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65975-8-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

DOUG WALKER, an individual,

Appellant,

v.

QUALITY LOAN SERVICE CORP. OF WASHINGTON, a Washington Corporation, SELECT PORTFOLIO SERVICING, INC., a Utah Corporation, CREDIT SUISSE FINANCIAL CORPORATION, a Delaware Corporation; TICOR TITLE COMPANY, a Washington Corporation; REGIONAL TRUSTEE SERVICES CORPORATION, a Washington Corporation; AMERICAN BROKERS CONDUIT; and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation

Respondents.

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REPLY TO RESPONDENT'S BRIEF

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I. INTRODUCTION

The Appellant, Doug Mr. Walker (hereinafter "Mr. Walker"), files this Reply to Respondent's Brief filed by Respondents Select Portfolio Servicing, Inc. (hereinafter "SPS") and Quality Loan Service Corporation of Washington, Inc. (hereinafter QLS).

II. ISSUES RAISED IN RESPONSE BRIEF AND ADDRESSED IN REPLY

1. MERS does not meet the statutory definition of a beneficiary under *RCW 61.24.005*.
2. Respondents incorrectly conclude trustee owed no duty to Mr. Walker.
3. The Deed of Trust at issue is contrary to public policy.
4. The Fair Debt Collection Practices Act applies to Respondent's actions.
5. Walker properly plead his Consumer Protection Act claim.

III. STATEMENT OF RELEVANT FACTS

On February 28, 2007, Mr. Walker executed a Deed of Trust with Ticor Title as trustee and naming MERS as the purported beneficiary and Credit Suisse as Lender. The parties agree that Mr. Walker owed to MERS no monetary or other obligation under the terms of any promissory note and made no payments to MERS at any time. Mr. Walker had made repeated attempts to negotiate modification of the subject loan, but was unable to make contact with any party that may have actually owned or

legally held the Note. SPS has at no time stated or provided any evidence that it actually owned or legally held the Note.

Presumably additional discovery would reveal the identity of the party to whom Mr. Walker actually owes the debt and that would actually obtain possession of the property following a trustee's sale, should one ever occur.

On May 22, 2009, SPS executed, claiming status as a beneficiary, an appointment of successor trustee nominating QLS as trustee. As of this date MERS remained the beneficiary in the public record. Not until July 6, 2009 did MERS execute an Assignment of Deed of trust (as nominee for Defendant Credit Suisse) in favor of SPS. On July 17, 2009, QLS executed a Notice of Trustee's Sale in connection with the 56th Avenue property.

IV. ARGUMENT

A. Statutory Interpretation of *RCW 61.24.005.*

In a case construing *RCW 61.24.050* the Washington Supreme Court described the approach to statutory interpretation:

> A court's objective in construing a statute is to determine the legislature's intent." *Tingey v. Haisch,* No. 77689-0, 159 Wash.2d 652, 657, 152 P.3d 1020, 1023 (2007). " '[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.' " *Id.* (alteration in original) (internal quotation marks omitted) (quoting *State v. Jacobs,* 154 Wash.2d 596, 600, 115 P.3d 281 (2005)). Plain meaning is "discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Id.* at 1023. If the statutory language remains

> susceptible to more than one reasonable interpretation, the statute is considered ambiguous, and the court may then employ statutory construction tools, including legislative history, for assistance in discerning legislative intent. *Id.*

Udall v. T.D. Escrow Services, Inc., 159 Wash.2d 903, 154 P.3d 882 (2007).

RCW 61.24.005(2) provides as follows:

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

Generally, to express one thing in a statute implies the exclusion of the other. *In re Det. of Williams,* 147 Wash.2d 476, 491, 55 P.3d 597 (2002). *RCW 61.24, et seq.* strips borrowers of many of the protections available under a mortgage. Lenders must strictly comply with the Deed of Trust statutes, and the statutes and Deeds of Trust must be strictly construed in favor of the borrower. Udall v. T.D. Escrow Services, Inc. (2007) 159 Wash.2d 903, 154 P.3d 882; *Amresco Independence Funding, Inc. v. SPS Properties, LLC* (2005) 129 Wash.App. 532, 119 P.3d 884; Koegel v. Prudential Mut. Sav. Bank, 51 Wn. App. 108, 752 P.2d 385 (1988); *In re Fritz*, E.D.Wash.1997, 225 B.R. 218.

