Court of Appeals No. 32315-3-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

MICHAEL URIBE and HELEN URIBE husband and wife,

Appellants,

v.

LIBEY, ENSLEY & NELSON, PLLC, a Washington professional limited liability company; GARY LIBEY and JANE DOE LIBEY, husband and wife and the marital community comprised thereof, RANDALL RUP AND LUZ DARYL-RUPP, husband and wife and the marital community comprised thereof; and 7HA FAMILY, LLC, a Washington limited liability company,

Respondents

Rupp and 7HA Family, LLC's CORRECTED Responsive Brief to Appellants' Opening Brief

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I. INTRODUCTION

The trial court did not err in awarding summary judgment to all of the defendants on all issues and dismissing all of the Uribe's claims with prejudice.

II. ASSIGNMENTS OF ERROR

A. ISSUES REGARDING THE CONDUCT OF THE NONJUDICIAL FORECLOSURE UNDER RCW 61.24, THE DEED OF TRUST ACT.

1. Waiver. Waiver can be applied where a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to a foreclosure prior to the sale, (3) failed to bring an action to obtain a court order to enjoin the sale. Appellants Uribe received the notices, had actual or constructive knowledge of a defense to the foreclosure and failed to bring an action to obtain a court order to enjoin the sale. Did the trial court properly find Uribe had waived their right to contest the sale?

2. Procedural Irregularity. This should be the first issue because if the Court finds there is no error in the foreclosure process, it does not need to address the other issues. However, this Brief will follow the format used by Uribe.

Uribe argued below that a technical error of recording the Notice of Trustee's Sale before recording the resignation and appointment of a successor trustee ("RAST") invalidated all subsequent proceedings which culminated in the foreclosures of the Franklin and Benton County

properties. Although Uribe can show no prejudice by this technical error, he argues that the technical error is enough to invalidate the sale. Is a foreclosure of a deed of trust invalid because of a technical error where no prejudice can be shown?

3. Strict Compliance with the Deed of Trust Act is required? Given the facts of number 2 above, is strict compliance with the Deed of Trust Act ("DTA") required even when no prejudice can be shown?

B. ISSUES PERTAINING TO FORMATION OF AN ENFORCEABLE CONTRACT AT THE TRUSTEE'S SALE.

Respondents Rupp and 7HA Family, L.L.C. ("Rupp") are not strictly involved with this issue and to the extent they are, they will adopt by reference the arguments of the Libey Respondents.

C. ISSUE PERTAINING TO THE CONSUMER PROTECTION ACT.

Respondents Rupp is not strictly involved with this issue and to the extent he is, he will adopt by reference the arguments of the Libey Respondents.

D. ISSUE CONCERNING RUPP'S AND 7HA'S BFP STATUS.

A bona fide purchaser for value is one who gives valuable consideration and who is without actual or constructive notice of another's interest in the property. By paying 1.28 million dollars for the property and relying on the record title as offered by the title insurance company, can Rupp claim the status of a bona fide purchaser?

III. MOTION TO STRIKE ARGUMENT

RAP 2.5(a) and 9.12 allow the appellate court to refuse to review any claim of error which is not raised in the trial court. Appellants Uribe argue for the first time in their opening brief that their bankruptcy filing resulted in an automatic stay of the Trustee's Sale and that this prevents the court from finding a waiver to later attack the Trustee's Sale. (*See* Appellants' Brief at pp. 17-18.) This argument was not presented to the trial court below and Rupp asks this Court to refuse review of this alleged error.

IV. STATEMENT OF THE CASE

Respondents Rupp are involved in this case only because of a technical irregularity committed by Gary Libey: he recorded the Notice of Trustee's Sale two hours before he recorded the RAST. (CP 611-612) As a technical matter, Libey was not yet the Successor Trustee when he recorded the Notice of Trustee's Sale. (CP 612)

This is a complicated case as it involves three separate legal proceedings: Uribe's filing for bankruptcy in 2009; the foreclosure action started in 2010 while the bankruptcy was still ongoing; and this lawsuit that was filed in 2011 with Rupp only being joined as a defendant in 2012. (CP 612)

Because of the interplay of these three lawsuits, the following timeline is provided.

- **May 31, 2002:** Bank of Whitman Loan Number 560005091 was made to Uribes in the amount of $1,655,185.50, which will be referred to as the "Franklin loan." The Franklin loan was secured by a first priority deed of trust on the Franklin County property located in Pasco, Washington, and a first priority mortgage on the Benton County property. In addition, the loan was also secured with personal property that Uribe used in their excavation business under the company name Uribe, Inc. (CP 106)

- **September 7, 2007:** Bank of Whitman Loan Number 560005006 was made to Uribe in the amount of $571,000, which will be referred to as the "Benton loan." This Benton loan was secured by a second priority deed of trust on the Benton County property, and a second priority mortgage on the Franklin County property. In addition, as with the Franklin loan, the Benton loan was also secured with personal property that Uribe used in their excavation business under the company name Uribe, Inc. This deed of trust also included a cross-collateralization clause linked to the 2002 Franklin loan. (CP 106)

- **March 23, 2009:** Uribes were notified by letter that they were in default on all outstanding Bank of Whitman loans. (CP 106)

- **June 4, 2009:** Uribes filed for Chapter 11 bankruptcy in the Eastern District of Washington Bankruptcy Court. (CP 107)

- **June 26, 2009:** In Uribe's Chapter 11 bankruptcy case, the Bank of Whitman filed a Motion for Relief from Automatic Stay and Order Requiring Debtors to Abandon Property. (CP 107)

- **June 30, 2010:** The Bankruptcy Court entered an order granting the Bank of Whitman's Motion for Relief from Automatic Stay as to Real and Personal Property. In its order, the Court incorporated findings of fact made by the Court earlier that year and entered additional findings of fact, including, in relevant part, the following:

  "The Bank of Whitman holds perfected liens secured by the Debtors' real property whose common description is [legal description of both Benton and Franklin properties was included]…. The Bank of Whitman holds perfected loans secured by the Debtors' equipment…. The Bank of Whitman is owed $2,745,982.78 as of May 4, 2010. The per diem interest is $672.20. **The balance as of June 10, 2010, is $2,770,854.18."**

  In its order, the Court found that the total value of Debtors' real and personal property was $2,550,171.00, listing the value of each as follows: Equipment ($403,950.00); Benton County Land

($1,500,000.00); Pasco/Franklin County property ($646,221.00). (CP 107)

- **July 14, 2010:** Notices of Default for Franklin and Benton County properties were sent to Uribe by certified mail. (CP 108)

- **July 20-21, 2010:** Process server posted Notices of Default on Franklin County and Benton County properties. (CP 108)

- **September 7, 2010:** Notices of Trustee's Sale and Foreclosure for Franklin and Benton County properties were sent to Uribe by certified mail. (CP 108)

- **September 13, 2010:** Process server posted Notices of Trustee's Sale on Franklin and Benton County properties. (CP 108)

- **September 8, 2010:**

    - **9:09 a.m.:** Notice of Trustee's Sale of Franklin County properties filed with Franklin County Auditor.

    - **11:37 a.m.:** Resignation of Chicago Title and Appointment of Successor Trustee filed with Franklin County Auditor.

    - **1:57 p.m.:** Notice of Trustee's Sale of Benton Properties filed with Benton County Auditor.

    - **4:02 p.m.:** Resignation of Chicago Title and Appointment of Successor Trustee (Gary Libey) filed with Benton County Auditor. (CP 108-109)

- **October 29, 2010:** The Bankruptcy case was dismissed. (CP 707)

- **December 17, 2010:** Non-judicial foreclosure sales held.

    - **10:00 a.m.:** The Bank of Whitman bid a portion of Uribe's debt - $390,000 – for the Franklin County property. There were no other bidders present, so the Bank of Whitman was the successful bidder and acquired the Franklin County property.

    - **11:00 a.m.:** Bank of Whitman bid a portion of Uribe's debt - $1,200,000 – for the Benton County property. There were no other bidders present, so the Bank of Whitman was the successful bidder and acquired the Benton County property. (CP 109)

- **December 28, 2010:** Trustee's Deed for Franklin County properties was recorded and filed in the Franklin County Auditor's office. (CP 109)

- **December 30, 2010:** Trustee's Deed for Benton County properties was recorded and filed in the Benton County Auditor's office. (CP 109-110)

- **October 27, 2011:** The Complaint in this lawsuit was filed. (CP 1)

- **June 12, 2012:** A Motion to Amend Complaint was filed. The proposed Amended Complaint added, for the first time, Defendants Rupp and 7HA Family, LLC and for the first time, added the allegations that Libey as Trustee had no authority to act because the Notice of Trustee's Sale was recorded before his appointment as Successor Trustee alleging that therefore the sale and foreclosure of the property were invalid. (Appendix 1)

- **August 17, 2012:** The Second Amended Complaint was filed. (CP 62)

A. TESTIMONY OF RANDY RUPP

Randy Rupp's deposition was taken on November 18, 2013. He testified to the following:

He has no development experience. (CP 640)[1] He had done business with the Bank of Whitman for years. (CP 641--p. 13, ls. 7-11) He was contacted about the Benton County property by an employee there, Steve Lancaster, who told Randy that the Bank was taking back some property through a foreclosure and that the Bank would sell it at its appraised value of $1.28 million. (CP 641-642) Randy told Harold Alexander about it and they eventually decided to buy it with one-half interest each. (CP 642) Randy has no confidence in appraisals and

[1] The quoted portions of the deposition were black-lined in the exhibit for the trial court's use.

completely ignored the Bank's appraisal. (CP 642-643) Randy Rupp does not know Gary Libey, he did not know Michael Uribe. (CP 644), and he knew nothing about the Bank of Whitman's foreclosure of Uribe's property. (CP 644-645) Mr. Rupp relies on the title insurance company to ensure him that there is good title to the property. (CP 646) Although Mr. Rupp purchased the property for investment purposes, shortly after buying the property they were contacted by an investment firm out of Spokane and they now have a contract to sell the property, with a five-year due diligence period. (CP 647-649)

B. TESTIMONY OF HAROLD ALEXANDER

Harold Alexander testified as follows:

He purchased the property for investment purposes only. (CP 650) He has been developing property for approximately three years. (CP 650-651) He had no prior dealings with the Bank of Whitman before the purchase of the Benton County property. (CP 651) He did not know Michael Uribe. He testified about the sale of the property to the Spokane Investment Group. They were contacted by a broker out of Bend, Oregon who represented an investment group in Spokane who were interested in purchasing the property. (CP 652-653) He knew nothing about the Bank of Whitman's foreclosure. (CP 654) He knew nothing about Michael Uribe. (CP 654) He testified that the reason he and Randy Rupp invested in the property together was because it was a lot of money and he did not want to stick his neck out that far by buying it by himself. (CP 654) He has no knowledge of foreclosures and does not know the role of a Trustee

of a Deed of Trust. (CP 655) He relied on the title insurance company to make sure he had good title to the property. (CP 655)

C. THE TRIAL COURT'S DECISION

All parties moved for summary judgment. The trial court heard oral argument on the motions on January 17, 2014. The Court presented its oral decision on the motions on January 30, 2014 ruling in favor of all defendants and dismissing all claims against them. As concerns Rupp, the Court had the following to say about the waiver issue:

> After reviewing all the information and the relevant case law and statute, the court finds that the motion for summary judgment filed on behalf of Rupp, 7HA should be granted for the following reason: The statute RCW 61.24.127 states that a failure to bring suit to enjoin the sale for any reason whatsoever, essentially, may result in waiver. And in regard to this court's analysis of the motion for summary judgment filed on behalf of Rupp and 7HA, primary irregularity that the court believes needs to be considered is that the change of trustee was not recorded until a few hours after the notice of sale was recorded.

(RP 1/30/14-p. 4, l. 23 – p. 5, l. 10)

On the question of whether or not Mr. Libey's recording the Notice of Trustee's Sale before recording the RAST was material, the Court stated as follows:

> Here the notice was provided to the plaintiffs with, what the court believes, was more than adequate notice for the plaintiffs to contest the sale to file a motion to enjoin the sale. So the court finds that the failure to record the change in trustee until a few hours after notice of the sale was recorded was not a material breach of the duties or the

> statute, as it had no adverse impact on either the debtor or creditor or members of the public.

(RP 1/30/14-p. 5, l. 22 – p. 6, l. 5)

On whether or not Rupp was bona fide purchaser for value, the Court noted as follows:

> Nothing in the record that could be located by a search of the records by the defendants, Rupp and 7HA would have disclosed there was any issue with the title and with the sale. And the court finds that the defendants, Rupp and 7HA paid a reasonable price for the property and are essentially bonafide purchasers.

(RP 1/30/14, p. 6, ls. 14-20)

Finally, the Court noted that the equities supported finding in favor of Rupp because such a finding supported the underlying purposes of the applicable statute which include supporting the efficient and inexpensive process for the sale of property and to promote the stability of land titles.

V. SUMMARY OF ARGUMENT

Uribe's Second Amended Complaint states at ¶10.5:

> The material misrepresentations by Libey in the Trustee's Deed are apparent from a review of the public records relating to this non-judicial sale and the public record gives notice to the world, including Rupp and 7HA, purchasers of the Benton County property from the Bank of Whitman, of the defect in the non-judicial foreclosure.

(CP 82)

A. WAIVER.

Waiver is an equitable principal that can apply to defeat someone's legal rights for postsale relief. Waiver of postsale challenges have been

found to occur where a party (1) received notice of right to enjoin the sale, (2) had actual or constructive knowledge of a defense to a foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order to enjoin the sale. Here, Uribe argues that the technical error of recording the Notice of Trustee's Sale before recording the RAST was "apparent from a review of the public records relating to this non-judicial sale and the public record gives notice to the world, including ..." Uribe of the defect in the non-judicial foreclosure. (*See* Uribe's Second Amended Complaint, ¶10.5) Thus all three elements exist and the Court should find that Uribe waived his right to challenge the foreclosure sale.

B. TECHNICAL VIOLATION MUST SHOW PREJUDICE.

A technical flaw in the foreclosure process requires that Uribe show he was prejudiced by the flaw. The Washington Deed of Trust Act permits the borrower or grantor to restrain a Trustee's Sale by court action on any proper or equitable ground. Proper grounds include defenses to the defaults such as payments having been made, lender liability issues, fraud, usury, violation of truth in lending and consumer protection laws. Proper grounds also include technical flaws in the foreclosure process such as is the land used for agricultural purposes, is the alleged default actually a default under the terms of the documents, or have errors been made in identifying the documents, real property, and defaults which are of sufficient magnitude to cause real confusion. Here, the technical flaw did not cause any confusion and did not prejudice the Uribes. In fact, the error

was so minute that three different law firms representing Uribe over a two-year span, did not discover it.

C. BONA FIDE PURCHASER.

When a person claims the status of a bona fide purchaser, the burden to prove that that status is not warranted is on the challenger, in this case Uribe. A bona fide purchaser is one who gives valuable consideration and who is without actual or constructive notice of another's interest in the property. A bona fide purchaser may rely on the record title as shown in the office of the County Auditor. A bona fide purchaser has constructive notice of liens on the property created by judgments filed and recorded in accordance with the statute. Here, Rupp relied on the record title as offered by the title insurance company. Rupp knew that the Bank of Whitman had foreclosed the property against Uribe, that the title insurance company was willing to insure title to the property and Rupp paid 1.28 million dollars for it. The Court should determine that Rupp is a bona fide purchaser for value of the property.

D. IMPLIED RATIFICATION.

Implied ratification is a concept where when an act is unauthorized or irregular, any competent and material evidence is admissible which tends to show subsequent ratification by someone having authority to ratify. If the ratification is implied, the conduct of the people involved is admissible. In this case, Gary Libey did not have the authority to record the Notice of Trustee's Sale when it was recorded two hours before the RAST was recorded. The question then becomes did his subsequent

actions imply ratification and thus verify the recording of the Notice of Trustee's Sale? Under the facts of this case, he clearly did ratify it as he took all of the appropriate actions subsequently required by statute to pursue the foreclosure.

VI. ARGUMENT

Appellant Uribe bases his entire case against Rupp on the allegation that because the RAST was recorded two hours after the Notice of Trustee's Sales that the appointment of Libey as Successor Trustee was invalid. Uribe offers little support for this proposition. Uribe assumes that because the appointment of the Successor Trustee was untimely, the foreclosure and the Trustee's Sale are invalid.

