

No. 69652-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MATTHEW N. ORTEGA and JENNIFER C. ORTEGA

Appellants,

vs.

NORTHWEST TRUSTEE SERVICES, INC.;
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,
INC.;
HSBC BANK USA, National Association as Trustee for Wells
Fargo Asset Securities Corp. Mortgage Asset-Backed Pass-
Through Certificates, Series 2008-I;
WELLS FARGO HOME MORTGAGE

Respondents.

BRIEF OF APPELLEE
NORTHWEST TRUSTEE SERVICES, INC.

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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

ORIGINAL

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I. STATEMENT OF THE CASE

A. Introduction

The Appellants Matthew and Jennifer Ortega filed a lawsuit to stop the nonjudicial foreclosure of their home. The Ortegases obtained a restraining order to prevent the foreclosure sale from going forward. As a condition of the order restraining the foreclosure sale, the Ortegases were ordered to make monthly payments into the court registry. The Ortegases' payments were sporadic and eventually stopped all together.

In response to the Ortegases' failure to maintain the monthly payments into the court registry, Wells Fargo, MERS, and the Wells Fargo Trust moved the court to find the Ortegases in contempt of the order requiring monthly payments. The trial court granted the motion for contempt, provided the Ortegases time to purge their contempt, and warned that failure to purge the contempt would result in the court striking all of the Ortegases' pleadings. Ultimately, the Ortegases failed to purge their contempt. On that basis, Wells Fargo, MERS, and the Wells Fargo Trust moved to dismiss and to disburse the funds held in the court registry. NWTS joined in the motion to dismiss. The trial court granted the motion, dismissing the Ortegases' claims. The Ortegases now seek review from this court.

B. Statement of Facts

In November 2007, Appellants Matthew and Jennifer Ortega (“Ortegas”), for valid consideration, made, executed, and delivered to Golf Savings Bank, a Promissory Note (the “Note”) in the amount of \$806,000.00. CP 1409-1416. The Note was specially endorsed by Golf Bank to Wells Fargo Bank, N.A (“Wells Fargo”). CP 1416. Wells Fargo then indorsed the Note in blank making it bearer paper. CP 1416.

To secure repayment of the Note, the Ortegas granted to Mortgage Electronic Systems Registration, Inc. (“MERS”) solely as a nominee for the Lender, Golf Savings Bank, and Lender’s successors and assigns, a deed of trust (the “Deed of Trust”). CP 1425. The Deed of Trust encumbers real property (the “Property”) commonly known as 4901 Ocean Ave., Everett, Washington, 98203 (the “Property”). CP 1425. The Deed of Trust was recorded on November 14, 2007, under Snohomish County Auditor’s File No. 200711140406. *Id.*

Thereafter, the Ortegas defaulted by failing to make the payments required under the terms of the Note and Deed of Trust. CP 1425.

On or about July 16, 2009, NWTS received a nonjudicial foreclosure referral from Wells Fargo directing NWTS to foreclose the Property in the name of HSBC Bank USA, National Association as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Asset

Back Pass-Through Certificate Series 2008-1 (“Wells Fargo Trust”).¹ CP 1419.

On July 21, 2009, NWTS executed a notice of default as the duly authorized agent of the Wells Fargo Trust. CP 1419.

NWTS received a declaration (the “Beneficiary Declaration”) pursuant to RCW 61.24.030(7)(a). CP 1419. The Beneficiary Declaration, signed August 28, 2009, by Wells Fargo as attorney in fact for the Wells Fargo Trust, declared under the penalty of perjury that “HSBC Bank as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Asset Back Pass-Through Certificate Series 2008-1 is the actual holder of the promissory note.” CP 1419, 1464.

On September 16, 2009, MERS assigned its agency interest under the deed of trust to the Wells Fargo Trust. The assignment of deed of trust (“Assignment of Deed of Trust”) was then recorded on September 17, 2009, under Snohomish County Auditor’s File No. 200909170332. CP 1426. No assignment of deed of trust, however is required to affect a nonjudicial foreclosure, and the recordation of an assignment of deed of trust is not a pre-requisite to a nonjudicial foreclosure.

¹ Wells Fargo was identified as the loan servicer and attorney in fact for HSBC Bank as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Asset Back Pass-Through Certificate Series 2008-1. CP 2041, 2043

On September 17, 2009, the Wells Fargo Trust, through its attorney in fact Wells Fargo, as beneficiary by virtue of being both the holder of the note and beneficiary of record as of September 16, 2009, recorded an appointment of successor trustee naming NWTS the successor trustee under the Deed of Trust. CP 1426-1427. The Appointment was recorded under Snohomish County Auditor's File No. 200909170333. CP 1426-1427.

On September 22, 2009, NWTS recorded the notice of trustee's sale (Notice of Trustee's Sale") under Snohomish County Auditor's File No. 200909220418. CP 1419. The Notice of Trustee's Sale scheduled the trustee's sale for December 28, 2009. CP 1419.

Ultimately, no sale occurred within the allowable statutory 120-day timeframe. CP 1420. No other trustee's sale has been scheduled. CP 1420.

C. Procedural History

On December 17, 2009, the Ortegas filed their complaint to Restrain or Set Aside Nonjudicial Deed of Trust Foreclosure Proceeding and For Damages. CP 1918-1936.

On January 20, 2010, the Ortegas moved to quash the trustee's sale. CP 1889-1907.

On January 29, 2010, the trial court entered an order staying the trustee's sale until March 30, 2010. CP 1828-1830. As a condition to the stay, the trial court ordered the Ortegas deposit monthly payments in the amount of \$5,669.18 into the court registry. *Id.*

On February 15, 2010, the Ortegas served discovery requests on NWTS. CP 806.

On March 17, 2010, the parties agree to a 60 day continuance of all deadlines, including discovery deadlines. CP 806.

On October 28, 2010, the Ortegas agree to wait until after the Court ruled on the pending motion for summary judgment before requiring defendants to respond to the discovery requests. CP 806.

In a letter dated November 10, 2010, the trial court, in granting the Ortegas' CR 56(f) motion for continuance, imposed a ninety day continuance for discovery. CP 1483-1485.

On December 9, 2010, NWTS served on the Ortegas responses to Ortegas' first set of interrogatories, requests for production, and requests for admission. CP 832-39.

On March 14, 2011, the Ortegas served NWTS with a request to supplement its discovery responses. CP 756.

Then, on March 21, 2011, the Ortegas moved to compel discovery by NWTS. CP 736-742.

On March 25, 2011, the trial court sent a letter to the parties indicating, among other things, that the court granted the Ortegas' motion to compel discovery. The Court also ordered the Ortegas to resume making payments into the court registry. CP 698-700.²

On June 10, 2011, NWTS supplemented its discovery.

Between March 25, 2011 and December 15, 2011, the Ortegas made the following payments into the court registry:

- April 26, 2011 – \$2,431.77
- May 26, 2011 - \$5,669.18
- June 16, 2011 - \$3,237.18
- June 28, 2011 - \$5,669.18

CP 108.

On October 11, 2011, Wells Fargo, MERS, and the Wells Fargo Trust filed a motion requesting the court find the Ortegas in contempt of court based on their failure to make payments into the court registry as ordered by the Court's March 25, 2011 decision. CP 687-692.

