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Supreme Court No. 89343-8

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

FLORENCE R. FRIAS

Plaintiff,

v.

ASSET FORECLOSURE SERVICES, INC.; LSI TITLE AGENCY,
INC.; U.S. BANK, N.A.; MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC.; and DOE DEFENDANTS 1 through 20,

Defendants.

**PLAINTIFF FLORENCE R. FRIAS' AMENDED REPLY BRIEF
ON QUESTIONS CERTIFIED TO THE SUPREME COURT BY
THE UNITED STATES DISTRICT COURT**

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I. INTRODUCTION

Defendants U.S. Bank and MERS elected to use the expedited nonjudicial foreclosure process set forth in the Deed of Trust Act (DTA), but they urge this Court to allow those using the statute to violate the requirements of the statute with impunity and avoid liability caused by their actions where there is no completed trustee's sale. Defendants LSI and Asset Foreclosure created a business model that was predicated upon avoidance of the DTA's strict statutory requirements, reaped profits therefrom and also seek to avoid liability for damages caused by their statutory violations absent a completed trustee's sale.

It is essential that this Court make clear that banks, loan servicers, foreclosing trustees and others who choose to utilize the provisions of the DTA and enjoy the benefits of Washington's nonjudicial foreclosure procedure will face the liability intended by the legislature when they violate its provisions and cause injury to borrowers, whether or not a foreclosure sale is completed. Without the ability to obtain monetary relief for injuries caused by the wrongful initiation of a foreclosure sale, the duties required by the DTA are meaningless.

The Court of Appeals' thoughtful analysis in *Walker v. Quality Loan Service Corp.*, 176 Wn. App. 294, 304-13, 308 P.3d 716 (2013), is correct and should be followed by the Court in answering these certified questions. See Pl. Opening Br. at 6-7, 23, 36-44, 46-48 & 50-55. The legislature's statement that "failure to enjoin a foreclosure sale under this chapter may not be deemed a waiver of a *claim for damages* . . .," RCW

61.24.127 (emphasis added), is an explicit recognition and expression of intent that such claims exist *prior to* a trustee's sale, because one cannot waive a claim that does not exist at the time of the waiver, and nothing in that provision requires that the violation resulted in a completed trustee's sale. *Walker*, 176 Wn. at 307 (following RCW 61.24.127).

The *Walker* court's conclusion is solidly supported by the plain language and structure of the DTA. Defendants' attempts to parse the language of RCW 61.24.127 to reach a contrary conclusion are unavailing, as is their argument based on its legislative history. The holding in *Walker* is further supported by the Washington case law governing the recognition of causes of action based on violations of statutory duties, and by sound principles of public policy. With respect to a CPA claim based on DTA violations that are unfair or deceptive acts or practices, all the Defendants except Asset Foreclosure acknowledge that Plaintiff may bring such a claim regardless of whether there has been a sale, subject to the *Hangman Ridge* requirements. The Court should have little trouble seeing through and rejecting Asset Foreclosure's arguments.

The claim for damages caused by a defendant's violations of the DTA, with or without a sale, is simply a cause of action for "failure to comply with the DTA, causing damage to the borrower," and should be governed by standard tort principles *Walker*, 176 Wn. App. at 307. Similarly, the elements of the CPA claim for injuries suffered as a result of a defendant's unfair or deceptive acts, which may include DTA violations, are the same principles that govern any CPA claim under *Hangman Ridge*.

II. ARGUMENT

The first, and primary, question certified by the federal court is whether under Washington law Plaintiff may state a claim for damages under the DTA and/or the CPA based on violations of the DTA, absent a completed trustee's sale. The answer is yes, both as a standalone claim for material violations of the DTA that cause injury, and under the CPA for violations of the DTA that are unfair or deceptive and meet all the other elements of a CPA claim. The second certified question is what principles govern Plaintiff's claims for damages under the DTA and CPA, assuming that the claims exist. With respect to Plaintiff's standalone claim for damages under the DTA, it should be governed by standard tort principles (duty, breach of duty, causation and damages), as articulated in *Walker*. As to Plaintiff's CPA claim for Defendants' violations of the DTA that were unfair or deceptive, the claim should be governed by the basic principles set forth in *Hangman Ridge* and its progeny, including *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012), *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013), and *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 204 P.3d 885 (2009). For both types of claims, standard principles of agency liability, joint liability and other similar forms of derivative or concurrent liability should apply, just as they do in other areas of the law.

- A. Plaintiff May State Damages Claims for Defendants' Violations of the DTA, Under Both the DTA and the CPA, in the Absence of a Completed Trustee's Sale.**

1. Plaintiff May State a Claim Under the DTA for Damages Caused by Violations of DTA Absent a Completed Trustee's Sale.

Walker's holding that a homeowner may state a claim for damages for injuries caused by a defendants' violations of the DTA is supported by the language and structure of RCW 61.24.127 and other provisions of the DTA, the legislative history of RCW 61.24.127, established Washington case law governing the recognition of causes of action based on violations of statutory duties, and sound principles of public policy.

a. The Claim for Damages for Injuries Caused by Violations of the DTA, Irrespective of Whether there is a Completed Trustee's Sale, is Expressly Recognized Under RCW 61.24.127.

The legislature's recognition of Plaintiff's damages claim for injuries caused by DTA violations is demonstrated by RCW 61.24.127's express statement that "[t]he failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter may not be deemed a waiver of a *claim for damages asserting: . . . [f]ailure of the trustee to materially comply with the provisions of this chapter.*" RCW 61.24.127(1)(c) (emphasis added). This expressly demonstrates the legislature's understanding and intent that a claim for damages exists *prior to* a trustee's sale, because one cannot waive a claim that does not exist at the time of waiver. *See, e.g., Panorama Residential Protective Ass'n v. Panorama Corp. of Washington*, 97 Wn.2d 23, 28, 640 P.2d 1057 (1982) ("waiver can only apply to a right that existed at the time of the waiver").

As the court explained in *Walker*, if there were nothing more than

injunctive relief available to a homeowner, then the non-waiver language in the DTA would make no sense. The *Walker* court stated:

This provision [RCW 61.24.127] preserves a cause of action existing at the time a sale could be restrained—*in other words, a claim existing before a foreclosure sale*. It reflects the legislature's understanding of existing law—that a cause of action for damages existed based upon a trustee's presale failure to comply with the DTA, causing damage to the borrower.

Walker, 176 Wn. App. at 307 (emphasis added). (“Nothing in RCW 61.24.127 requires that the violation resulted in the wrongful sale of the property.”) It merely provides clarification that a borrower who does not enjoin the sale may still pursue certain pre-existing damages claims.

In an effort to avoid this statutory language, Defendant LSI argues that *Walker* was based on “an incorrect and incomplete reading” of RCW 61.24.127, and then parses the provision to try to show that the damages claim for violations of the DTA that the legislature expressly recognized should be limited to *post-sale* claims. *See, e.g.*, LSI Opp. at 21-24. LSI argues that a homeowner cannot “fail to enjoin” a trustee’s sale until the moment a sale occurs, and so, by its logic, the damages claim that the statute says is not waived by a failure to enjoin the sale need not arise until the moment of sale. *Id.* at 22.

It is *LSI*, however, that ignores critical words in the statute. LSI argues that under the statute, “a borrower does not ‘fail’ to ‘bring a civil action to enjoin a foreclosure sale under the DTA unless and until the sale has actually occurred.” LSI Opp. at 22. It omits the key words “under this chapter” that appear immediately after the language it quotes. *Id.* at 22-

23. Restoring those words that LSI omitted, the provision states that a borrower's failure "to bring a civil action to enjoin a civil action *under this chapter* may not be deemed a waiver of a claim for damages . . ."

RCW 61.24.127(1) (emphasis added).

These words, "under this chapter," that LSI ignores are essential for understanding when a homeowner's non-waiver of the damages claim for material violations of the DTA occurs under RCW 61.24.127, because:

No court may grant a restraining order or injunction to restrain a trustee's sale unless the person seeking the restraint gives *five days' notice* to the trustee of the time when, place where, and judge before whom the application for the restraining order or injunction is to be made.

RCW 61.24.130(2) (emphasis added). Thus under the DTA, the failure to bring a civil action to enjoin a sale occurs not at the moment of sale, but *before* the sale. This language provides further recognition that claims for damages can exist prior to a trustee's sale.

LSI next argues that RCW 61.24.127(2), by its references to "the foreclosure sale," somehow limits the non-waived damages claims for DTA violations to claims asserted after a sale. LSI Opp. at 22-24. Those provisions, however, merely show that the non-waived claims *may* be brought after a sale, not that they *must* be. RCW 61.24.127(2)(a), for example, states that the non-waived claim "must be asserted or brought within two years from the date of the foreclosure sale *or* within the applicable statute of limitations for such claim, whichever expires earlier." RCW 61.24.127(2)(a) (emphasis added). When the non-waived claims are

brought in the absence of a completed sale, the statute of limitations is simply the applicable statute of limitations running from when the claim first accrued. *See* RCW 4.16.080. Similarly, the restrictions in subsections (2)(c) and (2)(d) concerning the effects of a non-waived claim on a foreclosure sale do not mean there must be a sale in order for the claim to be brought, but only that if there is a sale, the non-waived claim must comply with those subsections.

Further, even the waiver provisions in the DTA are limited, a fact which *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 189 P.3d 233 (2008), ignored, prompting legislative rejection. RCW 61.24.040(f)(IX) indicates that “[f]ailure to bring such a lawsuit [to enjoin the sale] *may* result in a waiver of any proper grounds for *invalidating the Trustee’s sale.*” RCW 61.24.040(f)(IX) (emphasis added). The legislature expressly limited what “may” be waived by a failure to enjoin the sale in both sections: sale invalidation. There is nothing in the statute concerning waiver of a claim for damages caused by an improperly initiated foreclosure sale in violation of the DTA and there are no Washington cases except those recently decided (and *Brown*, which has been expressly rejected by the legislature) that actually address the issue of pre-sale damages claims. Thus, the lower court correctly noted in *Walker*, “[n]o Washington case law relieves from liability a party causing damage by purporting to act under the DTA without lawful authority to act or failing to comply with the DTA’s requirements.” *Walker*, 176 Wn. App. at 313.

Other portions of the DTA also reference the ability to recover

damages. Under RCW 61.24.090(2), any party entitled to discontinue the sale “shall have the right, *before or after reinstatement*,” to ask a court to determine the reasonableness of any fees “*demanded or paid* as a condition to reinstatement.” RCW 61.24.090(2) (emphasis added). In that context, the court may “make such determination *as it deems appropriate*, which may include an award to the prevailing party of its costs and reasonable attorneys’ fees,” and such “[a]n action to determine fees shall not forestall any sale or affect its validity.” *Id.* (emphasis added) This section of the DTA is distinguishable from the injunctive relief provisions because merely filing the lawsuit does not result in a sale injunction. Injunction must be affirmatively sought in order to prevent the sale, but this section does give broad discretion to a court in deciding the remedy for improperly charged foreclosure fees. Again, this relief may be sought “*before or after*” a foreclosure sale has occurred. *Id.*¹

RCW 61.24.090(2) also refers specifically to “fees” charged in connection with the foreclosure, as it also describes what “expenses incurred . . . enforcing the terms” may be added to the defaulted amounts. Since those who challenge wrongfully initiated foreclosure sales contend that the initiation was improper, and fees are being demanded by the trustee to stop the sale that were incurred during the wrongfully initiation,

¹ It also makes sense for the legislature to specifically lay out a process to dispute fees charged in connection with a foreclosure and to give courts great latitude to fashion a remedy since in other cases, a debtor may not be able obtain a recovery when amounts are demanded in connection with a debt but are not paid. *See, e.g., Benoy v. Simons*, 66 Wn. App. 56, 65, 831 P.2d 167 (1992) (holding that plaintiffs could not state CPA claim for unfair or deceptive medical charges that were assessed but not paid).

it follows that a court may determine the validity of the underlying foreclosure prior to and separate from whether there is a sale, to determine if the fees being demanded are reasonable. If a foreclosure was wrongfully initiated, then necessarily the fees being demanded in connection therewith cannot be “reasonable.” RCW 61.24.090(1)(b) & (2). RCW 61.24.090 permits borrowers to challenge amounts demanded in a foreclosure, before a sale has occurred, and allows the court to fashion a recovery that “it deems appropriate.” RCW 61.24.090(2).²

Finally, the legislature’s recognition of a damages claim for a borrower’s expenses and other injuries caused by violations of the DTA, with or without a foreclosure sale, is reinforced by express provisions in the DTA requiring foreclosing trustees to send notices to homeowners advising them to consult an attorney to evaluate their legal rights. *See* RCW 61.24.030(8)(k) (requiring that notice of default contain language advising homeowners to “CONTACT . . . AN ATTORNEY LICENSED IN WASHINGTON NOW to assess your situation . . .” (capital letters original); RCW 61.24.040(2) (requiring that notice of foreclosure state that “You may wish to consult a lawyer”). A homeowner who follows this guidance and incurs the cost to consult an attorney, and learns that the foreclosure was unlawfully initiated in violation of the DTA, is economically injured by the DTA violations. When she takes the further

² Nothing required Plaintiff to specifically cite RCW 61.24.090(2) when she pled this claim. US Bank/MERS Opp. at 18. *See also* Pl. Opening Br. at 17.

step and enjoins the unlawfully initiated foreclosure, she has done what courts require of all wronged plaintiffs – she has mitigated damages. The DTA plainly contemplates through all these provisions, consistent with the express language in RCW 61.24.127, that a homeowner who is injured by violations of the DTA may be compensated for those injuries, irrespective of whether the violations result in a sale or a completed sale.

b. The Legislative History of RCW 61.24.127 Does Not Support Defendants’ Position that the Claim for Damages for Injuries Caused by Violations of the DTA Is Limited to Post-Sale Claims.

In *Walker*, the court noted that “nothing in the 2009 amendment [referring to Laws of 2009, ch. 292, § 6, now codified as RCW 61.24.127] requires that the violation [of the DTA] resulted in the wrongful sale of the property.” *Walker*, 176 Wn. App. at 307 & nn. 18 (citing legislative history). Yet despite the plain language of RCW 61.24.127, and without any tangible contrary evidence from the legislative history, Defendants U.S. Bank and MERS argue that the legislative history of RCW 61.24.127 demonstrates that the legislature only meant that post-sale claims for violations of the DTA are not waived by failure to enjoin the trustee’s sale. *See* U.S. Bank/MERS Opp. at 28-36. Again, their position is unfounded.

The attempt by U.S. Bank and MERS to overcome the plain language of RCW 61.24.127 based on snippets of legislative history violates the cardinal rule that this Court will consider legislative history “only if the statute remains ambiguous after the plain meaning inquiry.” *In re Adams*, 178 Wn.2d 417, 430, 309 P.3d 451 (2013). Here there is no

need to look to legislative history because the statute expressly states the legislature's recognition of a claim for damages that exists *prior to* a trustee's sale. But in any event, the legislative history does not support Defendants. While U.S. Bank and MERS are correct that the legislative history shows that RCW 61.24.127 was prompted by and enacted in response to *Brown*, they are *not* correct when they argue that the damages claims that the plaintiffs were barred from bringing in the *Brown* case were *post-sale* claims.³ In fact, the claims in *Brown* accrued *prior to* and were wholly independent of the sale because they were only about the making of the subject loans. *Brown*, 146 Wn. App. at 166-67, 171.

U.S. Bank and MERS rhetorically state that “not one public statement or document reveals *any* legislative intent to create a damages remedy for DTA violations in advance (much less in the absence) of a sale,” U.S. Bank/MERS Opp. at 34 (emphasis original), but the converse is just as true. There is not one statement or document in the legislative history indicating that the legislature intended to restrict the damages claims that it recognized are not waived by a failure to enjoin a sale to post-sale claims. The best evidence of the legislature's intent in RCW 61.24.127 is the language of the provision itself.

³ See U.S. Bank/MERS Opp. at 33-34 (“In *Brown*, the court held borrowers who failed to seek to enjoin the sale waived their right to sue the lender *after the sale* for fraud, breach of the covenant of good faith and fair dealing and fiduciary duties, and violations of the CPA and Truth in Lending Act.”) (emphasis added); see also *id.* at 34 (claiming that *Brown* “involved only post-sale claims”).

c. ***Walker's Recognition of Homeowners' Right to Recover for Damages Caused by Violations of the DTA Also Meets the Bennett Test.***

Defendants do not dispute the relevance to this case of the three-part *Bennett* test that this Court has developed for determining whether a cause of action exists or should be recognized for injuries caused by violations of statutory duties. *See* U.S. Bank/MERS Opp. at 39-42. Nor do they dispute that homeowners are “within the class for whose ‘especial’ benefit the statute was enacted,” satisfying the first factor of the test. *Id.*

With respect to the second *Bennett* factor—explicit or implicit evidence of legislative intent—U.S. Bank and MERS cite *Cazzanigi v. Gen. Elec. Credit Corp.*, 132 Wn.2d 433, 446, 938 P.2d 819 (1997), for the proposition that the Court “will not imply a private action *when drafters of a statute evidenced a contrary intent.*” U.S. Bank/MERS Opp. at 41 (emphasis added). Yet here, there is no evidence of *contrary* legislative intent. Rather, RCW 61.24.127 expressly recognizes that a claim for damages for injuries caused by DTA violations exists *prior to* a sale, because one cannot waive a claim that does not exist. *See Beggs v. Dept. of Social and Health Services*, 171 Wn.2d 69, 78, 247 P.3d 421 (2011) (recognizing statutory cause of action under *Bennett* test, finding implicit intent was established by terms of statute’s immunity provision because “[a] grant of immunity from liability clearly implies that civil liability can exist in the first place.”) (citation omitted).

The third *Bennett* factor—whether recognizing a cause of action serves the goals of the statute—is also met. The three goals of the DTA

are: (1) that the nonjudicial foreclosure be efficient and inexpensive, (2) that the process allow an adequate opportunity to prevent wrongful foreclosure, and (3) that the process promote stability of land titles. *Albice v. Premier Mort. Serv. of Washington, Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012). Recognizing a pre-sale cause of action for damages serves the first two goals because it will promote greater compliance by trustees, beneficiaries, and other foreclosing entities, thus reducing future litigation and the accompanying expense. As the court explained in *Walker*:

Bain observed that the lending industry has institutionalized a series of deceptive practices, that MERS has been involved with “an enormous number of mortgages in the country (and our state), perhaps as many as half nationwide,” and that MERS “often issue[s] assignments without verifying the underlying information.” Thus, the lending industry and MERS have already spawned the feared litigation with their institutionalized practices. ***Holding the lending industry liable for damages caused by its DTA violations should produce greater compliance and a reduction in future litigation. Thus, the availability of a presale cause of action for damages could significantly reduce the long-term system-wide expenses of nonjudicial foreclosures under the DTA.***

Walker, 176 Wn. App. at 311-12 (citing *Bain*, 175 Wn.2d at 117).