At other times, Uribe argues that Libey was not "properly timely appointed" but confuses and ignores the distinction between the two concepts.[2] Nowhere in his arguments does Uribe show proof of or even argue that he was prejudiced by this error as indeed he cannot. If the error had not occurred, nothing in anyone's subsequent actions would have changed. The error is, in effect, a non-event.

A. WAIVER.

Uribe repeatedly argues that because the RAST was recorded two hours after the Notice of Trustee's Sale, the entire world was put on notice

[2] *See* p. 30 of Uribe's Opening Brief, the paragraph where it reads "Furthermore, the trial court distinguished *Bavand* when *Bavand was entirely on point because the failure to properly timely appoint the successor trustee is a material breach of the DTA."*

that there was a defect in the foreclosure which invalidated the sale. Uribe never explained why this was not notice to him and his three law firms over a two-year period.

Numerous Washington cases hold that the application of the Waiver Doctrine to claims arising out of underlying obligations furthers the three goals of the Deed of Trust Act: "(1) that the non-judicial foreclosure process should be efficient and inexpensive, (2) that the process should result in interested parties having adequate opportunity to prevent wrongful foreclosure, and (3) that the process should promote stability of land titles." *See Plein v. Lackey*, 149 Wn.2d 214, 227-28, 67 P.3d 1061 (2003); *Universal Life Church v. GMAC Mortgage Corporation,* No. C06-651RSM, 2007 U.S. Dist. Lexis 29333 at 10 (WD Wash. Apr. 20, 2007)[3]; *In Re Kaseburg*, 126 Wn.App. 546, 108 P.3d 1278 (2005); *Hallas v. Ameriquest Mortgage Company*, 406 F. Supp. 2d 1176 (D. OR. 2005).

There is a very strong preference to validate foreclosure sales. Once the sale is completed, the legislature intended the purchaser to be in possession of the property with no need for further lengthy proceedings. This lawsuit is an example of why this preference is important. Here Rupp, the second owners of the property, have a potential sale of the property to a potential third owner on a contract with a five-year due

[3] Under Fed. R. App. P. 32.1, courts may not prohibit or restrict the citation of unpublished federal and judicial pleadings, orders, judgments or other dispositions after January 1, 2007. A copy of the *Universal Life* case is attached as Appendix 2.

diligence period. This property is part of a 1,800-acre development that will take years to put together, if that happens at all. If the foreclosure sale is invalidated, other lawsuits will follow.

Courts recognize that there are consequences to ignoring these goals. As noted in *Amresco v. SPS Properties,* 129 Wn. App. 532, 119 P.3d 884 (2005), these additional factors include that if trustee's deeds are easy to challenge, title insurers will not insure them, secured lenders will not lend on them, and buyers will not purchase real property with title obtained through a trustee's deed. Detailed statutory procedures govern the trustee's actions prior to the sale, require numerous and detailed notices to the borrower/grantor and a warning that if he or she does not restrain the sale, it will go forward. If he chooses to ignore them and not restrain the sale, he has waived his rights to contest the sale.

In *Brown v. Household Realty Corp.*, 146 Wn.App. 157, 189 P.3d 233 (2008), the borrowers alleged that the lenders failed to disclose loan terms and conditions, induced them to enter into loans with excessive fees and interest rates, required them to purchase unwanted insurance, and misled them that they were purchasing insurance for their first position loan rather than for their second position loan. They also claimed that they were unable to retain counsel to pursue their pre-sale remedies. But when their home was being foreclosed, they did not use the pre-sale remedies provided by the Deed of Trust Act. Because they did not take advantage of this process, the court deemed that they waived their right to postsale remedies.

In *Hallas, supra* the court held that Washington's waiver doctrine applies to bar postale challenges to both the foreclosure process and the underlying obligation. In *Hallas*, the borrower claimed that the lender failed to provide required disclosures regarding finance charges and interest. The court held that since the claim related either to the execution of the underlying trust deed or to the foreclosure, it could have been asserted as a defense to the foreclosure before the sale. It held that once the plaintiff receives notice of the sale, has actual or constructive knowledge of the alleged defenses to foreclosure and fails to restrain the sale, the plaintiff waives the right to bring those claims.

The most recent Washington State case on the waiver issue is *Frizzell v. Murray*, 179 Wn. 2d 301, 313 P.3d 1171 (2013). The court discusses RCW 61.24.040(1)(f)(i) which states:

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

The court notes that even though the right to invalidate the Trustee's sale may be waived, the right to sue for damages remains. The court at 307 then found that the plaintiff waived the right to invalidate the Trustee's sale because of the following:

1. She received notice of the right to enjoin the sale;
2. She actually filed a motion to enjoin the sale;

3. Even though the motion was granted, it was conditioned on her posting a bond, which she failed to do;
4. She had knowledge of a defense to the foreclosure prior to the sale; and
5. She consciously chose not to pursue all remedies by not posting security to enjoin the sale.

In our situation, Uribe claims that Rupp had notice of the irregularity in the foreclosure sale because those irregularities could have been found by a review of the recorded documents. Uribe attributes to Rupp, but not to himself, knowledge of the irregularity. But Uribe, through his own judicial admissions, admits that he too had knowledge of the deficiency. Because he had knowledge of the deficiency and he did not enjoin the foreclosure sale, the trial court correctly held that Uribe waived his right to contest the sale.[4]

In our case, not only was Uribe represented by counsel when Libey made the alleged error, but he was also in litigation with the bank. By his own admission, he had constructive notice of the alleged defects he waited two years to assert. He has waived his right to postsale remedies.

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[4] Uribe complains that Libey never told him of his "scheme" to cross collateralize the two loans (Brief at p. 20), yet ignores the fact that the loans were cross collateralized. Why wouldn't the bank realize on all its security when the total amount owed exceeded the value of the security?

Uribe argues that any technical irregularity in a foreclosure sale prevents the application of the Waiver Doctrine (Brief at p. 22). In this, he is simply wrong.

There is no excuse for Uribe not bringing an action to stop the foreclosure process, to effect the legislative intent and to have this matter resolved long before Rupp purchased the property. Worse, there are now four parties affected by Uribe's non-action: the Bank of Whitman, Libey, Rupp and the potential purchasers of Rupp's property!

B. IRREGULARITIES IN A FORECLOSURE PROCEEDING MUST BE SUBSTANTIAL AND PREJUDICIAL.

A defect that can result in the invalidation of a foreclosure sale must be substantial and prejudicial. It must be something that actually makes a difference. Just because a mistake is made somewhere in the process does not require invalidation of the sale. Uribe has never explained how the two-hour difference here was prejudicial to him.

Washington's Deed of Trust Act makes no provision for setting aside a sale after it has occurred. In our situation, it would be even more unfair to set aside the sale because Rupp owns the property as the second owner after the sale, the Bank of Whitman being the first. Washington courts have voiced many reasons that a sale by a Trustee of foreclosed property should not be overturned once it has taken place. That is why the State legislature provided a process to grant pre-sale remedies for those wanting to enjoin or restrain a threatened sale. Once the sale is completed, however, the legislature intended the purchaser to obtain possession quickly with no need for further lengthy proceedings.

In *Amresco, supra*, the plaintiff alleged that the notice required by statute was sent to plaintiff in care of his attorney and not to him. The

attorney acknowledged receipt of the notice of the sale. The plaintiffs did not contest the sale. The court affirmed summary judgment of dismissal and held that notice to the plaintiff's attorney was sufficient because he had already appeared in the action and acknowledged receipt of the notice.

Under the Washington Deed of Trust Act, Chapter 61.24 RCW, the notice of default must contain a range of information which advises the borrower and grantor that they may cure the default or contest the default in court. The notice of default further advises the borrower and grantor that failure to cure the default within thirty (30) days moves the process one step closer to the possible loss of the property. The notice also provides the borrower and grantor a warning that if he fails to cure the default within thirty (30) days of the notice, the trustee may begin the non-judicial foreclosure process by giving notice of the trustee's sale to the borrower, grantor and others. The Act permits the borrower or grantor to restrain the trustee's sale by court action for any proper or equitable ground. Such grounds include technical errors of the foreclosure process. In *Vawter v. Quality Loan Serv. Corp.,* 707 F. Supp. 2d 1115 (2010), the court noted at 1122:

> The DTA does not define what constitutes proper grounds for restraint. The statutory language, however, suggests a broad scope. As one commentator explains:
>
> > Presumably "proper grounds" would include defenses to the default(s) such as payments having been made, lender liability issues, fraud, usury, violation of truth in lending and consumer protection laws. "Proper grounds" should also refer to non-

> technical flaws in the foreclosure process—is the land used for agricultural purposes, is the alleged default actually a default under the terms of the documents, or have errors been made in identifying the documents, real property, and defaults which are of sufficient magnitude to cause real confusion.

27 Rombauer §3.62

In *Vawter*, Chase Bank bought a note but before actually obtaining it, they appointed a trustee. This occurred in April, 2009. Nine months later in January, 2010, Chase re-appointed the same trustee. After the trustee foreclosed the property, the debtors tried to set it aside arguing that the trustee was not properly appointed making all the actions he took during that nine months invalid. The court rejected this argument noting at 1127:

> The Vawters point to this error in support of their DTA claim, but have not shown how this error gives rise to a viable cause of action, as discussed above. *See Pfau,* 2009 U.S. Dist. LEXIS 14233, 2009 WL 484448, at *12; *Krienke*, 140 Wn. App. 1032, 2007 WL 2713737, at *5. Notably, the Vawters have not alleged that this error caused them prejudice or harm and have not explained how this error would affect any future nonjudicial foreclosure proceedings.

The fact that Libey recorded the Notice of Trustee's Sale only two hours before recording the RAST did not cause any confusion. In fact, Uribe had three law firms represent him over a two-year period before any of them discovered that this error had occurred. Clearly, there was no confusion what property was to be sold, how much was owed on it, its value, whether Uribe had defaulted under the terms of the documents, the

documents themselves, *et cetera*. Uribe did not show that he was prejudiced by the mistake, being unaware of it for two years after its occurrence. This mistake did not change the course of the foreclosure at all. In *Galladora v. Richter*, 52 Wn.App 778, 784, 764 P.2d 647 (1988), there was an issue whether notice was timely mailed to the debtor, Mr. Galladora. The court dismissed this claim noting that:

> Even if the mailing was a technical violation, however, the act itself limits the consequences. It penalizes untimely notice only if it is "material". Hume, *The Washington Real Estate Contract Forfeiture Act,* 61 Wash. L. Rev. 803, 813 (1986) (hereafter Hume). Here, Mr. Galladora actually received the declaration of forfeiture on April 2, 1987, and then timely initiated this action as required by former RCW 61.30.140(2). The failure, if any, did not significantly affect any of Mr. Galladora's rights and thus was not material."

Uribe alleges that the Deed of Trust Act must be strictly construed to protect borrowers and grantors of a Deed of Trust. This is true except that despite the strict compliance requirement, Uribe must still show prejudice before a court will set aside a trustee's sale. Prejudice is not established when a technical violation of the Deed of Trust Act occurs which does not harm the debtor.

As noted in 18 Washington Practice, (2d) §20.18:

> Washington's deed of trust statute makes no provision for setting aside the sale after it has occurred. Nevertheless, it is possible if there have been substantial and prejudicial irregularities in connection with the sale. We will attempt to define what irregularities will justify setting aside a sale. As a general proposition, Washington courts strongly favor restraining a sale over setting it aside. Underlying this

> preference are the policies that the nonjudicial foreclosure process should be efficient and inexpensive and should produce a stable title for the purchaser.

The authors cite *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985) as the leading case to set aside a trustee's sale. Among the factors leading to this result were (1) before the sale, the trustee led the grantor to believe he would not proceed with the sale; (2) at the sale, only the trustee, his secretary, and the buyer were present; (3) the property was worth between $200,000 to $300,000 and was bid by the secretary on a credit bid for five percent (5%) of this amount, $11,783, and the buyer purchased it for $1.00 more than that. The court held that the trustee's actions along with the grossly inadequate purchase price resulted in the voided sale.

In our case, there is no allegation that Uribe was misled as to whether or not the sale would take place or that the sale price was grossly inadequate. In fact, the bankruptcy judge determined that the value of the property was $1.5 million and the bank's bid was $1.20 million. Rupp paid $1,281,000 for the property or eighty-five percent (85%) of its value. In the same section as cited above, the authors note situations where sales have not been set aside:

> They have refused to set aside sales on account of irregularities in the procedures preceding the sale, such as failure to comply with the statutory notice requirements, unless the irregularities can be shown to have caused prejudice.

Uribe alleges that Rupp had the opportunity to review the public records and if he had done so, would have realized the alleged error

committed by Libey in recording the Notice of Trustee's Sale before the RAST. He ignores the fact that the error occurred forty-nine (49) days before the bankruptcy case was dismissed and that he had roughly three months to contest the foreclosure sale before it occurred. He states not only in his Complaint but also in his Answers to Interrogatories (CP 663-664) that: "[t]he world, including Rupp and 7HA, were put on actual notice of Libey's lack of authority to sell the Benton County property when the instruments for the non-judicial foreclosure were recorded." If Uribe is correct in his contentions, then by his own admissions, he condemns himself for not finding this technical error in time to enjoin the foreclosure sale.

C. RUPP IS A BONA FIDE PURCHASER OF THE BENTON COUNTY PROPERTY.

In *Biles-Coleman Lumber Co. v. Lesamiz*, 49 Wn.2d 436, 439, 302 P.2d 198 (1956), the court set out rules to apply to the bona fide purchaser for value concept. First, it held that the burden of establishing that a purchaser had prior notice of another's claimed right or equity rests upon the one who asserts such prior notice. It then held that a bona fide purchaser for value of real property may rely upon the record chain of title as shown in the office of the county auditor. It then defined a bona fide purchaser for value as one (a) who has had no notice of the claim of another's right to or equity in the property prior to his acquisition or title, and (b) who has paid the vender a valuable consideration.

These concepts have been followed throughout the years. *See*, for

example, *Glaser v. Holdorf*, 56 Wn.2d 204, 352 P.2d 212 (1960); *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme NW, Inc.*, 168 Wn.App. 56; 277 P.3d 18 (2012).

In *Glaser*, the Supreme Court applied the BFP doctrine to a lien holder and held that the concepts were interchangeable. The mortgagors in *Glaser* had recorded a $25,000 mortgage against the property in question. The previous sellers claimed that their recorded deed to the buyers was induced by fraud. The court found that because mortgagers had expressly relied upon the recorded title in making their new, secured loan of $25,000, they had a claim of lien against the property free and clear of any claim of the previous sellers. The *Glaser* court held at 209:

> Notice to a purchaser of real estate that parties other than a seller (or encumbrancer) have a claim of interest in the property need not be actual nor amount to full knowledge, but it should be such information as would excite apprehension in an ordinary mind and prompt a person of average prudence to make inquiry; however, a circumstance which would lead a person to inquire is notice as what a reasonable inquiry would reveal.

Uribe is asking the Court to determine that a person of average prudence would have gone beyond record title to inspect the records filed in the auditor's office for the entire foreclosure process and then determine that if an error was made in the timing of filing certain documents, this could have a legal effect which would invalidate all subsequent ownership interests. They hold this position even though Uribe's three law firms, the Lanz Law firm, Rob Seines Law Firm and Uribe's bankruptcy attorneys'

law firm, apparently did not do this inspection and/or did not realize and appreciate the potential effect of this technical error. In other words, Uribe is attributing more knowledge and more prudence to Randy Rupp and Harold Alexander than he placed in his own attorneys! This argument should be rejected.

Further, the alleged negligence of Libey, as Trustee, is completely irrelevant to the bona fide purchaser status of Rupp. Once Libey as the Trustee of record prepared and executed a proper deed of reconveyance that was notarized and contained proper reconveyance language and then recorded it in the Benton County Auditor's Office, Rupp and Alexander were entitled to rely on the record title when purchasing the Benton County property. The title insurance showed the property was free and clear of any other liens of the previous owner, Uribe.

Rupp's title insurance policy showed no reference to any recorded lien or impropriety in the foreclosure proceedings. Rupp was absolutely entitled to rely on the record title and the Trustee's deed which showed that as of December 30, 2010 record title belonged to the Bank of Whitman.

Under the holding of *Biles-Coleman*, the burden of establishing that Rupp had prior notice of other claims, rights or equity in the property rests with Uribe. Uribe has no evidence that Rupp had any such notice. The Bank owned the property under a proper deed. That ownership interest was of record in the Benton County Auditor's Office. Rupp had an absolute right to rely on such record title.