On November 16, 2011, a hearing was held on the motion for contempt. RP 8 – 21. At the hearing, Jennifer Ortega made a request to the court that the monthly payments be reduced. However, when the Court

² In follow up, in a letter dated May 10, 2011, the court advised that the monthly payment amount to be paid into the court registry was \$5,669.18, pursuant to the Order entered January 29, 2010. CP 694.

requested authority to support the request, none was offered. RP 15 at Lines 21-25.

Moreover, the Court pointed out that while Ortegas contended that their payment should be reduced to \$2,431.77, they had made no attempt to make even the reduced payment in the amount they contended they could afford. RP 17. Finally, the Court noted that a “huge amount” of time passed before the Court required the Ortegas to resume making payments, that it did not require any back payments, and that it had previously rejected a request to lower the payments because there was no authority for the Court to “remake the contract.” RP 18-19.

On November 16, 2011, the trial court found the Ortegas in contempt of the March 25, 2011 Order. RP 19.³ The Order provided the Ortegas may purge their contempt by (a) “paying into the court registry the current \$22,676.72 arrearage and remaining current on their monthly \$5,669.18 obligation” on or before January 16, 2012 and (b) remaining current on their monthly \$5,669.18 obligation. The Order further provided that “failure to so purge their contempt shall result in the Court striking the Ortega’s pleadings and dismissing the lawsuit.” CP 109. The Court also denied the Ortegas’ motion to compel discovery.⁴ *Id.*

³ The order was entered on December 20, 2011. CP 106-110.

⁴ Within their response to motion for contempt, the Ortegas moved to compel discovery against only Wells Fargo.

On March 13, 2012, Defendants Wells Fargo, MERS, and the Wells Fargo Trust moved the court for dismissal of the complaint, with prejudice, on the basis that the Ortega has failed to purge their contempt pursuant to the December 15, 2011 Order. Wells Fargo also requested disbursement of the funds held in the court registry. CP 102-105.

On March 14, 2012, NWTS joined in Defendants Wells Fargo, MERS, and the Wells Fargo Trust's motion to dismiss. CP 1958-1959.

After a hearing on March 26, 2012, on March 29, 2012, the court issued a letter staying the matter pending a decision in the *Bain v. Metro* case, and deferred ruling on the cross motions to dismiss and subsequent disbursement of court registry funds. CP 80-82.

On August 16, 2012, the Washington State Supreme Court issued its decision in the *Bain v. Metro. Mortg. Group, Inc. case. Bain v. Metro. Mortg. Group, Inc.*, 175 Wash. 2d 83, 91, 285 P.3d 34, 49, 2012 WL 3517326 (2012).

On or about October 26, 2012, Defendants Wells Fargo, MERS, and the Wells Fargo Trust renewed their motion to dismiss, which NWTS had previously joined, based on the Ortega's failure to purge their contempt. CP 45-51. Wells Fargo also moved for disbursement of the funds held in the court registry. CP 52-59.

On October 26, 2012, Plaintiffs responded to the motion to dismiss and moved to vacate the contempt order under CR 60(b)(11) based on the Supreme Court's decision in *Bain*. CP 68.

On November 5, 2012, the trial court held a hearing on the motion to dismiss and motion to disburse funds. RP 56-71. The trial court granted Wells Fargo, MERS, and the Wells Fargo Trust, and NWTs' motion to dismiss dismissing the matter in entirety and with prejudice. CP 1-3.

II. RESPONSE ARGUMENT

A. THE TRIAL COURT PROPERLY EXERCISED ITS CIVIL CONTEMPT POWER AND INHERENT POWER TO SANCTION.

1. Trial Courts Have Authority to Exercise Civil Contempt Power.

The trial court judge may exercise its civil contempt powers pursuant to RCW 7.21.020. Under RCW 7.21.010(1)(b), civil contempt of court includes the intentional disobedience of any lawful order of the court. Specifically, the court may treat as contempt, the disobedience of an order for the deposit of money. *See* RCW 4.44.490; *see also Yamaha Motor Corp. v. Harris*, 29 Wn. App. 859, 865-866, 631 P.2d 423, 1981 Wash. App. LEXIS 2496 (Wash. Ct. App. 1981).

Contempt of court is punishable either by statute, 7.21.020, or

pursuant to the court's inherent contempt power. *Yamaha Motor Corp. v. Harris*, 29 Wn. App. 859, 865-866, 631 P.2d 423, 1981 Wash. App. LEXIS 2496 (Wash. Ct. App. 1981); *see also Burke & Thomas, Inc. v. International Organization of Masters, Mates & Pilots*, 92 Wn.2d 762, 776, 600 P.2d 1282 (1979).

The trial court may initiate a proceeding to impose a remedial sanction on its own motion or on the motion of a person aggrieved by the contempt of court in the proceeding in which the contempt is related. RCW 7.21.030(1). A remedial sanction is any sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform. RCW 7.21.010(3). If the court finds that the person has failed or refused to perform an act that is within the person's power to perform, the court may find the person in contempt of court and impose a remedial sanction in the form of an order designed to ensure compliance with a prior order of the court. RCW 7.21.030(2)(c).

The court may use its inherent contempt power to coerce compliance with its lawful order and is not limited in its exercise of this power by the punishments prescribed by the civil contempt statute. *Yamaha Motor Corp. v. Harris*, 29 Wn. App. 859, 865-866, 631 P.2d 423, 1981 Wash. App. LEXIS 2496 (Wash. Ct. App. 1981); *see also Burke &*

Thomas, Inc. v. International Organization of Masters, Mates & Pilots, *supra* at 776. The coercive sanctions imposed for contempt lay within the sound discretion of the trial court, and its action will not be disturbed absent a clear showing of abuse. *Yamaha Motor Corp. v. Harris*, 29 Wn. App. 859, 865-866, 631 P.2d 423, 1981 Wash. App. LEXIS 2496 (Wash. Ct. App. 1981); *Schuster v. Schuster*, 90 Wn.2d 626, 630, 585 P.2d 130 (1978); *State v. Caffrey*, 70 Wn.2d 120, 122, 422 P.2d 307 (1966); *State v. Nelson*, 14 Wn. App. 658, 666, 545 P.2d 36 (1975).

"The law presumes that one is capable of performing those actions required by the court . . . [and the] inability to comply is an affirmative defense." *Britannia Holdings Ltd. v. Greer*, 127 Wn. App. 926, 933, 113 P.3d 1041, 2005 Wash. App. LEXIS 1342 (Wash. Ct. App. 2005). Yet, the burden of showing inability to comply with an order of contempt is on the party held in contempt. *See State ex rel. Smith v. Smith*, 17 Wash. 430, 432, 50 P. 52 (1897).

2. Trial Courts Have Inherent Authority to Impose Sanctions.

Courts have inherent authority to impose sanctions in the management of proceedings and parties. *State v. Gassman*, 175 Wn.2d 208, 210-11, 283 P.3d 1113 (2012). This authority arises from "the control necessarily vested in courts to manage their own affairs so as to achieve

the orderly and expeditious disposition of cases.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991) (quoting *Link v. Wabash R.R.*, 370 U.S. 626, 630-31, 82 S. Ct. 1386, 8 L. Ed. 2d 734(1962)). Such authority “is properly invoked upon a finding of bad faith,” which may be demonstrated by “delaying or disrupting litigation.” *State v. S.H.*, 102 Wn. App. 468, 475, 8 P.3d 1058 (2000). However, no *express* finding of bad faith is necessary; it is sufficient if the court finds conduct equivalent or tantamount to bad faith. *Gassman*, 175 Wn.2d at 211-13.