Similarly, the pre-sale cause of action promotes stability of land titles, because it incentivizes greater compliance with the non-waivable “requisite[s] to a trustee sale” which, if not complied with, deprive the trustee of the authority necessary for a valid trustee’s sale. *See Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 106-07, 297 P.3d 677 (2013); *see also Queen City Sav. & Loan Ass’n v. Mannhalt*, 111 Wn.2d 503, 515, 760 P.2d 350 (1988) (Dore, J., dissenting) (“Since the

judiciary is not involved in deed of trust foreclosures under the Act, only the words of the Act itself stand between the borrower and the lender eager to foreclose. Unless we strictly construe the Act, that protection will erode away to zero.”); *Klem*, 176 Wn.2d at 771 (citing Justice Dore’s dissent in *Mannhalt* with approval).⁴

Finally, U.S. Bank and MERS state that “[n]o cause of action should be implied when the legislature has provided an adequate remedy in the statute,” and then point to provisions of the DTA that provide for pre-sale monetary relief in certain situations. U.S. Bank/MERS Opp. at 39 (quoting *Cazzanigi*, 132 Wn.2d at 433, and citing RCW 61.24.090 and RCW 61.24.135). Their suggestion that the specific monetary remedies set forth in RCW 61.24.090 and RCW 61.24.135 are “adequate remedies” to compensate homeowners for the wide range of injuries that are caused by violations of the DTA ignores the limited and restrictive language of those provisions. The former provision allows homeowners to avoid or reduce reinstatement costs and recover for the costs associated with doing so. The latter allows homeowners to recover damages under the CPA, again in highly limited and defined situations. These are not adequate remedies.⁵ Nor is it pertinent that Plaintiff may also have a remedy

⁴ See also *Frizzell v. Murray*, ___ Wn.2d ___, 313 P.3d 1171, 1179 (2013) (González, J., concurring) (“For this system to remain efficient and stable as a whole, courts must preserve the integrity of the DTA and step in when the act is being used to unscrupulous ends”); see generally *Davis v. Baugh Industrial Contractors, Inc.*, 159 Wn.2d 413, 420, 150 P.3d 545 (2007) (discussing the “deterrent effect of tort law”).

⁵ See *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wn.2d 46, 61, 821 P.2d 18 (1991) (recognizing cause of action under *Bennett*, stating it is “not simply the

available under the CPA, because it is well-established that the CPA is a supplemental cause of action and not exclusive of other remedies. *See, e.g., Short v. Demopolis*, 103 Wn.2d 52, 65, 691 P.2d 163 (1984) (noting that the purpose of CPA is “to give an additional remedy to those who have suffered a wrong which does impact the public interest”); *MacCormack v. Robins Constr.*, 11 Wn. App. 80, 81-82, 521 P.2d 761 (1974) (stating that CPA is a supplemental cause of action and rejecting argument that existence of CPA remedy precluded other remedies).

Defendants are fighting to prevent homeowners from having the ability to pursue claims permitted under the DTA by the legislature because they want the unfettered ability to violate the statute, as they have been doing for years. *See Walker*, 176 Wn.App. at 311-12 (citing *Bain*, 175 Wn.2d 117). If this Court accepts Defendants’ position, then homeowners will have to pay attorneys and incur investigation, filing fees and other costs in order to enjoin a wrongfully initiated foreclosure sale without the ability to recover for those expenses if the sale never completes, at the same time responding to Defendant’s arguments that these expenses do not constitute injury under the CPA.

The facts of *Keahey v. Jared et al.*, U.S. Bankruptcy Court for W.D. Wash., No. 05-1153, demonstrate the types of injuries which can be

presence or absence of a remedy which is significant [but] the “comprehensiveness”); *DeNike v. Mowery*, 69 Wn.2d 357, 371, 418 P.2d 1010 (1966) (discussing the policy that injured persons “ought to be made as nearly whole as possible through pecuniary compensation,” describing it as “the basic underpinning of all tort law”).

sustained in connection with a wrongfully initiated foreclosure.⁶ Mr. Keahey fell behind on his monthly note payments by less than two months. Oral Ruling at 8. The private noteholder hired an attorney to collect. *Id.* at 6-8. The attorney, Jeff Jared, had never done a nonjudicial foreclosure and ultimately spent three years trying to foreclose on Mr. Keahey's residence in a neverending series of attempted nonjudicial foreclosures. *Id.* The trial court found that he "did just about everything wrong"; "signaled . . . with each and every communication that Mr. Keahey would never be able to keep his house"; demanded interest that was not owed; and demanded "incorrect and excessive property tax, insurance and utilities charges," and that he did so for his own benefit. *Id.* at 25-26. The trial court found that,

Even "[w]hen the claimed defaults were cured, Mr. Jared immediately claimed new defaults entitling him to restart the foreclosure process and charge additional fees and costs for his own benefit." By continually and unjustifiably varying the amount of debt owed, he unjustly prevented Keahey from exercising the right to cure for a period of three years.

Keahey, Oral Ruling at 30. As noted by the Bankruptcy Appellate Panel

⁶ See Transcript of Digitally-Recorded Ruling by Honorable Karen A. Overstreet, Bankr. W.D. Wash. No. 05-1153, dated Feb. 2, 2006 ("Oral Ruling"), Dkt. 67, and Decision of U.S. Bankruptcy Appellate Panel of the Ninth Circuit, BAP No. 08-1151 ("BAP Order"), dated Nov. 3, 2008, Dkt. 38, attached as Appendices A & B, hereto. These are public court records on the Public Access to Court Electronic Records (PACER) system. Plaintiff respectfully asks the Court to take judicial notice of them pursuant to ER 201(b)(2). See, e.g., *C.B. v. Sonora School Dist.*, 691 F. Supp. 2d 1123, 1138 (E.D. Cal. 2009) (courts "may take judicial notice of . . . court records available to the public through the PACER system"); *Doe v. Golden & Walters*, 173 S.W.3d 260, 265 & n.20 (Ky. App. 2005) (taking judicial notice of public court records obtained from PACER); *Graham v. Smith*, 292 F. Supp. 2d 153, 155 n.2 (D. Me. 2003) (same).

in its findings, Mr. Jared referred to the accuracy requirements of the DTA as “no big deal”. *Keahey*, BAP Ruling at 16:9-12.

While the *Keahey* case is an extreme example of the misconduct which can occur in a nonjudicial foreclosure setting, it illustrates precisely why it is so appropriate to affirm that violations of the DTA’s requirements allow for a damages recovery under a statutory tort theory. If this Court accepts the interpretation of the DTA offered by the Defendants, it would lead to absurd results, i.e., a borrower who prevented a wrongfully initiated sale is required to pay for that effort without any ability to recover either the expenses incurred or any other injury or damages, as compared to a borrower who sits on her rights and makes no effort to enjoin, who may then recover for injury or damages for the same wrongful acts done in connection with the foreclosure. Similarly, if a borrower sues and prevents a wrongfully initiated nonjudicial foreclosure, but a judicial foreclosure lawsuit ensues, and the borrower is precluded from recovering for injury and damages incurred, the result is a significant injustice to the borrower at the same time the foreclosing entity recovers all of its expenses incurred at every step along the way.

2. Plaintiff May Also State a CPA Claim for Damages for Injuries Caused by Violations of DTA Whether or Not There Is a Completed Trustee’s Sale.

Defendants LSI, MERS and U.S. Bank do not dispute that Plaintiff may pursue a CPA claim for damages caused by violations of the DTA that are unfair or deceptive acts or practices and meet each of the other

elements articulated in *Hangman Ridge* and its progeny. See LSI Opp. at 28-33; see also U.S. Bank/MERS Opp. at 48-49. Only Asset Foreclosure disagrees. See Asset Foreclosure Opp. at 12-13. Yet even the *Vawter* case that was rejected in *Walker*, on which Asset Foreclosure otherwise seeks to rely, *id.* at 11, 14 & 22, recognized that a homeowner may state a CPA claim for damages caused by DTA violations regardless of whether there has been a trustee's sale. See *Vawter v. Quality Loan Service Corp.*, 707 F. Supp. 2d 1115, 1129-30 (W.D. Wash. 2010).

The CPA by its nature is intended to reach far and wide. As this Court has recognized, “[t]he CPA attempts ‘to bring within its reach [] every person who conducts *unfair or deceptive acts* or practices in *any* trade or commerce.’” *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 602, 200 P.3d 695 (2009) (citation omitted; emphasis original). The legislature has specifically exempted a few very specific areas and transactions that are *not* subject to the CPA, but it is quite a short list and does not include the Deed of Trust Act. See RCW 19.86.170. And, as this Court noted in *Klem*, “[g]iven that there is ‘no limit to human inventiveness,’ courts . . . must be able to determine whether an act or practice is unfair or deceptive to fulfill the protective purposes of the CPA.” *Klem*, 176 Wn.2d at 785-86 (citation omitted). The legislature has made clear that the CPA “shall be liberally construed” to fulfill its objective of protecting the public against “unfair, deceptive, and fraudulent acts or practices.” RCW 19.86.920. Consistent with the broad and remedial purposes of the CPA, the Court should summarily reject Asset Foreclosure’s argument.

B. The Principles that Govern Plaintiff's Damages Claims Under the DTA and CPA Should Be the Usual Principles that Govern Tort and CPA Claims, as Articulated by the Court of Appeals in *Walker*, and by this Court in *Hangman Ridge, Bain, Panag* and Other Cases.

Answering the second certified question, the principles that govern Plaintiff's claims for damages for DTA violations, both on a standalone basis under the DTA and under the CPA, should be the standard principles that govern tort and CPA claims, as articulated by the Court of Appeals in *Walker*, and by this Court in *Hangman Ridge, Bain, Panag* and other cases. This should include, in appropriate cases, a beneficiary's liability under agency law and other derivative or joint liability principles for DTA violations committed by the foreclosing trustee.

1. A Beneficiary May Be Liable for the Trustee's Violations of the DTA Both Under a Standalone DTA Claim and under the CPA.

A governing principle for damages claims based on violations of the DTA, both under the DTA itself and under the CPA, concerns which parties may be liable for violations. In this case, the parties agree that the trustee is a potentially liable party under either statute. However, the beneficiary may also be liable under agency theory (Pl. Opening Br. at 7 n.1) or other tort law theories of joint and derivative liability.

Defendants argue that the question of potential beneficiary liability exceeds the scope of the certified questions and that the trustee is the only party that may be liable for a violation of the DTA. *See* U.S. Bank/MERS Opp. at 45-47. It is appropriate, however, to address potential beneficiary

liability as part of this second certified question. *See Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 205 n.1, 193 P.3d 128 (2008) (the Court may reformulate certified questions in its discretion as appropriate).⁷

Though the DTA imposes most of its requirements upon the trustee in conducting a non-judicial foreclosure sale, such acts do not occur in a vacuum. The beneficiary and loan owner must authorize the foreclosure; the trustee is not free to unilaterally initiate foreclosure. RCW 61.24.030(7). It is the beneficiary—and only the beneficiary—that has the power to appoint a successor trustee to perform the required acts. RCW 61.24.010(2). In the context of the CPA, this Court has already contemplated that an agency relationship may exist between the beneficiary and the trustee, and that vicarious liability may ensue:

Where the beneficiary so controls the trustee so as to make the trustee a mere agent of the beneficiary, then as principal, the beneficiary may be liable for the acts of its agent.

Klem, 176 Wn.2d at 791 n.12; *see also Walker*, 176 Wn. App. at 313.⁸ The beneficiary may also be liable for the trustee’s violations of the DTA under standard tort law theories of joint and derivative liability. The beneficiary appoints the successor trustee as provided under the DTA

⁷ *See also* Order Certifying Questions in this matter, dated Sept. 25, 2013 (“This Court does not intend its framing of the questions to restrict the Washington Supreme Court’s consideration of any issues it deems are relevant.”).

⁸ In contrast, this court observed in *Bain*, after considering MERS’ business model, that there was no evidence that MERS acts as an agent on behalf of any beneficiary. *See Bain*, 175 Wn.2d at 108 (“MERS fails to identify the entities that control and are accountable for its actions. It has not established that is an agent for lawful principal.”); Comp. at ¶ 2.8

(RCW 61.24.010(2)) and instructs the trustee to initiate a non-judicial foreclosure. Under the DTA, the beneficiary/loan owner and the trustee work together with a unity of purpose, each with the knowledge and consent of the other, to conduct the non-judicial foreclosure after providing proof of loan ownership. RCW 61.24.030(7). Therefore, if the beneficiary and trustee commit a tort by violating the DTA, and if the beneficiary so controls the trustee so as to make the trustee a mere agent of the beneficiary, they may also be held to be joint tortfeasors. *See, e.g., Elliott v. Barnes*, 32 Wn. App. 88, 90-91, 645 P.2d 1136 (1982) (“where distinct actors work in concert according to a general plan in committing a single tort they are joint tortfeasors.”) (citation omitted). The beneficiary and trustee may also act independently to produce an injury under the DTA, and so under the same circumstances, they could be held to be concurrent tortfeasors. *Seattle-First Nat’l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 235, 588 P.2d 1308 (1978) (“The *harm* caused by both joint and concurrent tortfeasors is *indivisible*.”) (emphasis original).

In a beneficiary-trustee relationship, agency liability may be based on the acts of the trustee on behalf of the beneficiary or may be based on apparent authority, or liability may be found to be joint or derivative under tort law theories. The beneficiary should therefore be subject to liability under these principles in either a standalone DTA claim or under the CPA.

2. Plaintiff’s Standalone Claim for Violations of the DTA Should Be Governed by Traditional Tort Principles as Articulated in *Walker*.

Defendants argue that any claims brought directly under the DTA

should only be allowed if the harm/injury is “material” or “prejudicial,” because the DTA specifically requires material prejudice in RCW 61.24.127(1)(c). LSI Opp. at 33-36; U.S. Bank/MERS Opp. at 42-45. Defendant concedes certain examples of potential prejudice: inability to determine the proper entity with whom to obtain a loan modification; remission of payment to the wrong entity resulting in default. LSI Opp. at 33-36. Plaintiff agrees with those examples, as far as they go, but they are simply a beginning, not an exhaustive list.

Plaintiff urges the Court to adopt the DTA claim principles as articulated in *Walker*:

No Washington case law relieves from liability a party causing damage by purporting to act under the DTA without lawful authority to act or failing to comply with the DTA’s requirements....[A] borrower has an actionable claim against a trustee who, by acting without lawful authority or in material violation of the DTA, injures the borrower, even if no foreclosure sale occurred.

Walker, 176 Wn. App. at 313.

In addition to the examples conceded by Defendant LSI, specific violations of the DTA comprise several broad categories. Any violation of the DTA that renders—or would render—the trustee’s sale unauthorized is material. RCW 61.24.030 and 61.24.040, for example, specify non-waivable, strict statutory requirements for a lawful non-judicial foreclosure. Failure to lawfully appoint the successor trustee under RCW 61.24.010(2) results in a foreclosure being pursued by a purported trustee without the authority to act, and therefore materially prejudices the homeowner. Attempting a foreclosure in the face of an active bankruptcy

stay or while mediation is on-going under the FFA are other examples of material violations. In summary, a material violation is one that involves an act or omission that renders the foreclosure unlawful and/or creates an injury and/or damages to the homeowner.

Unlike a CPA violation, which limits recovery to compensation for injury to business or property, a standalone claim under the DTA should sound in tort, and therefore also allow recovery for non-economic injury such as emotional distress. This is especially appropriate with regard to real property. See discussion of *Keahey*, supra 16-18; *see also*, e.g., *Parks v. Wells Fargo Home Mortgage, Inc.*, 398 F.3d 937, 941 (7th Cir. 2005) (“We have no doubt that anyone would suffer emotional harm from losing his or her home, or even from facing such a possibility.”)

3. Plaintiff’s CPA Claim Based on Defendants’ Violations of the DTA Should Be Governed by the Established Principles Set forth in *Hangman Ridge*, *Panag*, and Other Leading CPA Cases.

a. *Hangman Ridge* Establishes the Elements of a CPA Claim

It is undisputed by the parties, except Asset Foreclosure, that the well-established five elements as put forth in *Hangman Ridge* should govern CPA claims for DTA violations.

b. *Panag* Should Apply to Define the Range of Compensable Harms

A non-judicial foreclosure is fundamentally an attempt to collect on a debt. In *Panag*, this Court broadly defined CPA injury in the context of debt collection: “[T]he injury requirement is met upon proof the

plaintiff's 'property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violations are minimal.'" *Panag*, 166 Wn.2d at 57 (citing *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990)). Importantly for debtors, *Panag* upheld injury for investigative expenses and other inconvenience costs caused by deceptive business practices. *Id.* at 62. These expenses include loss of business profit as a result of time spent away from business responding to deception, *Sign-O-Lite Signs v. Delaurenti Florists*, 64 Wn. App. 553, 564, 825 P.2d 714 (1992); temporary loss of use of property as a result of deceptive practice, *Mason*, 114 Wn.2d at 854; costs of travel, *Tallmadge v. Aurora Chrysler Plymouth*, 25 Wn. App. 90, 605 P.2d 1275(1979); and costs and fees paid to attorney to dispel uncertainty regarding deceptive practices, *Panag*, 166 Wn. 2d at 62.

This Court should decline the invitation of Defendants to circumscribe this important precedent under the DTA. U.S. Bank/MERS Opp. at 48-49; LSI Opp. at 37-38. Ms. Frias recognizes fees and costs associated with the institution of a CPA claim are not recognized as injury. *Demopolis v. Galvin*, 57 Wn. App. 47, 786 P.2d 804 (1990). However, Defendants' contention that asserting statutory rights under the DTA or participating in the Foreclosure Fairness Act should be defined as the institution of a CPA claim misleads this Court. The investigative actions prompted by the deceptive actions in this case were instituted to save Ms. Frias' home, not sue for a CPA violation. And it is important to understand this in the context of the Defendants' arguments in this case -

they contend that homeowners should be required to incur attorneys' fees and costs to enjoin the sale under the DTA which are not recoverable, but then argue that these same expenditures are not sufficient to be an injury under the CPA. This is really the Defendants' agenda in this case – to convince the Court that borrowers can obtain an effective remedy by using the CPA alone while ignoring the DTA provisions that provide for relief, and then they will argue that no homeowner can ever meet the injury and causation elements of a CPA claim. U.S. Bank/MERS Opp. At 48.

