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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON IN:

KRISTIN BAIN,

Plaintiff,

v.

METROPOLITAN MORTGAGE GROUP, INC.; INDYMAC BANK, FSB; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS; REGIONAL TRUSTEE SERVICE; FIDELITY NATIONAL TITLE; and Doe Defendants 1 through 20, inclusive,

Defendants.

Case No. 86206-I

PLAINTIFF KRISTIN BAIN'S
OPENING BRIEF

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I. INTRODUCTION

Kristin Bain is a young woman with severe ADD who purchased her first home in 2007 so that she could live on her own. Ms. Bain does not earn a great deal when employed, but she purchased the condominium by using money from a trust fund for the down payment and she receives a modest amount monthly from the trust. During the loan application and purchase process, Ms. Bain's mother repeatedly advised the mortgage broker of her income restrictions and difficulty in understanding the documents and the transactions. At the same time, Ms. Bain's parents allowed her to handle much of the transaction on her own to promote her independence. Ms. Bain signed the documents but did not understand their terms. By the end of 2008 after losing her job, Ms. Bain was facing a pending foreclosure. Ms. Bain sought and obtained a temporary restraining order to halt the foreclosure sale in connection with a lawsuit filed in the King County Superior Court. Shortly thereafter, the case was removed to federal court by the Defendants. Ms. Bain maintains that the loan violated federal and state lending statutes and that the loan required monthly payments that she could not afford from the outset.

When Ms. Bain signed the loan, the "Lender" identified on the Promissory Note was IndyMac Federal Bank, F.S.B. ("IndyMac"). The identity of the "Lender" defendant has changed multiple times throughout

this case because of the failure and seizure of IndyMac by the Federal Deposit Insurance Corporation (“FDIC”) and the supposed transfer of the ownership interest in the loan, which still remains undocumented in this case. The foreclosing trustee, Regional Trustee Services (“RTS”) and the “nominee” for the “Lender” and the “beneficiary” identified on the Deed of Trust, Mortgage Electronic Registration Systems, Inc. (“MERS”) were originally named as defendants. Presently, the defendant identified as the loan owner or note holder is Deutsche Bank National Trust Company (“Deutsche”) on behalf of an unidentified trust and OneWest Bank, F.S.B. (“OneWest”) has been identified as the mortgage loan servicer.

Ms. Bain maintains that the foreclosure was wrongfully initiated and that the actions of the foreclosing entities were not in conformity with the requirements of the Deed of Trust Act (“DTA”), RCW 61.24, *et seq.* The central issue before this Court is whether the entity that purportedly initiated and in whose name the foreclosure was brought, MERS, is a “beneficiary” as defined by the DTA, RCW 61.24.005(2). A plain reading of the statute’s language and its legislative history makes clear that MERS is not a beneficiary under Washington law. “The holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.” RCW 61.24.005(2). Therefore, MERS could not legally initiate the

foreclosure sale and the trustee conducting the foreclosure was not properly appointed as the trustee by the beneficiary, as required by the Washington DTA. RCW 61.24, *et seq.*

I. STATEMENT OF ISSUES PRESENTED ON APPEAL

This Court has framed the certified question as follows:

Whether Mortgage Electronic Registration Systems, Inc., a corporation formed to provide a national electronic registry to track the transfer of ownership interests and servicing rights in mortgage loans, and nominated by many lenders as mortgagee of record and beneficiary under deeds of trust, may lawfully serve as beneficiary under the Washington Deed of Trust Act where it never held the underlying promissory note.

In answer to the certified question, Ms. Bain argues that under Washington law MERS cannot lawfully serve as a beneficiary where it never held the note.

Ms. Bain respectfully requests that this Court provide the federal court and Washington state courts with guidance as to the remedies available to a borrower who prevents the completion of a foreclosure sale initiated in violation of the requirements of the Deed of Trust Act and whether those remedies include the ability to bring a claim under the Consumer Protection Act (“CPA”), RCW 19.86, *et seq.*

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II. STATEMENT OF THE CASE

A. Mortgages and The Deed of Trust Act

Under English common law, mortgages were a conveyance of land from a borrower to a lender with a condition that the land would be conveyed back to the borrower if the borrower paid his debt pursuant to the terms of a promissory note. William B. Stoebuck & John W. Weaver 18 Wash. Prac., Real Estate §17.1. Such a transaction required two documents: 1) the obligation, which was traditionally memorialized as a promissory note, and 2) the mortgage or the deed, which was understood to serve as security for repayment of the promissory note. *Id.* The mortgage is ancillary to the obligation and serves only as security for the obligation. *Id.* The obligation can exist without the security, but the security cannot exist without the obligation. *Id.*

While some United States jurisdictions still authorize mortgages that act as a conveyance of land from the borrower to the lender, Washington State is a “lien-theory” state, meaning that the mortgage is understood to be a lien against the property rather than a conveyance of the ownership interest in the property. *Id.* Under Washington law, judicial foreclosure, which requires the filing of a lawsuit, is the exclusive method of foreclosing a straight mortgage. *Id.* at § 19.1.

The Deed of Trust Act, RCW 61.24, *et seq.*, was passed by the Washington Legislature in 1965 as a way to allow lenders the ability to foreclose on property used to secure a debt without having to file a lawsuit. *Id.* at § 20.1. The statutory deed of trust is a species of mortgage. *Rustad Heating & Plumbing Co. v. Waldt*, 91 Wash.2d 372, 376, 588 P.2d 1153, 1155 (1979).

Unlike a mortgage, which involves only two parties, a borrower and a lender, a deed of trust involves three parties, a borrower a lender and a trustee. *Stoebuck & Weaver* at § 17.3. The borrower or grantor conditionally conveys a lien on the property to the trustee in order to secure the borrower's repayment of their loan to the beneficiary or lender. John A. Gose, *Washington Real Property Desk Book*, p. 47-3 (1996). The trustee then has the authority to foreclose on the lien if the borrower defaults on his obligation. *Id.*

In 1998, the DTA underwent significant clarification and amendment, including a new definition section. Laws of 1998, ch. 295, ESSB 6191. The 1998 bill reports indicate that the intent of the amendments were to modernize the deed of trust act procedures and to reflect the current practices. ESSB 6191, Final Bill Report, at 1 (Wa. 1998). In the new definition section, the term "beneficiary" was defined to reflect what had been evident in the years prior to the addition of the

section: “‘Beneficiary’ means the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.” Laws of 1998, ch. 295, ESSB 6191 p. 1; RCW 61.24.005(2).

B. The Mortgages Electronic Registration System, Inc. and Affiliated Companies.

The origins of the Mortgage Electronic Registration System can be traced back to 1993 when a task force of mortgage finance companies drafted a proposal for the creation of an electronic book entry system for tracking mortgage loans. Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. Cin. L. Rev. 1359, 1368 (2010). Two years after the release of the initial white paper, MERS was incorporated in Delaware. *Id.* at 1370. The MERS system is “a national electronic registry system that tracks the changes in servicing rights and beneficial ownership interests in mortgage loans that are registered on the registry.” Sharon McGann Horstkamp, *MERS Case Law Overview*, 64 Consumer Fin. L.Q. Rep. 458 (2010). MERSCORP, Inc., which is not a defendant in this lawsuit, is the company that owns and operates the MERS registry system. Mortgage Electronic Registration Systems, Inc. (“MERS”), which is a defendant in the instant lawsuit, is a wholly-owned subsidiary of MERSCORP, Inc. *Id.*

The purpose of MERS, the subsidiary, is to be “the mortgagee of record and nominee for the beneficial owner,” of mortgage loans tracked by the registry. *Id.* The question presented to this Court is whether, given this description of its business, MERS can act as a “beneficiary” under the laws of Washington state. RCW 61.24.005(2).