Contrary to the formulation SPS and QLS would have this Court adopt the relevant question is not whether the above language prohibits MERS from being designated as beneficiary, but instead on what basis it could be said that MERS should be allowed to be designated as

beneficiary and assume the rights and privileges of that designation within the terms of *RCW 61.24, et seq.*

Courts construe the Deeds of Trust Act to further three objectives: (1) the nonjudicial foreclosure process should remain efficient and inexpensive, (2) the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure, and (3) the process should promote the stability of land titles. *Albice v. Premier Mortg. Services of Washington, Inc.* (2010) 157 Wash.App. 912, 239 P.3d 1148, review granted 170 Wash.2d 1029, 249 P.3d 623.

The seminal Washington case interpreting the Washington Deed of Trust Act is *Cox v. Helenius*, 103 Wash.2d 383, 693 P.2d 683 (1985). Since the decision was written there have been several revisions to *RCW 61.24*, but the objectives cited by the Court in *Albice* obviously remain. In discussing the objectives the *Cox* Court stated:

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

Cox at 387. Examining the law review cited by the Court reveals the meaning behind the three objectives and the manner in which the often competing objectives may be reconciled.

The first objective, that the process should remain efficient and

inexpensive, is relatively straightforward. As stated by the Court in *Peoples*, "The act was designed by the legislature to avoid time-consuming judicial foreclosure proceedings and to save substantial time and money to both the buyer and the lender." Peoples Nat'l Bank v. Ostrander, 6 Wn. App. 28, at 31, 491 P.2d 1058 (1971). While not extensively explained by subsequent cases, it is clear that Peoples stood for the proposition that *RCW 61.24* should be interpreted to limit post-sale remedies in favor of pre-sale remedies. This is echoed by Joseph Hoffman in the treatise cited in *Cox*. Joseph Hoffman, *Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington,* 59 Wash.L.Rev. 323, 331 (1984) ("In order to further all three objectives, the presale injunction remedy should be made more freely available and the use of postsale remedies should be restricted.")

The second objective, that the process provides an adequate opportunity for interested parties to prevent wrongful foreclosure, is also meant to guarantee all citizens access to justice and to provide similar safeguards as were present under the previous system of mortgages and judicial foreclosure. Hoffman, at 330, Fn 36.

The third objective, to promote stability in land titles, is clearly meant to allow the public a clear and unambiguous title record of real property. Hoffman, at 330, Fn 37 (citing to G. Osborne, G. Nelson & D. Whitman, *Real Estate Finance Law* § 1.6, at 11-13 (3d ed. 1979) and noting that land titles produced by nonjudicial foreclosure have proven

less stable than those produced by judicial foreclosure).

A proper foreclosure action extinguishes the debt and transfers title to the property to the beneficiary of the deed of trust or to the successful bidder at a public foreclosure sale. *In re Marriage of Kaseburg*, 126 Wash.App. 546, 558, 108 P.3d 1278 (2005). The logic of SPS and QLS seems to be that in addition to a successful bidder the property may be transferred to a "beneficiary" that has no interest in the underlying Note.

MERS was founded by the mortgage industry. MERS tracks "changes" in the ownership of the beneficial and servicing interests of mortgage loans as they are bought and sold among MERS members or others. Simultaneously, MERS acts as the "mortgagee" of record in a "nominee" capacity (a form of agency) for the beneficial owners of these loans.

