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**SUPREME COURT
OF THE STATE OF WASHINGTON**

KEVIN SELKOWITZ, an individual,

Plaintiff,

v.

LITTON LOAN SERVICING LP, a Delaware Limited Partnership; NEW CENTURY MORTGAGE CORPORATION, a California Corporation; QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington Corporation; FIRST AMERICAN TITLE INSURANCE COMPANY, a Washington Corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation, and DOE Defendants 1-20,

Defendants.

PLAINTIFF'S OPENING BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	
I. QUESTIONS CERTIFIED.....	1
II. STATEMENT OF THE CASE.....	1
III. ARGUMENT.....	5
A. Is MERS a lawful beneficiary under <i>RCW 61.24.005(2)</i> ?.....	5
1. Statutory Construction.....	5
2. A brief legislative history of <i>RCW 61.24</i>	8
3. A brief history of litigation construing <i>RCW 61.24</i>	10
4. <i>RCW 61.24.005(2)</i> requires the beneficiary to a deed of trust to be the holder of the underlying obligation.....	12
5. The advent of MERS and its impact.....	14
6. Review of other statutes and case law addressing MERS in other jurisdictions.....	22
7. The unintended consequences of using MERS.....	28
a. Impact of right of rescission under federal law.....	28
b. Circumvention of recording statutes and lax administration.....	31
c. Loss of transparency in land records and loss of revenue.....	34

d. Double liability for underlying debt.....37

8. Unlawful acts of MERS voids subsequent acts.....38

B. What is the legal effect of MERS' acting as an
unlawful beneficiary and what should the remedy be?..39

C. Do homeowners have a consumer protection claim
if MERS acts as an unlawful beneficiary?.....43

IV. CONCLUSION.....49

TABLE OF APPENDICES

TABLE OF CASES AND AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Allen v. Allen</i> , 51 N.W. 473, 474 (Minn. 1892)	41
<i>Anderson v. County Properties, Inc.</i> , 14 Wash.App. 502, 543 P.2d 653 (1975)	12
<i>Batten v. Fallgren</i> , 2 Wn.App. 360, 467 P.2d 882 (1970)	42
<i>Bellistri v. Ocwen Loan Servicing, LLC</i> , 284 S.W.3d 619 (Mo. App. 2009)	39
<i>Chauncey v. Arnold</i> , 24 N.Y. 330, 338 (1862)	41, 42
<i>Countrywide Home Loans v. Hannaford</i> , 2004 WL 1836744 (Ohio Ct. App. Aug. 18, 2004)	31
<i>Cox v. Helenius</i> , 103 Wn.2d 383, 693 P.2d 683 (1985)	9, 21, 41, 46
<i>Dep't of Ecology v. Campbell & Gwinn, LLC</i> , 146 Wash.2d 1, 43 P.3d 4 (2002)	6, 13
<i>Disque v. Wright</i> , 49 Iowa 538, 540 (1878)	41
<i>Fidelity & Deposit Co of Maryland v. Ticor Title Insurance Co.</i> , 88 Wn.App. 64, 943 P.2d 710 (1997)	11
<i>Fleishbein v. Thorne</i> , 193 Wash. 65, 74 P.2d 880 (1937)	42
<i>Freedom Mortg. Corp. v. Burnham Mortg., Inc.</i> , 2006 WL 695467 (N.D. Ill., Mar. 13, 2006)	30
<i>George v. Butler</i> , 26 Wash. 456, 467-68, 67 P. 263 (1901)	12
<i>Haner v. Quincy Farm Chems., Inc.</i> , 97 Wn.2d 753, 649 P.2d 828 (1982)	45

<i>Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 780, 719 P.2d 531 (1986).	44, 48
<i>In re Kang Jin Hwang</i> , 396 BR 757 (Bankr. C.D. Cal 2008)	27
<i>In re Leisure Time Sports, Inc.</i> , 194 B.R. 859 (B.A.P. 9th Cir.1996)	39
<i>In re Mitchell</i> , 2009 WL 1044368 at 2-6 (Bankr.D. Nev. 2009)	27
<i>In Re New Century Financial Corporation</i> , No. 07-10417 (Bankr. D. Del. filed April 2, 2007)	3
<i>In re Vargas</i> , 396 BR 511 (Bankr. C.D. Cal 2008)	27
<i>Jackson v. Mortgage Electronic Registration Systems, Inc.</i> , 770 N.W. 2d 487 (2009)	26
<i>Kelley v. Upshaw</i> , 39 Cal.2d 179 (1952)	39
<i>Koegel v. Prudential Mut. Sav. Bank</i> , 51 Wn. App. 108, 752 P.2d 385 (1988)	22
<i>Koster v. Wingard</i> , 50 Wash.2d 855, 314 P.2d 928 (1957)	12
<i>Lacey Nursing Ctr. v. Dep't of Revenue</i> , 128 Wash.2d 40, 905 P.2d 338 (1995)	6
<i>Landmark Nat'l Bank v. Kesler</i> , 289 Kan. 528, 216 P.3d 158 (2009)	19, 23, 24, 25, 39
<i>Leingang v. Pierce County Med. Bureau, Inc.</i> , 131 Wn.2d 133, 930 P.2d 288 (1997).	47
<i>Lightfoot v. MacDonald</i> , 86 Wn.2d 331, 544 P.2d 88 (1976)	44

<i>Miguel v. Country Funding Corp.</i> , 309 F.3d 1161 (9th Cir. 2002)	29
<i>Mills v. Western Washington University</i> , 150 Wash. App. 260, 208 P.3d 13, 244 Ed. Law Rep. 821 (2009), review denied, 167 Wash. 2d 1020, 225 P.3d 1011 (2010)	40
<i>Mortgage Electronic Registration Systems v. Neb. Dep't of Banking & Fin.</i> , 704 N.W.2d 784 (Neb. 2005)	14, 15, 30
<i>Mortgage Electronic Registration Systems, Inc. v. Southwest Homes of Arkansas</i> , 2009 Ark. 152 (2009)	23
<i>Mortgage Electronic Registration Systems, Inc. v. Saunders</i> , 2 A. 3d 289 (2010)	25
<i>Nordstrom, Inc. v. Tampourlos</i> , 107 Wn.2d 735, 740, 733 P.2d 208 (1987)	49
<i>Panag v. Farmers Ins. Co. of Washington</i> , 166 Wn. 2d 27, 204 P.3d 885 (2009)	47
<i>Parker v. Tumwater Family Practice Clinic</i> , 118 Wash. App. 425, 76 P.3d 764 (2003)	40
<i>Patton v. First Federal Saving & Loan Association</i> , 118 Ariz. 473, 578 P.2d 152 (1978)	22
<i>Perry v. Island Sav. and Loan Ass'n.</i> , 101 Wn.2d 795, 684 P.2d 1281 (1984)	44, 45
<i>Plummer v. Ilse</i> , 41 Wash. 5, 82 P. 1009 (1905)	42
<i>Roberts v. WMC Mortg. Corp.</i> , 173 Fed. Appx. 575 (9th Cir. 2006)	30
<i>Rustad Heating & Plumbing Co. v. Waldt</i> , 91 Wn. 2d 372, 588 P.2d 1153, 1154 (1979)	8

<i>Saxon Mortgage Servs. v. Hillery</i> , 2008 WL 5170180 (N.D. Cal 2008)	27
<i>Selkowitz v. Litton Loan Servicing LP, et al</i> , No.10-2-24157-4 (Sup. Ct. King Co. filed July 2, 2010)	4
<i>Selkowitz v. Litton Loan Servicing LP, et al</i> , No. 10-05523 (W.D. Wash. filed July 27, 2010)	4
<i>Sienkiewicz v. Smith</i> , 97 Wash.2d 711, 716, 649 P.2d 112 (1982)	41
<i>State ex rel. Royal v. Bd. of Yakima County Comm'rs</i> , 123 Wash.2d 451, 869 P.2d 56 (1994)	6
<i>Trout v. Taylor</i> , 32 P.2d 968 (Cal. 1934)	41, 42
<i>Vinluan v. Fidelity National Title & Escrow Co.</i> , Supreme Court Cause No. 85637-1	5
<i>Walcher v Benson and McLaughlin</i> , 79 Wn.App. 739, 904 P.2d 1176 (1995), review denied, 129 Wn.2d 1008 (1996)	11
<i>Young v. Estate of Snell</i> , 134 Wash.2d 267, 948 P.2d 1291 (1997)	6

WASHINGTON STATE STATUTES

<i>RCW 2.60.020</i>	1, 5
<i>RCW 7.28.230(1)</i>	8
<i>RCW 19.86</i>	14, 43, 50
<i>RCW 19.86.010(2)</i>	48
<i>RCW 19.86.090</i>	43, 45

<i>RCW 19.86.920</i>	43, 46
<i>RCW 61.24</i>	5, 9, 10, 12, 13, 21, 22, 26, 38, 40, 41, 46, 47
<i>RCW 61.24.005(2)</i>	1, 5, 8, 12, 13, 14, 21, 22, 23, 28, 42, 47, 49
<i>RCW 61.24.010</i>	3, 13, 14, 47
<i>RCW 61.24.010(2)</i>	49
<i>RCW 61.24.030(7)(a)</i>	26, 28
<i>RCW 61.24.030(7)(c)</i>	13, 14, 49
<i>RCW 61.24.090</i>	21
<i>RCW 61.24.100</i>	9
<i>RCW 61.24.130</i>	21
<i>RCW 62A</i>	8, 13, 14
<i>RCW 62A.1-201</i>	13
<i>RCW 62A.1-210(20)</i>	13
<i>RCW 62A.3-301</i>	13, 28
<i>RCW 65.12.430</i>	8
ESSB 6191, Final Bill Report	10
SSHB 1362, Section 7 (8)(b)(iii)	21