Washington CPA jurisprudence supports the claim that the CPA injury element is satisfied if under the DTA the borrower incurs investigative expenses resulting from a deceptive practice of the trustee or the beneficiary. Indeed, as discussed above, mandatory notices under the DTA advise homeowners to consult with an attorney to “help save your home,” RCW 61.24.040(2); and “to assess your situation.” RCW 61.24.030(8)(k). When a beneficiary's or trustee's deceptive actions and/or notices prompt a homeowner to consult an attorney or housing counselor, she incurs some economic cost (consultation, gas, parking) that falls within the investigative expenses contemplated in *Panag*. It is the investigative expenses to save the home spawned by, for instance, an unauthorized trustee issuing a notice of sale, that the CPA considers injurious and that should be protected by this Court.

III. CONCLUSION

Plaintiff respectfully requests that this Court answer these two certified questions as set forth above.

DATED this 7th day of January, 2014.

/s/ Melissa A. Huelsman

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DECLARATION OF SERVICE

I, Pamela Hamilton, paralegal at the Law Offices of Melissa A. Huelsman, P.S., certify under penalty of perjury under the laws of the State of Washington, that on this day I caused a copy of the foregoing to be mailed (via first class mail, postage prepaid), to the following counsel of record in this case:

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DATED at Seattle, Washington, this 7th day of January, 2014.

/s/ Pamela Hamilton
Pamela Hamilton

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UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RECEIVED BY E-MAIL

In re:)
)
JOHN PATRICK KEAHEY,) No. 04-25122
)
Debtor.)
)
)
)
JOHN PATRICK KEAHEY,)
)
Plaintiff,)
)
vs.) No. 05-1153
)
OSCAR H. NEWKERK III, et al.,)
)
Defendants.)

TRANSCRIPT OF THE DIGITALLY-RECORDED RULING

BY THE HONORABLE KAREN A. OVERSTREET

FEBRUARY 2, 2006

Reported by: Robyn Oleson Fiedler
CSR #1931

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A P P E A R A N C E S

For Jeff Jared:

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DIGITALLY RECORDED IN SEATTLE, WASHINGTON

SEPTEMBER 16, 2005

--ooOoo--

THE COURT: Good afternoon. Please have a seat. I've got a loaner computer today, so hopefully I'm going to be able to use this technology that we have. Let's start, if you will, by having appearances for the record.

MS. HUELSMAN: Melissa Huelsman for plaintiff, Mr. Keahey.

MS. COOPER: And Beth Cooper for Mr. Jared, and Mr. Jared is also here with me.

THE COURT: All right. Let me summarize -- start by summarizing the action. And I'll tell you that I have pretty lengthy findings of fact and conclusions of law. And I'm going to go through them in that order, with my summary of the case, and then I have findings of fact and conclusions of law. So let me get started.

This is the action by the plaintiff, Mr. Keahey in this case, against Mr. Jared, solely at this point, for, as I understand it, what's left in the case is intentional and negligent infliction of emotional distress, breach of fiduciary duty and fraud

1 in connection with Mr. Jared's representation of Oscar
2 Newkerk under a note executed by Mr. Keahey secured by
3 a deed of trust in favor of Mr. Newkerk against
4 Mr. Keahey's house and Mr. Jared's actions as the
5 trustee under the Newkerk deed of trust.

6 Mr. Newkerk, who is also a party to this
7 action, advised me just before trial that he had
8 reached a settlement with the debtor and would not be
9 participating in the trial.

10 The following are facts that you all
11 stipulated to in connection with filing of the pretrial
12 order. And I have just taken from that pretrial order
13 those facts that I think are necessary to my ruling.
14 They include:

15 The plaintiffs signed a promissory note in
16 the amount of \$180,000 secured by a deed of trust on
17 July 30, 1999, with respect to the purchase of his home
18 from defendant Newkerk. The total purchase price was
19 \$200,000. The terms of the promissory note provided
20 for monthly payments in the amount of \$1,167.48. The
21 interest rate under the note was 6.75 percent.

22 Mr. Jared caused to be recorded in the
23 records of King County, Washington a notice of default
24 on January 29, 2002, and four notices of trustee's sale
25 on the following dates: A notice of trustee's sale and

1 notice of foreclosure dated March 12, 2002, signed by
2 Mr. Jared as trustee and recorded on April 12th, 2002;
3 a notice of foreclosure and notice of foreclosure sale
4 dated October 3, 2002 and signed by Mr. Jared as
5 trustee and recorded on October 9, 2002; a notice of
6 trustee's sale dated December 15, 2003 and recorded on
7 December 15, 2003; a notice of trustee's sale dated
8 September 10, 2004 and recorded on September 24, 2004;
9 a notice of trustee's sale dated October 14, 2004 and
10 recorded on October 19, 2004; and finally, a notice of
11 trustee's sale dated October 14, 2004 and recorded on
12 October 20, 2004.

13 On July 21, 2004, the plaintiff and defendant
14 Newkerk, by and through their respective attorneys,
15 Larry Feinstein and defendant Jared, stipulated to an
16 agreed order regarding the amounts owed under the note.
17 That order was signed by me, and it was entered by the
18 Court. I held that this order was res judicata as to
19 the amount of the debt as of July 21, 2004.

20 Now, there were some additional factual
21 findings that I made at the time we had the summary
22 judgment hearing on October 5, 2005, and I want to put
23 those facts into the record as well.

24 I found that the promissory note was a
25 five-year note with a balloon payment at the end of

1 that five years; that the 2 percent interest rate
2 escalator was a default interest provision.

3 I also noted the two attorney's fees
4 provisions, one in the note, one in the deed of trust.
5 The note states that, quote, "If action be instituted
6 on this note, maker agrees to pay such sums as the
7 Court may fix as attorney's fees." End quote.

8 The deed of trust says that the grantor
9 agrees, quote, "To defend any action or proceeding
10 purporting to effect the security hereof or the rights
11 or powers of beneficiary or trustee, and to pay all
12 costs and expenses, including costs of title search and
13 attorney's fees in a reasonable amount in any such
14 action or proceeding and in any suit brought by
15 beneficiary to enforce this deed of trust." End quote.

16 The following are the findings of fact that I
17 make based upon the evidence that was presented to me
18 in court. Despite the provision in the note requiring
19 a tax and insurance escrow from the inception of the
20 relationship, both Mr. Keahey and Mr. Newkerk
21 established the practice where Mr. Keahey paid the real
22 estate taxes due directly to the county and purchased
23 his own insurance. Mr. Newkerk did not object to that
24 process.

25 Mr. Newkerk hired Mr. Jared to represent him

1 pursuant to a general hourly retainer agreement dated
2 January 3, 2001. That's trial Exhibit D-14. Pursuant
3 to that agreement, Mr. Newkerk was required to pay and
4 did pay a non-refundable retainer in the amount of
5 \$1,200. The agreement provides that the retainer is
6 earned upon receipt, regardless of whether any services
7 are performed.

8 Mr. Jared's billing rate under the agreement
9 is \$120 per hour. Mr. Jared testified that he
10 regularly required Mr. Newkerk to pay non-refundable
11 retainers each time he was asked to provide services.

12 At the time Mr. Jared took on this
13 representation of Mr. Newkerk, he had never done a
14 nonjudicial foreclosure before, nor had he ever acted
15 as the trustee under a deed of trust. He testified
16 that he was a general practitioner and that in order to
17 prepare for this work, he did legal research on the
18 Washington Foreclosure Statute and he consulted with
19 other attorneys who were familiar with the area. He
20 charged Mr. Newkerk for this work, believing that
21 Mr. Newkerk was getting a benefit from what Mr. Jared
22 believed was his low billing rate. No evidence was
23 produced to support Mr. Jared's claim that his billing
24 rate is low compared to others practicing in this area.

25 Mr. Keahey testified that his first default

1 occurred in early 2001 when he made two payments late.
2 Upon Mr. Jared's demand, he paid those two payments, as
3 well as \$1,100 to Mr. Jared for legal fees. At the
4 time of this payment, Mr. Jared was not acting as the
5 trustee under the deed of trust, and no foreclosure or
6 any other action had been commenced. Therefore,
7 Mr. Newkerk was not entitled to recover legal fees
8 under the note or the deed of trust.

9 Mr. Keahey defaulted again a year later under
10 the Newkerk note by failing to make the December 2001
11 and January 2002 mortgage payments. By a letter dated
12 January 7th, 2002, which is exhibit P-4, Mr. Jared
13 notified Mr. Keahey of his representation of
14 Mr. Newkerk and demanded \$600 in legal fees and \$800 in
15 property tax escrow amounts. The letter was incorrect
16 in that it did not refer to the two missed principal
17 payments and ignored the fact that Mr. Keahey had been
18 paying his taxes directly, rather than into escrow,
19 with Mr. Newkirk's acquiescence.

20 Mr. Jared testified that in sending the
21 letter, he was trying to be a, quote, "generalist," end
22 quote, in his words, to be friendly thinking that the
23 matter would settle. He did not think it really
24 mattered if the numbers demanded were accurate; it was
25 just to start the discussion.

1 Mr. Keahey did not recall receiving Exhibit
2 P-4, but on January 25, 2001, Mr. Keahey tendered
3 \$2,356 to Mr. Newkerk directly. That payment cured the
4 December and January missed payments and included a \$20
5 fee for a bad check that Mr. Newkerk had incurred. The
6 receipt Mr. Keahey received from Mr. Newkerk is Exhibit
7 P-5.

8 Mr. Jared became the successor trustee under
9 the deed of trust on January 24, 2002, and that is
10 evidenced by Exhibit P-6.

11 Exhibit P-7 is the first notice of default
12 dated January 29, 2002, and it was posted to
13 Mr. Keahey's -- the door of his house. Mr. Jared also
14 recorded this notice of default, even though the
15 foreclosure statute does not require that. The numbers
16 in this notice were wrong in that they included the
17 December and January payments that Mr. Keahey had just
18 paid on January 25, 2002, four days earlier.

19 Mr. Jared testified that he must not have
20 known of the cure. Although recording of the notice
21 was not required, Mr. Jared testified that he didn't
22 see any harm in recording it. He mistook this notice
23 for the notice he was supposed to record. So despite
24 his research on the law, he apparently did not
25 understand the difference between a default notice and

1 a trustee's sale notice. He described this as a,
2 quote, "pickup," end quote.

3 He also stated that he personally went down
4 to record this notice in the recorder's office because
5 he wanted to see the law from the ground up. He did
6 bill for his time to do this.

7 In fact, none of the numbers in this notice
8 was correct. The notice demanded that the two payments
9 Mr. Keahey had secured cured be paid, as well as
10 property taxes of \$800 and an additional \$1,200 in
11 legal fees. He added \$1,330 in estimated fees and
12 costs.

13 Exhibits P-8 and P-9 are a March 12, 2002,
14 notice of foreclosure and a notice of trustee's sale,
15 respectively. The property tax numbers in these
16 notices are off by a \$100 a month, even if we assume
17 that Mr. Keahey was required to pay property taxes into
18 an escrow account. Mr. Jared conceded this in his
19 testimony.

20 Mr. Jared also demanded \$2,400 in trustee's
21 or attorney's fees and included a demand for a
22 delinquent secure and water bill. There is nothing in
23 the note that would permit Mr. Newkerk to require
24 payment of this unsecured claim as a condition to
25 avoiding foreclosure.

1 Exhibit P-9 is the notice of trustee's sale
2 which carries over these incorrect amounts. Also,
3 Exhibit P-9 provides for the trustee's sale to take
4 place in Mr. Jared's law office parking lot, rather
5 than at the Kirkland City Hall as required by the
6 statute. Mr. Jared testified that he thought the sale
7 should take place in his parking lot, because he,
8 quote, "was going to personalize it, make it nice for
9 the bidders." He wanted the process to be less seedy,
10 and he wanted to "boutiquify it," in his words.

11 He said repeatedly that his intent was to
12 serve coffee and croissants. More than anything, this
13 this mistake by Mr. Jared is an example of his
14 incompetence as the trustee under the deed of trust.

15 Upon receipt of the receipt of the notice of
16 trustee's sale, Mr. Keahey sought the assistance of
17 attorney Greg Home. Mr. Keahey testified that he gave
18 Mr. Home a \$5,000 retainer to represent him.

19 Exhibit P-12 is Mr. Home's June 4, 2002,
20 letter to Mr. Jared pointing out the numerous errors in
21 the foreclosure notices prepared by Mr. Jared.
22 Mr. Homes also cited the Cox v. Helenius case, which is
23 at 103 Washington 2d 383, a 1985 case, notifying
24 Mr. Jared that as the trustee under the deed of trust
25 he had fiduciary duties to the debtor that were, quote,

1 "exceedingly high," end quote.

2 Mr. Home also notified Mr. Jared that
3 Mr. Keahey had sufficient funds to bring the legitimate
4 amounts due under the note current.

5 Mr. Jared responded to Mr. Homes' letter by a
6 letter dated June 14, 2002, which is Exhibit P-13. It
7 is clear from that letter that he had never read Cox v.
8 Helenius and did not understand his fiduciary duties to
9 the debtor under a deed of trust. His letter states,
10 quote, "Lastly, I am not familiar with the Washington
11 case law mentioned in your letter's footnote that
12 reportedly holds that the trustee attorney represents
13 both the debtor and creditor in the foreclosure
14 process. As of now, I represent only the creditor,
15 Mr. Newkerk in this case." End quote. He advised
16 Mr. Home that he intended to proceed with the trustee's
17 sale pursuant to the notice he had recorded.

18 Mr. Home responded that same day with a
19 letter that is Exhibit P-14, citing additional
20 authorities to Mr. Jared. Then he sent yet another
21 letter, which is Exhibit P-15. This letter laid out
22 all of the problems with Mr. Jared's collection
23 actions.

24 After that letter there was a series of
25 letters exchanged between Mr. Jared and Mr. Home, each

1 arguing their case about whether Mr. Jared was in
2 compliance with the foreclosure statute. And those
3 exhibits are exhibits P-16 through P-19.

4 On June 18, 2002, Mr. Jared faxed to Mr. Home
5 a draft notice of trustee's sale, which is Exhibit
6 P-16, in which he did provide for the sale to take
7 place at the Kirkland City Hall.

8 Exhibit 20 is a July 11, 2002, demand by
9 Mr. Jared with a breakdown showing that Mr. Keahey
10 would have to pay \$14,911.44 in order to avoid the
11 foreclosure. That demand included \$2,606.56, in back
12 taxes, a utility bill of \$208, \$4,000 in attorney's
13 fees and \$252 in miscellaneous costs.

14 In a letter dated the same day, which is
15 Exhibit P-21, Mr. Home asked for an explanation of the
16 attorney fees, requesting the name of the attorney
17 providing services to the trustee, and proof that the
18 fees had been actually incurred as required by RCW
19 61.24.0901.

20 Mr. Jared responded in Exhibit 22 that he was
21 acting as both the attorney for Mr. Newkerk and as the
22 attorney for the trustee.

23 By letter dated July 12, 2000, Mr. Home
24 notified Mr. Jared that the following Monday Mr. Keahey
25 would pay \$12,096.88 to cure delinquency under the

1 note. That amount included \$4,000 in fees and \$252 in
2 miscellaneous costs. The letter indicated that
3 Mr. Keahey had brought the real estate taxes current by
4 paying the escrow agent designated by Mr. Newkerk and
5 that he was going to pay the utility bill directly.

6 On July 15, 2002, a check in the amount of
7 \$12,096.88 was delivered to Mr. Jared with a cover
8 letter confirming that by making the payment,
9 Mr. Keahey was not waiving his right to challenge the
10 legality of the amounts being paid.

11 On July 15, 2002, that same day, Mr. Jared's
12 letter, which is Exhibit 25, claims that he still did
13 not have proof that the tax delinquency had been cured.
14 By his testimony it was clear that he had never even
15 bothered to contact his client's escrow agent, whereas
16 Mr. Keahey had gone personally to meet her, and
17 Mr. Home had spoken to her to confirm on the phone that
18 the delinquency was cured.

19 Mr. Jared included in his letter new
20 calculations for taxes and insurance. Mr. Jared
21 states, quote, "The notice of default states that the
22 costs and the bill are evolving and changing with time,
23 including the later discovery of presently unknown
24 expenditures so that the late mention of insurance
25 payments due shouldn't be fatal to us." End quote.

1 Mr. Jared demanded a second check for \$326.85 before he
2 would cancel the foreclosure sale.

3 Mr. Jared's communications continued in
4 Exhibit P-26 where he was still demanding proof that
5 delinquent taxes had been paid and asserting his math
6 calculations of interest and taxes going forward. This
7 letter concludes, quote, "So we won't stop the sale
8 until the \$560 for insurance is paid into the escrow
9 account by Wednesday, July 17, 2002."

10 So Mr. Keahey paid another \$560. And finally
11 on July 17th, 2002, as reflected in Exhibit P-27,
12 Mr. Jared proclaimed Mr. Keahey current and agreed to
13 cancel the sale.

14 Three days later Mr. Jared sent another
15 letter to Mr. Keahey which he described as a courtesy
16 letter with new numbers for insurance and taxes,
17 despite the fact that Mr. Keahey had just paid the
18 insurance bill in full for a year. Mr. Jared's number
19 for taxes on a monthly basis was incorrect. That's
20 Exhibit P-29.

21 On August 7, 2002, Mr. Jared issued another
22 notice of default, this time for Mr. Keahey's failure
23 to pay \$200 for property taxes which he claimed was due
24 on August 2, 2002, and \$60 for homeowner's insurance.
25 That's in Exhibit P-30.

1 P-29 stated that the amounts that were to be
2 paid were \$204 per month for taxes and \$56 per month
3 for insurance. Mr. Jared testified that he just
4 rounded the numbers.

5 Exhibit P-30 also includes a new demand for
6 \$600 in fees plus \$25 in postal costs and \$75 in
7 service and posting charges.

8 Mr. Jared testified that Mr. Keahey had to
9 pay his legal fees for the courtesy letters.
10 Mr. Keahey went back to Mr. Home for help at that
11 point.

12 Mr. Jared continued with the foreclosure
13 process, as evidenced by Exhibit P-31 and P-32. As was
14 typical for Mr. Jared, he continued to demand
15 increasing fees, \$1,200 demanded in Exhibit 31, which
16 is dated October 3, 2002, and \$2,300 in Exhibit 32
17 dated -- that's P-32, dated January 3, 2003.

18 Mr. Keahey testified that as of the time he
19 received Exhibit P-32, he could no longer afford to pay
20 Mr. Home and that he believed he would never be able to
21 get the accurate payoff number from Mr. Jared.

22 So on February 13, 2003, Mr. Keahey filed his
23 first Chapter 13 bankruptcy in which he was represented
24 by Mr. Chris Meleney. That is case number 03-11854.
25 The petition in that case reflects that Mr. Keahey paid

1 Mr. Meleney \$500 before filing the case, with another
2 \$900 due. The docket sheet indicates the filing fee
3 paid in the amount of \$185.

