

No 68217-2-I

**COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON**

MARISA BAVAND,

Appellant/Plaintiff,

v.

ONEWEST BANK, F.S.B., a federally chartered Savings Bank; REGIONAL TRUSTEE SERVICES CORPORATION, a Washington corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation and DOE DEFENDANTS 1-10,

Respondents/Defendants.

APPELLANTS' OPENING BRIEF

2012 AUG 23 PM 9:40
COURT OF APPEALS
STATE OF WASHINGTON
[Signature]

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I. ASSIGNMENTS OF ERROR

A. The trial court erred in denying Plaintiff's motion to enforce an agreement between the parties to the litigation under *CR 2A* when the parties had exchanged writings agreeing to void the sale in an order of November 29, 2011.

B. The trial court erred in refusing to find Defendants in contempt of court for their willful disregard of the Temporary Restraining Order entered in this matter on June 17, 2011, by the sale of Plaintiff's real property.

C. The trial court erred in granting judgment on the pleadings and dismissing Plaintiff's claims in an order of November 29, 2011, pursuant to *CR 12(b)*.

II. STATEMENT OF THE CASE

On August 7, 2007, Plaintiff/Appellant, MARISA BAVAND (hereinafter "Ms. Bavand") executed a Note and a Deed of Trust and Note in favor of Defendant/Respondent, INDYMAC BANK, F.S.B (hereinafter "IndyMac"). CP 136-140, 12-22. The Deed of Trust named Ticor Title Insurance Co as trustee, IndyMac as "lender" and purported to make Defendant/Respondent, MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC., (hereinafter "MERS") the "beneficiary." This Deed of Trust was recorded under King County Auditor's Recording No. 20070831000606. CP 12-22. At no time

relevant to this cause of action was MERS ever a “holder” of any promissory note or other evidence of debt, within the terms of *RCW 61.24.005(2)*, and. Plaintiff did not owe MERS any monetary or other obligation under the terms of any promissory note or other evidence of debt executed contemporaneously with the Deed of Trust.

On December 15, 2010, Defendant/Respondent, ONEWEST BANK, FSB (hereinafter “OneWest”) purportedly executed, “as beneficiary” an appointment of successor trustee, appointing Defendant/Respondent, REGIONAL TRUSTEE SERVICES CORPORATION (hereinafter “RTS”) a successor trustee, pursuant to *RCW 61.24.010*. The document was apparently signed by Filishia M. Swain as Assistant Secretary of OneWest in Travis County, Texas. This instrument was recorded under King County Auditor’s Recording No. 20101227002726. CP 27. Ms. Bavand alleges that at the time this document was executed, Filishia Swain was not an employee or agent of OneWest, that OneWest was not the beneficiary of the subject Deed of Trust and that OneWest had no express authority from the true and lawful holder and owner of the subject obligation to appoint a successor trustee, under *RCW 61.24.010*.

On December 16, 2010, MERS purportedly executed, “as nominee for IndyMac Bank, F.S.B.” an Assignment of Deed of Trust “together with the Note or Notes therein described”. The document was

apparently signed by Suchan Murray as Assistant Secretary of MERS in Travis County, Texas. This instrument was recorded at the King County Auditor's Recording No. 20101227002725. CP 24-25. Plaintiff alleges that MERS had never maintained an office in Travis County, Texas, that Suchan Murray was not a legitimate agent, employee or corporate officer of MERS at any time relevant to this cause of action and that the representations contained in the documents referenced therein regarding professional affiliations were false and known to be false at the time they were made. CP 1-10. Moreover, it is Ms. Bavand's allegation that at the time this document was executed, IndyMac was under bankruptcy protection with the United States Bankruptcy Court Central District of California (Case No. 08-bk-21752-BB). There is no evidence that the bankruptcy trustee abandoned the subject obligation and no order of the bankruptcy court exists that authorized MERS to execute the subject document on behalf of IndyMac or otherwise authorized MERS to act on IndyMac's behalf in connection with this matter. This bankruptcy case remains open and was open on the date MERS allegedly acted on IndyMac's behalf. CP 1-10. Finally, it is Ms. Bavand's allegation that MERS executed the subject Assignment of Deed of Trust without first obtaining the express authority to act from the true and lawful holder and owner of the obligations. CP 1-10.

On February 7, 2011, RTS executed a Notice of Trustee's Sale purportedly at the direction of OneWest, pursuant to *RCW 61.24.040*. The document set forth May 13, 2011 as the date of the trustee's sale. This instrument was recorded at the King County Auditor's Recording No. 0110209002007. CP 34-38. It is Ms. Bavand's contention that the Notice of Trustee's Sale was executed without the authority or knowledge of the true and lawful holder and owner of the subject obligation. CP 1-10.

On April 19, 2011 OneWest, through its subsidiary "IndyMac Mortgage Services," sent a letter to Ms. Bavand which identified itself as the "investor" in the subject loan. This directly contradicts all prior representations made by Defendants regarding OneWest's status under the Deed of Trust, each of whom identified OneWest as the "beneficiary" under the subject Deed of Trust. Additionally, the letter claimed to include a copy of the Executed Note that was signed at closing – not a true and correct copy of the original note. CP 42-47.

On May 5, 2011, Plaintiff, through counsel, served Notice under *RCW 61.24.130*, with a Summons and Complaint; Motion for Temporary Restraining Order and Order to Show Cause; Declaration of Richard Llewelyn Jones; Proposed Order; Notice under the Service Members Relief Act, and Verification of Complaint. CP 1-61 and CP 79-80. One of Ms. Bavand's primary allegations was that RTS was

improperly appointed as successor trustee and had acted without authority of the beneficiary then of record in violation of the Washington Deed of Trust Act, in apparent breach of RTS' duty of good faith, pursuant to *RCW 61.24.010(4)*.

