

No. 74210-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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MICHAEL J. BEVERICK and CINDY M. BEVERICK, husband & wife,

Appellants/Plaintiffs

vs.

LANDMARK BUILDING AND DEVELOPMENT INC.; WMC
MORTGAGE CORP.; AURORA BANK FSB; U.S. BANK, NATIONAL
ASSOCIATION AS TRUSTEE FOR STRUCTURED ASSET
CORPORATION MORTGAGE PASS CERTIFICATES, SERIES 2007-
GEL1 60 ACCOUNT NO. 0122944200; BISHOP AND LYNCH OF
KING CO.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,
INC.; and NATIONSTAR MORTGAGE LLC,

Respondents/Defendants

RESPONDENTS AURORA BANK, FSB; U.S. BANK, NATIONAL
ASSOCIATION AS TRUSTEE FOR STRUCTURED ASSET
SECURITIES CORPORATION MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2007-GEL1; BISHOP AND LYNCH OF
KING CO.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,
INC.; and NATIONSTAR MORTGAGE LLC's ANSWERING BRIEF

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I. INTRODUCTION

Appellants Michael and Cindy Beverick obtained a mortgage loan from WMC Mortgage, and failed to make payments thereon from October 2011, and thereafter. The ownership and holder status of the Promissory Note was explained and provided to the Bevericks. The original Promissory Note signed by the Bevericks was produced to the trial court at two summary judgment hearings, and was further provided to the Bevericks for inspection. The Bevericks admitted to its authenticity, WMC Mortgage agreed that it indorsed the promissory note in blank, and Nationstar and Aurora testified to holding the Note at the relevant times. No other party claimed to hold the Note, no other party asked for payments from the Bevericks, and the Bevericks provided no evidence rebutting that Aurora and Nationstar held the Note. Nor do they contest they failed to make payments on their mortgage loan.

The Bevericks consented to dismissal of all claims against MERS, Bishop and Lynch, and U.S. Bank, as the Bevericks conceded they failed to state a cognizable cause of action against these three parties. The trial court thus did not err when it dismissed those claims based upon the Bevericks' concession and acknowledgement.

Additionally, the Bevericks' attempt to appeal the judgment and decree of foreclosure entered May 21, 2015, fails *ab initio* because they failed to appeal that final judgment within 30 days as required by RAP 5.2(a). The Bevericks did not file their notice of appeal until November 9, 2015.

II. STATEMENT OF CASE

A. Factual Background

On or about May 1, 2006, Michael and Cindy Beverick obtained a loan from WMC Mortgage Corp. (“WMC”) in the principal amount of \$409,600.00, as evidenced by the Adjustable Rate Note (“Note.”) See CP 188-200 (“Complaint”) at ¶¶ 3.4. CP 57-62. The Note was secured by a Deed of Trust recorded May 5, 2006, under Skagit County Auditor No. 200605050111 (“Deed of Trust #1”), encumbering real property commonly known as 22814 Mud Lake Road, Mount Vernon, Washington 98273, and as more fully described in the Deed of Trust (hereafter “the Property”). CP 64-86.

Among other times, on September 13, 2011, Aurora advised the Bevericks that it serviced the loan, and that US Bank National Assoc. as Trustee for Structured Asset Securities Corp. Mortgage Pass-Through Certificates, Securities 2007-GEL1, owned the loan (hereinafter referred to as “US Bank”). CP 808-809. Upon the Bevericks’ inquiry, Aurora Bank provided them an address for US Bank in St. Paul, MN, as well as its own address, phone number and website. *Id.* On September 20, 2011, Aurora’s counsel further responded and pointed out that the Bevericks’ requests did not relate to why the account was in error, and further requested documents, all of which was outside the scope of what Aurora was required to provide them. CP 810-813. The Bevericks next contacted US Bank. CP 816-817. US Bank also responded just as Aurora did, and

advised Mr. Beverick that it owned the loan, that it did not have any information pertaining to the loan, and that the loan servicer, Aurora Bank, maintained all loan information. CP 818-819.

Aurora Bank possessed the Note, indorsed in blank by WMC, from December 23, 2011, to June 22, 2012. CP 678-690, at ¶8, Ex B.

The Bevericks failed to make a payment on the loan to any party since October 2011. CP 53-54, and 90. The unpaid principal balance was \$401,323.83. *Id.* Interest accrued from September 1, 2011, to March 17, 2015, in the amount of \$119,040.13, and continued to accrue in accordance with the terms of the Note and Deed of Trust thereafter. *Id.*

In March 2012, a Notice of Default was issued on behalf of Aurora Bank. CP 825-832. A Notice of Trustee's Sale was never issued.

In a letter dated May 14, 2012, Aurora again advised the Bevericks' lawyer that Aurora was servicing the loan. CP 833-840. It stated that US Bank owned the loan, and provided US Bank's address. *Id.* It also provided a copy of the Note. *Id.* It did not certify it was a true and correct copy of the Note, rather the copy it produced bore a stamp on the first page by First American Title Insurance Company that it was a true and correct copy. *Id.*

The loan servicing transferred to Nationstar Mortgage on July 1, 2012. CP 691-703 (at ¶8 of CP 694).

On or about August 27, 2012, Michael and Cindy Beverick filed their lawsuit. CP 188-200. The Bevericks asserted claims to quiet title,

cancel the debt, and alleged violation of the consumer protection act because the original promissory Note did not exist. *Id.*

Nationstar thereafter produced the Note to the trial court and the parties, and further testified that it held the note and was the beneficiary of the Deed of Trust. CP 564-596, at ¶ 2, Ex. 6. The trial court entered a decree of foreclosure. CP 1287-1294.

B. Motions for Summary Judgment

On or about August 20, 2013, Aurora, Nationstar, MERS, US Bank, and Bishop & Lynch, moved for summary judgment on all claims. CP 1107-1121. The Bevericks opposed the motion, but other than objecting to the declarations submitted in support of the motion, made none of the assertions that are now asserted by new counsel on appeal. CP 1380-1401. After oral argument on September 23, 2013, the trial court took the matter under advisement, and thereafter entered a general order denying the defendants' motion for summary judgment. CP 1275-1277.

On October 9, 2013, the moving defendants moved for partial reconsideration and/or clarification pursuant to CR 56(d) of the trial court's order denying their motion for summary judgment. CP 1081-1090. In response, the Bevericks conceded they had no valid claims against MERS, Bishop & Lynch, or US Bank. CP 1462-1468.

Thereafter, on or about November 14, 2013, the trial court entered an Order Granting Motion for Partial Reconsideration and CR 56(d)

Clarification. CP 1282-1286. The trial court appropriately dismissed all claims against MERS, Bishop & Lynch, and US Bank as Trustee. *Id.*

The trial court also determined, pursuant to CR 56(d), that the Bevericks executed the Note and Deed of Trust. *Id.* As such, only the following four issues remained in controversy:

- a. The authenticity of the indorsement on the Promissory Note.
- b. Who is the proper holder of the Promissory Note.
- c. Is the Deed of Trust authentic?
- d. Who has authority to enforce?

Id.

Nationstar completed discovery relating to these remaining issues. Specifically, Nationstar sent Plaintiffs requests for admission on December 3, 2013, asking that the Bevericks admit their original signatures were on the Note produced in court on September 30, 2013, as well as produced for their inspection at Nationstar's counsel's office. See CP 397-488 (RFA Nos. 3 and 4). Additionally, the Bevericks were asked to admit that the blank indorsement executed by WMC Mortgage Corp. on the Note was authentic. *Id.* (RFA No. 13). They were further asked to admit that they signed the Deed of Trust, and that the copy attached to the Requests for Admission was true and correct. *Id.* (RFA Nos. 7 and 8). Requests for admission were also issued to co-defendant WMC, asking it to admit that its assistant secretary indorsed the Note, which WMC admitted. *Id.*

The Bevericks did not deny the requests for admission within the thirty days required by CR 36. *Id.* While they attempted to obtain an extension to answer them in January 2015, no extension was ever obtained, and more than a year elapsed since issuance. *Id.* The Bevericks assigned no error relating to their attempt to obtain an extension in the trial court to respond to the requests for admission. Thus, the requests for admission were admitted pursuant to CR 36(a), and the same is not challenged, or even mentioned, on appeal. Despite these admissions, the Bevericks still attempted to take issue with the original Note produced, based upon Mr. Beverick's recollection from 2006 of the ink hue and paper weight of the Note, but they took no issue with the actual content or that they executed it, testifying that it "appears to be a copy printed on a color printer." CP 794-795. Despite over a year and a half in between Mr. Beverick's review of the original Note and Nationstar's motion for summary judgment, the Bevericks made no effort to have the Note reviewed by a document examiner or other potential expert that might refute the presumed authenticity thereof under RCW 62A.3-308 and ER 902(i) (discussed below).

Through Nationstar's discovery efforts, two of the material issues of fact identified by the trial court in its order on reconsideration were resolved, namely: (a) The authenticity of the indorsement on the Promissory Note, and (c) is the Deed of Trust authentic. See CP 204-317 (at ¶¶ 5-7, and Exs. 3, 4, and 5). Thus, the only two factual issues

remaining for trial were: (b) who is the proper holder of the Promissory Note; and (d) who has authority to enforce. These issues were addressed and resolved in Nationstar's second summary judgment motion, which relied upon an affidavit by A.J. Loll, among other things, who testified that Nationstar held and possessed the Note. CP 50-116.

Nationstar moved to amend its answer so that it could assert a counterclaim and third party complaint for judicial foreclosure, and leave to amend was granted. CP 973-979; CP 1280-1281. The amended answer and counterclaim and third party complaint was then filed on or about August 8, 2014. CP 119-170. The Third Party Plaintiff was Nationstar Mortgage, LLC. The Third Party Complaint identified, in the body of the Complaint, the owner of the Note, US Bank, and perpetuated two typographical errors in the entity name made by the Bevericks in their own original complaint. *Id.* US Bank was not the Third Party Plaintiff, and the typographical error identified in the Beverick's opening appeal brief was never raised in the trial court in any respect.

Once discovery with Martin Investments was completed, Nationstar moved for summary judgment on its judicial foreclosure claim against all parties. CP 1091-1106. Martin Investments filed its own motion for partial summary judgment on the issue of lien priority (CP 5-15), and thereafter stipulated to priority of Nationstar's Deed of Trust. CP 1543-1545.

The Bevericks filed a response to Nationstar's Motion arguing that there were issues of fact with regard to the authenticity of the Note, but failed to provide any specific evidence, other than speculation and self-serving assertions, to challenge the authenticity of the Note. CP 1341-1358. In any event, through the Requests for Admission, the authenticity of the Note was admitted. CP 397-488. The trial court properly granted Nationstar's motion for summary judgment and entered an order and decree of foreclosure. CP 1287-1294. In doing so, the trial court resolved the remaining four issues of fact it previously identified under CR 56(d) discussed above. CP 1282-1286. The trial court also found there to be no just reason for delay of the entry of judgment, and directed that judgment be entered in favor of Nationstar as particularly provided therein. CP 1287-1294. Despite this judgment being entered on May 21, 2015, the Bevericks did not file their notice of appeal until November 9, 2015. CP 1189-1209.

The Bevericks make several new arguments on appeal regarding the Deed of Trust Act. Many of the provisions on which they rely are only applicable to owner occupied property. The Property was not owner occupied, as it was occupied by renters John and Brenda Lund. CP 1584-85.

III. STATEMENT OF ISSUES

1. The Bevericks' Notice of Appeal was untimely with regard to the judgment and decree of foreclosure.
2. The trial court did not err when it entered the agreed dismissal of claims against MERS, Bishop & Lynch, and US Bank as Trustee.

3. The trial court did not err in considering the declarations of Loll, McCann and Hughes.
4. The Bevericks' claims relating to the Notice of Default were not raised in the trial court, the Notice of Default complied with RCW 61.24.030 in all respects, and the provisions of the statute do not apply because the Property was not owner occupied.
5. Nationstar held the Note and had standing to foreclose.
6. The trial court did not err when it dismissed the Bevericks' claim(s) for violation of the Consumer Protection Act as there was no unfair or deceptive act or practice that caused the Bevericks injury.

IV. ARGUMENT

STANDARDS FOR REVIEW

1. Timeliness of Appeal

“[A] notice of appeal must be filed in the trial court within ... 30 days after the entry of the decision of the trial court which the party filing notice wants reviewed[.]” RAP 5.2(a). This “[C]ourt has the authority to determine whether a matter is properly before it[.]” RAP 7.3.

When an appellant fails to timely perfect an appeal, the disposition of the case is governed by RAP 18.8(b). *State v. Ashbaugh*, 90 Wn.2d 432, 438, 583 P.2d 1206 (1978). That rule states:

The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section.

RAP 18.8(b).

Schaefco, Inc. v. Columbia River Gorge Comm'n, 121 Wn.2d 366, 368 (1993).

2. Review of Summary Judgment

The Court of Appeals reviews an order for summary judgment de novo, engaging in the same inquiry as the trial court. *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 271, 285 P.3d 854 (2012). Additionally, RAP 2.5(a) provides that an appellate court may refuse to review any claim of error which was not raised in the trial court. Appellate courts will generally not consider issues raised for the first time on appeal, following the reasoning of *Smith v. Shannon*, that a party must inform the trial court of the rules of law that it wishes the court to apply and offer the trial court an opportunity to correct any error, rather than allowing a party to hold back and seek a new trial if his first attempted arguments are unsuccessful. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983); *State v. Weber*, 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006); *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). The Bevericks have attempted to raise multiple new issues never raised in the trial court under the guise of de novo review, and no such new arguments should be allowed. *Id.*

Summary judgment is appropriate where the “pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and the moving party is entitled to summary judgment as a matter of law.” Civil Rule (CR) 56(c). A material fact is one on which the outcome of the litigation depends. *Swinehart v. City of Spokane*, 145 Wn. App. 836, 844, 187 P.3d 345 (2008).

Once a moving party meets its burden to show that there is no genuine issue as to any material fact, the nonmoving party must set forth specific facts rebutting the moving party's contention and disclosing that a genuine issue of material fact exists. *Strong v. Terrell*, 147 Wn. App. 376, 384, 195 P.3d 977 (2008). If the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial," then summary judgment should be granted. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1982).