4 Mr. Keahey and a Mr. Shepard represented
5 Mr. Newkerk in that proceeding. I entered an order
6 providing that Mr. Newkerk would have relief from stay
7 if Mr. Keahey missed a mortgage payment.

8 Mr. Jared submitted a letter stating that
9 Mr. Keahey missed the December 2003 payment, and I
10 signed an order granting relief from stay and
11 dismissing the case.

12 Although Mr. Keahey did not seek to set aside
13 the order dismissing the case, he testified at trial
14 that the delinquency statement prepared by Mr. Jared
15 during that bankruptcy, which is Exhibit P-34, was
16 incorrect and is that he had made the September,
17 October and November payments. He also believed that
18 he had made the December payment, although he offered
19 no proof of that at trial.

20 After the bankruptcy case was dismissed,
21 Mr. Jared restarted the foreclosure sale with a notice
22 that is Exhibit P-35. That notice included the demand
23 for \$10,578 in trustee and attorney fees.

24 Mr. Keahey then met with attorney Larry
25 Feinstein and filed his second Chapter 13 bankruptcy on

1 January 28th, 2004. That is case No. 04-11027. The
2 Rule 2016 statement filed with that petition does not
3 indicate that any fees were paid to Mr. Feinstein prior
4 to the filing of the petition. The docket sheet
5 indicates that payment of a \$194 filing fee.

6 Mr. Keahey testified to the difficulty of
7 getting a reinstatement number from Mr. Jared in this
8 proceeding. At one point he even listed the house for
9 sale to see if he could sell it.

10 At this time Mr. Jared was demanding the
11 accelerated amount of the debt, \$254,000. Mr. Keahey
12 believed that he only owed \$174,000 at that time.

13 Exhibit P-36 is a statement of the amount due
14 that Mr. Jared provided to Mr. Feinstein in May of
15 2004. It includes \$12,786 in attorney's fees and
16 \$36,000 for a 10 percent interest charge over two
17 years. The latter charge of \$36,000 was just flat-out
18 wrong, and Mr. Jared admitted that at trial. His
19 defense was that he apologized to Mr. and Mrs. Jared
20 [sic] at a settlement conference for this mistake.

21 Mr. Feinstein objected to Mr. Newkerk's claim
22 in the second case, and both parties filed pleadings in
23 support of their positions. Mr. Jared filed an
24 application for fees that was to include all of the
25 substantiation for his fees and costs. That

1 application is Exhibit P-55. The application includes
2 billing statements that are poorly written and do not
3 adequately provide the services performed. The receipt
4 submitted for the expenses cannot be reconciled with
5 what Mr. Jared claimed was due. And in my judgment,
6 the application is completely deficient to substantiate
7 the significant fee request.

8 Nevertheless, by an order that I approved on
9 July 21, 2004, Mr. Keahey and Mr. Newkerk settled the
10 amount of the claim. That order is P-38. Pursuant to
11 the terms of that order, the agreed amounts to be paid
12 to Mr. Newkerk were as follows: The principal amount
13 of \$174,505, interest through August 31, 2004, of
14 \$18,630.80, less a credit for the payment made November
15 4, 2003, of \$4,292. Total principal and interest
16 through August 31, 2004, was therefore \$188,843.79.

17 Also included in the order were allowed costs
18 of \$2,232, those being the costs of Mr. Jared, and
19 allowed attorney's fees of \$13,009.21, less
20 pre-confirmation payments made by the trustee to
21 Mr. Newkerk of \$5,836, making the total net claim
22 \$198,250.

23 The final paragraph in the order reads,
24 quote, "It is further ordered that relief from the
25 automatic stay be and is hereby granted and that under

1 Washington state law, the creditor, Oscar Newkerk, may
2 recommence his foreclosure sale on the property with a
3 sale to occur no earlier than September 15, 2004, if
4 the debtor's pending refinance of the property does not
5 otherwise pay off the above balance on or before said
6 sale." End quote.

7 In addition, a footnote reads, quote, "The
8 parties have agreed to cooperate to minimize additional
9 foreclosure costs and fees if the debtor's pending
10 refinance is approved and will close by August 31,
11 2004. Accordingly, even if additional costs and fees
12 are incurred, if the refinance closes before August 31,
13 2004, the net amount required to be paid shall remain
14 fixed at \$198,250." End quote.

15 As previously stated, I held on summary
16 judgment that this order was binding on both parties.
17 It was a final order that was not appealed and that set
18 the amount of the debt for all purposes. Nothing in
19 the order permitted Mr. Newkerk to ignore the agreed
20 amount of the debt in the event that Mr. Keahey's
21 refinancing did not close. In fact, the footnote I
22 just cited contemplated that only fees and costs
23 incurred in the future could be charged to Mr. Keahey.

24 Unfortunately for all concerned, Mr. Keahey's
25 refinance of this property fell through, and he was

1 again forced to confront reinstatement of the loan in
2 August of 2004. Mr. Home's help was again obtained by
3 Mr. Keahey, and Mr. Home's letter concerning the
4 reinstatement was Exhibit P-39.

5 By letter dated August 31, 2004, Mr. Home
6 tendered \$23,745.01 to Mr. Jared, the amount Mr. Home
7 believed was sufficient to cure the delinquency. His
8 letter is Exhibit P-40. The letter states that the
9 payment is conditioned upon Mr. Newkerk's acceptance
10 that no other sums are due as of August 31, 2004.
11 Mr. Home's calculation of what was due was based upon
12 my order of July 21, 2004.

13 Mr. Jared rejected that cure and rejected
14 Mr. Keahey's monthly payment in September, contending
15 that because the refinance had fallen through, all of
16 the fees and costs that had been compromised as part of
17 the July 21, 2004, settlement were due and owing.
18 Mr. Home took the position that the order was binding
19 and that the only fees and costs that could be added to
20 the debt were those incurred after the date of the
21 order. The exchanges of correspondence between the
22 parties on these issues are in Exhibits P-39 through
23 P-44.

24 As stated in Mr. Jared's September 13, 2004,
25 letter to Mr. Home, he eventually cashed the

1 reinstatement check plus a check for the monthly
2 payment so that funds paid to Mr. Jared on the Newkerk
3 debt total \$26,128.85. Mr. Jared then took the
4 position that the compromised amounts of fees and costs
5 were due and recommenced the foreclosure, as evidenced
6 by Exhibits P-46 through P-49. Once again, however,
7 his technical errors in the process, which were pointed
8 out again by Mr. Home, forced Mr. Jared to start the
9 process over.

10 In addition, Mr. Jared refunded the amounts
11 paid as of October 14th, 2004, by sending a check to
12 Mr. Home in the amount of \$23,263.81. That's Exhibit
13 P-50. Although the refund included \$13,009.21 for fees
14 and \$2,232 for costs, these amounts remained the
15 liability of Mr. Keahey to Mr. Newkerk pursuant to the
16 July 21, 2004, order.

17 Meanwhile, because Mr. Keahey had filed
18 failed to file delinquent tax returns, the IRS obtained
19 an order dismissing the bankruptcy case on September
20 22, 2004. There's no evidence on the docket sheet of
21 any order approving any payment of fees to
22 Mr. Feinstein, and no evidence to that effect was
23 presented.

24 When the foreclosure proceedings were
25 recommenced in October of 2004, Mr. Keahey was forced

1 to file his third bankruptcy proceeding on November 24,
2 2004, in which this adversary proceeding was commenced,
3 the case number for the main case at 04-25122. The
4 docket reflects the filing fee paid of \$194.

5 On September 7, 2005, Tax Attorneys, Inc., as
6 counsel for Mr. Keahey, filed an application for fees.
7 That application reflects the payment of fees in the
8 amount of \$1,000 on November 24, 2005, and that the
9 balance of \$800 is to be paid under the plan for the
10 filing of the bankruptcy. The application details
11 nearly \$20,000 in fees incurred in connection with the
12 bankruptcy proceeding, including for services related
13 to the Newkerk dispute.

14 When that application came up for hearing, I
15 deferred ruling on it because I wanted to determine
16 whether there was any validity to Mr. Keahey's claims
17 against Mr. Newkerk and Mr. Jared. Therefore, the
18 hearing on that application has been continued pending
19 resolution of this matter.

20 Mr. Keahey has now moved for approval of his
21 settlement with Mr. Newkerk as reflected in a
22 stipulation and order resolving the adversary
23 proceeding. The settlement includes an agreed amount
24 of Mr. Newkerk's debt using the July 21, 2004, order of
25 the court as a starting point. That means it includes

1 \$13,009.21 in fees related to Mr. Jared's services, and
2 \$2,232 in costs he incurred. Mr. Keahey also agreed to
3 pay fees and costs to Mr. Newkerk's counsel, Peterson
4 Russell Kelly in the amount of in the amount of
5 \$24,367.20. A hearing on this proposed settlement is
6 set for February 15, 2006.

7 In each of the three bankruptcy cases filed,
8 Mr. Keahey's schedules indicate minimal unsecured debt.
9 Although the IRS was asserting an estimated claim for
10 taxes due, there is no evidence of any pressure by the
11 IRS to collect any debt that would have forced
12 Mr. Keahey into bankruptcy. Mr. Keahey testified that
13 the sole reason he filed each case was to avoid the
14 foreclosure action being pursued by Mr. Newkerk through
15 Mr. Jared. The docket sheets in each case corroborate
16 this testimony.

17 Also, as the presiding judge in each case, I
18 will affirm that the single big issue in each case has
19 been Mr. Newkerk's debt.

20 Mr. Keahey testified that he paid Mr. Home
21 \$5,000 and that he owed Mr. Home between \$13,000 and
22 \$15,000. Mr. Home testified that he was owed \$5,500
23 for his initial representation and another \$15,000 in
24 fees and costs for services rendered after that. No
25 billing statements, invoices or evidence of payment

1 have been submitted into the record, however.

2 Mr. Keahey testified as to the distress
3 Mr. Jared's actions caused him. He testified that he
4 experienced a loss of sleep, cyclical vomiting, anger,
5 fear, worry, stress and disappointment over the
6 potential loss of his family's home. Over the
7 bankruptcy filings he testified concerning his
8 embarrassment, humiliation and shame. He testified
9 that at one point he had to spend a week in the
10 hospital, and he testified that at the time of his
11 second bankruptcy filing his second wife was pregnant,
12 and he was worried that he would not be able to provide
13 a home for his family.

14 Now, the following are my conclusions of law.
15 And what I want to start with is a description of what
16 I think Mr. Jared did wrong. In fact, I think a better
17 question is what did he do right. Because he did
18 almost nothing that was right. He did almost nothing
19 that was accordance with the Washington State
20 Foreclosure Statute. He mixed up his duties as the
21 attorney for Mr. Newkerk versus his duties as the
22 trustee versus his duties as the attorney for the
23 trustee. He never recognized the difference between
24 each of those functions.

25 When the trial resumed on January 5, 2006,

1 Mr. Jared had retained counsel, and for the first time
2 he stipulated that he had breached his duties to
3 Mr. Keahey under the Deed of Trust Foreclosure Act.

4 He charged attorney's fees that had not
5 actually been incurred or earned. As the attorney for
6 Mr. Newkerk under both the note and the deed of trust,
7 Mr. Jared could impose upon Mr. Keahey only those fees
8 that were actually incurred in connection with an
9 action filed and only to the extent the fees were
10 reasonable.

11 Under RCW 61.24.080, as the trustee or
12 attorney for the trustee, Mr. Jared could impose upon
13 Mr. Keahey only reasonable charges. Mr. Jared believed
14 he had the right to and did charge Mr. Keahey for the
15 non-refundable retainers he required Mr. Newkerk to
16 pay, even though some of those fees had not yet been
17 incurred or earned.

18 Given the poor work that was done,
19 Mr. Jared's fees were, in my judgment, both
20 unreasonable and excessive.

21 Mr. Jared refused to reinstate the loan
22 without verification of payments of tax and insurance
23 amounts. His client's own escrow agent had that
24 information, had he bothered to check.

25 There were defects in nearly every notice he

1 sent in connection with the foreclosure. There were
2 incorrect and excessive tax payments demanded. There
3 were incorrect and excessive insurance payments
4 demanded. And Mr. Jared ignored my order of July 21,
5 2004, which established the amount of Mr. Newkerk's
6 debt, including the fees and costs that could be
7 charged to Keahey as of the date of that order.

8 Mr. Keahey's first claim is that Mr. Jared
9 breached his fiduciary duties to Mr. Keahey as the
10 trustee under the deed of trust. Mr. Jared stipulated
11 to this claim with the advice of counsel. Had he not
12 stipulated, the record fully supports that he had an
13 actual conflict of interest acting as the attorney for
14 Mr. Newkerk, as the trustee under the deed of trust,
15 and as the attorney for himself, the trustee. He
16 failed entirely to recognize and treat those roles as
17 separate obligations.

18 Under Washington state law, strict compliance
19 with the Deed of Trust Foreclosure Statute is required.
20 And that is -- that proposition is stated in Queen City
21 Savings & Loan Association versus Manhall, 49
22 Washington Appellate 290. That's a 1987 case.

23 In addition, under the Cox versus Helenius
24 case, because the deed of trust foreclosure process is
25 conducted without review or confirmation by a court,

1 the fiduciary duty imposed upon a trustee is
2 exceedingly high. Quoting from Page 390 of that case
3 the Court stated, quote, "The trustee is bound by his
4 office to present the sale under every possible
5 advantage to the debtor, as well as to the creditor.
6 He is bound to use not only good faith, but also every
7 requisite degree of diligence in conducting the sale
8 and to attend equally to the interests of the debtor
9 and the creditor alike.

10 I conclude that Mr. Keahey has proved that
11 Mr. Jared violated his obligations as a trustee under
12 the Deed of Trust Foreclosure Statute.

13 Mr. Keahey's second claim is for intentional
14 infliction of emotional distress, also known as the
15 Tort of Outrage. The elements of that tort include,
16 One, extreme and outrageous conduct, Two, intentional
17 or reckless infliction of emotional distress, and
18 Three, an actual result to the plaintiff of severe
19 emotional distress.

20 I have been guided in my opinion by the case
21 of Kloepfel v. Bokor, 149 Washington 2d 192. That is a
22 2003 case in which the Washington State Supreme Court
23 held that, quote, "The objective symptomatology
24 requirement which properly applies to the tort of
25 negligent infliction of emotional distress is not a

1 requirement for proof of intentional infliction of
2 emotional distress or outrage." End quote.

3 The Court in that case also clarified the
4 meaning of severe emotional distress. At Page 203 the
5 Court noted that emotional distress includes all highly
6 unpleasant mental reactions such as fright, sorrow,
7 grief, shame, humiliation, embarrassment, anger,
8 chagrin, disappointment, worry and nausea.

9 Quoting from the restatement of torts, severe
10 emotional distress, the Court went onto say, is
11 distress such, quote, "that no reasonable man could be
12 expected to endure it." End quote. With the
13 requirement in the Tort of Outrage that will the
14 plaintiff prove extreme and outrageous intentional or
15 reckless conduct, quote, "It can be fairly presumed
16 that severe emotional distress was suffered." End
17 quote.

18 In that particular case the plaintiff
19 suffered nervousness, sleeplessness, hypervigilance and
20 stomach upset, but never sought any professional or
21 medical care. The Court affirmed a \$60,000 judgment in
22 the plaintiff's favor.

23 The first element that must be proved is that
24 the defendant engaged in extreme and outrageous
25 conduct. The defendant in this case has proved by

1 clear and convincing evidence that Mr. Jared did so
2 conduct himself. Mr. Jared had no idea how to conduct
3 a nonjudicial foreclosure sale when he took on the
4 representation of Mr. Newkerk. He did just about
5 everything wrong. All of his conduct signaled to
6 Mr. Keahey with each and every communication that
7 Mr. Keahey would never be able to keep his house.

8 When the claimed defaults were cured,
9 Mr. Jared immediately claimed new defaults entitling
10 him to restart the foreclosure process and charge
11 additional fees and costs for his own benefit. In my
12 12 years on the bench, I have never heard a collection
13 tale more outrageous than this one. The outrageousness
14 of the conduct is typified by what Mr. Jared did both
15 inside and outside the courtroom. He scheduled the
16 trustee's sale, as I mentioned, initially for the
17 parking lot of his condominium rather than the steps of
18 City Hall, as required by the statute, so that he could
19 personalize the sale.

20 At one point he demanded a 10 percent
21 interest rate which amounted to \$36,000 and then
22 \$42,000, as shown in Exhibits P-36 and P-37. I would
23 submit that these are huge amounts to people like the
24 Keaheys, and there was no 10 percent interest due under
25 the note.

1 In the courtroom Mr. Jared demonstrated that
2 he still does not understand the importance of the
3 duties that he had. He testified that he did not think
4 accuracy in the demand letter was a, quote, "big deal,"
5 end quote, that he treated these demands just as
6 methods to open discussion. He expected the matter to
7 be settled. He testified that the mistakes should be
8 overlooked by Mr. Keahey and by me because he was
9 charging what he considered to be a low billing rate.
10 Even if he had proved that the billing rate was low,
11 which he did not, that would not excuse this kind of
12 incompetence.

13 The second element of the Tort of Outrage is
14 that the defendants' infliction of emotional distress
15 on the plaintiff was intentional or reckless. And I
16 conclude that the plaintiff has proved this by clear
17 and convincing evidence. Mr. Jared testified that he
18 did not intend to cause any harm to Mr. Keahey. He
19 claimed that this was just a series of simple mistakes.
20 He claimed that the whole thing was Mr. Keahey's fault
21 because he failed to make his mortgage payments on
22 time.

23 The failure to make a mortgage payment,
24 however, should not unleash upon a debtor the kind of
25 outrageous collection behavior that occurred in this

1 case. If you miss a mortgage payment, your property is
2 subject to foreclosure, no doubt, pursuant to the
3 statutes of the State of Washington. But you have the
4 right to cure by paying the amounts required under the
5 statute.

6 Mr. Jared prevented Mr. Keahey from
7 exercising his cure rights under the foreclosure
8 statute by changing the numbers required to cure at
9 every point in the process. He was generating
10 substantial fees for himself, fees that were paid by a
11 client, Mr. Newkerk, who apparently did not question
12 the reasonableness of those fees, fees that were being
13 paid by Mr. Keahey because he was terrified of losing
14 his house. I conclude that Mr. Jared's conduct was
15 intentional.

16 I also conclude that his conduct was
17 reckless. He failed to to check the numbers he put in
18 his demand letters and foreclosure notices. He failed
19 to check with his own client's escrow company to verify
20 what amounts had been paid for tax and insurance
21 escrows. He says he did legal research to become
22 competent in the foreclosure area, yet he made mistake
23 after mistake after mistake.