D. IMPLIED RATIFICATION AND APPARENT AUTHORITY.

It is Rupp's goal to have the Trustee's Sale of the Benton County property upheld. This sale resulted in a contract between Libey and the Bank of Whitman. A principal can be bound to a contract when it ratifies an action taken by an agent even if that agent did not have authority to enter into the contract. Libey, as Successor Trustee, ratified the act of filing the Notice of Trustee's Sale by his subsequent actions. These include the following:

1. Statutory notices were provided to Uribes by the following actions taken before and after Gary Libey became the Successor Trustee[5];

2. Notice of Default and Notice to Guarantor was sent on July 14, 2010 by first class and certified mail to Michael and Helen Uribe at P.O. Box 2701, Pasco, Washington 99302;

3. Notice of Default on July 20-21, 2010 by posting the property;

4. Notice of Trustee's Sale and Notice of Foreclosure, with copies of Promissory Note and Deed of Trust on September 7, 2010 by first class and certified mail to Michael and Helen Uribe at P.O. Box 2701, Pasco, Washington 99302;

5. A copy of the "Notice of Trustee's Sale" was published twice preceding the time of sale in the Tri-City Harold; and

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[5] *See* Trustee's Deed, Exhibit 1, Declaration of Michael Simon.

6. The Notice of Trustee's Sale on September 13, 2010 was posted on the property.

Uribe has not alleged that any of these notices were improper or untimely or that they did not receive them. The notices subsequent to September 8, 2010 when the Notice of Trustee's Sale was recorded in Benton County were done pursuant to the Notice and the RAST. Libey obviously believed his actions were valid, and continued the foreclosure because of this belief and acted in a manner that shows that he believed that all of his actions were legal.

Halliburton Company Benefits Committee v. Graves, 463 F.3d 360 (2006) resulted from the merger of Dresser Industries, Inc. into a wholly owned subsidiary of Halliburton Company. As part of the merger, Halliburton agreed to maintain the Dresser Retiree Medical Program for eligible participants but modified them to align with the benefits provided to other Halliburton retirees. Halliburton filed this action against Dresser retirees seeking class certification of all participants in the Dresser Retiree Medical Program to declare that the merger agreement did not limit Halliburton's right to amend or terminate the Dresser Retiree Medical Program. The parties filed cross motions for summary judgment and the District Court ruled in favor of the Dresser retirees.

At a meeting to discuss the merger held on February 29, 1998, an attorney for Dresser took notes indicating that an officer of Halliburton agreed to protect all Dresser salaried employees who were grandfathered with respect to the old retired medical program and no loss benefits would

result to the active employees. These notes were delivered to the executive vice president and general counsel of Halliburton immediately after the meeting. The merger agreement was executed based on the negotiations. The assurances to the Dresser Retiree Medical Program were addressed in a notebook prepared by one of Dresser's Human Resources personnel and no one from Halliburton who received the memorandum and notebook disputed this interpretation.

In November 2003, five years after the merger, Halliburton attempted to amend three sub-plans of the Dresser Retiree Medical Program. Retired Dresser former employees objected and this action resulted.

An issue arose as to whether or not a specific provision of the merger agreement that dealt with the retirement benefits was properly executed because it had not been signed by the Vice President of Human Resources. This signature was required in the Dresser plan for the Retiree Medical Program.

The court determined that even if the Vice President's signature was required, the amendment was ratified by the company's subsequent actions. First, the shareholders of Halliburton and Dresser approved the merger agreement four months after the agreement was executed. Second, Halliburton administered its obligations the Dresser Retiree Medical Program for five years following the merger. Thus, even if the plan had not been properly adopted, subsequent actions of Halliburton and Dresser had impliedly authorized it.

This rationale is followed in Washington. In *Barnes v. Treece*, 15 Wn.App. 437; 549 P.2d 1152 (1976) the court noted: "The basic inquiry to determine whether an implied ratification has occurred is whether the facts demonstrate an intent to affirm, to approve, and to act in furtherance of the contract." *Supra,* at 443-444. Rupp wants to affirm the results of the auction and the contract, i.e., the Deed of Trust between Libey and the Bank of Whitman. All of Libey's actions certainly point to his intent to affirm his recording of the Notice of Trustee's Sale.

In *Barnes*, the plaintiff brought an action against a corporate vice president and the company. The Superior Court entered a judgment only against the corporate vice president and not against the company. Warren Treece was an agent for and an owner of his company, Vend-A-Win, Inc. The plaintiffs claimed that Vend-A-Win, Inc. ratified the contract between him and Treece.

Vend-A-Win, Inc. produced punchboards. Treece testified before the Gambling Commission that there were no "crooked" punchboards and stated if anyone could produce one, he would pay them $100,000. Barnes had been a bartender several years before this happened and was in possession two crooked punchboards. He brought them to Vend-A-Win, Inc.'s office, met Treece and gave him one of the two crooked boards. Later, both Barnes and Treece testified again before the Gambling Commission and Barnes produced the second crooked board. Treece refused to pay him $100,000 and Barnes sued.

The court determined that Vend-A-Win, Inc. did not cloak Treece

with apparent authority to make the contract and did not ratify it. The principal can impliedly ratify the actions of an agent if it (1) receives, accepts, and retains benefits from the contract, (2) remains silent, acquiesces, and fails to repudiate or disaffirm the contract, or (3) otherwise exhibits conduct demonstrating an adoption and recognition of the contract as binding. Rupp asserts that all three parts of this test are satisfied here. Once Libey became the Successor Trustee, he certainly conducted himself in a manner that shows he adopted the Notice of Trustee's Sale by mailing it to Uribe, posting at the property and going through with the foreclose sale and executing the Deed of Trust to the Bank.

In *Udall v. TD Escrow Services, Inc.*, 159 Wn. 2d 903, 154 P.3d 882 (2007), the trustee communicated via telephone, the opening bid for that day's sale to the sales company. The sales company then mistakenly bid $100,000 less than what they had been authorized to bid; $159,421.20 to $59,422.20. The auctioneer accepted the bid, said "sold," and the deal was done. The trustee refused to deliver the deed claiming there had been a procedural irregularity that voided the sale. The court held that insufficiency of price was not an irregularity that would void a sale and that the auctioneer had apparent authority, based on the buyer's knowledge, to sell the property. In our case, once Libey was appointed as Successor Trustee two hours after he had recorded the Notice of Trustee's Sale, he was the Trustee, properly appointed, and all of the actions he took

after that were valid. Uribe provides no reason why these actions were not valid.

Further, as Successor Trustee, he hired the auctioneer to auction the property and when the Bank of Whitman bought it and the auctioneer declared "sold," he did so with not only apparent authority but with the actual authority to sell the property. When that occurred, a contract was created between the auctioneer and the Bank of Whitman and the sale was completed. Under *Udall*, when the auctioneer dropped the gavel and accepted the Bank of Whitman's bid, the sale was completed. The Bank of Whitman then had the authority to sell the property to Rupp.

VII. CONCLUSION

This Court should affirm the decision of the trial court and affirm the dismissal of the Petitioners' case in its entirety.

DATED this 9TH day of SEPTEMBER, 2014.

Respectfully Submitted,

LANDERHOLM, P.S.

MICHAEL SIMON, WSBA No. 10931
Attorneys for Respondents

APPENDICES

1. Motion to Amend Complaint

2. *Universal Life Church v. GMAC Mortgage Corporation*, No. C06-651RSM, 2007 U.S. Dist. Lexis 29333 (WD Wash. Apr. 20, 2007)

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THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR BENTON COUNTY

MICHAEL URIBE and HELEN URIBE husband and wife, Plaintiffs, vs. LIBEY, ENSLEY & NELSON, PLLC, a Washington professional limited liability company; GARY LIBEY and JANE DOE LIBEY, husband and wife and the marital community comprised thereof, JAMES and JANE DOE TRIBETT, husband and wife and the marital community, WILLIAM E. and JANE DOE KNOX, husband and wife; and JOHN AND JANE DOES 1-20, Defendants.	Case No. 11-2-02670-9 PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT TO ADD ADDITIONAL DEFENDANTS AND ADDITIONAL CAUSES OF ACTION

I. MOTION

COMES NOW the plaintiffs, MICHAEL AND HELEN URIBE, husband and wife, ("Plaintiffs" herein) by and through their attorney, Bernard G. Lanz of The Lanz Firm, P.S., and move this court for leave to amend their Amended Complaint to add additional parties and allege additional causes of action based on the recent discovery provided by the defendant, Gary Libey.

The proposed 2nd Amended Complaint is attached hereto as Appendix A.

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This motion is based on Civil Rule 15 and the allegations set forth in Appendix A.

II. STATEMENT OF CASE

The facts and issues are set forth in the 2nd Amended Complaint.

III. ARGUMENT

ISSUE: SHOULD PLAINTIFFS BE GRANTED LEAVE TO AMEND THEIR COMPLAINT TO ADD ADDITIONAL PARTIES AND CAUSES OF ACTION?

CR 15(a) provides in pertinent part:

> [A] party may amend his pleadings only by leave of court or by written consent of the adverse party; and leave shall be freely given where justice so requires.

In *Caruso v. Local 690*, 100 Wn.2d 348, 670 P.2d 240 (1983), moving party delayed its motion for amendment until some five years and four months after the filing of the original complaint and within weeks of trial. In upholding the trial court's grant of leave to amend the Supreme Court explained the proper application of CR 15 as follows:

> The purpose of pleadings is to 'facilitate a proper decision on the merits'... and not to erect formal and burdensome impediments to the litigation process. Rule 15 of the Federal Rules of Civil Procedure, from which CR 15 was taken, 'was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result'... CR 15 was designed to facilitate the same ends.

Id., at 349, citations omitted.

Here, no prejudice will result to defendants (or any other party) from this amendment and this is a very complicated case with multiple defendants. It was only recently that the defendant Libey produced documents that clearly established multiple causes of action against him and the Bank of Whitman and the other defendants. There is certainly more than adequate time for the defendants prepare its additional defenses based on information they just recently deposited.

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IV. CONCLUSION

The court should grant leave to amend plaintiffs' Amended Complaint to add additional defendants and causes of action, as set forth in the attached Appendix A ("2nd Amended Complaint.") By doing so, the court can assure that all of the disputes outstanding between and among these parties are fully, fairly, and economically litigated in one action.

DATED this 12th day of June 2012.

THE LANZ FIRM, P.S.:

By: _____
Bernard G. Lanz, WSBA #11097
Attorney for Plaintiffs Uribe

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THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR BENTON COUNTY

MICHAEL URIBE and HELEN URIBE husband and wife,

Plaintiffs,

vs.

LIBEY, ENSLEY & NELSON, PLLC, a Washington professional limited liability company; GARY LIBEY and JANE DOE LIBEY, husband and wife and the marital community comprised thereof, JAMES and JANE DOE TRIBETT, husband and wife and the marital community, WILLIAM E. and JANE DOE KNOX, husband and wife; TOM HAMMONS and JANE DOE HAMMONS, husband and wife and the marital community; CRAIG CONKLIN and JANE DOE CONKLIN; husband and wife and the marital community; BANK OF WHITMAN, now known as COLUMBIA BANK, successor in interest to the FDIC as Receiver of Bank of Whitman; RANDALL RUPP AND LUZ DARY-RUPP, husband and wife and the marital community; 7HA FAMILY, LLC, a Washington limited liability company; and JOHN AND JANE DOES 1-20,

Defendants.

Case No.: 11-2-02670-9

2nd AMENDED COMPLAINT TO VACATE TRUSTEE'S SALE FOR VIOLATIONS OF RCW 61.24 et seq., FOR CONVERSION AND FOR DAMAGES FOR VIOLATIONS OF RCW 61.24 et seq., FOR CIVIL CONSPIRACY, FOR VIOLATIONS OF THE CONSUMER PROTECTION ACT AND FOR VIOLATIONS OF CIVIL RICO

[PROPOSED]

APPENDIX A

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COMES NOW the plaintiffs, MIKE URIBE and HELEN URIBE, husband and wife (the "Plaintiffs" herein), by and through their attorneys, BERNARD G. LANZ and THE LANZ FIRM, P.S., a Washington professional services corporation and ROBERT M. SEINES, Attorney at Law, and alleges as follows:

1.0 PARTIES

1.1 The Plaintiffs, MIKE URIBE and HELEN URIBE, are husband and wife and constitute a marital community under the laws of the State of Washington (hereinafter referred to as the "Plaintiffs"). All acts alleged herein were for and on behalf of the marital community and the individuals of which it is comprised. The Plaintiffs were also the fee owners of the real property, situated in Benton County, Washington, legally described in the Trustee's Deed.

1.2 Defendant, LIBEY, ENSLEY & NELSON, PLLC, is a Washington Professional Limited Liability Company, existing under the laws of the State of Washington (hereinafter referred to as one of the "Defendants" when referring to all the defendants collectively, other than Defendants Rupp and 7HA, and as the "Successor Trustee" or "Libey" when referring to this Defendant individually). The Successor Trustee conducted the trustee's sale that resulted in the Bank of Whitman becoming the fee owner of the Benton County Property.

1.3 Defendants, GARY LIBEY and JANE DOE LIBEY, are husband and wife, and constitute a marital community under the laws of the State of Washington. All acts alleged herein were performed by the individuals for and on their own behalf, for and on behalf of the marital community that they comprise and for and on behalf of the Bank of Whitman (hereinafter referred to as one of the "Defendants" when referring to all the defendants collectively, other than Defendants

APPENDIX A

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Rupp and 7HA, and as the "Successor Trustee" or "Libey" when referring to this Defendant individually).

1.4 Defendants, JAMES TRIBBETT and JANE DOE TRIBBETT, are husband and wife, and constitute a marital community under the laws of the State of Washington. All acts alleged herein were performed by the individuals for and on their own behalf, for and on behalf of the marital community that they comprise and for an on behalf of the Bank of Whitman, as its President and Chief Executive Officer (hereinafter referred to as one of the "Defendants" when referring to all the defendants collectively, other than Defendants Rupp and 7HA, and as "Tribbett" when referring to this Defendant individually).

1.5 Defendants, WILLIAM E. KNOX and JANE DOE KNOX, are husband and wife, and constitute a marital community under the laws of the State of Washington. All acts alleged herein were performed by the individuals for and on their own behalf, for and on behalf of the marital community that they comprise and for an on behalf of the Bank of Whitman, as its Senior Vice President (hereinafter referred to as one of the "Defendants" when referring to all the defendants collectively, other than Defendants Rupp and 7HA, and as "Knox" when referring to this Defendant individually).

1.6 Defendants, TOM HAMMONS and JANE DOE HAMMONS, are husband and wife, and constitute a marital community under the laws of the State of Washington. All acts alleged herein were performed by the individuals for and on their own behalf, for and on behalf of the marital community that they comprise and for an on behalf of the Bank of Whitman, as one of its officers (hereinafter referred to as one of the "Defendants" when referring to all the defendants

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collectively, other than Defendants Rupp and 7HA, and as "Knox" when referring to this Defendant individually).

1.7 Defendants, CRAIG CONKLIN and JANE DOE CONKLIN, are husband and wife, and constitute a marital community under the laws of the State of Washington. All acts alleged herein were performed by the individuals for and on their own behalf, for and on behalf of the marital community that they comprise and for an on behalf of the Bank of Whitman as one of its officers (hereinafter referred to as one of the "Defendants" when referring to all the defendants collectively, other than the Defendants Rupp and 7HA, and as "Conklin" when referring to this Defendant individually).

1.8 Defendant, BANK OF WHITMAN, whose assets are now under the control of the FDIC as Receiver of Bank of Whitman, is a Washington Banking Institution registered with the state of Washington and doing business in Benton County, State of Washington (hereinafter referred to as one of the "Defendants" when referring to all the defendants collectively, other than Defendants Rupp and 7HA, and as the "Bank of Whitman" when referring to this Defendant individually). The Bank was the fee owner of the Benton County Property, by virtue and as a result of a trustee's sale conducted on December 17, 2010 in Benton County, Washington by the Successor Trustee. The Bank of Whitman resold the Benton County Property to RANDALL RUPP AND LUZ DARY-RUPP and 7HA FAMILY, LLC, sometime after the trustee's sale on December 17, 2010.