FEDERAL STATUTES AND REGULATIONS

<i>12 C.F.R. § 226.23</i>	29
<i>69 Fed. Reg. 16,769 (Mar. 31, 2004)</i>	30
<i>15 U.S.C. § 1601</i>	29
<i>15 U.S.C. § 1635(f)</i>	29
<i>15 U.S.C. § 1641(c)</i>	29
<i>15 U.S.C. §1641(f)(1)</i>	29
<i>15 U.S.C. §1641(f)(2)</i>	30
<i>28 USC 1441</i>	4

FEDERAL COURT RULES

<i>Fed. R. Civ. P. 12(b)(6)</i>	4, 5
<i>Fed .R. Civ. P. 59(d)</i>	5

OTHER STATE STATUTES

Arkansas Code § 18-50-101	23
Minn.Stat. § 507.413	27

OTHER AUTHORITY

Robo-Signing, Chain of Title, Loss Mitigation and Other Issues in Mortgage Servicing: Hearings Before the House Committee on Financial Services Subcommittee on	
---	--

Insurance, Housing, and Community Opportunity, 111th Cong. (Nov. 18, 2010) (prepared statement of R.K. Arnold).	33
Black's Law Dictionary 727 (6th ed. abr.)	24
Ann M. Burkhart, Freeing Mortgages of Merger, 40 Vand. L. Rev. 283, 353–54 (1987)	34
Foreclosed Justice: Causes and Effects of the Foreclosure Crisis, Hearings Before the House Judiciary Committee, 111th Cong. (Dec. 2, 2010) (prepared statement of Thomas A. Cox)	36
Foreclosed Justice: Causes and Effects of the Foreclosure Crisis Hearings Before the House Judiciary Committee, 111th Cong. (Dec. 2, 2010) (prepared statement of Hon. F. Dana Winslow)	35
Jennifer Dixon, Programs for Financially Troubled Homeowners Haven't Helped Much To Date, Detroit Free Press, August 14, 2011	
Robert E. Dordan, Mortgage Electronic Registration Systems (MERS), Its Recent Legal Battles, and the Chance for A Peaceful Existence, 12 Loy. J. Pub. Int. L 177, 178 (2010)	32
Joseph L. Hoffman, Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington, 59 Wash.L.Rev. 323, 330 (1984).	9, 45
MERSCORP, Inc., Rules of Membership, (June 2009)	17, 18
Mortgage Electronic Registration Systems, Inc., Frequently Asked Questions (http://www.mersinc.org/why_mers/faq.aspx , last visited September 16, 2011).	

Foreclosed Justice: Causes and Effects of the Foreclosure Crisis, Hearings Before the House Judiciary Committee, 111th Cong. (Dec. 2, 2010) (prepared statement of Christopher L. Peterson)	34
Christopher L. Peterson, Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System, 78 U. Cin. L. Rev. 1359 (2010)	19
Christopher L. Peterson, Predatory Structured Finance, 28 CARDOZO L. REV. 2185 (2007)	20
Christopher L. Peterson, Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory (September 19, 2010)	33, 35
Michael Powell and Gretchen Morgenson, MERS? It May Have Swallowed Your Loan, N.Y. Times, March 5, 2011	32
Jill D. Rein, Significant Changes to Commencing Foreclosure Actions in the Name of MERS, http://www.usfn.org/AM/Template.cfm?Section=USFN_E_Update&Template=/CM/HTMLDisplay.cfm&ContentID=3791	17
RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 5.4, Comment e (1997)	38
Phyllis K. Slesinger and Daniel McLaughlin, Mortgage Electronic Registration System, 31 Idaho L. Rev. 805 (1995)	16
John Gose, Washington Real Property Desk Book, § 47.1	8
John Gose, Washington Real Property Desk Book, § 47.2.	9

J. Gose, <i>The Trust Deed Act in Washington</i> , 41 Wash. L. Rev. 94, (1966).	45
William Stoebuck & John Weaver, 18 Wash. Prac. Real Estate, § 20.1	9

I. QUESTIONS CERTIFIED

This matter comes before the Court upon the certification of questions to the Washington Supreme Court issued by the Honorable John C. Coughenour of the U.S. District Court for the Western District of Washington on June 27, 2011, pursuant to *RCW 2.60.020*. A copy of Judge Coughenour's Order of June 27, 2011, is attached hereto at *Appendix "A"*. The questions certified by the Honorable John C. Coughenour are as follows:

- A. Is Mortgage Electronic Registration Systems, Inc. (hereinafter "MERS"), a lawful "beneficiary" within the terms of Washington's deed of Trust Act, *RCW 61.24.005(2)*, if it never held the promissory note secured by the deed of trust?
- B. If [not], what is the legal effect of MERS acting as an unlawful beneficiary under the terms of Washington's Deed of Trust Act?
- C. Does a homeowner possess a cause of action under Washington's Consumer Protection Act against MERS, if MERS acts as an unlawful beneficiary under the terms of Washington's Deed of Trust Act?

II. STATEMENT OF THE CASE

At the time Judge Coughenour certified the above-noted questions

to this Court, no discovery had been initiated by the parties. Accordingly, the facts of the present controversy are necessarily limited. However, based upon the pleadings filed to date and certified to the Court in Judge Coughenour's Order of June 27, 2011, Plaintiff, KEVIN SELKOWITZ (hereinafter "Mr. Selkowitz"), offers the following.

Mr. Selkowitz executed a Note and Deed of Trust on November 1, 2006, with Defendant, FIRST AMERICAN TITLE COMPANY (hereinafter "First American") as trustee, Defendant, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (hereinafter "MERS") was named as the purported beneficiary, as nominee for the lender, while the lender was identified as Defendant, NEW CENTURY MORTGAGE CORPORATION (hereinafter "New Century"). The Deed of Trust was recorded in King County under Recordation No. 20061101000910, encumbering real property commonly known as 6617 S.E. Cougar Mountain Way, Bellevue, King County, Washington (hereinafter "the Property"). Please see Dkt. 9, Ex. "A".¹ At no time relevant to this cause of action did Mr. Selkowitz owe any monetary or other obligation to MERS, make any payments to MERS, or contact

¹ References to the record are based upon those documents certified to this Court in Judge Coughenour's Order of June 24, 2011, and are cited by Docket Number (Dkt) and by Exhibit reference (Ex.) as noted in the relevant document.

MERS for any reason.²

On April 2, 2007, the purported lender in the subject transaction, New Century and its related entities, filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court, District of Delaware, located in Wilmington, Delaware. Please see *In Re New Century Financial Corporation*, No. 07-10417 (Bankr. D. Del. filed April 2, 2007) and associated cases. At that point in time, the management, assets and liabilities of New Century were under the supervision of the U.S. Bankruptcy Court and the assigned Trustee.

On May 12, 2010, MERS executed, as purported "beneficiary" under the Deed of Trust, an Appointment of Successor Trustee nominating Defendant, QUALITY LOAN SERVICE CORPORATION OF WASHINGTON (hereinafter "QLS") as successor trustee, pursuant to *RCW 61.24.010*. This instrument was recorded in King County under Recordation No. 20100520000866 on May 20, 2010. Please see Dkt. 9, Ex. "B".

A search of the public records indicated that no assignment of the Note or Deed of Trust has ever been recorded. Based upon the

² It is important to note that the subject Promissory Note has never been produced nor is it part of the record on review.

information obtained to date, MERS has never owned the debt secured by the Deed of Trust and never obtained possession of the Note.

On May 27, 2010, QLS executed a Notice of Trustee's Sale on behalf of MERS, as beneficiary, to foreclose the subject Deed of Trust and obtain possession of the Property. This instrument was recorded in King County under Recording No. 20100601001460 on June 1, 2010. Please see Dkt. 9, Ex. "C".

On July 2, 2010, Mr. Selkowitz filed a Complaint in King County Superior Court that asserted claims under the Washington Consumer Protection Act and sought a Permanent Injunction barring non-judicial foreclosure in violation of the Washington Deed of Trust Act. *Selkowitz v. Litton Loan Servicing LP, et al*, King County Superior Court Case No.10-2-24157-4.

On July 27, 2010, the Defendants named in the King County case sought removal to the United States District Court Western District of Washington at Seattle, pursuant to 28 USC 1441. The matter is currently pending before Judge Coughenour as *Selkowitz v. Litton Loan Servicing LP, et al*, No. 3:10-cv-10-05523-JCC (W.D. Wash. filed July 27, 2010).

On August 6, 2010, First American filed a Motion to Dismiss, pursuant to *FRCP 12(b)(6)*. See Dkt 7.

On August 8, 2010, Defendant, Litton Loan Servicing and MERS

filed a Motion to Dismiss, pursuant to *FRCP 12(b)(6)*. See Dkt. 8.

On August 31, 2010, Judge Coughenour initially granted Defendants' Motions to Dismiss. See Dkt. 22.