C. The Instant Transaction.

Ms. Bain obtained a home loan in order to purchase her first home and alleges that the entities providing the loan did not comply with federal and state lending laws. (Dkt. 53). In connection with that loan, Ms. Bain signed a Promissory Note payable to IndyMac, F.S.B. which was identified as the “Lender”. (Dkt. 147-2). Ms. Bain also signed a Deed of Trust which listed MERS as the “Beneficiary” and Stewart Title as the Trustee. (Dkt. 147-3). Even though the Deed of Trust asserts that MERS is the beneficiary, it reads that MERS “is acting solely as a nominee for Lender [IndyMac Bank, F.S.B.] and Lender’s successors and assigns.” *Id.* at 2.

Ms. Bain struggled to make the payments on the loan and when she lost her job, she went into default and a foreclosure was initiated. (Dkt. 53 p. 3). Ms. Bain challenged the validity of the foreclosure and asserted in her Complaint not only her claims of violations of lending laws but also that the foreclosure, even though she was in default, was not

initiated in compliance with the requirements of the DTA. (Dkt. 112).

In her Responses to the Motions for Summary Judgment, Ms. Bain outlined the process by which the various defendants attempted to foreclose on her. (Dkt. 148). Ms. Bain first received a Notice of Default indicating that she was delinquent and had thirty (30) days to cure the default. (Dkt. 53 p. 3). During the time that Ms. Bain was receiving initial foreclosure notices, Bethany Hood, an employee of dismissed defendant Lenders Processing Services (“LPS”) signed an Assignment of Deed of Trust identifying herself as a Vice President of MERS “as nominee for its successors and assigns”. (Dkt. 67 p. 3). The Assignment asserts that MERS is assigning Ms. Bain’s loan to IndyMac – the original lender. (Dkt. 1 Ex. A to Declaration of Melissa Huelsman). It was signed on September 3, 2008 and recorded in King County on September 9, 2008. *Id.*

Prior to the execution and recording of the Assignment, Christina Allen, another LPS employee, signed an Appointment of Successor Trustee document on August 26, 2008, supposedly on behalf of IndyMac, purporting to appointment RTS as the trustee under the Deed of Trust. *Id.* at Ex. B. Next to Ms. Allen’s signature dated August 26, 2008, there is a handwritten notation that the Appointment is “effective 9/3/08”; however, the Appointment document was not recorded until September 9, 2008,

immediately after the Assignment was recorded. *Id.* LPS admitted in its pleadings that Ms. Hood is not an actual Vice President of MERS and Ms. Allen is not an actual Assistant Vice President of IndyMac. (Dkt. 74 pp. 13 and 22). The LPS documents used to verify the sham appointment of LPS employees as officers of MERS and IndyMac make clear that they were done solely for the purpose of executing documents in connection with foreclosures – the very documents that give rise to Ms. Bain’s claims that the foreclosure was done in contravention of Washington law. *Id.*

In conjunction with its Motion for Summary Judgment, RTS filed the Declaration of Deborah Kaufman, Vice President of RTS, in which she asserted that RTS “properly executed a Notice of Default . . . on August 26, 2008 as agent for MERS and was aware that the beneficial interest under said Deed of Trust was ultimately going to be assigned to IndyMac Federal Bank, FSB”. (Dkt. 92 p. 3). Ms. Kaufman and RTS were very careful in the pleadings not to identify how it supposedly obtained this information, as well as who advised it that it was going to be appointed as trustee and most importantly, who instructed it to foreclose. *Id.*

Presumably RTS was intentionally avoiding the issue since the DTA only permits the “beneficiary”, as defined within the statute, to appoint the trustee and to initiate a foreclosure sale. RCW 61.24.005(2); Dkt. 92. Ms. Bain maintains that RTS was loathe to openly admit that it only received

instructions regarding the foreclosure came from the servicing company, IndyMac through the LPS software program, and that no one at RTS ever knew or cared whether the actual beneficiary, as defined under Washington law, was providing it with instructions to conduct the foreclosure sale. (Dkt. 92, 93, 96, 97, 99, 100, 104, 105, 122 and 128.) The record and lack thereof supports this conclusion.

Ms. Bain received a Notice of Trustee's Sale ("NOTS") from RTS indicating that the foreclosure sale of her home was scheduled to take place on December 26, 2008. (Dkt. 92-2 pp. 52-55). The foreclosure was initiated by RTS contending it was the trustee and done on behalf of the purported "beneficiary", MERS. During the litigation of the case, there was a great deal of obfuscation by the defendants in identifying the note holder and/or owner of the loan at any time since it was originally signed. Ms. Bain had to bring and respond to numerous motions in an attempt to identify the correct defendant and amend the complaint. (Dkt. 21, 22, 23, 59, 60, 65, 66, 67, 68, 69, 109, 110). The limited information that was provided by the various defendants seems to indicate that the actual owner of the loan is Deutsche Bank acting as a trustee for an unidentified trust. (Dkt. 109, 110, 131, 138, 139, 140, 146, 147, 148, 150, 153) Thus, it appears that the note was sold at some point in time, perhaps long before the foreclosure was even initiated, to a securitized trust and IndyMac has

not been the “Lender” since shortly after the loan was originally made. *Id.*; Dkt. 86, 94, 95, 101, 102, 103, 107, 132, 133, 134, 145). IndyMac was the servicer and after the FDIC seizure, OneWest assumed that role but has refused to identify the note holder to Ms. Bain or the Court. *Id.*

LPS was named as a defendant in this case because of its employees’ acts of signing documents in connection with the foreclosure, as outlined above. LPS described itself in its Motion for Summary Judgment as “a national provider of mortgage processing services, settlement services and default solutions.” (Dkt. 42-2). LPS describes its role in the “non-judicial foreclosure process . . . as an agent for banks and MERS, to process the necessary paperwork to pursue foreclosure when a grantor goes into default.” *Id.* LPS further admitted in a footnote that,

MERS acts as a nominee in county land records for lenders and **servicers**. Thus, no matter how many times a loan’s servicing is traded, MERS remains the nominal mortgagee. . . . When a loan goes into default, MERS will reassign the deed of trust to the **current loan servicer**, so that foreclosure proceedings can be pursued.

LPS’ Motion for Summary Judgment (Dkt. 42-2 fn 1) (emphasis added).

LPS’ statement speaks volumes and makes clear the sham nature of the assertions made on the Assignment and Appointment of Successor Trustee documents as regards its role, its employees’ job titles, the role of IndyMac and that of MERS. *Id.* The Assignment signed by Ms. Hood on

behalf of MERS and purportedly assigning the beneficial interest in the Deed of Trust to IndyMac was an “assignment” initiated by LPS apparently without instruction from anyone and was an “assignment” to the mortgage loan servicer. (Dkt. 42, 43, 48, 51, 53, 54). This means that the Appointment of Successor Trustee document, also signed by an LPS employee purportedly on behalf of IndyMac, contravened Washington state law because only an actual “beneficiary”, as defined under Washington law at RCW 61.24.005(2), may appoint a successor trustee. *Id.*; RCW 61.24.010(2).¹ “Beneficiary” under the DTA is defined as the “holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.” RCW 61.24.005(2).

Although Judge Coughenour dismissed LPS on summary judgment, Ms. Bain maintains that LPS, and in turn MERS, violated the DTA because the documents that were executed by its employees contained false information, such as that MERS actually assigned Ms. Bain’s Deed of Trust to IndyMac, that MERS had the legal authority to initiate a foreclosure of Ms. Bain’s home and to appoint a successor

¹ “. . . 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. RCW 61.24.010(2).

trustee. (Dkt. 66, 67, 80) More importantly for this Court, the information regarding LPS and its involvement in the foreclosure is relevant to the discussion of MERS' involvement since it was an LPS employee who undertook one of the two affirmative acts on behalf of MERS in this case – signing the Assignment of Deed of Trust. MERS' other specific act herein was the initiation of the foreclosure in its name, but the evidence available to date makes it clear that that process was actually controlled by the purported trustee, RTS, and not based upon an affirmative instruction from MERS. *Id.*; Dkt. 44, 45, 46, 47, 48, 51, 53, 54, 77, 78. Certainly Ms. Bain maintains that MERS had no such legal authority to so act.