24 His attitude in the courtroom confirmed his
25 recklessness by arguing that he made mistakes, and when

1 these those mistakes were pointed out to him, he
2 corrected them. However, it was not incumbent upon
3 Mr. Keahey as the debtor and at great expense to
4 himself to educate Mr. Jared about the law or to point
5 out the errors to Mr. Jared. It was incumbent upon
6 Mr. Jared to get it right and to treat Mr. Keahey
7 fairly and respectfully. Mr. Jared did just the
8 opposite.

9 The final element of the Tort of Outrage is
10 that the plaintiff must suffer extreme emotional
11 distress as a result of the defendant's conduct. I
12 find that Mr. Keahey has proved this element by clear
13 and convincing evidence. Mr. Keahey testified to the
14 same kind of conditions mentioned in the Kloepfel case,
15 lost sleep, cyclical vomiting, anger, fear, worry,
16 distress and disappointment over the potential loss of
17 his home, and over the bankruptcy filings,
18 embarrassment, humiliation and shame. His testimony
19 was credible, and none of it was refuted.

20 I want to point out that home ownership in
21 this country is a cherished thing, and most of the
22 people I see in Chapter 13 are trying to save their
23 homes. In this case Mr. Keahey had made an initial
24 down payment of \$20,000 in the payment of this house.
25 That's a substantial amount for someone at his income

1 level. He had a lot to lose. His distressed response
2 to Mr. Jared's persistent attempts to foreclose his
3 house was reasonable and certainly understandable. In
4 the words of the Kloepfel court, Mr. Keahey suffered a
5 distress that no reasonable man could be expected to
6 endure.

7 The plaintiff's second claim is for negligent
8 infliction of emotional distress. I do agree with the
9 defendant that to prevail on this claim, Mr. Keahey
10 would have had to have introduced evidence showing
11 objective symptomatology. Mr. Keahey did not introduce
12 that evidence. Therefore, I will grant the defendant's
13 motion to dismiss this claim.

14 Finally, the plaintiff has made a claim for
15 fraud. Fraud requires proof of nine specific elements.
16 Having concluded already that Mr. Jared breached his
17 fiduciary obligations and committed the Tort of
18 Outrage, I conclude that I don't need to rule on this
19 claim and will not do so as part of this ruling.

20 Moving to causation. Mr. Jared's claim is
21 that Mr. Keahey's problems were caused by his failure
22 to make mortgage payments. I find that but for
23 Mr. Jared's intentional acts and violations of his
24 duties as the trustee under the deed of trust,
25 Mr. Keahey would not have paid amounts that were not

1 owed by him, and he would not have had to hire an
2 attorney to defend him against Mr. Jared's foreclosure
3 actions. But for Mr. Jared's intentional acts and
4 violations of his duties as the trustee under the deed
5 of trust, Mr. Keahey would not have had to file three
6 bankruptcy proceedings.

7 The defendant argues that because Mr. Keahey
8 had a number of unsecured debts in his bankruptcy
9 schedules and because he had unstable income during the
10 relevant time period, Mr. Jared's foreclosure actions
11 were not the cause of the bankruptcy filings. I reject
12 that argument. The unsecured debts in all three
13 bankruptcy cases are relatively minor compared to the
14 Newkerk debt. And there was absolutely no evidence
15 that any of the unsecured claims, or all of them
16 together, were the cause of the bankruptcy filings. In
17 each case the issue was the foreclosure action
18 commenced under the Newkerk deed of trust. That
19 evidence -- the evidence makes that clear.

20 What are the components of damages here. I
21 want to go through them one at a time. First of all,
22 as far as fees paid to Mr. Home, there is really no
23 proof of any fees having been paid to Mr. Home, nor any
24 proof of what amount is owed. The testimony by
25 Mr. Keahey and Mr. Home on his fees was non-specific

1 and uncorroborated. Therefore, I'm not able to award
2 anything to Mr. Keahey for Mr. Home's fees.

3 As far as fees paid to Mr. Jared, I am going
4 to deny his right to any fees and costs charged in
5 connection with the Newkerk loan to Mr. Keahey.

6 When a trustee has an actual conflict of
7 interest, the Court may properly disallow all of his
8 fees and costs. See *Truong versus Rutherford*, 119
9 Washington Appellate 1022, a 2003 case. In addition,
10 Mr. Jared should not be compensated by Mr. Keahey for
11 any of his fees and costs because his work was
12 completely incompetent and his charges were
13 unreasonable.

14 The judgment in Mr. Keahey's favor will
15 include any and all amounts approximate amounts that he
16 has paid relating to Mr. Jared's services, including
17 any amounts already paid or to be paid. This amount
18 includes \$1,100 paid in 2001, \$4,000 in fees paid in
19 July of 2002, and \$252 in costs paid in July of 2002.

20 Mr. Keahey is entitled to a judgment for the
21 \$20 bad check fee he was required to pay.

22 There were bankruptcy filings fees. The
23 judgment will include the filing fees paid by
24 Mr. Keahey for each of his three bankruptcy cases as
25 reflected in the court's docket sheet, \$185 for the

1 first case, \$194 for the second case, and \$194 for the
2 case that is currently pending.

3 There is an issue concerning Mr. Keahey's
4 fees paid for bankruptcy attorneys. Mr. Meleney
5 represented Mr. Keahey in the first bankruptcy. The
6 petition filed in that case shows that Mr. Keahey paid
7 \$500 to Mr. Meleney before the case was filed. There
8 is no evidence of any other fees paid to Mr. Meleney.

9 Mr. Feinstein represented Mr. Keahey in his
10 second bankruptcy case, but there's no evidence of any
11 fees paid to Mr. Feinstein.

12 Tax Attorneys, Inc. represented Mr. Keahey in
13 his third bankruptcy filing and still represents him
14 here. The petition in this case shows that Mr. Keahey
15 paid \$1,000 to Tax Attorneys, Inc. on November 24th,
16 2005. In addition, there is currently a fee
17 application currently pending for nearly \$20,000 in
18 fees. I deferred ruling on that application so that I
19 could determine whether the services performed were of
20 benefit to the estate, i.e., whether there was any
21 validity to Mr. Keahey's case against Mr. Jared and
22 Mr. Newkerk. A hearing on that fee application will be
23 set, and Mr. Jared will be given an opportunity to
24 object to those fees.

25 For purposes of this proceeding, however, I

1 find that the cost of Tax Attorneys, Inc. resulted from
2 Mr. Jared's unlawful conduct and that these were
3 reasonably foreseeable consequences of that conduct.

4 There is an issue concerning the fees that
5 Mr. Keahey has paid or may need to pay to Mr. Newkerk.
6 Mr. Keahey's settlement with Mr. Newkerk is scheduled
7 for hearing on February 15th, 2006. That settlement
8 appears to require Mr. Keahey to pay \$13,009.21 in fees
9 and \$2,232 in costs that were part of the July 21,
10 2004, order. If the settlement is approved, the
11 judgment here will include those amounts.

12 Mr. Jared will be given the opportunity to
13 argue as to why he should not be required to pay the
14 additional \$24,367.20 in fees incurred by Peterson
15 Kelly. I find, however, that any such fees required to
16 be paid by Mr. Keahey were caused by Mr. Jared's
17 unlawful conduct and are reasonably foreseeable
18 consequences of that conduct.

19 As far as damages for intentional infliction
20 of emotional distress, I'm going to award Mr. Keahey
21 \$60,000 in damages. That brings the total damages so
22 far, including amounts due under the July 21, 2004,
23 order to \$82,686.21, plus whatever will be included
24 after the hearings that I conduct on the Tax Attorneys,
25 Inc. and Peterson Kelly fees.

1 Subsequent to a determination by me of what
2 amount of fees and costs are attributable to the
3 services of Tax Attorneys, Inc. and Peterson Kelly,
4 what amount of those fees will be included in the
5 judgment here, the plaintiff may move for statutory
6 fees and costs incurred by Ms. Huelsman. Under RCW
7 61.24.0902, any person entitled to cause a
8 discontinuance of the sale proceedings shall have the
9 right before or after reinstatement to request any
10 court, excluding a small claims court, for disputes
11 within the jurisdictional limits of that court to
12 determine the reasonableness of any fees demanded or
13 paid as a condition to reinstatement. The Court shall
14 make such determination as it deems appropriate, which
15 may include an award to the prevailing party of its
16 costs and reasonable attorney's fees and render
17 judgment accordingly.

18 For purposes of what I am going to order, all
19 you need to know for now is that I am going to continue
20 the hearings on the debtor's proposed settlement with
21 Mr. Newkerk and on the fee application of Tax
22 Attorneys, Inc. to March 3, 2006 at 9:30 a.m. I don't
23 want it on my Chapter 13 calendar. I'm going to put it
24 on one of my Friday calendars, which are much shorter.

25 Mr. Jared must file any objections that he

1 has to the amounts of the fees the plaintiff has agreed
2 to pay to the firm of Peterson Kelly and to the fees of
3 Tax Attorneys, Inc. on or before February 24, 2006.
4 The debtor may file a reply to those objections on or
5 before March 1, 2006.

6 I will determine at the hearing on March 3
7 what will be added to the judgment. This hearing,
8 therefore, is being continued also to March 3, 2006.

9 Ms. Huelsman, any fees and costs which you
10 want to apply for must be applied for separately by a
11 motion on notice and hearing, and I'll make a
12 determination based upon what you filed.

13 MS. HUELSMAN: Would you like me to set it
14 for hearing on that same date, Your Honor?

15 THE COURT: Only if there's sufficient number
16 of days to provide notice under the local rules. I'm
17 not -- unless there's an emergency, there's no reason
18 to shorten the time.

19 MS. HUELSMAN: No problem.

20 THE COURT: I will advise you both that our
21 digital court reporting system now permits you to go
22 downstairs to the clerk's office and request a CD ROM
23 of my transcript. When we get down to findings of fact
24 and conclusions of law, when I do this kind of detailed
25 findings, I do not expect the plaintiff to restate

1 findings of fact and conclusions in a document, because
2 it takes too long to work through those and I think I
3 have said it in as much detail as is necessary. So the
4 only requirement will be an order and a judgment with
5 the transcript attached.

6 So Ms. Huelsman, you will need to order it
7 and have it transcribed through our regular court
8 reporting system.

9 MS. HUELSMAN: I will do that.

10 THE COURT: Any questions?

11 MS. COOPER: Yes, Your Honor.

12 THE COURT: Ms. Cooper?

13 MS. COOPER: The hearing that you've set for
14 March 3rd, Mr. Jared has a long-standing plan to be out
15 of the country during the month of March returning
16 March 31st. Certainly, he should be afforded the
17 opportunity to be present at these hearings.

18 THE COURT: And then when does he leave?

19 MR. JARED: March 1.

20 THE COURT: March 1. I could put it on my
21 February 17 calendar, but you would have to file your
22 response by February 10th. What that requires is that
23 you go to documents that are already in the record. As
24 far as the Tax Attorneys, Inc. claims, you will find a
25 detailed application attached to which are detailed

1 billing statements showing the services performed.

2 Mr. Kelly is here. I don't know what has
3 been filed by way of backup as far as his firm is
4 concerned. But you will need to have access to that if
5 you want to make any -- if you want to make any
6 objection to what his fees are.

7 MS. HUELSMAN: Mr. Kelly has provided the
8 billings statements to us. I am sure that either he or
9 I could get that to you immediately by email today.

10 THE COURT: So that would amend our schedule.
11 If we were going to have the hearing on February 17th,
12 you would file -- I could actually -- from my
13 standpoint, you could file your response by let's say
14 the 13th. That would give you a little more time.

15 And Ms. Huelsman, you could file yours by the
16 15th.

17 MS. HUELSMAN: That's fine, Your Honor.

18 THE COURT: Do you want to do that instead?

19 MS. COOPER: Well, I actually would much
20 sooner have more time, Your Honor.

21 THE COURT: Well, I don't know what the --

22 MS. COOPER: I'm not sure what the Court is
23 contemplating by way of response. I'm assuming that
24 I'm probably going to need to go through these billing
25 statements and go line item by line item and determine

1 from our perspective or based on the evidence that's
2 been presented to you whether that particular item can
3 possibly be related to Mr. Jared's actions or whether
4 it was related to something else.

5 THE COURT: Yes. I mean, I think what you're
6 going to find in there are those kinds of time entries.
7 The approach that I'm taking that you should know
8 already -- and I think I've said it in my opinion -- is
9 that to the extent that we're talking about services
10 that are necessitated by the fact that they're in
11 bankruptcy, I view those as foreseeable expenses in a
12 case like this.

13 What I don't view as foreseeable might be
14 separate problems that the Keaheys have with the IRS,
15 with some individual creditor or something that is an
16 issue that they would have whether they were in
17 bankruptcy or not. And I believe that Mr. Green's
18 billing statements will be detailed enough for you to
19 go through and identify those.

20 I don't know about Mr. Kelly's, because it
21 seems to me that his entire fee application is about
22 this. And the only thing that you're going to be
23 looking for is whether you think there are unreasonable
24 expenses as part of that fee application.

25 I make no rulings ruling today concerning the

1 relationship between Mr. Jared and his own client,
2 Mr. Newkerk. As far as I know, Mr. Newkerk has paid
3 Mr. Jared's fees as they have been demanded. So I'm
4 not making any finding about the liability of either
5 one to the other. I'm only dealing with the liability
6 to Mr. Keahey.

7 So now, with that in mind, let me ask
8 Ms. Huelsman about the pressures of the Chapter 13
9 case. Because it's really my fault that I continued
10 the fee application process, because frankly, I was
11 concerned that if there was no case here, it's my
12 obligation to reduce debtor's attorney's fees because
13 they were not beneficial to the estate. So that is why
14 I refused to have a hearing on the fees that were
15 request requested. Because I did that, unfortunately,
16 it necessarily meant that we were not able to deal with
17 them in this process. On the other hand, Mr. Jared has
18 a right now to respond to those fees.

19 I don't know what the pressures of this
20 settlement are. I don't know whether the Keaheys are
21 making payments now, whether they need to get the order
22 on settlement entered, what's happening with that.

23 MS. HUELSMAN: Well, to the extent --
24 obviously, I'm not their Chapter 13 attorney. But my
25 understanding is they have been making their Chapter 13

1 payments. They have been making them regularly to the
2 court. I believe Mr. Newkerk has been receiving
3 regular payments. Mr. Kelly can confirm that.

4 And the settlement provides the requirement
5 that the Keaheys get the house refinanced by a date
6 certain in June or July, I can't remember. So we have
7 enough time with this to get this resolved and let them
8 then proceed with the Chapter 13. But right now
9 they're making their plan payments. Mr. Newkerk is
10 receiving them from the Chapter 13 trustee. I know Tax
11 Attorneys wants to be paid, but I haven't had any
12 indication from them that there's some emergency.

13 I understand Mr. Jared does have travel
14 plans. But on the other hand, you know, I do think
15 pushing this into April, then, does get us quite far
16 out.

17 THE COURT: Isn't that what we have to do?
18 Because if he returns on the 31st, we can't really have
19 a hearing on the 31st.

20 MS. COOPER: Yes, but it just dawned on me --
21 I don't have my calendar in front of me, but I do -- I
22 received in the mail today a notice of hearing up in
23 Skagit County on the 17th. I think their calendar is
24 at 9:30 in the morning. So I do have a conflict on
25 that date that I can try to work with. And if sooner

1 is what the Court would prefer, I can get the briefing
2 done. I just don't know.

3 THE COURT: Well, I want to get on with it
4 because this matter has been pending for quite some
5 time. But as you can see, I'm out that one week, too,
6 so there's nothing to be done that week. Otherwise we
7 are pretty much at April 7. Let me ask Mr. Kelly, is
8 there any reason why we can't continue status quo until
9 April 7?

10 MR. KELLY: The only problem right now is
11 that it is true that the Keaheys have made every
12 payment. But their payments to Newkerk are one month
13 behind because they make them so late in the month.
14 The plan was going to be amended to provide --

15 THE COURT: I see.

16 MR. KELLY: We can get caught up, but in
17 reality, you know, for my client's comfort, he wants a
18 confirmed plan so that everything is set --

19 THE COURT: Well, I do, too. This is the
20 third time we've been here. We need to confirm a plan.

21 MR. KELLY: In reality, I don't think --
22 there's nothing from our standpoint that would prevent
23 it from being --

24 THE COURT: I'm going to move it to April 7th
25 at 9:30. And that means Mr. Jared's response can be

1 filed by the 31st.

2 And Ms. Huelsman, you can file a reply by
3 April 5th.

4 And I have one more thing to say. And that's
5 to Mr. Keahey. I see a lot of repeat filers. And I'll
6 tell you frankly that most of them are abusing the
7 bankruptcy process. And sometimes that causes me and
8 other judges not to pay attention as closely as we
9 should to what repeat filers are saying. And I have to
10 tell you that in this particular case, I almost missed
11 the legitimate claims that you had because you were a
12 repeat filer. And to that extent, I want you to know
13 that your case is like a lesson learned that repeat
14 filers, we still need to make sure that there isn't
15 some legitimate reason why they're here and it's not
16 just abusing the system.

17 So with that, we are adjourned. And I will
18 see you -- Mr. Kelly?

19 MR. KELLY: I just want to confirm, so April
20 7th the will be the confirmation hearing as well as the
21 fee application?

22 THE COURT: I do not know whether that works.
23 Because I don't know whether -- I haven't looked at the
24 plan. Is the plan -- does the plan contemplate every
25 possibility?

1 MS. HUELSMAN: Well, no, but it --

2 MR. KELLY: It contemplates whatever the
3 outcome of this case --

4 MS. HUELSMAN: -- that that would be
5 incorporated into the plan.

6 THE COURT: If that's so, and if
7 Mr. Fitzgerald has no objections to the plan, then I
8 don't have a problem with him continuing it to the 7th.
9 But Mr. Fitzgerald doesn't normally attend my Friday
10 motions calendar. So if he's going to have an
11 objection, it's better set on my 13 calendar, which
12 unfortunately would be April 3rd or April 19th.

13 MR. KELLY: I'll talk to Mr. Fitzgerald.

14 THE COURT: So talk to him. If he's
15 satisfied with everything else in the plan and it
16 provides for what happens to the money and how they're
17 going to pay, then it's fine to have the confirmation
18 hearing that day.

19 MS. HUELSMAN: And since we obviously have
20 enough time, I'll just go ahead and set my motion for
21 that same day as well so we don't have to have any
22 duplication.

23 THE COURT: I think that's fine, except that
24 if you do that, I would suspect that you won't capture
25 the fees that you will incur in the process of dealing

1 with this additional hearing.