1.9 Defendants, RANDALL RUPP AND LUZ DARY-RUPP, are believed to be husband and wife, and constitute a marital community under the laws of the State of Washington. All acts alleged herein were performed by the individuals for and on their own behalf, for and on behalf of the marital community that they comprise (hereinafter referred to as the "Defendant Rupp" when

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when referring to this Defendant individually). Defendant Rupp is one of the current owners of the Benton County Property.

1.10 Defendant, 7HA FAMILY, LLC, is believed to be a Washington limited liability company and the other owner of the Benton County Property (hereinafter referred to as the "Defendant 7HA" when referring to this Defendant individually).

1.11 Defendant Rupp and Defendant 7HA are named in this proceeding solely as the co-owners of the Benton County Property. The only affirmative relief sought against the Secondary Defendants is to vacate the trustee's sale that the Defendants conducted to acquire title to the Benton County Property. The Bank of Whitman then sold the Benton County Property to the Defendant Rupp and Defendant 7HA.

2.0 JURISDICTION AND VENUE

2.1 Jurisdiction is proper in Benton County Superior Court.

2.2 Venue is proper in this court as the Property that is the subject of this lawsuit is situated in Benton County, Washington and the trustee's sale occurred therein.

3.0 FACTS

3.1 The Plaintiffs are the owners of an excavation company doing business as Uribe, Inc. The Plaintiffs have been doing business in Benton County and other counties in the State of Washington and other states for over forty-five (45) years.

3.2 In addition to operating an excavation company, the Plaintiffs were developing a certain parcel of real property situated in Benton County, Washington into 47, 2.5 acre residential/commercial lots valued at approximately $3.76 million at the time (e.g. the Benton County Property). This development was part of a 1,000 acre parcel that the Plaintiffs' owned and

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the entire 1,000 acre parcel, including the residential/commercial lots, was worth substantially more than $3.76 million at the time.

3.3 The development was financed, in part, by the Plaintiffs themselves and from a line of credit from the Bank of Whitman. The Plaintiffs' line of credit was secured with the Benton County Property, 173 acres in the City of Kennewick and with the heavy equipment used in the Plaintiffs' excavation business (referred to herein as the "Personal Property").

3.4 The Bank of Whitman, Defendants Tribbett, Knox, Hammons and Conklin alleged that the Benton County obligation was in default.

3.5 Defendants Tribbett and Knox hired Defendant Libey as the Successor Trustee to non-judicially foreclose two separate deeds of trusts securing two separate promissory notes for each of the properties being foreclosed, namely the "Benton County Property" and the "Franklin County Property." The Benton County Property was also secured with the Personal Property Uribe used in his excavation business.

3.6 Libey, the Successor Trustee, and Defendants, Tribbett and Knox, together planned the non-judicial foreclosures of the Benton County and Franklin County obligations and the replevin of Uribe's Personal Property. Libey, the Successor Trustee, was charged with conducting the foreclosures and the replevin action and he and defendants Tribbett, Knox, Conklin and Hammons acknowledged the following dilemma relating to the multiple foreclosures:

> I understand one parcel *(Benton County)* is worth a lot more than the debt and the other is worth a lot less than its debt *(Franklin County)*. Atty Crane Berdall, who is the attorney for the CRP tenant, who will lose his CRP share after the foreclosure, called me and said they may bid at the sale *(Benton County)* since the land is worth a lot more than the debt against it. On the other hand the land in Franklin County is worth a lot less, so if a sale happens and someone bids more than the BW debt, the BW is faced with losing any equity in the piece. So, if you can get a deed in lieu, then we could of course avoid this dilemma.

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Libey's e-mail to Tribbett, Hammons and Lancaster dated September 21, 2010 (LIBEY 00819)

3.7 Discussions then ensued by and among these defendants about how to resolve the dilemma. Libey, Tribbett, Knox, Conklin and Hammons came up with the following resolution:

> I suspect the BW will bid up to the fmv of the Franklin County property of $600k, although the debt is close to $2.4m, and then roll the excess debt into the second sale whereby the BW would bid up to or close to the $1.4m fmv of the Benton County land to maximize the value of both pieces of land due to the cross-collateralization as explained below. I have been contacted by an attorney [Crane Berdgall] who says he has a client interested [the tenant/crp tenant] who will likely bid on the Benton county land because the land may have $1m in equity. The Benton County Deed of Trust contains a cross-collateralization clause which states in part that in addition to Note referenced; the Deed of Trust also secures all other indebtedness from Uribe to the BW, which is great of course. However, Uribe may take issue with me as the trustee taking the excess money from the bidder and applying it to the other loan. If I get sued as trustee by these borrowers or any third party who may be involved, then I need full and complete indemnification from the BW [and so does Tim Esser]. I may have to resign as trustee because of liability concerns if indemnification is not granted.

Libey's e-mail to Knox, Conklin and Hammons dated November 9. 2010 (LIBEY 00813-00814.

3.8 To protect himself from any liability for his these actions, Libey requested an "Indemnity Agreement" from Bank of Whitman in case Libey, as the Successor Trustee, takes "...excess money from the bidder and applies it to the other loan" and then gets sued by Uribe." Id. The "Indemnity Agreement" protects Libey from liability for: "....any acts, errors, or omissions as trustee or successor trustee to any deed of trust foreclosure action." Id. Libey was correct in asking for an indemnity to protect him from liability for such "acts, errors, or omissions."

3.9 The DTA governing non-judicial foreclosures generally prohibits a "deficiency" against the "borrower" and permits a "deficiency" in only two, very limited situations—if the borrower converts rent or wastes the property (RCW 61.24.100). In all other situations, the

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"borrower" has no liability for any portion of the foreclosed debt that exceeds the fair market value of the property (e.g. a "deficiency").

3.10 The Bank of Whitman, the Defendants Tribbett, Knox, Conklin, Hammons and the Successor Trustee, Libey, nonetheless and contrary to the DTA, decided to cross-collateralize the Benton County obligation with the portion of the Franklin County obligation that exceeded the fair market value of the Benton County Property. Under RCW 61.24.100, however, only a "guarantor" can be held liable for a "deficiency" and a "borrower" cannot be a "guarantor" under the DTA and the DTA treats them both separately for that reason.

3.11 Formulating the foreclosure strategy in a way to deprive Uribe or a cash bidder of the Benton County Property was important. Libey, Tribbett, Knox, Conklin and Hammons were acutely aware of the interest of a potential bidder in acquiring the Benton County Property at the trustee's sale and the $1 million in equity in the Benton County Property:

> .....I have been contacted by an attorney (Crane Berdgall) who says he has a client (the tenant/crp farmer) who will likely bid on the Benton county land because the land may have $1m equity.....

Id.

3.12 Based on the possibility that someone may outbid Bank of Whitman for the alleged amount claimed due in the Notice of Trustee's Sale (e.g. $420,000) for the Benton County Property, the Bank of Whitman, Tribbett, Knox, Conklin, Hammons and the Successor Trustee, Libey conspired to bid in more debt on the Benton County obligation than was due and owing by adding the amount due on Franklin County obligation, less its fair market value, in blatant violation of RCW 61.24.100. Id.

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3.13 After the Notices of Trustee's Sale for both properties were purportedly given by Libey, more strategy discussions ensued by and among the Defendants Tribbett, Knox, Hammons, Conklin, all Bank of Whitman officers, and Libey, the Successor Trustee, on how to obtain both properties at the trustee's sales (e.g. to "avoid this dilemma"). In an e-mail in early December 2010 these same individuals discussed how much to bid on each property. The aforementioned e-mail includes the title company's analysis about how to foreclose two deeds of trust on two parcels of property securing *one* promissory note and obtain title insurance after the trustee's sale within the parameters of *Donovick v. Seafirst*, 111 Wash. 2d 413 (1988).

3.14 Notwithstanding whether *Donovick* applies to the situation of foreclosing two deeds of trust securing the repayment of *two* promissory notes, as in this case, the Bank of Whitman, Defendants Tribbett, Knox, Conklin, Hammons, Libey and the title company decided to proceed to the trustee's sale in the method and manner set forth in the *Donovick* case by foreclosing one property as quickly after the other as was possible.

3.15 Knowing that the Franklin County obligation (approx. $2.4 million) exceeded its fair market value (approx. $400,000) by about $2 million and that no one was going to bid any more than its fair market value (e.g. $400,000) this meant "taking" excess debt from the Franklin County obligation (e.g. the "deficiency") and transferring the "deficiency" to the Benton County obligation (e.g. to illegally "cross-collateralize" the Benton County obligation with enough debt from Franklin County obligation to open the bid at the fair market value for the Benton County property (approx. $1.2 million)).

3.16 The Notices of Trustee's Sale for both properties are in accord with the procedures set forth in the *Donovick* case. The Trustee's Sale for the Franklin County Property (the under-secured

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property) was set for 10:00 a.m. and the trustee's sale for the Benton County property (the over-secured property) was set for 11:00 a.m. Both Notices of Trustee's Sale explicitly stated that the amount due on each obligation was limited to the amount due on the promissory note secured thereby. There was no notice in either of the Notices of Trustee's Sale that indicated the Successor Trustee was going to "take" debt from one obligation and "give" that portion of the debt to the other obligation as was eventually done by the Successor Trustee, Libey.

3.17 This course of conduct of treating each of the loans separately and distinctly from the other in both Notices of Trustee's Sale made it clear that any excess obligation from one obligation or the other would *not* be "cross-collateralized" with the other obligation. Libey never notified Uribe that this course of conduct was changing or had been changed and the trustee's sales proceeded under those Notices of Trustee's Sales. Having given no notice of his intention to change his course of conduct, Libey, as the Successor Trustee, had no right to do so.

3.18 Libey sold the Franklin County property first at 10:00 a.m. on December 17, 2010. Libey then sold the Benton County property at 11:00 a.m. on December 17, 2010. The Trustee's Deed for the Franklin County property states:

> ...the trustee then and there sold at the public auction to said Grantee the highest bidder therefor, the property hereinabove described for the sum of Three Hundred Ninety Thousand Dollars ($390,000) cash ***by satisfaction in full of the obligation then secured by said deed of trust***, together with all fees, costs and expenses as provided by statute.

3.19 With the Franklin County obligation satisfied in full, Libey had no "deficiency" to cross-collateralize to the Benton County obligation. Any further proceedings on that obligation were illegal under the DTA because there was no obligation in default to foreclose, much less any obligation whatsoever to foreclose.

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3.20 The Bank of Whitman, Defendants Tribbett, Knox, Conklin and Hammons, Bank of Whitman officers, and the Successor Trustee, Libey, then illegally transferred the non-existent "deficiency" from the Franklin County obligation to the Benton County obligation and bid $1.2 million in cash for the Benton County Property. Transferring the "excess debt" (e.g. the "deficiency") from the Franklin County obligation to the Benton County obligation all but eliminated the potential for being outbid by the CRP tenant (e.g. "chilled the bidding"). This bid was in violation of the DTA and had the intended effect of chilling the bidding to make sure that the Defendants and Libey's client, the Bank of Whitman, acquired Uribe's most valuable property—the Benton County Property.

3.21 Libey, the Successor Trustee, and BW's officers, Tribbett, Knox, Conklin and Hammons also intentionally converted the proceeds from the sale of the Uribes' Personal Property. Bank of Whitman, by and through the Defendants, simultaneously with the non-judicial foreclosures described above, sued Uribe for the replevin of Uribe's Personal Property that was pledged as collateral for the Benton County obligation. Uribe's Personal Property was replevied and eventually sold in a public auction and, at least, $271,000 in net proceeds was generated. Applying these proceeds to the Benton County obligation would have reduced the amount due on that obligation to approximately $149,000 ($420,000 - $271,000 =$149,000).

3.22 The Defendants were all fully aware of the auction of Uribe's Personal Property and the net proceeds it generated, as well as Libey who was the Bank of Whitman's lawyer in the replevin action. Libby didn't withdraw as the Bank of Whitman's lawyer in the replevin action until sometime in October 2010, well after the non-judicial foreclosure was allegedly commenced.

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3.23 Notwithstanding actual knowledge of the pending replevin action and his duties as the Successor Trustee, Libey and the Defendants failed to inquire or ignored whether the proceeds from the sale Uribe's Personal Property were available to apply in reduction of the Benton County obligation. Had they done so and as Libey should have done under the DTA, the auction company would have told them that net proceeds were available to apply in reduction of the Benton County obligation. Having such knowledge, which was readily available, Libey, as Successor Trustee, should have, given notice to Uribe that the amount due on the Benton County obligation was now reduced to approximately $149,000.

3.24 When Libey, the Successor Trustee, finally checked 1-1/2 years after the Benton County trustee's sale, he discovered that the sale of Uribe's personal property netted proceeds due and owing Uribe in the amount of $271,000. In effect, the Benton County property was sold for approximately $149,000 ($426,000 minus $271,000) or $12.5% of $1.2 million (Bank of Whitman's valuation) or 10% of $1.5 million (Bankruptcy Court's valuation).

3.25 By the time the proceeds from the sale of Uribe's Personal Property were delivered to the Bank of Whitman, both non-judicial foreclosures were completed by satisfaction in full satisfaction of the obligations secured thereby. The net proceeds from the sale of Uribe's Personal Property were paid *after* both of the aforementioned trustee's sales concluded by satisfying both of those obligations satisfied in full. Consequently, not only did Bank of Whitman obtain both of Uribe's real properties, it also obtained the net proceeds from the sale of Uribe's Personal Property in the amount of, at least, $271,000--the "Grand Slam" for the Defendants.

3.26 Uribe, on the other hand, lost real property worth, at least $1.5 million (according to the Bankruptcy Court valuation) plus, at least, $271,000 in cash.

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3.27 Libey, the "Successor Trustee," however, was never vested with the statutory authority to give the Notice of Trustee's Sale and any and all acts pursuant to the invalid Notice of Trustee's Sale have no legal significance. Chicago Title signed the "Resignation and Appointment of Successor Trustee" (hereinafter "RAST") on August 26, 2010. The RAST was finally recorded by Defendant Libey *at 4:02:18 p.m. on September 8, 2010.* The Notice of Trustee's Sale for the Benton County property *was recorded on September 8, 2010 at 1:57:53 p.m.*, two hours *before* the RAST was recorded.

3.28 The RAST empowers the Successor Trustee and the Successor Trustee has no powers until the RAST is recorded:

> ...*ONLY* upon recording the appointment of successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of the original trustee.

RCW 61.24.010(2) (emphasis added):

3.29 RCW 61.24.040 provides that a deed of trust foreclosed under the DTA shall be foreclosed by giving the Notice of Trustee's Sale in the form provided for therein. The Successor Trustee, however, must be "vested with all the powers of the original trustee" before it can "give" the Notice of Trustee's Sale. RCW 61.24.040(1) requires: "At least ninety days before the sale, the *trustee* shall:....."

3.30 Libey was not the Successor Trustee at the time the Notice of Trustee's Sale was recorded and/or given and the statutory authority to conduct a trustee's sale never vested in Libey until *after* the Notice of Trustee's Sale was recorded and/or given and by then it was too late--the Notice of Trustee's Sale invalid and any further proceedings under that Notice of Trustee's Sale were illegal under the DTA.

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3.31 The Trustee's Deed was invalid for the same reason. Libey was not "vested with all the powers of the original trustee" at the time the Notice of Trustee's Sale was given. Absent a valid, recorded Notice of Trustee's sale, the statutory prerequisites for a non-judicial foreclosure required by RCW 61.24.040 (e.g. giving and recording the Notice of Trustee's Sale and the Notice of Foreclosure) remained unfulfilled and the recitals otherwise made by the Successor Trustee in the Trustee's Deed were materially false based on a review of the real property records themselves and of no legal significance:

> ...This conveyance is made pursuant to the powers, including the power of sale, conferred upon said Trustee by that certain Deed of Trust between.....and by that certain RAST recorded on September 8, 2010, under Benton County Auditor's File No. 2010-025855.....;

3.32 This conclusory recital statement in the Trustee's Deed is contrary to the actual facts and the statement itself is inadequate to demonstrate compliance with the DTA. Procedural irregularities, such as those divesting a trustee of its statutory authority to sell the property, can invalidate the sale. Here, the Successor Trustee was never vested with the authority to give the Notice of Trustee's Sale until after it was given and/or recorded and that procedural irregularity, coupled with the grossly inadequate sales price for the Benton County Property and the other material, irregularities justify setting aside the trustee's sale.