Mere allegations, argumentative assertions, conclusory statements, and speculation do not raise issues of material fact to preclude summary judgment. *Grimm v. Univ. of Puget Sound*, 110 Wn.2d 355, 360, 753 P.2d 517 (1988). The party seeking to avoid summary judgment must affirmatively present the admissible factual evidence upon which he relies; he cannot rely upon the bare allegations of his pleadings. *Meyer v. University of Washington*, 105 Wn.2d 847, 852 (1986).

ISSUES ADDRESSED

1. THE BEVERICKS' NOTICE OF APPEAL WAS UNTIMELY WITH REGARD TO THE JUDGMENT AND DECREE OF FORECLOSURE.

a. The Decree of Foreclosure Is a Final Judgment

RAP 2.2(a) does not explicitly list a decree of foreclosure as an appealable order. However, the Rules of Appellate Procedure "make no effort to define a final judgment." Karl Tegland, 2A Washington Practice

82 (2004). “At common law, a final judgment was one that disposed of all of the issues as to all of the parties.” *Id.* (citing *Collins v. Miller*, 252 U.S. 364, 40 S. Ct. 347, 64 L.Ed. 616 (1920); Carlton M. Crick, THE FINAL JUDGMENT AS A BASIS FOR APPEAL, 41 Yale L.J. 539 (1932).

Although legal proceedings between the Bevericks and WMC Mortgage continued following entry of the Judgment and Decree of Foreclosure, entry of that judgment and decree settled all claims as to all other parties. The Bevericks’ claim against WMC was only for monetary damages and could not have had any effect on the Property or the Judgment and Decree of Foreclosure already entered. The Judgment and Decree expressly provided that “no just reason exists for delay in the entry of judgment in favor of Nationstar as prayed for in its Amended Answer to Complaint, Counterclaim and Third Party Complaint, and that it is hereby expressly directed that judgment be entered in favor of Nationstar...” CP 1287-1294.

Under Washington law, function trumps form in determining whether a judgment is final for purposes of triggering the running of the 30 day appeal period under RAP 5.2(a).

In determining the nature of the court's determination, substance controls over form. *State ex rel. Lynch v. Pettijohn*, 34 Wn.2d 437, 209 P.2d 320 (1949). Hence, for this purpose the court looks not to the title of the instrument but to its content. Accordingly, the court may find that an instrument entitled as a judgment is in fact an order or final order; and an instrument entitled as an order may in fact be a final judgment.

Nestegard v. Inv. Exch. Corp., 5 Wn. App. 618, 623 (1971).

Treating a judgment and decree of foreclosure as a final judgment subject to immediate appeal is also consistent with long standing Washington law. The Washington Supreme Court has long recognized:

[A] money judgment contained in a decree of foreclosure is a final judgment which may be enforced by a single execution, first by a sale of the mortgaged property, and second by a levy upon and sale of other property of the judgment debtor for the deficiency 'under the same execution.' Our statute furnishes no warrant for the entry of two judgments.

Codd v. Von Der Ahe, 92 Wash. 529, 533 (1916).

Likewise, Washington's statutory scheme for foreclosures treats a decree of foreclosure as a final judgment: "In rendering judgment of foreclosure, the court shall order the mortgaged premises, or so much thereof as may be necessary, to be sold to satisfy the mortgage and costs of the action..." RCW 61.12.060. Accordingly, by ordering that the mortgaged premises be sold, the decree operates as a final judgment in the trial court as any subsequent legal proceeding in the trial court could only be a question of enforcement. The Judgment and Decree of Foreclosure should therefore be considered a final judgment under RAP 2.2(a)(1) subject to the 30 day appeal requirement of RAP 5.2(a).

b. Other Jurisdictions Correctly Conclude that a Decree of Foreclosure is a Final Judgment that Must be Appealed Within the Time Period Required for Perfecting an Appeal from Final Judgment.

While Washington courts have not explicitly held that a decree of foreclosure is a final judgment that must be appealed within 30 days, other

states that have addressed the issue have required foreclosure appeals to be filed within their proscribed time limits. *See e.g. Security Pacific Mortgage Corp. v. Miller*, 71 Haw. 65, 783 P.2d 855, 857 (1989) (holding that a decree of foreclosure is a final judgment even when additional legal proceedings at trial court remain unresolved); *Watanabe v. Webb*, 320 Ark 375, 896 S.W.2d 597, 598-99 (1995) (decree of foreclosure is a final judgment that must be appealed within the statutory time limit even when “the foreclosure decree was not final because it failed to set a day and place for the sale”); *Fed. Sav. & Loan Ins. Corp. v. Hamilton*, 241 Mont. 367, 786 P.2d 1190, 1192 (order granting deficiency judgment held to be a final order that could only be appealed within the statutory time period, even where the amount of the deficiency judgment was not determined at the time).

Perhaps the most persuasive discussion of the issue as it applies to the situation here was the Hawaii Supreme Court’s discussion in *Beneficial Haw., Inc. v. Casey* in 2002:

A litigant who wishes to challenge a decree of foreclosure and order of sale may --and, indeed, must -- do so within the thirty day period following entry of the decree or will lose the right to appeal that portion of the foreclosure proceeding. The rationale for permitting (and requiring) an appeal of a foreclosure decree and its accompanying orders, even though there may be additional proceedings remaining in the circuit court, is that a foreclosure decree falls within that small class of orders "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Beneficial Haw., Inc. v. Casey, 98 Haw. 159, 165, 45 P.3d 359 (2002)

This reasoning also resonates here as the nature of the judgment and decree of foreclosure was fully independent of any claims remaining in the case, and the import of the decree was such that appeal thereof should not be deferred until such time as the Bevericks got around to completing their litigation over alleged monetary damages against WMC. Foreclosure, by its very nature, directly affects rights in real property by a process that must be as swift and as certain as is practicable. By requiring an appeal to be filed within 30 days of the entry of a decree of foreclosure, debtors are provided with prompt access to the appellate courts, while at the same time promoting the stability of land titles that might otherwise be clouded by potentially prolonged rights to appeal.

This Court should therefore conclude that Plaintiff's appeal of the trial Court's Judgment and Decree of Foreclosure (CP 1287-1294) was a final judgment that was required to have been appealed within 30 days as provided by RAP 5.2(a). Additionally, no circumstance exists here that should entice the Court into providing an extension to the Bevericks under RAP 18.8, as no extraordinary circumstances exist, and application of the rules would not create a gross miscarriage of justice.

2. THE TRIAL COURT DID NOT ERR WHEN IT ENTERED THE AGREED DISMISSAL OF CLAIMS AGAINST MERS, BISHOP & LYNCH, AND US BANK AS TRUSTEE.

MERS, Aurora, Bishop & Lynch, Nationstar, and US Bank all moved for summary judgment and dismissal of all claims in the trial court,

and the court initially summarily denied the parties' motions. CP 1275-1277. Upon reconsideration, the moving parties pointed out that the claims against MERS, Bishop & Lynch, and US Bank, did not relate to the authenticity of the indorsement on the Note, and therefore the claims against at least those parties should be dismissed. CP 1081-1090. The Bevericks agreed. In response to the Motion for Reconsideration, the Bevericks stated that the facts alleged in their complaint did not support a cause of action against MERS, Bishop & Lynch, or US Bank. CP 1462-1468. The trial court appropriately dismissed those claims based upon the Bevericks' concession. Accordingly, the trial court did not err and indeed no error was preserved in the trial court as to the dismissal of these claims against these three parties, and this Court should affirm their dismissal.

The Bevericks vaguely and generally assert in their Assignments of Error there were issues of fact concerning the "Respondents." Opening Brief, pp. 2 - 3. The Bevericks specifically take issue with the dismissal against certain parties, asserting that there were material issues of disputed fact, and that the trial court dismissed the claims against MERS, Bishop & Lynch, and US Bank without "proper basis in law or fact." They argue the dismissal should be reversed. Bevericks' Opening Brief, p. 25.¹

¹ The Bevericks actually assert that the trial court should not have dismissed the claims against *Aurora Bank*, Bishop and Lynch of King County and MERS, omitting US Bank as Trustee. Opening Brief p. 25. It is unclear, then, whether they even assign error on appeal to the dismissal of claims against US Bank as Trustee. But what is clear is they consented to dismissal of all claims against US Bank as Trustee, MERS, and Bishop & Lynch, in the trial court, and this Court should affirm the agreed dismissal of those claims due to the failure to preserve any error in the trial court.

RAP 2.5(a) provides in part, “The appellate court may refuse to review any claim of error which was not raised in the trial court.” See also, *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008). The rule reflects a policy of encouraging the efficient use of judicial resources and refusing to sanction a party's failure to point out an error that the trial court, if given the opportunity, might have been able to correct to avoid an appeal. *In re Guardianship of Cornelius*, 181 Wn. App. 513, 533, 326 P.3d 718 (2014) (citing *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988); *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983)). The rule also protects against the “great potential for abuse when a party does not raise an issue below because a party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.” *State v. Stoddard*, 192 Wn. App. 222, 227, 366 P.3d 474 (2016).

Here, the trial court entered the dismissal based upon the Bevericks’ own concession and agreement that their complaint did not state a legally cognizable cause of action against these three parties. When faced with an agreement and concession by counsel such as this, a trial court may so enter the dismissal order, commits no error in so doing, and the trial court’s dismissal here should be affirmed.

3. THE TRIAL COURT DID NOT ERR IN CONSIDERING THE DECLARATIONS OF LOLL, MCCANN AND HUGHES.

Business records are admissible in evidence under RCW 5.45.020 under certain conditions, provides that such records are admissible “. . . if,

in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.” The trial court’s ruling in admitting or excluding such records under the uniform business records as evidence act is given much weight and will not be reversed unless there has been a manifest abuse of discretion. *Cantrill v. American Mail Line, Ltd.*, 42 Wn.2d 590, 608, 257 P.2d 179 (1953); and *De Young v. Campbell*, 51 Wn.2d 11, 17-18, 315 P.2d 629 (1957). The trial court in this case considered two declarations which included foundation to establish the admission of business records, the McCann and Loll declarations. Whether under *de novo* review or an abuse of discretion standard, the trial court did not err in considering the declarations.

The Bevericks raised very few objections to the declarations in the trial court. Regarding the Loll declaration, they argued that Loll had no personal knowledge of the authenticity of the note *because Loll did not or could not testify as to the Note’s whereabouts from 2006-2011*. CP 1341-1358 at p. 9. Further, the Bevericks argued that the Loll declaration did not establish that Nationstar held the Note. *Id.*, p. 12. Loll directly testified, however, that Nationstar was the “true and legal holder and possessor of the Note through possession by its counsel of record in this action.” CP 50-116 (at CP 53, ¶6). Other than speculation and self-serving argument, the Bevericks provided no evidence to refute this testimony.

The following objections, contained on pp. 12-13 in the Bevericks' Opening Brief, are raised for the first time on appeal: Loll did not personally inspect the original Note and Deed of Trust; Loll did not provide dates of employment; Loll has no knowledge where the business records came from, who prepared them, how they were maintained before being transferred to Nationstar; when they were submitted to Nationstar and by whom; whether the records reviewed had been modified or tampered with either prior to or after transfer to Nationstar; and Loll did not share "computer generated information" with the court. Notwithstanding that none of these new arguments have merit, with none of these issues raised in the trial court, the trial court did not err in considering the Loll declaration.

Regarding the McCann declaration, the Bevericks actually relied on it in the trial court, citing it in support of their argument that neither Aurora nor Nationstar held the Note. CP 1380-1400 (at p.12, CP 1391). They also generally stated that McCann did not have personal knowledge. *Id.* at CP 1392-1394. The Bevericks further stated that the documents *appeared to be business records*, but that McCann was without personal knowledge as to who entered the information. CP 1341-1358 (at p. 11, CP 1351). They also argued that McCann should not have relied upon the DokTrak computer record, because it did not reference the Note, but instead referenced the collateral file. CP 1393. This argument, however, was nothing more than semantics as the original Note is contained within

the collateral file and Ms. McCann's testimony specifically provided that the DokTrak record reflected the physical location of the Note. CP 694.

The following objections to the McCann declaration in the Bevericks' Opening Brief on pages 14 through 16 were raised for the first time on appeal: did not provide dates of employment; did not allege she inspected the original Note and Deed of Trust; did not inspect the contents of the collateral file; parroting information seen on a computer screen; information was actually from third party sources WMC, Wells Fargo, and DokTrack² and that such third party records must be separately authenticated. Again, notwithstanding these arguments lack merit, with none of them raised in the trial court, the trial court did not err in considering the McCann declaration.

A declaration in support of summary judgment must be made on personal knowledge, set forth admissible evidentiary facts, and affirmatively show that the declarant is competent to testify to the matters stated therein. CR 56(e), *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 127, 141, 331 P.3d 40 (2014); *McKee v. Am. Home Prods., Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989). Declarations that are made based upon a review of business records satisfy the personal knowledge requirement of CR 56(e) so long as the declaration satisfies the business records statute RCW 5.45.020. *Discovery Bank v. Bridges*, 154 Wn. App. 722, 726, 226 P.3d 191 (2010).

² DokTrack is not a "third party." It was Aurora's document tracking system that records the location of Aurora's documents. CP 694.

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020.

The Bevericks summarily argue that the declarations of McCann and Loll do not meet the requirements of CR 56(e) or RCW 5.45.020. However, both McCann's declaration and Loll's declaration provide the foundation required by RCW 5.45.020 to support the business records provided therein. See CP 691-703 and CP 50-116. Further, the Bevericks fail to provide any basis to question the validity or reliability of the records provided by Ms. McCann or Mr. Loll.

McCann's declaration attaches a copy of the Note, and a copy of Aurora Bank and Aurora Commercial's document tracking records showing the location of the original Note during the time periods referenced therein. CP 691-703. The Bevericks attempt to argue that these records are not reliable, but notably at no point during this litigation, or between the first and second summary judgment hearings (over a year and a half apart), did the Bevericks pursue discovery or challenge these assertions. The McCann declaration was properly accepted and considered by the trial court under RCW 5.45.020.