The FDIC was substituted into the case following the seizure of IndyMac and eventually was dismissed based upon the successive representations made to counsel for Plaintiff regarding the sale of the bank and its assets. (Dkt. 59, 60, 65, 66, 67, 68, 69, 80, 86, 94, 95, 101, 102, 103, 107, 108, 109, 110, 155).

When Judge Coughenour entered his Order, which included rulings on the Motions for Summary Judgment brought by RTS, MERS, One West and Deutsche Bank (Dkt. 155), he noted that if MERS is not a beneficiary under the DTA, then its assignment to IndyMac was “erroneous” and RTS’ appointment as a successor trustee is “erroneous” and RTS “may have breached its duty of good faith.” *Id.*

MERS's attempt to serve as the beneficiary may have been improper under state law and it may have led to widespread confusion regarding home ownership, payment delivery, and negotiable positions. If MERS violated state law, its conduct may very well be classified as "unfair" under the CPA. There is no doubt that MERS's conduct impacts the public interest. *See Hangman Ridge Training Stables, Inc., v. Safeco Title Ins. Co.*, 719 P.2d 531, 537-38 (Wash. 1986) (listing factors for determining public interest); Peterson, *supra*, at 1362 ("Although MERS is a young company, 60 million mortgage loans are registered on its system."); R.K. Arnold, *Yes, There Is Life on MERS*, 11 Prob. & Prop. 32, 33 (1997) ("Some have called MERS the most significant event for the mortgage industry since the formation of Fannie Mae and Freddie Mac. Others have compared it to the creation of uniform mortgage instruments, which have become standard throughout the residential mortgage industry.") And the harm Plaintiff may have suffered because of MERS's conduct may include expending resources to avert an unlawful foreclosure and preventing Plaintiff from identifying the real beneficiary and negotiating a new arrangement to avoid foreclosure.

(Dkt. 155 p. 11). This is a part of the reason that Ms. Bain is asking this Court to rule on Judge Coughenour's question as to whether a violation of the DTA may constitute a violation of the CPA.

As noted by Judge Coughenour in his first order indicating that he wanted guidance from this Court on Ms. Bain's state law claims,

A ruling favorable to Plaintiff in this case and others like it cannot and should not create a windfall for all homeowners to avoid upholding their end of the mortgage bargain – paying for their homes. But a homeowner's failure to make payments cannot grant lenders trustees and so-called beneficiaries like MERS license to ignore the law and foreclose using any means necessary.

Id. at 12. See also, ORDER CERTIFYING QUESTION TO THE WASHINGTON SUPREME COURT (Dkt. 159, 161).

III. ARGUMENT

A. MERS Cannot be a “Beneficiary” as Defined by the Washington Legislature.

1. *MERS’ business model directly contravenes the requirements of Washington’s Deed of Trust Act and requires a separation of the beneficiary of the deed of trust from the holder of the promissory note secured by the deed of trust, which is inconsistent with the DTA.*

MERS has created a business model that is not consistent with Washington State law. MERS serves two primary purposes. First, the parent company of MERS, MERSCORP, Inc. owns and operates “a national electronic registry system that tracks the changes in servicing rights and beneficial ownership interests in mortgage loans.” Sharon McGann Horstkamp,² *MERS Case Law Overview*, 64 CONFLQR 458 (2010). The defendant in this lawsuit, Mortgage Electronic Registration Systems, Inc., which is a wholly-owned subsidiary of MERSCORP, Inc., claims to serve as the “mortgagee of record and nominee for the beneficial owner of the mortgage loan.” *Id.*

A Supreme Court decision from Nebraska described the manner in which MERS conducts its business:

² According to footnote a2 of this article, Sharon McGann Horstkamp is Vice President and General Counsel of MERSCORP, Inc.

MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignments of the members' interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members.

Mortgage Elec. Reg. Sys., Inc. v. Nebraska Depart. of Banking, 270 Neb. 529, 530, 704 N.W.2d 784 (2005). Because of this description of the manner in which it conducts its business, MERS was spared from having to be licensed as a mortgage banker in Nebraska. *Id.*

The Nebraska Supreme Court went on to note the following factual findings that were adopted by it from the trial court record:

The district court went on to discuss the elements of the contract between MERS and its members, referring specifically to a document entitled "Terms and Conditions," that states, in part:

MERS shall serve as mortgagee of record with respect to all such mortgage loans solely as a nominee, in an administrative capacity, for the beneficial owner or owners thereof from time to time. MERS shall have no rights whatsoever to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans. MERS agrees not to assert any rights (other than rights specified in the

Governing Documents) with respect to such mortgage loans or mortgaged properties.

The document also states that “MERS shall at all times comply with the instructions of the beneficial owner of mortgage loans as shown on the MERS® System.”

Id. at 530-531 (emphasis added). MERS’ own documents then make clear that it has no relationship to the loan or right to payment except on a computer system and the MERS deed of trust document that is designed to help the actual note holder avoid having to pay recording fees to the various counties around the country.

The first of the stated two purposes for MERS is a useful and important tool for the mortgage lending industry. It is useful for lenders, servicers, investors, and other MERS members to have access to a registry that tracks information about the millions of home loans in the United States, to the extent that it is actually reliable. It is important to remember that MERS is only as accurate as the people who enter and/or change the information on the system. However, the second purpose presumes that an entity can serve as a “mortgagee of record” or in this case a “beneficiary” and be a separate entity from the owner of the promissory note. The Washington Legislature has gone to the trouble to define beneficiary as “the holder of the instrument or document evidencing the obligations secured by the deed of trust.” RCW 61.24.005(2). In other

words, the beneficiary is defined as the holder of the promissory note that is secured by the deed of trust. *Id.* There is nothing in the Washington DTA which defines an entity such as MERS with no actual relationship to the note or deed of trust. RCW 61.24.005.

A deed of trust foreclosure in Washington State can only occur when the beneficiary has declared the borrower or grantor to be in default. RCW 61.24.030(8)(c). That is to say, a foreclosure can only occur when the holder of the promissory note has determined that the borrower has breached the promissory note. Since MERS is never the holder of the promissory note, it cannot be the “beneficiary” under Washington state law. RCW 61.24.005(2).

2. *History of the Deed of Trust Act and the intended statutory scheme.*

Foreclosure laws, and real property laws more generally, are determined individually by the states. “Foreclosure proceedings are governed by state law.” David R. Greenberg, *Neglected Formalities in the Mortgage Assignment Process and the Resulting Effects on Residential Foreclosures*, 83 Temp. L. Rev. 253, 261 (2010). “Concepts of real property are deeply rooted in state traditions, customs, habits, and laws.” *Reconstruction Finance Corp. v. Beaver County, PA.*, 328 U.S. 204, 210, 66 S.Ct. 992, 995 (1946). There are no federal foreclosure laws, except

those guidelines related to federally insured loans, as real property laws are reserved to the states. *See generally* Patrick A. Randolph, Jr., *The Future of American Real Estate Law: Uniform Foreclosure Laws and Uniform Land Security Interest Act*, 20 Nova L. Rev. 1109 (1996) (arguing that the many disparate foreclosure laws across the states should be harmonized).