3.33 Defendant Libey, as "Successor Trustee" affirmatively represented in the Trustee's Deed that the *cash sales price* for the Benton County Property was $1.2 million. From and after the Trustee's Sale through and including the date of this 2nd Amended Complaint, despite written demand to do so from Plaintiffs' counsels, the Successor Trustee refuses to deposit the difference between the cash sales price of $1.2 million and the amount due and owing the Bank of Whitman at

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the time of the Trustee's Sale. Now, disingenuously, Libey, as the purported "Successor Trustee" claims there were no such sales proceeds, as he represented in the Trustee's Deed.

3.34 As of the date of this Complaint, the Bank of Whitman, Defendants Tribbett and Knox, the Successor Trustee and/or Defendant Libey have never deposited the proceeds from the Trustee's Sale in excess of the amount due and owing the Bank into the court registry.

4.0 FIRST CAUSE OF ACTION: FAILURE TO DEPOSIT PROCEEDS FROM SALE INTO COURT REGISTRY IN VIOLATION OF RCW 61.24.080

4.1 Plaintiffs re-allege each and every allegation in paragraphs 1.0 through 3.34 above.

4.2 The Successor Trustee, Libey and the Defendants, acting in concert, refused, after demand was made to the Successor Trustee, Libey, to deposit the surplus funds from the proceeds of the sale of the Benton County Property into the court registry, estimated to be in the amount of at least $800,000.00 and more after the proceeds from the UCC sale of the Personal Property are applied in reduction of the foreclosed obligation.

4.3 Such deposit is required by RCW 61.24. 080(3).

4.4 The Successor Trustee, Defendant Libey, the Bank of Whitman and Defendants Tribbett, Knox, Conklin and Hammons were all acting in concert and in violation of RCW 61.24. 080(3) by failing to deposit the surplus funds into the court registry.

4.5 Uribe has suffered substantial damages as a result of the Defendants failure to comply with RCW 61.24. 080(3).

5.0 SECOND CAUSE OF ACTION: COLLUSIVE BID IN VIOLATION OF RCW 61.24.135

5.1 Plaintiffs re-allege each and every allegation in paragraphs 1.0 through 4.5 above.

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5.2 The Bank of Whitman, Defendants Tribbett, Knox, Hammons and Conklin, acting in concert with the Successor Trustee, Libey, conspired to raise the bid for the Benton County Property at the trustee's sale to chill any competitive bids. This was necessary because these defendants knew that there was at least one interested bidder for the Benton County Property.

5.3 The Bank of Whitman wanted to acquire the Benton County Property because it was the more valuable of the two properties being foreclosed. The problem was the Franklin County obligation was under-secured and the Benton County obligation was over-secured.

5.4 Bank of Whitman, Defendants Tribbett, Knox, Hammons and Conklin, acting in concert with the Successor Trustee, Libey, decided that the Franklin County obligation (approx. $2.4 million) exceeded its fair market value (approx. $400,000) by about $2 million. Knowing that no one would pay more for the Benton County Property than its fair market value (e.g. $1.2 million), the conspirators had to "take" excess debt from the Franklin County obligation (e.g. the debt that exceeded the fair market value of the Franklin County obligation or the "deficiency") and transfer the "deficiency" to the Benton County obligation (e.g. to "cross-collateralize" the Benton County obligation with enough of the remaining debt from Franklin County obligation to open the bid at the fair market value for the Benton County property (approx. $1.2 million)). An opening bid in such an amount equal to the fair market value for the Benton County Property would certainly eliminate the potential for being outbid by the CRP tenant (e.g. "chilled the bidding") or another third party bidder. This bid was in violation of the DTA and had the intended effect of chilling the bidding to make sure the Defendants' client, Bank of Whitman, wrongfully acquired Uribe's most valuable property—the Benton County Property.

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5.5 Irrespective of the legality of the cross-collateralization issue, Bank of Whitman and Defendants Tribbett and Knox and Libey, the Successor Trustee, foreclosed a non-existent debt. The Franklin County Trustee's Deed clearly and unequivocally recites that the obligation secured by the Franklin County Property has been *satisfied in full*. Therefore, there was no "deficiency" to transfer from the Franklin County Property to the Benton County Property.

5.6 The conspiracy was for the sole benefit of the Bank of Whitman and Defendants Tribbett, Knox, Conklin and Hammons and Libey, the Successor Trustee, in derogation of Uribe's rights in the Benton County Property and in violation of RCW 61.24.135 (collusive bidding) and RCW 61.24.100 (anti-deficiency provision of the DTA), by reference, RCW 19.86, et seq., as a deceptive and unfair act or practice under the Consumer Protection Act.

5.7 The Trustee's Sale is void for the collusive bidding and for the failure to give the Plaintiffs' the credit due and owing them from the sale of their Personal Property.

5.8 All such actions were undertaken for the sole purpose of depriving the Plaintiffs' of the Benton County Property and the proceeds from the sale of their Personal Property in the amount of, at least, $271,000.

6.0 THIRD CAUSE OF ACTION: COLLUSIVE BID IN VIOLATION OF RCW 19.86 et seq.

6.1 The Plaintiffs re-allege each and every allegation in paragraphs 1.0 through 5.8 above.

6.2 As described in paragraphs 3.0 through 3.33 above, the Bank of Whitman and Defendants Tribbett, Knox, Hammons and Conklin and Libey, the Successor Trustee, engaged in unfair or deceptive acts or practices in trade or commerce.

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6.3 Defendants' conduct was and is deleterious to the public interest because, among other things, it occurred in connection with the defendants' businesses, was part of a planned pattern of conduct and has the potential for repetition. Plaintiffs were damaged by these violations of the Consumer Protection Act, and entitled to damages for their losses, treble damages as provided by the Act and attorney's fees and costs incurred.

7.0 FOURTH CAUSE OF ACTION: CONVERSION

7.1 The Plaintiffs re-allege each and every allegation in paragraphs 1.0 through 6.3 above.

7.2 The Defendants were all acting in concert with the Successor Trustee and/or Defendant Libey, to willfully and maliciously convert Plaintiffs' interest in the Benton County Property by the wrongful foreclosure and the wrongful retention of the proceeds from the sale of Uribe's Personal Property.

7.3 At the time of the conversion of the Benton County Property, the value of Benton County Property was, at least, $1.5 million and the proceeds from the sale of Uribe's Personal Property were, at least, $271,000. The amount Uribe owed the Bank of Whitman on the Benton County obligation was approximately $149,000 and Plaintiffs are entitled to recover, at least, $1.35 million depending on the fair market value of the Benton County Property at the time it was foreclosed, which is more likely than not higher and, at least, $271,000 in cash from the conversion of the proceeds from the sale of Uribe's Personal Property.

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8.0 FIFTH CAUSE OF ACTION: CIVIL CONSPIRACY

8.1 The Plaintiffs re-allege each and every allegation in paragraphs 1.0 through 7.3 above.

8.2 The Defendants, acting in concert and pursuant to a detailed plan to accomplish an unlawful purpose, willfully and maliciously converted the Plaintiffs' interest in the Benton County Property by the wrongful foreclosure of that property and the wrongful retention of the proceeds from the sale of Uribe's Personal Property.

8.3 This combination of the Defendants, acting in concert and pursuant to a plan to accomplish an unlawful purpose by unlawful means and the agreement by and among the defendants to do so constitutes a civil conspiracy.

8.4 Uribe is entitled to the damages the defendants caused by the conspiracy to convert the Benton County Property and Uribe's Personal Property and the proceeds from its sale.

9.0 SIXTH CAUSE OF ACTION: VIOLATION OF §1962(d) of RICO

9.1 The Plaintiffs re-allege each and every allegation in paragraphs 1.0 through 8.4 above.

9.2 The Bank of Whitman and Defendants Tribbett, Knox, Hammons, Conklin and Libey, the Successor Trustee, pursuant to a mutual understanding to attempt to accomplish an offense in violation of §1962 (a), (b) and/or (c) of RICO, while being employed or associated by an enterprise, engaged in activities that affected interstate commerce through a pattern of racketeering activity in the manner alleged.

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9.3 These same defendants knowingly and willingly became a member of the conspiracy by words and actions that objectively indicated their agreement to conduct, directly or indirectly, the affairs of the enterprise known as the Bank of Whitman through a pattern of racketeering activity.

9.4 All of the Defendants, either directly or indirectly, committed at least one overt act in an effort to accomplish the object or the purpose of the conspiracy which was to convert the Benton County Property and the proceeds from the sale of Uribe's Personal Property to and for the benefit of the Bank of Whitman.

10.0 SEVENTH CAUSE OF ACTION: VACATE THE TRUSTEE'S SALE FOR VIOLATIONS OF RCW 61.24 et seq.

10.1 The Plaintiffs re-allege each and every allegation in paragraphs 1.0 through 9.4 above.

10.2 The trustee's sale resulted in selling the Benton County Property for 10% of its fair market value, according to the Bankruptcy Court valuation, a grossly inadequate sales price. In addition, there were many circumstances surrounding the trustee's sale indicating additional unfairness that provide sufficient equitable grounds to set aside the non-judicial foreclosure.

10.3 Those additional circumstances include, without limitation, Libey never had the authority to conduct the trustee's sale because he wasn't appointed the Successor Trustee until after he gave the Notice of Trustee's Sale, Libey, pursuant to the conspiracy by and among the Primary Defendants, cross-collateralized the Benton County obligation with a portion of the Franklin County obligation that was satisfied in full, intentionally mislead Uribe with the Notices of Trustee's Sales that no cross-collateralization would occur by treating both the Benton County and Franklin County obligations separately in the Notices of Trustee's Sales for the Benton County Property and the Franklin County Property, with full knowledge of the pending auction for Uribe's Personal Property,

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failed to give Uribe credit in the amount of, at least, $271,000 from the proceeds of that auction or to even check with the auctioneer about when those proceeds would be available, made materially false statements in the trustee's deed with respect to Libey's power and authority to conduct the trustee's sale and that $1.2 million, in cash, was paid for the property at the trustee's sale when no cash was received by Libey, and chilled the bidding so that Bank of Whitman would be the successful bidder at the trustee's sale of the Benton County Property.

10.4 The DTA must be strictly construed in Uribe's favor because of the lack of judicial oversight in conducting non-judicial sales.

10.5 The subsequent purchasers of the Benton County Property were not bona fide purchasers for value with no notice of a defect in the proceeding that led up to the purchase of the Benton County Property. The material misrepresentations by Libey in the trustee's deed were apparent from a review of the public records relating to this non-judicial sale and the public record gives notice to the world, including Rupp and 7HA, the purchasers of the Benton County Property from the Bank of Whitman, of the defect in the non-judicial foreclosure.

10.6 The trustee's sale of the Benton County Property should, therefore, be set aside and title vested in Uribe as if the trustee's sale had never occurred or, in the alternative, damages awarded against the Defendants, other than Rupp and 7HA, for the losses Uribe incurred as a result of the illegal, inequitable and outrageous actions of the Defendants and each of them.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief against all of the Defendants and each of them, jointly and severally, excluding Defendants Rupp and 7HA, except as indicated below:

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A. For judgment voiding the Trustee's Sale on the grounds the obligation foreclosed was overstated and/or paid in full and/or the sale was collusive and/or illegal, restoring title to the Benton County Property to the Plaintiffs and ejecting the Bank of Whitman and/or its successors or assigns, Defendants Rupp and 7HA, from the Benton County Property;

B. In the alternative, for judgment against the Defendants, excluding Defendants Rupp and 7HA, and each of them, jointly and severally, for the fair market value of the Benton County Property sold at the procedurally defective and collusive trustee's sale on December 17, 2010;

C. In the alternative, for judgment against the Defendants, excluding Defendants Rupp and 7HA, jointly and severally, compelling the defendants and each of them to deposit $1,200,000, cash, plus the amount of the sale proceeds from the sale of the Personal Property into the court registry;

D. In the alternative, for judgment against the Defendants, excluding Defendants Rupp and 7HA, jointly and severally, for violation of the Consumer Protection Act for an unfair and deceptive act or practice in commerce under RCW 19.86.090 for the procedurally defective and collusive Trustee's Sale in the amount of $25,000 in punitive damages, plus actual damages in the amount of the fair market value of the Benton County Property and the attorney's fees and costs of suit incurred by the Plaintiffs Uribe;

E. In the alternative, for judgment against the Defendants, excluding Defendants Rupp and 7HA, jointly and severally, for a civil conspiracy, civil RICO and conversion of the Plaintiffs' Benton County Property by the procedurally defective and collusive Trustee's Sale in the amount of in the amount of the fair market value of the Benton County Property and the attorney's fees and costs of suit incurred by the Plaintiffs Uribe;

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F. For judgment against the Defendants, excluding Defendants Rupp and 7HA, for the costs and attorney's fees incurred by the Plaintiffs in bringing this action against the Defendants pursuant to RCW 19.86, et seq., civil RICO and RCW 4.56.330; and

G. For such other and further relief as the court deems just and proper.

Dated this ____ day of June 2012.

THE LANZ FIRM, P.S.

By:_____
Bernard G. Lanz, WSBA #11097
Attorney for the Plaintiffs

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THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR BENTON COUNTY

MICHAEL URIBE and HELEN URIBE husband and wife, Plaintiffs, vs. LIBEY, ENSLEY & NELSON, PLLC, a Washington professional limited liability company; GARY LIBEY and JANE DOE LIBEY, husband and wife and the marital community comprised thereof, JAMES and JANE DOE TRIBETT, husband and wife and the marital community, WILLIAM E. and JANE DOE KNOX, husband and wife; and JOHN AND JANE DOES 1-20, Defendants.	Case No. 11-2-02670-9 ORDER GRANTING LEAVE TO AMEND COMPLAINT TO ADD ADDITIONAL PARTIES AND ADDITIONAL CLAIMS OF ACTION *[Proposed]*

This court having received and reviewed the Plaintiff's Motion for Leave to Amend Complaint to Add Additional Parties and Additional Claims of Action, having received and reviewed the responses in opposition to this motion (if any), having heard argument of counsel, having also reviewed the files and pleadings herein, and being otherwise fully advised on the merits, hereby:

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ORDERS, ADJUDGES & DECREES

1. The Plaintiff's Motion for Leave to Amend Complaint to Add Additional Parties and Additional Causes of Action is granted; and

2. The Plaintiffs may file their Second Amended Complaint as set forth in Appendix A.

DONE IN OPEN COURT this _____ day of June 2012.

_____
THE HONORABLE

Presented by:

THE LANZ FIRM, P.S.

By: _____
Bernard G. Lanz, WSBA #11097
Attorney for Plaintiffs

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THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR BENTON COUNTY

MICHAEL URIBE and HELEN URIBE husband and wife,

Plaintiffs,

vs.

LIBEY, ENSLEY & NELSON, PLLC, a Washington professional limited liability company; GARY LIBEY and JANE DOE LIBEY, husband and wife and the marital community comprised thereof, JAMES and JANE DOE TRIBETT, husband and wife and the marital community, WILLIAM E. and JANE DOE KNOX, husband and wife; TOM HAMMONS and JANE DOE HAMMONS, husband and wife and the marital community; CRAIG CONKLIN and JANE DOE CONKLIN; husband and wife and the marital community; BANK OF WHITMAN, now known as COLUMBIA BANK, successor in interest to the FDIC as Receiver of Bank of Whitman; RANDALL RUPP AND LUZ DARY-RUPP, husband and wife and the marital community; 7HA FAMILY, LLC, a Washington limited liability company; and JOHN AND JANE DOES 1-20,

Defendants.

Case No.: 11-2-02670-9

2nd AMENDED COMPLAINT TO VACATE TRUSTEE'S SALE FOR VIOLATIONS OF RCW 61.24 et seq., FOR CONVERSION AND FOR DAMAGES FOR VIOLATIONS OF RCW 61.24 et seq., FOR CIVIL CONSPIRACY, FOR VIOLATIONS OF THE CONSUMER PROTECTION ACT AND FOR VIOLATIONS OF CIVIL RICO

[PROPOSED]

APPENDIX A

THE LANZ FIRM, P.S.
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COMES NOW the plaintiffs, MIKE URIBE and HELEN URIBE, husband and wife (the "Plaintiffs" herein), by and through their attorneys, BERNARD G. LANZ and THE LANZ FIRM, P.S., a Washington professional services corporation and ROBERT M. SEINES, Attorney at Law, and alleges as follows:

1.0 PARTIES

1.1 The Plaintiffs, MIKE URIBE and HELEN URIBE, are husband and wife and constitute a marital community under the laws of the State of Washington (hereinafter referred to as the "Plaintiffs"). All acts alleged herein were for and on behalf of the marital community and the individuals of which it is comprised. The Plaintiffs were also the fee owners of the real property, situated in Benton County, Washington, legally described in the Trustee's Deed.

