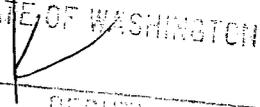


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COURT OF APPEALS  
DIVISION II

2014 FEB 11 AM 11:47

STATE OF WASHINGTON

BY  DEPUTY

No. 44810-6-II

IN THE COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON

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BIG BLUE CAPITAL PARTNERS OF WASHINGTON, LLC,  
Appellant,

v.

NORTHWEST TRUSTEE SERVICES, INC.,  
Respondent.

---

APPELLANT'S OPENING BRIEF

---

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I.  
INTRODUCTION.

This is a case wherein the Plaintiff/Appellant Big Blue Capital Partners of Washington, LLC's (hereinafter "BBCPW") claims against Northwest Trustee Services, Inc. (hereinafter "NWTS") for Violation of the Washington Deed of Trust Act (DOTA) and Declaratory Judgment were dismissed by the Honorable Christine Schaller, Judge of the Thurston County Superior Court on the basis that there was no cause of action solely against the Trustee. Plaintiff/Appellant seeks review of the lower court's decision because RCW 61.24.010 et seq., (the Washington Deed of Trust Act also referred to herein as DOTA) and related case law set forth a duty of a foreclosing trustee engaged in procedures to proceed with a non-judicial foreclosure sale in compliance with all details of the Washington Deed of Trust Act, as well as a duty of good faith toward all parties upon the foreclosing Trustee conducting a non-judicial foreclosure sale. DOTA effectively creates a cause of action against a foreclosing trustee who is violating the Washington Deed of Trust Act. Plaintiff's claims stated in its Complaint against the foreclosing trustee were for the trustee's own violation(s) of the Washington Deed of Trust Act as stated in Plaintiff's Complaint and therefore were and are proper statements of claims under the applicable standards of Washington Civil Rule CR

12(b)(6)..

## II. ASSIGNMENTS OF ERROR

1. The trial court erred when it dismissed Plaintiff's complaint upon motion of defendant due to Plaintiff's Complaint failing to state a cause of action against NWTs. VR 18-20.
2. The trial court erred in finding BBCPW had no cause of action under the Deed of Trust Act against NWTs. VR 18.
3. The trial court erred when it found that Defendant did not have a good faith obligation to research whether the declaration of the beneficiary is true, when it was clear under recent Washington case law that Mortgage Electronic Registration Systems, Inc., (MERS) could not be a legal beneficiary. VR 18.
4. The trial court erred when it ruled that the Plaintiff had to start a different lawsuit against one or more other reputed necessary persons, instead of granting Plaintiff's oral motion join the reputed necessary parties in an Amended Complaint.. VR19-20
5. The trial court erred in dismissing the entire case based on there being no cause of action under the Deed of Trust Act, when there were two other causes of action in the complaint, one for declaratory judgment and one for violation of the foreclosing trustee's failure to act in good faith to determine who, if anyone known to the foreclosing trustee, was the proper beneficiary. VR 18 and Order, CP 16, ¶ 3.1 through CP 18, line 14.

### **Issues Pertaining to Assignments of Error**

Under the Deed of Trust Act, does a cause of action exist solely against a trustee when the trustee fails to follow the Deed of Trust Act? (Assn of Error Nos. 1 2, 4 and 5.)

Does a trustee under a Deed of Trust have a responsibility to perform research whether the declaration of a beneficiary is true when it owes a duty to all parties to a deed of trust to act in good faith and must have proof a beneficiary is the owner of a promissory note? (Assn of Error No. 3)

### III. STATEMENT OF THE CASE

#### A. Historical Facts

BBCPW is a limited liability company registered to do business in the State of Washington, and all sums due and owing the State have been paid. (CP 7, ¶ 1.3, lines 12-14.) BBCPW asserted in its Complaint that it was the sole owner of the fee title to the real property located at 5732 39<sup>th</sup> Ave. SE, Lacey, WA 98513 (Id., lines 14-16) acquired by Trustee's Deed dated November 7, 2012, issued to BBCPW for that Washington State real property and recorded in Thurston County under Thurston County Recording No. 4306078. (CP 8, ¶ 2.1. and Exhibit A, CP 22-24)

