

FILED

OCT 23 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By.....

No. 315703

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

KELLY J. MELLON and CYNTHIA L. MELLON,
husband and wife

Appellants,

v.

REGIONAL TRUSTEE SERVICES CORPORATION,
Trustee; INDYMAC MORTGAGE SERVICES, A DIVISION
OF ONE WEST BANK, FSB; and ONE
WEST BANK, FSB,

Respondents.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Kelly J. Mellon and Cynthia L. Mellon (“Plaintiffs”) are the owners of property that secure a loan held by One West Bank, FSB, a federally chartered savings bank. The loan is serviced by Indymac Mortgage Services. When Plaintiffs’ loan went into default as a result of their failure to make monthly payments due for nine months, Plaintiffs filed a lawsuit and obtained a preliminary injunction to stop the foreclosure sale of their property.

Plaintiffs’ Complaint asserts two claims for relief against One West Bank and Indymac (“Defendants”): one claim for specific performance of an unknown subsection of the Washington Deed of Trust Act (“DTA”) and a second claim for violation of Washington’s Consumer Protection Act (“CPA”), based on the same alleged DTA violation. Critically, the Complaint requests that the court cure Plaintiffs’ mortgage loan default and rewrite their monthly payment term.

The trial court properly found, on Defendants’ Motion to Dismiss, that the claims fell squarely within the category of claims that are preempted by federal regulations promulgated by the Office of Thrift Supervision (“OTS”) under the Home Owner’s Loan Act (“HOLA”), 12 U.S.C. § 1461 *et. seq.* The claims were therefore subject to dismissal as

preempted claims. *See* 12 C.F.R. § 560.2(b)(10) (preempting all state laws that impose requirements regarding “[p]rocessing, origination, servicing, sale or purchase of, or investment and participation in mortgages”). *See also* *Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001, 1004 (9th Cir. 2008) (federal regulations governing lending practices by federal savings banks have “left no room for state regulatory control.”)

Further, even if Plaintiffs’ claims were not preempted by federal law, the trial court found that the Complaint on its face failed to state a claim for relief plausible under Washington law. Plaintiffs have never cited any authority, either in the proceedings below or the instant appeal, supporting their argument that a trial court can reinstate a mortgage loan at an unpaid principal balance and monthly payment amount of Plaintiffs’ choosing. Consequently, the trial court ruled that Plaintiffs’ claims were subject to dismissal for failure to state a claim.

Finally, the trial court correctly ruled that Defendants were entitled to receive the funds deposited by Plaintiffs as a condition to obtaining a preliminary injunction on the foreclosure sale scheduled for their home. Plaintiffs respectfully contend that this Court should affirm the rulings of the trial court.

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II. COUNTERSTATEMENT OF THE CASE

The underlying facts and procedure pertinent to this appeal are as follows:

A. The Loan

On or about October 25, 2007, Plaintiffs Kelly J. Mellon and Cynthia L. Mellon executed a promissory note secured by a deed of trust (collectively, the "Loan") encumbering real property purchased as their residence (the "Property"). (CP 4.) The lender under the deed of trust is Indymac Bank, FSB. (CP 15.) The Loan was sold and assigned to One West Bank, FSB ("OWB"), but at all times relevant to this action Indymac Mortgage Services ("Indymac") has serviced the Loan. (CP 5, 401, 697.) (Collectively, "Defendants.") It is undisputed that Indymac Bank, FSB and One West Bank, FSB are federally chartered savings associations.

B. Plaintiffs' Default and Entry Into Forbearance Agreement

Beginning in approximately May 2010, Plaintiffs were unemployed. (CP 5-6.) They consequently defaulted on their loan, missing six payments from August 2010 through January 2011. (CP 5-6, 31-32. 621.) Rather than foreclose on the Loan, IndyMac offered Plaintiffs terms for a forbearance agreement. (CP 6, 532.) In the offer,

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Plaintiffs were provided three different payment plans to bring their loan current:

	<u>Option #1</u>	<u>Option #2</u>	<u>Option #3</u>
February	\$16,879.79	\$10,004.89	\$ 6,228.04
March	\$ 1,523.00	\$ 2,951.20	\$ 3,706.57
April	\$ 1,523.00	\$ 2,951.20	\$ 3,706.57
May	\$ 1,523.00	\$ 2,951.20	\$ 3,706.57
June	\$ 1,523.00	\$ 2,951.20	\$ 3,706.57
July	\$ 1,523.00	\$ 2,951.20	\$ 3,706.57

(CP 6, 532.) Plaintiffs chose Option #2, paid \$10,004.89, and signed a forbearance agreement reflecting the terms in Option #2. (“Forbearance Agreement”). (CP 151.) The agreement expressly acknowledged that Indymac would retain the right to re-commence foreclosure actions immediately with no further notice to Plaintiffs if they defaulted under the terms of the agreement. (CP 151.) Despite this, Plaintiffs made only the February 2011 payment required under the Forbearance Agreement, and did not make any other payments. (CP 622.)

C. Plaintiffs’ Lawsuit and Preliminary Injunction

Three months after entering into the Forbearance Agreement, on May 5, 2011, Plaintiffs filed the subject Complaint. (CP 3-11.) The Complaint alleges that the three payment options offered to Plaintiffs were “unreasonable and impossible to perform” because Plaintiffs were not capable of making the payments. (CP 6-7.) This is the only specific wrongful conduct claimed in the Complaint, although the Complaint

opines that offering the unreasonable payment options was unfair and deceptive, impacted the public interest, and was behavior that is likely to reoccur. (CP 9.) The Complaint states that offering the “unreasonable” payment options violated an unspecified subsection of former RCW 61.24.031, a statute setting forth duties that the beneficiary of a note must comply with prior to initiating default proceedings. (CP 6.)

Plaintiffs’ claims in the lawsuit were twofold. First, Plaintiffs sought specific performance and injunctions, pursuant to which the Court would: (1) reinstate the original Note and Deed of Trust; (2) require Defendants and its agents “to follow RCW 61.24.031 and to deal with the Plaintiffs in good faith;” (3) reinstate the Plaintiffs’ loan and adjust the monthly payment to \$1,523.89 per month; and (4) permanently restrain and enjoin Defendants from foreclosing the Deed of Trust. (CP 7-8, 10.) Plaintiffs’ second claim asserted violations of the CPA based on the alleged failure to comply with RCW 61.24.031, seeking attorney fees and treble damages in connection with the claim. (CP 10.)