In 1965, the Washington Legislature created the Deed of Trust Act, RCW 61.24, *et seq.*, which set out the statutory scheme for nonjudicial foreclosures. Wash. Laws of 1965, ch. 74; *see* Stoebuck & Weaver, § 20.1, at 403. Pursuant to this statutory scheme, a “beneficiary” lends money to a “borrower” and “grantor” for the purpose of purchasing or refinancing real property, and the “borrower/grantor” conveys an estate in the real property to a third-party “trustee” who has the authority to conduct a sale of the real property in the event that the “borrower/grantor” defaults on her obligation to the beneficiary. *Id.* The transaction is documented by the “grantor”, usually identified on the Note as the “borrower”, signing a promissory note wherein she promises to repay the “Lender” under certain terms and within a certain time. The “borrower” also signs a Deed of Trust, in which she is identified as the “grantor”, wherein she grants a security interest in the real property which secures the repayment of the debt evidenced by the Note. *Id.*

The role of the “Lender” in a foreclosure is specifically laid out in the DTA and it is defined in the Act as the “Beneficiary”. The “Beneficiary” is defined as the “holder of the instrument”, which mirrors the scheme outlined in the Uniform Commercial Code (“UCC”), which was also incorporated into the Washington statutory scheme in 1965, the same year as the DTA. Laws of 1965, ch. 157. To enforce the terms of a promissory note, a negotiable instrument, a person must either be the holder or a nonholder in possession with the rights of the holder. RCW 62A.3-203. To act as a “person” entitled to enforce a negotiable instrument under RCW 62A.3-301, that “person” must satisfy all of the prongs of the statute. A “person entitled to enforce” is “(i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of the holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or RCW 62A.3-418(d).” RCW 62A 3-203.

The holder of an instrument is defined in RCW 62A.2-201(20) as the person in possession if the instrument is payable to the bearer or, in the case of an instrument payable to an identified person, the identified person in possession. If the instrument is payable to an identified party other than the possessor, then the possessor is a “nonholder in possession.” In the case of a nonholder in possession, it only has enforcement rights if the

holder has conveyed its enforcement rights. RCW 62A.3-203.

The UCC is concerned only with the negotiable instrument, the Note, and the DTA governs the manner in which the security instrument, the Deed of Trust, may be enforced. The security rights granted in the Deed of Trust may only be enforced when the terms of the Note have been breached, as the Deed of Trust is entirely dependent upon the Note. The DTA requires that the beneficiary of the deed of trust declare a breach of the underlying obligation. In order to foreclose, the notice of default must contain: "A statement that the beneficiary has declared the borrower or grantor to be in default, and a concise statement of the default alleged." RCW 61.24.030(8)(c).

The Deed of Trust "follows" the Note and exists solely to provide an alternative means of enforcing its terms besides litigation. "The debt manifested by the promissory note is the principal obligation; the mortgage only secures payment of the debt and typically cannot be transferred independently." National Consumer Law Center, Foreclosures § 4.4.4.2, The Primacy of the Note (3d ed. 2010). Similarly, there is nothing in the DTA which proscribes how the payments may be collected and by whom, and the only statute which specifically regulates mortgage loan servicing is a federal law, the Real Estate Settlement Procedures Act ("RESPA"). RESPA does not, however, regulate the non-judicial

foreclosure process or the enforcement of deeds of trust. 12 U.S.C. § 2601.

Utilization of the specific provisions of the DTA is the only non-judicial means by which a lender may obtain title to the real property which secures the debt evidenced by the Note. Stoebuck & Weaver at § 20.1; RCW 61.24, *et seq.* The DTA proscribes the detailed process for non-judicial foreclosures and the parameters of a judicial foreclosure. However, a lender has at least two other ways in which it can attempt to enforce repayment of the note. The lender could foreclose judicially pursuant to RCW 61.12, or the lender could choose to “sue on the note”. Without reference to the deed of trust at all, the lender could seek to enforce the borrower’s promise to repay as evidenced by the promissory note.

Pursuant to Washington State’s mortgage foreclosure statute, if a borrower has pledged their property as security for a loan, and the borrower has defaulted on their obligation to repay the loan, the lender can file a lawsuit seeking to recover the secured property. RCW 61.12.040. Under the judicial foreclosure process, the lender seeks a court order authorizing the sheriff to conduct a sale of the property. RCW 6.21.030. However, the purchaser of the property at the sheriff’s sale does not gain possession until eight months after the sheriff’s sale if the lender agrees to

waive a deficiency judgment or twelve months after the sale if the lender intends to pursue a deficiency judgment. RCW 6.23.020(1). During that eight or twelve month period, the borrower has an opportunity to redeem the property by paying the amount that was owed to the lender plus any fees and costs incurred by the lender during the foreclosure process. RCW 6.23.020(2).

In enacting the DTA, the Washington legislature sought to promote three primary goals: “(1) that the nonjudicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and (3) that the process should promote stability of land titles.” *Plein v. Lackey*, 67 P.3d 1061, 1065 (Wash. 2003); *see Cox v. Helenius*, 693 P.2d 683, 686 (Wash. 1985); Joseph L. Hoffman, Comment, *Court Actions Contesting the nonjudicial foreclosure of deeds of trust in Washington*, 59 WASH. L. REV. 323, 330 (1984).

3. *Litigation regarding the Deed of Trust Act.*

Litigation regarding the ramifications of the failure to comply with the requirements of the DTA reached a nadir in 1985 with this Court’s decision in *Cox v. Helenius*, 103 Wn.2d 385, 693 P.2d 683, 686 (Wash. 1985). In that case, the “trustee in a deed of trust foreclosure was made aware of an action for damages and reconveyance of the deed of trust

pending against the grantee of the deed of trust. He was also aware that the grantors believed their action had halted foreclosure proceedings. Nevertheless, he initiated foreclosure proceedings and held a trustee's sale in which the grantor's home, with an equity of at least \$100,000 existing in the grantor, was sold for \$11,784.00." *Cox* at 385-386. Because the trustee was aware that an action disputing the underlying obligation had been initiated by the grantors, one of the prerequisites to initiating a non-judicial foreclosure had not been met. *Id.* (A non-judicial foreclosure cannot be commenced if an action on the obligation has been commenced.) RCW 61.24.020.

In describing the duties of a trustee who has the power to conduct the non-judicial foreclosure sale, the *Cox* Court stated:

Even if the statutory requisites to foreclosure had been satisfied and the Coxes had failed to properly restrain the sale, this trustee's actions, along with the grossly inadequate purchase price, would result in a void sale. *See Lovejoy v. Americus*, 111 Wn. 571, 574, 191 P. 790 (1920); *Miebach v. Colasurdo* 102 Wn.2d 170, 685 P.2d 1074 (1984). Because the deed of trust foreclosure process is conducted without review or confirmation by a court, the fiduciary duty imposed upon the trustee is exceedingly high.

Washington courts do not require a trustee to make sure that a grantor is protecting his or her own interest. However, a trustee of a deed of trust is a fiduciary for both the mortgagee and mortgagor and must act impartially between them. G. Osborne, G. Nelson & D. Whitman, *Real Estate Finance Law* § 7.21 (1979).

The trustee is bound by his office to present the sale under every possible advantage to the debtor as well as to the creditor. He is bound to use not only good faith but also every requisite degree of diligence in conducting the sale and to attend equally to the interest of the debtor and creditor alike.

Swindell v. Overton, 310 N.C. 707, 712, 314 S.E.2d 512 (1984). See *Blodgett v. Martsch*, 590 P.2d 298, 302 (Utah 1978) ("duty of the trustee under a trust deed is ... to treat the trustor fairly and in accordance with a high punctilio of honor"); *McHugh v. Church*, 583 P.2d 210, 213 (Alaska 1978); *Spires v. Edgar*, 513 S.W.2d 372 (Mo. 1974); *Whitlow v. Mountain Trust Bank*, 215 Va. 149, 207 S.E.2d 837 (1974); *Woodworth v. Redwood Empire Sav. & Loan Ass'n*, 22 Cal.App.3d 347, 99 Cal.Rptr. 373 (1971).