The real property at 5752 39<sup>th</sup> Ave. SE, Lacey WA was purportedly encumbered by a Deed of Trust recorded in the Thurston County Records, Recording No. 3868359, on September 26, 2006. (CP 8-9, ¶2.2, and Exhibit B, CP 25-43.) BBCPW asserted in its Complaint that there were multiple problems with the recorded Deed of Trust, including but not limited to factually false statements in the recorded Deed of Trust; and that the Deed of Trust was knowingly prepared, executed, and recorded in the public land records of Thurston County in violation of RCW 40.16.030. (CP 9-10, ¶ 2.3. including footnotes 2 and 3, including the identification of Exhibit C attached to the Complaint; see CP 44-46.)

BBCPW asserted in its Complaint that the recorded Deed of Trust was controlled by applicable Washington State law, including judicial opinions. (CP 10-11.)

As set forth in the Complaint, the documents on which Defendant NWTS was relying to initiate the non-judicial trustee sale process by issuing and posting a Notice of Default on Plaintiff's real property contained and/or were based on information identified as false, and in some instances involved acts on behalf of or for non-existent entities signed by persons whose authority was questionable and questioned and challenged by the Complaint. (CP 11- 15, ¶ 2.5, including all subparagraphs thereof, and Exhibits, D, E, F, and G attached to the Complaint. (See CP 47-57.)

BBCPW asserted in its Complaint two causes of action, based on the pleaded facts identified above. The First claim was that Defendant NWTS had violated the Washington State Deed of Trust Act (DOTA) in two ways. The first violation was committed (1) by NWTS preparing and posting a Notice of Default on Plaintiff's property while knowing that (a) the Assignment of the Deed of Trust purported to assign an unenforceable Deed of Trust that contained false information; and (b) that the Assignor (MERS) had no beneficial interest in the Deed of Trust and therefore had no ability to assign the beneficial interest in the Deed of Trust to anyone

else. (CP 16, ¶ 3.1. including sub-¶ 3.1.1)

BBCPW expressly asserted in its Complaint that:

Plaintiff claims that Defendant NWTS has violated the Washington Deed of Trust Act by issuing the NoD without being lawfully appointed successor trustee to the Deed of Trust.

(*Id.*, sub-¶ 3.1.1, lines 13-14.)

The second violation under the first claim was that NWTS had violated its duty of good faith as purported successor trustee by failing to (a) observe procedures in initiating and advancing toward a non-judicial foreclosure sale and (b) failing to investigate documentary defects that it knew or should have known existed as a result of its knowledge of its usual area of business activity taking into consideration the recent Washington State Supreme Court Decision on *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 93, 285 P.3d 34 (2012), which was expressly referenced in the complaint as authority relied upon by Plaintiff.

A part of the record below is contained in Plaintiff's Opposing Brief in Response to Defendant's 12(b)(6) Motion to Dismiss. In Plaintiff's Opposing Brief (etc.) Plaintiff identified and described the Deposition of Jeff Stenman, an executive of NWTS taken in another case in which NWTS had been appointed successor trustee preparatory to commencing a non-judicial foreclosure in that case. In his deposition Mr. Stenman admitted that NWTS had originally prepared the two documents

in that case that were essentially like the Assignment of Deed of Trust and the Appointment of Successor Trustee documents relied upon by NWTs in this case at bar, which documents were then relied upon by NWTs to commence the non-judicial foreclosure in this case at bar that is now on appeal. Plaintiff's Opposing Brief in Response to Defendant's CR 12(b)(6) is at CP-175-234. The relevant part of Plaintiff's Opposing Brief that identifies and discusses the Assignment of the Deed of Trust and the Appointment of Successor Trustee is at CP-186, line 6 – CP-191 line 14. In that document at CP-188, lines 8-12, and fn 6 the Transcript of the Deposition of Jeff Stenman is identified, and attached as Exhibit C. In Plaintiff's Opposing Brief a relevant part of the of Jeff Stenman Deposition that shows that NWTs prepared (drafted) (1) the Assignment of the Deed of Trust and (2) the Appointment of Successor Trustee in that case appears at CP-189, lines 1 – 22. Further confirmation of Mr. Stenman's testimony in his Deposition Transcript appears at CP -214 – through CP- 217. Please take notice that the copy of the transcript was in condensed form to reduce the number of pages served and filed of record, therefore CP 214-217 inclusive contains pages 29-44 of the Deposition of Jeff Stenman, of which the relevant text in the Deposition Transcript extends beginning at page 31, line 22 through page 42. Line 22.