The same day that Plaintiffs filed their Complaint, they appeared before the Court *ex parte* and without notice to Defendants and obtained a TRO restraining the trustee’s sale of the Property. (CP 36-40.) On May 18, 2011, still prior to any notice to Defendants (CP 50-52), the TRO was converted to a preliminary injunction. (CP 47-49.) A Trustee’s

Foreclosure Sale had been scheduled to take place on the Property on May 27, 2011. (CP 48.) Pursuant to statute, the Court's order restraining the sale required Plaintiffs to make monthly payments of principal, interest, and reserves into the Clerk of Spokane County Superior Court. (CP 48.) At Plaintiffs' request, the Court set this amount at \$1,523.89.

Indymac and OWB filed a Motion to Dismiss on January 24, 2012. (CP 244-54.) The motion requested that the trial court dismiss the case, terminate the preliminary injunction, and order disbursement to Defendants of the funds held by the court as security for the injunction. Defendants argued that Plaintiffs' claims were preempted by federal law and that the Complaint failed to state a claim for relief. (CP 247-54.)

D. Plaintiffs' Requests for Continuances Caused Delay in Resolving the Case

On February 16, 2012, Plaintiffs requested pre-foreclosure mediation. (CP 698.) In a pre-mediation communication between the parties in April 2012, Defendants provided Plaintiffs a payoff statement indicating a loan balance of \$223,450.76. (CP 634.) The payoff statement set forth the current unpaid principal balance of \$181,984.37, and also listed the other charges due on the note. (CP 633-634.)

On April 2, 2012, Plaintiffs filed a "Motion to Reinstate the Promissory Note and Deed of Trust Under 62.24.031." (CP 315-16.) On

April 23, 2012, Plaintiffs filed a “Motion to Fix the Unpaid Balance and to Reinstate the Mortgage.” (CP 319-393.) The motions requested that the Court disregard the Forbearance Agreement entered into by the parties and instead reinstate the Plaintiffs’ loan as if no default had occurred, and set the monthly payment on the loan at \$1,523.89 per month. ¹ (CP 311-316.)

In the interim, a mediation in the case was scheduled for April 24, 2012. (CP 699.) Although under no obligation to do so, Defendants agreed to postpone the mediation to May 29 to allow Plaintiffs time to secure employment so they could qualify for a loan modification.

(CP 699.) Defendants subsequently offered Plaintiffs a trial loan modification requiring three monthly payments of \$1,366.19. (CP 636.) If the trial plan was successfully completed, Plaintiffs would qualify for a permanent modification. (CP 636.) Accordingly, the mediation was continued to September 27, 2012. (CP 700.) Further, the parties requested a continuance of the hearing on Defendants’ Motion to Dismiss in order to accommodate the Plaintiffs’ request for mediation. (CP 862.)

Plaintiffs completed the trial modification plan and were offered a “Final Fannie Mae Alternative Modification Plan.” (CP 700.) Plaintiffs were required to execute and return the plan no later than September 21,

¹ A third motion entitled “Order to Show Cause Directed to Indy Mac Mortgage Services to Fix Amount of Loan Balance” was filed September 18, 2002. CP 391-93. The motion requested the same relief as the previous motions.

2012, with the first payment due on October 1, 2012. (CP 624, 642-50.)

The Plan recapitalized past due interest and fees owed on the loan, establishing a loan balance of \$234,795.46. (CP 645.) The Plan also provided low interest rate over a 40 year term, requiring monthly payments of \$1,074.49 plus escrow. (CP 645.)

Plaintiffs questioned the breakdown of attorney fees, interest, and other charges calculated as part of the new, recapitalized, unpaid principal balance contained in the loan modification offer. (CP 624.) Indymac provided the breakdown: the new unpaid principal balance included the prior balance of \$181,604.88, plus delinquent interest in the amount of \$20,831.28; escrow advances in the amount of \$4,389.64; and corporate advances in the amount of \$27,969.66. (CP 625-26.) Defendants also provided a breakdown regarding the delinquent interest and corporate advances, which included attorney fees, accrued on the loan. (CP 624-26, 654-56.) Nonetheless, Plaintiffs filed a Motion for Order to Show Cause, requesting for the first time that the Court require an accounting of the loan and again asking that the Court fix the unpaid loan balance and fees on the Note. (CP 389-390.) In support, Plaintiffs filed an Affidavit of Kelly J. Mellon, which asserted that Defendants should not be allowed to recover the approximately \$50,000 in interest, escrow advances, attorney fees, and other loan charges – not because the charges were improper, but

because of the financial difficulty those charges posed to Plaintiffs. (CP 659-660.) Plaintiffs also rejected the settlement offer. (CP 626.)

E. Court Rulings and Subsequent Procedural Background

Settlement efforts having failed, the parties proceeded to a hearing on Defendants' Motion to Dismiss on October 9, 2012. (CP 736.) Although the motion had been filed in January and re-noted for a hearing, Plaintiffs never filed an opposition to the motion. At the hearing, the only argument made by Plaintiffs' counsel to explain his theory that his claims were not preempted was that Washington had promulgated numerous laws governing foreclosure and would not go to the trouble of doing that if exclusive jurisdiction lies with the Federal court. (CP 749.) With regard to the merits of Plaintiffs' claims (putting aside the preemption issue), counsel argued that RCW 61.24.031 "says the parties should sit down and see what you can do and what you can work out" with regard to structuring a repayment plan, and that the options offered to Plaintiffs did not satisfy this requirement. (10/9/2012 VRP 15:13-14.) Plaintiffs' counsel admitted that his clients were unable to pay the required fees and costs to reinstate the loan. *Id.* at 19:20-25.

While expressing sympathy for Plaintiffs' situation, the trial court ruled that Plaintiffs' claims were preempted and also found that the remedies requested, such as setting a payment amount and allowing

reinstatement without payment of past due fees, were not within the court's power. (10/9/2012 VRP 7:10-15, CP 863.)

