as security for the performance of all or part of the borrower's obligations.
3. **RCW 61.24.010(4)** --- The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor.
4. **RCW 61.24.020** --- Except as provided in this chapter, a deed of trust is subject to all laws relating to mortgages on real property. A deed conveying real property to a trustee in trust to secure the performance of an obligation of the grantor or another to the beneficiary may be foreclosed by trustee's sale. The county auditor shall record the deed as a mortgage and shall index the name of the grantor as mortgagor and the names of the trustee and beneficiary as mortgagee. No person, corporation or association may be both trustee and beneficiary under the same deed of trust: PROVIDED, That any agency of the United States government may be both trustee and beneficiary under the same deed of trust. A deed of trust conveying real property that is used principally for agricultural purposes may be foreclosed as a mortgage. Pursuant to \*RCW 62A.9-501(4), when a deed of trust encumbers both real and personal property, the trustee is authorized to sell all or any portion of the grantor's interest in that real and personal property at a trustee's sale.
5. **RCW 61.24.030(7)(a)** --- That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.
6. **RCW 61.24.030(7)(b)** --- Unless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection.
7. **RCW 61.24.030(8)(l)** --- That at least thirty days before notice of sale shall be recorded, transmitted or served, written notice of default shall be transmitted by the beneficiary or trustee to the borrower and grantor at their last known addresses by both first-class and either registered or certified mail, return receipt requested, and the beneficiary or trustee shall cause to be posted

in a conspicuous place on the premises, a copy of the notice, or personally served on the borrower and grantor. This notice shall contain the following information:

(l) In the event the property secured by the deed of trust is residential real property, the name and address of the owner of any promissory notes or other obligations secured by the deed of trust and the name, address, and telephone number of a party acting as a servicer of the obligations secured by the deed of trust;

8. **RCW 61.24.031(1)(a)** --- A trustee, beneficiary, or authorized agent may not issue a notice of default under RCW 61.24.030(8) until: (i) Thirty days after satisfying the due diligence requirements as described in subsection (5) of this section and the borrower has not responded; or (ii) if the borrower responds to the initial contact, ninety days after the initial contact with the borrower was initiated.

9. **RCW 61.24.031(1)(c)** --- (c) The letter required under this subsection, developed by the department pursuant to RCW 61.24.033, at a minimum shall include:

(i) A paragraph printed in no less than twelve-point font and bolded that reads:

"You must respond within thirty days of the date of this letter. **IF YOU DO NOT RESPOND** within thirty days, a notice of default may be issued and you may lose your home in foreclosure.

**IF YOU DO RESPOND** within thirty days of the date of this letter, you will have an additional sixty days to meet with your lender before a notice of default may be issued.

You should contact a housing counselor or attorney as soon as possible. Failure to contact a housing counselor or attorney may result in your losing certain opportunities, such as meeting with your lender or participating in mediation in front of a neutral third party. A housing counselor or attorney can help you work with your lender to avoid foreclosure.

If you filed bankruptcy or have been discharged in bankruptcy, this communication is not intended as an attempt to collect a debt from you personally, but is notice of enforcement of the deed of trust lien against the property. If you wish to avoid foreclosure and keep your property, this notice sets forth your rights and options.";

(ii) The toll-free telephone number from the United States department of housing and urban development to find a department-approved housing counseling agency, the toll-free numbers for the statewide foreclosure hotline recommended by the housing finance commission, and the statewide civil legal aid hotline for assistance and referrals to other housing counselors and attorneys;

(iii) A paragraph stating that a housing counselor may be available at little or no cost to the borrower and that whether or not the borrower contacts a housing counselor or attorney, the borrower has the right to request a meeting with the beneficiary; and

(iv) A paragraph explaining how the borrower may respond to the letter and stating that after responding the borrower will have an opportunity to meet with his or her beneficiary in an attempt to resolve and try to work out an alternative to the foreclosure and that, after ninety days from the date of the letter, a notice of default may be issued, which starts the foreclosure process.

10. **RCW 61.24.040(1)(a)** --- A deed of trust foreclosed under this chapter shall be foreclosed as follows:

(1) At least ninety days before the sale, or if a letter under RCW 61.24.031 is required, at least one hundred twenty days before the sale, the trustee shall:

(a) Record a notice in the form described in (f) of this subsection in the office of the auditor in each county in which the deed of trust is recorded[.]