In response to the foregoing, RTS continued its sale set for May 13, 2011, voluntarily.

On June 9, 2011, Plaintiff, through counsel, served notice under *RCW 61.24.030*; a Note for the Motion Calendar before the assigned judge; an updated Declaration of Richard Llewelyn Jones attaching the new Notice under *RCW 61.24.030* as an exhibit; and the remaining documents previously served on May 5, 2011. CP 81-93 RTS contacted counsel for Plaintiff on the morning of June 10, 2011, regarding a typographical error in the notice which was corrected and transmitted by email at the request of the trustee. CP 81-93, 260-282. An additional amendment was made to the notice amending the location to Ex Parte. CP 89.

On June 16, 2011, Ms. Bavand's request for a temporary restraining order was presented and denied by Court Commissioner Velategui due to lack of proof of service of the five day statutorily required notice. CP 75-78. This lack of notice was corrected by the filing of an affidavit of service and Declaration of Dan Williams, both

actually filed on June 16, 2011, though officially filed at 9:00 a.m. on June 17, 2011. CP 81-93

On June 16, 2011 at 5:54 p.m., Susan Rodriguez, an employee of Plaintiff's attorneys' offices, sent an electronic mail message to Olin Gutierrez informing the trustee of the denied order and informing the trustee that we would return to Ex Parte the next morning at 9:00 a.m. A second electronic mail message was sent by counsel to Plaintiff to the trustee at 7:53 a.m. on June 17, 2011. CP 289. A confirmation receipt was requested and obtained indicating the message to RTS was read by its intended recipient at 7:53 a.m. on June 17, 2011. CP 260-282; 289.

On June 17, 2011, counsel for Plaintiff re-appeared before Commissioner Velategui who considered and granted Plaintiff's Motion for TRO. Counsel for Plaintiff obtained a certified copy of the order and contacted RTS to advise their staff that the TRO was granted. CP 94-97.

On June 17, 2011, and subsequent to the entry of Commissioner Velategui's TRO, RTS wrongfully sold Ms. Bavand's real property to "OWB REO, Inc." for \$560,000.00, \$162,950.00 less than the amount owed. CP 300-303. On information and belief, "OWB REO, Inc." is a wholly owned subsidiary of OneWest. See CP 296. No evidence has ever been adduced that "OWB REO, Inc." ever obtained an assignment of the subject Note and Deed of Trust prior to sale, was ever a beneficiary, within the terms of *RCW 61.24.005(2)*, or was ever

authorized to act on behalf of IndyMac. Plaintiff continued to allege that OWB REO, Inc., was not the beneficiary or holder of the obligation secured by the subject Deed of Trust at the time of sale and the recitations in the Deed were false and known to be false at the time that RTS recorded the Deed.

On June 21, 2011, counsel for RTS, Nicolas Daluiso, in an email communication to counsel for Plaintiff, stated that he had confirmed with his client that the Trustee's Deed would not record and that Defendants would unwind the sale, as the property "went back to the lender." CP 296.

On June 28, 2011, the trial judge, the Honorable Laura Middaugh dissolved the subject TRO. CP 98. Significantly, Judge Middaugh did not dismiss the subject action or limit future motions for injunctive relief.

On August 9, 2011, despite assurances from RTS's counsel to the contrary, RTS recorded a Trustee's Deed, conveying the subject property to "OWB REO, Inc." CP 300-303. Said Trustee's Deed was recorded under King County Auditor's Recording No. 20110809001214.

On August 11, 2011, upon learning of the recordation of the Trustee's Deed, counsel for Plaintiff contacted Defendant RTS's counsel by telephone. In response, RTS's counsel sent an email at 4:55 p.m. that same day stating a miscommunication had occurred causing RTS to

record the Trustee's Deed. CP 283-305 Counsel for RTS further stated that "They will be rescinding." CP 305,

On September 26, 2011 OneWest and MERS filed a joint motion to dismiss under *CR 12(b)(6)*. CP 113-174

On October 7, 2011, RTS filed and served its Motion to Validate the Trustee's Sale and Void the TRO, having full knowledge of the fact that Plaintiff's counsel was unavailable until October 15, 2011. CP 175-181

On October 21, 2011, Ms. Bavand moved the Court to enforce the parties' prior agreements to void the sale, pursuant to *CR 2A* and to vacate the Trustee's Deed recorded on August 9, 2011. CP 251-259

On November 29, 2011, the trial court denied Ms. Bavand's motions and granted Defendants' motions. CP 452-454

On December 9, 2011, Ms. Bavand moved for reconsideration of the trial court's Order of November 29, 2011. CP 457-469.

On December 20, 2011 the trial court denied Ms. Bavand's motion for reconsideration. CP 481.

On January 16, 2011, Ms. Bavand filed a Notice of Appeal. CP 484-492.

III. ARGUMENT

A. Standard of Review

A trial court's denial of Plaintiff's motion to enforce the *CR 2A* is subject to *de novo* review, as it relates to the proper interpretation of a statute or rule of court. *State v. Greenwood*, 120 Wn.2d 585, 845 P.2d 971 (1993) (rules of court).

Further, the validity of an agreement under contract law is also subject to *de novo* review. *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 840 P.2d 851 (1992). When the facts are undisputed, the trial court's determination becomes a conclusion of law and is reviewable on appeal. *State v. Sykes*, 27 Wn.App. 111, 615 P.2d 1345 (1980).