1.2 Defendant, LIBEY, ENSLEY & NELSON, PLLC, is a Washington Professional Limited Liability Company, existing under the laws of the State of Washington (hereinafter referred to as one of the "Defendants" when referring to all the defendants collectively, other than Defendants Rupp and 7HA, and as the "Successor Trustee" or "Libey" when referring to this Defendant individually). The Successor Trustee conducted the trustee's sale that resulted in the Bank of Whitman becoming the fee owner of the Benton County Property.

1.3 Defendants, GARY LIBEY and JANE DOE LIBEY, are husband and wife, and constitute a marital community under the laws of the State of Washington. All acts alleged herein were performed by the individuals for and on their own behalf, for and on behalf of the marital community that they comprise and for and on behalf of the Bank of Whitman (hereinafter referred to as one of the "Defendants" when referring to all the defendants collectively, other than Defendants

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Rupp and 7HA, and as the "Successor Trustee" or "Libey" when referring to this Defendant individually).

1.4 Defendants, JAMES TRIBBETT and JANE DOE TRIBBETT, are husband and wife, and constitute a marital community under the laws of the State of Washington. All acts alleged herein were performed by the individuals for and on their own behalf, for and on behalf of the marital community that they comprise and for an on behalf of the Bank of Whitman, as its President and Chief Executive Officer (hereinafter referred to as one of the "Defendants" when referring to all the defendants collectively, other than Defendants Rupp and 7HA, and as "Tribbett" when referring to this Defendant individually).

1.5 Defendants, WILLIAM E. KNOX and JANE DOE KNOX, are husband and wife, and constitute a marital community under the laws of the State of Washington. All acts alleged herein were performed by the individuals for and on their own behalf, for and on behalf of the marital community that they comprise and for an on behalf of the Bank of Whitman, as its Senior Vice President (hereinafter referred to as one of the "Defendants" when referring to all the defendants collectively, other than Defendants Rupp and 7HA, and as "Knox" when referring to this Defendant individually).

1.6 Defendants, TOM HAMMONS and JANE DOE HAMMONS, are husband and wife, and constitute a marital community under the laws of the State of Washington. All acts alleged herein were performed by the individuals for and on their own behalf, for and on behalf of the marital community that they comprise and for an on behalf of the Bank of Whitman, as one of its officers (hereinafter referred to as one of the "Defendants" when referring to all the defendants

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collectively, other than Defendants Rupp and 7HA, and as "Knox" when referring to this Defendant individually).

1.7 Defendants, CRAIG CONKLIN and JANE DOE CONKLIN, are husband and wife, and constitute a marital community under the laws of the State of Washington. All acts alleged herein were performed by the individuals for and on their own behalf, for and on behalf of the marital community that they comprise and for an on behalf of the Bank of Whitman as one of its officers (hereinafter referred to as one of the "Defendants" when referring to all the defendants collectively, other than the Defendants Rupp and 7HA, and as "Conklin" when referring to this Defendant individually).

1.8 Defendant, BANK OF WHITMAN, whose assets are now under the control of the FDIC as Receiver of Bank of Whitman, is a Washington Banking Institution registered with the state of Washington and doing business in Benton County, State of Washington (hereinafter referred to as one of the "Defendants" when referring to all the defendants collectively, other than Defendants Rupp and 7HA, and as the "Bank of Whitman" when referring to this Defendant individually). The Bank was the fee owner of the Benton County Property, by virtue and as a result of a trustee's sale conducted on December 17, 2010 in Benton County, Washington by the Successor Trustee. The Bank of Whitman resold the Benton County Property to RANDALL RUPP AND LUZ DARY-RUPP and 7HA FAMILY, LLC, sometime after the trustee's sale on December 17, 2010.

1.9 Defendants, RANDALL RUPP AND LUZ DARY-RUPP, are believed to be husband and wife, and constitute a marital community under the laws of the State of Washington. All acts alleged herein were performed by the individuals for and on their own behalf, for and on behalf of the marital community that they comprise (hereinafter referred to as the "Defendant Rupp" when

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when referring to this Defendant individually). Defendant Rupp is one of the current owners of the Benton County Property.

1.10 Defendant, 7HA FAMILY, LLC, is believed to be a Washington limited liability company and the other owner of the Benton County Property (hereinafter referred to as the "Defendant 7HA" when referring to this Defendant individually).

1.11 Defendant Rupp and Defendant 7HA are named in this proceeding solely as the co-owners of the Benton County Property. The only affirmative relief sought against the Secondary Defendants is to vacate the trustee's sale that the Defendants conducted to acquire title to the Benton County Property. The Bank of Whitman then sold the Benton County Property to the Defendant Rupp and Defendant 7HA.

2.0 JURISDICTION AND VENUE

2.1 Jurisdiction is proper in Benton County Superior Court.

2.2 Venue is proper in this court as the Property that is the subject of this lawsuit is situated in Benton County, Washington and the trustee's sale occurred therein.

3.0 FACTS

3.1 The Plaintiffs are the owners of an excavation company doing business as Uribe, Inc. The Plaintiffs have been doing business in Benton County and other counties in the State of Washington and other states for over forty-five (45) years.

3.2 In addition to operating an excavation company, the Plaintiffs were developing a certain parcel of real property situated in Benton County, Washington into 47, 2.5 acre residential/commercial lots valued at approximately $3.76 million at the time (e.g. the Benton County Property). This development was part of a 1,000 acre parcel that the Plaintiffs' owned and

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the entire 1,000 acre parcel, including the residential/commercial lots, was worth substantially more than $3.76 million at the time.

3.3 The development was financed, in part, by the Plaintiffs themselves and from a line of credit from the Bank of Whitman. The Plaintiffs' line of credit was secured with the Benton County Property, 173 acres in the City of Kennewick and with the heavy equipment used in the Plaintiffs' excavation business (referred to herein as the "Personal Property").

3.4 The Bank of Whitman, Defendants Tribbett, Knox, Hammons and Conklin alleged that the Benton County obligation was in default.

3.5 Defendants Tribbett and Knox hired Defendant Libey as the Successor Trustee to non-judicially foreclose two separate deeds of trusts securing two separate promissory notes for each of the properties being foreclosed, namely the "Benton County Property" and the "Franklin County Property." The Benton County Property was also secured with the Personal Property Uribe used in his excavation business.

3.6 Libey, the Successor Trustee, and Defendants, Tribbett and Knox, together planned the non-judicial foreclosures of the Benton County and Franklin County obligations and the replevin of Uribe's Personal Property. Libey, the Successor Trustee, was charged with conducting the foreclosures and the replevin action and he and defendants Tribbett, Knox, Conklin and Hammons acknowledged the following dilemma relating to the multiple foreclosures:

> I understand one parcel *(Benton County)* is worth a lot more than the debt and the other is worth a lot less than its debt *(Franklin County)*. Atty Crane Berdall, who is the attorney for the CRP tenant, who will lose his CRP share after the foreclosure, called me and said they may bid at the sale *(Benton County)* since the land is worth a lot more than the debt against it. On the other hand the land in Franklin County is worth a lot less, so if a sale happens and someone bids more than the BW debt, the BW is faced with losing any equity in the piece. So, if you can get a deed in lieu, then we could of course avoid this dilemma.

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Libey's e-mail to Tribbett, Hammons and Lancaster dated September 21, 2010 (LIBEY 00819)

3.7 Discussions then ensued by and among these defendants about how to resolve the dilemma. Libey, Tribbett, Knox, Conklin and Hammons came up with the following resolution:

> I suspect the BW will bid up to the fmv of the Franklin County property of $600k, although the debt is close to $2.4m, and then roll the excess debt into the second sale whereby the BW would bid up to or close to the $1.4m fmv of the Benton County land to maximize the value of both pieces of land due to the cross-collateralization as explained below. I have been contacted by an attorney [Crane Berdgall] who says he has a client interested [the tenant/crp tenant] who will likely bid on the Benton county land because the land may have $1m in equity. The Benton County Deed of Trust contains a cross-collateralization clause which states in part that in addition to Note referenced; the Deed of Trust also secures all other indebtedness from Uribe to the BW, which is great of course. However, Uribe may take issue with me as the trustee taking the excess money from the bidder and applying it to the other loan. If I get sued as trustee by these borrowers or any third party who may be involved, then I need full and complete indemnification from the BW [and so does Tim Esser]. I may have to resign as trustee because of liability concerns if indemnification is not granted.

Libey's e-mail to Knox, Conklin and Hammons dated November 9. 2010 (LIBEY 00813-00814.

3.8 To protect himself from any liability for his these actions, Libey requested an "Indemnity Agreement" from Bank of Whitman in case Libey, as the Successor Trustee, takes "...excess money from the bidder and applies it to the other loan" and then gets sued by Uribe." Id. The "Indemnity Agreement" protects Libey from liability for: "....any acts, errors, or omissions as trustee or successor trustee to any deed of trust foreclosure action." Id. Libey was correct in asking for an indemnity to protect him from liability for such "acts, errors, or omissions."

3.9 The DTA governing non-judicial foreclosures generally prohibits a "deficiency" against the "borrower" and permits a "deficiency" in only two, very limited situations—if the borrower converts rent or wastes the property (RCW 61.24.100). In all other situations, the

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"borrower" has no liability for any portion of the foreclosed debt that exceeds the fair market value of the property (e.g. a "deficiency").

3.10 The Bank of Whitman, the Defendants Tribbett, Knox, Conklin, Hammons and the Successor Trustee, Libey, nonetheless and contrary to the DTA, decided to cross-collateralize the Benton County obligation with the portion of the Franklin County obligation that exceeded the fair market value of the Benton County Property. Under RCW 61.24.100, however, only a "guarantor" can be held liable for a "deficiency" and a "borrower" cannot be a "guarantor" under the DTA and the DTA treats them both separately for that reason.

3.11 Formulating the foreclosure strategy in a way to deprive Uribe or a cash bidder of the Benton County Property was important. Libey, Tribbett, Knox, Conklin and Hammons were acutely aware of the interest of a potential bidder in acquiring the Benton County Property at the trustee's sale and the $1 million in equity in the Benton County Property:

> .....I have been contacted by an attorney (Crane Berdgall) who says he has a client (the tenant/crp farmer) who will likely bid on the Benton county land because the land may have $1m equity.....

Id.

3.12 Based on the possibility that someone may outbid Bank of Whitman for the alleged amount claimed due in the Notice of Trustee's Sale (e.g. $420,000) for the Benton County Property, the Bank of Whitman, Tribbett, Knox, Conklin, Hammons and the Successor Trustee, Libey conspired to bid in more debt on the Benton County obligation than was due and owing by adding the amount due on Franklin County obligation, less its fair market value, in blatant violation of RCW 61.24.100. Id.

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3.13 After the Notices of Trustee's Sale for both properties were purportedly given by Libey, more strategy discussions ensued by and among the Defendants Tribbett, Knox, Hammons, Conklin, all Bank of Whitman officers, and Libey, the Successor Trustee, on how to obtain both properties at the trustee's sales (e.g. to "avoid this dilemma"). In an e-mail in early December 2010 these same individuals discussed how much to bid on each property. The aforementioned e-mail includes the title company's analysis about how to foreclose two deeds of trust on two parcels of property securing *one* promissory note and obtain title insurance after the trustee's sale within the parameters of *Donovick v. Seafirst*, 111 Wash. 2d 413 (1988).

3.14 Notwithstanding whether *Donovick* applies to the situation of foreclosing two deeds of trust securing the repayment of *two* promissory notes, as in this case, the Bank of Whitman, Defendants Tribbett, Knox, Conklin, Hammons, Libey and the title company decided to proceed to the trustee's sale in the method and manner set forth in the *Donovick* case by foreclosing one property as quickly after the other as was possible.

3.15 Knowing that the Franklin County obligation (approx. $2.4 million) exceeded its fair market value (approx. $400,000) by about $2 million and that no one was going to bid any more than its fair market value (e.g. $400,000) this meant "taking" excess debt from the Franklin County obligation (e.g. the "deficiency") and transferring the "deficiency" to the Benton County obligation (e.g. to illegally "cross-collateralize" the Benton County obligation with enough debt from Franklin County obligation to open the bid at the fair market value for the Benton County property (approx. $1.2 million)).

3.16 The Notices of Trustee's Sale for both properties are in accord with the procedures set forth in the *Donovick* case. The Trustee's Sale for the Franklin County Property (the under-secured

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property) was set for 10:00 a.m. and the trustee's sale for the Benton County property (the over-secured property) was set for 11:00 a.m. Both Notices of Trustee's Sale explicitly stated that the amount due on each obligation was limited to the amount due on the promissory note secured thereby. There was no notice in either of the Notices of Trustee's Sale that indicated the Successor Trustee was going to "take" debt from one obligation and "give" that portion of the debt to the other obligation as was eventually done by the Successor Trustee, Libey.

3.17 This course of conduct of treating each of the loans separately and distinctly from the other in both Notices of Trustee's Sale made it clear that any excess obligation from one obligation or the other would *not* be "cross-collateralized" with the other obligation. Libey never notified Uribe that this course of conduct was changing or had been changed and the trustee's sales proceeded under those Notices of Trustee's Sales. Having given no notice of his intention to change his course of conduct, Libey, as the Successor Trustee, had no right to do so.

3.18 Libey sold the Franklin County property first at 10:00 a.m. on December 17, 2010. Libey then sold the Benton County property at 11:00 a.m. on December 17, 2010. The Trustee's Deed for the Franklin County property states:

> ...the trustee then and there sold at the public auction to said Grantee the highest bidder therefor, the property hereinabove described for the sum of Three Hundred Ninety Thousand Dollars ($390,000) cash ***by satisfaction in full of the obligation then secured by said deed of trust***, together with all fees, costs and expenses as provided by statute.

3.19 With the Franklin County obligation satisfied in full, Libey had no "deficiency" to cross-collateralize to the Benton County obligation. Any further proceedings on that obligation were illegal under the DTA because there was no obligation in default to foreclose, much less any obligation whatsoever to foreclose.

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3.20 The Bank of Whitman, Defendants Tribbett, Knox, Conklin and Hammons, Bank of Whitman officers, and the Successor Trustee, Libey, then illegally transferred the non-existent "deficiency" from the Franklin County obligation to the Benton County obligation and bid $1.2 million in cash for the Benton County Property. Transferring the "excess debt" (e.g. the "deficiency") from the Franklin County obligation to the Benton County obligation all but eliminated the potential for being outbid by the CRP tenant (e.g. "chilled the bidding"). This bid was in violation of the DTA and had the intended effect of chilling the bidding to make sure that the Defendants and Libey's client, the Bank of Whitman, acquired Uribe's most valuable property—the Benton County Property.

3.21 Libey, the Successor Trustee, and BW's officers, Tribbett, Knox, Conklin and Hammons also intentionally converted the proceeds from the sale of the Uribes' Personal Property. Bank of Whitman, by and through the Defendants, simultaneously with the non-judicial foreclosures described above, sued Uribe for the replevin of Uribe's Personal Property that was pledged as collateral for the Benton County obligation. Uribe's Personal Property was replevied and eventually sold in a public auction and, at least, $271,000 in net proceeds was generated. Applying these proceeds to the Benton County obligation would have reduced the amount due on that obligation to approximately $149,000 ($420,000 - $271,000 =$149,000).

3.22 The Defendants were all fully aware of the auction of Uribe's Personal Property and the net proceeds it generated, as well as Libey who was the Bank of Whitman's lawyer in the replevin action. Libby didn't withdraw as the Bank of Whitman's lawyer in the replevin action until sometime in October 2010, well after the non-judicial foreclosure was allegedly commenced.

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3.23 Notwithstanding actual knowledge of the pending replevin action and his duties as the Successor Trustee, Libey and the Defendants failed to inquire or ignored whether the proceeds from the sale Uribe's Personal Property were available to apply in reduction of the Benton County obligation. Had they done so and as Libey should have done under the DTA, the auction company would have told them that net proceeds were available to apply in reduction of the Benton County obligation. Having such knowledge, which was readily available, Libey, as Successor Trustee, should have, given notice to Uribe that the amount due on the Benton County obligation was now reduced to approximately $149,000.