The trial court then considered which party was entitled to receive the money paid by Plaintiffs to the clerk pursuant to the injunction restraining the May 27, 2011 foreclosure sale. (CP 762-63.) The amount totaled \$18,300 at the close of the case. (CP 863, 658-59.) The trial court requested additional briefing on an expedited schedule in order to accommodate his planned two-month absence during November and December. (CP 763-64, 860.) The trial court's efforts to wrap the case up prior to his absence were thwarted when Plaintiffs filed a Motion for Reconsideration on October 17, 2012, briefing for the first time the merits of Defendants' Motion to Dismiss. (CP 704-720.)

Ultimately, the trial court denied the motion for reconsideration and confirmed his previous dismissal of the action. (CP 863.) He held that Plaintiffs' claims were preempted and also that they failed to state a claim as a matter of law. (CP 863.) The trial court noted that the Plaintiffs "were unable to reinstate pursuant to RCW 61.24.040 (providing for the inclusion of trustee's costs, fees, advances, and attorneys fees incurred by the lender). (CP 863.) He further ruled that he did not have authority to set an "equitable mortgage payment and order the reinstatement of the loan, without the mandatory fees" Finally, the

trial court ruled that the clerk should disburse the funds held as security for the preliminary injunction to Defendants. (CP 863.)

III. ARGUMENT

A. Summary of the Argument

Plaintiffs' claims are premised solely on purported Washington laws that OTS regulations expressly preempt. The claims are an attempt to impose state law mandates on the servicing and processing of a federal bank's loan, and because such claims are preempted, this Court has no jurisdiction to consider them on the merits. Moreover, even if the claims were not preempted, they fail to state a claim as a matter of law. In this regard, Plaintiffs' claims present a moving target, as Plaintiffs have asserted additional bases for their claims in subsequent motions, at oral argument, and in the instant appeal. While this Court should only consider the facts and theories alleged in Plaintiffs' Complaint, the fact is that Plaintiffs have never asserted any theory of relief supported by Washington authority. Plaintiffs seek to rewrite the terms of their loan; obtain Court approval of their breach of the Forbearance Agreement; obtain forgiveness of past deficiencies in their loan payments; and preclude Indymac from recovering attorney fees and loan charges it is entitled to under the deed of trust. There is no basis in Washington law for such a remedy.

Finally, the trial court correctly ruled that Defendants were entitled to receive the monthly payments deposited with the clerk during the pendency of the preliminary injunction. Plaintiffs' loan has been in default since August 2010, and Plaintiffs have successfully restrained a foreclosure sale originally scheduled for May 27, 2011. The fees paid into the Court registry represent the amount of the principal and interest that would have been "due on the obligation secured by the deed of trust if the deed of trust was not being foreclosed," RCW 61.24.130(1)(a), and Defendants were entitled to the funds.

B. Standard of Review

"This court reviews questions of law, including preemption, *de novo*." *McCurry v. Chevy Chase Bank, FSB*, 169 Wn. 2d 96, 100, 233 P.3d 861 (2010). The standard of review is the same for motions to dismiss made pursuant to CR 12(b)(6). *Burton v. Lehman*, 153 Wn. 2d 416, 422, 103 P.3d 1230 (2005).

C. The Court Should Decline to Consider Arguments Made for the First Time Plaintiffs' Motion to Reconsider or on Appeal

As noted above, Plaintiffs failed to file a written opposition to Defendants' Motion to Dismiss and did not make any arguments regarding preemption at the hearing other than asserting that the Washington state legislature would not have enacted comprehensive laws regarding

foreclosure if they were all preempted. (CP 749; *see also infra* Section 1E.) As to the merits of Plaintiffs' claims, up until filing a motion for reconsideration, Plaintiffs only cited RCW 61.24.031 as the statute allegedly violated and supporting their injunctive relief and CPA claims. (Indeed, RCW 61.24.031 remains the only authority in the Complaint, other than a reference to conduct and a statute authorizing attorney fees.) All other arguments Plaintiffs make regarding preemption or the viability of their claims were made for the first time in a motion for reconsideration, if not in the instant appeal.

Motions for reconsideration are not intended to "permit a plaintiff, finding a judgment unsatisfactory, to suddenly propose a new theory of the case." *Eugster v. City of Spokane*, 121 Wn. App. 799, 811, 91 P.3d 117 (2004). Consequently, issues raised for the first time in a motion for reconsideration need not be considered by this Court on appeal. *Building Industry Ass'n v. Washington v. McCarthy*, 152 Wn. App. 720, 218 P.3d 196 (2009) (declining to rule on issue not raised prior to motion for reconsideration as not preserved); *Wesche v. Martin*, 64 Wn. App. 1, 6-7, 922 P.2d 812 (1992) (same). Therefore, the Court should decline to entertain Plaintiffs' arguments concerning preemption and the legal sufficiency of Plaintiffs' Complaint.

Additionally, Plaintiffs raise RCW 61.24.135(2), RCW 61.24.163, and RCW 61.24.174 for the first time on appeal.² These authorities, while also unhelpful to Plaintiffs, should not be considered. RAP 2.5(a).

D. The Trial Court Correctly Held that Federal Law Preempted Plaintiffs' Claims and the Court had No Jurisdiction

1. Overview of HOLA Preemption

“Congress enacted the Home Owners’ Loan Act of 1933 (“HOLA”) to restore public confidence by chartering savings and loan associations under federal law at a time when record numbers of home loans were in default and a staggering number of state-chartered savings associations were insolvent.” *Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001, 1004 (9th Cir. 2008). Under HOLA, Congress gave the Federal Home Loan Bank Board, now known as the Office of Thrift Supervision (“OTS”), the plenary power to comprehensively and uniformly regulate the operations of federal savings associations, including lending practices. *Fidelity Federal Savings & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 159-68 (1982).