The Loll declaration provides the basis and foundation for Loll being a custodian and reviewing business records, states that Nationstar

held the Note, attaches a copy of the Note, Deed of Trust (publicly recorded), Assignment of Deed of Trust (publicly recorded), a Payoff Statement, and a Power of Attorney (publicly recorded). CP 50-116. The Bevericks did not attack the reliability of any of these documents, but instead argued generally that Loll did not have personal knowledge of these documents. Again, the Bevericks failed to put forth any sufficient basis to challenge the reliability of the business records provided by Loll and as such, the trial court properly considered them under RCW 5.45.020.

With regard to Mr. Hughes' declaration, the Bevericks challenge Mr. Hughes' testimony only to the extent that it describes the location of the original Note prior to production by counsel. This testimony, however, was not germane to the Court's determination on summary judgment—Loll testified that Nationstar held the Note "through possession by its counsel of record in this action." CP 50-116 (at CP 53, ¶6). And by having the original Note in hand at both summary judgment hearings, Mr. Hughes' testimony regarding Nationstar's possession of the Note was confirmed. The trial court did not err when it considered Mr. Hughes' declaration.

4. THE BEVERICKS' CLAIMS RELATING TO THE NOTICE OF DEFAULT WERE NOT RAISED IN THE TRIAL COURT, THE NOTICE OF DEFAULT COMPLIED WITH RCW 61.24.030 IN ALL RESPECTS, AND THE SPECIFIC STATUTORY PROVISIONS DO NOT APPLY BECAUSE THE PROPERTY WAS NOT OWNER OCCUPIED.

The Bevericks made no argument in the trial court regarding violations of the Deeds of Trust Act (the "DTA"). Rather, the Bevericks' CPA claim was based upon the claim that neither Aurora nor Nationstar was entitled to collect on the Note. See Plaintiff's Oppositions to Summary Judgment Motions: CP 1380-1400 (specifically 1399-1400 addressing the CPA claim) and CP 1341-1358 (no DTA argument made). Given that these DTA violations were never raised, neither the parties nor the trial court could have addressed them, and the trial court did not err in granting summary judgment.

These claims, nonetheless, fail for multiple reasons.

1. RCW 61.24.031

RCW 61.24.031(1)(b) provides that the beneficiary or authorized agent shall make contact with the borrower by letter to provide the borrower information under (c) of that subsection and by telephone under subsection (5) of that section. Mr. Beverick himself filed Aurora Bank's declaration that stated the beneficiary or beneficiary's agent had exercised due diligence to contact the borrower as required in RCW 61.24.031(5), and he made no allegation that the same was not true. CP 831.

Further, RCW 61.24.031(7)(a) provides that the section applies only to deeds of trust that are recorded against owner-occupied residential

real property. The Property was occupied by renters John and Brenda Lund. *See* CP 1584-85.

2. RCW 61.24.030(8)(c)

At least thirty days before a Notice of Sale is recorded, transmitted or served, a written Notice of Default shall be transmitted and shall contain, among other things, a statement that the beneficiary has declared the borrower or grantor to be in default, and a concise statement of the alleged default. Here, the Notice of Default stated: “You are hereby notified that the beneficiary has declared a default of the obligation secured by the deed of trust...” CP 825-832. On page 4, there is an itemization and list of the defaults, primarily including failure to make monthly payments since October 1, 2011, forward. CP 828. The Bevericks argue that the Notice of Default does not identify the beneficiary, and that it was difficult to identify the holder. Opening brief, p. 21. The Notice of Default, however, complied with RCW 61.24.030, identifying the owner of the note, and the servicer, as required by the statute. CP 825-832. Further, no trustee sale was ever scheduled, and RCW 61.24.030 sets forth those requirements to occur prior to issuance of a notice of sale. Accordingly, there was no violation of RCW 61.24.030(8)(c). The Bevericks argue that there was “conflicting evidence” of who held the note in March of 2012, and that none of the parties would have had the right to enforce the Note or declare a default *if* the original was in the hands of another. Aurora testified that it possessed

the Note in March 2012. The Bevericks did not establish otherwise, but only now argue that Aurora's statement was hearsay based upon a third party vendor, DokTrack. DokTrack, however, was not a "third party," as Ms. McCann explained that it is a document system used by Aurora. CP 694. The Bevericks have simply manufactured this "third party" fact on appeal. There was no conflicting evidence as to who held the Note in March 2012. Theirs is a speculative argument based upon no evidence, and as such, even if it had been argued in the trial court, would have failed to rebut the applicable presumptions on summary judgment.

3. RCW 61.24.030(8)(k)

The Bevericks' argument with regard to this statute fails for three separate reasons. First, by its own terms, it only applies to owner occupied real property: "(k) In the event the property secured by the deed of trust is owner-occupied residential real property, a statement, prominently set out at the beginning of the notice, which shall state as follows..." Second, the Notice of Default contained the notices required by the current statute in effect at the time.³ Third, RCW 61.24.030(8) provides what notices must be given *prior to* recording, transmitting or service of a Notice of Sale. Here, no Notice of Sale ever issued. Thus,

³ The notice required RCW 61.24.030(8)(k) was substantially rewritten and the required language changed substantially effective June 7, 2012 by House Bill 2614. See Appendix A hereto. The Notice of Default at issue here was dated March 13, 2012, and tracked the required language exactly. The Bevericks do not bother to identify the "statutorily mandated statements" that were not included in the Notice of Default, rather they state only that the statute provides a "number" of statements and representations, and that "these" were not incorporated into the document. Their Reply Brief is not an appropriate place to raise and identify for the first time the specific "statements and representations" they fail to identify Opening Brief.

even if the Notice of Default did not contain the information required under RCW 61.24.030(8)(k) (which it did), the statute was not violated.

4. RCW 61.24.030(8)(l)

Again, this statute provides the information that must be provided prior to issuing a Notice of Sale, namely that the Notice of Default must contain the name and address of the owner of any promissory notes and the name, address, and telephone number of a party acting as servicer of the obligation secured by the deed of trust. *See* RCW 61.24.030. No Notice of Sale was ever issued. Accordingly, there was no violation of RCW 61.24.030(8)(l). Further, US Bank was identified as the owner, as it was in the past, and the address for the servicer was provided, as the servicer maintains all information about the loan. CP 818-819. Indeed, the Bevericks had the address for US Bank, contacted US Bank, sent it qualified written requests, and their counsel received a response from US Bank, all of which occurred prior to the Notice of Default. *Id.*

At least two courts have found that provision of a loan servicer's address for the note owner is not a violation of the DTA or Washington's Consumer Protection Act. *Meyer v. U.S. Bank Nat'l Ass'n*, 530 B.R. 767, 781, (W.D. Wash. 2015),⁴ and *In re Butler*, 512 B.R. 643, 657 (July 9, 2014).

⁴ The Bevericks' counsel cited the bankruptcy court's decision in *Meyer* in the Opening Brief, p. 39, 506 B.R. 533 (2014). He failed to advise this Court that the bankruptcy court's decision was reversed by the U.S. District Court, and he represents the Meyers in that case. The *Meyer* case is now pending before the Ninth Circuit Court of Appeals.

5. NATIONSTAR HELD THE NOTE AND HAD STANDING TO FORECLOSE.

The holder of a note can commence a judicial foreclosure. *Deutsche Bank Nat'l Tr. Co. v. Slotke*, 192 Wn. App. 166, 172, 367 P.3d 600 (2016); citing *John Davis & Co. v. Cedar Glenn # Four, Inc.*, 75 Wn.2d 214, 222-23, 450 P.2d 166 (1969). The Court in *John Davis & Co.* held:

The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument. See RCW 62.01.051. It is not necessary for the holder to first establish that he has some beneficial interest in the proceeds.

Id., 75 Wn.2d at 222-23.

The court in *Slotke* held: “[T]he plain words of that case apply to a judicial foreclosure of a deed of trust. Specifically, it is the holder of a note who is entitled to enforce it. It is not necessary for the holder to establish that it is also the owner of the note secured by the deed of trust.” *Id.*, 192 Wn. App. at 173. Here, Nationstar held the Note, and was the third party plaintiff. As such, the Bevericks’ claims that the typographical error in the description of US Bank, that US Bank was not registered with the Federal Securities and Exchange Commission, and that Nationstar was not the agent of US Bank, are all immaterial and irrelevant. Nationstar held the Note, and it was the proper party to foreclose.⁵

⁵ The thirty one cases cited in a string cite on p. 27 of the Opening Brief do not, in fact, hold that “holder” is used in conjunction with “ownership” of the obligation. These cases are generally prior to Washington’s Deeds of Trust Act, enacted in 1965, and prior to the UCC, enacted in 1965 and effective in 1967. The most recent case in the string cite, *Kennebec, Inc., v Bank of the West*, 88 Wn.2d 718, 724-25, 565 P.2d 812 (1977), has

The Bevericks attempt to create a dispute of material fact as to whether or not the Promissory Note held by Nationstar, indorsed in blank, is the original Promissory Note. This issue was resolved when the Bevericks failed to deny the authenticity or validity of the signatures on the Note. In answering Nationstar's counterclaim, the Bevericks admitted to executing the Note, but otherwise generally denied Nationstar's judicial foreclosure claim. Compare CP 119-170 with CP 181-184. The Bevericks did not specifically deny the authenticity or validity of any of the signatures on the Note and as such, their validity and authenticity was deemed admitted. RCW 62A.3-308 (“(a) In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. ...”). General denials like those asserted by the Bevericks are insufficient. *Id.*, see also e.g. *Paatalo v. J.P. Morgan Chase Bank, N.A.*, 2012 WL 2505742 (D. Mont. 2012)(general denial of validity of instrument insufficient under UCC 3-308); *In re Miller*, 310 BR 185, 193 (Bkrcty. C.D. Cal. 2004)(general denial creates presumption of authenticity under UCC 3-308).

Even if the Bevericks specifically denied the validity of the signatures on the Note, they would still be required to put forth clear and convincing evidence in order to controvert an admittedly executed and delivered piece of commercial paper. ER 902(i); *Hampton v. Gilleland*,

nothing to do with whether the foreclosing party has to be the owner, and the cite contains a recitation of the law from 1869.

61 Wn.2d 537, 545, 379 P.2d 194 (1963) (“we hold again that the possession of the deed carries with it a strong presumption of its lawful delivery. This presumption can be overcome only by clear and convincing evidence.”); *In re Stanley, 514 BR 27, 39 (Bkrctcy. D. Nev. 2012)*(signature presumed authentic under UCC 3-308 absent specific evidence to the contrary).

Yet, in the face of production of the original Note, the Bevericks only speculated as to whether or not the Note that Nationstar has is the original. They argued that the original Note was on “heavy paper,” and appeared to Mr. Beverick’s non-expert eye to be a copy printed on a color printer. As the trial court saw, however, the original Promissory Note is on normal paper and was obviously the original. There was no admissible evidence to the contrary, let alone the required clear and convincing evidence. Accordingly, the trial court properly granted summary judgment.

Finally, following production of the original Promissory Note to the Court and to Plaintiff for review in September 2013, Nationstar sent requests for admission on December 3, 2013:

REQUEST FOR ADMISSION NO. 3: Admit that Your original signatures were on the Note produced in Court at the September 30, 2013, summary judgment hearing in this matter.

RESPONSE:

REQUEST FOR ADMISSION NO. 4: Admit that Your original signatures were on the Note produced for Your and Your counsel’s review at the offices of the undersigned

defense counsel in Seattle, Washington, on September 30, 2013.

RESPONSE:

REQUEST FOR ADMISSION NO. 5: Admit the You have no basis for denying that Your original signatures are on the Note as produced for You and Your counsel's review by the undersigned defense counsel on September 30, 2013.

RESPONSE:

See CP 397-488. The Bevericks did not respond to those requests for admission until January 2015, more than a year late and thus by rule they were deemed admitted. CR 36(a). The Bevericks filed a motion to extend time to answer the requests for admission, but no extension was granted, and no error has been assigned to their failure to obtain an extension. CP 1125-1145.

Nationstar holds the original Promissory Note, indorsed in blank, and was thus entitled to enforce its provisions through foreclosure of the Deed of Trust. *John Davis & Co.*, 75 Wn.2d at 222-23; *Slotke*, 192 Wn. App. at 173; RCW 62A.3-301. The trial court did not err when it granted summary judgment.

6. THE TRIAL COURT DID NOT ERR WHEN IT DISMISSED THE BEVERICKS' CLAIM FOR VIOLATION OF THE CONSUMER PROTECTION ACT AS THERE WAS NO UNFAIR OR DECEPTIVE ACT OR PRACTICE THAT CAUSED INJURY.

Most of the Bevericks' arguments in their opening brief in support of their CPA claims were not made to the trial court and as such these arguments should not be considered. RAP 2.5(a), *Smith*, 100 Wn.2d at 37; *Weber*, 159 Wn.2d at 271-72; *Emery*, 174 Wn.2d at 762. In the trial court,

the Bevericks only argued that Aurora and Nationstar: (1) did not have authority to collect payments on the Note because they did not hold the Note, and (2) the endorsement on the Note was not authentic. CP 1462-1468, and 1380-1400.

The first issue as to authority to collect payment was resolved by the declarations of Laura McCann, AJ Loll, and Adam Hughes (discussed above), and when the original Note was produced. Additionally, Aurora and US Bank both advised the Bevericks that Aurora (and then Nationstar) was servicing the loan for US Bank. The Bevericks made no claim that payments had not been applied properly to their loan. See CP 796-851. The second issue as to the validity of the indorsement was resolved through additional discovery that confirmed WMC indorsed the Note in blank. CP 397-488.

Now, the Bevericks generally argue that some, or possibly all, of the Respondents somehow caused them to investigate who owned their loan and such constitutes a violation of the Consumer Protection Act. Yet there was no unfair or deceptive act or practice and nothing caused the Bevericks any injury. The parties provided the Bevericks accurate information as to who owned the Note, the servicer, and how to make payments. Nothing caused them to continue their investigation into the truth of the information they were given. And most importantly, nothing prevented them from making payments on their mortgage loan.