11. **RCW 61.24.040(2)** --- In addition to providing the borrower and grantor the notice of sale described in subsection (1)(f) of this section, the trustee shall include with the copy of the notice which is mailed to the grantor, a statement to the grantor in substantially the following form:

#### NOTICE OF FORECLOSURE

11. **rcw 61.24.070(2)** --- The trustee shall, at the request of the beneficiary, credit toward the beneficiary's bid all or any part of the monetary obligations secured by the deed of trust. If the beneficiary is the purchaser, any amount bid by the beneficiary in excess of the amount so credited shall be paid to the trustee in the form of cash, certified check, cashier's check, money order, or funds received by verified electronic transfer, or any combination thereof. If the purchaser is not the beneficiary, the entire bid shall be paid to the trustee in the form of cash, certified check, cashier's check, money order, or funds received by verified electronic transfer, or any combination thereof.

12. **RCW 61.24.163(5)(c)** --- Within twenty days of the beneficiary's receipt of the borrower's documents, the beneficiary shall transmit the documents required for mediation to the mediator and the borrower. The required documents include:

(c) Proof that the entity claiming to be the beneficiary is the owner of any promissory note or obligation secured by the deed of trust. Sufficient proof may be a copy of the declaration described in RCW 61.24.030(7)(a)[;]

**APPENDIX 2**  
**Cited Provisions of RCW Chapter 62A.**

## CITED RCW CHAPTER 62A. PROVISIONS

1. **RCW 62A.1-201(21)** --- "Holder" with respect to a negotiable instrument, means:

(A) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;

2. **RCW 62A.1-201(35)** --- "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. "Security interest" includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9A of this title.

3. **RCW 62A.3-201, Official Comment 1** --- Subsections (a) and (b) are based in part on subsection (1) of former Section 3-202. A person can become holder of an instrument when the instrument is issued to that person, or the status of holder can arise as the result of an event that occurs after issuance. "Negotiation" is the term used in Article 3 to describe this post-issuance event. Normally, negotiation occurs as the result of a voluntary transfer of possession of an instrument by a holder to another person who becomes the holder as a result of the transfer. Negotiation always requires a change in possession of the instrument because nobody can be a holder without possessing the instrument, either directly or through an agent. But in some cases the transfer of possession is involuntary and in some cases the person transferring possession is not a holder. In defining "negotiation" former Section 3-202(1) used the word "transfer," an undefined term, and "delivery," defined in Section 1-201(14) to mean voluntary change of possession. Instead, subsections (a) and (b) use the term "transfer of possession" and, subsection (a) states that negotiation can occur by an involuntary transfer of possession. For example, if an instrument is payable to bearer and it is stolen by Thief or is found by Finder, Thief or Finder becomes the holder of the instrument when possession is obtained. In this case there is an involuntary transfer of possession that results in negotiation to Thief or Finder.

4. **RCW 62A.3-203, Official Comment 1** --- 1. Section 3-203 is based on former Section 3-201 which stated that a transferee received such rights as the transferor had. The former section was confusing because some rights of the transferor are not vested in the transferee unless the transfer is a negotiation. For example, a transferee that did not become the holder could not negotiate the instrument, a right that the transferor had. Former Section 3-201 did not define "transfer." Subsection (a) defines transfer by limiting it to cases in which possession of the instrument is delivered for the purpose of giving to the person receiving delivery the right to enforce the instrument.

Although transfer of an instrument might mean in a particular case that title to the instrument passes to the transferee, that result does not follow in all cases. The right to enforce an instrument and ownership of the instrument are two different concepts. A thief who steals a check payable to bearer becomes the holder of the check and a person entitled to enforce it, but does not become the owner of the check. If the thief transfers the check to a purchaser the transferee obtains the right to enforce the check. If the purchaser is not a holder in due course, the owner's claim to the check may be asserted against the purchaser. Ownership rights in instruments may be determined by principles of the law of property, independent of Article 3, which do not depend upon whether the instrument was transferred under Section 3-203. Moreover, a person who has an ownership right in an instrument might not be a person entitled to enforce the instrument. For example, suppose X is the owner and holder of an instrument payable to X. X sells the instrument to Y but is unable to deliver immediate possession to Y. Instead, X signs a document conveying all of X's right, title, and interest in the instrument to Y. Although the document may be effective to give Y a claim to ownership of the instrument, Y is not a person entitled to enforce the instrument until Y obtains possession of the instrument. No transfer of the instrument occurs under Section 3-203(a) until it is delivered to Y.