In their brief SPS and QLS argue that "even if Mr. Walker were correct that the holder of the underlying obligation did not authorize MERS to assign the Deed of Trust to SPS, the note holder is the party with the option to either to cancel the assignment or ratify it." *Respondent's Brief* at page 8. So, in the event that a third party engages in an entirely fraudulent transaction, homeowners such as Mr. Walker will have no recourse to challenge any aspect of the proceedings since only the note holder has such authority, this despite the fact that Mr. Walker had no knowledge of who that might be, even if he were to desire to alert them. Instead of promoting stability of land titles such a system would be wide

open for fraud and abuse.

Notably, SPS and QLS both answered an allegation in Mr. Walker's Amended Complaint with the same language: "Answering ¶ 3.5, Quality/Select lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in ¶ 3.5, and on that basis denies them." CP 86 and CP 97 This is notable for the fact that the allegation in ¶ 3.5 was:

> Upon information and belief, MERS has never owned the debt secured by the Deed of Trust at issue herein. Further, Defendant MERS never obtained possession of the Promissory Note which secures the subject Deed of Trust.
>
> CP 128

According the public record SPS acquired the Note from MERS. The Assignment of Deed of Trust noted above that was executed by MERS to SPS claimed to assign Deed "together with the Note" it leads to the inescapable conclusion that SPS knowingly participated in the recording of an assignment that was completely fraudulent by misrepresenting the true facts of the transaction. CP 156

A challenge to a nonjudicial foreclosure on the basis that the foreclosing beneficiary is not the true beneficiary, i.e. the party that merely possesses the Note as opposed to "holding" the Note, is clearly within the universe of grievances the statute is meant to redress and the objectives set forth by Washington Courts. Instead of promoting the objectives of *RCW 61.24,* the actions of the Respondents undermine them by intentionally

concealing the identity of the true party in interest, which adversely impacts Mr. Walker's ability to engage in legitimate negotiations and creating uncertainty in the land title system.

Citing to several cases in the federal district courts of Washington and elsewhere SPS and QLS argue that borrowers do not have causes of action challenging the propriety of a nonjudicial trustee's sale on the basis that the true beneficiary is not foreclosing. Aside from the fact that these cases are in no way binding upon this Court, even within the Western District of Washington there is significant disagreement concerning the propriety of a federal court casually interpreting Washington statutes.[1]

SPS and QLS cite to several cases outside Washington to support their argument that MERS is a legitimate beneficiary under *RCW 61.24.005*. However, the California cases demonstrate the danger in attempting to draw direct analogies between states. In contrast Mr. Walker urges the Court to consider the reasoning of other courts in interpreting Washington law.

Washington is a lien theory state, a mortgage does not convey title but merely creates a lien, or security interest, in the mortgagee. Because the deed of trust is considered a species of mortgage in Washington, it does not convey title to the trustee, but merely creates a lien in favor of the

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[1] Please refer to the Honorable John C. Coughenour's Order Certifying Question to the Washington Supreme Court, filed June 27, 2011 in the matter of *Selkowitz v. Litton Loan Servicing LP*, et al., U.S. District Court Case No. 3:10-cv-05523-JCC, a copy of which is attached hereto at ***Appendix "A"***. The Court is requested to take judicial notice of this Order, pursuant to *ER 201*.

beneficiary. In California, also a lien theory state, the deed of trust is not considered a species of mortgage. Instead, deeds of trust differ from mortgages in that deeds of trust convey title to the trustee. Additionally, the California Civil Code differs from *RCW 61.24.005* in the definition of beneficiary. In pertinent part California Civil Code section 2943 states:

> (a) As used in this section:
>
> (1) "Beneficiary" means a mortgagee or beneficiary of a mortgage or deed of trust, **or his or her assignees.**
>
> (Emphasis added).

The most similar statutory framework Appellant has discovered is that in Arkansas, cited in Appellant's Opening Brief, and interpreted by the Arkansas Supreme Court as prohibiting MERS from acting as beneficiary. *Mortgage Electronic Registration Systems, Inc. v. Southwest Homes of Arkansas*, 2009 Ark. 152 (2009).