A sanction decision is reviewed for abuse of discretion. *Gassman*, 175 Wn.2d at 210. A trial court abuses its discretion only when its decision is manifestly unreasonable, or exercised on untenable grounds, for untenable reasons. *In re Estate of Black*, 153 Wn.2d 152, 172, 102 P.3d 796 (2004). A trial court necessarily abuses its discretion if its ruling is based on an erroneous view of the law. *City of Bellingham v. Chin*, 98 Wn. App. 60, 66, 988 P.2d 479, 1999 Wash. App. LEXIS 2002 (Wash. Ct. App. 1999).

3. In the Present Case, the Trial Court Properly Exercised its Civil Contempt Power.

Here, the trial court first ordered the Ortegas to make monthly payments into the court registry on January 29, 2010, as a condition of the

restraint of the trustee's sale. CP 1829. Under RCW 61.24.130(1), the trial court "shall require as a condition of granting the restraining order or injunction that the applicant pay to the clerk of the court the sums that would be due on the obligation secured by the deed of trust if the deed of trust was not being foreclosed." The trial court ordered the Ortegas to make payments in the amount of \$5,669.18, the amount due under the note and deed of trust. CP 1828-1830.

Then, after the Ortegas stopped making payments, on March 25, 2011 the trial court ordered the Ortegas to resume making monthly payments into the court registry. CP 698-700. Following the March 25, 2011 order, the Ortegas made four payments. However, two of those payments were less than the full amount ordered by the court despite clarification that the monthly payment amount was \$5,669.18. 694. The Ortegas completely stopped making their required payments after June 28, 2011. CP 108.

After months of nonpayment, in October 2011, Wells Fargo, the Wells Fargo Trust, and MERS moved the court to find the Ortegas in contempt of the March 25, 2011 order requiring monthly payments. CP 687-692.

In response to the motion to compel, the Ortegas asserted they did not have the financial resources to make payments in the amount of

\$5,669.18, but would commit to making payments in the amount of \$2,431.77, the amount the Ortegas' payment would have been if they would have accepted a previously offered modification. CP 189.

The Ortegas did not petition the Court for a reduction in payments and submitted no evidence demonstrating that the payments were too much. RP 9-10. At the November 16, 2011 hearing, when the court requested authority to reduce the payment, none was offered. RP 15.

The trial court noted that the Ortegas had made no efforts to make even the reduced payment amount and that the court had allowed large portions of time to pass before requiring the payments resume, did not require back payments, and had already addressed a request to reduce the payments but had been provided no authority to "remake the contract." RP 17-19.

On November 16, 2011, the trial court found the Ortegas in contempt of the March 25, 2011 Order. RP 19.⁵ The contempt order provided the Ortegas could purge their contempt on or before January 16, 2012, by paying the arrearage of their monthly payments due and then remaining current on their \$5,669.18 monthly obligation. CP 106-110. The Court warned that failure to purge the contempt would result in the court striking the Ortegas' pleadings and dismissing the lawsuit. CP 106-110.

⁵ The order was entered on December 20, 2011. CP 102-105.

Despite the Court's warning, the Ortegas failed to purge their contempt on or before January 16, 2012. Then, in March 2012, all Defendants moved for dismissal based on the Ortegas' failure to purge their contempt.⁶ On other grounds unrelated to the Ortegas' contempt, the court stayed the matter in March 2013.⁷ After the stay was lifted, in October 2012, the Defendants renewed the motion to dismiss for failure to purge the contempt, and on November 5, 2012, after a hearing on the matter, the trial court granted the motion dismissing the Ortegas' lawsuit, with prejudice.

During the November 5, 2012 hearing, the court expressly determined that the Ortegas, given their contempt, did not have "clean hands." RP 67-68. Such an express finding regarding the Ortegas conduct is "equivalent or tantamount to bad faith." *See Gassman*, 175 Wn.2d at 211-13.

The record demonstrates the trial court properly invoked its civil contempt power when the Ortegas repeatedly ignored the order requiring payments. The Court considered the Ortegas' unsupported statement relating to their ability to pay, and ultimately rejected it as disingenuous in

⁶ NWTS joined in Defendants Wells Fargo, the Wells Fargo Trust, and MERS' motion to dismiss. CP 1958-1959.

⁷ The matter was stayed pending issuance of a decision in the Supreme Court case *Bain v. Metro*. CP 80-82. The stay lifted with the issuance of the *Bain* decision in August 2012. *Id.*

light of the Ortegas' request to make the monthly payments in the amount they claimed they could afford. Additionally, the Court properly invoked its inherent power to sanction a litigant by dismissing the Ortegas' lawsuit for their failure to purge their contempt. The dismissal sanction was supported by the trial court's determination that the Ortegas lacked "clean hands." Accordingly, both the contempt finding and ultimate dismissal was proper and should not be disturbed on appeal.

**B. THE TRIAL COURT PROPERLY DENIED THE
ORTEGAS' MOTION TO VACATE THE CONTEMPT
ORDER.**

In response to the motion to dismiss for Ortegas' failure to purge their contempt, the Ortegas moved the Court to vacate the contempt order pursuant to CR 60(b)(11) based on the Washington Supreme Court's decision in *Bain v. Metro. Mortg. Group, Inc.*, 175 Wash. 2d 83, 91, 285 P.3d 34, 49, 2012 WL 3517326 (2012). CP 68. In their opening brief, the Ortegas contend that the trial court erred by failing to vacate the contempt order and by ordering the court registry funds to be dispersed without making a holder status determination. Appellants' Brief, Pg. 3.

CR 60(b)(11) provides one ground upon which a court may relieve a party from an order; namely, the court may vacate an order for "any other reason justifying relief from the operation of the judgment." CR

60(b)(11) applies only in situations involving “extraordinary circumstances” relating to “irregularities which are extraneous to the action of the court or go to the question of the regularity of its proceedings.” *Tatham v. Rogers*, 170 Wn. App. 76, 100, 283 P.3d 583, 2012 Wash. App. LEXIS 1939, 2012 WL 3292953 (Wash. Ct. App. 2012) (quoting *State v. Keller*, 32 Wn. App. 135, 141, 647 P.2d 35 (1982)).

1. A Determination of “Holder Status” is Not a Pre-Requisite to the Required Payments That Gave Rise to the Ortegas’ Contempt.

Under Washington’s Deed of Trust Act (“DTA”), the term “‘beneficiary’ means the holder of the instrument or document evidencing the obligation secured by the deed of trust[.]” RCW 61.24.005(2). Under the Uniform Commercial Code (“UCC”), as adopted in Washington, a “[p]erson entitled to enforce” an instrument includes the holder of the instrument. RCW 62A.3-301. “Holder” status may be evidenced by physical possession of the note, which has either been indorsed to that person or indorsed in blank to bearer. RCW 62A.1-201.