In his Deposition Mr. Stenman admitted that the procedures

followed in that case are essentially the same with regard to all cases. (CP-216, Transcript p. 37, lines 1-20.) In his Deposition Mr. Stenman also admitted that he was aware that the entity bank to whom he sent the Assignment of Deed of Trust in that case no longer existed, but denied that he knew when it ceased to function as an entity, (CP-216, Transcript, p. 38, lines 9 – 20;) but also denied that if the Assignment of Deed of Trust was executed after the entity bank had ceased to operate that such a fact made any difference because the assignor was MERS. (CP-216, p. 38, line 21 through p. 39, line 1-25 incl.)

In his deposition Mr. Stenman also admitted that NWTS had created the Appointment of Successor Trustee for the purpose of appointment of NWTS as successor trustee, and delivered it to the entity bank who was to sign the document. (CP 216, p. 40, lines 1-2.5.) The document was prepared from a template in the NWTS computer system. (CP 217, p. 41, lines 10-12.) It was sent to the entity bank, which executed the document and returned it to NWTS. (CP 217, lines 13-16.) It was signed by Roger Stotts, Vice President of IndyMac Bank FSB and notarized on May 7, 2009. (CP 217, p. 41, line 17 through p. 42, line 2.) Mr. Stenman admitted that he did not know Mr. Stotts, and would not have any idea whether Mr. Stotts executed the document. (CP 217, p. 42. Lines 3-12.) Mr. Stenman also admitted he did not know whether the

entity bank was still in existence at the time the document was notarized. (CP 217 p. 42 Lines 10-17.) Nevertheless, Mr. Stenman admitted that NWTS used the Appointment of Successor Trustee to process the foreclosure. (CP 217, p. 42 , lines 18-22.)

The transcript of the Deposition of Jeff Stenman describes a set of standardized procedures by which NWTS normally drafts and submits an Assignment of Deed of Trust plus an Appointment of Successor Trustee for signature to the entity or entities it considers its clients followed by return of the documents to NWTS, after which NWTS relies on those documents to commence the non-judicial foreclosure procedures. That is the basis for the substance of Plaintiff's claims asserted in Plaintiff's Complaint, page 6, ¶ 2.5 (including subparagraphs thereof,) and Pages 11-13, ¶¶ 3.1.1 and 3.1.3. By doing those acts, when it knows or should know, based on the *Bain* decision cited above, that MERS is not a legal beneficiary under the Washington Deed of Trust Act, and has no beneficial interest to assign, and therefore, cannot assign the beneficial interest in the Deed of Trust. Nevertheless, NWTS proceeded, after being fully aware of the holding in the *Bain* decision to prepare the false Assignment of Deed of Trust, and then prepared and submitted for signature the Appointment of Successor Trustee appointing itself, NWTS, as Successor Trustee based on the purported validity of the false

Assignment of Deed of Trust. Under the applicable standards for a motion to dismiss under Washington State Civil Rule CR 12(b)(6) Plaintiff's complaint has clearly stated allegations of claims that include violation of the Washington State Deed of Trust Act and reasonably expects that plaintiff's discovery will produce discovery results that are essentially similar to the parts of the Transcript of the Jeff Stenman Deposition identified and described above.