On September 27, 2010, Mr. Selkowitz filed a Motion to Amend, pursuant to *FRCP 59(d)*. See Dkt. 25.

In response to Mr. Selkowitz's Motion to Amend, Judge Coughenour entered an Order to Show Cause on October 6, 2010, ordering the parties to show cause why the Court should not submit the question of MERS' authority to act as a beneficiary under *RCW 61.24, et seq.* to the Washington Supreme Court, pursuant to *RCW 2.60.020*. Dkt. 26.

On June 27, 2011, after this Court denied a similar request for clarification of the same issue on discretionary review in the matter of *Vinluan v. Fidelity National Title & Escrow Co.*, Supreme Court Cause No. 85637-1, Judge Coughenour entered an Order Certifying Question to the Washington Supreme Court. *Appendix "A"*.

III. ARGUMENT

A. Is MERS a lawful beneficiary under RCW 61.24.005(2)?

1. Statutory Construction.

Judge Coughenour has requested this Court to construe the meaning and application of *RCW 61.24.005(2)*.

The meaning of a statute is a question of law that is considered by the Court, *de novo*. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 11, 43 P.3d 4 (2002). In addressing questions of statutory interpretation, this Court has said that its "primary obligation is to give effect to the legislature's intent." *State ex rel. Royal v. Bd. of Yakima County Comm'rs*, 123 Wash.2d 451, 458, 869 P.2d 56 (1994); *Lacey Nursing Ctr. v. Dep't of Revenue*, 128 Wash.2d 40, 53, 905 P.2d 338 (1995); *Young v. Estate of Snell*, 134 Wash.2d 267, 279, 948 P.2d 1291 (1997). In doing so, a court should attempt to give effect to the plain meaning of a statute. In analyzing the "plain meaning of a statute," this Court has noted in the case of *Dep't of Ecology v. Campbell & Gwinn, LLC, supra.*, at pages 10-11:

Other cases indicate, however, that under the "plain meaning" rule, examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found, is appropriate as part of the determination whether a plain meaning can be ascertained. In *Estate of Lyons v. Sorenson*, 83 Wash.2d 105, 108, 515 P.2d 1293 (1973), for example, the court said that legislative intent is to be determined from what the Legislature said, if possible. The court then determined legislative intent from the "plain and unambiguous" language of a statute "in the context of the entire act" in which it appeared. *Id.*; see also *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wash.2d 699, 708-09, 985 P.2d 262 (1999) (where statutory language is clear and unambiguous, its meaning is derived from its language alone; court construes an act as a whole, giving effect to all the language used, with related statutory provisions interpreted in relation to one another); *ITT Rayonier, Inc. v. Dalman*, 122 Wash.2d 801, 807, 863 P.2d 64 (1993) (a term in a regulation should not be read in

isolation but rather within the context of the regulatory and statutory scheme as a whole; statutory provisions must be read in their entirety and construed together, not by piecemeal).

As has been noted:

In the past, the plain meaning rule rested on theories of language and meaning, now discredited, which held that words have inherent or fixed meanings. These theories are unnecessary to the plain meaning rule, however, if the rule is interpreted to direct a court to construe and apply words according to the meaning that they are ordinarily given, taking into account the statutory context, basic rules of grammar, and any special usages stated by the legislature on the face of the statute. So defined, the plain meaning rule requires courts to consider legislative purposes or policies appearing on the face of the statute as part of the statute's context. In addition, background facts of which judicial notice can be taken are properly considered as part of the statute's context because presumably the legislature also was familiar with them when it passed the statute. Reference to a statute's context to determine its plain meaning also includes examining closely related statutes, because legislators enact legislation in light of existing statutes.

2A Norman J. Singer, *Statutes and Statutory Construction* § 48A:16, at 809-10 (6th ed. 2000) (extracts from R. Randall Kelso & C. Kevin Kelso, *Appeals in Federal Courts by Prosecuting Entities Other than the United States: The Plain Meaning Rule Revisited*, 33 *Hastings L.J.* 187 (1981)).

Under this second approach, the plain meaning is still derived from what the Legislature has said in its enactments, but that meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. Upon reflection, we conclude that this formulation of the plain meaning rule provides the better approach because it is more likely to carry out legislative intent. Of course, if, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids to construction, including legislative history. *Cockle v. Dep't of Labor & Indus.*, 142 Wash.2d 801, 808, 16 P.3d 583 (2001); *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wash.2d 305, 312, 884 P.2d 920 (1994).

The statute at issue in this case, *RCW 61.24.005(2)*, is clear and unambiguous, particularly when the provisions of *RCW 62A* are considered.

2. A brief legislative history of *RCW 61.24*.

Initially, Washington followed the English common law with regard to real property security devices. This was essentially a “title theory” of mortgages. William Stoebuck & John Weaver, 18 Wash. Prac. Real Estate, § 17.1.

However, in 1869, the legislature radically changed lenders’ rights and remedies to secure real property from a “title theory” to a “lien theory” of mortgages. Laws of 1869, ch. 46, § 498. See also John Gose, Washington Real Property Desk Book, § 47.1. This policy is currently embodied in *RCW 7.28.230(1)*: “A mortgage of any interest in real property, shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law.”

It is frequently observed that a deed of trust is a “species of mortgage”: a three party mortgage (lien) that vests the power of sale of the secured real property in a neutral third party – the trustee. *RCW 65.12.430*; *Rustad Heating and Plumbing Co. v. Waldt*, 91 Wn.2d 372, 588 P.2d 1153 (1979). See also John Gose, Washington Real Property

Desk Book, § 47.2. Upon default by the borrower (grantor), the lender (beneficiary) may either foreclose the deed of trust judicially, as a mortgage, or direct the trustee to commence the non-judicial foreclosure process. *RCW 61.24.100*.

In 1965, the legislature again modified public policy regarding real property security interests by adopting *RCW 61.24*, which provides lenders a mechanism to foreclose interests in real property non-judicially. Laws of 1965, ch 74. See also William Stoebeck & John Weaver, 18 Wash. Prac. Real Estate, § 20.1; Joseph L. Hoffman, *Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59 Wash.L.Rev. 323, 330 (1984).

More of the public policies balanced under *RCW 61.24* will be discussed below, but suffice it to say that the three primary objectives of the current statute are outlined in the case of *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985), at page 387:

Washington's deed of trust act should be construed to further three basic objectives. See Comment, *Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59 Wash.L.Rev. 323, 330 (1984). First, the nonjudicial foreclosure process should remain efficient and inexpensive. *Peoples Nat'l Bank v. Ostrander*, 6 Wash.App. 28, 491 P.2d 1058 (1971). Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, the process should promote the stability of land titles. (Emphasis added).

In 1998, *RCW 61.24* was amended to include a definitions section, including a clear and unambiguous definition for the term “beneficiary.” Laws of 1998, ch 295. The intent of the amendments was to “modernize” the foreclosure procedures and “to reflect the current practices.” ESSB 6191, Final Bill Report, at 1.

The statute has more recently been amended to include, *intra alia*, expansion of borrower’s remedies upon foreclosure and mediation to modify the underlying loan obligations at default.

3. A brief history of litigation construing *RCW 61.24*.

Until recently, there have been few reported cases construing the provisions of *RCW 61.24* and none that specifically address the issues raised by Judge Coughenour. However, there have been a few cases that may touch upon some of the issues that may need to be addressed by the Court in addressing Judge Coughenour’s questions.

In *Cox v. Helenius, supra.*, this Court addressed the duties and responsibilities of the trustee under a deed of trust. Of relevance to this Court’s consideration of the questions now before it are the Court’s comments, found at page 388-389:

Even if the statutory requisites to foreclosure had been satisfied and the Coxes had failed to properly restrain the sale, this trustee's actions, along with the grossly inadequate purchase price, would result in a void sale. See *Lovejoy v. Americus*, 111 Wash. 571, 574, 191 P. 790 (1920); *Miebach v. Colasurdo*, 102

Wash.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).

In *Walcher v Benson and McLaughlin*, 79 Wn.App. 739, 904 P.2d 1176 (1995); review denied, 129 Wn.2d 1008 (1996), Division III of the Washington Court of Appeals held that a deed of trust cannot be considered separate from the note it secures and if enforcement of the note becomes time barred by application of the appropriate statute of limitations, enforcement of the deed of trust is also barred. Thus, it is clear that a deed of trust has no independent existence without the note or "underlying obligation" it secures.

In *Fidelity & Deposit Co of Maryland v. Ticor Title Insurance Co.*, 88 Wn.App. 64, 943 P.2d 710 (1997), Division I of the Washington Court of Appeals reinforced the *Walcher* decision by holding the primacy of the note or underlying obligation over the deed of trust in collecting monies due. In a convoluted fact pattern in which the holder of a forged promissory note attempted to enforce its rights under a duly executed deed of trust, the Court held that "if the obligation for which the mortgage was

given fails for some reason, the mortgage is unenforceable.” *Id.* at page 68, citing to *Anderson v. County Properties, Inc.*, 14 Wash.App. 502, 503, 543 P.2d 653 (1975); *Koster v. Wingard*, 50 Wash.2d 855, 314 P.2d 928 (1957); and *George v. Butler*, 26 Wash. 456, 467-68, 67 P. 263 (1901).