2 MS. HUELSMAN: That's correct. Okay.

3 THE COURT: So I think the contemplation of
4 post-trial fees is that you're done, and then you make
5 a motion.

6 MS. HUELSMAN: Okay.

7 THE COURT: Okay. We're at recess, then.

8 Thank you.

9 MS. HUELSMAN: Thank you very much.

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CERTIFICATE

ROBYN OLESON FIEDLER certifies that:

The foregoing pages represent an accurate and complete transcript of the entire record of the digitally-recorded ruling by the HONORABLE KAREN A. OVERSTREET presiding, in the matter of KEAHEY v. NEWKERK, et al.; and

These pages constitute the original or a true copy of the original transcript of the ruling.

Signed and dated this 20th day of February, 2006.

AHEARN & ASSOCIATES

by |s| Robyn Oleson Fiedler
ROBYN OLESON FIEDLER, Notary
Public in and for the State of
Washington, residing at Tacoma

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OF THE NINTH CIRCUIT

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2
3 UNITED STATES BANKRUPTCY APPELLATE PANEL
4 OF THE NINTH CIRCUIT
5

6 In re:) BAP No. WW-08-1151-PaJuKa
7 JOHN PATRICK KEAHEY,)
8 Debtor.) Bk. No. 04-25122-KAO
9) Adv. No. 05-01153-KAO

10 JEFF E. JARED,)
11 Appellant,)
12 v.)
13 JOHN P. KEAHEY)
14 Appellee.)

MEMORANDUM¹

15
16 Argued and submitted on October 17, 2008
17 at Seattle, Washington

18 Filed - November 3, 2008

19 Appeal from the United States Bankruptcy Court
for the Western District of Washington

20 Honorable Karen A. Overstreet, Chief Bankruptcy Judge, Presiding.

21
22 Before: PAPPAS, JURY and KAUFMAN², Bankruptcy Judges.
23

24
25 ¹ This disposition is not appropriate for publication.
26 Although it may be cited for whatever persuasive value it may have
(see Fed. R. App. P. 32.1), it has no precedential value. See 9th
Cir. BAP Rule 8013-1.

27 ² The Honorable Victoria Kaufman, United States Bankruptcy
28 Judge for the Central District of California, sitting by
designation.

APPENDIX B

1 In this appeal, the Panel reviews a decision by the
2 bankruptcy court finding that a creditor's attorney committed the
3 tort of outrage and violated his fiduciary duties as a deed of
4 trust trustee in connection with his repeated, abusive attempts to
5 collect a debt secured by the debtor's home. The bankruptcy court
6 awarded the debtor money damages, together with attorney's fees
7 and costs. Perceiving no error, we AFFIRM.

8

9

FACTS³

10 Chapter 13⁴ Debtor John P. Keahey ("Keahey") purchased a home
11 from Oscar Newkerk ("Newkerk") on July 30, 1999. Keahey paid
12 Newkerk a down payment of \$20,000, and gave him a Promissory Note
13 (the "Note") for the \$180,000 balance, payable in monthly
14 payments, secured by a deed of trust on Keahey's home. Keahey
15 agreed to make separate monthly payments into an escrow account at
16 a law firm to pay property taxes and insurance.

17 Keahey failed to make two monthly Note payments, and in
18 January 2001, Jeff E. Jared ("Jared"), Newkerk's attorney, sent
19 Keahey a letter demanding payment of \$2,200.00 for the missed loan

20

21

22

23 ³ Most of these facts are not disputed. We identify those
to which either party objects.

24

25 ⁴ Unless otherwise indicated, all chapter, section and rule
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, as
26 enacted and promulgated prior to the effective date (October 17,
2005) of the relevant provisions of the Bankruptcy Abuse
27 Prevention and Consumer Protection Act of 2005, Pub. L. 109-8,
April 20, 2005, 119 Stat. 23, and to the Federal Rules of
Bankruptcy Procedure, Rules 1001-9037.

28

1 payments and \$1,100 in attorney's fees.⁵ Keahey paid the amounts
2 demanded.

3 Keahey defaulted again, failing to pay the December 2001 and
4 January 2002 monthly installments. Jared sent him another demand
5 letter on January 7, 2002, this time requiring payment of \$500 in
6 attorney's fees and \$800 in property taxes, but failing to mention
7 the two missed mortgage payments. The bankruptcy court would
8 later find that this demand was improper, not only because of its
9 omission of the delinquent monthly payments, but because Keahey
10 had, with Newkerk's approval, been paying the taxes into an escrow
11 account.

12 Jared thereafter became successor trustee under the deed of
13 trust, and on January 29, 2002, he prepared, recorded and posted a
14 Notice of Default on the front door of Keahey's home. The
15 bankruptcy court later determined that none of the numbers in the
16 Notice of Default were correct: it included the two monthly
17 payments as in default, even though they had been made to Newkerk
18 four days earlier; \$800 in property taxes, even though they had
19 already been paid into escrow; \$1,200 in legal fees; and \$1,350 in
20 other estimated fees and costs. Moreover, as the bankruptcy court
21 later observed, Jared apparently did not understand the difference
22 between a Notice of Default that, under Washington law, need not
23 be recorded, and a Notice of Sale, that should be.

24 On March 12, 2002, Jared sent Keahey a Notice of Foreclosure
25

26 ⁵ The Note permitted Newkerk to recover attorney's fees, but
27 only in the "event an action was initiated on the deed of trust."
The bankruptcy court would later determine that Jared was not
entitled to recover these legal fees.

28

1 and a Notice of Trustee's Sale, also containing serious errors.
2 The property tax numbers in the sale notice were off by \$100. The
3 sale notice sought collection of \$2,400 in trustee and attorney's
4 fees, and demanded that Keahey pay a delinquent sewer and water
5 bill, even though neither the Note nor deed of trust required
6 Keahey to pay utility bills. Finally, in what can only be
7 regarded as a very curious maneuver, Jared's notice scheduled the
8 foreclosure sale to occur in the parking lot of Jared's
9 condominium, rather than at Kirkland City Hall as required by
10 statute.⁶

11 Upon receipt of the sale notice, Keahey retained Greg Home
12 ("Home") as his attorney. Home wrote to Jared on June 4, 2002,
13 informing him that Keahey had sufficient funds to bring all
14 legitimate amounts due under the Note current. He also informed
15 Jared that as the trustee under a deed of trust, under Washington
16 case law, Jared owed fiduciary duties to Keahey. Jared responded
17 indicating that he was not acquainted with the Washington case
18 cited in Home's letter, that he owed no duties to Keahey and
19 considered himself as only acting as attorney for Newkerk, and
20 that, in spite of Keahey's offer to cure, he was proceeding with
21 the foreclosure sale. In response to Jared's demand that Keahey
22 pay \$14,911.14 to avoid foreclosure, Keahey tendered a check for
23

24 ⁶ Jared would later testify that his plan was to serve
25 coffee and croissants to those attending the sale and, in his
26 words, to "boutiquify it." The bankruptcy court observed that
27 Jared's ill-considered decision to conduct a foreclosure sale in
28 this fashion was compelling evidence of his "incompetence" to
serve as the trustee under a deed of trust. When contacted by
Keahey's attorney, Jared agreed to change the sale location to the
city hall.

1 \$12,096.88, noting that the tax and utility bills mentioned in
2 Jared's letter had been or would be paid separately and that
3 Keahey reserved his rights to challenge the legality of the bill.

4 The same day he received Keahey's check, Jared sent Home a
5 letter stating that he still lacked proof that the taxes had been
6 paid.⁷ Further, he added new charges of \$326.85. He sent Home
7 another letter a few days later increasing the charges to \$560,
8 indicating that the foreclosure sale would occur unless that sum
9 was paid. Keahey paid the \$560 and Jared canceled the foreclosure
10 sale on July 17, 2002.

11 Just a few days later, on August 7, 2002, Jared sent Keahey a
12 new Notice of Default, alleging that Keahey had failed to pay
13 property taxes of \$200 and \$60 for homeowners insurance. In fact,
14 both of these numbers were incorrect, and Jared later testified
15 that he had just rounded them.

16 Over the following months, Jared continued with the
17 foreclosure process, demanding that Keahey pay increasing legal
18 fees of \$1,200 on October 3, 2002, and \$2,300 on January 3, 2003.
19 Faced with the prospect of the loss of his home to foreclosure,
20 Keahey filed the first of three chapter 13 bankruptcy cases on
21 February 13, 2003. Newkerk moved for stay relief and the
22 bankruptcy court entered an order that Newkerk would have stay
23 relief if Keahey missed any mortgage payments. Jared, acting as
24 attorney for Newkerk, later informed the bankruptcy court that
25 Keahey had missed a payment, and the court granted relief from

26
27 ⁷ The bankruptcy court later found that Jared had not
28 checked with the escrow agent who had indeed received the payment.

1 stay and dismissed the bankruptcy case.

2 Jared thereupon revived the foreclosure process, now
3 demanding that Keahey pay \$10,758 in trustee and attorney's fees.
4 Keahey filed a second chapter 13 case on January 28, 2004. In May
5 2004, Jared provided Keahey a statement of amount owed on the
6 Note, with the accelerated balance due of \$254,000; Keahey
7 believed it should have been \$174,000. The statement also
8 demanded \$12,786 in attorney and trustee's fees and \$36,000 as a
9 ten percent interest charge. The bankruptcy court later
10 determined this interest demand was "flat-out wrong."

11 The bankruptcy court approved a settlement agreement between
12 Keahey and Newkerk on July 21, 2004, fixing the principal of
13 Newkerk's claim at \$174,505 and a total net claim of \$198,250
14 including interest, fees, and costs less pre-confirmation
15 payments. The court's order included a provision that if Keahey
16 completed a refinance of the property before August 31, 2004, no
17 additional costs and fees would be allowed to Newkerk.

18 Keahey's refinancing attempts failed. On August 31, 2004,
19 Keahey tendered to Jared a check for \$23,745.01, which he believed
20 was sufficient to cure the total delinquency on the Note. Jared
21 rejected the check, as well as the September monthly payment,
22 contending that because the refinancing had fallen through, all
23 the fees and costs that had been compromised in the July 21, 2004
24 settlement agreement were now reinstated and immediately due and
25 payable.

26 In September 2004, Jared again began the foreclosure
27 proceeding; due to his errors in the filing process, it had to be

28

1 restarted again in October 2004. In the meantime, Keahey failed
2 to file delinquent tax returns, and the IRS obtained an order
3 dismissing the second bankruptcy case.

4 Keahey filed a third chapter 13 case on November 24, 2004.
5 But this time, in April, 2005, Keahey commenced an adversary
6 proceeding against Newkerk and Jared. His complaint stated joint
7 claims against them for, inter alia, intentional and negligent
8 infliction of emotional distress, fraud, breach of fiduciary duty,
9 slander of title, and violations of the Fair Debt Collection
10 Practices Act ("FDCPA") and the Washington State Consumer
11 Protection Act ("CPA").

12 On September 16, 2005, the bankruptcy court granted Jared a
13 partial summary judgment, dismissing the claims against him for
14 violations of FDCPA and CPA. The court also granted a partial
15 summary judgment in Newkerk's favor on all claims based on acts
16 committed before entry of the settlement order. Before trial,
17 Newkerk and Keahey entered into a tentative settlement agreement
18 and trial proceeded against Jared alone.⁸

19 Trial began on October 6, 2005, and continued on October 18,
20 2005. Keahey was represented by counsel Melissa Huelsman
21 ("Huelsman"), and Jared appeared pro se. After the second day of
22 trial, Jared retained counsel to represent him. The bankruptcy

23
24 ⁸ The settlement agreement between Newkerk and Keahey
25 apparently failed and the trial was continued against Newkerk
26 alone on September 21 and October 3, 2006. As a result of the
27 trial, the bankruptcy court dismissed all claims against Newkerk,
28 allowed his secured claim against Keahey in the amount of
\$192,664.69 plus accruing interest, and awarded Newkerk attorney's
fees of \$38,875.00. Jared was not involved in this phase of the
trial and the attorney's fees were not charged against him.

1 court conducted a telephonic hearing on November 18, 2005, to set
2 additional trial dates and consider the request of counsel to
3 allow the parties to attempt mediation. The court expressed its
4 concerns about allowing a lengthy period to mediate in light of
5 the advanced state of the trial and the dwindling resources of the
6 estate. The parties and the court agreed that a short time would
7 be allowed for mediation.

8 No mediation was held, settlement discussions failed, and the
9 trial resumed on January 5, 2006. Jared stipulated to liability
10 to Keahey on the claim for breach of fiduciary duty. Trial was
11 concluded that day, and the bankruptcy court announced its
12 decision in open court on February 2, 2006.

13 The bankruptcy court stated extensive findings of fact and
14 conclusions of law on the record. Among them the court found,
15 consistent with his stipulation, that Jared had breached his
16 fiduciary duties as a foreclosing trustee under the Washington
17 Deed of Trust Act, R.C.W. 61.24 et seq. ("DOTA"), and was liable
18 to Keahey for damages for that breach. Trial Tr. 28:9-11
19 (February 2, 2006).⁹ The court determined that, "but for Mr.
20 Jared's intentional acts and violations of his duties as the
21 trustee under the deed of trust, Mr. Keahey would not have had to
22 file three bankruptcy proceedings." Trial Tr. 35:2-5. For breach
23 of fiduciary duty,¹⁰ the court announced its intention to award
24

25 ⁹ Unless otherwise noted, all references to the trial
26 transcript are to the proceedings occurring on February 2, 2006.

27 ¹⁰ The measure of damages in Washington for breach of
28 fiduciary duty is "the actual loss resulting from the breach."

(continued...)

1 Keahey as damages: (1) "any and all amounts that [Keahey] has paid
2 relating to Mr. Jared's services, including any amounts already
3 paid or to be paid." Trial Tr. 36:13-16; (2) all bankruptcy
4 filing fees, Trial Tr. 36:21; (3) fees and expenses paid by Keahey
5 to his attorney in the third bankruptcy case, to be determined at
6 a later hearing where "Jared will be given an opportunity to
7 object to those fees." Trial Tr. 37:11-23.¹¹

8 The bankruptcy court also found that Jared had committed the
9 tort of outrage in his conduct toward Keahey, made findings
10 related to the three elements of that tort, and awarded Keahey
11 damages of \$60,000. Trial Tr. 28:12-34:6. As to Keahey's claim
12 that Jared had committed the tort of negligent infliction of
13 emotional distress, the bankruptcy court found that Keahey had not
14 presented proof necessary for one element of that tort, objective
15 symptomatology, and thus dismissed that claim. Trial Tr. 34:6-12.
16 In light of its ruling in Keahey's favor on the outrage claim, the
17 bankruptcy court decided it was unnecessary to rule on Keahey's
18 claim that Jared engaged in fraud. Trial Tr. 34:13-17.

19 Finally, the bankruptcy court indicated that Keahey could,
20 via separate motion, recover the attorney's fees and costs
21 incurred in connection with the adversary proceeding pursuant to
22 R.C.W. 61.24.09(02). Trial Tr. 39:13-17. On April 18, 2007, the
23

24 ¹⁰ (...continued)
25 Patnode v. Edward N. Getoor & Assocs., 613 P.2d 804, 804 (Wash.
Ct. App. 1980).

26 ¹¹ The bankruptcy court declined to award Keahey any amounts
27 he had paid to his attorneys in the first two bankruptcy cases
because it had been given no evidence of those payments.
28

1 bankruptcy court conducted a hearing in the adversary proceeding
2 to evaluate the fee application filed by Keahey's attorney in the
3 adversary proceeding. The bankruptcy court awarded Keahey
4 \$54,044.34 in attorney's fees and costs for the adversary
5 proceeding, and indicated that it would charge that amount against
6 Jared.

7 The bankruptcy court entered a judgment for Keahey against
8 Jared on May 4, 2007. In it, the court awarded the following
9 damages, finding that they were all proximately caused by Jared's
10 conduct: (1) \$60,000 for the tort of outrage; and (2) \$38,876.01
11 for breach of fiduciary duties. The court also awarded Keahey
12 attorney's fees of \$51,287.50 and costs of \$2,756.84 incurred in
13 the prosecution of the adversary proceeding pursuant to R.C.W.
14 61.24.090(2).

15 Jared filed a notice of appeal on May 14, 2007. On the same
16 day, Jared filed a motion for reconsideration with the bankruptcy
17 court, which was dismissed by the bankruptcy court for lack of
18 jurisdiction because of the pending appeal. At Jared's request,
19 the Panel dismissed the appeal as 'interlocutory. Jared v. Keahey
20 (In re Keahey), No. WW-07-1198 (9th Cir. BAP February 8, 2008).
21 On June 4, 2008, the bankruptcy court entered an order denying the
22 motion for reconsideration and an amended judgment for damages in
23 the same amount as in the original judgment. Jared filed a timely
24 notice of appeal of the amended judgment on June 12, 2008.

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JURISDICTION

7 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
8 and 157(b)(1).¹² The Panel has jurisdiction pursuant to 28 U.S.C.
9 § 158.

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ISSUES

- 23 1. Whether the bankruptcy court erred in deciding Jared was
24 liable to Keahey for the tort of outrage.
25 2. Whether the bankruptcy court erred in awarding attorney's
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27
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¹² As authorized in 28 U.S.C. § 157(a), the district court in Western Washington has referred to the bankruptcy court "all cases under Title 11, and all proceedings arising under Title 11 or arising in or related to cases under Title 11." United States District Court for the Western District of Washington, General Rule 7 ¶ 1.01. To the extent that some of Keahey's claims against Newkerk and Jared were for "personal injury torts," under 28 U.S.C. § 157(b)(5), the parties could have requested that they be tried by the district court. In addition, if some of Keahey's claims were "non-core" under 28 U.S.C. § 157(c)(1), the parties could have required the bankruptcy court, after trial, to submit its proposed findings and conclusions to the district court for de novo review and entry of a final judgment. No such requests were made. Moreover, in a Pre-Trial Order entered in this action on October 6, 2005, the bankruptcy court determined that it had jurisdiction of the adversary proceeding, that it was a core proceeding, and that it could adjudicate the "state law claims because they are based upon the same facts and allegations that underlie the core claims and are, therefore, within the Court's supplemental jurisdiction." Adv. Dkt. No. 48 at 2. Counsel for Keahey and Newkerk, and Jared individually, approved this Pretrial Order. Under these circumstances, we deem the parties to have impliedly consented to the bankruptcy court's exercise of jurisdiction and entry of judgment such that we need not examine it here. See Mann v. Alexander Dawson, Inc. (In re Mann), 907 F.2d 923, 926 (9th Cir. 1990) (holding that parties' failure to raise objection that bankruptcy court was hearing a non-core proceeding and entering judgment constitutes consent); Price v. Lehtinen (In re Lehtinen), 332 B.R. 404, 410-11 (9th Cir. BAP 2005) (party cannot challenge bankruptcy court's entry of final judgment in non-core proceeding if not raised before the bankruptcy court); Adelson v. Smith (In re Smith), 389 B.R. 902, 913-914 (Bankr. D. Nev. 2008) (holding that a party, by failure to timely request it, may waive right under 28 U.S.C. § 157(b)(5) to have trial of personal injury tort conducted by district court).