The right to enforce the note *also* includes the right to enforce the deed of trust providing security for the note. *See Carpenter v. Longan*, 83 U.S. 271, 275, 21 L. Ed. 313 (1872) [“The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention

of the latter.... All the authorities agree that the debt is the principal thing and the mortgage an accessory.”]. This concept is well-settled in Washington law and also described in a long line of cases from many other jurisdictions.⁸

In the case at bar, the Wells Fargo Trust possessed the note, and as the attorney in fact and loan servicer for the Wells Fargo Trust, Wells Fargo stored the note at the offices of Wells Fargo in Iowa. CP 1593-1595.⁹

A borrower may enjoin a trustee’s sale on any proper legal or equitable ground. RCW 61.24.130(1). However, the DTA sets forth a specific procedure to enjoin a trustee’s sale. *Plein v. Lackey*, 149 Wn.2d 214, 225, 67 P.3d 1061, 1067 (2003). The procedure requires a party file a lawsuit, move “to restrain” the trustee’s sale, and requires that the person

⁸ See *Kennebec, Inc. v. Bank of the West*, 88 Wn.2d 718, 724-25, 565 P.2d 812, 816 (1977) [“the territorial legislature of 1869... provided that, ‘a mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law,’ and since such enactment a mortgage executed in this state, whatever its terms, has been merely a security incident to, and for the payment of, the principal debt.”]; see also *In re Leisure Time Sports, Inc.*, 194 B.R. 859 (9th Cir. 1996); *Andrews v. Commissioner of Internal Revenue*, 38 F.2d 55 (2nd Cir. 1930); *Union Supply Co. v. Morris*, 220 Cal. 33; *U.S. Bank NA. v. Collymore*, 68 A.D.3d 752, 890 N.Y.S.2d. 578 (N.Y.A.D. 2009); *Northstream Investments Inc. v. 1804 Country Store Co.*, 2005 SD 61, 697 N.W. 2d 762 (S.D. 2005); *Prime Financial Services, LLC v. Vinson*, 279 Mich. App. 245, 761 N.W.2d 694 (Mich. Ct. App. 2008); *Columbus Investments v. Lewis*, 48 P.3d 1222 (Colo. Sup. Ct. 2002) (en banc); UCC § 3-310(c)(2)(ii) (providing that if an instrument is payable to “a person described as agent or similar representative of a named or identified person, the instrument is payable to the represented person, the representative, or a successor of the representative.”).

⁹ During the course of the litigation, the note was provided to counsel for Wells Fargo and the Wells Fargo Trust. CP 1481-1482.

seeking the order provide five days' notice to the trustee of the attempt to seek the order.” *Id.* at 225-26; RCW 61.24.130(1), (2). As discussed *supra*, the DTA also requires the trial court “require as a condition of granting the restraining order or injunction, that the applicant pay to the clerk of the court the sums that would be due on the obligation secured by the deed of trust if the deed of trust was not being foreclosed.” RCW 61.24.130(1).

Notably, a determination of holder status is not a pre-requisite to obtaining an order to enjoin the trustee’s sale and nothing under the DTA suggests that an order to make payments under RCW 61.24.130(1) be contingent on a determination of holder status. The *Ortegas* provide no authority to support such a contention.

The finding of contempt was based on the *Ortegas*’ failure to make the payments as required by RCW 61.24.130(1). Thus, in determining whether to vacate the contempt order neither consideration of nor a determination of “holder status” was necessary or relevant to the analysis. The Court made this clear during the November 16, 2011, hearing when it refused to go into other issues stating, “The contempt is a non-payment issue.” RP 17. Accordingly, the Court had no obligation to make a holder status determination as a pre-condition to its initial grant of the restraining order, which required the *Ortegas* to make payments nor did the trial court

have an obligation to make a holder status determination prior to finding the Ortegas in contempt.

2. The *Bain* Decision Does Not Justify Vacation of the Contempt Order.

The issuance of the Washington Supreme Court's decision in *Bain* was not an "irregularity" to justify vacation of the contempt order pursuant to CR 60(b)(11), and the Ortegas never argued as such.

In the *Bain* decision, the Washington Supreme Court addressed the question of whether MERS may act as a deed of trust beneficiary in a non-agency capacity, and if not, what the effect of that conduct was. *Bain v. Metro. Mortg. Group, Inc.*, 175 Wash. 2d 83, 91, 285 P.3d 34, 49, 2012 WL 3517326 (2012). The issue arose in conjunction to the *Selkowitz* case (certified along with *Bain* by Judge Coughenour). In *Selkowitz*, MERS (acting as beneficiary) appointed the successor trustee, which in turn initiated foreclosure by recording a notice of trustee's sale. *Id.*¹⁰ The Court held that unless MERS was the note holder, it could not act as beneficiary in a non-agency capacity, but recognized that MERS could act as an agent for the beneficiary note holder. *Id.* at 106. ("MERS argues

¹⁰ The Supreme Court mistakenly suggested in *Bain* that MERS also appointed the successor Trustee, and frames the "primary issue" as whether "MERS is a lawful beneficiary with the power to appoint trustees ... if it does not hold the promissory notes secured by the deeds of trust." 2012 WL 3517326, at *1-*2. But in *Bain*, MERS did not appoint the successor trustee, IndyMac did, after receiving an assignment from MERS. See *Bain v. Metropolitan Mortg. Group, Inc.*, 2011 WL 917385, *2 (W.D. Wash. 2011).

that lenders and their assigns are entitled to name it as their agent...That is likely true and nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note. Washington law, and the deed of trust act itself, approves of the use of agents.).

Specifically, the Washington Supreme Court held in *Bain* that if MERS did not hold the promissory note, it cannot be a beneficiary in its own right under RCW 61.24.005(2). *Id.* at 110. The *Bain* court specifically concluded that even if MERS was never a holder of the note, merely naming MERS in the deed of trust in no way “voids” the deed of trust. *Bain*, at 112.

In the case at bar, MERS did not appoint the successor trustee, did not assert a right to foreclose, and nothing in the record suggests NWTS ever acted at the direction or request of MERS to prosecute the foreclosure.¹¹

¹¹ Courts have uniformly rejected claims stemming from MERS' involvement when MERS did not attempt to foreclose in its own name, but merely terminated its agency interest by assigning its rights to the Deed of Trust to the foreclosing note holder as it did here. See *Florez v. OneWest Bank, F.S.B.*, 2012 U.S. Dist. LEXIS 56111, 2012 WL 1118179, at *1-*2 (W.D. Wash. Apr. 3, 2012); *Frase v. U.S. Bank, N.A.*, 2012 U.S. Dist. LEXIS 66419, 2012 WL 1658400, at *9-*10 (W.D. Wash. May 11, 2012); *Sanoy v. Aurora Loan Serv., LLC, No. 11-1440-MJP*, 2012 WL 37494, at *4-*5 (W.D. Wash. Jan. 9, 2012) (rejecting DTA claim because “there are no facts pleaded or in the documents appended to the complaint showing that MERS has acted to foreclose on Plaintiffs' home or file a lien”); *Fay v. Mortgage Elec. Registration Sys.*, 2012 U.S. Dist. LEXIS 39306, 2012 WL 99343, at *2 (W.D. Wash. Mar. 22, 2012); *Corales*, 822 F. Supp. 2d at 1109; *Mickelson*, 2012 WL 1301251, at *4-*5; *Chan v. Chase Home Loans, Inc., No. C12-0273JLR*, 2012 WL 1576164, at *4 (W.D. Wash May 4, 2012); *Amador v. Cent. Mortg. Co., No. C11-414 MJP*, 2012 WL 405175, at *3 (W.D. Wash. Feb. 8, 2012); *Buddle*, 2012 WL 254096, at *5; *McNellis v. Mortgage Elec. Registration Sys.*, 2011 U.S. Dist.

The holding in *Bain* was irrelevant to the Ortegas' contempt for failure to comply with the court order. As the court pointed out in the November 16, 2011, hearing, the contempt related to Ortegas' non-payment, and nothing else. RP 17.