Each of these cases touches on the principles underlying the regulation of non-judicial foreclosure of deeds of trust in Washington, but is not particularly germane to the issues now before the Court. However, until Wall Street developed an insatiable appetite for mortgage-backed securities and the creation of MERS to facilitate the process of securitization of deeds of trust, borrowers and lenders in Washington behaved themselves and lived within the provisions of *RCW 61.24* as the legislature intended, without much controversy or involvement of the courts.

4. *RCW 61.24.005(2)* requires the beneficiary to a deed of trust to be the holder of the underlying obligation.

RCW 61.24.005(2) provides as follows:

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

The designation as “beneficiary” carries significance and weight under the statute because only a beneficiary defined under *RCW 61.24.005(2)* may (1) appoint a successor trustee or (2) declare a default in

the underlying obligation. *RCW 61.24.010* and *RCW 61.24.030(7)(c)*.

This use of the term "holder" in *RCW 61.24.005(2)* suggests the use of the same term in the UCC. *RCW 62A.1-201, RCW 62A.3-301*. This suggestion is not unwarranted because at time the legislature was considering adoption of the Deed of Trust Act (*RCW 61.24*), it was considering adoption of the Uniform Commercial Code (UCC – *RCW 62A*). Laws of 1965, ch. 157. Thus, construing the terms of *RCW 61.24* in a manner consistent with those found in *RCW 62A* is not unreasonable. *Dep't of Ecology v. Campbell & Gwinn, LLC, supra.*, at pages 10-11

RCW 62A.1-210(20) defines the "holder" of an instrument. The statute provides as follows:

(20) "Holder" with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. "Holder" with respect to a document of title means the person in possession if the goods are deliverable to bearer or to the order of the person in possession.

RCW 62A.3-301 identifies the party entitled to enforce an instrument. The statute provides in pertinent part:

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

Although no reported case has addressed the issue posed by Judge Coughenour, the Court is urged, to construe the term “holder” in *RCW 61.24.005(2)* in a manner that is consistent with the UCC definition of the term.

If, as alleged herein, MERS is not the “holder” of the underlying obligation, within the terms of *RCW 62A*, it can never be a lawful beneficiary under the terms of *RCW 61.24.005(2)* or enjoy the benefits conferred upon lawful beneficiaries under *RCW 61.24*, including, without limitation, *RCW 61.24.010* and *RCW 61.24.030(7)(c)*. Therefore, the appointment of a successor trustee by MERS on May 12, 2010 and the initiation of foreclosure proceedings by QLS on behalf of MERS, as “beneficiary,” on May 27, 2010, were wrongful and unlawful, for which Plaintiff is entitled to (1) permanent injunction of Defendants’ future foreclosure efforts, (2) damages for wrongful foreclosure, (3) quiet title to the subject Property, (4) relief under *RCW 19.86, et seq.* Please see the analysis of these claims found at Dkt.25.

5. The advent of MERS and its impact.

MERS was created by the mortgage banking industry to facilitate the transfer of mortgages on the secondary mortgage market and save lenders the cost of filing assignments. *MERS v. Nebraska Dept. Of Banking & Finance*, 704 N.W.2d, 784 (Neb. 2005). MERS is not a

lender; it does not ever own or have any beneficial interest in the notes secured by the mortgages or deeds of trust registered through it, leading the Nebraska Court to describe MERS as follows:

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

Id.

Unlike the traditional process in which the lender or holder of the underlying obligation is identified as "beneficiary" of the security instrument in the public record, MERS is inserted into the security instrument as the "nominee for the lender," which is then filed for record with the county auditor/recorder. The underlying reason for this deceit is clear. Concealing the identity of the true note holder and beneficiary insulates the real holder of the underlying obligation, or their successor in interest, from potential liability in situations involving predatory loans.

There was no consideration of the public's interest or the rights of borrowers and homeowners in the creation and implementation of the MERS registration system and its potential impact on foreclosure

procedures. Phyllis K. Slesinger and Daniel McLaughlin, *Mortgage Electronic Registration System*, 31 Idaho L. Rev. 805, 811, 814-15 (1995) (MERS initially sought input from industry representatives; no input sought from consumers; discussion of Ernst & Young study commissioned by mortgage banker to study how much money they could avoid paying to county governments through the MERS system).

Utilization of MERS as a "nominee" of an undisclosed note holder is a useful tool for unscrupulous out-of-state lenders and mortgage bankers. Homeowners claims of wrongful foreclosure in Washington based upon lending law violations would be almost impossible to litigate if they involved MERS. MERS would have difficulty responding to discovery requests for documents it does not possess, especially if, as is the case in this action, the original lender is defunct or in bankruptcy. Any successor in interest could be difficult to ascertain, since the identity of the successor in interest would not be a matter of public record, and impossible to locate through the MERS system, which is available only to subscribing member lending institutions – not the general public.

Similarly a settlement of any contest would be impossible to negotiate because the true party with authority to negotiate settlement may never be revealed and would likely not be an original party to the litigation.

MERS has, in revisions to its rules of membership governing how foreclosures are brought, attempted to address these issues, but a review of MERSCORP, Inc.'s Rules of Membership in effect at the time Defendants initiated foreclosure proceedings against Mr. Selkowitz demonstrates the flagrant disregard of state law built into the very system.

MERS Rule 8 governs the foreclosure proceedings for loans registered with MERS. The June 2009 edition of Rule 8 provides that a foreclosure could be brought "in the name of Mortgage Electronic Registration Systems, Inc., the name of the servicer, or the name of a different party to be designated by the beneficial owner." MERSCORP, Inc., Rules of Membership, Rule 8, Section 1(a) (June 2009)³ See also *Jill D. Rein, "Significant Changes to Commencing Foreclosure Actions in the Name of MERS"*.

Instead of requiring a foreclosure be brought in the name of the "investor", the "beneficiary" or the beneficial owner "holding" the note, MERS allows the foreclosure to be brought in the name of any party without regard to the underlying truth of the transaction. This could be a mere servicer. For states such as Washington, MERS even allows a

³ The current version of the Rules effective in July of 2011 prohibits any further foreclosures in MERS name effective July 22, 2011. This document is available at <http://www.mersinc.org/Foreclosures/index.aspx>.

fraudulent foreclosure in its own name.

(b) In non-judicial foreclosure states, if the Member chooses to foreclose in MERS's name under the power of sale provision in the security instrument and is not seeking a deficiency judgment, then the note does not need to be in the possession of the Member's MERS Certifying Officer when commencing the foreclosure action; provided, however, that under no circumstances may the Member allege that the note is in their possession unless it so possesses.

MERSCORP, Inc., supra, Section 2(b). In other words, MERS encourages foreclosures be brought against homeowners such as Mr. Selkowitz, in a manner that clearly violates current Washington law. MERS is essentially a "straw-man" to hide the identity of the real holder of the obligation.

In this case, the Notice of Trustee's Sale recorded by QLS on May 27, 2010 states that it is being brought on behalf of MERS, as nominee for New Century, even though MERS' purported principal was then bankrupt. Dkt 9, Ex. "C". Yet this conduct comports with Rule 8, Section 1(a) and Section 2(b).

The Kansas Supreme Court described the problems created by this regime as follows:

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

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

Schwartz, 366 B.R. 265, 266 (Bankr. D. Mass. 2007).

"[T]he practices of the various MERS members, including both [the original lender] and [the mortgage purchaser], in obscuring from the public the actual ownership of a mortgage, thereby creating the opportunity for substantial abuses and prejudice to mortgagors..., should not be permitted to insulate [the mortgage purchaser] from the consequences of its actions in accepting a mortgage from [the original lender] that was already the subject of litigation in which [the original lender] erroneously represented that it had authority to act as mortgagee." *Johnson v. Melnikoff*, 20 Misc.3d 1142, 873 N.Y.S.2d 234, 2008 WL 4182397, at *4 (Sup.1008)

Landmark Nat'l Bank v. Kesler, 289 Kan. 528, 216 P.3d 158 (2009) at page 168.

Courts, legislatures, and consumers may wonder why so many different financial institutions and mortgage bankers have elected to use MERS at all. The reason is that the marketing and securitization of subprime loans required it. See Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. Cin. L. Rev. 1359 (2010). In the real estate frenzy of the first part of this century, mortgage bankers and their Wall Street investors no longer depended upon the consumers to make payments on the loans they created and therefore had no reason to be concerned with the title contained in the public record. Fly by night mortgage brokers and bankers made their fees and sold the loans to Wall Street investment banks, who sold to yet other investors or aggregators who securitized the loans for sale in the securities markets. The mortgage bankers no longer had any

concern with whether the consumer would be able to make the payments or whether the language utilized in the nationally standardized deed of trust comported with the laws of the jurisdiction in which the security was located. Long tested legal principles were disregarded in favor of short term profit. While it would be unfair to blame MERS for America's current foreclosure crisis, it is hard to argue that utilization of MERS by mortgage bankers played a significant role in facilitating many of the problems that triggered the crisis. MERS essentially facilitated predatory loan practices by lowering exit costs. MERS allowed investors to be assured that even when a lender went bankrupt the foreclosure process would proceed unimpeded since county property records would remain unchanged, regardless of who might be the current holder of the obligation. Christopher L. Peterson, *Predatory Structured Finance*, 28 Cardozo L. Rev. 2185. This regime also limits counterclaims that consumers could make in the foreclosure context as MERS could disclaim liability that could attach to lenders, servicers, or mortgage brokers for the underlying loan as it would involve separate litigation following the traumatic loss of a home.