A trial court's dismissal of an action under *CR 12(b)(6)* is a question of law that this court reviews *de novo*. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007). Interpretation of a statute is a question of law reviewed *de novo*. *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 488, 200 P.3d 683 (2009). Trial court's should consider even a hypothetical situation conceivably raised by the complaint on a motion to dismiss under *CR 12(b)*. *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995) (quoting *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978)). If the trial court dismisses a complaint for failure to state a claim (a motion normally heard on affidavits or other writings), and if the plaintiff appeals, the appellate court will consider even hypothetical

facts that might give the plaintiff a cause of action. *Bravo v. Dolsen Companies, supra*. (trial court's dismissal reversed; extended discussion of dismissals for failure to state a claim).

B. Ms. Bavand and RTS had a Binding CR 2A Agreement that Should have been Enforced by the Trial Court.

In Washington, a trial court's authority to compel enforcement of a settlement agreement is governed by *CR 2A* and *RCW 2.44.010*. *CR 2A* provides as follows:

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

Morris v. Maks, 69 Wn.App. 865, 868, 850 P.2d 1357, 1358 (1993). Settlement agreements are governed by general principles of contract law. *Stottlemire v. Reed*, 35 Wn.App. 169, 171, 665 P.2d 1383, review denied, 100 Wash. 2d 1015 (1983). In determining whether informal writings such as letters are sufficient to establish a contract even though the parties contemplate signing a more formal written agreement, Washington courts consider whether (1) the subject matter has been agreed upon, (2) the terms are all stated in the informal writings, and (3) the parties intended a binding agreement prior to the time of the signing

and delivery of a formal contract. *Loewi v. Long*, 76 Wash. 480, 484, 136 Pac. 673 (1913).

Courts have traditionally held that an exchange of correspondence between parties' attorneys is sufficient to establish a binding *CR 2A* agreement. For example, in *Morris* the attorneys for the parties discussed a settlement over the telephone. *Morris v. Maks*, *supra.*, at page 867. The attorneys conferred again and agreed to that they had a settlement agreement. *Id.* The plaintiff's attorney sent a letter confirming the points of the settlement. *Id.* In response, the defendant's attorney wrote a letter and stated in part, "[e]xcept as specifically set forth below, your letter accurately reflects the terms of the agreed settlement. I view the items listed below as clarifying or supplemental points rather than conflicts with your letter." *Id.* at 867-868. Shortly thereafter, but before a formal written settlement had been executed, the defendant's attorney informed the plaintiff's attorney that his client had decided to terminate the settlement negotiations. *Id.* at 868. The trial court entered an order of enforcing the settlement agreement based on the exchange of two letters between the attorneys confirming the settlement. *Id.*

In reviewing whether the material terms of the agreement had been addressed in the letter, the court held that the terms at issue were adequately addressed notwithstanding the fact that subsequent drafts of

the proposed settlement agreement had been more refined. *Id.* at 869-870. In addition, the court held that the parties intended to be bound by the exchange of letters. *Id.* at 870-71. The defendant argued on appeal that his intent was only to be bound upon execution of a final settlement agreement. *Id.* In interpreting intent, the court relied on the objective manifestation theory in construing the words and acts of the alleged contractual parties. *Id.* at 871. The objective manifestation theory requires the court to impute to a person an intention corresponding to the reasonable meanings of his words and acts. *Id.* The court found that without any evidence of defense counsel's subjective intent in the agreement, the parties intended to be bound by the terms set forth in the letter. *Id.*

In the present case, Ms. Bavand presented, through the declaration of counsel, ample evidence of the existence of a valid and binding agreement between the parties and RTS' intention to be bound by the terms of the agreement: that RTS would defer recording of the Trustee's deed and to void the June 17, 2011 sale and rescission of the Trustee's Deed after it was erroneously recorded, in violation of counsel's prior agreement, based upon the recognition by both parties that there existed a valid TRO at the time of the sale. CP 296 and CP 305.

Turning to the communications in question, Defendants

intentions were clear, unequivocal and unconditional.

On June 21, 2011, counsel for RTS advised counsel for Ms. Bavand that “I just confirmed with Regional that the Trustee’s Deed will not be recorded and they will unwind the sale as it went back to the lender.” CP 296.

On August 11, 2011, counsel for RTS advised counsel for Ms. Bavand that “. . . I discussed with Regional and they were to rescind the sale. I think there was some miscommunication by Regional on what the dissolving of the TRO meant and they thought they could move forward and record. They will be rescinding.” CP 305.

CR 2A and *RCW 2.44.010* provide that an agreement entered into by an attorney is binding on his client if presented in open court or evidence of the same is in writings by the party against whom the agreement must be enforced. In the present matter the attorney for RTS agreed with Plaintiff’s counsel that the sale subject to dispute would be rescinded. CP 283-305.

There is no dispute that defense counsel agreed on June 21, 2011, after consulting his client, not to record the deed from the Trustee’s sale on June 17, 2011 and would rescind the sale. CP 296. No pre-conditions or caveats were put on the validity of the agreement. Under the objective manifestation theory, the only reasonable interpretation is that defense counsel intended to be bound by their agreement. This agreement was

reaffirmed on August 11, 2011. CP 305. Again no pre-conditions or caveats were put on the validity of the agreement.

Regardless of the fact that the TRO was subsequently vacated, there was no express or implied assertion that defense counsel's decision was specifically based on the efficacy of the TRO.¹ The determinative issue on appeal is not whether the *CR 2A* agreement evidenced by the e-mails between counsel of June 21, 2011 and August 11, 2011 are invalidated in light of the vacation of the TRO, but rather whether the parties had an agreement in place until that time. RTS, through counsel, agreed to rescind the subject trustee's sale, and they should be ordered to honor their agreement, including the vacation of the Trustee's Deed.