**3. The Ortegas' Conclusions Relating to the Beneficiary
Declaration Do Not Justify Vacation of the Contempt
Order.**

The Ortegas argue for the first time on appeal that NWTs' reliance on the Beneficiary Declaration and alleged breach of duty of good faith supports vacation of the contempt order. Appellants' Brief, Pgs. 13-18.

LEXIS 146851, 2011 WL 6440424, at *4 (W.D. Wash. Dec. 21, 2011) ("this Court and the Ninth Circuit have both held that to argue MERS is not a proper beneficiary is insufficient to defeat a Rule 12 motion to dismiss"); *Schanne v. Nationstar Mortg., LLC*, 2011 U.S. Dist. LEXIS 124645, 2011 WL 5119262, at *3 (W.D. Wash. Oct. 27, 2011); *Myers v. Mortgage Elec. Registration Sys.*, 2012 U.S. Dist. LEXIS 30891, 2012 WL 678148, at *3 (W.D. Wash. Feb. 24, 2012); *Szmania v. Bank of Am. Home Loans, Inc.*, No. 11-5330-RJB, 2012 WL 254084, at *7 (W.D. Wash. Jan. 26, 2012); *Treece v. Fieldston Mortg. Co.*, No. 11-5981-RJB, 2012 WL 123042, at *5 (W.D. Wash. Jan. 17, 2012); *Williams v. Wells Fargo Bank, NA*, No. 10-5880-BHS, 2012 WL 72727, at *3 (W.D. Wash. Jan. 10, 2012); *Lamb v. MERS*, 10-5856-RJB, 2011 WL 5827813, at *6 (W.D. Wash. Nov. 18, 2011); *Moseley v. CitiMortgage Inc.*, No. 11-5349-RJB, 2011 WL 5175598, at *6-7 (W.D. Wash. Oct. 31, 2011); *Dooms v. Cal-W. Reconveyance Corp.*, No. 11-5419-RJB, 2011 WL 5592760, at *4 (W.D. Wash. Nov. 16, 2011); *Cebun v. HSBC Bank USA, NA*, No. 10-5742-BHS, 2011 WL 321992, at *3 (W.D. Wash. Feb. 2, 2011); *Thepvongsa v. Reg'l Tr. Serv. Corp.*, No. 10-1045-RSL, 2011 WL 307364, at *4 (W.D. Wash. Jan. 26, 2011); *Klinger v. Wells Fargo Bank, NA*, No. 10-5546-RJB, 2010 WL 5138478, at *7 (W.D. Wash. Dec. 9, 2010); *Daddabbo v. Countrywide Home Loans, Inc.*, No. 09-1417-RAJ, 2010 WL 2102485, at *5 (W.D. Wash. May 20, 2010); *Montgomery v. Nw. Tr. Serv.*, No. 09-159-JCC, 2010 WL 1417262, at *5 (W.D. Wash. 2010); cf. *Salmon*, 2011 WL 2174554, at *6; *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1044 (9th Cir. 2011) (rejecting argument that MERS's role means no entity may foreclose).

Generally, if an issue is not raised in the trial court it may not be raised on appeal. *See* RAP 2.5(a); *Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005). The rule contains three express exceptions: “a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.” RAP 2.5(a).

The Ortegas fail to set forth any reasoning to support the notion that NWTS’ reliance on the Beneficiary Declaration supports vacation of the contempt order under CR 60(b)(11). As discussed *supra*, the contempt order related only to the Ortegas’ non-payment. RP 17.

In any event, the record shows NWTS was entitled to rely on the Beneficiary Declaration.

For residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. RCW 61.24.030(7)(a). One way in which the proof requirement may be satisfied is to obtain a declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust. *Id.* Unless the trustee has violated its duty of good faith,

it is entitled to rely on the beneficiary's declaration as proof. RCW 61.24030(7)(b). *Id.* The declaration pursuant to 61.24.030(7)(a) is not recorded nor is it provided to the borrower. *Id.*

No provision under RCW 61.24 *et seq.* or other authority requires that the *borrower* receive evidence of the beneficiary's holder status. Further, no provision of RCW 61.24 *et seq.* allows a borrower to challenge a foreclosure for alleged failure of a beneficiary declaration. Rather, the beneficiary declaration provides the trust a defense against an allegation that it did not have sufficient proof that the beneficiary in a foreclosure was proper.

The record in this case demonstrates NWTS obtained a declaration stating the Wells Fargo Trust was the actual holder of the Note. Additionally, no evidence exists that NWTS violated its duty of good faith, and the Ortegas make no rationale argument to lead to that conclusion. Consequently, NWTS was entitled to rely on this Beneficiary Declaration under RCW 61.24.030(7)(a), and NWTS' reliance on the Beneficiary Declaration provides no grounds for reversal on appeal.

**4. Allegations of Contradictory Statements Do Not Support
Vacation of the Contempt Order.**

The Ortegas also argue that NWTS received contradicting statements regarding holder status that precluded their reliance on the

Beneficiary Declaration. Appellants' Brief, Pg. 13. The documents and information provided to NWTS consistently identified the note holder beneficiary as the Wells Fargo Trust. CP. 1419, 1426, 1427, 1464. Many of the documents also identified Wells Fargo as the loan servicer and entity acting as the Wells Fargo Trust's attorney in fact. There was no contradiction, however, and a review of the documents in the record confirm the same.

First, in a declaration dated August 29, 2009, the Wells Fargo Trust through its attorney in fact, Wells Fargo, attested under the penalty of perjury, that the Wells Fargo Trust was the actual holder of the Note. The record demonstrates NWTS received such declaration in advance of recording the notice of trustee's sale as required by RCW 61.24.030(7)(a).¹² CP 1419, 1464.

Second, on September 16, 2009, MERS assigned its agency interest under the deed of trust to the Wells Fargo Trust.¹³ CP 1465. The Assignment of Deed of Trust¹⁴ was then recorded on September 17, 2009.

¹² Contrary to Appellants' implication, there is no requirement that a Beneficiary Declaration pursuant to RCW 61.24.030(7)(a) be recorded. Appellants' Brief, Pg. 16.

¹³ In *Bain*, the court recognized that the note holder may act through an agent as it did in this case. *Bain*, at 106.

¹⁴ The Ortegas claim NWTS claimed to have relied on the recording of the Assignment to establish the transfer for the security documents. Appellants' Brief, Pg. 16. However, the Ortegas fail to support this statement with any citation to the record. In fact, the record demonstrates, NWTS argued to the trial court in its motion for summary judgment that "the beneficiary's authority to act does not depend on the recording of any assignment of the beneficiary interest under the deed of trust."¹⁴ CP 1433.

The Ortigas erroneously argue that the Assignment of Deed of Trust conferred upon the Wells Fargo Trust its beneficiary status. However, as discussed above, under the DTA the Beneficiary is the holder, and UCC principles allow enforcement by the holder. RCW 61.24.005(2); *see also* RCW 62A.3-301. Holder status is conferred through indorsement and delivery of the Note. RCW 62A.3-201 and RCW 62A.3-204. An instrument indorsed in blank is bearer paper, resulting in enforcement through possession alone. RCW 62A.3-205.