Clearly, MERS transforms what had previously been a transparent lending market into an opaque one-way mirror in which homeowners and borrowers stare at themselves and never know who owns the obligations

secured by their residences. This is not what the Washington legislature intended when it adopted *RCW 61.24*.

In the absence of judicial oversight there is an expectation that all parties will act consistently with the procedural requirements which are meant to provide borrowers notice of the process and an opportunity to object to the process to protect their rights and prevent abuses. *Cox v. Helenius, supra*. Underlying all the procedures outlined in *RCW 61.24*⁴ is the assumption that the borrower will have knowledge of the identity and the ability to reach the holder of the obligation. There must be no uncertainty regarding which party the underlying obligation or covenant secured by a deed of trust is owed to, for the borrower must have such knowledge if they are to protect their rights, including bringing an action to block a trustee's sale or the right to cure as set forth in *RCW 61.24.090* and *RCW 61.24.130*. But these values and principles are subverted by the introduction of MERS into the mortgage lending regime.

RCW 61.24 strips borrowers of many of the protections available under a traditional mortgage, particularly judicial oversight of the process.

⁴ Recent amendments to *RCW 61.24* require proof that the "entity claiming to be the beneficiary is the owner of any promissory note or obligations secured by the deed of trust." This new language further supports Plaintiff's contention that the language of *RCW 61.24.005(2)* was intended to refer to the owner of the underlying obligation as the change imposes a new obligation on the trustee while leaving the definition of beneficiary unchanged. SSB 1362, Section 7 (8)(b)(iii).

Therefore, lenders must strictly comply with the provisions of *RCW 61.24*, which must be strictly construed in favor of the borrower. *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 111, 752 P.2d 385 (1988). The *Koegel* court cited with approval the Arizona Supreme Court which held that “lenders must strictly comply with the Deed of Trust statutes, and the statutes and Deeds of Trust must be strictly construed in favor of the borrower.” *Patton v. First Federal Saving & Loan Association*, 118 Ariz. 473, 578 P.2d 152 (1978) (finding the clause giving beneficiary authority to withhold consent to transfer was contrary to statute and invalid.)

6. Review of other statutes and case law addressing MERS in other jurisdictions.

As noted above, no Washington appellate court has attempted to construe the limits of *RCW 61.24.005(2)*. However, the issue has been addressed in other jurisdictions across the nation.

The State of Michigan has the statutory scheme most similar to Washington’s. *MCL 600.3204(d)* provides 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 upon this statutory language, the courts in Michigan have ruled that MERS does not have the authority to foreclose. *Residential Funding Co., LLC, v. Saurman*, ____ N.W.2d ____, 2011 WL

1516819 (Mich. App. 2011)

The Supreme Court of Arkansas rejected the designation of MERS as a beneficiary under that state's Deed of Trust statutes. ("MERS is not the beneficiary, even though it is so designated on the deed of trust"). *Mortgage Electronic Registration Systems, Inc. v. Southwest Homes of Arkansas*, 2009 Ark. 152 (2009). The relevant Arkansas law mirrors *RCW 61.24.005*, which states in pertinent part:

"Beneficiary" means the person named or otherwise designated in a deed of trust as the person for whose benefit a deed of trust is given or his successor in interest.

Arkansas Code § 18-50-101.

The Arkansas Court found that simply labeling MERS a beneficiary under the statute did not fulfill the purposes of the statute and would ultimately frustrate the purpose of the recording system:

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

Southwest Homes, supra, at page 152.

Similarly, the Supreme Court of Kansas ruled that MERS had no interest in either the property or the obligation it secured. *Landmark Nat'l Bank v. Kesler, supra*. At issue in *Landmark* was whether MERS was a

necessary party requiring notice in a foreclosure action. The Court reasoned that since MERS was acting "solely as nominee" and "nominee" and the term was not defined in the document, it was left to the Court to interpret MERS's role in the transaction and the Court held that MERS lacked a legally cognizable interest in a foreclosure:

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

Landmark Nat'l Bank v. Kesler, supra, at page 167.

A nominee is one designated to act for another as his/her representative in a rather limited sense. Simply put: an agent. In its commonly accepted meaning, the word 'nominee' connotes the delegation of authority to the nominee in a representative capacity only, and does not connote the transfer or assignment to the nominee of any property in or ownership of the rights of the person nominating him/her. Black's Law Dictionary 727 (6th ed. abr.). The MERS system has attempted to achieve the barest superficial compliance with the non-judicial foreclosure process

(by assigning itself the role of "beneficiary") without reference the Washington Deed of Trust Act (which has a definition of "beneficiary" that MERS does not meet).

The language of the subject Deed of Trust is identical to the language used in the *Landmark* instrument. As cited above, the *Landmark* court ruled that MERS had no interest in either the property or the obligation it secured.

The Supreme Court of Maine also held that MERS was not the proper party to initiate a foreclosure action. *Mortgage Electronic Registration Systems, Inc. v. Saunders*, 2 A.3d 289 (2010). Although a judicial foreclosure state, the reasoning of the Maine Court is applicable to the cases here.

As discussed above, 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 mortgagee 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.

Id., at page 296.

While the *Saunders* court went on to discuss why such a lack of interest may be acceptable in a non-judicial context, the court offered no reasoning as to why this should be so. The end result should be the same in both judicial and non-judicial cases and the language of the Washington statute is clear that it is the party to whom the debt is owed that should retain the trustee and institute the foreclosure proceedings. As noted above, Washington requires that the foreclosing trustee have “proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust.” *RCW 61.24.030(7)(a)*. It would be unreasonable to hold that the party with no interest in the note could foreclose judicially, while requiring the trustee to have proof of a contrary fact.

There are other courts that have allowed MERS to conduct foreclosure activities on behalf of undisclosed principals, however aside from using occasionally flawed logic, these states utilize legal frameworks that are quite distinguishable from *RCW 61.24, et seq.*

In Minnesota, the Supreme Court allowed MERS to conduct foreclosures, in large part because the Minnesota legislature passed legislation that specifically authorized it. *Jackson v. Mortgage Electronic Registration Systems, Inc.*, 770 N.W. 2d 487 (2009) (“the Minnesota

Legislature passed an amendment to the Recording Act that expressly permits nominees to record “[a]n assignment, satisfaction, release, or power of attorney to foreclose.” Act of Apr. 6, 2004, ch. 153, § 2, 2004 Minn. Laws 76, 76-77 (codified at Minn.Stat. § 507.413 (2008)). The amendment, frequently called “the MERS statute,” went into effect on August 1, 2004.”).

In many cases, MERS was allowed to exist because the local statutes allowed it to do so. However, in Washington there are no such exceptions, meaning the laws of this state have more in common with those states that have rejected the use of MERS.

The courts in Arkansas, Kansas, and Maine are not the only courts to question the role of MERS in matters such as these. Please see *In re Vargas*, 396 BR 511 (Bankr. C.D. Cal 2008) (“MERS presents no evidence as to who owns the note or any authorization to act on behalf of the present owner”); *Saxon Mortgage Services. v. Hillery*, 2008 WL 5170180 (N.D. Cal 2008) (“there is no evidence of record that establishes that MERS either held the promissory note or was given the authority by New Century [the original lender] to assign the note”); *In re Mitchell*, 2009 WL 1044368 (Bankr.D. Nev. 2009); *In re Kang Jin Hwang*, 396 BR 757 (Bankr. C.D. Cal 2008).

Unlike Minnesota and California, and perhaps other states, the

Washington statutory scheme provides for no exceptions to the clear definition of “beneficiary” as set forth above. There is no additional language that can be read to include anything other than the holder of the note, which, even with reference to *RCW 62A.3-301*, would exclude an entity such as MERS from serving in that role. Additionally, the recent amendments to *RCW 61.24.030(7)(a)* demonstrate that the state legislature believes that a beneficiary is limited to a note holder. It would be unreasonable and inconsistent to require a foreclosing trustee to provide proof that a beneficiary is the holder of the note while simultaneously allowing a party that does not hold the note to act as a beneficiary.

Whatever the precise standard of construction used or the extent of analysis to which *RCW 61.24.005(2)* may be subjected, the interpretation must be the same. The designation of a party that is not the actual holder of the note secured by the deed of trust clearly conflicts with the statute and is therefore improper under Washington law.

7. The unintended consequences of using MERS.

a. Impact on right of rescission under federal law.

In addition to the litigation problems noted above, the inability to readily identify the holder of the underlying obligation has other serious ramifications, including impingement upon borrower’s rights of rescission.

Federal law creates a right of rescission whenever a homeowner refinances a home, or otherwise enters into a non-purchase money mortgage. If a lender fails to comply fully with the dictates of the Truth-in-Lending Act, 15 U.S.C. § 1601 et seq., the borrower is entitled to exercise the right of rescission for an extended three year period. 15 U.S.C. § 1635(f). When exercised, this right is extremely powerful: it cancels the lender's security interest or mortgage, credits all payments entirely to principal, relieves the homeowner of the obligation to repay any closing costs or fees financed, and provides the possibility of recovering statutory and compensatory damages. 12 C.F.R. § 226.23. Of critical importance in the context of this proceeding, the right to rescind may be asserted against assignees of the obligation, i.e. the note holder itself and his or her successors. In fact, rescission is one of the few tools available to homeowners to stop a foreclosure. 15 U.S.C. § 1641(c). Unlike note holders, loan servicers are not liable for rescission, and some courts have refused to honor a homeowner's rescission where the servicer's identity is the only information available to the homeowner. 15 U.S.C. §1641(f)(1); *Miguel v. Country Funding Corp.*, 309 F.3d 1161 (9th Cir. 2002).