B. Procedural Facts

Plaintiff, BBCPW filed its complaint against NWTs on January 7, 2013, alleging violation of the Washington Deed of Trust Act RCW 61.24 et. seq. and seeking Declaratory Judgment under RCW 7.24 et. seq. CP 6-57. On January 18, 2013, Defendant NWTs. moved to dismiss Plaintiff's lawsuit under CR 12(b)(6) for failure to state a claim upon which relief can be granted. CP 63-174. Plaintiff filed its response on February 19, 2013. CP 175-234 On February 20, 2013, defendant re-noted its motion for March 29, 2013. CP 235-236. Defendant replied on March 20, 2013. CP 237-244. Plaintiff filed a surreply to Defendant's renoted motion on March 27, 2013. CP 245-255. The trial court heard oral arguments on March 29, 2013 (CP 256) and then issued its Order that Plaintiff's complaint be dismissed in its entirety with prejudice. CP 257-258. Plaintiff filed its Notice of Appeal on April 26, 2013. CP 259-262.

#### IV. LEGAL AUTHORITY AND ARGUMENT.

The Deed of Trust Act, RCW 61.24 *et seq.* regulates transactions in the State of Washington involving deeds of trust that secure the payment of promissory notes or other debt instruments. The beneficiary is the holder and owner of the instrument or document which evidences the obligation secured by the deed of trust. The Trustee is the person designated as the trustee in the deed of trust or appointed under RCW 61.24.010(2). A successor trustee is vested with all powers of an original trustee only upon recording of an appointment of successor trustee by a lawful beneficiary. *Walker v. Quality Loan Service Corp. of Washington*, 176 Wn.App. 294, \_\_\_, 308 P.3d 716, 720 (2013) *citing* 18 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Transactions* §17.3 at 260 (2d ed. 2004). The trustee lacks authority to act unless lawfully appointed and the documentation is recorded.

Only a lawful beneficiary has the power to appoint a successor trustee and only a lawfully appointed successor trustee has the authority to issue a notice of trustee's sale. Accordingly, when an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice of trustee sale.

*Id.*

A trustee, beneficiary, or authorized agent may not issue a notice of default under RCW 61.24.030(8) until (i) Thirty days after satisfying the due diligence requirements as described in subsection (5) of this section and the borrower has not responded;

or (ii) if the borrower responds to the initial contact, ninety days after the initial contact with the borrower was initiated.

RCW 61.24.030(1)(a) Once this notice of default is issued, the foreclosure process starts rolling. An unlawfully appointed trustee cannot initiate a nonjudicial foreclosure sale.

RCW 61.24.030 requires the trustee have “proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust” before issuing a notice of trustee sale.

*Walker*, 176 Wn.App. \_\_\_, 308 P.3d 721.

A. **The Deed Of Trust Act Provides A Cause Of Action Solely Against A Trustee When The Trustee Fails To Follow The Deed Of Trust Act.**

The Washington Deed of Trust Act can be construed to provide a cause of action solely against a trustee when the trustee fails to follow the Deed of Trust Act’s provisions or is acting outside the authority given the trustee within the Act. RCW 61.24.127(1),(a) and/or The Washington Deed of Trust Act, and specifically, RCW 61.24.010(4), expressly provides: “The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor.”

Therefore, the trustee must act as a neutral third party. This duty to act in good faith enumerated in the statute, when breached is negligence on the part of the trustee. Thus, a cause of action exists.

The Deed of Trust Act must be strictly construed in favor of the homeowner. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-916, 154 P. 3d 882 (2007) (citing *Queen City Sav. & Loan Ass'n v. Mannhalf*, 111 Wn. 2d 503, 514, 760 P.2d 350 (1988); *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 89, 95-97, 110-112, 285 P.3d 34 (2012) *Amresco Independence Funding, Inc. v. SPS Props, LLC* 129 Wn. App. 532, 537 119 P.3d 884 (2005). Only the actual holder of a note may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure. *Bain*, 175 Wn 2d. at 89. A trustee lacks authority to record and serve a notice of trustee's sale when appointed by an unlawful or non-existent beneficiary. *Walker*, 176 Wn.App.\_\_\_\_, 308 P.3d 722. The court has held that such actions taken by an improperly appointed trustees constitute "material violations of the [Deed of Trust Act]." *Id.* Consequently, when a purported trustee, as NWTs did here, the Trustee materially violated the Deed of Trust Act. Violation of the duty set forth in therein is negligence and a common law cause of action exists.