There is absolutely no question that there was a lawful order entered by Commissioner Velategui on June 17, 2011 restraining RTS, as a successor trustee, from "foreclosing that certain real property commonly known as 'the Yale Property' pending further order of the Court." CP 94-97. The issue of knowledge of the order is irrelevant to

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It is significant to note that in response to Ms. Bavand's Motion for Order to Enforce *CR 2A* Agreement, counsel for RTS misled the trial court by asserting that the "emails to defense counsel were made without knowledge of the TRO denied by Judge Middaugh." CP 342. Judge Middaugh entered her order denying Ms. Bavand's TRO on June 28, 2011. CP 98. Accordingly, while the assertions of RTS and its counsel to explain its breach may have been true as to the June 21, 2011 e-mail, it doesn't explain its breach with regard to the August 11, 2011 e-mail, sent over a month after Judge Middaugh's Order of June 28, 2011. RTS and counsel for RTS conveniently ignore the August 11, 2011 e-mail in which they agreed to rescind the trustee sale.

the issue of the agreement between the parties, because defense counsel knew of these issues at the time the agreement was made. One could speculate that Defendants basis for agreeing to rescind the sale of June 17, 2011 was to remove all uncertainty surrounding the sale, and to assure the footing of any subsequent sale with a favorable adjudication of Ms. Bavand's claims. However, this was not the course that was ultimately pursued, for if Ms. Bavand knew Defendants would not honor their agreement, she would likely have altered her strategy as well to block any subsequent sale. By electing to breach the *CR 2A* agreement, RTS and its principals compromised the integrity of the process and deprived the Ms. Bavand potential options to contest the sale. See *RCW 61.24.127*. For this Defendants should be promissory estopped from denying their agreement.

Additionally, the Court's Order of June 28, 2011 that dissolved the TRO, presumed the efficacy of the subject TRO and should have invoked new notice requirements of the trustee for a sale under *RCW 61.24.130*. In particular, *RCW 61.24.130(3)* requires that the court, at the request of the trustee, to set a new date not less than forty-five days from the date of the order dissolving the restraining order invoking new notice requirements:

(3) If the restraining order or injunction is dissolved after the date of the trustee's sale set forth in the notice as provided in *RCW 61.24.040(1)(f)*, the court granting such restraining

order or injunction, or before whom the order or injunction is returnable, shall, at the request of the trustee, set a new sale date which shall be not less than forty-five days from the date of the order dissolving the restraining order. The trustee shall:

(a) Comply with the requirements of RCW 61.24.040(1) (a) through (f) at least thirty days before the new sale date; and

(b) Cause a copy of the notice of trustee's sale as provided in RCW 61.24.040(1)(f) to be published in a legal newspaper in each county in which the property or any part thereof is situated once between the thirty-fifth and twenty-eighth day before the sale and once between the fourteenth and seventh day before the sale.

Apparently, the trial court assumed that since the sale had already occurred, compliance with *RCW 61.24.130(3)* was unnecessary and inconvenient.

Moreover, this statutory provision was ignored in the Court's Order of November 29, 2011. The entire premise of the proceeding to dissolve the TRO was that it was valid and the *ex post facto* justifications for ignoring it were based primarily on convenience rather than a reflection of what all parties believed at the time – that the TRO was valid and that the trustee's sale should be rescinded without prejudice to further proceedings within the statutory and legal requirements.

In sum, the trial court wrongfully ignored the parties' *CR 2A* agreement and, in the process, prejudiced Ms. Bavand's rights under *RCW 61.24.130*. The trial court's failure to enforce the parties' *CR 2A*

agreement has deprived Ms. Bavand all benefit she may have derived through this litigation. Accordingly, this Court should reverse the trial Court's Order of November 29, 2011, nullify the trustee's sale conducted on June 17, 2011, vacate the Trustee's Deed recorded August 9, 2011 and remand this matter back to the trial court for consideration of the matter on the merits.

C. Ms. Bavand's Complaint was Wrongly Dismissed

On a *CR 12(b)(6)* motion to dismiss, the Court may only dismiss an action if it appears beyond doubt that the plaintiff cannot prove any set of facts that would (a) be consistent with the complaint and (b) warrant relief. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000); *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 744 P.2d 1032 (1987); *Havsy v. Flynn*, 88 Wn.App. 514, 945 P.2d 221 (1997). Motions brought under *CR 12(b)(6)* should be granted sparingly and only in cases where the plaintiff includes allegations that demonstrated an insurmountable bar to relief. *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998) 330 (citing *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988), *aff'd*, 113 Wn.2d 148, 776 P.2d 963 (1989), *Bravo v. Dolsen Co.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995)) Caution should be especially exercised when the area of law involved is "in the process of

development”, as it is here with regard to the “MERS issue.” *Haberman v. WPPSS, supra.*

A trial court’s dismissal under *CR 12(b)(6)* is appropriate only if it appears beyond a reasonable doubt that the plaintiff cannot prove any set of facts that would justify recovery. *Tenore*, 136 Wn.2d at 329-330 (citing *Hoffer v. State, supra.* and *Bravo v. Dolsen Co., supra.*). In deciding a motion brought under *CR 12(b)(6)* a court may choose to consider hypothetical facts that may not be included in the record. *Tenore*, 136 Wn.2d at 330.

Moreover, if the trial court believed that the Ms. Bavand’s Complaint was deficient in any technical sense, Ms. Bavand should have been permitted leave to amend the Complaint, pursuant to *CR 15*, in lieu of dismissal, as requested in her responsive pleadings.