The Bevericks defaulted on their loan. The parties did nothing to keep them from performing or curing the default. The servicer and owner were identified, and the Bevericks were in contact with the correct party regarding ways to resolve the default.

In *Singh v. Federal National Mortgage Ass'n*, 2014 U.S. Dist. LEXIS 15745, the court found that borrowers pleaded facts sufficient to establish that a foreclosure trustee violated its duty of good faith. There it was alleged that the trustee acted with the beneficiary and servicer to collectively mislead the borrowers about the status of the foreclosure while borrowers attempted to negotiate a loan modification. However, *even given the violation of the duty of good faith*, the court dismissed the complaint for lack of causation. The court held that had the defendants complied with their duties, the plaintiffs did not allege that they would have done anything differently. *Id.* at *6. Most critically, the court emphasized that *the borrowers did not allege that they could have met their financial obligations. Id.* The court found that for those reasons, their complaint did not plausibly allege that the financial and emotional damages flowing from the foreclosure proceeding were attributable to the defendants' misconduct. *Id.* The court chided the defendants' actions in that case, but held that if a homeowner does not pay her mortgage, she will ultimately lose her home. *Id.* Here, the Bevericks either could not or chose not to make their payments—and the failure to make payments was

not caused by any action of any Respondent. With the fundamental causation requirement missing, the claim fails.

Similarly, in *Marts v. U.S. Bank Nat'l Ass'n*, 2016 U.S. Dist. LEXIS 24741, *2-3 (W.D. Wash. Feb. 26, 2016), Bear Stearns Trust owned the Note, and U.S. Bank, as trustee of the Bear Stearns Trust, held the Note. EMC, and later Chase, acted as loan servicers, i.e., the parties responsible for day-to-day interaction with the borrowers. *3. The borrowers did not dispute they defaulted on their Note, nor did they dispute that they knew at all times where to submit payments and whom to contact regarding loan modifications. *4. U.S. Bank attempted to foreclose a number of times, and the borrowers filed bankruptcy. Just as the Bevericks now argue, the borrowers alleged that U.S. Bank and MERS attempted to obscure their ability to determine who actually owned their loan and had the right to foreclose, and that they incurred costs associated with investigating ownership of their note to determine the party entitled to enforce the note secured by their residence. *Id.* at *4. The court granted summary judgment in favor of U.S. Bank and MERS noting that the borrowers did not incur costs bargaining with the wrong entity, and they knew whom to submit their loan payments to and whom to contact to apply for a loan modification. *Id.* at *6. The court held that the borrowers failed to demonstrate any issue of fact regarding causation of their injuries, *because they appeared to be self-inflicted.* *Id.* at *7. *See also, e.g., Babrauskas v. Paramount Equity Mortgage*, 2013 U.S. Dist. LEXIS

152561, 2013 WL 5743903, *4 (W.D. Wash. Oct. 23, 2013) (finding no injury under the CPA because "plaintiff's failure to meet his debt obligations is the 'but for' cause of the default, the threat of foreclosure, any adverse impact on his credit, and the clouded title"); *McCrorey v. Fed. Nat. Mortg. Ass'n*, 2013 U.S. Dist. LEXIS 25461, 2013 WL 681208 (W.D. Wash. Feb. 25, 2013) (finding no injury under the CPA because "it was [plaintiffs'] failure to meet their debt obligations that led to a default, the destruction of credit, and the foreclosure") (bracketed material supplied); *Peterson v. Citibank, N.A.*, 2012 Wash. App. LEXIS 2197, 2012 WL 4055809 (Wash. Ct. App. 2012) ("[R]egardless of MERS' conduct as the beneficiary under the deed of trust, the Petersons' property would still have been foreclosed upon based on their failure to make payments on the loan.").

The Bevericks claim they had to investigate ownership of their loan, and the location and existence of the Note they indisputably signed. Aurora, US Bank, and Nationstar all advised the Bevericks how to make their payments, and ultimately the foreclosure resulted from failure to make those payments. Therefore, nothing any Respondent did caused the Bevericks to default, and there was no unfair or deceptive at or practice, and no injury was caused. There was, accordingly, no violation of the Consumer Protection Act, and the trial court did not err when it dismissed all of the Bevericks' claims on summary judgment.

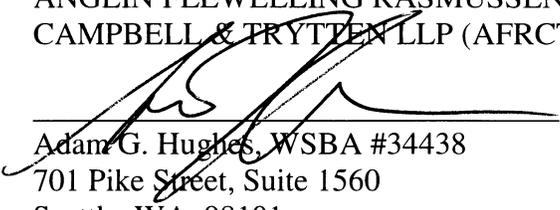
To the extent that the Court allows the Bevericks to make new CPA arguments against MERS despite their agreement to dismissal of MERS at the trial court level, all such claims against MERS also fail. Rather than repeating the argument made to this Court by Co-Respondent WMC Mortgage, Respondents hereby incorporate and join in the well-reasoned appellate briefing of WMC Mortgage on pages 12-28 of its Answering Brief. In short, the Bevericks failed to put forth evidence that could support a CPA claim against MERS as the issue has been addressed by multiple Washington courts over the past few years. The only distinguishing factor here is that the Bevericks actually agreed to dismissal of MERS at the trial court, which by itself requires affirmance of the dismissal of all claims asserted against MERS.

VI. CONCLUSION

For the foregoing reasons, Respondents AURORA BANK, FSB; U.S. BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-GEL1; BISHOP AND LYNCH OF KING CO.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; and NATIONSTAR MORTGAGE LLC respectfully request that this Court affirm the trial court's grant of summary judgment and decree of foreclosure.

Respectfully submitted this 29th day of July, 2016.

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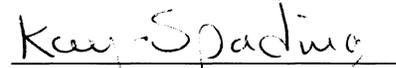
CERTIFICATE OF SERVICE

I, Kay Spading, certify that on the 29th day of July, 2016, I caused the foregoing document, Respondents Aurora Bank, FSB; U.S. Bank National Association, as Trustee for Structured Asset Corporation Mortgage Pass-Through Certificates, Series 2007-GEL1 60 Account No. 122944200; Bishop and Lynch of King Co.; Mortgage Electronic Registration Systems, Inc., and Nationstar Mortgage LLC's Answering Brief, to be delivered to the following parties in the manner indicated below:

<p>Richard Llewelyn Jones KOVAC & JONES, PLLC 1750 – 112th Ave. NE, Ste. D-151 Bellevue, WA 98004</p> <p>Attorney for Appellants/Plaintiffs</p>	<p><input checked="" type="checkbox"/> By United States Mail <input type="checkbox"/> By Legal Messenger <input checked="" type="checkbox"/> By Electronic Mail rlj@kovacandjones.com <input type="checkbox"/> By Facsimile</p>
<p>Shawn Larsen-Bright Zach Davison DORSEY & WHITNEY LLP 701 Fifth Ave., Ste. 6100 Seattle, WA 98104-7043</p> <p>Attorneys for Respondent/ Defendant WMC Mortgage Corp.</p>	<p><input checked="" type="checkbox"/> By United States Mail <input type="checkbox"/> By Legal Messenger <input checked="" type="checkbox"/> By Electronic Mail Larsen.bright.shawn@dorsey.com Davison.zach@dorsey.com <input type="checkbox"/> By Facsimile</p>
<p>Wendy E. Lyon RIDDELL WILLIAMS, P.S. 1001 Fourth Ave., Ste. 4500 Seattle, WA 98154</p> <p>Attorneys for Third Party Defendant Martin Investments, LLC</p>	<p><input checked="" type="checkbox"/> By United States Mail <input type="checkbox"/> By Legal Messenger <input checked="" type="checkbox"/> By Electronic Mail wlyon@riddellwilliams.com <input type="checkbox"/> By Facsimile</p>

Under penalty of perjury of the laws of the State of Washington,
the foregoing is true and correct.

Dated this 29th day of July, 2016, at Seattle, Washington.



Kay Spadina, Legal Assistant
AFRCT, LLP
701 Pike Street, Suite 1560
Seattle, WA 98101

APPENDIX A

2011 Wa. HB 2614

Enacted, March 29, 2012

Reporter

2012 Wa. ALS 185; 2012 Wa. Ch. 185; 2011 Wa. HB 2614

WASHINGTON ADVANCE LEGISLATIVE SERVICE > WASHINGTON SECOND SESSION OF THE 62ND
REGULAR SESSION > CHAPTER 185 > HOUSE BILL 2614

Notice

Added: Text highlighted in green

Deleted: Red text with a strikethrough

Synopsis

AN ACT Relating to assisting homeowners in crisis by providing alternatives, remedies, and assistance; amending *RCW 18.86.120*, **4.16.040**, *61.24.031*, *61.24.160*, *61.24.163*, *61.24.169*, **61.24.174**, *61.24.030*, *61.24.040*, **61.24.172**, *61.24.010*, and *61.24.050*; adding a new section to chapter 64.04 RCW; adding a new section to chapter 61.24 RCW; and declaring an emergency.

Text

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Sec. 1 A new section is added to chapter 64.04 RCW to read as follows:

(1)

If the beneficiary or mortgagee, or its assignees, of debt secured by owner-occupied real property intends to release its deed of trust or mortgage in the real property for less than full payment of the secured debt, it shall provide upon its first written notice to the borrower the following information in substantially the following form:

"To: [Name of borrower] DATE:

Please take note that [name of beneficiary or mortgagee, or its assignees],

in releasing its security interest in this owner-occupied real property,

[waives or reserves] the right to collect that amount that constitutes full

payment of the secured debt. The amount of debt outstanding as of the date of

this letter is \$ However, nothing in this letter precludes the borrower

from negotiating with the [name of beneficiary or mortgagee, or its assignees]

for a full release of this outstanding debt.

If [name of beneficiary or mortgagee, or its assignees] does not initiate a court action to collect the outstanding debt within three years on the date which it released its security interest, the right to collect the outstanding debt is forfeited."

- (2) If the beneficiary or mortgagee, or its assignees, of debt secured by owner-occupied real property intends to pursue collection of the outstanding debt, it must initiate a court action to collect the remaining debt within three years from the date on which it released its deed of trust or mortgage in the owner-occupied real property or else it forfeits any right to collect the remaining debt.

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- (3) This section applies only to debts incurred by individuals primarily for personal, family, or household purposes. This section does not apply to debts for business, commercial, or agricultural purposes.
- (4) For the purposes of this section, "owner-occupied real property" means real property consisting solely of a single-family residence, a residential condominium unit, or a residential cooperative unit that is the principal residence of the borrower.

Sec. 2 RCW 18.86.120 and 1997 c 217 s 7 are each amended to read as follows:

(1)

The pamphlet required under RCW 18.86.030(1)(f) shall consist of the entire text of RCW 18.86.010 through 18.86.030 and 18.86.040 through 18.86.110 with a separate cover page. The pamphlet shall be 8 1/2 by 11 inches in size, the text shall be in print no smaller than 10-point type, the cover page shall be in print no smaller than 12-point type, and the title of the cover page "The Law of Real Estate Agency" shall be in print no smaller than 18-point type. The cover page shall be in the following form:

The Law of Real Estate Agency This pamphlet describes your legal rights in dealing with a real estate broker or salesperson. Please read it carefully before signing any documents.

The following is only a brief summary of the attached law:

Sec. 1.

Definitions. Defines the specific terms used in the law.

Sec. 2.

Relationships between Licensees and the Public. States that a licensee who works with a buyer or tenant represents that buyer or tenant -- unless the licensee is the listing agent, a seller's subagent, a dual agent, the seller personally or the parties agree otherwise. Also states that in a transaction involving two different licensees affiliated with the same broker, the broker is a dual agent and each licensee solely represents his or her client -- unless the parties agree in writing that both licensees are dual agents.

Sec. 3.

Duties of a Licensee Generally. Prescribes the duties that are owed by all licensees, regardless of who the licensee represents. Requires disclosure of the licensee's agency relationship in a specific transaction.

Sec. 4.

Duties of a Seller's Agent. Prescribes the additional duties of a licensee representing the seller or landlord only.

Sec. 5.

Duties of a Buyer's Agent. Prescribes the additional duties of a licensee representing the buyer or tenant only.

Sec. 6.

Duties of a Dual Agent. Prescribes the additional duties of a licensee representing both parties in the same transaction, and requires the written consent of both parties to the licensee acting as a dual agent.

Sec. 7.

Duration of Agency Relationship. Describes when an agency relationship begins and ends. Provides that the duties of accounting and confidentiality continue after the termination of an agency relationship.

Sec. 8.

Compensation. Allows brokers to share compensation with cooperating brokers. States that payment of compensation does not necessarily establish an agency relationship. Allows brokers to receive compensation from more than one party in a transaction with the parties' consent.

Sec. 9.

Vicarious Liability. Eliminates the common law liability of a party for the conduct of the party's agent or subagent, unless the agent or subagent is insolvent. Also limits the liability of a broker for the conduct of a subagent associated with a different broker.

Sec. 10.

Imputed Knowledge and Notice. Eliminates the common law rule that notice to or knowledge of an agent constitutes notice to or knowledge of the principal.

Sec. 11.

Interpretation. This law replaces the fiduciary duties owed by an agent to a principal under the common law, to the extent that it conflicts with the common law.

(2)

- (a)** The pamphlet required under RCW 18.86.030(1)(f) must also include the following disclosure: When the seller of owner-occupied residential real property enters into a listing agreement with a real estate licensee where the proceeds from the sale may be insufficient to cover the costs at closing, it is the responsibility of the real estate licensee to disclose to the seller in writing that the decision by any beneficiary or mortgagee, or its assignees, to release its interest in the real property, for less than the amount the borrower owes, does not automatically relieve the seller of the obligation to pay any debt or costs remaining at closing, including fees such as the real estate licensee's commission.
- (b)** For the purposes of this subsection, "owner-occupied real property" means real property consisting solely of a single-family residence, a residential condominium unit, or a residential cooperative unit that is the principal residence of the borrower.