1 fees to Keahey under R.C.W. § 61.24.090(2) or abused its
2 discretion in taking judicial notice of fees awarded in the
3 main bankruptcy case.

4 3. Whether the bankruptcy court was biased against Jared.

5
6 **STANDARDS OF REVIEW**

7 We review a court's findings of fact for clear error. United
8 States v. Doe, 155 F.3d 1070, 1074 (9th Cir. 1998) (en banc). Due
9 regard must be given to the opportunity of the bankruptcy court to
10 judge the credibility of the witnesses. Rule 8013. Review under
11 the clearly erroneous standard is significantly deferential,
12 requiring a "definite and firm conviction that a mistake has been
13 committed." Easley v. Cromartie, 532 U.S. 234, 242 (2001).

14 We review a bankruptcy court's interpretation of state law de
15 novo. Rabkin v. Ore. Health Sciences Univ., 350 F.3d 967, 971
16 (9th Cir. 2003). The trial court's interpretation of a state
17 statute regarding attorney's fees is reviewed de novo. Jorgensen
18 v. Cassaday, 320 F.3d 906, 918 (9th Cir. 2003).

19 A trial court's decision whether to take judicial notice is
20 reviewed for abuse of discretion. Madeja v. Olympic Packers, 310
21 F.3d 628, 639 (9th Cir. 2002). No error in the admission or
22 exclusion of evidence is ground for disturbing a judgment unless
23 the refusal to take such action appears to the court inconsistent
24 with substantial justice. FED. R. CIV. P. 61, as incorporated by
25 Rule 9005.

26 "Federal judges are granted broad discretion in supervising
27 trials, and a judge's behavior during trial justifies reversal
28 only if he abuses that discretion." Price v. Kramer, 200 F.3d

1 1237, 1252 (9th Cir. 2000).

2 DISCUSSION

3 I.

4 The bankruptcy court did not err in deciding that Jared
5 was liable to Keahey for the tort of outrage
6 and awarding general damages.

7 Jared does not challenge the bankruptcy court's finding that
8 he breached the fiduciary duties he owed to Keahey as a statutory
9 deed of trust trustee, nor the award of damages made against him
10 by the bankruptcy court proximately caused by his breach.
11 Instead, the principal issue raised by Jared in this appeal is
12 embodied in his argument that "[t]he trial court erred when it
13 held that Defendant's conduct was intentional or outrageous rising
14 to the level of outrage, when it was really only negligent
15 infliction of emotional distress." Jared's Opening Br. at 21.
16 Based upon this contention, Jared asks the Panel to reverse the
17 bankruptcy court's conclusion that he committed the tort of
18 outrage and remand with instructions that its judgment be
19 "replaced with an order finding [that Jared committed] the tort of
20 negligent infliction of emotional distress." Id. In so doing,
21 Jared also seeks relief from the \$60,000 in damages awarded to
22 Keahey as a result of his alleged intentional conduct. We reject
23 Jared's position.

24 Jared argues the bankruptcy court erred when it found facts
25 existed to justify its conclusion that Jared had committed the
26 tort of outrage, also known as intentional infliction of emotional
27 distress. Under Washington case law, intentional and negligent
28 infliction of emotional distress are independent and distinct

1 torts, each requiring proof of different factual elements.¹³
2 Kloepfel v. Bokor, 66 P.3d 630, 634 (Wash. 2003). Jared insists
3 that, at worst, his acts amounted to a series of negligent
4 mistakes, and therefore, his conduct could not be considered to
5 have been intentional. Jared then points out that the bankruptcy
6 court dismissed Keahey's claim against him for negligent
7 infliction because it found that Keahey had not provided required
8 medical evidence showing "objective symptomatology"¹⁴ of distress,
9 a required element for the tort of negligent infliction. Trial
10 Tr. 34:6-12. As a result, Jared argues, since he was guilty of,
11 at most, negligent infliction of emotional distress, the money
12 damage award against him must be reversed "because no medical
13 proof was supplied at trial." Jared's Opening Br. at 22.

14 Jared's argument is based upon a faulty premise: that the
15 bankruptcy court erred when it found that he acted intentionally
16 in committing the tort of outrage. To the contrary, the
17 bankruptcy court's findings are amply supported by competent
18 evidence submitted at trial, and its legal conclusions are
19 consistent with the binding case law of the State of Washington.

20 The tort of outrage is explored in depth by the Washington
21

22 ¹³ We reject Jared's suggestion that negligent infliction
23 constitutes a "lesser included" charge of outrage. Jared's
24 Opening Br. at 22. This criminal law principle has no application
in civil litigation.

25 ¹⁴ Objective symptomatology means that the plaintiff's
26 emotional distress must be such that it is susceptible to medical
27 diagnosis and must be proven through medical evidence. Kloepfel,
28 66 P.3d at 633. This is one of the five required elements to be
proven in the tort of negligent infliction of emotional distress.
Snyder v. Med. Serv. Corp., 35 P.3d 1158, 1164 (Wash. 2001)
(holding that elements of this tort include duty, breach,
proximate cause, damage or injury and objective symptomatology).

1 Supreme Court in Kloepfel. As the Washington court summarized:

2 The tort of outrage requires the proof of three
3 elements: (1) extreme and outrageous conduct, (2)
4 intentional or reckless infliction of emotional
5 distress, and (3) actual result to plaintiff of severe
6 emotional distress. Reid v. Pierce County, 136 Wn.2d
7 195, 202, 961 P.2d 333 (1998) (citing Dicores v. State,
8 113 Wn.2d 612, 630, 782 P.2d 1002 (1989) (quoting Rice
9 v. Janovich, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987))).
10 These elements were adopted from the Restatement
11 (Second) of Torts § 46 (1965) by this court in Grimsby
12 v. Samson, 85 Wn.2d 52, 59-60, 530 P.2d 291 (1975).

13 Kloepfel, 66 P.3d at 631.

14 The Grimsby court had earlier described the proof required
15 for these three elements:

16 First, the emotional distress must be inflicted
17 intentionally or recklessly; mere negligence is not
18 enough. Second, the conduct of the defendant must be
19 outrageous and extreme. . . . Liability exists "only
20 where the conduct has been so outrageous in character,
21 and so extreme in degree, as to go beyond all possible
22 bounds of decency, and to be regarded as atrocious, and
23 utterly intolerable in a civilized community." . . .
24 Third, the conduct must result in severe emotional
25 distress to the plaintiff (comment j). Resulting bodily
26 harm would, of course, be an indication of severe
27 emotional distress, but a showing of bodily harm is not
28 necessary.

1 Grimsby, 530 P.2d at 295 (citing RESTATEMENT (SECOND) OF TORTS § 46
2 (1965) and comments to that Restatement).

3 The bankruptcy court's findings of fact and conclusions of
4 law explicitly tracked the case law. Trial Tr. 28:19-20 ("I have
5 been guided in my opinion by the case of Kloepfel v. Bokor, 149
6 Wn.2d 192.").

7 With regard to the first element, that the subject conduct
8 must be extreme and outrageous, the bankruptcy court found by
9 clear and convincing evidence that Jared engaged in extreme and
10 outrageous conduct. Trial Tr. 29:25. Among the court's findings
11 were that:

- 1 • Jared had no idea how to conduct a nonjudicial foreclosure
2 sale and did "just about everything wrong. All of his
3 conduct signaled to Mr. Keahey with each and every
4 communication that Mr. Keahey would never be able to keep his
5 house." Trial Tr. 30:1-6.
- 6 • At one point, Jared demanded a 10 percent per annum interest
7 charge, amounting to first \$36,000, then \$42,000, that was
8 not justified under the Note. Such a large sum would be
9 enormously burdensome to a person of Keahey's resources.
10 Trial Tr. 30:19-23.
- 11 • In what is a truly bizarre approach to conducting a
12 foreclosure, Jared had scheduled the trustee's sale in the
13 parking lot of his condominium, rather than the public
14 location required by the statute. Trial Tr. 30:14-15.
- 15 • Jared did not appreciate or even understand the importance of
16 his various duties as attorney for the lender and deed of
17 trust trustee, as is especially apparent from the universal
18 inaccuracy of his demand letters. Jared characterized the
19 requirement of accuracy as "no big deal." Trial Tr. 31:3.
- 20 • Even when Keahey cured a noticed default, Jared then
21 incorrectly claimed new defaults entitling him to restart the
22 foreclosure process and allegedly entitling him and his
23 client to charge additional fees and costs, many of which
24 inured to Jared's personal benefit. This pattern of behavior
25 was constantly repeated over a three-year period. Trial Tr.
26 30:8-10.
- 27 • "But for Mr. Jared's intentional acts and violations of his
28 duties as the trustee under the deed of trust, Mr. Keahey
would not have had to file three bankruptcy proceedings."
Trial Tr. 35:2-5.¹⁵

The bankruptcy court next concluded that the second element
of the tort of outrage, that the infliction was intentional or
reckless, had also been proven by clear and convincing evidence.
Trial Tr. 32:16. The court found:

¹⁵ Elaborating, the bankruptcy court found that Jared's
conduct had forced Keahey without justification to file three
bankruptcy cases to save his home. The court determined that
Keahey had only minor unsecured debts during this time, and that
the IRS was not pressuring Keahey to pay an alleged claim. The
only real cause of the bankruptcy filings was, according to the
court, the need to stop the improper foreclosure actions initiated
by Jared. Trial Tr. 35:6-18.

- 1 • Jared prevented Keahey from exercising his cure rights by
2 changing the various numbers stated in demand letters and
3 default notices for amounts required to cure the defaults "at
4 every point in the process." Trial Tr. 32:6-8.
- 5 • Jared failed to check the accuracy of numbers in his demand
6 letters and foreclosure notices. Trial Tr. 32:16-17.
- 7 • Jared charged Keahey for tax and insurance payments, which he
8 would have found to have been paid if he had checked with his
9 own client's escrow company. Trial Tr. 32:17-20.

10 Finally, the bankruptcy court determined that the third
11 element of the tort of outrage, that Keahey suffered extreme
12 emotional distress as a result of Jared's conduct, was proven by
13 clear and convincing evidence. Trial Tr. 33:8-10. In particular,
14 the court noted that:

15 Mr. Keahey testified that he had experienced the same
16 kind of conditions described in the Kloepfel case: lost
17 sleep, cyclical vomiting, anger, fear, worry, distress
18 and disappointment over the potential loss of his home,
19 and over the bankruptcy filings, embarrassment,
20 humiliation and shame. Moreover, the court observed
21 that this testimony was credible, and none of it was
22 refuted.

23 Trial Tr. 33:10-17. In his Opening Brief, Jared concedes that
24 this third element, that Keahey suffered extreme emotional
25 distress as a result of Jared's conduct, was satisfied. Jared's
26 Opening Br. at 22 ("only the third element is met here").

27 Regarding the second element, requiring an intentional or
28 reckless act, Jared repeatedly asserts that he never intended to
29 inflict emotional distress on Keahey. However, as Kloepfel
30 cautions, the bankruptcy court was not required to focus upon
31 whether Jared intended his conduct and actions to cause Keahey
32 emotional distress, but instead, need only consider whether
33 Jared's acts were intentional or recklessly undertaken. Kloepfel,
34 66 P.3d at 632. Measured against this standard, clearly, Jared's

1 grossly unconventional and overreaching attempts to collect what
2 were, repeatedly, inaccurate or excessive amounts from Keahey were
3 all intentional, or at least, committed without any regard to
4 their inevitable consequences.

5 Jared also challenges the bankruptcy court's finding that the
6 first element of outrage was proven, that is, whether his conduct
7 was extreme or outrageous. Jared argues that he engaged in no
8 conduct amounting to outrage in this case because none of his
9 actions were "atrocious," "beyond all bounds of decency" or
10 "shocking to the conscience." Jared's Opening Br. at 21. Jared
11 bases this argument on Kloepfel's citation to Browning v.
12 Slenderella Sys., 341 P.2d 859, 864 (Wash. 1959), which in turn
13 quotes the Restatement of Torts, § 46(g) (Supp. 1948): "[The
14 conduct amounting to outrage must be such that] the recitation of
15 the facts to an average member of the community would arouse his
16 resentment against the actor to lead him to exclaim 'outrageous.'"
17 Relying upon this quotation, Jared posits:

18 The trial Court may have felt that [Jared's] actions
19 were outrageous, but an average member of the community
20 would not. And clearly, a U.S. Bankruptcy Court Judge
21 is not an average member of the community. Therefore,
22 the finding of outrage below is in error and should be
23 vacated[.]

24 Jared's Opening Br. at 21.

25 Contrary to Jared's suggestion, the courts of Washington have
26 held that the test for the tort of outrage in Washington is not
27 measured by the reaction of "an average member of the community,"
28 but instead is based on the understanding of a reasonable mind
applied to the three elements of the tort. Reid v. Pierce County,
961 P.2d 333, 337 (Wash. 1998). The Washington Supreme Court has

1 explicitly ruled that a trial judge may determine whether conduct
2 is outrageous. Robel v. Roundup Corp., 59 P.3d 611, 620 (Wash.
3 2002) ("[W]e believe that reasonable minds (such as the one
4 exercised by the trial judge) could conclude that, in light of the
5 severity and context of the conduct, it was 'beyond all possible
6 bounds of decency, . . . atrocious, and utterly intolerable in a
7 civilized community[.]'"). Indeed, where a jury acts as trier of
8 fact, Washington requires the court to determine, before
9 submitting the question of outrageous conduct to the jury, "in the
10 first instance that reasonable minds could differ on whether the
11 conduct has been sufficiently extreme and outrageous to result in
12 liability." Philips v. Hardwick, 628 P.2d 506, 510 (Wash. Ct. App.
13 1981).

14 Measured against this standard, we conclude that the
15 bankruptcy court did not err when it found and concluded that
16 Jared acted intentionally and outrageously, such that the tort of
17 outrage had been proven. Viewed fairly, Jared cavalierly
18 disregarded the fiduciary duties he owed to Keahey as trustee
19 under the deed of trust. He repeatedly failed to verify the
20 accuracy of the information he included in the many demands for
21 payment he served on Keahey. And in most instances, those demands
22 were not just inaccurate, they sought to collect charges that were
23 excessive, unreasonable, and in some instances, just plain
24 illegal. Moreover, given his incessant and repeated attempts to
25 collect unjustified sums from Keahey, the bankruptcy court was
26 justified in concluding that Jared's motives were suspect, and
27 that his miscues not merely "mistakes."

28 Jared persisted in his ham-handed approach to collection from

1 Keahey for several years, forcing him to file three bankruptcy
2 cases, to incur thousands of dollars in attorney's fees and costs,
3 and rendering Keahey emotionally upset and physically ill.
4 Jared's conduct in relentlessly pursuing Keahey under threat of
5 foreclosure on Keahey's home, and his incessant demands for
6 payment of incorrect and, in some instances, illegal charges, can
7 reasonably be characterized as outrageous as that term is
8 explained in the Washington cases. For these reasons, we conclude
9 the bankruptcy court did not err in finding that Jared had
10 committed the tort of outrage.

11
12 II.

13 The bankruptcy court did not err in awarding attorney's fees
14 to Keahey under R.C.W. 61.24.090(2), and did not abuse its
15 discretion in taking judicial notice of attorney's fees
16 in the main bankruptcy case.

17 Jared objects to the award of attorney's fees made by the
18 bankruptcy court to Keahey as damages against Jared. In that
19 award, the bankruptcy court included amounts paid by Keahey to his
20 bankruptcy counsel, Tax Attorneys, Inc. ("Tax Attorneys"), and to
21 Huelsman, his adversary proceeding counsel. However, in
22 challenging this award, Jared cites but two narrow issues: (1)
23 whether the bankruptcy court erred in awarding attorney's fees
24 based on R.C.W. 61.24.090(2); and (2) whether the bankruptcy court
25 abused its discretion in taking judicial notice of fees awarded to
26 Tax Attorneys in the bankruptcy case. Based upon a review of this
27 record, we conclude that the bankruptcy court did not err in
28 either respect.

1 A.

2 Like many state statutory schemes, the Washington DOTA
3 prescribes a nonjudicial process for the enforcement of deeds of
4 trust whereby foreclosure is accomplished by a private sale
5 conducted by the trustee under a deed of trust. R.C.W. 61.24.20 et
6 seq. Under this system, after the process has been initiated by
7 the deed of trust trustee, a borrower may cause the process to be
8 discontinued by curing the defaults set forth in the notice
9 initiating the process. R.C.W. 61.24.090(1). In connection with
10 this process,

11 Any person entitled to cause a discontinuance of the
12 sale proceedings shall have the right, before or after
13 reinstatement, to request any court, excluding a small
14 claims court, for disputes within the jurisdictional
15 limits of that court, to determine the reasonableness of
16 any fees demanded or paid as a condition of
17 reinstatement. The court shall make such determination
18 as it deems appropriate, which may include an award to
19 the prevailing party of its costs and reasonable
20 attorney's fees, and render judgment accordingly. An
21 action to determine fees shall not forestall any sale or
22 affect its validity.

23 R.C.W. 61.24.090(2). Because it found that the amounts demanded
24 by Jared in the default notices to cure Keahey's defaults under
25 the Newkerk deed of trust were wrong, the bankruptcy court awarded
26 Keahey, as the prevailing party, \$54,044.34, representing a
27 portion of the attorney's fees he incurred with Huelsman to
28 prosecute the adversary proceeding.

Jared objects to this award, contending that the statute does
not apply once a foreclosure sale has been stopped.¹⁶ Jared notes

¹⁶ Jared has not objected to the reasonableness of the fees
claimed, even though he was offered that opportunity by the court,
(continued...)

1 that Keahey effectively stopped the foreclosure process when he
2 commenced his third bankruptcy case on November 24, 2004, and that
3 the adversary proceeding, in which the attorney's fees and costs
4 were incurred, was not filed until four months later. Because in
5 all the time Huelsman worked on Keahey's case there never was a
6 pending foreclosure sale, Jared contends the attorney's fees and
7 costs incurred in the adversary proceeding cannot be recovered
8 under R.C.W. 61.24.090(2).