We agree with a recent Alaska decision which emphasizes that a trustee's management responsibilities under a deed of trust are less extensive than those of trustees in other fiduciary settings. *McHugh*, 583 P.2d at 214. See also *S & G Inv. Inc. v. Home Fed. Sav. & Loan Ass'n*, 505 F.2d 370, 377 n. 21 (D.C. Cir.1974). The trustee of a deed of trust is not required to obtain the best possible price for the trust property. Cf., e.g., *Allard v. Pacific Nat'l Bank*, 99 Wn.2d 394, 406, 663 P.2d 104 (1983). Nonetheless, the trustee must "take reasonable and appropriate steps to avoid sacrifice of the debtor's property and his interest." *McHugh*, 583 P.2d at 214.

Cox v. Helenius, *supra*, at 388-389. Thus, this Court emphasized the duties of a trustee to both parties in the process and made clear the importance of statutory compliance. Certainly any person or entity conducting a foreclosure sale in Washington state after the *Cox* decision should have been well aware that Washington courts expected strict adherence to the statute by everyone, and not just the foreclosing trustee.

“Because the deed of trust foreclosure process is conducted without review or confirmation by a court, the fiduciary duty imposed upon the trustee is exceedingly high.” *Id.* In this case, the duties of the trustee are directly impacted by this Court’s decision as to whether MERS can cause the initiation of a non-judicial foreclosure sale when it is not the “beneficiary”. As Judge Coughenour noted, if MERS cannot act as the beneficiary, then “RTS’ appointment as a successor trustee is ‘erroneous’ and RTS ‘may have breached its duty of good faith.’” (Dkt. 155)

4. *Changes to the Deed of Trust Act and codification of specific definitions.*

The DTA has been amended several times since 1965 and one of the most comprehensive amendments occurred in 1998. The Legislature amended 12 of the 14 sections of the DTA and added another four sections. Craig A. Fielden, *An Overview of Washington’s 1998 Deed of Trust Act Amendments*, Washington State Bar News, July 1998 at 23-27 (“Fielden, Bar News”). One of the most significant additions was the Definitions section, RCW 61.24.005, which defined “eleven key terms”, including “beneficiary”. *Id.*

Below are the definitions added in 1998 which have bearing on the issues before this Court in this case:

(2) “Beneficiary” means the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding

persons holding the same as security for a different obligation.

(3) “Borrower” means a person or general partner in a partnership, including a joint venture, that is liable for all or part of the obligations secured by the deed of trust under the instrument or other document that is the principal evidence of such obligations, or the person’s successors if they are liable for those obligations under a written agreement by the beneficiary.

....

(6) “Grantor” means a person, or its successors, who executes a deed of trust to encumber the person’s interest in the property as security for the performance of all or part of the borrower’s obligations.

....

(7) “Guarantor” means any person and its successors who is not a borrower and who guarantees any of the obligations secured by a deed of trust in any written agreement other than the deed of trust.

RCW 61.24.005(2), (3), (6) and (7). These definitions make clear that the note is the “instrument or document evidencing the obligations secured by the deed of trust”, i.e., the note, and that it is separate and distinct from the deed of trust which only “secures” the obligation. *Id.* The “Borrower” and “Grantor” are clearly the same person, but she is identified separately because of the two different documents that she is required to sign – the note and the deed of trust. *Id.* The language used in the Definitions Section makes clear that the documents serve separate functions and purposes. One evidences the debt and the other secures the debt with the real property. *Id.* Similarly, as is pointed out in the article describing the

changes, the distinction between the “Borrower” and the “Guarantor” is important as regards the actual obligation, but allows the “Guarantor” to also execute a deed of trust to secure the debt. *Id.*; Fielden, Bar News at 4-5.

Prior to the changes made to the DTA in 1998, a Washington-licensed title insurance company, Security Title Insurance Company, in 1966 was going to do business acting as a foreclosing trustee and it published a pamphlet for its customers and for solicitation of customers who wanted it to act as a foreclosing trustee. William K. Roberts & H. Eugene Tully, *An Introduction to Washington Deeds of Trust*, Security Title Company (1966) (“Security Title Pamphlet”). The Security Title Pamphlet contains descriptions of the parties’ and their relationship to each other which is consistent with the language that was added to the DTA in 1998. In it, the beneficiary is repeatedly identified as the “lender”. *Id.* “Under a deed of trust the grantor (owner, borrower, trustor) conditionally conveys title to his real property to the trustee (grantee) **to secure grantor’s repayment to beneficiary (lender) of the loan evidenced by the note.**” *Id.* (emphasis added). This supports Ms. Bain’s assertion that the codification of the definitions conformed to the manner in which the words had been defined in usage prior to becoming part of the Code.

Consistent with the historical perspective on who could initiate a foreclosure, the Final Bill Report and Senate Bill Report utilized by the Legislature when making the 1998 amendments reads as follows: “The Deed of Trust Act is amended to clarify and modernize its procedures, and **reflect current practices.**” Laws of 1998, ch. 295, ESSB 6191 p. 1 (emphasis added). This means that the entities conducting foreclosure sales prior to 1998 were conducting foreclosure sales in the manner proscribed by the formalized language added to the DTA by way of the Definitions Section and elsewhere. *Id.*; RCW 61.24.005. The Senate Bill Report also reflects the testimony in support of the changes which noted that the “Bill represents results of a consensus of professionals in the field.” *Id.* These documents reinforce Ms. Bain’s position that the Legislature clearly indicated its position that the “obligation” is separate and distinct from the security interest obtained by executing the deed of trust, which is consistent with the UCC, Article 3 and its treatment of promissory notes as negotiable instruments, not security instruments. RCW 61.24.005; RCW 62A 3-301, *et seq.*

The DTA was again amended in the years after 1998 to bring more clarity to the non-judicial foreclosure process as more and more issues arose from litigation surrounding non-judicial foreclosures. In 2009 there were a number of changes made to the DTA, including the creation

of an additional “meet and confer” requirement which the Legislature hoped would induce lenders to work with borrowers on trying to negotiate loan modifications prior to the initiation of the formal non-judicial foreclosure process. RCW 61.24.031. (This section was amended again in 2011 in order to provide for a much broader and more specific foreclosure mediation program, The Foreclosure Fairness Act.)

In direct response to Division I’s decision in *Brown v. Household*, 146 Wn.App. 157 P.3d 233 (2008), the 2009 Legislature also amended the DTA to specifically provide that borrowers in owner-occupied, residential property were free to pursue claims for fraud and misrepresentation, violations of RCW 19, including the CPA and “failure of the trustee to materially comply with the provisions of this chapter” even if they failed to try to prevent the sale. RCW 61.24.127(1)(a)-(c). Borrowers are required to bring the claims within two (2) years of the foreclosure and are only allowed to make claims for money damages. RCW 61.24.127(2). That particular amendment was a specific rebuttal to the *Brown* decision and further demonstrates the importance that the Legislature is placing upon the requirement to adhere strictly to the provisions of the DTA, even allowing claims to be brought by those who sit on their rights and let the foreclosure occur. *Id.*; Bill Analysis, Judiciary Committee, ESB 5810.

Also in 2009, in an effort at increasing compliance with the statute and consistent with Ms. Bain's assertions that MERS is not the "beneficiary" as defined under the statute with the power to initiate a non-judicial foreclosure, the Legislature added requirements that the trustee have proof that the beneficiary is the owner of the promissory note secured by the deed of trust, but proof can be in the form of the beneficiary's declaration and does not need to be by the trustee having possession of the original note. RCW 61.24.030(7). The statute also allows the trustee to rely on the declaration, unless the trustee violates its duty of good faith, presumably which could include its knowledge that the declaration is untruthful. *Id.* These provisions do not apply when the beneficiary is a homeowner or condominium association, thus supporting the notion that the additions were specifically directed at professional trustees such as RTS, mortgage loan servicers such as IndyMac and OneWest and purported beneficiaries and/or nominees such as MERS. RCW 61.24.030(7)(c). In addition, the Notice of Default proscribed forms were amended to require that it contain the name and address of the owner of the promissory note and servicer of any obligation secured by the deed of trust. RCW 61.24.030(8)(l).