The OTS did just that. One of the regulations promulgated by the OTS is 12 C.F.R. § 560.2. That regulation states explicitly: “OTS hereby

² See CP 863, the order of the trial court noting that Plaintiff’s claims found “no support in the only statutes referenced by Plaintiffs in the entirety of their pleadings: The Washington Foreclosure Fairness Act, RCW 61.24.031, RCW 61.12.120, and RCW 61.24 as amended on July 22, 2011.”

occupies the entire field of lending regulation for federal savings associations.” 12 C.F.R. § 560.2. Section 560.2 provides that in order to give federal savings associations “maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation,” the associations may operate without regard to state laws purporting to regulate various lending practices. *Id.* The regulation then provides some illustrative examples of the types of state laws preempted, stating that, without limitation, there is preemption of state laws purporting to impose requirements regarding (in relevant part):

...

(4) **The terms of credit**, including amortization of loans and the **deferral and capitalization of interest and adjustments to the interest rate, balance, payments due**, or term to maturity of the loan, **including the circumstances under which a loan may be called due and payable** upon the passage of time or a specified event external to the loan;

(5) **Loan-related fees**, including without limitation, initial charges, **late charges**, prepayment penalties, **servicing fees**, and overlimit fees;

...

(9) **Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in** credit application forms, credit solicitations, billing statements, **credit contracts, or other credit-related documents** and laws requiring creditors to supply copies of credit reports to borrowers or applicants; [and]

(10) **Processing**, origination, **servicing**, sale or purchase of, or investment or participation in, mortgages 12 C.F.R. § 560.2(b).

The regulation further provides that general state laws “only incidentally affect[ing]” lending operations are not preempted. 12 C.F.R. § 560.2(c).

As Appellant’s brief acknowledges, there are three ways that federal law may preempt state law – express preemption; field preemption; and conflict preemption. Here, there is no doubt that field preemption applies, as the Ninth Circuit has expressly recognized. *Silvas*, 514 F.3d at 1004-05 (recognizing that HOLA and implementing OTC regulations occupy the entire regulatory field for federal savings associations). Indeed, HOLA has been described as a “radical and comprehensive response to the inadequacies of the existing state system, and so pervasive as to leave no room for state regulatory control.” *Id.* (Internal citations omitted). Thus, to the extent a plaintiff attempts to regulate a federal savings institution’s lending activities through state law claims, those claims are wholly preempted. *Fultz v. World Savings & Loan Ass’n*, 571 F. Supp. 2d 1195, 1197 (W.D. Wash. 2008).

It is undisputed that federal savings banks are subject to HOLA and regulated by the OTS. 12 U.S.C. § 1464; *Silvas*, 514 F.3d at 1005. Thus, HOLA preemption analysis applies to Plaintiffs’ Loan.

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2. The Basis of Plaintiffs' Complaint: RCW 61.24.031

Plaintiffs' Complaint focuses on an alleged violation of an unspecified subsection of RCW 61.24.031. According to Plaintiffs, Indymac's provision of "unreasonable" and "unfair" options to cure Plaintiffs' loan default somehow violated this statute. The statute version in effect at the time Plaintiffs filed their Complaint imposes nearly four pages of requirements that a beneficiary or its agent must comply with before pursuing default proceedings against the grantor of a deed of trust. Under the statute, a beneficiary may not issue a notice of default until thirty days after it first contacts the borrower to "assess the borrower's financial ability to pay the debt" and "explore options for the borrower to avoid foreclosure." RCW 61.24.031(1)(a)-(b) (May 2011). This contact may occur by letter followed by telephone calls, but only under specific conditions. *Id.* at (5). The statute requires that, in this initial contact, the beneficiary or agent advise the borrower that he or she can request additional meetings. *Id.* at (1)(c). A subsequent default must then include a declaration that this contact occurred or that the beneficiary tried with due diligence to have this contact. *Id.* at (2). The form of the declaration is specifically delineated in RCW 61.24.031(9) (May 2011).

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3. Plaintiffs' Claims are Preempted by Federal Law

Plaintiffs incorrectly characterize the trial court's ruling below as finding that HOLA "preempts all state foreclosure law." To the contrary, the trial court found that the claims made by Plaintiffs fell –

. . . within the category of claims that are preempted . . .
[by] 2 C.F.R. 560.2 (preempting all state laws that impose requirements regarding '[p]rocessing, origination, servicing, sale or purchase of, or investment or participation in mortgages.') (CP 863.)

There was no error.

The parties agree on the analysis this Court should engage in to consider whether Plaintiffs' claims are preempted. (*See* Plaintiffs' Opening Br. at 15.) First, the Court determines whether the type of law in question is listed in 2 C.F.R. § 560.2(b). *See Silvas*, 514 F.3d at 105. "If so, the analysis will end there; the law is preempted. If the law is not covered by paragraph (b), the next question is whether the law affects lending." *Id.* If it does, a presumption arises that the law is preempted, but 12 C.F.R. § 560.2(c) states that some laws are not preempted if they only "incidentally" effect lending. *Id.*

Plaintiffs argue that the type of law at issue is "state foreclosure law" and that "foreclosure" is not a word used in the types of laws mentioned under § 560.2(b). This characterization is unreasonable: Plaintiffs' claims were for injunctive relief pertaining to – and

enforcement of – a statute that provides very specific requirements a lender must comply with before foreclosing. The requirements of RCW 61.24.031 fall within numerous categories of preempted matters described in 12 C.F.R. § 560.2(b). The statute imposes requirements regarding the “terms of credit,” mandating extra-contractual contacts with a borrower prior to issuing a notice of default. 12 C.F.R. § 560.2(b)(4). It clearly regulates the disclosures required in credit-related documents – laws preempted under § 560.2(b)(9) – since the RCW provision proscribes disclosures that must be made with a notice of default. Moreover, the Washington provision imposes extra duties with regard to the “processing” and “servicing” of the loan, categories mentioned in § 560.2(b)(10). The law therefore falls within several different categories of § 560.2(b) – any one of which requires a finding that the law is preempted. Thus, the analysis has reached its end and the state law is preempted. *Silvas*, 514 F.3d at 1005.