In Washington, the security (deed of trust) follows the debt (note) with or without actual assignment of the deed of trust. *In re Leisure Time Sports, Inc.*, 194 B.R. 859, 861 (9th Cir. B.A.P. 1996) (citing *Carpenter v. Longan*, 83 U.S. 271, 275, 21 L.Ed. 313 (1872)). The State of Washington does not require recordation of an Assignment of Deed of Trust as part of the nonjudicial foreclosure process. *See Fed. Nat. Mortg. Ass'n v. Wages*, 2011 WL 5138724 (W.D.Wash Oct. 28, 2011); *Corales v. Flagstar Bank, FSB*, 2011 WL 4899957 (W.D.Wash. Jan. 10, 2012) (“Washington State does not require the recording of such transfers and assignments”); *In re United Home Loans*, 71 B.R. 885, 891 (Bankr. W.D.Wash. 1978), *aff'd* 876 F.2d 897 (9th Cir. 1989) (“An Assignment of deed of trust...is valid

between the parties whether or not the assignment is ever recorded”).¹⁵

Accordingly, the Wells Fargo Trust’s status as holder conferred upon it beneficiary status, not the Assignment of Deed of Trust.¹⁶ Had there never been an assignment of the Deed of Trust, under Washington law, the Wells Fargo Trust still could have foreclosed if it held the Note. Consequently, even if the Assignment of Deed of Trust here was defective or void, which it was not, that would not form the basis of any defect in the foreclosure.

Third, on September 17, 2009, the Wells Fargo Trust through its attorney in fact, Wells Fargo, appointed NWTs the successor trustee under the Deed of Trust. CP 1466. Under RCW 61.24.010(2), the beneficiary may appoint the successor trustee, and upon recordation of 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 an original trustee. RCW 61.24.010(2).

The record shows the Wells Fargo Trust was the note holder, and therefore beneficiary, on September 17, 2009, when the Appointment of

¹⁵ Courts have also rejected allegations that an Assignment was “robotically signed” under that rationale that, even if true, the borrower plaintiff has no standing to object to an allegedly “robotically signed” recorded assignment. *See Brodie v. Nw. Tr. Services, Inc.*, 12-CV-0469-TOR, 2012 WL 6192723 (E.D. Wash. Dec. 12, 2012) (citing *Kuc v. Bank of Am., NA*, 2012 WL 1268126 at *2 (D.Ariz., Apr.16, 2012) and *Javaheri v. JPMorgan Chase Bank N.A.*, 2012 WL 3426278 at *6 (C.D.Cal., Aug.13, 2012)).

¹⁶ Wells Fargo testified transferred to Wells Fargo in November 2007. CP 1594. Wells Fargo also produced the original Note to the trial court. CP 1481-1482.

Successor Trustee was recorded. CP 1419, 1464; and 1594. Moreover, although there is no requirement that a trustee have proof of the beneficiary's status when it is appointed, NWTS had obtained such proof through the Beneficiary Declaration.

Accordingly, NWTS was entitled to rely on the Appointment of Successor Trustee.¹⁷ Moreover, the timing of the Beneficiary Declaration, Appointment of Successor Trustee, and Assignment of Deed of Trust complied with the Washington's Deed of Trust Act ("DTA") such that NWTS was entitled to rely on each of the documents.¹⁸

5. The Ortegas' Allegations that the Beneficiary Declaration Was "Suspect" Do Not Justify Vacation of the Contempt Order.

Furthermore, the record does not support Appellants' conclusion that the Beneficiary Declaration was suspect. Appellants' Brief, Pg. 17. The Ortegas contend that two different copies of the Beneficiary Declaration were provided in the course of the trial court litigation.

¹⁷ *Mickelson v. Chase Home Fin. LLC*, 2012 U.S. Dist. LEXIS 171242, 7 (W.D. Wash. Dec. 3, 2012); see also *Mickelson v. Chase Home Fin. LLC*, 2011 U.S. Dist. LEXIS 131818, 7-9, 2011 WL 5553821 (W.D. Wash. Nov. 14, 2011).

¹⁸ A non-judicial foreclosure of owner-occupied residential real property in Washington includes: 1) issuing a Notice of Default (RCW 61.24.030), 2) recording an Appointment of Successor Trustee if applicable (RCW 61.24.010(2)), 3) recording a Notice of Trustee's Sale (RCW 61.24.040), and 4) delivery and recordation of a Trustee's Deed to the purchaser at sale (RCW 61.24.050).¹⁸ Noticeably absent is any requirement to "prove" one's status as beneficiary, or execute or record an Assignment of the Deed of Trust.

Appellants' Brief, Pg. 17. Based on this contention, the Ortigas argue NWTS was not entitled to rely on the Beneficiary Declaration as well as had a duty to terminate the nonjudicial foreclosure.

Under GR 31(e), parties shall not include, and if present shall redact, the following personal identifiers from all documents filed with the court...[including] financial account numbers. GR 31(e). A redaction is the careful editing of a document that includes the removal of confidential references or offensive material. Black's Law Dictionary (8th ed. 2004).

The Beneficiary Declaration contains a personal identifier, the loan number. When the Beneficiary Declaration was submitted as an exhibit in support of NWTS' motion for summary judgment, the loan number was fully redacted by the law firm representing NWTS. CP 1842; 1882; and 2005-2043. However, in error, when the same Beneficiary Declaration was submitted as an exhibit to NWTS' response to Plaintiffs' Motion to Quash, it was not redacted. CP 1842.

The record in this case shows NWTS explained the discrepancy between the two documents, and the explanation was also supported by the declarations from the two law firm staff who had prepared the Beneficiary Declaration as exhibits to be filed with the court. CP 1830-1833; 1834-1836. NWTS and its employees had no part in any alteration of the Beneficiary Declaration and undertook no attempt to engage in the

alleged spoliation of the Beneficiary Declaration. Rather, the only alterations to the Beneficiary Declaration were made by the law firm representing NWTS and only for the purpose of preparing copies of the Beneficiary Declaration to be submitted as an exhibit to the trial court. *Id.*

6. NWTS Was Charged With a Duty of Good Faith, and the Record Demonstrates NWTS Satisfied its Duty of Good Faith.

i. The Trustee's Duty of Good Faith Pursuant to RCW 61.24.010(4).

In conjunction with Assignment of Error No. 3 relating to the trial court's denial of the Ortegas' motion to vacate the contempt order, the Ortegas argue that a determination of the duty owed by NWTS is relevant. Appellants' Brief, Pg. 4. Like a holder status determination, the holding in the *Bain* case, and the Beneficiary Declaration, the duties owed by NWTS are irrelevant to the Ortegas' request to vacate the contempt order because the Ortegas never argued those issues to the trial court and they do not relate to the Ortegas' non-payment that led to their contempt.

Nonetheless, under the current form of Washington's Deed of Trust Act ("DTA"), Washington's nonjudicial foreclosure statute, RCW 61.24.010(4) provides: "[t]he trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor." "This subsection

became effective on June 12, 2008, prior to the initiation of the underlying foreclosure. It was intended to address ambiguities regarding the duties of trustee after the Washington Supreme Court imposed dual (and in many ways competing) obligations in *Cox*.” *Thepvongsa v. Reg'l Tr. Services Corp.*, 2011 WL 307364 (W.D. Wash. Jan. 26, 2011), *citing Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985), Wn. Senate Bill Report, 2008 Reg. Sess. S.B. 5378 (Feb. 9, 2008); Wn. House Rep. Bill Report, 2008 Reg. Sess. S.B. 5378 (March 6, 2008).