Walker maintains that the failure of the Deed of Trust to identify a legally sufficient beneficiary results in an illegal cloud upon his title. Several previously cited cases support the proposition that the separation of the Note from the Deed results in the latter becoming a nullity. *Carpenter v. Longan*, 83 U.S. 271 (1872)(An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity."); *Kelley v. Upshaw*, 39 Cal.2d 179 (1952)("purported assignment of the mortgage without an assignment of the debt which is secured was a legal nullity"); *Landmark Nat'l Bank v. Kesler*, 216 P.3d 158 (2009).

SPS and QLS seem to contend that Mr. Walker is attempting to

escape a valid debt, however this is simply not the case. In allowing a claim to proceed by a junior lienholder following a nonjudicial trustee's sale the Washington Supreme Court described the result:

> [W]hile Beal Bank's rights in the collateral are extinguished by Washington Mutual's trustee's sale, the underlying promise by the Sariches and Mr. Cashman to pay Beal Bank on the two notes continues via the promissory notes, although the promissory notes are now unsecured as a result of that trustee's sale."

Beal Bank, SSB v. Sarich, 161 Wash.2d 544, at 550, 167 P.3d 555 (2007). This is precisely the same result Mr. Walker urges be adopted in this case. This is the principle underlying Mr. Walker's Quiet Title claim, that while the Deed of Trust is invalid the legal holder of the Note may still be entitled to payment.

SPS and QLS claim that *RCW 61.24.031* provides general authority for a "beneficiary or authorized agent" to take foreclosure actions. This reading of the section strains credulity. This section deals **solely** with the requirements of a Notice of Default as required by *RCW 61.24.030(8)* and does not provide a grant of general authority.

SPS and QLS also cite *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 154 P.3d 882 (2007) for the general proposition that an agent can take any action whatsoever under *RCW 61.24*. However, the agent in that case was the foreclosing trustee conducting an otherwise undisputed trustee's sale and the dispute centered on price at sale instead of whether the lender or their agent had complied with the statutory framework of the Deed of Trust Act.

SPS and QLS entitle one section of their brief "No Party is Required to Produce the Promissory Note to Prove Standing to Pursue Nonjudicial Foreclosure." *Respondent's Brief* page 9. The shocking implications of this reasoning are revealed by simply substituting the word "Possess" for the word "Produce" in the heading. There is nothing in the argument following the heading that couldn't be used to support either proposition. Mr. Walker's argument is that a proper reading of *RCW 61.24.005* eliminates this absurd result.

B. Trustee's Duties under *RCW 61.24.010*

RCW 61.24.010(2), provides as follows:

> (2) The trustee may resign at its own election <u>or be replaced by **the beneficiary**</u>. The trustee shall give prompt written notice of its resignation to the beneficiary. The resignation of the trustee shall become effective upon the recording of the notice of resignation in each county in which the deed of trust is recorded. If a trustee is not appointed in the deed of trust, or upon the resignation, incapacity, disability, absence, or death of the trustee, or the election of the beneficiary to replace the trustee, <u>**the beneficiary** shall appoint a trustee or a successor trustee</u>. Only upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee

(Emphasis added).

It is the contention of Mr. Walker that for two reasons the appointment of QLS as trustee was invalid. As noted above, MERS was not an entity legally qualifying as a beneficiary under the facts of the case. As a result the Appointment of Successor Trustee should fail as a matter of law.

Second, the Appointment executed by SPS was made prior to SPS obtaining whatever authority MERS had to bestow. Under the statute cited above this appointment should be held invalid as the beneficiary of record did not make the appointment.

Only a beneficiary defined under *RCW 61.24.005(2)* can appoint a successor trustee or declare a default in the underlying obligation. *RCW 61.24.010, RCW 61.24.030(7)(c).* In the absence of judicial oversight there is an expectation that trustees, and the parties that have retained them, will act consistently with the procedural requirements which are meant to provide borrowers notice of the process and an opportunity to object to the process to protect their rights and prevent abuses. Cox v. Helenius, 103 Wn.2d 383, 693 P.2d 683 (1985).