The necessity of finding preemption is even clearer when this Court accounts for the remedy requested by Plaintiffs (as well as the Plaintiffs’ apparent interpretation of RCW 61.24.031). As noted in *McCurry v. Chevy Chase Bank, FSB*, 169 Wn. 2d 96, 104, 233 P.3d 861 (2010), preemption under HOLA occurs when generally applicable state laws “incidentally affect the lending operations or are otherwise consistent

with the purposes of [preemption].” Any law that purports to allow Plaintiffs to rewrite the terms of their loan, breach their Forbearance Agreement, or obtain court-ordered forgiveness of past due amounts would significantly impact the above-mentioned categories. Such a law would also impact the “capitalization of interest and adjustments to the interest rate, balance, [and] payments due . . . , including the circumstances under which a loan may be called due and payable” 12 C.F.R. § 560.2(b)(4). Further, such a law would purport to impose requirements regarding loan-related fees, including “late charges” and “servicing fees.” § 560.2(b)(5).

For this reason, Plaintiffs’ reliance on *McCurry* is unavailing. In *McCurry*, the Court considered preemption of the claims before it under § 560.2(b), and found that the contract and CPA claims alleged impacted Chevy Chase’s lending practice only incidentally, by forcing Chevy Chase to adhere to the terms of the contract it already had with the lender and to not misrepresent those contract terms. 169 Wn. 2d at 105-106. *See also Fultz*, 571 F. Supp. 2d at 1196-97 (holding if object of a state law is “to regulate the relationship between federal savings associations and borrowers, the law will be automatically preempted under § 560.2(b),” whereas if the law is of general applicability, further analysis is needed.)

In contrast, RCW 61.24.031 explicitly imposes extra-contractual duties on lenders; and Plaintiffs' claims (if authorized by law at all) would literally allow the rewriting of loans owned by federal savings and loan associations and require those lenders to forgive past due amounts when negotiating payment plans. The claims are therefore preempted.

4. Other Courts have Ruled that Similar Laws are Preempted

The preemption analysis and result before the Court is not novel. In *Quintero Family Trust v. OneWest Bank, F.S.B.*, No. 09-CV-1561-IEG, 2010 WL 2618729 (S.D. Cal. Jun. 25, 2010), a federal district court considered whether California Civil Code § 2923.5 was preempted in the action before it. Like RCW 61.24.031, the California statute required a mortgagee to contact a borrower in default in person or by telephone to assess the borrower's financial situation and explore options to avoid foreclosure. *Id.* at *6 (citing Cal. Civil. Code § 2923.5). Also like RCW 61.24.031, the code required any Notice of Default to include a declaration from the mortgagee to indicate it had made this contact or to say that the borrower had surrendered the property. *Id.* The *Quintero* court found that the law was clearly preempted as applied to federal savings banks. It explained: "As other courts have found, the state laws' requirements dealing with contacting the borrower and including a specific declaration in the Notice of Default fall squarely within the scope of HOLA's Section

560.2(b)(1), which deals with the “[p]rocessing, origination, servicing, sale or purchase of, or investment or participation in, mortgages.” *Id.* See also *DeLeon v. Wells Fargo Bank, N.A.*, 729 F. Supp 2d 1119, 1127 (ND Cal 2010) (holding claims under § 2923.5 are preempted because the statute affects the processing and servicing of mortgages); *Taguinod v. World Saving Bank, FSB*, 755 F. Supp. 2d 1064, 1073-74 (CD Cal 2010) (noting that the overwhelming weight of authority has held that a claim under § 2923.5 is preempted by HOLA).

As in *Quintero* and many other cases, it is clear that state statutes such as RCW 61.24.031, which impose additional disclosure and communication obligations upon a lender prior to commencement of foreclosure proceedings, are preempted under § 560.2(b).

5. There is no Concurrent Jurisdiction

Plaintiffs argue that there is at the very least concurrent jurisdiction with the state court to hear Plaintiffs’ claim. To the contrary, concurrent jurisdiction only exists where the Legislature has not specifically stated its intent to occupy a given field. *Baker v. Snohomish County Dept. of Planning and Community Development*, 68 Wn. App. 581, 585, 841 P.2d 1321 (1992). See also *Stevedoring Services of America, Inc. v. Eggert*, 129 Wn. 2d 17, 36, 914 P.2d 737, 747 (1996) (finding Longshore and Harbor Workers' Compensation Act was not intended to occupy entire

field and thus state law had concurrent jurisdiction and state law remedies could supplement the act.) As noted above, preemption under HOLA is field preemption. *Silvas*, 514 F.3d at 1004-05. Consequently, there is no concurrent jurisdiction.

E. The Court Correctly Held that Plaintiffs' Complaint Failed to State a Claim for Relief

Both of Plaintiffs' claims as stated in their Complaint are based on a single allegation of "misconduct;" that is, Indymac's provision to Plaintiffs of unreasonable forbearance agreement options. (CP 6.) Plaintiffs argue that the Forbearance Agreement offered by Indymac – which was designed to get Plaintiffs' loan caught up to date and therefore increased the payment amount of the loan temporarily – was "unconscionable," "unfair," and "deceptive in nature." *See* Plaintiffs' Opening Br. at 18. The Complaint states no other factual basis for the remedies requested, other than a comment about facts entitling Plaintiffs to attorney fees. Even if Plaintiffs' injunctive relief and CPA claims were not preempted by federal law, the trial court correctly ruled that their threadbare factual allegations fail to state any claim for relief. (CP 863.)

1. Plaintiffs Failed to State a Claim for Injunctive Relief

Plaintiffs' first claim for specific performance and injunctive relief sought a reinstatement of their loan at a monthly payment of their

choosing and a permanent injunction on foreclosure. The only authority the Complaint relies on for the claim is RCW 61.24.031. (CP 7.) That statute imposes no requirement on lenders to sacrifice interest, fees, or other monies it is owed when it negotiates the terms of a Forbearance Agreement. Consequently, the facts alleged do not show a violation of RCW 61.24.031.

Further, there is no authority for the remedy requested in Plaintiffs' first claim; a court may not simply rewrite a parties' loan. To the contrary, Washington courts have held that a lender is not required to restructure a loan agreement or otherwise accept a material change in the terms of its contract. *Badgett v. Security State Bank*, 116 Wn. 2d 563, 569, 807 P.2d 356 (1991) (declining to hold a lender in bad faith for refusing to restructure a loan agreement).