In general, “good faith” is also the “absence of intent to defraud or to seek unconscionable advantage.” *See Black’s Law Dictionary*, 701 (7th ed. 1999); *see also Indus. Indem. Co. of the Northwest, Inc. v. Kallevig*, 114 Wn.2d 907, 792 P.2d 520 (1990). A “covenant of good faith and fair dealing cannot ‘be read to prohibit a party from doing that which is expressly permitted by an agreement.’” *Collins v. Power Default Services, Inc.*, 2010 WL 234902 (N.D. Cal. Jan. 14, 2010), *citing Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal.4th 342, 374, 6 Cal.Rptr.2d 467, 826 P.2d 710 (1992).

NWTS’ role as successor trustee is delineated by the Deed of Trust, specifying that “[a]fter the time required by Applicable Law and after publication of the Notice of Sale, Trustee, without demand on Borrower, shall sell the property at public auction to the highest bidder at

the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines.” CP 1425; 1445-1461. NWTS cannot act in bad faith through the fulfillment of its required duties, as delineated in the Deed of Trust that the Ortegas assented to.

ii. The Present Case is Distinguishable From *Klem*.

In their opening brief, the Ortegas, for the first time and without citation to the record, in an apparent effort to liken this case to the *Klem* case, allege they contacted NWTS on numerous occasions and requested it continue the trustee’s sale and that NWTS would not continue the sale without the servicer’s approval. Brief, Pg. 5. Such a statement is simply not true. It is not supported by the record and should not be considered.

In any event, the subject facts are not akin to those in *Klem* and the case can be distinguished.

In *Klem*, the court evaluated whether the trustee’s conduct was unfair or deceptive to support a CPA claim. *Klem v. Wash. Mut. Bank*, 2013 Wash. LEXIS 151, at 25-39 (2013). In analyzing whether there was an unfair or deceptive act or practice to meet the first CPA element, the *Klem* court sought to evaluate whether (1) the trustee’s practice of postponing trustee’s sale only with permission of the beneficiary and (2) the trustee’s practice of predating foreclosure notices satisfied the first

CPA element. *Id.* There, the court held the trustee's practice of deferring to the lender on whether to postpone a foreclosure sale satisfied the first element of the CPA. *Id.* at 32. The court also held the act of false dating by a notary employee of the trustee is an unfair and deceptive act or practice to satisfy the first element of a CPA claim. *Id.* at 38. Finally, the court also expressed concern where the evidence suggested a postponement of even one week was likely to have resulted in the property being sold for an amount more than the sale price. *Id.*

The facts of the present case are distinguishable from those in *Klem*. Here, unlike in *Klem*, no trustee's sale occurred and nothing in the record indicates that Ortegas ever requested a postponement from NWTS or were misled to believe that a postponement would be given. The record is completely void of anything to suggest that NWTS' practice was to postpone sales only with the permission of the beneficiary or its servicer. The Appellants filed a lawsuit and moved the court to restrain the sale as provided for by RCW 61.24, *et seq.* In accordance with the court's order restraining the sale, NWTS postponed and ultimately cancelled the trustee's sale. As the Ortegas acknowledged in their opening brief, NWTS has not proceeded to set a new sale even though it could have following the dismissal of the Ortegas' complaint. Moreover, there is no evidence to

show NWTS engaged in any unfair or deceptive practice that could be equated with pre-dating notices. *Klem* does not apply here.

iii. NWTS is Entitled to Defend Against the Ortegas' Claims, and Such Defense is Not a Breach of NWTS' Duty of Good Faith.

The Ortegas contend that “so far in this litigation, the trustee has acted solely for the lender and lender’s successors.” Appellants’ Brief, Pg. 21. As discussed *supra*, there is nothing in the record to show the Ortegas ever made any attempt to contact NWTS prior to filing their lawsuit which alleged wrongdoing by NWTS and sought damages against NWTS. Once the Ortegas filed a lawsuit against NWTS, NWTS was entitled to defend against those claims, and its conduct in defending against the claims waged by the Ortegas cannot be considered a breach of its duty of good faith.

iv. NWTS Had No Obligation to Terminate the Nonjudicial Foreclosure.

Without citation to any authority, the Ortegas argue that the trustee had a duty to terminate the foreclosure when it became aware the deed of trust did not have a legal description of the property. Appellants Brief, Pg. 21. The record demonstrates the deed of trust identified the abbreviated

legal description on Page 1 and included as Exhibit A, the full legal description. CP 1445-1461.

Yet, even if that was not the case, a defect in the security instrument does not affect the validity of the instrument. RCW 65.08.030; *see also Real Property of Smith*, 93 Wn. App. 282, 968 P.2d 904, 908 1998 Wash. App. LEXIS 1772 (Wash. Ct. App. 1998)(“documents which are not properly executed and acknowledged impart the same notice to third persons, from the date of recording”); *Anderson Buick Co. v. Cook*, 7 Wn.2d 632, 110 P.2d 857, 862 1941 Wash. LEXIS 426 (Wash. 1941) (“the fact that securities were taken by one person in the name of another, who had no interest in them, does not invalidate the securities, or prevent the person beneficially interested from enforcing payment of them by action.”). Thus, the Ortegas can find no support for their assertion that to comply with the duty of good faith, NWTS was obligated to terminate the foreclosure based on the legal description contained in the Deed of Trust

Appellants also argue NWTS had a duty to terminate the foreclosure when it could not resolve conflicting statements regarding holder status. Appellants’ Brief, Pg. 21. However, as discussed *supra* (See Section (II)(B)(6)(ii)), there were no conflicting statements regarding holder status, and NWTS strictly complied with its duties and the requirements under the DTA.

v. NWTS Took No Part in Wells Fargo's Motion For Disbursement of Funds.

Wells Fargo, as loan servicer for the Wells Fargo Trust, moved the court for disbursement of the funds held in the court registry paid by the Ortegas in accordance with the January 29, 2010 and March 25, 2011 orders. CP 52-59. Wells Fargo moved on the basis that possession of the blank indorsed note had been demonstrated through the production of the original note, and corroborated by Appellants' own expert. *Id.*

By contrast, NWTS made no motion for disbursement, and NWTS did not join in the motion of Wells Fargo. At no time did NWTS lay any claim to the funds held in the court registry.

C. THE TRIAL COURT'S DENIAL OF ORTEGAS' MOTION TO COMPEL DOES NOT RELATE TO NWTS.

The Ortegas argue that the court erred when it denied the Ortegas' motion to compel discovery. Appellants' Brief, Pg. 22. The record reflects the motion to compel discovery associated with Assignment of Error No. 4 was not directed toward NWTS.¹⁹ CP 162-190. The Ortegas moved to compel discovery within their response to Defendants Wells Fargo, the

¹⁹ The Ortegas filed a separate motion to compel discovery as to NWTS on March 21, 2011, which was granted. CP 736-803 and 699. In response thereto, NWTS supplemented its discovery responses, and the Ortegas took no further action in relation to its discovery demands on NWTS.

Wells Fargo Trust, and MERS' motion for contempt. However, the motion to compel set forth no information about the discovery requests to NWTs, its response, or supplemental response.

D. THE TRIAL COURT PROPERLY DISMISSED THE ORTEGAS' COMPLAINT, AND THE ORTEGAS WERE NOT ENTITLED TO A TRIAL.

There is no absolute right to a civil trial as the Ortegas suggest. *See e.g., State v. Oakley*, 2003 Wash. App. LEXIS 1562, 117 Wn. App. 730, 72 P.3d 1114 (2003), review denied, 151 Wn.2d 1007, 87 P.3d 1185 (2004); *see also Nave v. Seattle*, 68 Wn.2d 721, 725, 415 P.2d 93, 1966 Wash. LEXIS 798 (Wash. 1966) (citing *United States v. Stangland*, 242 F.2d 843, 846, 1957 U.S. App. LEXIS 2864 (7th Cir. Ind. 1957)).