3.24 When Libey, the Successor Trustee, finally checked 1-1/2 years after the Benton County trustee's sale, he discovered that the sale of Uribe's personal property netted proceeds due and owing Uribe in the amount of $271,000. In effect, the Benton County property was sold for approximately $149,000 ($426,000 minus $271,000) or $12.5% of $1.2 million (Bank of Whitman's valuation) or 10% of $1.5 million (Bankruptcy Court's valuation).

3.25 By the time the proceeds from the sale of Uribe's Personal Property were delivered to the Bank of Whitman, both non-judicial foreclosures were completed by satisfaction in full satisfaction of the obligations secured thereby. The net proceeds from the sale of Uribe's Personal Property were paid *after* both of the aforementioned trustee's sales concluded by satisfying both of those obligations satisfied in full. Consequently, not only did Bank of Whitman obtain both of Uribe's real properties, it also obtained the net proceeds from the sale of Uribe's Personal Property in the amount of, at least, $271,000--the "Grand Slam" for the Defendants.

3.26 Uribe, on the other hand, lost real property worth, at least $1.5 million (according to the Bankruptcy Court valuation) plus, at least, $271,000 in cash.

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3.27 Libey, the "Successor Trustee," however, was never vested with the statutory authority to give the Notice of Trustee's Sale and any and all acts pursuant to the invalid Notice of Trustee's Sale have no legal significance. Chicago Title signed the "Resignation and Appointment of Successor Trustee" (hereinafter "RAST") on August 26, 2010. The RAST was finally recorded by Defendant Libey *at 4:02:18 p.m. on September 8, 2010.* The Notice of Trustee's Sale for the Benton County property *was recorded on September 8, 2010 at 1:57:53 p.m.*, two hours *before* the RAST was recorded.

3.28 The RAST empowers the Successor Trustee and the Successor Trustee has no powers until the RAST is recorded:

> ...*ONLY* upon recording the appointment of successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of the original trustee.

RCW 61.24.010(2) (emphasis added):

3.29 RCW 61.24.040 provides that a deed of trust foreclosed under the DTA shall be foreclosed by giving the Notice of Trustee's Sale in the form provided for therein. The Successor Trustee, however, must be "vested with all the powers of the original trustee" before it can "give" the Notice of Trustee's Sale. RCW 61.24.040(1) requires: "At least ninety days before the sale, the *trustee* shall:....."

3.30 Libey was not the Successor Trustee at the time the Notice of Trustee's Sale was recorded and/or given and the statutory authority to conduct a trustee's sale never vested in Libey until *after* the Notice of Trustee's Sale was recorded and/or given and by then it was too late--the Notice of Trustee's Sale invalid and any further proceedings under that Notice of Trustee's Sale were illegal under the DTA.

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3.31 The Trustee's Deed was invalid for the same reason. Libey was not "vested with all the powers of the original trustee" at the time the Notice of Trustee's Sale was given. Absent a valid, recorded Notice of Trustee's sale, the statutory prerequisites for a non-judicial foreclosure required by RCW 61.24.040 (e.g. giving and recording the Notice of Trustee's Sale and the Notice of Foreclosure) remained unfulfilled and the recitals otherwise made by the Successor Trustee in the Trustee's Deed were materially false based on a review of the real property records themselves and of no legal significance:

> ...This conveyance is made pursuant to the powers, including the power of sale, conferred upon said Trustee by that certain Deed of Trust between.....and by that certain RAST recorded on September 8, 2010, under Benton County Auditor's File No. 2010-025855.....;

3.32 This conclusory recital statement in the Trustee's Deed is contrary to the actual facts and the statement itself is inadequate to demonstrate compliance with the DTA. Procedural irregularities, such as those divesting a trustee of its statutory authority to sell the property, can invalidate the sale. Here, the Successor Trustee was never vested with the authority to give the Notice of Trustee's Sale until after it was given and/or recorded and that procedural irregularity, coupled with the grossly inadequate sales price for the Benton County Property and the other material, irregularities justify setting aside the trustee's sale.

3.33 Defendant Libey, as "Successor Trustee" affirmatively represented in the Trustee's Deed that the *cash sales price* for the Benton County Property was $1.2 million. From and after the Trustee's Sale through and including the date of this 2nd Amended Complaint, despite written demand to do so from Plaintiffs' counsels, the Successor Trustee refuses to deposit the difference between the cash sales price of $1.2 million and the amount due and owing the Bank of Whitman at

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the time of the Trustee's Sale. Now, disingenuously, Libey, as the purported "Successor Trustee" claims there were no such sales proceeds, as he represented in the Trustee's Deed.

3.34 As of the date of this Complaint, the Bank of Whitman, Defendants Tribbett and Knox, the Successor Trustee and/or Defendant Libey have never deposited the proceeds from the Trustee's Sale in excess of the amount due and owing the Bank into the court registry.

4.0 FIRST CAUSE OF ACTION: FAILURE TO DEPOSIT PROCEEDS FROM SALE INTO COURT REGISTRY IN VIOLATION OF RCW 61.24.080

4.1 Plaintiffs re-allege each and every allegation in paragraphs 1.0 through 3.34 above.

4.2 The Successor Trustee, Libey and the Defendants, acting in concert, refused, after demand was made to the Successor Trustee, Libey, to deposit the surplus funds from the proceeds of the sale of the Benton County Property into the court registry, estimated to be in the amount of at least $800,000.00 and more after the proceeds from the UCC sale of the Personal Property are applied in reduction of the foreclosed obligation.

4.3 Such deposit is required by RCW 61.24. 080(3).

4.4 The Successor Trustee, Defendant Libey, the Bank of Whitman and Defendants Tribbett, Knox, Conklin and Hammons were all acting in concert and in violation of RCW 61.24. 080(3) by failing to deposit the surplus funds into the court registry.

4.5 Uribe has suffered substantial damages as a result of the Defendants failure to comply with RCW 61.24. 080(3).

5.0 SECOND CAUSE OF ACTION: COLLUSIVE BID IN VIOLATION OF RCW 61.24.135

5.1 Plaintiffs re-allege each and every allegation in paragraphs 1.0 through 4.5 above.

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5.2 The Bank of Whitman, Defendants Tribbett, Knox, Hammons and Conklin, acting in concert with the Successor Trustee, Libey, conspired to raise the bid for the Benton County Property at the trustee's sale to chill any competitive bids. This was necessary because these defendants knew that there was at least one interested bidder for the Benton County Property.

5.3 The Bank of Whitman wanted to acquire the Benton County Property because it was the more valuable of the two properties being foreclosed. The problem was the Franklin County obligation was under-secured and the Benton County obligation was over-secured.

5.4 Bank of Whitman, Defendants Tribbett, Knox, Hammons and Conklin, acting in concert with the Successor Trustee, Libey, decided that the Franklin County obligation (approx. $2.4 million) exceeded its fair market value (approx. $400,000) by about $2 million. Knowing that no one would pay more for the Benton County Property than its fair market value (e.g. $1.2 million), the conspirators had to "take" excess debt from the Franklin County obligation (e.g. the debt that exceeded the fair market value of the Franklin County obligation or the "deficiency") and transfer the "deficiency" to the Benton County obligation (e.g. to "cross-collateralize" the Benton County obligation with enough of the remaining debt from Franklin County obligation to open the bid at the fair market value for the Benton County property (approx. $1.2 million)). An opening bid in such an amount equal to the fair market value for the Benton County Property would certainly eliminate the potential for being outbid by the CRP tenant (e.g. "chilled the bidding") or another third party bidder. This bid was in violation of the DTA and had the intended effect of chilling the bidding to make sure the Defendants' client, Bank of Whitman, wrongfully acquired Uribe's most valuable property—the Benton County Property.

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5.5 Irrespective of the legality of the cross-collateralization issue, Bank of Whitman and Defendants Tribbett and Knox and Libey, the Successor Trustee, foreclosed a non-existent debt. The Franklin County Trustee's Deed clearly and unequivocally recites that the obligation secured by the Franklin County Property has been *satisfied in full*. Therefore, there was no "deficiency" to transfer from the Franklin County Property to the Benton County Property.

5.6 The conspiracy was for the sole benefit of the Bank of Whitman and Defendants Tribbett, Knox, Conklin and Hammons and Libey, the Successor Trustee, in derogation of Uribe's rights in the Benton County Property and in violation of RCW 61.24.135 (collusive bidding) and RCW 61.24.100 (anti-deficiency provision of the DTA), by reference, RCW 19.86, et seq., as a deceptive and unfair act or practice under the Consumer Protection Act.

5.7 The Trustee's Sale is void for the collusive bidding and for the failure to give the Plaintiffs' the credit due and owing them from the sale of their Personal Property.

5.8 All such actions were undertaken for the sole purpose of depriving the Plaintiffs' of the Benton County Property and the proceeds from the sale of their Personal Property in the amount of, at least, $271,000.

6.0 THIRD CAUSE OF ACTION: COLLUSIVE BID IN VIOLATION OF RCW 19.86 et seq.

6.1 The Plaintiffs re-allege each and every allegation in paragraphs 1.0 through 5.8 above.

6.2 As described in paragraphs 3.0 through 3.33 above, the Bank of Whitman and Defendants Tribbett, Knox, Hammons and Conklin and Libey, the Successor Trustee, engaged in unfair or deceptive acts or practices in trade or commerce.

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6.3 Defendants' conduct was and is deleterious to the public interest because, among other things, it occurred in connection with the defendants' businesses, was part of a planned pattern of conduct and has the potential for repetition. Plaintiffs were damaged by these violations of the Consumer Protection Act, and entitled to damages for their losses, treble damages as provided by the Act and attorney's fees and costs incurred.

7.0 FOURTH CAUSE OF ACTION: CONVERSION

7.1 The Plaintiffs re-allege each and every allegation in paragraphs 1.0 through 6.3 above.

7.2 The Defendants were all acting in concert with the Successor Trustee and/or Defendant Libey, to willfully and maliciously convert Plaintiffs' interest in the Benton County Property by the wrongful foreclosure and the wrongful retention of the proceeds from the sale of Uribe's Personal Property.

7.3 At the time of the conversion of the Benton County Property, the value of Benton County Property was, at least, $1.5 million and the proceeds from the sale of Uribe's Personal Property were, at least, $271,000. The amount Uribe owed the Bank of Whitman on the Benton County obligation was approximately $149,000 and Plaintiffs are entitled to recover, at least, $1.35 million depending on the fair market value of the Benton County Property at the time it was foreclosed, which is more likely than not higher and, at least, $271,000 in cash from the conversion of the proceeds from the sale of Uribe's Personal Property.

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8.0 FIFTH CAUSE OF ACTION: CIVIL CONSPIRACY

8.1 The Plaintiffs re-allege each and every allegation in paragraphs 1.0 through 7.3 above.

8.2 The Defendants, acting in concert and pursuant to a detailed plan to accomplish an unlawful purpose, willfully and maliciously converted the Plaintiffs' interest in the Benton County Property by the wrongful foreclosure of that property and the wrongful retention of the proceeds from the sale of Uribe's Personal Property.

8.3 This combination of the Defendants, acting in concert and pursuant to a plan to accomplish an unlawful purpose by unlawful means and the agreement by and among the defendants to do so constitutes a civil conspiracy.

8.4 Uribe is entitled to the damages the defendants caused by the conspiracy to convert the Benton County Property and Uribe's Personal Property and the proceeds from its sale.

9.0 SIXTH CAUSE OF ACTION: VIOLATION OF §1962(d) of RICO

9.1 The Plaintiffs re-allege each and every allegation in paragraphs 1.0 through 8.4 above.

9.2 The Bank of Whitman and Defendants Tribbett, Knox, Hammons, Conklin and Libey, the Successor Trustee, pursuant to a mutual understanding to attempt to accomplish an offense in violation of §1962 (a), (b) and/or (c) of RICO, while being employed or associated by an enterprise, engaged in activities that affected interstate commerce through a pattern of racketeering activity in the manner alleged.

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9.3 These same defendants knowingly and willingly became a member of the conspiracy by words and actions that objectively indicated their agreement to conduct, directly or indirectly, the affairs of the enterprise known as the Bank of Whitman through a pattern of racketeering activity.

9.4 All of the Defendants, either directly or indirectly, committed at least one overt act in an effort to accomplish the object or the purpose of the conspiracy which was to convert the Benton County Property and the proceeds from the sale of Uribe's Personal Property to and for the benefit of the Bank of Whitman.

10.0 SEVENTH CAUSE OF ACTION:
VACATE THE TRUSTEE'S SALE FOR VIOLATIONS OF RCW 61.24 et seq.

10.1 The Plaintiffs re-allege each and every allegation in paragraphs 1.0 through 9.4 above.

10.2 The trustee's sale resulted in selling the Benton County Property for 10% of its fair market value, according to the Bankruptcy Court valuation, a grossly inadequate sales price. In addition, there were many circumstances surrounding the trustee's sale indicating additional unfairness that provide sufficient equitable grounds to set aside the non-judicial foreclosure.

10.3 Those additional circumstances include, without limitation, Libey never had the authority to conduct the trustee's sale because he wasn't appointed the Successor Trustee until after he gave the Notice of Trustee's Sale, Libey, pursuant to the conspiracy by and among the Primary Defendants, cross-collateralized the Benton County obligation with a portion of the Franklin County obligation that was satisfied in full, intentionally mislead Uribe with the Notices of Trustee's Sales that no cross-collateralization would occur by treating both the Benton County and Franklin County obligations separately in the Notices of Trustee's Sales for the Benton County Property and the Franklin County Property, with full knowledge of the pending auction for Uribe's Personal Property,

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failed to give Uribe credit in the amount of, at least, $271,000 from the proceeds of that auction or to even check with the auctioneer about when those proceeds would be available, made materially false statements in the trustee's deed with respect to Libey's power and authority to conduct the trustee's sale and that $1.2 million, in cash, was paid for the property at the trustee's sale when no cash was received by Libey, and chilled the bidding so that Bank of Whitman would be the successful bidder at the trustee's sale of the Benton County Property.

10.4 The DTA must be strictly construed in Uribe's favor because of the lack of judicial oversight in conducting non-judicial sales.

10.5 The subsequent purchasers of the Benton County Property were not bona fide purchasers for value with no notice of a defect in the proceeding that led up to the purchase of the Benton County Property. The material misrepresentations by Libey in the trustee's deed were apparent from a review of the public records relating to this non-judicial sale and the public record gives notice to the world, including Rupp and 7HA, the purchasers of the Benton County Property from the Bank of Whitman, of the defect in the non-judicial foreclosure.

10.6 The trustee's sale of the Benton County Property should, therefore, be set aside and title vested in Uribe as if the trustee's sale had never occurred or, in the alternative, damages awarded against the Defendants, other than Rupp and 7HA, for the losses Uribe incurred as a result of the illegal, inequitable and outrageous actions of the Defendants and each of them.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief against all of the Defendants and each of them, jointly and severally, excluding Defendants Rupp and 7HA, except as indicated below:

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A. For judgment voiding the Trustee's Sale on the grounds the obligation foreclosed was overstated and/or paid in full and/or the sale was collusive and/or illegal, restoring title to the Benton County Property to the Plaintiffs and ejecting the Bank of Whitman and/or its successors or assigns, Defendants Rupp and 7HA, from the Benton County Property;

B. In the alternative, for judgment against the Defendants, excluding Defendants Rupp and 7HA, and each of them, jointly and severally, for the fair market value of the Benton County Property sold at the procedurally defective and collusive trustee's sale on December 17, 2010;

C. In the alternative, for judgment against the Defendants, excluding Defendants Rupp and 7HA, jointly and severally, compelling the defendants and each of them to deposit $1,200,000, cash, plus the amount of the sale proceeds from the sale of the Personal Property into the court registry;

D. In the alternative, for judgment against the Defendants, excluding Defendants Rupp and 7HA, jointly and severally, for violation of the Consumer Protection Act for an unfair and deceptive act or practice in commerce under RCW 19.86.090 for the procedurally defective and collusive Trustee's Sale in the amount of $25,000 in punitive damages, plus actual damages in the amount of the fair market value of the Benton County Property and the attorney's fees and costs of suit incurred by the Plaintiffs Uribe;

E. In the alternative, for judgment against the Defendants, excluding Defendants Rupp and 7HA, jointly and severally, for a civil conspiracy, civil RICO and conversion of the Plaintiffs' Benton County Property by the procedurally defective and collusive Trustee's Sale in the amount of in the amount of the fair market value of the Benton County Property and the attorney's fees and costs of suit incurred by the Plaintiffs Uribe;

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F. For judgment against the Defendants, excluding Defendants Rupp and 7HA, for the costs and attorney's fees incurred by the Plaintiffs in bringing this action against the Defendants pursuant to RCW 19.86, et seq., civil RICO and RCW 4.56.330; and

G. For such other and further relief as the court deems just and proper.

Dated this ____ day of June 2012.