2. Plaintiffs Failed to State a Claim for Violations of the CPA

According to Plaintiffs, the Forbearance Agreement terms offered to Plaintiffs was "unreasonable" and therefore violated provision RCW 61.24.135(2) of the Washington Consumer Protection Act, which protects borrowers in a foreclosure proceeding. Plaintiffs further argue that the settlement offer made during the pendency of the litigation – a protected ER 408 communication – constitutes a CPA claim because the offer

sought to obtain attorneys' fees and inspection fees as part of other loan-related fees totaling \$53,295.46. None of these arguments have merit.

First of all, RCW 61.24.135(2) was not effective until July 22, 2011 – *after* Plaintiffs' Complaint was filed. The statute cannot be applied retroactively and it therefore cannot support Plaintiffs' claim for relief. *See Nyby v. Allied Fidelity Ins. Co.*, 42 Wn. App. 543, 548-49, 712 P.2d 861 (1986) (holding statute cannot be applied retroactively absent legislative intent). Moreover, neither that statute nor any other authority supports Plaintiffs' argument that Defendants are liable for providing borrowers an opportunity to cure their loan default through a plan that catches up the borrowers' past due payments.

Plaintiffs' argument that Defendants' settlement offer also creates liability is equally unsupported by authority. The argument cannot, in any event, be considered on the merits, since Plaintiffs never moved to amend their Complaint to include allegations regarding the settlement offer and the offer is, moreover, protected by an absolute litigation privilege and by ER 408. *See, e.g., Kirby v. City of Tacoma*, 124 Wn. App. 454, 472, 98 P.3d 827 (2004) (noting party may not amend its complaint through arguments in briefing); *Deatherage v. State Examining Bd. of Psychology*, 134 Wn. 2d 131, 135, 948 P.2d 828 (1997) ("The defense of absolute

privilege generally applies to statements made in the course of judicial proceedings and acts as a bar to any civil liability.”)

Further, Plaintiffs’ Complaint does not state a *prima facie* claim for violation of the CPA. The Washington Supreme Court has repeatedly recognized that “not every violation of a statute results in a per se consumer protection action.” *State v. Schwab*, 103 Wn. 2d 542, 549, 693 P.2d 108 (1985) (internal citations omitted). At the time Plaintiffs’ suit was filed, no law supported liability under the CPA for any pre-sale foreclosure conduct, and this Court should find that the CPA did not cover such acts.

Finally, to state a CPA claim, a plaintiff must allege (1) an unfair or deceptive act or practice (2) occurring in trade or commerce (3) that impacts the public interest, which (4) causes an injury to plaintiff in his or her business or property and (5) a causal relationship between the unfair or deceptive act and the resulting injury. *Indoor Billboard/Wash. Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn. 2d 59, 75, 170 P.3d 10 (2007). All elements of a CPA claim must be present and a finding that any element is missing is fatal to the claim. *See Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 743-44 (1997).

Even if the CPA did apply in this case, Plaintiffs’ Complaint fails to allege any facts to establish any of the elements that define the requisite

public interest under a CPA claim. Rather, Plaintiffs allege that the alleged practices “have the capacity to deceive a substantial portion of the public . . .” (CP 9.) Plaintiffs’ conclusory allegations as to the impacted public interest need are unsupported by facts and should not be accepted by the Court. Additionally, causation for damages under the CPA is established only where the plaintiff can prove that he or she “relied upon a misrepresentation of fact . . . [that] induced the plaintiff to act or refrain from acting.” *Robinson v. Avis Rent A Car System, Inc.*, 106 Wn. App. 104, 113, 22 P.3d 818 (2001). No factual basis for this element is stated in Plaintiffs’ Complaint.

F. The Court Did Not Err in Failing to Rule on Plaintiffs’ Motions

Plaintiffs assign error to the trial court’s failure to rule on three motions Plaintiffs filed during the course of the litigation, all seeking to reinstate the Plaintiffs’ promissory note at an unpaid principal balance of their choosing. (CP 315-16, 356-388, 391-393, 514-529.) Plaintiffs request a remand of the case in order to allow the trial court to enter an order on the motions.

A remand would only serve to further delay resolution of this case and allow Plaintiffs additional time to reside in their home without making payments on their Loan. The trial court effectively denied Plaintiffs’

motions as moot when it found it had no jurisdiction and dismissed their claims. There was no error because the trial court properly found it lacked jurisdiction over the case. *See Fowlkes v. International Broth. of Elec. Workers, Local No. 76*, 58 Wn. App. 759, 764, 795 P.2d 137 (1990) (noting preemption concerns the subject matter jurisdiction of the state court); *Brewsolin v. Morris*, 86 Wn. 2d 241, 245, 543 P.2d 235 (noting judgment is void where the court lacks subject matter jurisdiction).

Additionally, as the trial court recognized, the Plaintiffs' motions had no merit for the same reason Plaintiffs' claims lacked merit – there is no authority allowing Plaintiffs to rewrite the terms of their mortgage. Plaintiffs' motions requested the court reduce the amount Plaintiffs' owed on their loan by more than \$50,000, essentially waiving missed payments, delinquent interest, and fees and costs incurred over the past two years.

G. The Court Correctly Ruled that Funds Held in the Court Registry Pursuant to RCW 61.24.130 Should be Released to the Lender

The trial court granted a preliminary injunction just weeks prior to a scheduled May 27, 2011 trustee sale of the Property. The injunction was authorized by RCW 61.24.130 and expressly conditioned upon monthly payments of principal, interest and reserves to the clerk. (CP 48.) As a result of Plaintiffs' monthly payments and the numerous continuances requested by Plaintiffs, at the conclusion of the case in March 2013, the

court clerk held funds in the amount of \$18,300.00. The trial court correctly ruled that the funds should be disbursed to Defendants, the party damaged by the injunction.