However, Ms. Bavand’s Complaint plead various meritorious claims upon which relief should have been provided.

i. The Defective Deed of Trust and Non-Judicial Foreclosure Process Entitle Ms. Bavand to Equitable Relief under RCW 61.24.

The Washington Deed of Trust Act was enacted in 1965 to provide an alternative to the state's mortgage foreclosure process and authorizes the foreclosure of deeds of trust without judicial intervention. *Joseph L. Hoffman, Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59 Wash.L.Rev. 323, 330

(1984). Significant rights and interests are at stake in most non-judicial foreclosure cases. The debtor stands to lose all rights in the property, including the right of redemption, while the lender stands to lose a valuable security interest. *Id* at 323.

In striking a balance between borrowers and lenders, the Washington Deed of Trust Act was established and the Washington Supreme Court announced its three goals (1) that the non-judicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and (3) that the process should promote stability of land titles. *Cox v. Helenius*, 103 Wash.2d 383, 387, 693 P.2d 683 (1985) (emphasis added); *Country Express Stores, Inc. v. Sims*, 87 Wash.App. 741, 747-48, 943 P.2d 374 (1997).

The fulfillment of these three goals requires strict compliance with the statutory provisions. *Albice v. Premier Mortg. Services of Washington, Inc.*, 276 P.3d 1277 (2012) (citing *Udall v. T.D. Escrow Servs., Inc.*, 159 Wash.2d 903, 915-16, 154 P.3d 882); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 752 P.2d 385 (1988)(the statutes and Deeds of Trust must be strictly construed in favor of the borrower). Failure by the lender to comply with the statutory provisions leads to invalidation of the sale. *Cox v. Helenius, supra.*; *Albice v. Premier Mortg. Services of Washington, Inc., supra.* A borrowers

failure to enjoin a sale under *RCW 61.24.130* will result in a loss of the borrower's rights to contest the sale after it occurs:

We agree that the waiver rule applied by the Court of Appeals in *Country Express Stores, Steward, Koegel* and like cases appropriately effectuates the statutory directive that any objection to the trustee's sale is waived where presale remedies are not pursued. See *RCW 61.24.040(1)(f)(IX)*.

Plein v. Lackey, 149 Wash.2d 214, 67 P.3d 1061 (2003).

Ms. Bavand sought protection under *RCW 61.24.130* in the form of a temporary restraining order prior to seeking later and more permanent injunctive relief blocking the sale by the parties and under the documents issued prior to the June 17, 2011 sale. These arguments began with the assertion that the Deed of Trust was itself defective under Washington's statutory framework.

At the core, Ms. Bavand argues in her Complaint that the lender's utilization of MERS perverted the security and foreclosure process, rendering her Deed of Trust voidable and the efforts of these Defendants, who apparently acted without the authority of the true and lawful holder and owner of the subject obligation, unlawful.

RCW 61.24.005(2) provides as follows:

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

(Emphasis added)

A beneficiary's authority to act depends upon the recording of the deed of trust or the recording of the beneficial interest in the deed of trust. Only a beneficiary defined under *RCW 61.24.005(2)* can appoint a successor trustee (*RCW 61.24.010*) or declare a default (*RCW 61.24.030(7)(c)*) or initiate a non-judicial foreclosure. In the absence of judicial oversight there is an expectation that trustees, and the parties that have retained them, will act consistently with the procedural requirements which are meant to provide borrowers notice of the process and an opportunity to object to the process if necessary. *Cox v. Helenius, supra.*; *Albice v. Premier Mortg. Services of Washington, Inc., supra.* Underlying all these procedures is the implicit assumption that the borrower will have knowledge or have the ability to reach the holder of the obligation.

MERS was designated as beneficiary under the subject Deeds of Trust at the outset by the lender. At no time relevant to this cause of action did MERS have an interest in the underlying Note, as required by statute. Accordingly, MERS was not a proper "beneficiary" under *RCW 61.24.005(2)*, which provides that the beneficiary must be "the holder of the instrument or document evidencing the obligations secured by the deed of trust," a use of language that is similarly found and used in the UCC. If MERS never had an interest in the underlying Note, it could never be a proper beneficiary under *RCW 61.24.005(2)* and never had

the right to assign the Deed of Trust, making any subsequent assignment a nullity. The only potential exception to this would be if MERS had the express authority of the principal, IndyMac, the original lender. However, no evidence of such express authority being given by IndyMac has been provided and such an assignment would have required proceedings under the U.S. Bankruptcy Code.

The subject Deed of Trust provides, in pertinent part, as follows:

“MERS” is Mortgage Electronic Registration Systems, Inc., MERS is a separate corporation that is acting solely as a nominee for Lender and Lender’s successors and assigns. MERS is the beneficiary under this Security Instrument. . . .

It is important to note that nothing in any of the documents or instruments executed on October 20, 2006 or at any time thereafter ever assigned an interest in the underlying Notes to MERS. The role of MERS in the subject transactions and its legal interest in the Note and/or Deed of Trust is crucial, because if MERS had no authority to act under the subject Deeds of Trust then all subsequent actions taken under the authority granted by the Deed must fail. This is the conclusion reached by other courts across the nation.

The Supreme Court of Arkansas rejected the designation of MERS as a beneficiary under that states Deed of Trust statutes. (“MERS is not the beneficiary, even though it is so designated on the deed of trust”). *Mortgage Electronic Registration Systems, Inc. v. Southwest*

Homes of Arkansas, 2009 Ark. 152 (2009). The relevant Arkansas laws closely mirror *RCW 61.24.005*, the Arkansas Code states in pertinent part:

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

Arkansas Code § 18-50-101.