The Legislature was also looking at the somewhat ambiguous definition of the "fiduciary" duties imposed on a trustee after *Cox* and that portion of the statute was amended in 2008 to specifically state that trustees

under deeds of trust do not have “fiduciary” duties to the parties but that they had a duty “to act impartially between the borrower, grantor and beneficiary.” RCW 61.24.010(3) and (4) (2008 amendments). This Legislation was an attempt to clarify the particular type of “fiduciary” duty of the trustee which was laid out by the Court in *Cox*. The new language caused even more confusion and the stakeholders went back to the Legislature in 2009 seeking to change the “duty” language again. The language used by the Legislature in 2009 imposed upon the trustee “a duty of good faith to the borrower, beneficiary and grantor.” RCW 61.24.010(4).

It is clear that the Legislature was tightening up the DTA to make it more clear with each and every amendment that adherence to the statutory requirements for a non-judicial foreclosure sale was of paramount importance, and that it is the “beneficiary” or note holder who has the power to appoint a successor trustee and to cause the initiation of a foreclosure sale. RCW 61.24, *et seq.* Obviously, the 2009 Amendments to the DTA occurred after Ms. Bain brought her case against the defendants and enjoined her foreclosure sale. They do not apply to her particular case. However, it is nevertheless important for this Court to consider the more recent actions by the Legislature when answering the broader question regarding whether MERS can act as a beneficiary as defined in the DTA and if not, the liability attached for those who attempt to do so in its name. All of the treatises and

practice guides available prior to the addition of the 1998 “Definitions” section contain descriptions of non-judicial foreclosures which are consistent with the definitions that were adopted. The subsequent additions and changes to the DTA continue to lend support to the argument that the Legislature knew exactly what it was doing when it so defined “beneficiary”. It is also clear that the Legislature has done everything possible to enact stringent requirements to try to ensure compliance with the DTA which is without judicial oversight. The fact that foreclosing entities continue to foreclose in the name of MERS even now, as evidenced by the other case which compromises these certified questions, demonstrates the complete disregard that MERS, LPS, RTS and the other defendants have for Washington law.

5. *MERS is not the “Beneficiary” as defined by the Deed of Trust Act.*

There are very few Washington cases which discuss the relationship between the note and the deed of trust, and none which discuss the import of the definition of “beneficiary” provided in the DTA. RCW 61.24.005(2). The case of *Fidelity & Deposit Co. of Maryland v. Ticor Title Ins. Co.*, 88 Wash.App. 64 (1997) stands for the well-established legal principle that it is the note that matters when attempting to collect on the payments due. In that case, the originating lender sold

two notes which were secured by one piece of property. The borrowers signed a real note and deed of trust and apparently the deed of trust was recorded in the appropriate county. The real note was sold to Affiliated, along with an assignment of the deed of trust confirming the security interest held in the real property. The originating lender then prepared and signed a forged note and assignment of the same deed of trust, which were sold to Home Federal (who then assigned it to Fidelity). Fidelity then recorded its assignment of the deed of trust before Affiliated recorded its assignment. Fidelity, admitting that its note was forged, asserted that it was entitled to collect on the debt simply because of the first in time recorded assignment of the deed of trust. In essence, Fidelity claimed that the recording statutes relating to the assignment provided it with a superior claim for payment than the holder of the real note actually signed by the borrowers. It contended that the forgery was irrelevant, that the “note only evidences the debt.” *Fidelity & Deposit Co. of Maryland*, at 66.

The Court of Appeals held that the Fidelity assignment of the deed of trust was invalid because Fidelity did not have the real note. “The forgery does matter. . . . If the obligation for which the mortgage was given fails for some reason, the mortgage is unenforceable.” *Id.* (Citing to *Anderson v. County Properties, Inc.*, 14 Wn.App. 502, 503, 543 P.2d 653 (1975); *Koster v. Wingard*, 50 Wn.2d 855, 314 P.2d 928 (1957); see also,

George v. Butler, 26 Wash. 456, 467-68, 67 P. 263 (1901).)

The *Fidelity* Court further noted, referring to notable real property treatises:

Where the assignee of a mortgage securing a negotiable note fails to record the assignment but gets and keeps possession of the note, he or she should, and by what is believed to be the better authority, does prevail over a subsequent purchaser of the mortgage from its record owner. The reason is substantially the same one that should leave the purchaser of the secured negotiable note free to ignore prior recorded assignments of the mortgage, namely that the principal thing that is being bought is the note itself, not its accessory, the mortgage. At least that is the controlling thought and should prevail in determining the rules governing the priorities of the parties who take successive assignments of it. Commercial policy in the free mobility of the debt is more important in a case of this sort than the policy underlying the recording acts.

. . . And it follows that an assignee who gets and holds onto the negotiable note and mortgage, although running some risks if the assignment is not recorded, should not run the hazard of losing to a subsequent assignee from the assignor.

(Citing to GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 5.34, at 458-62; note 6, § 5.34, at 461-62 (footnotes omitted) (3d ed. 1993).)

Further, as stated in THOMPSON ON REAL PROPERTY:

[U]nder the maxim that the mortgage follows the debt, the holder in due course should also have the benefit of the mortgage regardless of whether the holder has recorded an assignment of the mortgage. Likewise, the law of negotiable instruments rather than of property should operate to confer priority to a prior holder in due course of a note secured by a mortgage over a later assignee who acquired only a copy of the note.

(Citing to 12 THOMPSON ON REAL PROPERTY, THOMAS EDITION § 101.05(b)(2)(i) & (ii), at 434-38; note 6, § 101.05(b)(2)(ii), at 437 (footnote omitted) (David A. Thomas ed., 1994).)

Fidelity & Deposit, supra, at 68-70. The *Fidelity* Court correctly noted that under the requirements of the DTA, “the default must occur on the obligation secured” under RCW 61.24.030. *Id.* “It is the default that gives rise to the power to sell. . . . The recording statute cannot make valid the invalid note that Home Federal/Fidelity received” *Id.* While the Court in *Fidelity* was dealing with a forged note and corresponding assignment, the analysis remains applicable to MERS’ involvement in the non-judicial foreclosure process. The mere recording of a document does not alter the legal obligations between the parties and the fact that the note is the obligation which is enforceable.

Another Washington Court of Appeals Division came to a similar conclusion in *Walcker v. Benson and McLaughlin*, 79 Wash.App. 739, 904 P.2d 1176 (1995), *review denied*, at 129 Wn.2d 1008 (1996). The *Walcker* Court was very clear in ruling that the deed of trust could not be considered separately from the note as it only secures the obligation evidenced in the note. In that case, the Walckers executed a promissory note to pay for legal services which was secured by a deed of trust on their property. The note holder did not take action to enforce its terms for more than six (6) years. The note holder initiated a non-judicial foreclosure sale and the Walckers filed suit to quiet title and enjoin the sale, asserting that collection of the debt was statutorily time-barred. RCW 4.16.040; see

also, RCW 7.28.300 and 61.24.020. The note holder asserted that it could not bring a lawsuit to enforce the terms of the note because of the statute of limitations, but that it could non-judicially foreclose, relying entirely upon the deed of trust. *Walcker, supra*, at 739-740.

The *Walcker* Court refused to allow the beneficiary under a deed of trust (in that case, the same party as the note holder) to ignore the statute of limitations having run on enforcement of the note and seek payment by using the non-judicial foreclosure process after the time period had passed. In doing so, it relied upon the following:

[O]ur first inquiry is whether the deed of trust act creates a species of mortgage. The authorities are in strong agreement that it does. 1 Glenn on Mortgages § 20, at 123 (1943) states: "The trust deed was well known at the beginning of the nineteenth century, and the courts had little difficulty in treating the device as a mortgage in effect." Glenn characterizes the trust deed as in effect a power of sale mortgage with the power of sale resting in a third person, the trustee, rather than in the mortgagee. G. Osborne, Mortgages § 17, at 26-27 (2d ed. 1970), while noting the obvious differences in the operation of straight mortgages and trust deed mortgages, primarily in the manner of foreclosure, often refers to a deed of trust as a "trust deed mortgage." State courts have concurred. *Rustad Heating & Plumbing Co. v. Waldt*, 91 Wn.2d 372, 375, 588 P.2d 1153 (1979).