1. Washington law protects lenders by requiring borrowers who enjoin a foreclosure sale to make payments on their loan

Under RCW 61.24.130, a trial court may enjoin a foreclosure sale if the court requires, “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 as if the deed of trust was not being foreclosed” RCW 61.24.130(1)(a). As expressly noted by this Court, “the purpose of [RCW 61.24.130] is to protect good faith lenders.” *Bowcutt v. Delta North Star Corp.*, 95 Wn. App. 311, 231, 976 P.2d 643 (1999). A good faith lender is protected from unjustified attempts to restrain foreclosure only if the statute is construed as a means of ensuring that the borrower’s default on his loan is not allowed to increase during the pendency of any injunction preventing the sale. Likely for this reason, nowhere does the statute indicate that if a borrower’s complaint is later dismissed, the complaining party who sought the injunction is entitled to return of the funds deposited with the clerk. Rather, in requiring that a party restraining a foreclosure sale on his home must make monthly payments as if the deed of trust “were not being

foreclosed,” the legislature recognized that a borrower seeking a preliminary injunction is already in default, and should not be allowed to preclude the only remedy the lender has while living at the property without payment during the course of an injunction.

As demonstrated by Defendants in the proceedings below, Defendants have suffered actual damages as a result of Plaintiffs’ default and the preliminary injunction. Delinquent interest due as of September 2012 totaled \$20,831.28. (CP 624.) Further, Defendants have made escrow advances in the amount of \$4,389.64. (CP 624.) It is therefore beyond dispute that Defendants have been damaged by not receiving these funds as a result of the injunction, and the statute requires the funds to be held as security for these payments, and used for that purpose. *See, e.g., Surety Sav. & Loan Assn. v. Nat’l Auto. & Cas. Ins. Co.*, 8 Cal. App. 3d 752, 758-59, 87 Cal. Rptr 572 (1970) (holding interest accruing during injunction would be paid from court registry). The text of the statute and Washington authorities further recognizes that a borrower is damaged when it does not receive principal due on a loan, and is entitled to the period payments required by the parties’ loan agreement. *See* RCW 61.24.130(1)(a) (requiring monthly payments of “principal, interest, and reserves” into the clerk to obtain injunction). *See also* 27 Wash. Prac., Creditors’ Remedies – Debtors’ Relief § 3.62 (2d ed.) (noting that where a

default relates to the failure to pay monthly payments, the recommencement of the payments may be sufficient security interest to protect the enjoined party from damages.) Here, the Defendants have been damaged by the increase in principal and interest that continued to accrue, and the insurance and taxes that they had to pay, during the injunction. In contrast, it would be inequitable to return the principal and interest payments to Plaintiffs so that they could essentially reside free at the Property, while Defendants made tax and insurance payments on the loan.

The purchaser at the scheduled trustee sale, whether Defendants or a third party, would have been entitled to possession of the Property 20 days following the trustee sale, on or about June 16, 2011. RCW 61.24.060(1). Defendants have thus been damaged by their inability to have the sale conducted to pay the secured debt on the Property. Plaintiffs, conversely, have been able to reside at the Property for over 15 months, thus saving on paying rental payments elsewhere had the foreclosure taken place.

Moreover, as the foreclosure recommences, Defendants will incur further costs and lost interest. Pursuant to RCW 61.24.130, the foreclosing trustee will need to continue the sale pursuant to the requirements in that statute, including new publication of the notice of

trustee sale. RCW 61.24.130(3). Thus, the fees and costs incurred by Defendants will increase.

2. Disbursing funds to Respondent does not result in a "forefeiture"

Plaintiffs argue that allowing Defendants to obtain the money deposited with the clerk, as well as foreclose on the property, results in a forfeiture. The analogy is misplaced and incorrectly suggests that Defendants are receiving a benefit they are not entitled to through receipt of the payments. Plaintiffs' payments do not represent an abstract forfeiture of funds disfavored at law, but an enforcement of the contractual obligations contained in the deed of trust and mandated by the statute as a condition to enjoin a trustee sale. After all, Defendants are entitled to payments on the Plaintiffs' loan by virtue of the note and deed of trust on the Property. In contrast, there is no basis supporting any entitlement of Plaintiffs to live in their home for over a year and a half rent/payment-free while they block efforts to foreclose with claims that lack any support in the law. Indeed, returning principal and interest payments made under the statute would create an incentive for borrowers to file baseless lawsuits and then move to enjoin a trustee sale, secure in the knowledge that the dismissal of their complaint will likely be a lengthy process and that they will receive a return of monies paid to the clerk.

Consequently, Defendants respectfully request that this Court affirm the trial court's decision that the \$18,300.00 held with the Court Clerk should be released to Defendants for payment against the principal and interest on the Loan.

H. Plaintiffs' Notice of Appeal was Untimely

It is undisputed that Plaintiffs' Notice of Appeal was not filed within thirty days of entry of the final order as required by RAP 5.2(a). The proper procedure is for Plaintiffs to request an extension of time to appeal from the Court of Appeals. RAP 18.8(b). Plaintiffs have not made this request or discussed how the circumstances satisfy RAP 18.8(b).

IV. ENTITLEMENT TO ATTORNEY FEES

Respondent respectfully requests an award of costs and attorneys' fees as the prevailing party pursuant to RAP 14. Respondent also requests an award of its reasonable attorney fees on appeal pursuant to RCW 4.84.330 and RAP 18.1. It is undisputed that the deed of trust and note provide for an award of attorney fees to the prevailing party who is required to litigate to enforce or interpret the provisions of the contract. (CP 8, 27.) Although Plaintiffs' claims for relief cannot be construed as litigation to enforce the provisions of the contract (as the claims do not rely on any contractual provisions), Defendants' defense of the lawsuit and preliminary injunction have been necessary to enforce Defendants'

right to foreclose under the deed of trust. Attorney fees are therefore appropriately awarded to Defendants pursuant to RCW 4.84.330. *Deere Credit, Inc. v. Cervantes Nurseries, LLC*, 172 Wn. App. 1, 288 P.3d 409 (2012) (awarding attorney fees to prevailing party on appeal where contract allowed fees); *IBF, LLC v. Heuft*, 141 Wn. App. 624, 638-39, 174 P.3d 95 (2007) (“[a] contractual provision for an award of attorney fees at trial supports an award of attorney fees on appeal.”)