THE LANZ FIRM, P.S.

By:_____
Bernard G. Lanz, WSBA #11097
Attorney for the Plaintiffs

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Universal Life Church v. GMAC Mortg. Corp.

United States District Court for the Western District of Washington
April 20, 2007, Decided ; April 20, 2007, Filed
CASE NO. C06-651RSM

Reporter: 2007 U.S. Dist. LEXIS 29333; 2007 WL 1185861

UNIVERSAL LIFE CHURCH OF SNOHOMISH COUNTY, a nonprofit corporation; DONALD WINDER, and ELIZABETH JOHNSTON, individually and as officers of Universal Life Church, Plaintiffs, v. GMAC MORTGAGE CORPORATION; JP MORGAN CHASE BANK CORPORATION; and SELECT PORTFOLIO SERVICING, INC., f/k/a FAIRBANKS CAPITAL CORPORATION; Defendants.

Subsequent History: Reconsideration denied by Universal Life Church v. GMAC Mortg. Corp., 2007 U.S. Dist. LEXIS 37616 (W.D. Wash., May 23, 2007)

Core Terms

Declaration, trust deed, summary judgment, mortgage, notice, foreclosure, trustee sale, servicing, genuine, amended complaint, co-borrower, plaintiffs', transferred, borrower, parties

Counsel: [*1] For Universal Life Church of Snohomish County, a nonprofit corporation, Donald Winder, Elizabeth Johnston, individually and as officers of Universal Life Church, Plaintiffs: Nancy S. Taft, LEAD ATTORNEY, TAFT, PLLC, MARYSVILLE, WA.

For GMAC Mortgage Corporation, JP Morgan Chase Bank Corporation, Defendants: Ann T Marshall, Michael Sean Walsh, BISHOP WHITE & MARSHALL, SEATTLE, WA.

For Select Portfolio Servicing Inc, formerly known as Fairbanks Capital Corporation, Defendant: Mark A Bailey, LEAD ATTORNEY, BERESFORD BOOTH, EDMONDS, WA.

For Universal Life Church of Snohomish County, a nonprofit corporation, Counter Defendant: Nancy S. Taft, LEAD ATTORNEY, TAFT, PLLC, MARYSVILLE, WA.

Judges: RICARDO S. MARTINEZ, UNITED STATES DISTRICT JUDGE.

Opinion by: RICARDO S. MARTINEZ

Opinion

ORDER ON DEFENDANT SELECT PORTFOLIO SERVICING'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court for consideration of a motion for summary judgment filed by defendant Select Portfolio Servicing, Inc., ("SPS"). Dkt. # 17. Plaintiffs have opposed the motion, and the matter has been fully briefed. For the reasons set forth below, defendant's motion shall be granted.

BACKGROUND

The following facts appear [*2] in the declarations and exhibits, and are not in dispute. In 1998, Gina Bakeng, who is not a party to this action, entered into a loan agreement secured by a deed of trust on residential property in Everett, Washington. The loan was initially serviced by Equicredit Corporation. On September 28, 2001, Ms. Bakeng entered into an agreement with the Universal Life Church of Snohomish County ("ULC") by which ULC would make all future payments on the mortgage, as well as pay real estate taxes for the second half of 2001. Dkt. # 21, Exhibit A. The agreement was signed by Donald Winder on behalf of ULC. The same day, Ms. Bakeng executed a quitclaim deed, conveying a fifty percent interest in the property to ULC. *Id.* The quitclaim deed bears marks indicating that it was recorded on October 2, 2001. Mr. Winder contacted Equicredit to confirm that there would be no problems with ULC making the mortgage payments, and to advise Equicredit of ULC's mailing address.

On December 20, 2001, servicing of the loan was transferred from Equicredit to Fairbanks Capital Corporation, now known as SPS. ULC was notified by mail of the transfer. Mr. Winder contacted SPS to confirm that there would be no [*3] problem with ULC making the mortgage payments. Mr. Winder states in his declaration that the SPS representative suggested that he assume the loan individually because SPS would not extend credit to

a church. Declaration of Donald Winder, p. 2. Mr. Winder declined to assume the loan as an individual, but asked that he be listed as a "co-borrower" on the loan. He sent a written request to be added as a "co-borrower" on February 8, 2003. Dkt. # 21, Exhibit B. ULC never received a written response to this request, and the loan documents were never amended. Ms. Bakeng remained the sole obligor on the loan. However, ULC's payments were accepted and were applied to the loan.

On June 2, 2003, servicing of the loan was transferred again, this time to defendant GMAC Mortgage Corporation ("GMACM"). SPS sent notice of the transfer to Gina Bakeng, the borrower of record on the loan, as required by law. SPS did not send notice to ULC or to Donald Winder. Ms. Bakeng did not inform ULC of the transfer, and ULC continued to make loan payments to SPS. For several months, SPS forwarded these payments to GMACM. However, SPS did not forward the November, 2003 payment to GMACM; instead, it returned the [*4] check to the borrower of record, Ms. Bakeng. Ms. Bakeng apparently did not notify ULC that she received this check; Mr. Winder states in his declaration that he did not learn the fate of the November 2003 check until the filing of this motion. L Declaration of Donald Winder, P 9. However, at some point he became aware of the problem because he contacted SPS, and was told at that time that the loan had been transferred to GMACM. *Id.* ULC then began sending payments to GMACM.

Mr. Winder does not state in his declaration that there was any problem with the December, 2003 payment. However, GMACM returned the payments for January, February, and March, 2004 to ULC because the amounts were not sufficient to make the account current. *Id.*, P 10. ULC sent a replacement check to GMACM in the amount of $ 4320.00 for the missing three payments, but GMACM claimed the check was never received. [1] GMACM sent a Notice of Default to ULC and to Gina Bakeng, followed by a Notice of Foreclosure and Notice of Trustee's Sale, also sent to ULC as well as Ms. Bakeng. ULC did not act to prevent the foreclosure and sale, and the property was sold in December, 2004.

[*5] In March, 2005, plaintiff ULC filed suit against GMACM and JP Morgan Chase Bank in Snohomish County Superior Court. Thirteen months later, an amended complaint was filed, with Donald Winder and Elizabeth Johnson as additional plaintiffs, and Fairbanks Capital Corporation named as an additional defendant. Fairbanks, now known as Select Portfolio Services timely removed the case to this Court on the basis of the parties' diversity, pursuant to *28 U.S.C. § 1332*. SPS then moved for summary judgment of dismissal as to the two claims asserted against it, namely negligence and "acting in concert".

DISCUSSION

Summary judgment is proper only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *F.R.Civ. P. 56(c)*. The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial by "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together [*6] with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the moving party satisfies this burden, the opponent must set forth specific facts showing that there remains a genuine issue for trial. *F.R.Civ. P. 56(e)*.

A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). If the evidence is merely colorable or is not significantly probative, summary judgment may not be granted. *Id.* at 249-50. It is not the court's function at the summary judgment stage to determine credibility or to decide the truth of the matter. *Id.* Rather, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

Plaintiffs claim that SPS acted negligently in transferring the loan account to GMACM because it did not notify ULC of the transfer, and because it mishandled the mortgage payments it received [*7] from ULC. Amended Complaint, P 24. Then, after setting forth nine separate tort claims against co-defendants GMACM and JP Morgan Chase Bank, plaintiffs assert a claim of "acting in concert" against SPS, alleging that SPS is jointly and severally liable with GMACM and JP Morgan Chase for all of plaintiffs' injuries. Amended Complaint, P 44. However,

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[1] Although not relevant to the present motion, the following facts are helpful in understanding the subsequent events. According to exhibits provided by plaintiffs, the $ 4320.00 check was mistakenly sent by GMACM to a different customer, Latartas McKee of Coweta County, Georgia. Declaration of Donald Winder, Exhibit D. The local prosecuting attorney investigated the basis for a charge of first degree forgery against Mr. McKee. *Id.* Eventually it was determined that Mr. McKee had sent a check in a similar amount to GMACM at the same time, and for some reason GMACM sent ULC's check to Mr. McKee. Mr. McKee's negotiation of the ULC check was the result of confusion or mistake, rather than criminal intent. *Id.*

"acting in concert" is not itself a tort, but rather a vehicle for joint liability under R.C.W. 4.22.070(1)(a). Therefore, only the negligence claims will be addressed.

In moving for summary judgment on the tort claims, SPS first asserts that plaintiff waived all claims relating to the foreclosure and trustee's sale by failing to timely object or bring a lawsuit to restrain the sale. The argument arises from Washington's Deed of Trust Act, RCW 61.24 ("Act"). This Act sets forth the procedure and notice requirements for non-judicial foreclosure and a trustee's sale. The required notice states, in section IX:

> Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130 [*8] . **Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.**

R.C.W. 61.24.040(f) (emphasis added). It is undisputed that ULC received this notice, and that it contained the required language. Declaration of Mark Bailey, Exhibit B.

The courts have found that the waiver language of the Deed of Trust Act is broad, and applies both to challenges to the pre-foreclosure process, and to the underlying obligation. *Hallas v. Ameriquest Mortgage Co.*, 406 F. Supp. 2d 1176, 1181 (D. Or. 2005) (interpreting the Washington Act). Nevertheless, plaintiffs argue that the waiver provision of the Deed of Trust Act should not apply to their tort claims. They have, however, provided no legal authority for this argument. The Court shall therefore look to Washington cases which address the purpose of the Deed of Trust Act.

The Washington Supreme Court has recently reiterated the three goals of the Washington Deed of Trust Act: (1) that the nonjudicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity [*9] to prevent wrongful foreclosure; and (3) that the process should promote stability of land titles. *Plein v. Lackey*, 149 Wash. 2d 214, 225, 67 P.3d 1061 (2003) (*citing Cox v. Helenius* 103 Wash. 2d 383, 387, 693 P.2d 683 (1985) and *Country Express Stores, Inc., v. Sims*, 87 Wash. App. 741, 747-48, 943 P.2d 374 (1997). The Act includes a specific procedure for halting trustee's sale so that an action contesting the default can proceed. *Id.* The failure to take advantage of the pre-sale remedies under the Act may result in a waiver of the right to object to the sale. *Id.* at 227.

The Washington Supreme Court noted that the Washington State Court of Appeals has found waiver in a number of cases involving a failure to enjoin a trustee's sale.

> Specifically, that court has held that waiver of **any postsale contest** occurs where a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale.

Id. at 228 (emphasis added); *citing Country Express Stores*, 87 Wash. App. at 749-751; [*10] *Steward v. Good*, 51 Wash. App. 509, 515-17, 754 P.2d 150 (1988); *Koegel v. Prudential Mutual Savings Bank*, 51 Wash. App. 108, 114, 752 P.2d 385 (1971). The application of the waiver doctrine in this context serves all three goals of the Deed of Trust Act. *Id.* To allow one to delay in asserting a defense until after the sale "would be to defeat the spirit and intent of the trust deed act." *Id., quoting Country Express Stores*, 87 Wash. App. at 752.

Plaintiffs in this action seek monetary damages for the alleged improper foreclosure sale of the home, including reimbursement for the market value of the home. Amended Complaint, p. 13. This is precisely the type of relief that is barred by the waiver doctrine. As discussed above, all three requirements for application of the waiver doctrine--notice, knowledge of a defense, and failure to act--have been met. While plaintiffs assert that their failure to file suit to restrain the sale arose from a lack of financial resources and their inability to retain counsel, this is not an excuse acknowledged in the waiver doctrine. Declaration of Donald Winder, P 4. Further, plaintiffs have not demonstrated why they could [*11] not have filed *pro se*, as indeed they did in originally filing this lawsuit. [2]

As plaintiffs failed to invoke the remedies provided in the Deed of Trust Act, they shall not now be allowed to circumvent the purposes of the Act by couching their claims in tort language. The Court thus finds no basis for excepting plaintiff's tort claims against SPS from the waiver provision of the Deed of Trust Act.

Plaintiffs also assert that the Snohomish County Superior Court ruled that their tort claims were not waived in this

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[2] Although the original state court complaint was filed *pro se*, the amended complaint was filed in state court by counsel. Plaintiffs remain represented by counsel in these proceedings, as ULC, a nonprofit corporation, must be under the rules of this Court. Local Rule GR 2(g)(4)(B).

case, and that the ruling is now res judicata and not amenable to relitigation. However, as defendant correctly notes, SPS was not a party to the case at the time of that ruling, and plaintiffs' claims against [*12] SPS were not included in that ruling. The relitigation rule does not apply, because [c]entral to the concepts of res judicata and collateral estoppel is the principle that only parties to a prior action and parties in privity with [such] parties are barred from relitigating claims or issues in a subsequent action." *Sandpiper Village Condominiums Association v. Louisiana-Pacific*, 428 F. 3d 831, 848 n. 24 (9th Cir. 2005)*citing* *Tahoe-Sierra Pres. Council, Inc., v. Tahoe Regional Planning Agency*, 322 F. 3d 1064, 1081 (9th Cir. 2003).

Even if the Court were to find that the waiver doctrine did not apply, plaintiffs' negligence claims against SPS would be found meritless. A negligence action requires that the plaintiffs demonstrate (1) a duty of care was owed them by the defendant; (2) there was a breach of that duty; (3) that breach was the cause of their harm; and (4) they suffered damages as a result. *Zahka v. Bank of America Corp*, 131 Wash. App. 167, 171, 127 P.3d 722 (2005). Here, plaintiffs have failed to demonstrate any duty of care owed them by SPS. The private agreement between Ms. Bakeng, the borrower, and ULC was not binding upon the [*13] lender, and did not create any contractual or other relationship between ULC and SPS from which a duty of care might arise. The lender's duty of care was only to the borrower of record, not to any third party who was gratuitously making payments. *Id.* at 172. As SPS had no duty of care toward plaintiffs, the negligence claims necessarily fail.

In opposing summary judgment, plaintiffs assert that there are three "primary" issues of fact in dispute. First, they contend there is an issue of fact as to "what SPS did with the November 2003 mortgage check". Plaintiffs' Response, p. 4. However, this is not a fact in dispute; plaintiffs themselves admit knowing at this point that SPS returned the November 2003 check to Gina Bakeng. Second, plaintiffs contend there is a factual dispute as to why "SPS process[ed] the November 2003 check differently than it did all of the other checks received from ULC." *Id.* This is not a question of fact but of motive. The fact that SPS did handle the November 2003 check differently is not in dispute. As SPS has explained, it had no obligation to forward ULC's payments to GMACM once the mortgage was transferred. By forwarding the payments [*14] to GMACM for the first few months after the transfer, SPS incurred no obligation to continue to do so. Instead, the mis-directed check was returned to Ms. Bakeng, the borrower of record. Any issues arising from Ms. Bakeng's failure to inform ULC of this return are not relevant to plaintiffs' claims against SPS. Finally, plaintiffs contend there is an issue of fact as to "why SPS did not follow through with its suggestion and the request made by ULC and Gina Bakeng to make ULC a co-borrower on the mortgage loan." *Id.* Again, this is not a question of fact but of motive. The facts themselves are not in dispute: the church (ULC) could not be made an obligor on the loan, and Mr. Winder declined to personally assume the obligation. Declaration of Donald Winder, P 5. Without any assumption by Mr. Winder of the financial obligation, and amendment of the loan documents to reflect that, the term "co-borrower" is meaningless. The question regarding SPS's failure to designate ULC as a "co-borrower" is therefore not a material factual issue to defeat summary judgment.

CONCLUSION

The pleadings, declarations, and exhibits on file show that there is no genuine issue as to any material fact. [*15] The Court has determined that on the basis of these undisputed facts, defendant SPS is entitled to judgment as a matter of law. Accordingly, defendant's motion for summary judgment (Dkt. # 17) is GRANTED, and the claims against defendant SPS are DISMISSED.

Dated this 20th day of April, 2007.

RICARDO S. MARTINEZ

UNITED STATES DISTRICT JUDGE