Walcker v. Benson & McLaughlin, supra, 741. There was no dispute about the validity of the debt or that the Walckers had owed the money, but the time for collecting the debt had run and the recording of a deed of

trust did not change that fact because it was only providing security for the now uncollectible debt.

B. Other States that have Similarly Narrow Definitions of Mortgagee or Beneficiary have Ruled that MERS is not an Appropriate Party in a Foreclosure.

Questions about whether or not MERS is an appropriate party in a foreclosure action have been raised on a number of occasions in front of many different courts around the country. The cases are too numerous for Ms. Bain to cite to even a small portion of them, especially since only a very few states have statutes that define the term “beneficiary” or “mortgagee” broadly such that an entity like MERS could lawfully act as a beneficiary.³ There are also only a few states like Washington that specifically define “beneficiary”. RCW 61.24.005(2).

Michigan is the state with the statute most analogous to Washington’s deed of trust statute. Michigan Compiled Laws Section 600.3204(d) reads as follows: “The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.” Based

³ See Ariz. Rev. Stat. § 33-801(1): “‘Beneficiary’ means the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or the person's successor in interest,” and Idaho Code § 45-1502: “‘Beneficiary’ means the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or his successor in interest, and who shall not be the trustee.” These states’ legislatures have determined to give authority to foreclose to the person named on the deed of trust rather than the note. Thus, there cannot be an analogy to their case law.

on this definition, the Michigan appellate court has ruled that “MERS did not have the authority to foreclose by advertisement on defendants’ properties.” *Residential Funding Co. LLC v. Saurman*, --- N.W.2d ---, 2011 WL 1516819 (Mich.App. 2011).

Like Michigan and Washington, in Colorado a foreclosure can only be initiated by the holder of the evidence of the debt. *See* Colo. Rev. Stat. § 38-38-101 (requiring that the “holder of the evidence of the debt” be the entity that can declare a violation of the covenant and thereby initiate foreclosure proceedings).⁴ Because Colorado’s statutes are so clear, MERS’ own recommended foreclosure procedures advise MERS members not to foreclose in the name of MERS in Colorado:

⁴ The statute also provides a very precise definition for the term “holder of the evidence of the debt”: (10) “Holder of an evidence of debt” means the person in actual possession of or person entitled to enforce an evidence of debt; except that “holder of an evidence of debt” does not include a person acting as a nominee solely for the purpose of holding the evidence of debt or deed of trust as an electronic registry without any authority to enforce the evidence of debt or deed of trust. For the purposes of articles 37 to 40 of this title, the following persons are presumed to be the holder of an evidence of debt:

- (a) The person who is the obligee of and who is in possession of an original evidence of debt;
- (b) The person in possession of an original evidence of debt together with the proper indorsement or assignment thereof to such person in accordance with section 38-38-101(6);
- (c) The person in possession of a negotiable instrument evidencing a debt, which has been duly negotiated to such person or to bearer or indorsed in blank; or
- (d) The person in possession of an evidence of debt with authority, which may be granted by the original evidence of debt or deed of trust, to enforce the evidence of debt as agent, nominee, or trustee or in a similar capacity for the obligee of the evidence of debt.

Colo. Rev. Stat. § 38-38-100.3(10).

“[B]ecause Colorado differs from other states in that the Promissory Note controls, and MERS is not the beneficial note holder, we recommend foreclosing in the servicer’s name by endorsing the Note to the servicer.”

Sharon McGann Horstkamp, *State-by-State MERS Recommended*

Foreclosure Procedures, mersinc.org, available at

www.mersinc.org/filedownload.aspx?id=176&table=ProductFile,

Updated 2002, accessed September 19, 2011. There is no Colorado case

law on point because neither MERS nor any of its members have

attempted to initiate a foreclosure action in Colorado in MERS’ name.

Similar to Colorado, Washington’s DTA defines beneficiary as “the holder

of the instrument or document evidencing the obligations secured by the

deed of trust.” RCW 61.24.005(2). For some unknown reason, even

though Washington has the same sort of language, MERS has no similar

prohibition on foreclosing in its name in Washington. Apparently MERS

was interested in adhering to the requirements of the non-judicial

foreclosure law in Colorado, but in Washington it was, and apparently still

is, unconcerned with complying with the law. *Id.*

The Maine Supreme Court has also found that MERS does not have standing to foreclose. The Maine Supreme Court ruled as follows:

MERS's only right is the right to record the mortgage. Its designation as the “mortgagee of record” in the document does not change or expand that right; and having only that right, MERS does not qualify as a mortgagee pursuant to our foreclosure statute, 14 M.R.S. §§ 6321-6325. Section

6321 provides: “After breach of condition in a mortgage of first priority, the *mortgagee* or any person claiming under the mortgage may proceed for the purpose of foreclosure by a civil action....” (Emphasis added.) It is a “fundamental rule of statutory interpretation that words in a statute must be given their plain and ordinary meanings.” *Joyce v. State*, 2008 ME 108, ¶ 11, 951 A.2d 69, 72 (quotation marks omitted); accord *Hanson v. S.D. Warren Co.*, 2010 ME 51, ¶ 12, 997 A.2d 730, 733. The plain meaning and common understanding of mortgagee is “[o]ne to whom property is mortgaged,” meaning a “mortgage creditor, or lender.” Black's Law Dictionary 1104 (9th ed. 2009). In other words, a mortgagee is a party that is entitled to enforce the *debt obligation* that is secured by a mortgage.

Mortgage Electronic Registration Systems, Inc. v. Saunders, 2 A.3d. 289, 295-96 (Me., 2010).

Even though Maine’s foreclosure statute did not contain a specific definition limiting the entities that could lawfully act as a mortgagee, the Maine court interpreted the plain meaning of the term mortgagee to be the party that is entitled to enforce the debt obligation. Washington’s DTA obviates the need for the court to interpret or try to decipher the meaning of “beneficiary”, as that term is defined statutorily as the entity holding the document evidencing the obligation. RCW 61.24.005.

As mentioned previously, there are some states in which the terms beneficiary or mortgagee are defined broadly and could conceivably include entities such as MERS. There are some states,

such as Maine, in which the foreclosure statutes do not provide an explicit definition for these terms. In those states, the courts must decide how narrowly or broadly to define those terms. Lastly, there are states such as Washington and Colorado in which the terms are statutorily defined and explicitly exclude entities that do not hold the document evidencing the debt. MERS has chosen to comply with the laws of Colorado and to wholly disregard those of Washington. This Court should make clear that that is unacceptable.

The Kansas Supreme Court rendered a decision against MERS in connection with its claim that it was a necessary party entitled to receive notice of a foreclosure. *Landmark Nat'l. Bank v. Kesler*, 216 P.3d 158 (2009). The Kansas foreclosure process is somewhat similar to the process used in Washington. In reviewing MERS' role in the foreclosure, the Kansas Supreme Court accurately pointed out that "MERS is not an economic 'beneficiary' under the Deed of Trust" because it was not owed and would not collect any money, it held that because "MERS is only the mortgagee, without ownership of the mortgage instrument, it does not have an enforceable right." *Landmark Nat'l Bank v. Kesler, supra*, at 163, citing to *In re Vargas*, 396 B.R. 517 (Bankr. C. D. Cal. 2008), ("While the note is 'essential', the mortgage is only 'an incident' to the note.").