Sec. 3 RCW 4.16.040 and 2007 c 124 s 1 are each amended to read as follows:

The following actions shall be commenced within six years:

- (1)** An action upon a contract in writing, or liability express or implied arising out of a written agreement , except as provided for in section 1(2) of this act .
- (2)** An action upon an account receivable. For purposes of this section, an account receivable is any obligation for payment incurred in the ordinary course of the claimant's business or profession, whether arising from one or more transactions and whether or not earned by performance.
- (3)** An action for the rents and profits or for the use and occupation of real estate.

Sec. 4 RCW 61.24.031 and 2011 c 58 s 5 are each amended to read as follows:**(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 initial contact with the borrower was initiated as required under (b) of this subsection or 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.
- (b)** A beneficiary or authorized agent shall make initial contact with the borrower by letter to provide the borrower with information required under (c) of this subsection and by telephone as required under subsection (5) of this section. The letter required under this subsection must be mailed in accordance

with subsection (5)(a) of this section and must include the information described in (c) of this subsection and subsection (5)(e)(i) through (iv) of this section.

- (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.
- (d) If the beneficiary has exercised due diligence as required under subsection (5) of this section and the borrower does not respond by contacting the beneficiary within thirty days of the initial contact, the notice of default may be issued. "Initial contact" with the borrower is considered made three days after the date the letter required in (b) of this subsection is sent.
- (e) If a meeting is requested by the borrower or the borrower's housing counselor or attorney, the beneficiary or authorized agent shall schedule the meeting to occur before the notice of default is issued. An assessment of the borrower's financial ability to modify or restructure the loan obligation and a discussion of options must occur during the meeting scheduled for that purpose.
- (f) The meeting scheduled to assess the borrower's financial ability to modify or restructure the loan obligation and discuss options to avoid foreclosure must be in person, unless the requirement to meet in person is waived in writing by the borrower or the borrower's representative. A person who is authorized to modify the loan obligation or reach an alternative resolution to foreclosure on behalf of the beneficiary may participate by telephone or video conference, so long as a representative of the beneficiary is at the meeting in person may be held telephonically, unless the borrower or borrower's representative requests in writing that a meeting be held in person. The written request for an in-person meeting must be made within thirty days of the initial contact with the borrower. If the meeting is requested to be held in person, the meeting must be held in the county where the borrower resides. A

person who is authorized to agree to a resolution, including modifying or restructuring the loan obligation or other alternative resolution to foreclosure on behalf of the beneficiary, must be present either in person or on the telephone or video conference during the meeting .

- (2)** A notice of default issued under RCW 61.24.030(8) must include a declaration, as provided in subsection (9) of this section, from the beneficiary or authorized agent that it has contacted the borrower as provided in subsection (1) of this section, it has tried with due diligence to contact the borrower under subsection (5) of this section, or the borrower has surrendered the property to the trustee, beneficiary, or authorized agent. Unless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the declaration as evidence that the requirements of this section have been satisfied, and the trustee is not liable for the beneficiary's or its authorized agent's failure to comply with the requirements of this section.
- (3)** If, after the initial contact under subsection (1) of this section, a borrower has designated a housing counseling agency, housing counselor, or attorney to discuss with the beneficiary or authorized agent, on the borrower's behalf, options for the borrower to avoid foreclosure, the borrower shall inform the beneficiary or authorized agent and provide the contact information to the beneficiary or authorized agent. The beneficiary or authorized agent shall contact the designated representative for the borrower to meet.
- (4)** The beneficiary or authorized agent and the borrower or the borrower's representative shall attempt to reach a resolution for the borrower within the ninety days from the time the initial contact is sent and the notice of default is issued. A resolution may include, but is not limited to, a loan modification, an agreement to conduct a short sale, or a deed in lieu of foreclosure transaction, or some other workout plan. Any modification or workout plan offered at the meeting with the borrower's designated representative by the beneficiary or authorized agent is subject to approval by the borrower.
- (5)** A notice of default may be issued under RCW 61.24.030(8) if a beneficiary or authorized agent has initiated contact with the borrower as required under subsection (1)(b) of this section and the failure to meet with the borrower occurred despite the due diligence of the beneficiary or authorized agent. Due diligence requires the following:

 - (a)** A beneficiary or authorized agent shall first attempt to contact a borrower by sending a first-class letter to the address in the beneficiary's records for sending account statements to the borrower and to the address of the property encumbered by the deed of trust. The letter must be the letter described in subsection (1)(c) of this section.
 - (b)**

 - (i)** After the letter has been sent, the beneficiary or authorized agent shall attempt to contact the borrower by telephone at least three times at different hours and on different days. Telephone calls must be made to the primary and secondary telephone numbers on file with the beneficiary or authorized agent.
 - (ii)** A beneficiary or authorized agent may attempt to contact a borrower using an automated system to dial borrowers if the telephone call, when answered, is connected to a live representative of the beneficiary or authorized agent.
 - (iii)** A beneficiary or authorized agent satisfies the telephone contact requirements of this subsection (5)(b) if the beneficiary or authorized agent determines, after attempting contact under this subsection (5)(b), that the borrower's primary telephone number and secondary telephone number or numbers on file, if any, have been disconnected or are not good contact numbers for the borrower.
 - (iv)** The telephonic contact under this subsection (5)(b) does not constitute the meeting under subsection (1)(f) of this section.
 - (c)** If the borrower does not respond within fourteen days after the telephone call requirements of (b) of this subsection have been satisfied, the beneficiary or authorized agent shall send a certified letter, with return receipt requested, to the borrower at the address in the beneficiary's records for sending

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account statements to the borrower and to the address of the property encumbered by the deed of trust. The letter must include the information described in (e)(i) through (iv) of this subsection. The letter must also include a paragraph stating: "Your 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."

- (d) The beneficiary or authorized agent shall provide a means for the borrower to contact the beneficiary or authorized agent in a timely manner, including a toll-free telephone number or charge-free equivalent that will provide access to a live representative during business hours for the purpose of initiating and scheduling the meeting under subsection (1)(f) of this section .
- (e) The beneficiary or authorized agent shall post a link on the home page of the beneficiary's or authorized agent's internet web site, if any, to the following information:
 - (i) Options that may be available to borrowers who are unable to afford their mortgage payments and who wish to avoid foreclosure, and instructions to borrowers advising them on steps to take to explore those options;
 - (ii) A list of financial documents borrowers should collect and be prepared to present to the beneficiary or authorized agent when discussing options for avoiding foreclosure;
 - (iii) A toll-free telephone number or charge-free equivalent for borrowers who wish to discuss options for avoiding foreclosure with their beneficiary or authorized agent; and
 - (iv) The toll-free telephone number or charge-free equivalent made available by the department to find a department-approved housing counseling agency.

(6)

Subsections (1) and (5) of this section do not apply if any of the following occurs:

- (a) t he borrower has surrendered the property as evidenced by either a letter confirming the surrender or delivery of the keys to the property to the trustee, beneficiary, or authorized agent ; or
- (b) The borrower has filed for bankruptcy, and the bankruptcy stay remains in place, or the borrower has filed for bankruptcy and the bankruptcy court has granted relief from the bankruptcy stay allowing enforcement of the deed of trust .

(7)

- (a) This section applies only to deeds of trust that are recorded against owner-occupied residential real property. This section does not apply to deeds of trust: (i) Securing a commercial loan; (ii) securing obligations of a grantor who is not the borrower or a guarantor; or (iii) securing a purchaser's obligations under a seller-financed sale.
- (b) This section does not apply to association beneficiaries subject to chapter 64.32, 64.34, or 64.38 RCW.

(8) As used in this section:

- (a) "Department" means the United States department of housing and urban development.
- (b) "Seller-financed sale" means a residential real property transaction where the seller finances all or part of the purchase price, and that financed amount is secured by a deed of trust against the subject residential real property.

(9)

The form of declaration to be provided by the beneficiary or authorized agent as required under subsection (2) of this section must be in substantially the following form:

"FORECLOSURE LOSS MITIGATION FORM

Please select applicable option(s) below.

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The undersigned beneficiary or authorized agent for the beneficiary hereby represents and declares under the penalty of perjury that [check the applicable box and fill in any blanks so that the trustee can insert, on the beneficiary's behalf, the applicable declaration in the notice of default required under chapter 61.24 RCW]:

- (1) The beneficiary or beneficiary's authorized agent has contacted the borrower under, and has complied with, RCW 61.24.031 (contact provision to "assess the borrower's financial ability to pay the debt secured by the deed of trust and explore options for the borrower to avoid foreclosure") and the borrower did not request a meeting.
- (2) The beneficiary or beneficiary's authorized agent has contacted the borrower as required under RCW 61.24.031 and the borrower or the borrower's designated representative requested a meeting. A meeting was held in compliance with RCW 61.24.031.
- (3) The beneficiary or beneficiary's authorized agent has exercised due diligence to contact the borrower as required in RCW 61.24.031(5).
- (4) The borrower has surrendered the secured property as evidenced by either a letter confirming the surrender or by delivery of the keys to the secured property to the beneficiary, the beneficiary's authorized agent or to the trustee.
- (5) Under RCW 61.24.031, the beneficiary or the beneficiary's authorized agent has verified information that, on or before the date of this declaration, the borrower(s) has filed for bankruptcy, and the bankruptcy stay remains in place, or the borrower has filed for bankruptcy and the bankruptcy court has granted relief from the bankruptcy stay allowing the enforcement of the deed of trust. "

Sec. 5 RCW 61.24.160 and 2011 c 58 s 6 are each amended to read as follows:

(1)

- (a) A housing counselor who is contacted by a borrower under RCW 61.24.031 has a duty to act in good faith to attempt to reach a resolution with the beneficiary on behalf of the borrower within the ninety days provided from the date the beneficiary initiates contact with the borrower and the date the notice of default is issued. A resolution may include, but is not limited to, modification of the loan, an agreement to conduct a short sale, a deed in lieu of foreclosure transaction, or some other workout plan.
- (b) Nothing in RCW 61.24.031 or this section precludes a meeting or negotiations between the housing counselor, borrower, and beneficiary at any time, including after the issuance of the notice of default.
- (c) A borrower who is contacted under RCW 61.24.031 may seek the assistance of a housing counselor or attorney at any time.

(2) Housing counselors have a duty to act in good faith to assist borrowers by:

- (a) Preparing the borrower for meetings with the beneficiary;
- (b) Advising the borrower about what documents the borrower must have to seek a loan modification or other resolution;
- (c) Informing the borrower about the alternatives to foreclosure, including loan modifications or other possible resolutions; and
- (d) Providing other guidance, advice, and education as the housing counselor considers necessary.

(3)

A housing counselor or attorney assisting a borrower may refer the borrower to a mediation program , pursuant to RCW 61.24.163, if :

- (a) t he housing counselor or attorney determines that mediation is appropriate based on the individual circumstances ; and

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(b) A notice of sale on the deed of trust has not been recorded.

(4) and the borrower has received a notice of default. The referral to mediation may be made any time after a notice of default has been issued but no later than twenty days after the date a notice of sale has been recorded.

- (4) For borrowers who have received a letter under RCW 61.24.031 before the effective date of this section, a referral to mediation by a housing counselor or attorney does not preclude a trustee issuing a notice of default if the requirements of RCW 61.24.031 have been met.
- (5) Housing counselors providing assistance to borrowers under RCW 61.24.031 are not liable for civil damages resulting from any acts or omissions in providing assistance, unless the acts or omissions constitute gross negligence or willful or wanton misconduct.
- (6) Housing counselors shall provide information to the department to assist the department in its annual report to the legislature as required under RCW 61.24.163 (15) (18) . The information provided to the department by the housing counselors should include outcomes of foreclosures and be similar to the information requested in the national foreclosure mortgage counseling client level foreclosure outcomes report form.

Sec. 6 RCW 61.24.163 and 2011 2nd sp.s. c 4 s 1 are each amended to read as follows:

- (1) The foreclosure mediation program established in this section applies only to borrowers who have been referred to mediation by a housing counselor or attorney. The referral to mediation may be made any time after a notice of default has been issued but no later than twenty days after the date a notice of sale has been recorded. The mediation program under this section is not governed by chapter 7.07 RCW and does not preclude mediation required by a court or other provision of law.
- (2) A housing counselor or attorney referring a borrower to mediation shall send a notice to the borrower and the department, stating that mediation is appropriate.
- (3) Within ten days of receiving the notice, the department shall:
 - (a) Send a notice to the beneficiary, the borrower, the housing counselor or attorney who referred the borrower, and the trustee stating that the parties have been referred to mediation. The notice must include the statements and list of documents and information described in subsection s (4) and (5) (b)(i) through (iv) of this section and a statement explaining each party's responsibility to pay the mediator's fee ; and
 - (b) Select a mediator and notify the parties of the selection.
- (4) Within forty-five twenty-three days of the department's notice that the parties have been referred to mediation, the borrower shall transmit the documents required for mediation to the mediator and the beneficiary. The required documents include an initial Making Home Affordable Application (HAMP) package or such other equivalent homeowner financial information worksheet as required by the department. In the event the department is required to create a worksheet, the worksheet must include, at a minimum, the following information:
 - (a) The borrower's current and future income;
 - (b) Debts and obligations;
 - (c) Assets;
 - (d) Expenses;
 - (e) Tax returns for the previous two years;
 - (f) Hardship information;
 - (g) Other applicable information commonly required by any applicable federal mortgage relief program.
- (5) 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:
 - (a) An accurate statement containing the balance of the loan within thirty days of the date on which the beneficiary's documents are due to the parties;
 - (b) Copies of the note and deed of trust;