In *Rucker v. Novastar Mortgage, Inc.*, 175 Wn. App. 1066, 1082 (2013). , Division I of the Washington Court of Appeals in an unpublished opinion, found that there were genuine issues of material fact regarding whether the Trustee in that case, Quality Loan Service, conducted the sale

without authority because there was also a question as to whether Novastar was appointed by the proper beneficiary. That is the same issue in the case at bar: NWTS acting without authority because it was not appointed by the true beneficiary, issued a notice of default which set a foreclosure action into motion. If NWTS had done any due diligence, it would have and should have discovered that it was not appointed by the note holder/owner and therefore lacked authority to act. And, thusly, by failing to perform any due diligence NWTS violated its duty of good faith to act impartially under RCW 16.24.010(4) of the Deed of Trust Act. Because NWTS violated the Deed of Trust Act, the plaintiff, Big BBCPW has a cause of action against NWTS for violating that statute under RCW 61.24.127(c) and (d).

In sum, because there is a duty set forth in the Deed of Trust Act, it can be construed that a cause of action exists solely against the trustee for violation of that duty. It was improper for the Thurston County Superior Court to dismiss BBCPW's claim on a CR 12(b)(6) motion because (1) if NWTS was not lawfully appointed, it had no authority to act, and therefore, violated the Deed of Trust Act and (2) is liable under the language of the statute, RCW 62.24.010(4) "The trustee has a duty of good faith to the borrower, [as well as to the] beneficiary, and grantor."

That duty is breached when the trustee acts outside its authority. If the trustee has no authority to do a non-judicial sale ANY action that commenced such non-judicial foreclosure would be a violation of the statute. Thus, the trial court erred in dismissing Plaintiff's claims stated in its Complaint.

**B. A Trustee Under A Deed Of Trust Has A Responsibility To Perform Research Whether The Declaration Of A Beneficiary Is True When It Owes A Duty To All Parties To A Deed And Must Have Proof A Beneficiary Is The Owner Of The Promissory Note.**

**1. The Trustee had a duty to act with good faith toward all parties, including Plaintiff.**

The Washington Deed of Trust Act sets forth the duty to act in good faith toward all parties. See RCW 61.24.010(4). Additionally, "the Trustee **shall** have proof that the beneficiary is the owner of any promissory note or other obligation secured by the Deed of Trust before issuing a notice of trustee's sale." [emphasis added]. RCW 61.24.030(7)(a). If a purported beneficiary is not the owner of the note, then it does not have authority to order a successor trustee to foreclose and the initiation of that proceeding by the Trustee is unlawful. Although the Trustee is not required to prove its authority to Act before filing a notice of default, it is still required to be authorized to act on behalf of the true beneficiary because the next subsection in RCW 61.24.030(7)(b) states:

(b) Unless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection.

As that language clearly and unambiguously states, that adherence to the duty set forth in 61.24.020(4) is a prerequisite, i.e., a condition precedent, to a foreclosing trustee relying solely on the declaration of the beneficiary. To rely solely on the declaration of the beneficiary, the trustee must act in good faith. Acting in good faith requires acting within the trustee's authority. If the trustee has no authority, it therefore is not acting in good faith and cannot rely solely on the declaration of the beneficiary.

**2. This Case at Bar is Distinguishable from *Mickelson*.**

The case at bar can be easily distinguished from *Mickelson v. Chase Home Finance, LLC*, 901 F.Supp.2d 1286 (W.D. Wash 2012) which has been widely used by non-judicial successor trustee's like, NWTS and trial courts as support for the notion that failing to investigate on the part of the trustee is not violation of its duty of good faith. In *Mickelson*, the Court found that a trustee was not obligated to conduct an "independent" investigation when there is no information comparable to the information available in the *Bain* decision or in this case at bar.. However to not perform any level of due diligence upon being notified of possible issues, as in the case here, is certainly unreasonable and a violation of NWTS's duty of good faith as enumerated in the statute.