The *Landmark* Court provided a detailed description of the language regarding MERS used in the security instrument at issue in that case and that language is almost identical to the language used in Ms. Bain's Deed of Trust. *Id.* at 160-162. It then pointed out the often contrary positions repeatedly taken by MERS, apparently choosing whichever suits its purpose at any given time. *Id.* Ultimately the *Landmark* Court reached the correct conclusion and that is that MERS has no relationship to the note, is not entitled to payment or any other beneficial interest and therefore it upheld the trial court findings entered against MERS. This Court should do the same.

C. MERS Violated the CPA When it Acted as an Unlawful Beneficiary.

Ms. Bain maintains that consistent with Judge Coughenour's Order, the actions of the defendants herein, including MERS, constitute a violation of the CPA. RCW 19.86, *et seq.*; Dkt. 155. While it may be that this Court believes that an evaluation regarding violations of the CPA should be made on a case by case basis, because the defendants have argued that a violation of the requirements of the DTA cannot support a claim for violations of the CPA, it would be helpful to Ms. Bain and other litigants if this Court would answer that question.

Judge Coughenour clearly articulated the reasons that violations of

the DTA would support a claim for violation of the CPA. (Dkt. 155). The CPA declares unlawful “unfair or deceptive acts in the conduct of any trade or commerce.” RCW 19.86.020. The CPA defines “trade or commerce” broadly, to include “sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington.” RCW 19.86.010(2). The business of conducting foreclosure sales would clearly involve “trade or commerce” and the false identification of the party with supposed authority to foreclosure would certainly constitute an “unfair and deceptive practice.” *Id.*

As noted by the Washington Supreme Court in *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 204 P.3d 885 (Wash. 2009), “The purpose of the CPA is to “complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts and practices in order to protect the public and foster fair and honest competition.” RCW 19.86.920; *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 169, 744 P.2d 1032, 750 P.2d 254 (1987).

The CPA expressly confirms its provisions “shall be liberally construed” to fulfill its objective of protecting the public against “unfair, deceptive, and fraudulent acts or practices.” RCW 19.86.920.

Whether the practice impacts the public interest is also a question of fact, but is generally determined according to such factors as (i)

whether the acts were committed in the course of the defendant's business; (ii) whether the defendant advertised to the general public; (iii) whether the defendant actively solicited the plaintiff or others; and (iv) whether the defendant occupied a superior bargaining position to the plaintiff. *Cotton v. Kronenberg*, 111 Wn. App. 258, 274, 44 P.3d 878 (2002). These, and potentially other relevant factors, are to be viewed in light of the context and circumstances in which the alleged unfair or deceptive practices took place. See *Cotton* at 274. "A plaintiff need not show the act in question was intended to deceive, only that it had the capacity to deceive a substantial portion of the public." *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997).

Here, there can be no question that "unfair and deceptive" foreclosure practices would impact the general public, and certainly Ms. Bain maintains that she has been harmed financially by having to initiate a lawsuit in order to prevent an improper foreclosure. The damages incurred by individuals bringing claims under the CPA do not need to be significant in order to be considered an "injury" under the statute. The injury requirement is met upon proof that a party's "property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal." *Mason v. Mortgage Am., Inc.*, 114

Wn.2d 842, 854, 792 P.2d 142 (1990); see also, *Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn.App. 90, 605 P.2d 1275 (1979).

For these reasons, Ms. Bain maintains that she can support a claim for a violation of the CPA against MERS and the other defendants based upon their violations of the DTA. The Legislature saw fit to affirmatively state that homeowners who do nothing to prevent the loss of the property are entitled to bring claims under the Title 19, including the CPA, for up to two years after the foreclosure sale. RCW 61.24.127. It is nonsensical to assume that it intended to preclude homeowners who prevent the loss of the home by taking action, who pay attention to the protections afforded by the statute and act in time, would lose the ability to pursue a claim that is available to the inattentive homeowner. *Id.* The Legislature was required to take action following the Court of Appeals decision in *Brown v. Household, supra*, and state the claims that are available after a foreclosure. There is no indication that they meant to preclude claims for others and the more likely interpretation of the Legislature's intentions is that it did not feel the need to state the obvious – that a homeowner had the right to bring claims for violations of the requirements of the DTA and that those claims could constitute a claim for violations of the CPA, assuming that it met all of the criteria. *Id.*; RCW 19.86, *et seq.*

Ms. Bain respectfully requests that this Court make it clear that borrowers who can prove claims for violations of the DTA are not precluded from arguing that those acts constitute violations of the CPA as well.

V. CONCLUSION

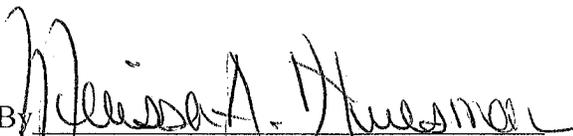
Ms. Bain maintains that the questions presented to this Court by Judge Coughenour are relatively simple to answer by referring to the plain language of the Deed of Trust Act. RCW 61.24, *et seq.* In particular, the definition of “beneficiary” in the DTA makes clear the Legislature’s intent that persons utilizing the expedited process of non-judicial foreclosure must be the “holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.” RCW 61.24.005(2). MERS cannot meet the definition of “beneficiary” and therefore it did not have the legal authority to appoint a successor trustee under RCW 61.24.010(2). There was no legal authority for a foreclosure to be initiated in MERS’ name and therefore the actions of the other defendants in this case relating to the initiation of a foreclosure were also done in violations of the requirements of the DTA. RCW 61.24.005(2) and 61.24.010(2).

MERS made a choice when choosing to conduct business in Washington state. It could have followed the same course of action that it

apparently followed in Colorado, which was not to initiate foreclosures in its name because Colorado law prohibited the same. Washington's statute has very similar language and yet it chose to participate in this foreclosure and many others as though it had the legal authority to do so. Not only are MERS and the other defendants liable to Ms. Bain for the violations of the DTA, but they are liable to her under the CPA. RCW 19.86, *et seq.*; Dkt. 155.

This Court needs to clearly answer the questions regarding MERS' involvement in its non-judicial foreclosure scheme and that answer must be a resounding affirmation that pursuant to the scheme devised by the Legislature, MERS cannot be a "beneficiary" under the DTA and therefore Ms. Bain's foreclosure was wrongfully initiated by MERS and all of the defendants involved in perpetrating the wrongdoing.

RESPECTFULLY SUBMITTED this 19th day of September, 2011.

By 
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Law Offices of Melissa A. Huelsman
Attorney for Plaintiff Kristin Bain

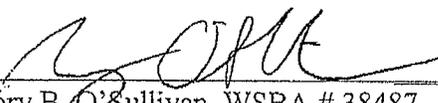
By _____
Rory B. O'Sullivan, WSBA # 38487
Eulalia Sotelo, WSBA # 41407
Northwest Justice Project
Attorneys for Plaintiff Kristin Bain

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By  _____
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Eulalia Sotelo, WSBA # 41407
Northwest Justice Project
Attorneys for Plaintiff Kristin Bain

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON IN:

KRISTIN BAIN, Plaintiff,

v.

METROPOLITAN MORTGAGE GROUP, INC.; INDYMAC BANK, FSB; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS; REGIONAL TRUSTEE SERVICE; FIDELITY NATIONAL TITLE; and Doe Defendants 1 through 20, inclusive, Defendants.

Case No. 86206-I

CERTIFICATION OF SERVICE

CERTIFICATION OF SERVICE

I certify that on the 19th day of September, 2011, I caused a true and Correct copy of this Plaintiff's Opening Brief to be served on the following in Manner indicated below:

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DATED this day of 19th of September, 2001.

/s/ Monique Lefebvre _____
Monique Lefebvre

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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v.

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Defendants.

Case No. 86206-I

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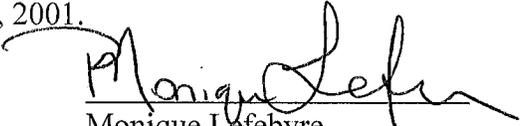
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