The Supreme Court of Kansas ruled that MERS had no interest in either the property or the obligation it secured. *Landmark Nat’l Bank v. Kesler*, 216 P.3d 158 (2009). The *Landmark* court noted, after finding a non-lender had no right to intervene in a foreclosure action, that:

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

The Arkansas and Kansas Supreme Courts are not the only courts to question the role of MERS in matters such as these. The Washington Supreme Court is currently considering the role of MERS

under Washington law.²

In addition to the legal defects created by involving MERS in the lending process, and the fraudulently executed Assignment while IndyMac was in bankruptcy, there was a procedural defect in the appointment of RTS as successor trustee.

On December 15, 2010, OneWest purportedly executed, “as beneficiary” an appointment of successor trustee, appointing RTS as successor trustee, pursuant to *RCW 61.24.010*. CP 27-28. However, MERS didn’t assign its interest in the subject Deed of Trust until December 16, 2010 – a day later. CP 24-25. Accordingly, applying the strict compliance requirement set forth in *Albice* and *Udall*, and assuming the efficacy of the Assignment of Deed of Trust, which Ms. Bavand does not, at the time the Assignment of Deed of Trust was executed, OneWest was not the beneficiary of record under the Deed of Trust and had no authority to appoint RTS a successor trustee, under *RCW 61.24.010*. Absent an appropriate appointment, RTS lacked legal

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As noted above, the “MERS issue” is one that is in development in the State of Washington and is now pending before the Washington Supreme Court in the matters of *Bain v Metropolitan Mortgage Group Inc.*, Washington State Supreme Court Case No. 86206-1, and *Selkowitz v. Litton Loan Servicing LP*, Washington State Supreme Court Case No. 86207-9. Accordingly, the trial court’s dismissal of Ms. Bavand’s claims was thoroughly inappropriate and constituted an egregious abuse of discretion. *Haberman v. WPPSS, supra*.

authority to initiate or conduct any sale of the property or to issue a Trustee's Deed under *RCW 61.24*.

It is further Ms. Bavand's contention that RTS know or should have known of these defects. Indeed, most, if not all, of the documents prepared, executed and recorded after August 7, 2007, were done by RTS. Accordingly, RTS has breached its duty of good faith to Ms. Bavand, under *RCW 61.24.010(4)*.

ii. Defendants have Violated the Washington Consumer Protection Act

The acts that give rise to Ms. Bavand's claim under the WCPA include, without limitation, the following: (1) the assignment of the Note and Deed of Trust by MERS to OneWest despite the fact that MERS was not a proper beneficiary under *RCW 61.24.005(2)* and otherwise having no interest in the subject Note; (2) the appointment of RTS as successor trustee by OneWest when it had no authority to make such an appointment under *RCW 61.24.010(2)*; (3) declaration of a default in the obligation by a party who was not the beneficiary, in violation of *RCW 61.24.030(7)(c)*; (4) the deceptive and misleading efforts by OneWest and RTS through the wrongfully execution and recording of documents each knew or should have known contained false statements related to the Appointment of Successor Trustee and Assignment of Deed of Trust; and (5) the engagement of acts by MERS, OneWest and RTC in

violation of the FDCPA.

The elements of a claim under Washington's Consumer Protection Act (hereinafter "WCPA"), *RCW 19.86, et seq.*, include the following: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation. *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986). The WCPA should be "liberally construed that its beneficial purposes may be served." *RCW 19.86.920; Short v. Demopolis*, 103 Wn.2d 52, 691 P.2d 163 (1984).

The Washington Supreme Court has further implied that the violation of another Washington law or statute might constitute a *per se* violation of the WCPA. The Court in *Perry v. Island Sav. and Loan Ass'n.*, 101 Wn.2d 795, 684 P.2d 1281 (1984), held that a savings and loan association's attempt to enforce a due-on-sale clause in a deed of trust didn't constitute a *per se* violation of the WCPA because there is no statute that exists which restricts the enforcement of such clauses. *Perry v. Island Sav. and Loan Ass'n, surpa.*, at 810-11, n. 9. The obvious inference of this holding is that the violation of another statute with regard to a citizen's claim under the WCPA would support the contention that there has been a *per se* violation of the WCPA.

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

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

Determining whether a particular act is an unfair or deceptive act within the terms of the WCPA is a question of law for the court, if there is no factual dispute. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 930 P.2d 288 (1997). Of importance to the facts of the present controversy, an unfair or deceptive act can include misrepresentations of facts related to the legal status of a debt. *Panag v. Farmers Ins. Co. Of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009)

(deceptive methods used by a collection agency to recover money on behalf of an insurance company).

In applying *Panag* to the facts of the present controversy, it is undisputed that OneWest retained the services of RTS to represent OneWest in the non-judicial foreclosure of Ms. Bavand's property. The actions of OneWest, and its agent RTS, in asserting that they were acting in accordance with the provision of *RCW 61.24, et seq.* to collect a debt and specifically asserting by their actions that OneWest was the current and proper "beneficiary" to act under *RCW 61.24.005(2)* and *RCW 61.24.010*, were materially false or misleading to the extent that the purported transactions were not consistent with *RCW 61.24, et seq.*, and therefore failed to meet the legal standards for non-judicial foreclosures in this state. This is especially so where OneWest took action to appoint RTS prior to having the colorable authority to do so under *61.24.010(2)*.