Cox v. Helenius, *supra.,* imposed a "fiduciary duty" upon trustees under *RCW 61.24.* However, statutory amendments to *RCW 61.24.010* put into effect June 12, 2008 appear to have modified the trustee's duty to the grantor and the beneficiary to a "duty of impartiality." *RCW 61.24.010(4).* More recently, statutory amendments to RCW 61.24.010 put into effect on July 24, 2009 appear to have modified the trustee's duty to the grantor and the beneficiary to a "duty of good faith." *RCW 61.24.010(4).*

SPS and QLS correctly note that the duty QLS owed to Mr. Walker at the time the Notice of Trustee's Sale was issued was not the fiduciary duty found by the Cox court. The Respondent's Brief failed to

discuss what level of duty was present at that time. The ambiguously worded duty of "impartiality" was contained in *RCW 61.24.010*. It is not at all clear what the characteristics of this duty were at the time. At least one court had seemed to equate a duty of impartiality with a fiduciary duty. *Meyers Way Development Ltd. Partnership v. University Sav. Bank*, 80 Wn.App. 655, 910 P.2d 1308 (1996) ("A trustee of a deed of trust acts as the fiduciary for both the creditor and debtor on a deed of trust, so must act impartially between them.")

Regardless of the precise outlines of the duty owed by QLS to Walker, there is no dispute that there was a duty owed. Whether this duty was a fiduciary duty, one of good faith, or impartiality QLS should have enquired concerning whether its principal had any actual interest in the obligation upon which QLS sought to foreclose.

C. Contracts Contrary to Public Policy

SPS and QLS argue that since Mr. Walker agreed to MERS designation as the "beneficiary" under the Deed of Trust that he ratified the role of MERS even if it violates the provisions of *RCW 61.24*. However, this argument is simply wrong.

A contract that violates a specific statute is illegal and void under the public policy doctrine. *Mills v. Western Washington University*, 150 Wn.App. 260, 208 P.3d 13, 244 Ed. Law Rep. 821 (2009), review denied, 167 Wn.2d 1020, 225 P.3d 1011 (2010); *Parker v. Tumwater Family Practice Clinic*, 118 Wn.App. 425, 76 P.3d 764 (2003). Except

where the agreement is not criminal or immoral and the statute or ordinance contains an adequate remedy for its violation an agreement that violates a statute or municipal ordinance is void. *Sienkiewicz v. Smith,* 97 Wash.2d 711, 716, 649 P.2d 112 (1982).

A contract that is contrary to the terms and policy of an express legislative enactment is illegal and unenforceable, in which case the court will leave the parties where it finds them. *Vedder v. Spellman,* 78 Wn.2d 834, 837, 480 P.2d 207 (1971); *Waring v. Lobdell,* 63 Wn.2d 532, 533, 387 P.2d 979 (1964). This is true even if the parties to the contract acted in good faith. *Fallahzadeh v. Ghorbanian*, 119 Wn.App. 596, 82 P.3d 684 (2004) (lease agreement between dental practice and landlord constituted illegal partnership between professional and nonprofessional and was not enforceable).

RCW 61.24 provides for no specific remedies for violation of the statute in the context of pre-sale actions meant to prevent the wrongful foreclosure from occurring. Presumably, by providing a basis to block a sale under the statute for statutory violations, the legislature did not intend for a sale to subsequently proceed in contravention of the statute.

Additionally, the circumstances of the contract suggest that the transaction should be construed as an adhesion contract. Adhesion contracts are contracts of exculpation which have the potential to become unconscionable if enforcement of the contract or a provision therein is deemed unfair or oppressive. An adhesion contract is a standardized

contract which gives the party with weaker bargaining power no opportunity to bargain and no realistic choice as to the terms of the contract. Mendez v. Palm Harbor Homes, Inc., 111 Wn.App. 446, 45 P.3d 594 (2002). Generally, an adhesion contract is (1) a standard form, (2) prepared by one party and submitted to another party on a "take it or leave it" basis, (3) when the bargaining power between the parties was not truly equal. Townsend v. Quadrant Corp., 153 Wn.App. 870, 224 P.3d 818 (2009). While characterizing the contract as an adhesion contract does not void the contract, such a characterization enables the courts to protect the injured party from an unconscionable contract provision. Adler v. Fred Lind Manor, 153 Wn.2d 331, 103 P.3d 773 (2004).