While the Federal Reserve Board subsequently amended its Official Staff Commentary to clarify that service upon an agent of the holder, as defined by state law, is sufficient, where the creditor does not

designate a person to receive the notice of rescission, *69 Fed. Reg. 16,769* (Mar. 31, 2004), many ambiguities remain and courts have continued to question the adequacy of notice unless given to the holder of the loan. *Roberts v. WMC Mortg. Corp.*, 173 Fed. Appx. 575 (9th Cir. 2006). It is essential for a rescinding homeowner to identify and notify the holder. Identifying the holder of the note is dependent upon accurate land records, as servicers incur no liability for withholding this information. While the Truth In Lending Act requires loan servicers to tell borrowers, upon request, who the holder is, there is no requirement that the response be timely and there is no remedy for its violation. *15 U.S.C. §1641(f)(2)*.

Service upon MERS is likewise ineffective, as MERS is neither the holder nor the loan servicer. As “nominee,” MERS is not an agent of the holder for purposes of receipt of rescission notices. Black’s Law Dictionary 727 (6th ed. abr.) (defining nominee as “one designated to act for another as his representative in a rather limited sense”); *Mortgage Electronic Registration Systems v. Neb. Dep’t of Banking & Fin.*, 704 N.W.2d 784 (Neb. 2005) (MERS argues that it is only nominee of mortgages and is contractually prohibited from exercising any rights to the mortgages). Moreover, the history of litigation involving MERS confirms that it would be foolish to rely on notice to MERS as notice to the holder of the underlying obligation. *Freedom Mortg. Corp. v. Burnham Mortg.*,

Inc., 2006 WL 695467 (N.D. Ill., Mar. 13, 2006) (lender arguing that it is not bound by foreclosure bids of MERS as its nominee); *Countrywide Home Loans v. Hannaford*, 2004 WL 1836744 (Ohio Ct. App. Aug. 18, 2004).

This leaves the consumer in a nearly impossible situation. In order to exercise the right of rescission, the homeowner must provide notice to the holder of the note or its agent. MERS does not serve as the holder, nor does it serve as the holder's agent for this purpose; it does not believe it is required to comply with the Truth-In-Lending Act at all; and it refuses or is incapable of providing the homeowner with the name or address of the holder of the note. This is one of the underlying purposes of the MERS system: that by design, MERS withholds information from homeowners that is key to their exercising a critical federal right, MERS has and continues to infringe on homeowners' rights of rescission.

For Mr. Selkowitz the original lender went bankrupt on April 2, 2007, and to this day he has no knowledge of who the true owner of the loan may be. It is that owner that should be identified as the "beneficiary" under the Deed of Trust. The confusion and obstacles that are created by this MERS system are significant, particularly for homeowners whose predatory loans put them at an increased risk of default and foreclosure.

b. Circumvention of recording statutes and lax administration.

MERS circumvents the public recording system by allowing MERS members to electronically record the purported assignment of a mortgage from one MERS member to another on MERS's electronic servers, instead of utilizing the public land records. Robert E. Dordan, *Mortgage Electronic Registration Systems (MERS), Its Recent Legal Battles, and the Chance for A Peaceful Existence*, 12 Loy. J. Pub. Int. L 177, 178 (2010). Since the MERS recording system is available only to MERS members, borrowers, homeowners and the general public have no means to ascertain the holders of their Notes.

Moreover, MERS was specifically designed to make the assignment of secured obligations opaque from the very outset and was created without regard for real property and recording laws of the states. Michael Powell and Gretchen Morgenson, *MERS? It May Have Swallowed Your Loan*, N.Y. Times, March 5, 2011. Aside from ignoring the relevant legal frameworks in the states in which it operated, the MERS system also facilitated lax record keeping by providing authorization to people and entities to act as a "MERS representative" for a mere \$25, without ever having actually worked for MERS or establish any qualification other than logging on to a computer.

Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, *supra* at page 8. MERS has empowered individuals to adversely affect homeowner's rights and interests in their homes without supervision or accountability by the very company on whose behalf they purport to act. It is no surprise that significant mischief was a central result, with the introduction into the lexicon of "robo-signing" and other forms of malfeasance. *Robo-Signing, Chain of Title, Loss Mitigation and Other Issues in Mortgage Servicing: Hearings Before the House Committee on Financial Services Subcommittee on Insurance, Housing, and Community Opportunity*, 111th Cong. (Nov. 18, 2010) (prepared statement of R.K. Arnold). This has led federal regulators to cite MERS for "unsafe and unsound" practices. MERS Consent Order, Department of the Treasury Comptroller of the Currency, OCC Docket No. AA-EC-11-20, Enforcement Action 2011-44 at 5. As a result of federal investigation it was found that MERS and MERSCORP:

- a. have failed to exercise appropriate oversight, management supervision and corporate governance, and have failed to devote adequate financial, staffing, training, and legal resources to ensure proper administration and delivery of services of Examined Members; and
- b. have failed to establish and maintain adequate internal controls, policies, and procedures, compliance risk management, and internal audit and reporting requirements with respect to the administration of services to Examined members.

Id. at 5.

This federal enforcement action did not discuss the apparent disregard of state law by the MERS system, however it provides a searing indictment that even under its own terms, MERS is failing to conduct business in a sound and reliable manner.

c. Loss of transparency in land records and loss of revenues.

The system of public recording has the central aim of providing a transparent and reliable record of real property ownership. Ann M. Burkhardt, *Freeing Mortgages of Merger*, 40 Vand. L. Rev. 283, 353–54 (1987). As Professor Peterson aptly notes: “Society needs an authoritative, transparent source of information on who owns land to protect property rights, encourage commerce, expose fraud, and avoid disputes.” *Foreclosed Justice: Causes and Effects of the Foreclosure Crisis, Hearings Before the House Judiciary Committee*, 111th Cong. (Dec. 2, 2010) (prepared statement of Christopher L. Peterson) at page 10. By ignoring the established county recording systems, MERS turns a transparent system of public information into an opaque system governed by secrecy and operated in a manner contrary to the public interest for the financial benefit of a privileged few.

In his exhaustive analysis of the MERS system, Professor Peterson

quoted two recorders, one an elected recorder from Kentucky, that set forth the difference between a public servant that is publicly accountable and a private system where information may or may not be retained accurately:

But you see, I am the official custodian of that data base and everything that goes in there is required by Kentucky statutes that says this is what goes in that database that I am officially responsible for, and I'm held accountable for that. If what I am officially responsible for is the assignments then my next door neighbor is going to come in to see his record of assignment . . . Now, I can provide him access to that. . . . This should be public record and all of a sudden it is no longer a public record. It's an inconclusive file. It went in this black hole called a clearinghouse...

It is a huge project to put this all together, handling this for everybody, all over the nation. If you don't do it 100% right, it's going to be one big awful mess.

Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, at page 14.

Problems with record keeping in the context of foreclosures are endemic and widespread. It is most frequently revealed during litigation resulting from judicial foreclosures. *Foreclosed Justice: Causes and Effects of the Foreclosure Crisis, Hearings Before the House Judiciary Committee*, 111th Cong. (Dec. 2, 2010) (prepared statement of Hon. F. Dana Winslow) at pages 1-7. These problems include, without limitation, affidavits submitted without the actual knowledge sworn to by the affiant, fraudulently created documents of impossible transactions. Even worse,

such conduct often implicates attorneys representing the banks. *Foreclosed Justice: Causes and Effects of the Foreclosure Crisis, Hearings Before the House Judiciary Committee, 111th Cong. (Dec. 2, 2010)* (prepared statement of Thomas A. Cox) at pages 4-16. MERS creates and facilitates these problems by creating a layer of paperwork based on deception and a falsehood – including assertions that MERS, as is the case in this action, is the note holder. Please see Dkt. 9, Ex. “B”. However, there is no reason to believe these problems are any less endemic and widespread in non-judicial foreclosure states, such as Washington.

Any cost savings resulting from the MERS regime only benefit its member lenders, who are freed from the costs of recording mortgage assignments, not homeowners or the public. These cost savings are touted by MERS: “[Y]ou’ll save \$30 or more per loan when you specify MERS as the Original Mortgagee” and “paperless transmission and elimination of assignments, not to mention the savings of about \$22 per loan that correspondents realize by being on MERS.” Mortgage Electronic Registration Systems, Inc., *Frequently Asked Questions* (<http://www.mersinc.org/why.mers/faq.aspx>, last visited September 16, 2011).

Finally, MERS’ evasion of the public databases has, as its

designers intended, created a drain on the public treasuries. This transfer of significant revenues from county and city clerks throughout the country to MERS and its members, is an unwarranted interference with the clerks' public recordation function. 60 million mortgages and deeds of trust have been registered with MERS since it began. *Powell and Morgenson, supra*. It is not known how many times the typical MERS loan is transferred during its life, but it is often assigned or transferred many times. Assuming for the sake of argument that a given obligation is transferred three times during its life and the average recording fee for each transaction is \$30, the loss of revenue to local governments on the mortgages and deeds of trust registered with MERS is a staggering: \$5,400,000,000.00!

d. Double liability for underlying debt.