- (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);
 - (d) The best estimate of any arrearage and an itemized statement of the arrearages;
 - (e) An itemized list of the best estimate of fees and charges outstanding;
 - (f) The payment history and schedule for the preceding twelve months, or since default, whichever is longer, including a breakdown of all fees and charges claimed;
 - (g) All borrower-related and mortgage-related input data used in any net present values analysis. If no net present values analysis is required by the applicable federal mortgage relief program, then the input data required under the federal deposit insurance corporation and published in the federal deposit insurance corporation loan modification program guide, or if that calculation becomes unavailable, substantially similar input data as determined by the department;
 - (h) An explanation regarding any denial for a loan modification, forbearance, or other alternative to foreclosure in sufficient detail for a reasonable person to understand why the decision was made;
 - (i) Appraisal or other broker price opinion most recently relied upon by the beneficiary not more than ninety days old at the time of the scheduled mediation; and
 - (j) The portion or excerpt of the pooling and servicing agreement that prohibits the beneficiary from implementing a modification, if the beneficiary claims it cannot implement a modification due solely to limitations in a pooling and servicing agreement, and documentation or a statement detailing the efforts of the beneficiary to obtain a waiver of the pooling and servicing agreement provisions.
- (6) Within seventy days of receiving the referral from the department, the mediator shall convene a mediation session in the county where the borrower resides, unless the parties agree on another location. The parties may agree in writing to extend the time in which to schedule the mediation session. If the parties agree to extend the time, the beneficiary shall notify the trustee of the extension and the date the mediator is expected to issue the mediator's certification.
- (5) (7)
- (a) The mediator may schedule phone conferences, consultations with the parties individually, and other communications to ensure that the parties have all the necessary information and documents to engage in a productive mediation.
 - (b) The mediator must send written notice of the time, date, and location of the mediation session to the borrower, the beneficiary, and the department at least fifteen thirty days prior to the mediation session. At a minimum, the notice must contain:
 - (i) A statement that the borrower may be represented in the mediation session by an attorney or other advocate;
 - (ii) A statement that a person with authority to agree to a resolution, including a proposed settlement, loan modification, or dismissal or continuation of the foreclosure proceeding, must be present either in person or on the telephone or video conference during the mediation session; and
 - (iii) A complete list of documents and information required by this section that the parties must provide to the mediator and the deadlines for providing the documents and information; and
 - (iv) A statement that the parties have a duty to mediate in good faith and that failure to mediate in good faith may impair the beneficiary's ability to foreclose on the property or the borrower's ability to modify the loan or take advantage of other alternatives to foreclosure.
- (6) (8)
- (a) The borrower, the beneficiary or authorized agent, and the mediator must meet in person for the mediation session. However, a person with authority to agree to a resolution on behalf of the beneficiary may be present over the telephone or video conference during the mediation session.
 - (7) (b) After the mediation session commences, the mediator may continue the mediation session once, and any further continuances must be with the consent of the parties.

- (9) The participants in mediation must address the issues of foreclosure that may enable the borrower and the beneficiary to reach a resolution, including but not limited to reinstatement, modification of the loan, restructuring of the debt, or some other workout plan. To assist the parties in addressing issues of foreclosure, the mediator must may require the participants to consider the following:
- (a) The borrower's current and future economic circumstances, including the borrower's current and future income, debts, and obligations for the previous sixty days or greater time period as determined by the mediator;
 - (b) The net present value of receiving payments pursuant to a modified mortgage loan as compared to the anticipated net recovery following foreclosure;
 - (c) Any affordable loan modification calculation and net present value calculation when required under any federal mortgage relief program, including the home affordable modification program (HAMP) as applicable to government-sponsored enterprise and nongovernment-sponsored enterprise loans and any HAMP-related modification program applicable to loans insured by the federal housing administration, the veterans administration, and the rural housing service. If such a calculation is not provided or required, then the beneficiary must use the current calculations, assumptions, and forms that are provide the net present value data inputs established by the federal deposit insurance corporation and published in the federal deposit insurance corporation loan modification program guide or other net present value data inputs as designated by the department. The mediator may run the calculation in order for a productive mediation to occur and to comply with the mediator certification requirement ; and
 - (d) Any other loss mitigation guidelines to loans insured by the federal housing administration, the veterans administration, and the rural housing service, if applicable.
- (8) (10)A violation of the duty to mediate in good faith as required under this section may include:
- (a) Failure to timely participate in mediation without good cause;
 - (b) Failure of the borrower or the beneficiary to provide the following documentation to the borrower and mediator at least ten days before the mediation or pursuant to the mediator's instructions:
 - (i) An accurate statement containing the balance of the loan as of the first day of the month in which the mediation occurs;
 - (ii) Copies of the note and deed of trust;
 - (iii) 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);
 - (iv) The best estimate of any arrearage and an itemized statement of the arrearages;
 - (v) An itemized list of the best estimate of fees and charges outstanding;
 - (vi) The payment history and schedule for the preceding twelve months, or since default, whichever is longer, including a breakdown of all fees and charges claimed;
 - (vii) All borrower-related and mortgage-related input data used in any net present value analysis;
 - (viii) An explanation regarding any denial for a loan modification, forbearance, or other alternative to foreclosure in sufficient detail for a reasonable person to understand why the decision was made;
 - (ix) The most recently available appraisal or other broker price opinion most recently relied upon by the beneficiary; and
 - (x) The portion or excerpt of the pooling and servicing agreement that prohibits the beneficiary from implementing a modification, if the beneficiary claims it cannot implement a modification due solely to limitations in a pooling and servicing agreement, and documentation or a statement detailing the efforts of the beneficiary to obtain a waiver of the pooling and servicing agreement provisions;
 - (c) Failure of the borrower to provide documentation to the beneficiary and mediator, at least ten days before the mediation or pursuant to the mediator's instruction, showing the borrower's current and future income, debts and obligations, and tax returns for the past two years;

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- (d) Failure of either party to pay the respective portion of the mediation fee in advance of the mediation as required under this section;
 - (e) documentation required before mediation or pursuant to the mediator's instructions;
 - (c) Failure of a party to designate representatives with adequate authority to fully settle, compromise, or otherwise reach resolution with the borrower in mediation; and
 - (f) (d) A request by a beneficiary that the borrower waive future claims he or she may have in connection with the deed of trust, as a condition of agreeing to a modification, except for rescission claims under the federal truth in lending act. Nothing in this section precludes a beneficiary from requesting that a borrower dismiss with prejudice any pending claims against the beneficiary, its agents, loan servicer, or trustee, arising from the underlying deed of trust, as a condition of modification.
- (9) (11) If the mediator reasonably believes a borrower will not attend a mediation session based on the borrower's conduct, such as the lack of response to the mediator's communications, the mediator may cancel a scheduled mediation session and send a written cancellation to the department and the trustee and send copies to the parties. The beneficiary may proceed with the foreclosure after receipt of the mediator's written confirmation of cancellation.
- (12) Within seven business days after the conclusion of the mediation session, the mediator must send a written certification to the department and the trustee and send copies to the parties of:
- (a) The date, time, and location of the mediation session;
 - (b) The names of all persons attending in person and by telephone or video conference, at the mediation session;
 - (c) Whether a resolution was reached by the parties, including whether the default was cured by reinstatement, modification, or restructuring of the debt, or some other alternative to foreclosure was agreed upon by the parties;
 - (d) Whether the parties participated in the mediation in good faith; and
 - (e) If a written agreement was not reached, a description of the any net present value test used, along with a copy of the inputs, including the result of the any net present value test expressed in a dollar amount.
- (10) (13) If the parties are unable to reach any agreement and the mediator certifies that the parties acted in good faith, the beneficiary may proceed with the foreclosure.
- (11) an agreement, the beneficiary may proceed with the foreclosure after receipt of the mediator's written certification.
- (14)
- (a) The mediator's certification that the beneficiary failed to act in good faith in mediation constitutes a defense to the nonjudicial foreclosure action that was the basis for initiating the mediation. In any action to enjoin the foreclosure, the beneficiary shall be is entitled to rebut the allegation that it failed to act in good faith.
 - (b) The mediator's certification that the beneficiary failed to act in good faith during mediation does not constitute a defense to a judicial foreclosure or a future nonjudicial foreclosure action if a modification of the loan is agreed upon and the borrower subsequently defaults.
 - (c) If an affordable loan modification is not offered in the mediation or a written agreement was not reached and the mediator's certification shows that the net present value of the modified loan exceeds the anticipated net recovery at foreclosure, that showing in the certification shall constitute s a basis for the borrower to enjoin the foreclosure.
- (12) (15) The mediator's certification that the borrower failed to act in good faith in mediation authorizes the beneficiary to proceed with the foreclosure.
- (13) (16)

- (a) If a borrower has been referred to mediation before a notice of trustee sale has been recorded, a trustee may not record the notice of sale until the trustee receives the mediator's certification stating that the mediation has been completed. (b) If the trustee does not receive the mediator's certification, the trustee may record the notice of sale after ten days from the date the certification to the trustee was due. If the , after a notice of sale is recorded under this subsection (13)(b) and (16)(a), the mediator subsequently issues a certification alleging finding that the beneficiary violated the duty of good faith, the trustee may not proceed with the sale.

(14) the certification constitutes a basis for the borrower to enjoin the foreclosure.

- (b) If a borrower has been referred to mediation after the notice of sale was recorded, the sale may not occur until the trustee receives the mediator's certification stating that the mediation has been completed.
- (17) A mediator may charge reasonable fees as authorized by this subsection and by the department. Unless the fee is waived or the parties agree otherwise, a foreclosure mediator's fee may not exceed four hundred dollars for preparing, scheduling, and conducting a mediation session lasting between one hour and three hours. For a mediation session exceeding three hours, the foreclosure mediator may charge a reasonable fee, as authorized by the department. The mediator must provide an estimated fee before the mediation, and payment of the mediator's fee must be divided equally between the beneficiary and the borrower. The beneficiary and the borrower must tender the loan mediator's fee seven within thirty calendar days before the commencement of the from receipt of the department's letter referring the parties to mediation or pursuant to the mediator's instructions.
- (15) (18) Beginning December 1, 2012, and every year thereafter, the department shall report annually to the legislature on:
- (a) The performance of the program, including the numbers of borrowers who are referred to mediation by a housing counselor or attorney;
 - (b) The results of the mediation program, including the number of mediations requested by housing counselors and attorneys, the number of certifications of good faith issued, the number of borrowers and beneficiaries who failed to mediate in good faith, and the reasons for the failure to mediate in good faith, if known, the numbers of loans restructured or modified, the change in the borrower's monthly payment for principal and interest and the number of principal write-downs and interest rate reductions, and, to the extent practical, the number of borrowers who report a default within a year of restructuring or modification;
 - (c) The information received by housing counselors regarding outcomes of foreclosures; and
 - (d) Any recommendations for changes to the statutes regarding the mediation program.

Sec. 7 RCW 61.24.169 and 2011 2nd sp.s. c 4 s 2 are each amended to read as follows:

- (1) For the purposes of RCW 61.24.163, the department must maintain a list of approved foreclosure mediators. The department may approve the following persons to serve as foreclosure mediators under this section if the person has completed ten mediations and either a forty-hour mediation course and sixty hours of mediating or has two hundred hours experience mediating :
- (a) Attorneys who are active members of the Washington state bar association;
 - (b) Employees of United States department of housing and urban development-approved housing counseling agencies or approved by the Washington state housing finance commission;
 - (c) Employees or volunteers of dispute resolution centers under chapter 7.75 RCW; and
 - (d) Retired judges of Washington courts ; and
 - (e) Other experienced mediators .
- (2) The department may establish a required training program for foreclosure mediators and may require mediators to acquire training before being approved. The mediators must be familiar with relevant aspects

of the law, have knowledge of community-based resources and mortgage assistance programs, and refer borrowers to these programs where appropriate.

(3) The department may remove any mediator from the approved list of mediators.

(4)

(a) A mediator under this section who is an employee or volunteer of a dispute resolution center under chapter 7.75 RCW is immune from suit in any civil action based on any proceedings or other official acts performed in his or her capacity as a foreclosure mediator, except in cases of willful or wanton misconduct.

(b) A mediator is not subject to discovery or compulsory process to testify in any litigation pertaining to a foreclosure action between the parties. However, the mediator's certification and all information and material presented as part of the mediation process may be deemed admissible evidence, subject to court rules, in any litigation pertaining to a foreclosure action between the parties.

Sec. 8 RCW 61.24.174 and 2011 1st sp.s. c 24 s 1 are each amended to read as follows:

(1) Except as provided in subsection (4) (5) of this section, beginning October 1, 2011, and every quarter thereafter, every beneficiary issuing notices of default, or directing that a trustee or authorized agent issue the notice of default, on owner-occupied residential real property under this chapter must:

(a) Report to the department the number of owner-occupied residential real properties for which the beneficiary has issued a notice of default during the previous quarter; and

(b) Remit the amount required under subsection (2) of this section ; and

(c) Report and update beneficiary contact information for the person and work group responsible for the beneficiary's compliance with the requirements of the foreclosure fairness act created in this chapter .

(2) For each owner-occupied residential real property for which a notice of default has been issued, the beneficiary issuing the notice of default, or directing that a trustee or authorized agent issue the notice of default, shall remit two hundred fifty dollars to the department to be deposited, as provided under RCW 61.24.172, into the foreclosure fairness account. The two hundred fifty dollar payment is required per property and not per notice of default. The beneficiary shall remit the total amount required in a lump sum each quarter.

(3) Reporting and payments under subsections (1) and (2) of this section are due within forty-five days of the end of each quarter.

(4) No later than thirty days after April 14, 2011, the beneficiaries required to report and remit to the department under this section shall determine the number of owner-occupied residential real properties for which notices of default were issued during the three months prior to April 14, 2011. The beneficiary shall remit to the department a one-time sum of two hundred fifty dollars multiplied by the number of properties. In addition, by July 31, 2011, the beneficiaries required to report and remit to the department under this section shall remit to the department another one-time sum of two hundred fifty dollars multiplied by the number of owner-occupied residential real properties for which notices of default were issued from April 14, 2011, through June 30, 2011. The department shall deposit the funds into the foreclosure fairness account as provided under RCW 61.24.172.

(4) (5) This section does not apply to any beneficiary or loan servicer that is a federally insured depository institution, as defined in 12 U.S.C. Sec. 461(b)(1)(A), and that certifies under penalty of perjury that it has issued, or has directed a trustee or authorized agent to issue, fewer than two hundred fifty notices of default in the preceding year.

(5) (6) This section does not apply to association beneficiaries subject to chapter 64.32, 64.34, or 64.38 RCW.