D. Defendants and the FDCPA

It is true that the extent to which the Fair Debt Collection Practices Act (FDCPA) applies to foreclosure (and repossession) has been questioned, but it seems clear that these are covered debt collection accounts. A question arises because the definition expressly includes a repossession agency but only for a limited purpose, that is, a person who uses interstate commerce or the mails in a business with a principal purpose of enforcing security interests is expressly included for the purpose of the section of the Act that defines unfair practices in nonjudicial repossessions.

15 U.S.C.A. § 1692f(6) provides that unfair practices include taking action to effect dispossession of property if (A) there is no present

right to possession, (B) there is no present intention to take possession, or (C) the property is exempt by law from such action.

By negative implication, the express inclusion provision appears to exclude persons engaged in the business of enforcing security interests if they do not commit one of the unfair practices. In other words, an actor such as QLS would only become subject to the FDCPA in the event they violated the above provision.

A court concluded that that provision expands the basic definition rather than limiting it, so that any person who qualifies under the basic definition is a debt collector for purposes of the Act, even though that person is not covered by the express inclusion provision relating to the business of enforcing security interests. *Shapiro and Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992), rev'g 811 P.2d 409; *Crossley v. Lieberman*, 868 F.2d 566, 27 Fed. R. Evid. Serv. 544 (3d Cir. 1989) (counted mortgage foreclosure actions in considering whether an attorney was regularly engaged in debt collection practice); *Sandlin v. Shapiro & Fishman*, 919 F. Supp. 1564 (M.D. Fla. 1996) (defendant law firm directed debtor to send payment to it rather than to creditor).

In other words, the express inclusion provision merely brings under the Act those businesses enforcing security interests that do not otherwise satisfy the basic definition of "debt collector."

Taken together with cases previously cited by Mr. Walker, the above indicates that the FDCPA applies to QLS and SPS in this case to the

extent that each company sought to collect past due amounts owed to another party. This is not only the common sense definition of a debt collector, but the consensus view. *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006); *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir. 2003); *Bailey v. Security Nat'l Servicing Corp.*, 154 F.3d 384, 387 (7th Cir. 1998); *Whitaker v. Ameritech Corp.*, 129 F.3d 952, 958 (7th Cir. 1997); *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 403-404 (3d. Cir. 2000); *Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 106-107 (6th Cir. 1996).

This is especially true when the potential defendant only becomes involved in collection following default. *McKinney v. Cadleway Properties, Inc.*, 548 F.3d 496, 501 (7th Cir. 2008); *FTC v. Check Investors, Inc.*, 502 F.3d 159, 171-74 (3d Cir. 2007). SPS seems to be denying that it acquired collection rights to the loan following an initial default. This assertion is demonstrably false as demonstrated by the Amended Complaint. SPS was assigned to the Deed of Trust "together with the Note" by MERS on July 6, 2009. CP 156 and CP 158. There were defaults alleged which occurred in advance of this date, therefore the contention that Mr. Walker failed to plead that these parties became involved in collection activities following alleged default is simply incorrect. In addition to the Notice of Trustee's Sale which listed alleged defaults well in advance of this date, QLS and/or SPS would also have sent additional notices in order to comply with *RCW 61.24*. CP 158

E. Defendant's and the Consumer Protection Act (CPA).

1. Actions of QLS were deceptive and contrary to law.

An act is unfair or deceptive if it had the capacity to deceive a substantial portion of the public, proof of intent to deceive is not required. *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986).

The CPA does not define "unfair or deceptive act or practice," but deception exists "if there is a representation, omission or practice that is likely to mislead a reasonable consumer." *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009) quoting *Southwest Sunsites, Inc. v. F.T.C.*, 785 F.2d 1431, 1435 (9th Cir. 1986).