The Washington Supreme Court has also recently discussed the duties of a trustee in *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013) as follows:

As a pragmatic matter, it is the lenders, servicers, and their affiliates who appoint trustees. Trustees have considerable financial incentive to keep those appointing them happy and very little financial incentive to show the homeowners the same solicitude. *Bain v. Metro. Mortg. Grp., Inc.* 175 Wn.2d 83, 95-97, 285 P.3d 34 (2012). However, despite these pragmatic considerations and incentives under our statutory system, a trustee is not merely an agent for the lender or the lender's successors. Trustees have obligations to all of the parties to the deed, including the homeowner. RCW 61.24.010(4). . . . In a judicial foreclosure action, an impartial judge of the superior court acts as the trustee and the debtor has a one year redemption period. RCW 61.12.040; RCW 4.12.010; RCW 6.23.020(1). In a nonjudicial foreclosure, the trustee undertakes the role of the judge as an impartial third party who owes a duty to both parties to ensure that the rights of both the beneficiary and the debtor are protected. *Cox*, 103 Wn.2d at 389. While the legislature has established a mechanism for nonjudicial sales, neither due process nor equity will countenance a system that permits the theft of a person's property by a lender or its beneficiary under the guise of a statutory nonjudicial foreclosure. An independent trustee who owes a duty to act in good faith to exercise a fiduciary duty to act impartially to fairly respect the interests of both the lender and the debtor is a minimum to satisfy the statute, the constitution, and equity, at the risk of having the sale voided, title quieted in the original homeowner, and subjecting itself and the beneficiary to a CPA claim.

*Klem*, 176 Wn.2d at 789.

The court erred in dismissing the Plaintiff's claims and this case should be remanded.

V. CONCLUSION

The trial court erred in finding that BBCPW failed to state a claim in the Complaint against NWTs. The trial court misconstrued the Plaintiff's claims as if they were against MERS and Deutsche Bank as Trustee for the Certificate holders of a reputed securitized trust. That misunderstanding was fostered by and on behalf of NWTs. Plaintiff's Claims in this Complaint were clearly against NWTs who drafted and determined the content of the (1) the Assignment of Deed of Trust from MERS to Deutsche Bank as Trustee for the RALI 2006-QA14 Trust. The court erred in dismissing the case pursuant to a CR 12(b)(6) motion. The trial court should be reversed and the case remanded to Thurston County Superior Court for further proceedings.

Respectfully submitted this 10th day of February, 2014.



Edward L. Mueller, WSBA # 264,  
Co-Counsel for Appellant.



Donna Beasley Gibson, WSBA # 33583  
Co-Counsel for Appellant.

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IN THE COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON

<p>BIG BLUE CAPITAL PARTNERS OF WASHINGTON, LLC</p> <p style="text-align: right;">Appellant,</p> <p style="text-align: center;">vs.</p> <p>NORTHWEST TRUSTEE SERVICES, INC.,</p> <p style="text-align: right;">Respondent.</p>	<p style="text-align: center;">No. <u>44810-6-II</u></p> <p style="text-align: center;"><b>DECLARATION OF SERVICE of Notice Of Association Of Counsel, And Appellant's Opening Brief.</b></p>
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I, Edward L. Mueller, counsel of record for Appellant, Big Blue Capital Partners of Washington, LLC declare:

I personally served a copy of each of the following two named documents on RCO Legal, P.S., attorney of record for Northwest Trustee Services, Inc., Respondent, at RCO Legal's office at 13555 SE 36<sup>th</sup> St. Suite 300. Bellevue, WA 98006 on February 24, 2014 before 10:30 am, and received a copy received stamp on my file copy of:

- (1) Notice of Association of Counsel, and
- ((2) Appellant's Opening Brief .

1 I declare under penalty of Perjury pursuant to the laws of the State of Washington that  
2 the above statement is true.

3 Signed in Bellevue, WA on February 24, 2014.

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5 Edward L. Mueller,  
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