Sec. 9 RCW 61.24.030 and 2011 c 58 s 4 are each amended to read as follows:

It shall be requisite to a trustee's sale:

(1) That the deed of trust contains a power of sale;

- (2) That the deed of trust contains a statement that the real property conveyed is not used principally for agricultural purposes; provided, if the statement is false on the date the deed of trust was granted or amended to include that statement, and false on the date of the trustee's sale, then the deed of trust must be foreclosed judicially. Real property is used for agricultural purposes if it is used in an operation that produces crops, livestock, or aquatic goods;
- (3) That a default has occurred in the obligation secured or a covenant of the grantor, which by the terms of the deed of trust makes operative the power to sell;
- (4) That no action commenced by the beneficiary of the deed of trust is now pending to seek satisfaction of an obligation secured by the deed of trust in any court by reason of the grantor's default on the obligation secured: PROVIDED, That (a) the seeking of the appointment of a receiver shall not constitute an action for purposes of this chapter; and (b) if a receiver is appointed, the grantor shall be entitled to any rents or profits derived from property subject to a homestead as defined in RCW 6.13.010. If the deed of trust was granted to secure a commercial loan, this subsection shall not apply to actions brought to enforce any other lien or security interest granted to secure the obligation secured by the deed of trust being foreclosed;
- (5) That the deed of trust has been recorded in each county in which the land or some part thereof is situated;
- (6) That prior to the date of the notice of trustee's sale and continuing thereafter through the date of the trustee's sale, the trustee must maintain a street address in this state where personal service of process may be made, and the trustee must maintain a physical presence and have telephone service at such address;
- (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.
 - (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.
 - (c) This subsection (7) does not apply to association beneficiaries subject to chapter 64.32, 64.34, or 64.38 RCW;
- (8) 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:
 - (a) A description of the property which is then subject to the deed of trust;
 - (b) A statement identifying each county in which the deed of trust is recorded and the document number given to the deed of trust upon recording by each county auditor or recording officer;
 - (c) A statement that the beneficiary has declared the borrower or grantor to be in default, and a concise statement of the default alleged;
 - (d) An itemized account of the amount or amounts in arrears if the default alleged is failure to make payments;
 - (e) An itemized account of all other specific charges, costs, or fees that the borrower, grantor, or any guarantor is or may be obliged to pay to reinstate the deed of trust before the recording of the notice of sale;

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- (f) A statement showing the total of (d) and (e) of this subsection, designated clearly and conspicuously as the amount necessary to reinstate the note and deed of trust before the recording of the notice of sale;
- (g) A statement that failure to cure the alleged default within thirty days of the date of mailing of the notice, or if personally served, within thirty days of the date of personal service thereof, may lead to recordation, transmittal, and publication of a notice of sale, and that the property described in (a) of this subsection may be sold at public auction at a date no less than one hundred twenty days in the future , or no less than one hundred fifty days in the future if the borrower received a letter under RCW 61.24.031 ;
- (h) A statement that the effect of the recordation, transmittal, and publication of a notice of sale will be to (i) increase the costs and fees and (ii) publicize the default and advertise the grantor's property for sale;
- (i) A statement that the effect of the sale of the grantor's property by the trustee will be to deprive the grantor of all their interest in the property described in (a) of this subsection;
- (j) A statement that the borrower, grantor, and any guarantor has recourse to the courts pursuant to RCW 61.24.130 to contest the alleged default on any proper ground;

(k)

In the event the property secured by the deed of trust is owner-occupied residential real property, a statement, prominently set out at the beginning of the notice, which shall state as follows:

"You should take care to protect your interest in your home. This notice of default (your failure to pay) is the first step in a process that could result in you losing your home. You should carefully review your options. For example:

Can you pay and stop the foreclosure process?

Do you dispute the failure to pay?

Can you sell your property to preserve your equity?

Are you able to refinance this loan or obligation with a new loan or obligation from another lender with payments, terms, and fees that are more affordable?

Do you qualify for any government or private homeowner assistance programs?

Do you know if filing for bankruptcy is an option? What are the pros and cons of doing so?

Do not ignore this notice; because if you do nothing, you could lose your home at a foreclosure sale. (No foreclosure sale can be held any sooner than ninety days after a notice of sale is issued and a notice of sale cannot be issued until thirty days after this notice.) Also, if you do nothing to pay what you owe, be careful of people who claim they can help you. There are many individuals and businesses that watch for the notices of sale in order to unfairly profit as a result of borrowers' distress.

You may feel you need help understanding what to do. There are a number of professional resources available, including home loan counselors and attorneys, who may assist you. Many legal services are lower-cost or even free, depending on your ability to pay. If you desire legal help in understanding your options or handling this default, you may obtain a referral (at no charge) by contacting the county bar association in the county where your home is located. These legal referral services also provide information about lower-cost or free legal services for those who qualify. You may contact the Department of Financial Institutions or the statewide civil legal aid hotline for possible assistance or referrals"

"THIS NOTICE IS ONE STEP IN A PROCESS THAT COULD RESULT IN YOUR LOSING YOUR HOME.

You may be eligible for mediation in front of a neutral third party to help save your home.

CONTACT A HOUSING COUNSELOR OR AN ATTORNEY LICENSED IN WASHINGTON NOW to assess your situation and refer you to mediation if you might benefit. Mediation MUST be requested between the time you receive the Notice of Default and no later than twenty days after the Notice of Trustee Sale is recorded.

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DO NOT DELAY. If you do nothing, a notice of sale may be issued as soon as 30 days from the date of this notice of default. The notice of sale will provide a minimum of 120 days' notice of the date of the actual foreclosure sale.

BE CAREFUL of people who claim they can help you. There are many individuals and businesses that prey upon borrowers in distress.

REFER TO THE CONTACTS BELOW for sources of assistance.

SEEKING ASSISTANCE

Housing counselors and legal assistance may be available at little or no cost to you. If you would like assistance in determining your rights and opportunities to keep your house, you may contact the following:

The statewide foreclosure hotline for assistance and referral to housing counselors recommended by the Housing Finance Commission

Telephone: Web site:

The United States Department of Housing and Urban Development

Telephone: Web site:

The statewide civil legal aid hotline for assistance and referrals to other housing counselors and attorneys

Telephone: Web site:"

The beneficiary or trustee shall obtain the toll-free numbers and web site information from the department for inclusion in the notice ; and

- (I) 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; and
- (9) That, for owner-occupied residential real property, before the notice of the trustee's sale is recorded, transmitted, or served, the beneficiary has complied with RCW 61.24.031 and, if applicable, RCW 61.24.163.

Sec. 10 RCW 61.24.040 and 2009 c 292 s 9 are each amended to read as follows:

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;
 - (b) To the extent the trustee elects to foreclose its lien or interest, or the beneficiary elects to preserve its right to seek a deficiency judgment against a borrower or grantor under RCW 61.24.100(3)(a), and if their addresses are stated in a recorded instrument evidencing their interest, lien, or claim of lien, or an amendment thereto, or are otherwise known to the trustee, cause a copy of the notice of sale described in (f) of this subsection to be transmitted by both first-class and either certified or registered mail, return receipt requested, to the following persons or their legal representatives, if any, at such address:
 - (i) The borrower and grantor;
 - (ii) The beneficiary of any deed of trust or mortgagee of any mortgage, or any person who has a lien or claim of lien against the property, that was recorded subsequent to the recordation of the deed of trust being foreclosed and before the recordation of the notice of sale;
 - (iii) The vendee in any real estate contract, the lessee in any lease, or the holder of any conveyances of any interest or estate in any portion or all of the property described in such notice, if that contract, lease, or conveyance of such interest or estate, or a memorandum or

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other notice thereof, was recorded after the recordation of the deed of trust being foreclosed and before the recordation of the notice of sale;

- (iv) The last holder of record of any other lien against or interest in the property that is subject to a subordination to the deed of trust being foreclosed that was recorded before the recordation of the notice of sale;
 - (v) The last holder of record of the lien of any judgment subordinate to the deed of trust being foreclosed; and
 - (vi) The occupants of property consisting solely of a single-family residence, or a condominium, cooperative, or other dwelling unit in a multiplex or other building containing fewer than five residential units, whether or not the occupant's rental agreement is recorded, which notice may be a single notice addressed to "occupants" for each unit known to the trustee or beneficiary;
- (c) Cause a copy of the notice of sale described in (f) of this subsection to be transmitted by both first-class and either certified or registered mail, return receipt requested, to the plaintiff or the plaintiff's attorney of record, in any court action to foreclose a lien or other encumbrance on all or any part of the property, provided a court action is pending and a lis pendens in connection therewith is recorded in the office of the auditor of any county in which all or part of the property is located on the date the notice is recorded;
- (d) Cause a copy of the notice of sale described in (f) of this subsection to be transmitted by both first-class and either certified or registered mail, return receipt requested, to any person who has recorded a request for notice in accordance with RCW 61.24.045, at the address specified in such person's most recently recorded request for notice;
- (e) Cause a copy of the notice of sale described in (f) of this subsection to be posted in a conspicuous place on the property, or in lieu of posting, cause a copy of said notice to be served upon any occupant of the property;

(f)

The notice shall be in substantially the following form:

NOTICE OF TRUSTEE'S SALE

I.

NOTICE IS HEREBY GIVEN that the undersigned Trustee will on the day

of, . . ., at the hour of o'clock M. at [street

address and location if inside a building] in the City of, State of

Washington, sell at public auction to the highest and best bidder, payable at

the time of sale, the following described real property, situated in the

County(ies) of, State of Washington, to-wit:

[If any personal property is to be included in the trustee's sale, include a description that reasonably identifies such personal property]

which is subject to that certain Deed of Trust dated, . . .,

recorded, . . ., under Auditor's File No., records of

....County, Washington, from, as Grantor, to, as Trustee, to

secure an obligation in favor of, as Beneficiary, the beneficial

interest in which was assigned by, under an Assignment recorded under

Auditor's File No.... [Include recording information for all counties if the

Deed of Trust is recorded in more than one county.]

II.

No action commenced by the Beneficiary of the Deed of Trust is now pending to seek satisfaction of the obligation in any Court by reason of the Borrower's or Grantor's default on the obligation secured by the Deed of Trust.

[If there is another action pending to foreclose other security for all or part of the same debt, qualify the statement and identify the action.]

III.

The default(s) for which this foreclosure is made is/are as follows:

[If default is for other than payment of money, set forth the particulars]

Failure to pay when due the following amounts which are now in arrears:

IV.

The sum owing on the obligation secured by the Deed of Trust is: Principal \$, together with interest as provided in the note or other instrument secured from the day of, . . . , and such other costs and fees as are due under the note or other instrument secured, and as are provided by statute.

V.

The above-described real property will be sold to satisfy the expense of sale and the obligation secured by the Deed of Trust as provided by statute. The sale will be made without warranty, express or implied, regarding title, possession, or encumbrances on the day of, . . . The default(s) referred to in paragraph III must be cured by the day of, . . . (11 days before the sale date), to cause a discontinuance of the sale. The sale will be discontinued and terminated if at any time on or before the day of, . . . , (11 days before the sale date), the default(s) as set forth in paragraph III is/are cured and the Trustee's fees and costs are paid. The sale may be terminated any time after the day of, . . . (11 days before the sale date), and before the sale by the Borrower, Grantor, any Guarantor, or the holder of any recorded junior lien or encumbrance paying the entire principal and interest secured by the Deed of Trust, plus costs, fees, and advances, if any, made pursuant to the terms of the obligation and/or Deed of Trust, and curing all other defaults.

VI.

A written notice of default was transmitted by the Beneficiary or Trustee to the Borrower and Grantor at the following addresses:

....

....

....

by both first-class and certified mail on the day of, . . . ,
proof of which is in the possession of the Trustee; and the Borrower and
Grantor were personally served on the day of, . . . , with said
written notice of default or the written notice of default was posted in a
conspicuous place on the real property described in paragraph I above, and the
Trustee has possession of proof of such service or posting.

VII.

The Trustee whose name and address are set forth below will provide in writing to anyone
requesting it, a statement of all costs and fees due at any time prior to the sale.

VIII.

The effect of the sale will be to deprive the Grantor and all those who hold by, through or under the
Grantor of all their interest in the above-described property.

IX.

Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity
to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW
61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for
invalidating the Trustee's sale.

[Add Part X to this notice if applicable under RCW 61.24.040(9)]

....

.... , Trustee
.... >
.... Address
....
....) Phone

[Acknowledgment]

(g)

If the borrower received a letter under RCW 61.24.031, the notice specified in subsection (1)(f) of
this section shall also include the following additional language:

"THIS NOTICE IS THE FINAL STEP BEFORE THE FORECLOSURE SALE OF YOUR HOME.

You have only 20 DAYS from the recording date on this notice to pursue mediation.

**DO NOT DELAY. CONTACT A HOUSING COUNSELOR OR AN ATTORNEY LICENSED IN
WASHINGTON NOW to assess your situation and refer you to mediation if you are eligible and it
may help you save your home. See below for safe sources of help.**

SEEKING ASSISTANCE

**Housing counselors and legal assistance may be available at little or no cost to you. If you would
like assistance in determining your rights and opportunities to keep your house, you may contact
the following:**

**The statewide foreclosure hotline for assistance and referral to housing counselors recommended
by the Housing Finance Commission**

Telephone: Web site:

The United States Department of Housing and Urban Development

Telephone: Web site:

The statewide civil legal aid hotline for assistance and referrals to other housing counselors and attorneys

Telephone: Web site:"

The beneficiary or trustee shall obtain the toll-free numbers and web site information from the department for inclusion in the notice.

(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

Pursuant to the Revised Code of Washington,

Chapter 61.24 RCW

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. Unless the default(s) is/are cured, your property will be sold at auction on the day of, . . .