The test is not the most sophisticated consumer, but the least. *Panag*. Whether the act in question had the capacity to deceive a substantial portion of the public is a question of fact. *Holiday Resort Community Ass'n v. Echo Lake Associates, LLC*, 134 Wn.App. 210, 135 P.3d 499 (2006), review denied, 160 Wn.2d 1011, 163 P.3d 793 (2007) (trial court erroneously dismissed claim where plaintiffs presented triable issue).

Of importance to the facts of the present controversy, an unfair or deceptive act can include misrepresentations of facts related to the legal status of a debt. *Panag* (deceptive methods used by a collection agency to recover money on behalf of an insurance company). Further, the use of MERS to conceal from the borrower the true identity of the party to whom

the debt as owed is obviously and intentionally deceptive. That the actions of SPS and QLS also violated multiple provisions of *RCW 61.24* in doing so strengthens Mr. Walker's case.

2. The actions of QLS clearly impact the public interest

Among the factors set forth in Hangman Ridge in determining if the public interest element is met are: (1) were the alleged acts committed in the course of defendant's business? (2) are the acts part of a pattern or generalized course of conduct? (3) were repeated acts committed prior to the act involving plaintiff? (4) is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? Hangman Ridge v. Safeco, *supra.* For disputes more private in nature, courts will consider whether (1) the acts alleged were committed in the course of defendant's business? and (2) whether plaintiff and defendant occupy unequal bargaining positions? Not all of the factors need to be present, and none is dispositive and whether the transaction at issue is a private or consumer transaction is a question of fact for the jury. Michael v. Mosquera-Lacy, 165 Wn.2d 595, 200 P.3d 695 (2009), review granted, 163 Wn.2d 1033, 187 P.3d 268 (2008) (trial court erroneously granted summary judgment where plaintiff's evidence raised factual question as to impact on public interest).

QLS appears to be contending that Mr. Walker did not plead actions meeting the elements required under a CPA claim. However, the Amended Complaint plead each element against QLS (and Regional

Trustee). Certainly, Mr. Walker has not had the opportunity to prove each element because the trial court erroneously dismissed his action under CR 12.

3. Mr. Walker's Injuries Caused by QLS

As previously noted Mr. Walker has not had the opportunity to prove each element because the trial court erroneously dismissed his action under *CR 12.* However the injury to Mr. Walker's business or property occurred in the necessity for investigation and consulting with professionals to address the wrongful foreclosure and collection practices and violation of *RCW 61.24, et seq.*

Injury to person's business or property is broadly construed and in some instances where "no monetary damages need be proven, and that non-quantifiable injuries, such as loss of goodwill would suffice for this element of the *Hangman Ridge* test." *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987). All of the injuries plead were the direct and proximate result of the misconduct of QLS and the other defendants. Mr. Walker does require the opportunity to prove to a jury that the injuries alleged occurred as a result of the Defendant's conduct, but Mr. Walker has properly plead the claim.

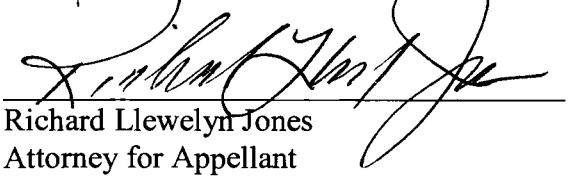
V. CONCLUSION

SPS and QLS have failed to demonstrate compliance with multiple provisions the Revised Code of Washington and instead the facts suggest knowing and intentional violations of the statutes, in addition to the public

records system in Snohomish County. As a result of these violations SPS and QLS have further violated the Fair Debt Collections Practices Act and Washington Consumer Protection Act.

REPECTFULLY SUBMITTED this 22nd day of August, 2011.

RICHARD LLEWELYN JONES, P.S.



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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

That on August 22, 2011, I arranged for service of the forgoing Reply Brief on the following parties:

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