Panag stands for the proposition that such statutory violations related to the collection of a debt are a *per se* unfair or deceptive act under the first element of the WCPA claim. As applied here, at no time relevant to this cause of action did OneWest have the right to possession of the subject properties at the time RTS threatened Ms. Bavand with non-judicial foreclosure of the subject property.

Whether an act occurs in trade or commerce is an issue of whether the act "directly or indirectly affect[s] the people of the State of

Washington." *RCW 19.86.010(2)*. Misrepresentations concerning the legal status of a debt related to real property and the party to whom the debt is owed clearly affects the people of Washington. The court in *Panag* interpreted the WCPA broadly in order to give maximum effect to the Act in circumstances similar to those alleged in this matter. Additionally, the Defendants in this case are companies engaged in similar transactions across the State of Washington and nationally. Their misconduct clearly occurred in connect with their trade. The WCPA defines "trade or commerce" to include the "sale of assets or services, and any commerce directly or indirectly affecting the people of the State of Washington." *RCW 19.86.010(2)*. Enforcement of notes and deeds of trust and foreclosure of the same in Washington clearly falls under the umbrella of "trade or commerce" as defined by the WCPA.

Among the factors set forth in *Hangman Ridge* in determining if the public interest element is met are: (1) were the alleged acts committed in the course of defendant's business? (2) are the acts part of a pattern or generalized course of conduct? (3) were repeated acts committed prior to the act involving plaintiff? (4) is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? *Hangman Ridge v. Safeco, supra*. For disputes more private in nature, courts will consider whether (1) the acts alleged were committed in the course of defendant's business? and (2) whether

plaintiff and defendant occupy unequal bargaining positions? The answer to most of these questions is an unequivocal “Yes.” The conduct alleged here was in the normal course of their respective businesses and substantially the same in form when conducting business with homeowners throughout the State of Washington.

There is no genuine argument that both the prevention of wrongful foreclosure and the promotion of stability in land titles fall within the auspices of the public interest. *Cox v. Helenius, supra.*; *Albice v. Premier Mortg. Services of Washington, Inc., supra.* The majority of land titles in Washington are privately held and subject to default under the *RCW 61.24* such that allowing for procedurally defective foreclosures or instability in land titles would stand in stark contrast to the stated public interest.

Regardless of the ultimate answer to the above questions, the *Hangman Ridge* court stated that the “*per se* method requires a showing that a statute has been violated which contains a specific legislative declaration of public interest impact.” *RCW 61.24.135* makes such a declaration for violation for several specific actions, including the offering of a property for sale “if it appears . . . the sale might have been void.” In addition, there are other statutory violations addressed in Ms. Bavand’s Complaint that could give rise to other *per se* violations, such as violation of the Federal Fair Debt Collection Practices Act.

The injury to Ms. Bavand's property occurred in the necessity for investigation and consulting with professionals to address wrongful legal procedures related to violations of *RCW 61.24, et seq.* The expenditure of out-of-pocket expenses for postage, parking, and consulting an attorney are sufficient proof of an injury under *Hangman Ridge. Panag, supra*, at 902. Here, Ms. Bavand had to take time off from work and incurred travel expenses to consult with an attorney to address the misconduct of the OneWest, RTS and MERS.

Additionally, injury to person's business or property is broadly construed and in some instances where "no monetary damages need be proven, and that non-quantifiable injuries, such as loss of goodwill would suffice for this element of the *Hangman Ridge* test." *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987). All of the injuries outlined were the direct and proximate result of the misconduct of OneWest, RTS and MERS.

All of these injuries were the direct and proximate cause of the misconduct alleged in the Complaint and subsequent pleadings related to the wrongful foreclosure of Ms. Bavand's home and, had the trial court properly presumed the validity of all of Ms. Bavand's allegations and all inferences that could be inferred therefrom, all five elements for a private cause of action under the WCPA are met.

iii. Ms. Bavand's Claim for Quiet Title Lies as a Matter of Law

The final claim addressed in Ms. Bavand's Complaint relates to the dismissal of her action to quiet title. Ms. Bavand is the owner of the subject real property in fee simple, and has been in the actual and uninterrupted possession of the property at all times relevant to this cause of action. It is Ms. Bavand's contention that (1) MERS has never been a legitimate beneficiary of the Deed of Trust under *RCW 61.24.005*, and (2) the acts of the original lender and several Defendants named herein has irreparably severed the Note from the Deed of Trust, thus rendering the subject Deed of Trust an invalid lien upon the property.

The Corporate Assignment of Deed of Trust purportedly executed by MERS states: "Assignor hereby assigns unto the above named Assignee, the said Deed of Trust together with the Note." CP 24-25. At no time did MERS ever hold the Note. Even if MERS had the express authority to transfer the beneficial interest of the Deed of Trust, which Ms. Bavand does not, the Deed of Trust does not contain a grant of authority to MERS to transfer the Note.

In the case of *In Re: Wilhelm et al.*, Case No. 08-20577-TLM (opinion of Hon. Terry L. Myers, Chief U.S. Bankruptcy Judge, July 9, 2009), Judge Myers analyzed the decisional law as to MERS' purported

standing to assign the Note where MERS was nothing more than the “nominal beneficiary” under the Deed of Trust. The Court concluded that even if MERS is granted authority to foreclose if required by “custom or law” (as set forth in the Deed of Trust), this language does not, either expressly or by implication, authorize MERS to transfer promissory notes.