Finally, by essentially circumventing the public recording systems, MERS exposes homeowners and consumers to the threat of double liability because the holder of the promissory note and a different beneficiary may both show up at different times demanding compensation or right to the collateral. This danger is especially acute in a non-judicial foreclosure regime such as Washington's where the record keeping concerning the actual holder of the beneficial interest and underlying note is lax and done by individuals and entities who may conduct business

outside the State with no real interest in the obligations.

8. Unlawful acts of MERS void subsequent actions.

If, as argued above, MERS has no authority to act as a beneficiary under *RCW 61.24*, all actions taken by MERS must be void. But even unlawful behavior by MERS could have a substantial impact on the parties.

Since the whereabouts of Mr. Selkowitz's Note is unknown at this time, there is no way of ascertaining if the same has been endorsed to an undisclosed third party. If this has occurred, MERS conduct with regard to the subject appointment of QLS as successor trustee and QLS' foreclosure on behalf of MERS has effectively segregated the Note from the Deed of Trust. This could have a substantial impact on the validity of the subject Deed of Trust as the separation of the Note from the Deed of Trust renders the subject Deed of Trust unenforceable. In other words, separation of the Note from the Deed of Trust results in the Note being unsecured. Restatement (Third) of Property: Mortgages § 5.4, Comment e (1997) ("in general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation"). This is the basis of Mr. Selkowitz's claims for quiet title and defamation of title.

This reasoning has been adopted by various courts and should be adopted by this Court. This reasoning was recognized as authority in the

Landmark case and was cited by a Missouri court in finding that an assignment of deed of trust (which also purported to assign the underlying note) was of no force or effect. *Landmark Nat'l Bank v. Kesler, supra* at pages 166-167, *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619 (Mo. App. 2009). Moreover, this reasoning was adopted by the United States Supreme Court when it addressed this issue in *Carpenter v. Longan*, 83 U.S. 271 (1872), which stated the rule succinctly:

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

Carpenter at 274.

See also *Kelley v. Upshaw*, 39 Cal.2d 179 (1952) (“purported assignment of the mortgage without an assignment of the debt which is secured was a legal nullity”); *In re Leisure Time Sports, Inc.*, 194 B.R. 859, 861 (B.A.P. 9th Cir.1996) (stating that “[a] security interest cannot exist, much less be transferred, independent from the obligation which it secures” and that, “[i]f the debt is not transferred, neither is the security interest.”).

In sum, there is a very real possibility that one result of MERS’ action in this case is to void the very Deed of Trust Defendants seek to foreclose.

B. What is the legal effect of MERS' acting as an unlawful beneficiary and what should the remedy be?

As argued above, the legal impact of MERS acting as an unlawful beneficiary is to render the subject Deed of Trust and actions taken by MERS on the basis of the subject Deed of Trust void or voidable.

The proper remedy for a violation of *RCW 61.24* should be rescission, which does not excuse Mr. Selkowitz from payment of any monetary obligation, but merely precludes non-judicial foreclosure of the subject Deed of Trust. Moreover, if the subject Deed of Trust is void, Mr. Selkowitz should be entitled to quiet title to his property, in addition to the other relief requested in Mr. Selkowitz's Amended Complaint. See Dkt. 9 and 25.

MERS and its affiliates have argued that since parties such as Mr. Selkowitz agreed to MERS' designation as the "beneficiary" under the Deed of Trust, that they ratified the role of MERS even if it violates the provisions of *RCW 61.24*. However, this argument is simply wrong. A contract that violates a specific statute is illegal and void under the public policy doctrine. *Mills v. Western Washington University*, 150 Wash. App. 260, 208 P.3d 13, 244 Ed. Law Rep. 821 (2009), review denied, 167 Wash. 2d 1020, 225 P.3d 1011 (2010); *Parker v. Tumwater Family Practice Clinic*, 118 Wash. App. 425, 76 P.3d 764 (2003).

An agreement that violates a statute or municipal ordinance is void, except where the agreement is not criminal or immoral and the statute or ordinance contains an adequate remedy for its violation. *Sienkiewicz v. Smith*, 97 Wash.2d 711, 716, 649 P.2d 112 (1982). However, *RCW 61.24* does not provide any specific remedies for violation of the statute in the context of pre-sale actions meant to prevent the wrongful foreclosure from occurring, although this appears to have been contemplated by the Court in *Cox v. Helenius, supra*.

By failing to name a legally cognizable beneficiary the Deed of Trust itself should be held invalid. This is identical to a situation where a deed fails to name a grantee resulting in the deed being held void. *Trout v. Taylor*, 32 P.2d 968 (Cal. 1934); *Allen v. Allen*, 51 N.W. 473, 474 (Minn. 1892); *Disque v. Wright*, 49 Iowa 538, 540 (1878); *Chauncey v. Arnold*, 24 N.Y. 330, 338 (1862).

The *Chauncey* case from New York is illustrative of the point that a legally invalid beneficiary should render the instrument itself void. In that case the mortgagee was intentionally left blank to facilitate subsequent transfers. Despite the obvious intention of a drafting party to create a legally binding document, the New York court held that "No mortgagee or obligee was named in [the security agreement], and no right to maintain an action thereon, or to enforce the same, was given therein to

the plaintiff or any other person. It was, *per se*, of no more legal force than a simple piece of blank paper” *Id.*, at 335.

The *Trout* case in California reached the same result under similar circumstances holding “the deed in question was not voidable, but was void *in toto*; a nullity.” *Trout v. Taylor, supra.*, at page 970.

In the alternative, should the Court find that MERS is not a lawful beneficiary within the terms of *RCW 61.24.005(2)*, then the creation of an equitable mortgage may be appropriate. Granting the true loan owner (if it can be identified) an equitable mortgage that prevents any implication that the borrower is trying to escape responsibility for the debt they incurred. Traditionally, courts of equity sometimes were willing to imply an equitable mortgage in cases in which the parties to the transaction intended to have security for the loan but failed to comply with formal conveyance requirements. *Fleishbein v. Thorne*, 193 Wash. 65, 74 P.2d 880 (1937). However, this would require disclosure of the true “holder” of the underlying obligation, clear proof of the sum which the agreement was to secure, the intent of the parties to create a mortgage, lien or charge on the property sufficiently described or identified to secure the obligation. *Plummer v. Ilse*, 41 Wash. 5, 82 P. 1009 (1905); *Batten v. Fallgren*, 2 Wn.App. 360, 467 P.2d 882 (1970). The sensible policy behind the rule is to give effect to the substance of the transaction rather

than its form.

Application of this equitable doctrine would address the argument that “dead-beat” borrowers are “getting their homes for free.” Awarding this relief would require resort to judicial proceedings, but given the confusion created by multiple undisclosed assignments executed by individual and entities of questionable authority and integrity would alleviate many of the problems now facing the mortgage lending industry (who are having difficulty re-financing MERS loans), title companies (who are unwilling to insure title to properties involving MERS loans) and homeowners (who have no clear idea of who owns their deeds of trust and how much they may owe on their obligations).

C. **Do homeowners have a consumer protection claim if MERS acts as an unlawful beneficiary?**

The Washington Consumer Protection Act (WCPA), *RCW 19.86, et seq.* was originally adopted by the Washington Legislature in 1961. The Act was created and adopted, “to protect the public and foster fair and honest competition.” *RCW 19.86.920.*

In 1971, the Legislature amended the Act to provide for a private right of action under which citizens could bring a suit to enforce the provisions of the WCPA. *See RCW 19.86.090*, which provides that “any person who is injured in his business or property by a violation of *RCW*

19.86.020 . . . may bring a civil action . . . to enjoin further violations, to recover . . . actual damages . . . or both, together with the costs of the suit, including a reasonable attorney's fee”

The case of *Lightfoot v. MacDonald*, 86 Wn.2d 331, 544 P.2d 88 (1976) ,was the first to recognize a statutory basis for the requirement that a citizen seeking recovery or redress under the WCPA make a showing that the public interest would be served by the private lawsuit. *Lightfoot v. MacDonald, Lightfoot, supra.*, at 334-35.

Since the Supreme Court's decision in *Lightfoot*, Washington Courts have carved out five elements which when met give rise to a private cause of action under the WCPA. These elements are (1) an unfair or deceptive act of practice; (2) occurring in trade or commerce; (3) which affects the public interest; (4) which injures to a person's business or property; and (5) a showing of causation. *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

The Washington Supreme Court has further implied that the violation of another Washington law or statute might constitute a *per se* violation of the WCPA. The Court in *Perry v. Island Sav. and Loan Ass'n.*, 101 Wn.2d 795, 684 P.2d 1281 (1984) held that a Savings and loan association's attempt to enforce a due-on-sale clause in a deed of trust didn't constitute a *per se* violation of the WCPA because there is no

statute that exists which restricts the enforcement of such clauses. *Perry v. Island Sav. and Loan Ass'n, surpa.*, at 810-11, n. 9. The obvious inference of this holding is that it necessarily implies that the violation of another statute in regards to a citizen's claim under the WCPA would support the contention that there has been a *per se* violation of the WCPA.