An instrument is a reified right to payment. The right is represented by the instrument itself. The right to payment is transferred by delivery of possession of the instrument "by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." The quoted phrase excludes issue of an instrument, defined in Section 3-105, and cases in which a delivery of possession is for some purpose other than transfer of the right to enforce. For example, if a check is presented for payment by delivering the check to the drawee, no transfer of the check to the drawee occurs because there is no intent to give the drawee the right to enforce the check.

5. **RCW 62A.3-301** --- "Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

6. **RCW 62A.9A.-102(7)** --- (7) "Authenticate" means:

(A) To sign; or

(B) To execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with the present intent of the authenticating person to identify the person and adopt or accept a record.

7. **RCW 62A.9A.-102(12)** --- "Collateral" means the property subject to a security interest or agricultural lien. The term includes:

(A) Proceeds to which a security interest attaches;

(B) Accounts, chattel paper, payment intangibles, and promissory notes that have been sold; and

(C) Goods that are the subject of a consignment.

8. **RCW 62A.9A.-102(44)** --- "Goods" means all things that are movable when a security interest attaches. The term includes (i) fixtures, (ii) standing timber that is to be cut and removed under a conveyance or contract for sale, (iii) the unborn young of animals, (iv) crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes, and (v) manufactured homes. The term also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if (i) the program is associated with the goods in such a manner that it customarily is considered part of the goods, or (ii) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. The term does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded. The term also does not include accounts, chattel paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments, investment property, letter-of-credit rights, letters of credit, money, or oil, gas, or other minerals before extraction or a manufactured home converted to real property under chapter 65.20 RCW.

9. **RCW 62A.9A.-102(47)** --- "Instrument" means a negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment. The term does not include (i) investment property, (ii) letters of credit, (iii) writings that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card, (iv) writings that do not contain a promise or order to pay, or (v) writings that are expressly nontransferable or nonassignable.

10. **RCW 62A.9A.-102(69)** --- "Record," except as used in "for record," "of record," "record or legal title," and "record owner," means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.

11. **RCW 62A.9A.-102(72)** --- (72) "Secured party" means:

(A) A person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding;

(B) A person that holds an agricultural lien;

(C) A consignor;

(D) A person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold;

(E) A trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for; or

(F) A person that holds a security interest arising under RCW 62A.2-401, 62A.2-505, 62A.2-711(3), 62A.2A-508(5), 62A.4-210, or 62A.5-118.

12. **RCW 62A.9A.-109(a)(3)** --- General scope of Article. Except as otherwise provided in subsections (c) and (d) of this section, this Article applies to:

....

(3) A sale of accounts, chattel paper, payment intangibles, or promissory notes[.]

13. **RCW 62A.9A.-313(a)** --- Perfection by possession or delivery. Except as otherwise provided in subsection (b) of this section, a secured party may perfect a security interest in tangible negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral. A secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under RCW62A.8-301.

14. **RCW 62A.9A.-313(c)** --- Collateral in possession of person other than debtor. With respect to collateral other than certificated securities and goods covered by a document, a secured party takes possession of collateral in the possession of a person other than the debtor, the secured party, or a lessee of the collateral from the debtor in the ordinary course of the debtor's business, when:

(1) The person in possession authenticates a record acknowledging that it holds possession of the collateral for the secured party's benefit; or

(2) The person takes possession of the collateral after having authenticated a record acknowledging that it will hold possession of collateral for the secured party's benefit.

**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 1st day of July, 2013, I delivered an original Brief of Appellant and Certificate of Service for filing in the Court of Appeals, Division I, and true and correct copies of the same by email to each of the following parties through their counsel of record:

Attorneys for Respondents, Provident Funding Associates, L.P., MERS, Regional Trustee Services Corporation, Robinson Tait, P.S., Nicolas Daluiso and Joseph Tami:

Nicolas Daluiso  
Robinson Tait, P.S.  
710 Second Ave., Suite 710  
Seattle, WA 98104

COURT OF APPEALS  
DIVISION ONE

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DATED this 1st day of July, 2013, at Kent, Washington.

MELANIE S. KELLER



Melanie S. Keller, Appellant Pro se  
30476 – 154th Pl. SE  
Kent, WA 98042  
(253) 221-0190

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STATE OF WASHINGTON