The Court cited to the cases of *Saxon Mortgage Services v. Hillery*, 2008 WL 5170180 (N.D. Cal., Dec. 9, 2008) and *Bellistri* as being in accord, holding that MERS presents no evidence as to who owns the note or of any authorization to act on behalf of the present owner of the note. Both cases were effectively dismissed (*Hillery* by outright dismissal; *Bellistri* by summary judgment), finding that there was no standing as there was no authority for the MERS assignment of the note. The *Wilhelm* Court quoted the pertinent portion of the *Bellistri* opinion:

The record reflects that BNC was the holder of the promissory note. There is no evidence in the record or the pleadings that MERS held the promissory note or that BNC gave MERS the authority to transfer the promissory note. MERS could not transfer the promissory note; therefore the language in the assignment of the deed of trust purporting to transfer [the] promissory note is ineffective.”

This is relevant to the underlying title as the separation of the Note from the Deed of Trust renders the subject Deed of Trust unenforceable. In other words, separation of the Note from the Deed of

Trust results in the Note being unsecured. Restatement (Third) of Property: Mortgages § 5.4, Comment e (1997) (“in general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation”). See also *Jackson v. MERS*, 770 N.W.2d 487 (Minn. 2009) (“by acting as the nominal mortgagee of record for its members, MERS has essentially separated the promissory note and the security instrument, allowing the debt to be transferred without an assignment of the security instrument.” *Id* at 494.)

This rule should be adopted by this Court and it was by the *Landmark* court and was cited by a Missouri court in finding that an assignment of deed of trust (which also purported to assign the underlying note) was of no force or effect. *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619 (Mo. App. 2009). When the subject Note is divorced from the Deed of Trust, the Deed of Trust becomes void and is an inappropriate and unlawful cloud on the owner’s title.

The United States Supreme Court addressed this issue in *Carpenter v. Longan*, 83 U.S. 271 (1872) and stated succinctly:

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

Carpenter at 274.

The Supreme Court of California arrived at the same conclusion in *Kelley v. Upshaw*, 39 Cal.2d 179 (1952) (“purported assignment of the mortgage without an assignment of the debt which is secured was a legal nullity”).

The Kansas Court in *Landmark* similarly explained the consequences of such scenarios:

Indeed, in the event that a mortgage loan somehow separates interests of the note and the deed of trust, with the deed of trust lying with some independent entity, the mortgage may become unenforceable.

"The practical effect of splitting the deed of trust from the promissory note is to make it impossible for the holder of the note to foreclose, unless the holder of the deed of trust is the agent of the holder of the note. [Citation omitted.] Without the agency relationship, the person holding only the note lacks the power to foreclose in the event of default. The person holding only the deed of trust will never experience default because only the holder of the note is entitled to payment of the underlying obligation. [Citation omitted.] The mortgage loan becomes ineffectual when the note holder did not also hold the deed of trust." *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 623 (Mo. App. 2009).

The Missouri court found that, because MERS was not the original holder of the promissory note and because the record contained no evidence that the original holder of the note authorized MERS to transfer the note, the language of the assignment purporting to transfer the promissory note was ineffective. "MERS never held the promissory note, thus its assignment of the deed of trust to Ocwen separate from the note had no force." 284 S.W.3d at 624; see also *In re Wilhelm*, 407 B.R. 392 (Bankr. D. Idaho 2009) (standard mortgage note language does not expressly or implicitly authorize MERS to transfer the note); *In re Vargas*, 396 B.R. 511, 517 (Bankr. C.D. Cal. 2008) ("[I]f FHM has transferred the note, MERS is no longer an authorized agent of the holder unless it has a separate agency contract with the new undisclosed principal. MERS presents no evidence as to who

owns the note, or of any authorization to act on behalf of the present owner."); *Saxon Mortgage Services, Inc. v. Hillery*, 2008 WL 5170180 (N.D. Cal. 2008) (unpublished opinion) ("[F]or there to be a valid assignment, there must be more than just assignment of the deed alone; the note must also be assigned.... MERS purportedly assigned both the deed of trust and the promissory note.... However, there is no evidence of record that establishes that MERS either held the promissory note or was given the authority... to assign the note.").

Absent an effective assignment by the real holder and owner of the underlying obligation to the person or entity conducting the sale, the non-judicial foreclosure is void. Absent proper parties to the original Deed of Trust that document must also be found void. In sum, there is a very real possibility that one result of MERS' action in this case is to void the very Deed of Trust the Defendants/Respondents seek to foreclose.

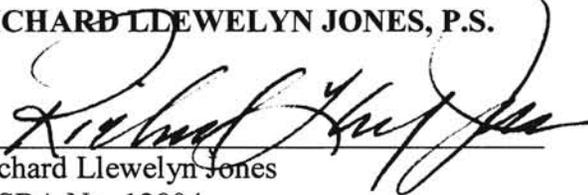
IV. CONCLUSION

Based on the foregoing, Ms. Bavand respectfully request that this Court to (1) reverse the trial court's Orders November 29, 2011 and December 20, 2011, (2) vacate and set aside the Sale June 17, 2011, and that certain Trustee's Deed wrongfully recorded by Defendants on August 9, 2011, under King County Auditor's Recording No. 2011080900121; (3) remand this matter for trial on the merits; and (4) award Ms. Bavand her taxable costs and reasonable attorney's fees incurred herein, pursuant to Paragraph 26 of the subject Deed of Trust.

Ms. Bavand also requests this Court to stay proceedings herein until the Washington Supreme Court has ruled in the matters of *Bain v Metropolitan Mortgage Group Inc.*, Washington State Supreme Court Case No. 86206-1, and *Selkowitz v. Litton Loan Servicing LP*, Washington State Supreme Court Case No. 86207-9, given the centrality of the MERS issue to the claims now before this Court.

REPECTFULLY SUBMITTED this 9th day of August, 2012.

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