At the very least, a violation of another statute may constitute a *per se* violation of the public interest element of the above-mentioned five part test. In *Haner v. Quincy Farm Chems., Inc.*, 97 Wn.2d 753, 649 P.2d 828 (1982) this Court specifically held that violation of a statute wherein there is a legislative declaration of public interest constitutes a *per se* violation of the public interest requirement of *RCW 19.86.090*. *Haner v. Quincy Farm Chems., Inc., surpa.*, at 762.

The Courts' interpretation of the legislative intent underlying Washington's Deed of Trust Act has been often speculative and up for interpretation. See Joseph L. Hoffmann, *Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59 Wash. L. Rev. 323, 324 (1984). That said, it is almost universally agreed that there are significant rights and interests at stake in most non-judicial foreclosure cases brought under the Act as a homeowners stand to lose all rights in their property. *Id. Citing Gose, The Trust Deed Act in Washington*, 41 Wash. L. Rev. 94, 101 (1966).

As noted above, this Court has made a general finding regarding the legislative intent underlying *RCW 61.24* in *Cox v. Helenius, supra*. Specifically this Court held that, "Washington's deed of trust act should be construed to further three basic objectives. . . . Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, the process should promote stability in land titles." *Cox v. Helenius, supra.*, at 387. There is no argument that both the prevention of wrongful foreclosure and the promotion of stability in land titles fall within the auspices of the public interest. The majority of land titles in Washington are privately held and subject to default under the *RCW 61.24* such that allowing for procedurally defective foreclosures or instability in land titles would stand in stark contrast to the public interest.

Even if this Court should find that there is no *per se* violation of *RCW 61.24* in this matter, the facts of this case satisfy the five above-mentioned elements supporting a private cause of action under the WCPA as stated in *Hangman Ridge*. The WCPA expressly states that its provisions "shall be liberally construed" as a means of protecting the public against "unfair, deceptive, and fraudulent acts or practices." *RCW 19.86.920*.

Determining whether a particular act is an unfair or deceptive act within the terms of the WCPA is a question of law for the court, if there is

no factual dispute. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 930 P.2d 288 (1997). An unfair or deceptive act may include misrepresentations of facts related to the legal status of a debt. *Panag v. Farmers Ins. Co. Of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009) (deceptive methods used by a collection agency to recover money on behalf of an insurance company).

In applying *Panag* to the facts of the present controversy, it is undisputed that in the original Deed of Trust, New Century granted a beneficial interest to MERS, an act which set in motion the events that led to improper and invalid subsequent appointment of QLS as successor trustee and eventual debt collection action. The conduct of QLS in asserting that it and the other Defendants named herein were acting in accordance with the relevant provisions of *RCW 61.24, et seq.*, and specifically asserting by their actions that MERS is a proper beneficiary to act under *RCW 61.24.005(2)*, *RCW 61.24.010* and *RCW 61.24.020*, is materially false and/or misleading to the extent that the purported transactions were not consistent with laws of the State of Washington and therefore failed to meet the legal standards entitling any of the named Defendants to take action against Mr. Selkowitz's home.

Defendants misconduct was clearly occurred in connect with their trade. The WCPA defines "trade or commerce" to include the "sale of

assets or services, and any commerce directly or indirectly affecting the people of the State of Washington.” *RCW 19.86.010(2)*. Enforcement of notes and deeds of trust and foreclosure of the same clearly falls under the umbrella of “trade or commerce” as defined by the WCPA.

Among the factors set forth in *Hangman Ridge* in determining if the public interest element is met are: (1) were the alleged acts committed in the course of defendant's business? (2) are the acts part of a pattern or generalized course of conduct? (3) were repeated acts committed prior to the act involving plaintiff? (4) is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? *Hangman Ridge*, 105 Wn.2d at 789. For disputes more private in nature, courts will consider whether (1) the acts alleged were committed in the course of defendant's business? and (2) whether plaintiff and defendant occupy unequal bargaining positions? The answer to these questions is an unequivocal “Yes.” The conduct alleged herein by Mr. Selkowitz occurred in the course of Defendants’ respective businesses and substantially conforms to their conduct in foreclosing other homeowners throughout the State of Washington.

Injury to person’s business or property is broadly construed and in some instances where “no monetary damages need be proven, and that non-quantifiable injuries, such as loss of goodwill would suffice for this

element of the *Hangman Ridge* test." *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987). Mr. Selkowitz has suffered injuries in the form of loss of time from work, monetary damages in the form of attorney fees, and non-quantifiable injuries resulting from the emotional distress of pursuing this litigation.

All of Mr. Selkowitz's injuries were the direct and proximate cause of Defendants' misconduct in the wrongful foreclosure to Mr. Selkowitz's home and, as such, all five elements for a private cause of action under the WCPA are met.

V. CONCLUSION

Based upon the foregoing, it is clear that MERS is not a lawful "beneficiary" within the terms of *RCW 61.24.005(2)* because it is not the "holder of the instrument evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for different obligation." Accordingly, MERS had no lawful authority to appoint QLS as successor trustee under *RCW 61.24.010(2)*, to declare a default under *RCW 61.24.030(7)(c)*, or to authorize foreclosure proceedings against Mr. Selkowitz's home.

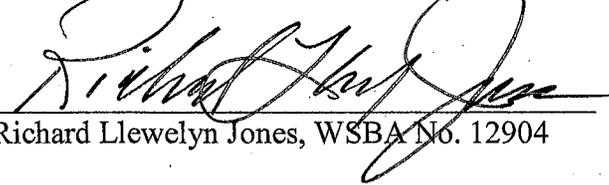
The legal effect of MERS acting as an unlawful beneficiary is to render the subject Deed of Trust void, which entitles Mr. Selkowitz to rescission of the security instrument. This would not necessarily leave the

true holder without a remedy, as a trial court could establish an equitable mortgage in the true holder's favor.

However, it is clear that in addition to all other rights and remedies available to Mr. Selkowitz, MERS designation as an unlawful beneficiary violates the provisions of the WCPA and entitles Mr. Selkowitz to pursue his rights and remedies under *RCW 19.86*.

RESPECTFULLY SUBMITTED this 28th day of September,
2011.

RICHARD LLEWELYN JONES, P.S.



Richard Llewelyn Jones, WSBA No. 12904

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury of the laws of the State of Washington that on Friday, September 30, 2011, I caused to be delivered an original plus one copy of the foregoing Plaintiff's Opening Brief to the Court with Appendices; and a copy of the brief with the appendices on a compact disc to all attorneys of record in the manner indicated:

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Dan L. Williams
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Appendices
are located in
two large notebooks

TABLE OF APPENDICES

APPENDIX	ARTICLE	PAGE(S)
A	Hon. John C. Coughenour, Judge, U.S. District Court, Western Washington Seattle, Order of June 27, 2011, USDC Case No. C10-5223.	1, 2, 4, 5, 10, 14
B	MERSCORP, Inc., Rules of Membership, Rule 8, Section 1(a) (June 2009)	17, 18
C	Jill D. Rein, "Significant Changes to Commencing Foreclosure Actions in the Name of MERS", USFN, May 4, 2006.	17
D	Christopher L. Peterson, Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System, University of Cincinnati Law Review, Vol. 78, No. 4, 2010.	19
E	Christopher L. Peterson, Predatory Structured Finance, Cardoza Law Review Vol. 28:5, 2007.	20
F	Christopher L. Peterson, Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory, 53 WILLIAM & MARY L. REV., 2011	33, 35
G	Robert E. Dordan, Mortgage Electronic Registration Systems (MERS), Its Recent Legal Battles, and the Chance for a Peaceful Existence, 12 Loy. J. Pub. Int. L 177, 178 (2010).	32

APPENDIX	ARTICLE	PAGE(S)
H	Michael Powell and Gretchen Morgenson, MERS? It May Have Swallowed Your Loan, N.Y. Times, March 5, 2011.	32
I	Robo-Signing, Chain of Title, Loss Mitigation and Other Issue in Mortgage Servicing: Hearings Before the House Committee on Financial Services Subcommittee on Insurance, Housing, and Community Opportunity, 111th Cong. (Nov. 18, 2010) (prepared statement of R.K. Arnold).	33
J	MERS Consent Order, Department of the Treasury Comptroller of the Currency, OCC Docket No. AA-EC-11-20, Enforcement Action 2011-44 at 5.	33
K	Ann M. Burkhardt, Freeing Mortgage of Merger, 40 Vand. L. Rev. 283, 353-54 (1987).	34
L	Foreclosed Justice: Causes and effects of the Foreclosure Crisis, Hearings Before the House Judiciary Committee, 111th Congress (Dec. 2, 2010) (prepared statement of Christopher L. Peterson).	34
M	Foreclosed Justice: Causes and effects of the Foreclosure Crisis, Hearings Before the House Judiciary Committee, 111th Congress (Dec. 2, 2010) (prepared statement of Hon. F. Dana Winslow).	35

APPENDIX	ARTICLE	PAGE(S)
N	Foreclosed Justice: Causes and effects of the Foreclosure Crisis, Hearings Before the House Judiciary Committee, 111th Congress (Dec. 2, 2010) (prepared statement of Thomas A. Cox).	36
O	Mortgage Electronic Registration Systems, Inc., Frequently Asked Questions (http://www.mersinc.org/why.mers/faq.aspx , last visited Septemer 16, 2011).	36