9 Although we have located no cases in which R.C.W.
10 61.24.090(2) has been applied in the context of a bankruptcy
11 proceeding, to the extent that there is any ambiguity in the
12 statute, Washington case law is clear that, whenever possible, the
13 DOTA should be interpreted in favor of the borrower:

14 We must construe [DOTA] to further three objectives.
15 First, the statutory nonjudicial foreclosure process
16 should remain efficient and inexpensive. Second, it
17 should provide an adequate opportunity for interested
18 parties to prevent wrongful foreclosure. Third, it
19 should promote the stability of land titles. Cox v.
20 Helenius, 103 Wn.2d 383, 387, 693 P.2d 683 (1985). In
21 addition, because nonjudicial foreclosures lack the
22 judicial oversight inherent in judicial foreclosures, we
23 strictly apply and interpret the Act in favor of the
24 borrower. Koegel v. Prudential Mut. Sav. Bank, 51 Wn.
25 App. 108, 111, 752 P.2d 385, review denied, 111 Wn.2d
26 1004 (1988).

21 Udall v. T.D. Escrow Servs, Inc., 130 P.3d 908, 911 (Wash. Ct.
22 App. 2006) rev'd on other grounds, 154 P.3d 882 (Wash. 2007)
23 (emphasis added); see also Amresco v. SPS Props., 119 P.3d 884,
24 886 (Wash. Ct. App. 2005) ("Because [DOTA] removes many

25 _____
26 ¹⁶(...continued)
27 nor to the finding by the bankruptcy court that his actions
28 proximately caused damages which included this fee. Apparently,
his sole objection is to the court's authority to award fees under
this statute.

1 protections borrowers have under a mortgage, . . . courts must
2 strictly construe [DOTA] in the borrower's favor.").¹⁷

3 The requirements of the statute, R.C.W. 61.24.090(2), are
4 straightforward. As we read it, a borrower, as a person entitled
5 to cause the discontinuance of a trustee's sale proceeding under
6 R.C.W. 61.24.090(1), may ask a court "to determine the
7 reasonableness or any fees demanded or paid as a condition of
8 reinstatement of the deed of trust obligation." (Emphasis added.)
9 In connection with that determination, the court may award the
10 prevailing party costs and reasonable attorney's fees "and render
11 judgment accordingly."

12 Contrary to Jared's position, the statute does not require
13 that the proceedings to determine the propriety of the amounts
14 demanded to reinstate the loan occur before the sale process is
15

16 ¹⁷ Washington case law interpreting the DOTA statute aligns
17 closely with the facts of this case. DOTA has frequently been
18 invoked against trustees who, as here, breach their fiduciary
19 duties to borrowers. For example, in Cox v. Helenius, 693 P.2d
20 683 (Wash. 1985), a case cited by the Udall court, the court
21 explained,

22 The [deed of trust] trustee is bound by his office to
23 present the sale under every possible advantage to the
24 debtor as well as to the creditor. He is bound to use
25 not only good faith but also every requisite degree of
26 diligence in conducting the sale and to attend equally
27 to the interest of the debtor and creditor alike.

28 Id. at 685 (citations omitted). The Cox case is particularly apt
here because the particular breach in that case arose from the
trustee serving also as attorney for the grantor of the deed, and
the Washington Supreme Court's finding that the dual
representation was at the root of the fiduciary breaches. Indeed,
early in this case, Keahey's attorneys reminded Jared about his
responsibilities as a fiduciary to the borrower, and specifically
referenced the Cox case, DOTA, and the consequences of a fiduciary
breach under Washington law. Jared elected to ignore this
information and instead sought to demand payment of inappropriate
sums.

1 discontinued. To be precise, as can be seen from the last
2 sentence of the statute, the statute does not require that the
3 sale be stopped: "An action to determine fees shall not forestall
4 any sale or affect its validity."

5 Here, Keahey, the borrower, asked "a court," the bankruptcy
6 court,¹⁸ to find that the charges Jared demanded he pay to stop the
7 foreclosure sale on his home were unreasonable, inaccurate, and
8 inappropriate. The bankruptcy court found in favor of Keahey on
9 this issue. As a result, the bankruptcy court was authorized by
10 R.C.W. 61.24.090(2) to award Keahey, the prevailing party in this
11 contest, reasonable attorney's fees and costs. By shifting the
12 costs of this proceeding from Keahey to Jared, the bankruptcy
13 court properly embraced the purpose of the statute by providing
14 Keahey an opportunity to challenge a wrongful foreclosure
15 proceeding.

16 The bankruptcy court did not err in awarding Keahey
17 attorney's fees and costs.¹⁹

18 B.

19 The bankruptcy court did not abuse its discretion by taking
20 judicial notice of fees awarded in the main bankruptcy case.

21 Tax Attorneys served as Keahey's counsel in his third
22 bankruptcy case. At the hearing on February 2, 2006, in the
23

24 ¹⁸ Only small claims courts are not authorized to act under
25 R.C.W. 61.24.090.

26 ¹⁹ Jared has also raised a technical objection to Huelsman's
27 fee application because it did not make specific reference to the
28 DOTA as the grounds for award of fees and appears to have used a
format appropriate for an interim fee application under § 331.
Like the bankruptcy court, we do not consider this omission
material.

1 adversary proceeding, the bankruptcy court took notice of the fees
2 and costs Keahey had incurred in his three bankruptcy cases,
3 including "any amounts already paid or to be paid." Trial Tr.
4 36:15-16. Specifically noting that Jared could be charged with
5 the attorney's fees of Tax Attorneys, the court observed: "In
6 addition, there is currently a fee application pending for nearly
7 \$20,000 in [Tax Attorneys' fees in the main bankruptcy case]. . .
8 . A hearing on that fee application will be set, and Mr. Jared
9 will be given an opportunity to object to those fees." Trial Tr.
10 37:15-23.

11 On April 26, 2006, the bankruptcy court approved, without
12 objection, \$15,689.80 in fees and costs for Tax Attorneys. Then,
13 in its May 4, 2007 judgment, the bankruptcy court awarded the same
14 amount as damages in favor of Keahey against Jared. This amount
15 was also included in the bankruptcy court's June 4, 2008 amended
16 judgment.

17 Jared argues that the bankruptcy court erred in taking
18 judicial notice of attorney's fees awarded by the bankruptcy court
19 in the main bankruptcy case because it was done on the judge's own
20 motion, the fees were in dispute, and there was only fleeting
21 discussion between the court and Jared's counsel concerning the
22 propriety of taking judicial notice.

23 Neither the facts nor the law support Jared's position.

24 First, Keahey, not the bankruptcy judge, requested judicial
25 notice be taken of amounts allowed to Tax Attorneys. Trial Tr.
26 155:13-14 (January 5, 2006). Second, there is no indication in
27 the record of either the adversary proceeding or the bankruptcy
28 case that Jared objected to Tax Attorneys' fees, though the court

1 explicitly offered him the opportunity to object and his attorney
2 was given notice of the fee application hearing. Third, there was
3 a discussion on the third day of trial involving the court,
4 counsel for Jared and counsel for Keahey, regarding judicial
5 notice of Tax Attorneys' fees. Trial Tr. 147:21 - 155:22 (January
6 5, 2006).

7 A trial court may take judicial notice of its own records,
8 even in unrelated cases, provided the court complies with Fed. R.
9 Evid. 201. United States v. Wilson, 631 F.2d 118, 119 (9th Cir.
10 1980); Credit Alliance Corp. v. Idaho Asphalt Supply, Inc. (In re
11 Blumer), 95 B.R. 143, 146 (9th Cir. BAP 1988) ("It is well
12 established that a bankruptcy court may take judicial notice of
13 its own records."); see also In re Applin, 108 B.R. 253 (Bankr.
14 E.D. Cal. 1989) (holding that judicial notice of filings in a
15 bankruptcy case is permissible to fill in gaps in the evidentiary
16 record of a specific adversary proceeding or contested matter);
17 Barry Russell, BANKRUPTCY EVIDENCE MANUAL § 201.5, 706 (West 2007)
18 ("It is generally accepted that a bankruptcy judge may take
19 judicial notice of the bankruptcy court's records").

20 Judicial notice of such adjudicative facts is governed by
21 Fed. R. Evid. 201:

22 Rule 201. Judicial Notice of Adjudicative Facts.
23

24 (b) Kinds of facts. A judicially noticed fact must be one
25 not subject to reasonable dispute in that it is either
26 (1) generally known within the territorial jurisdiction
27 of the trial court or (2) capable of accurate and ready
28 determination by resort to sources whose accuracy cannot
reasonably be questioned.

1 (e) Opportunity to be heard. A party is entitled upon
2 timely request to an opportunity to be heard as to the
3 propriety of taking judicial notice and the tenor of the
4 matter noticed. In the absence of prior notification,
5 the request may be made after judicial notice has been
6 taken.

7 In this case, the bankruptcy court complied with the
8 requirements of FED. R. EVID. 201(b) and (e). Jared was heard at
9 the trial court concerning judicial notice of Tax Attorneys' fees.
10 Trial Tr. 147:21 - 155:22 (January 5, 2006). Then, on February 3,
11 2006, the day after the bankruptcy court announced its decision
12 awarding damages against Jared and that it would take notice of
13 any fees allowed in the bankruptcy case to Tax Attorneys, Jared's
14 trial counsel was notified that a fee application hearing on Tax
15 Attorneys' fees would be held in the bankruptcy case on April 7,
16 2006.²⁰ At that hearing, the attorney's fees were approved without
17 objection. Neither Jared nor his attorney objected to the fee
18 application or attended the hearing. The amount of fees awarded
19 to Tax Attorneys by the bankruptcy court was incorporated in an
20 order filed in the bankruptcy case. In other words, the fee award
21 was a fact capable of accurate and ready determination by resort
22 by the bankruptcy court to its own records, a source whose
23 accuracy could not under these circumstances reasonably be
24 questioned.

25 It was not an abuse of discretion for the bankruptcy court to
26 take judicial notice of the amounts it awarded to Tax Attorneys
27 for serving as Keahey's counsel in the bankruptcy case.

28 ²⁰ Bankr. Dkt. entry following no. 96.

1 III.

2 The bankruptcy court was not biased against Jared.

3 Finally, Jared alleges that the bankruptcy judge exhibited
4 bias against him, and therefore, should not have presided over the
5 trial nor entered judgment against him. He supports this
6 allegation of bias by quoting from statements made by the
7 bankruptcy judge on November 18, 2005, during the course of a
8 telephonic hearing with counsel to discuss scheduling additional
9 trial dates, where the judge states:

10 It is going to be very hard for Mr. Jared to convince me
11 that he did not commit, at a minimum, negligence. And
12 he is about ready to put on his case. . . . damages that I
13 believe have already been shown. . . . [T]he more time
14 the plaintiff's lawyer spends . . . at trial, . . . the
15 higher those damages go. Mr. Jared has a long way to go
16 to provide me with an explanation of all the mistakes
17 and what I believe to be the negligent conduct in which
18 he has engaged. . . . Because as far as I'm concerned,
19 we're almost done.

20 Jared's Opening Br. at 33 (ellipses in Jared's brief). To Jared,
21 this snippet selected from the judge's comments shows that the
22 court was biased against him because, in his words, the bankruptcy
23 judge had reached "a preliminary opinion and ruling on liability,
24 damages and Ms. Huelsman's attorney's fees, before the defendant's
25 case had even started." Id.

26 Before addressing the merits of this argument, we note that
27 Jared's use of ellipses omitted some material content from the
28 court's statements. As noted above, the hearing was convened by
the court because of its concern that a mediation proposed by the
parties would unduly delay the trial and, in the judge's words, "I
cannot allow you just to go blindly off expending legal fees when
substantial proceedings have already occurred in front of me."

1 Hr'g Tr. 5:10-12 (November 18, 2005). Interpreted in the proper
2 context, the judge was therefore expressing only a tentative
3 opinion that some damages had already been shown, and she was
4 cautioning counsel that "Mr. Jared needs to be aware of the fact
5 that the more time the plaintiff's lawyer spends on other things
6 and at trial, potentially, the higher those damages go." Hr'g Tr.
7 5:2-5 (emphasis represents text omitted from Jared's quotation).
8 In other words, when her full statement is considered, the
9 bankruptcy judge was expressing concern that additional costs,
10 which are "potential" damages, may be incurred if the trial were
11 delayed and a mediation conducted in the middle of that trial.

12 Additionally, the bankruptcy judge's observation that "as far
13 as I'm concerned, we're almost done" does not indicate that the
14 bankruptcy judge had made up her mind about the issues, but simply
15 that the trial had proceeded so far that, she presumed, it was
16 nearly concluded. Again, the judge's complete statement was: "But
17 I did not want to have you go off doing that [mediation], spending
18 more money, without knowing where I am so far in this case.
19 Because as far as I'm concerned, we're almost done." Again, when
20 the omitted words are restored, the statements by the court amount
21 to an expression of concern that further delays in a trial may
22 consume the resources of the parties. Such a comment appears
23 appropriate in this context.

24 In general, comments made by a court in the course of
25 judicial proceedings are rarely sufficient to establish bias
26 requiring recusal. Pau v. Yosemite Park & Curry Co., 928 F.2d
27 880, 885 (9th Cir. 1991) (although district judge was "gruff," he
28 accorded heavy-handed treatment to all parties equally); United

1 States v. Conforte, 624 F.2d 869, 881 (9th Cir. 1980) (court's
2 comments on insufficiency of evidence before completion of
3 evidentiary hearing insufficient to find bias and require
4 recusal). A finding of judicial bias must usually stem from some
5 personal interest in the case or an extrajudicial source. Liteky
6 v. United States, 510 U.S. 540, 552-53 (1994).

7 There is no evidence in the record before us that the
8 bankruptcy judge had any personal interest, financial or
9 otherwise, in this case, nor does Jared make any such assertion.

10 The "extrajudicial source" rule is implicated when bias
11 originates outside the courtroom. United States v. Grinnell
12 Corp., 384 U.S. 563, 583 (1966) (explaining that the "alleged bias
13 and prejudice to be disqualifying must stem from an extrajudicial
14 source and result in an opinion on the merits on some basis other
15 than what the judge learned from his participation in the case.");
16 United States v. Bray, 546 F.2d 851, 857 (10th Cir. 1976).

17 ("unjudicious" remarks such as referring to counsel's comments as
18 ridiculous, or describing a witness as pathetic are not
19 extrajudicial, but "reflected the judge's attitude and reactions
20 to specific incidents occurring at trial"). There is no
21 indication in the record that the bankruptcy judge's opinions,
22 expressed during a hearing in the case, were based on any
23 information or events originating outside the bankruptcy court
24 proceedings.

25 Jared's claim of judicial bias, if it is valid at all, must
26 fall within a narrow exception to the rule that bias must arise
27 either personally or extrajudicially. This is the so-called
28 "pervasive bias" exception. The United States Supreme Court

1 instructs that "opinions formed by the judge on the basis of facts
2 introduced or events occurring in the course of the current
3 proceedings, or of prior proceedings, do not constitute a basis
4 for a bias or partiality motion unless they display a deep-seated
5 favoritism or antagonism that would make fair judgment
6 impossible." Liteky, 510 U.S. at 555 (emphasis added). As one
7 treatise explains:

8 This pervasive bias exception to the extrajudicial
9 source factor arises when a judge's favorable or
10 unfavorable disposition toward a party, although
11 stemming solely from the facts adduced or the events
12 occurring at trial, nonetheless becomes so extreme as to
13 indicate the judge's clear inability to render fair
14 judgment. However, the exception is construed narrowly;
15 bias stemming solely from facts gleaned during judicial
16 proceedings must be particularly strong in order to
17 merit recusal.

18 12 MOORE'S FED. PRAC.- CIV. § 63.21[5] (Matthew Bender, 3d ed. 2007)
19 (emphasis added); accord In re Huntington Commons Assocs., 21 F.3d
20 157, 158 (7th Cir. 1994) (judge does not have to be impervious to
21 impressions about litigants; impatience, admonishments to
22 defendant, adverse rulings, and vague references to possible
23 predisposition not remotely sufficient to meet requirement of
24 deep-seated and unequivocal antagonism that would render fair
25 judgment impossible).

26 We have carefully examined the record in this appeal and can
27 find no evidence of any "deep-seated antagonism" shown by the
28 bankruptcy court against Jared.²¹ Instead, when the bankruptcy

29 ²¹ Indeed, the bankruptcy court had earlier granted a partial
30 summary judgment in favor of Jared, dismissing Keahey's claims
31 against him for violations of FDCPA and CPA. It also dismissed
32 Keahey's claim against Jared for negligent infliction of emotional
33 distress and ruled that it need not address Keahey's claim against
34 Jared for fraud.

1 judge's comments at the November 18, 2005 telephonic hearing are
2 viewed in context, and completely, they merely reflected the
3 court's concern that further delays in the proceedings to conduct
4 a mediation may increase Keahey's claim for damages, and provided
5 suggestions to Jared as to how he might continue his evidentiary
6 presentation.

7

8

CONCLUSION

9 The bankruptcy court did not err in finding that Jared
10 committed the tort of outrage, nor in awarding Keahey his
11 adversary proceeding attorney's fees and costs. The bankruptcy
12 court also did not abuse its discretion in taking judicial notice
13 of its own record in the bankruptcy case to determine the amount
14 Keahey incurred for attorney's fees and costs for his bankruptcy
15 counsel to be included as part of the damage award. Finally,
16 Jared has not shown the bankruptcy judge was biased against him.

17

The judgment of the bankruptcy court is AFFIRMED.

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Subject: RE: Frias v. Asset Foreclosure, et al.; Case No. 89343-8: Frias Reply Brief
Importance: High

Good morning:

Attached please find Plaintiff Frias' Amended (to correct page references only) Reply Briefing with Appendices A & B. Hard copies are being delivered to all counsel of record via ABC Legal Messenger service and are slated to arrive before the day's end.

Please call or email with any questions or comments. Thank you for your patience, and I apologize for the tech hiccup! - Pamela

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Thank you. I have let the case manager know.

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Subject: RE: Frias v. Asset Foreclosure, et al.; Case No. 89343-8: Frias Reply Brief
Importance: High

Greetings:

It was just discovered that Plaintiff Frias' reply brief contains inaccurate page numbering. We are working to correct the issue now and will be submitting an amended reply simply to correct that issue just as quickly as possible.

Thank you in advance for your patience; we sincerely appreciate it! - Pamela

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Subject: RE: Frias v. Asset Foreclosure, et al.; Case No. 89343-8: Frias Reply Brief

Attached please find Ms. Frias' Reply brief with attachments. Please call or email with any questions or comments; thank you! - Pamela

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Subject: Frias v. Asset Foreclosure, et al.; Case No. 89343-8: Motion to Extend Briefing Deadline

Dear Clerk of the Court,

Attached please find submitted for filing in the above referenced case the following pleading:

1. Plaintiff's Motion to Extend Briefing Deadline with Proof of Service.

Please let me know if there is anything else that the Court requires at this time.

Thank you,

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This law firm is a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.

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