The court can affirm on any grounds supported by the record. *State v. Huynh*, 107 Wn. App. 68, 74, 26 P.3d 290, 2001 Wash. App. LEXIS 1307 (Wash. Ct. App. 2001). As discussed below, the list of legal conclusions set forth by the Ortegas fails to demonstrate any legal entitlement to a trial or any meritorious claim. *See Appellants' Brief*, Pg. 24-25. Accordingly, even if the trial court would have considered each of the Ortega's claims on the merits, dismissal would have been appropriate.

1. The Ortegas' Claim that NWTS is "Conflicted" Fails.

The Ortegas contend that Jeff Stenman was "conflicted because he was an agent for both MERS and Northwest." Appellants' Brief, Pg. 24. Washington law and the DTA approves of the use of agents. *See Bain*, at 106 ("Nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note. Washington law, and the deed of trust act itself, approves the use of agents."); *see also Mickelson v. Chase Home Fin. LLC*, 2012 U.S. Dist. LEXIS 171242, 6 (W.D. Wash. Dec. 3, 2012) Moreover, other courts have recognized "[t]here is simply nothing deceptive about using an agent to execute a document, and this practice is commonplace in deed of trust actions." *Russell v. Lundberg*, 120 P.3d 541, 544 (Utah Ct.App.2005).

Specifically, nothing in the DTA limits an employee of the successor trustee to act in an agent capacity of the beneficiary (or its agent) for purposes of executing documents. The Ortegas cite no such authority.

Pursuant to the Agreement among MERSCORP, Inc., Mortgage Electronic Registrations Systems, Inc., Wells Fargo, and Northwest Trustee Services, Mr. Stenman was a Vice President of MERS and possessed authority to sign documents such as the Assignment on behalf

of MERS. CP 1513, 1984. Washington law clearly permits the use of agents to perform such actions under Washington law. *Bain*, 106.

The Ortegas also contend NWTS favored its employer and did not disclose its conflicts of interest. Appellants' Brief, Pg. 24. NWTS does not have an employer/employee relationship with any party to the lawsuit, and nothing in the record demonstrates or suggests such a relationship. Rather, the record demonstrates that NWTS was appointed successor trustee in strict compliance with the DTA to carry out a nonjudicial foreclosure as contemplated by statute. The Ortegas apparently conclude that NWTS is akin to an employee of the beneficiary because the beneficiary appoints the successor trustee and directs the trustee to initiate the foreclosure. The Ortegas conclude that such an arrangement creates a conflict of interest. Appellants' Brief, Pg. 24.

Given that RCW 61.24.010(2) requires that the beneficiary appoint the successor trustee and given that the beneficiary would necessarily be the party to initiate or direct commencement of the foreclosure, the Ortegas' conclusion that the relationship between the beneficiary and trustee as created by statute creates an employer/employee relationship must fail. Under the Ortegas' reasoning, every nonjudicial foreclosure trustee should be disqualified for conflict of interest.

The DTA, RCW 61.24 *et. seq.*, sets out the requirements for completing a nonjudicial foreclosure proceeding. However, there is neither a definition of “conflicted” as the Ortegas appear to suggest nor is there any requirement that a “conflicted” trustee must disclose a conflict. *See* RCW 61.24 *et. seq.* In their opening brief and their complaint, the Ortegas fail to plead facts or provide any supporting law that amounts to a cognizable claim in conjunction with the assertion that NWTS is conflicted. Therefore, any claim based on lack of impartiality of the trustee or that NWTS is “conflicted” lacks both factual and legal basis or merit and fails as a matter of law.

**2. The Ortegas Cannot Demonstrate Any Excessive,
Unauthorized, or Illegal Fees and Costs by NWTS.**

In their complaint, the Ortegas allege NWTS had no right to initiate nonjudicial foreclosure proceedings before performing the applicable special default servicing obligations under TARP and therefore “defendants” have charged and/or attempted to collect payments from the Ortegas for attorney’s fees, legal fees, foreclosure costs, vendor charges, advances, other fees, property preservation charges, inspection charges that are not authorized by or in conformity with the terms of the subject note and mortgage. CP 1932.

In the general allegations section of their complaint, the Ortegas cite certain provisions from Public Law 110-343, known as the Economic Stabilization Act of 2008 that purportedly outline the purposes of the Act. However, they cite no authority to support the notion that NWTS, as the trustee carrying out the nonjudicial foreclosure was required to act in a manner other than the manner NWTS acted here. As successor trustee, NWTS, does not charge any amounts to the borrower or attempt to collect any amounts from the borrower. It is solely within the discretion of the lender or servicer, what costs, if any, are passed on to the borrower. Accordingly, this claim fails on the merits.

3. The Ortegas Cannot Prevail on a CPA Claim as to NWTS.

The Consumer Protection Act (“CPA”) prohibits “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” RCW 19.86.020. To state a prima facie claim under the CPA, a plaintiff must “establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation.” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986). Failure to meet any one of these elements under the CPA is fatal to the claim and requires dismissal. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298 (2002).

In both the Ortegas' complaint and opening brief, the Ortegas fails to set forth any basis upon which a claim under the CPA lies against NWTS. Based on the Ortegas' utter failure to even plead the required elements of a CPA claim, the claim fails as a matter of law. *Sorrel*, at 298.

4. The Ortegas Cannot Prevail on an Emotional Distress

Claim as to NWTS.

To prevail on a claim of outrage, the plaintiff must prove 1) extreme and outrageous conduct, 2) intentional or reckless infliction of emotional distress, and 3) that severe emotional distress actually resulted. *Womack v. Rardon*, 133 Wn. App. 254, 260-61, 135 P.3d 542 (2006). To be considered outrageous and extreme, the conduct complained of must be so outrageous in character and so extreme in degree as to be indecent, atrocious, and intolerable in a civilized community. *Kloepfel v. Bokor*, 149 Wn.2d 192, 196, 66 P.3d 630 (2003). Whether a course of conduct is sufficiently outrageous to result in liability is generally a question of fact to be determined by the jury. *Chambers-Castanes v. King County*, 100 Wn. App. 1, 15, 27 P.3d 205 (2001). However, summary judgment is appropriate if reasonable minds could only reach one conclusion. *Birkliid v. Boeing co.*, 127 Wn.2d 853, 867, 904 P.2d 278 (1995).

The record is devoid of any allegations of conduct by NWTS that could reasonably amount to outrageous conduct. Moreover, the Ortegas

presented no evidence they suffered any severe emotional distress. Accordingly, the claim fails as a matter of law.

5. NWTS Did Not Breach its Duty of Good Faith.

As discussed *supra* in Section (III)(B)(6), NWTS did not breach the duty of good faith under RCW 61.24.010.

III. CONCLUSION

The Ortegas' failure to comply with the court's order supports the trial court's contempt finding, and their failure to purge their contempt supports the trial court's dismissal sanction. The Ortegas failed to set forth any basis upon which the contempt order should have been vacated, and ultimately presented no meritorious claim as to NWTS. The trial court committed no error when it granted Appellees' Motion to Dismiss, and that ruling below should be affirmed.

DATED this 26th day of June, 2013.

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