To cure the default(s), you must bring the payments current, cure any other defaults, and pay accrued late charges and other costs, advances, and attorneys' fees as set forth below by the day of, . . . [11 days before the sale date]. To date, these arrears and costs are as follows:

Estimated amount

Currently due	that will be due
to reinstate	to reinstate
on....	on....
....
	(11 days before
	the date set
	for sale)

Delinquent payments

from.....,

. . . . , in the

amount of

\$ /mo.: \$ \$

Late charges in

the total

amount of: \$ \$

Estimated
Amounts

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Attorneys' fees: \$ \$

Trustee's fee: \$ \$

Trustee's expenses:

(Itemization)

Title report \$ \$

Recording fees \$ \$

Service/Posting of \$ \$

Notices

Postage/Copying expense \$ \$

Publication \$ \$

Telephone charges \$ \$

Inspection fees \$ \$

.... \$ \$

.... \$ \$

TOTALS \$ \$

To pay off the entire obligation secured by your Deed of Trust as of the
day ofyou must pay a total of \$ in principal, \$in
 interest, plus other costs and advances estimated to date in the amount of
 \$ From and after the date of this notice you must submit a written request
 to the Trustee to obtain the total amount to pay off the entire obligation
 secured by your Deed of Trust as of the payoff date.

As to the defaults which do not involve payment of money to the Beneficiary of your Deed of Trust, you must cure each such default. Listed below are the defaults which do not involve payment of money to the Beneficiary of your Deed of Trust. Opposite each such listed default is a brief description of the action necessary to cure the default and a description of the documentation necessary to show that the default has been cured.

Default	Description of Action Required to Cure and Documentation Necessary to Show Cure
....

....

You may reinstate your Deed of Trust and the obligation secured thereby at any time up to and including the day of, . . . [11 days before

Adam Hughes

the sale date], by paying the amount set forth or estimated above and by curing any other defaults described above. Of course, as time passes other payments may become due, and any further payments coming due and any additional late charges must be added to your reinstating payment. Any new defaults not involving payment of money that occur after the date of this notice must also be cured in order to effect reinstatement. In addition, because some of the charges can only be estimated at this time, and because the amount necessary to reinstate or to pay off the entire indebtedness may include presently unknown expenditures required to preserve the property or to comply with state or local law, it will be necessary for you to contact the Trustee before the time you tender reinstatement or the payoff amount so that you may be advised of the exact amount you will be required to pay. Tender of payment or performance must be made to:, whose address is, telephone () AFTER THE . .

. . DAY OF, . . . , YOU MAY NOT REINSTATE YOUR DEED OF TRUST BY PAYING THE BACK PAYMENTS AND COSTS AND FEES AND CURING THE OTHER DEFAULTS AS OUTLINED

ABOVE. The Trustee will respond to any written request for current payoff or reinstatement amounts within ten days of receipt of your written request. In such a case, you will only be able to stop the sale by paying, before the sale, the total principal balance (\$) plus accrued interest, costs and advances, if any, made pursuant to the terms of the documents and by curing the other defaults as outlined above.

You may contest this default by initiating court action in the Superior Court of the county in which the sale is to be held. In such action, you may raise any legitimate defenses you have to this default. A copy of your Deed of Trust and documents evidencing the obligation secured thereby are enclosed. You may wish to consult a lawyer. Legal action on your part may prevent or restrain the sale, but only if you persuade the court of the merits of your defense. You may contact the Department of Financial Institutions or the statewide civil legal aid hotline for possible assistance or referrals.

The court may grant a restraining order or injunction to restrain a trustee's sale pursuant to *RCW 61.24.130* upon five days notice to the trustee of the time when, place where, and the judge before whom the application for the restraining order or injunction is to be made. This notice shall include copies of all pleadings and related documents to be given to the judge. Notice and other process may be served on the trustee at:

NAME:
 ADDRESS:

 TELEPHONE NUMBER:

If you do not reinstate the secured obligation and your Deed of Trust in the manner set forth above, or if you do not succeed in restraining the sale by court action, your property will be sold. The effect of such sale will be to deprive you and all those who hold by, through or under you of all interest in the property;

- (3) In addition, the trustee shall cause a copy of the notice of sale described in subsection (1)(f) of this section (excluding the acknowledgment) to be published in a legal newspaper in each county in which the property or any part thereof is situated, once on or between the thirty-fifth and twenty-eighth day before the date of sale, and once on or between the fourteenth and seventh day before the date of sale;
- (4) On the date and at the time designated in the notice of sale, the trustee or its authorized agent shall sell the property at public auction to the highest bidder. The trustee may sell the property in gross or in parcels as the trustee shall deem most advantageous;
- (5) The place of sale shall be at any designated public place within the county where the property is located and if the property is in more than one county, the sale may be in any of the counties where the property is located. The sale shall be on Friday, or if Friday is a legal holiday on the following Monday, and during the hours set by statute for the conduct of sales of real estate at execution;
- (6) The trustee has no obligation to, but may, for any cause the trustee deems advantageous, continue the sale for a period or periods not exceeding a total of one hundred twenty days by (a) a public proclamation at the time and place fixed for sale in the notice of sale and if the continuance is beyond the date of sale, by giving notice of the new time and place of the sale by both first class and either certified or registered mail, return receipt requested, to the persons specified in subsection (1)(b)(i) and (ii) of this section to be deposited in the mail (i) not less than four days before the new date fixed for the sale if the sale is continued for up to seven days; or (ii) not more than three days after the date of the continuance by oral proclamation if the sale is continued for more than seven days, or, alternatively, (b) by giving notice of the time and place of the postponed sale in the manner and to the persons specified in subsection (1)(b), (c), (d), and (e) of this section and publishing a copy of such notice once in the newspaper(s) described in subsection (3) of this section, more than seven days before the date fixed for sale in the notice of sale. No other notice of the postponed sale need be given;
- (7) The purchaser shall forthwith pay the price bid and on payment the trustee shall execute to the purchaser its deed; the deed shall recite the facts showing that the sale was conducted in compliance with all of the requirements of this chapter and of the deed of trust, which recital shall be prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value, except that these recitals shall not affect the lien or interest of any person entitled to notice under subsection (1) of this section, if the trustee fails to give the required notice to such person. In such case, the lien or interest of such omitted person shall not be affected by the sale and such omitted person shall be treated as if such person was the holder of the same lien or interest and was omitted as a party defendant in a judicial foreclosure proceeding;
- (8) The sale as authorized under this chapter shall not take place less than one hundred ninety days from the date of default in any of the obligations secured;
- (9)

If the trustee elects to foreclose the interest of any occupant or tenant of property comprised solely of a single-family residence, or a condominium, cooperative, or other dwelling unit in a multiplex or other building containing fewer than five residential units, the following notice shall be included as Part X of the Notice of Trustee's Sale:

X. NOTICE TO OCCUPANTS OR TENANTS

The purchaser at the trustee's sale is entitled to possession of the property on the 20th day following the sale, as against the grantor under the deed of trust (the owner) and anyone having an interest junior to the deed of trust, including occupants who are not tenants. After the 20th day following the sale the purchaser has the right to evict occupants who are not tenants by summary proceedings under chapter 59.12 RCW. For tenant-occupied property, the purchaser shall provide a tenant with written notice in accordance with *RCW 61.24.060*;

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- (10) Only one copy of all notices required by this chapter need be given to a person who is both the borrower and the grantor. All notices required by this chapter that are given to a general partnership are deemed given to each of its general partners, unless otherwise agreed by the parties.

NEW SECTION. Sec. 11 A new section is added to chapter 61.24 RCW to read as follows:

- (1) A borrower who has been referred to mediation before the effective date of this section may continue through the mediation process and does not lose his or her right to mediation.
- (2) A borrower who has not been referred to mediation as of the effective date of this section may only be referred to mediation after a notice of default has been issued but no later than twenty days from the date a notice of sale is recorded.
- (3) A borrower who has not been referred to mediation as of the effective date of this section and who has had a notice of sale recorded may only be referred to mediation if the referral is made before twenty days have passed from the date the notice of sale was recorded.

Sec. 12 RCW 61.24.172 and 2011 c 58 s 11 are each amended to read as follows:

The foreclosure fairness account is created in the custody of the state treasurer. All receipts received under RCW 61.24.174 must be deposited into the account. Only the director of the department of commerce or the director's designee may authorize expenditures from the account. Funding to agencies and organizations under this section must be provided by the department through an interagency agreement or other applicable contract instrument. The account is subject to allotment procedures under chapter 43.88 RCW, but an appropriation is not required for expenditures. Expenditures from the account must be used as follows: (1) No less than eighty seventy-six percent must be used for the purposes of providing housing counselors for counseling activities to benefit borrowers, except that this amount may be less than eighty seventy-six percent only if necessary to meet the funding level specified for the office of the attorney general under subsection (2) of this section and the department under subsection (4) of this section; (2) up to six percent, or six hundred fifty-five thousand dollars per biennium, whichever amount is greater, to the office of the attorney general to be used by the consumer protection division to enforce this chapter; (3) up to two percent to the office of civil legal aid to be used for the purpose of contracting with qualified legal aid programs for legal representation of homeowners in matters relating to foreclosure. Funds provided under this subsection (3) must be used to supplement, not supplant, other federal, state, and local funds; (4) up to nine thirteen percent, or four hundred fifty-one five hundred ninety thousand dollars per biennium, whichever amount is greater, to the department to be used for implementation and operation of the foreclosure fairness act; and (5) up to three percent to the department of financial institutions to conduct homeowner prepurchase and postpurchase outreach and education programs as defined in RCW 43.320.150.

The department shall enter into interagency agreements to contract with the Washington state housing finance commission and other appropriate entities to implement the foreclosure fairness act.

Sec. 13 RCW 61.24.010 and 2009 c 292 s 7 are each amended to read as follows:

- (1) The trustee of a deed of trust under this chapter shall be:
 - (a) Any domestic corporation or domestic limited liability corporation incorporated under Title 23B, 25, 30, 31, 32, or 33 RCW of which at least one officer is a Washington resident; or
 - (b) Any title insurance company authorized to insure title to real property under the laws of this state, or any title insurance agent licensed under chapter 48.17 RCW; or
 - (c) Any attorney who is an active member of the Washington state bar association at the time the attorney is named trustee; or
 - (d) Any professional corporation incorporated under chapter 18.100 RCW, any professional limited liability company formed under chapter 25.15 RCW, any general partnership, including limited liability partnerships, formed under chapter 25.04 RCW, all of whose shareholders, members, or partners,

respectively, are either licensed attorneys or entities, provided all of the owners of those entities are licensed attorneys, or any domestic corporation wholly owned by any of the entities under this subsection (1)(d); or

- (e) Any agency or instrumentality of the United States government; or
 - (f) Any national bank, savings bank, or savings and loan association chartered under the laws of the United States.
- (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.
- (3) The trustee or successor trustee shall have no fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust.
- (4) The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor.

Sec. 14 RCW 61.24.050 and 1998 c 295 s 7 are each amended to read as follows:

When delivered (1) Upon physical delivery of the trustee's deed to the purchaser, or a different grantee as designated by the purchaser following the trustee's sale, the trustee's deed shall convey all of the right, title, and interest in the real and personal property sold at the trustee's sale which the grantor had or had the power to convey at the time of the execution of the deed of trust, and such as the grantor may have thereafter acquired. Except as provided in subsection (2) of this section, if the trustee accepts a bid, then the trustee's sale is final as of the date and time of such acceptance if the trustee's deed is recorded within fifteen days thereafter. After a trustee's sale, no person shall have any right, by statute or otherwise, to redeem the property sold at the trustee's sale.

(2)

- (a) Up to the eleventh day following the trustee's sale, the trustee, beneficiary, or authorized agent for the beneficiary may declare the trustee's sale and trustee's deed void for the following reasons:
 - (i) The trustee, beneficiary, or authorized agent for the beneficiary assert that there was an error with the trustee foreclosure sale process including, but not limited to, an erroneous opening bid amount made by or on behalf of the foreclosing beneficiary at the trustee's sale;
 - (ii) The borrower and beneficiary, or authorized agent for the beneficiary, had agreed prior to the trustee's sale to a loan modification agreement, forbearance plan, shared appreciation mortgage, or other loss mitigation agreement to postpone or discontinue the trustee's sale; or
 - (iii) The beneficiary or authorized agent for the beneficiary had accepted funds that fully reinstated or satisfied the loan even if the beneficiary or authorized agent for the beneficiary had no legal duty to do so.
 - (b) This subsection does not impose a duty upon the trustee any different than the obligations set forth under RCW 61.24.010 (3) and (4).
- (3) The trustee must refund the bid amount to the purchaser no later than the third day following the postmarked mailing of the rescission notice described under subsection (4) of this section.

(4)

No later than fifteen days following the voided trustee's sale date, the trustee shall send a notice in substantially the following form by first-class mail and certified mail, return receipt requested, to all parties entitled to notice under RCW 61.24.040(l) (b) through (e):

NOTICE OF RESCISSION OF TRUSTEE'S SALE

NOTICE IS HEREBY GIVEN that the trustee's sale that occurred on (trustee's sale date) is rescinded and declared void because (insert the applicable reason(s) permitted under RCW 61.24.050(2)(a)).

The trustee's sale occurred pursuant to that certain Notice of Trustee's Sale dated,, recorded,, under Auditor's File No., records of County, Washington, and that certain Deed of Trust dated,, recorded,, under Auditor's File No., records of County, Washington, from, as Grantor, to, as, as original Beneficiary, concerning the following described property, situated in the County(ies) of, State of Washington, to wit:

(Legal description)

Commonly known as (common property address)

- (5) If the reason for the rescission stems from subsection (2)(a) (i) or (ii) of this section, the trustee may set a new sale date not less than forty-five days following the mailing of the notice of rescission of trustee's sale. The trustee shall:
- (a) Comply with the requirements of RCW 61.24.040(1) (a) through (f) at least thirty days before the new sale date; and
 - (b) Cause a copy of the notice of trustee's sale as provided in RCW 61.24.040(1)(f) to be published in a legal newspaper in each county in which the property or any part of the property is situated, once between the thirty-fifth and twenty-eighth day before the sale and once between the fourteenth and seventh day before the sale.

NEW SECTION. Sec. 15 Section 12 of this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately. Passed by the House March 6, 2012. Passed by the Senate March 5, 2012. Approved by the Governor March 29, 2012. Filed in Office of Secretary of State March 29, 2012.

History

Approved by the Governor March 29, 2012

Effective June 7, 2012 - Except section 12, which becomes effective March 29, 2012

READ FIRST TIME 01/31/12.

WASHINGTON ADVANCE LEGISLATIVE SERVICE
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