Plaintiffs incorrectly contend that Defendants may not obtain attorney fees because such fees were not requested in the proceedings below. To the contrary, this Court considers attorney fee requests presented for the first time on appeal if the request is based on a statutory authority and is made only to obtain fees incurred during the appeal. *Scheib v. Crosby*, 160 Wash. App. 345, 249 P.3d 184 (2011). As Plaintiffs seek fees under the same provision that Defendants sought their fees at trial, CP 8-8, and the statutory basis for fees is a reciprocal fee statute, there is no surprise to Defendants that the statutory basis for fees exists.

V. CONCLUSION

For the reasons set forth above, Defendants request that the Court affirm the trial court’s rulings. Plaintiffs’ claims are preempted and also unsupported by any authority. Defendants are entitled to obtain a resolution of this matter; to receive funds paid to the clerk to enjoin

Defendants' lawful foreclosure sale; and to obtain attorney fees and costs incurred in the defense of this nearly frivolous appeal.

DATED this 21st day of October, 2013

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APPENDIX OF CITED AUTHORITIES PURSUANT TO RAP 10.4

1. STATUTES

California Civil Code § 2923.5 Notice of default; recording; contact of borrower by mortgage servicer; application to entities described in subd. (b) of Section 2924.18

(A) Either 30 days after initial contact is made as required by paragraph (2) or 30 days after satisfying the due diligence requirements as described in subdivision (e).

(B) The mortgage servicer complies with paragraph (1) of subdivision (a) of Section 2924.18, if the borrower has provided a complete application as defined in subdivision (d) of Section 2924.18.

(2) A mortgage servicer shall contact the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure. During the initial contact, the mortgage servicer shall advise the borrower that he or she has the right to request a subsequent meeting and, if requested, the mortgage servicer shall schedule the meeting to occur within 14 days. The assessment of the borrower's financial situation and discussion of options may occur during the first contact, or at the subsequent meeting scheduled for that purpose. In either case, the borrower shall be provided the toll-free telephone number made available by the United States Department of Housing and Urban Development (HUD) to find a HUD-certified housing counseling agency. Any meeting may occur telephonically.

(b) A notice of default recorded pursuant to Section 2924 shall include a declaration that the mortgage servicer has contacted the borrower, has tried with due diligence to contact the borrower as required by this section, or that no contact was required because the individual did not meet the definition of "borrower" pursuant to subdivision (c) of Section 2920.5.

(c) A mortgage servicer's loss mitigation personnel may participate by telephone during any contact required by this section.

(d) A borrower may designate, with consent given in writing, a HUD-certified housing counseling agency, attorney, or other advisor to discuss with the mortgage servicer, on the borrower's behalf, the borrower's financial situation and options for the borrower to avoid foreclosure. That contact made at the direction of the borrower shall satisfy the contact requirements of paragraph (2) of subdivision (a). Any loan modification or

workout plan offered at the meeting by the mortgage servicer is subject to approval by the borrower.

(e) A notice of default may be recorded pursuant to Section 2924 when a mortgage servicer has not contacted a borrower as required by paragraph (2) of subdivision (a) provided that the failure to contact the borrower occurred despite the due diligence of the mortgage servicer. For purposes of this section, "due diligence" shall require and mean all of the following:

(1) A mortgage servicer shall first attempt to contact a borrower by sending a first-class letter that includes the toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency.

(2)(A) After the letter has been sent, the mortgage servicer shall attempt to contact the borrower by telephone at least three times at different hours and on different days. Telephone calls shall be made to the primary telephone number on file.

(B) A mortgage servicer may attempt to contact a borrower using an automated system to dial borrowers, provided that, if the telephone call is answered, the call is connected to a live representative of the mortgage servicer.

(C) A mortgage servicer satisfies the telephone contact requirements of this paragraph if it determines, after attempting contact pursuant to this paragraph, that the borrower's primary telephone number and secondary telephone number or numbers on file, if any, have been disconnected.

(3) If the borrower does not respond within two weeks after the telephone call requirements of paragraph (2) have been satisfied, the mortgage servicer shall then send a certified letter, with return receipt requested.

(4) The mortgage servicer shall provide a means for the borrower to contact it in a timely manner, including a toll-free telephone number that will provide access to a live representative during business hours.

(5) The mortgage servicer has posted a prominent link on the homepage of its Internet Web site, if any, to the following information:

(A) Options that may be available to borrowers who are unable to afford their mortgage payments and who wish to avoid foreclosure, and instructions to borrowers advising them on steps to take to explore those options.

(B) A list of financial documents borrowers should collect and be prepared to present to the mortgage servicer when discussing options for avoiding foreclosure.

(C) A toll-free telephone number for borrowers who wish to discuss options for avoiding foreclosure with their mortgage servicer.

(D) The toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency.

(f) This section shall apply only to mortgages or deeds of trust described in Section 2924.15.

(g) This section shall apply only to entities described in subdivision (b) of Section 2924.18.

(h) This section shall remain in effect only until January 1, 2018, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2018, deletes or extends that date.

RCW 4.84.330 Actions on contract or lease which provides that attorney's fees and costs incurred to enforce provisions be awarded to one of parties--Prevailing party entitled to attorney's fees--Waiver prohibited (May 2011)

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorney's fees is void.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

RCW 61.24.031 Notice of default under RCW 61.24.030(8)--Beneficiary's duties--Borrower's options (May 2011)

(1)(a) A trustee, beneficiary, or authorized agent may not issue a notice of default under RCW 61.24.030(8) until thirty days after initial contact with the borrower is made as required under (b) of this subsection or thirty days after satisfying the due diligence requirements as described in subsection (5) of this section.

(b) A beneficiary or authorized agent shall contact the borrower by letter and by telephone in order to assess the borrower's financial ability to pay the debt secured by the deed of trust and explore options for the borrower to avoid foreclosure. The letter required under this subsection must be mailed in accordance with subsection (5)(a) of this section and must include the information described in subsection (5)(a) and (e)(i) through

(iv) of this section.

(c) During the initial contact, the beneficiary or authorized agent shall advise the borrower that he or she has the right to request a subsequent meeting and, if requested, the beneficiary or authorized agent shall schedule the meeting to occur within fourteen days of the request. The assessment of the borrower's financial ability to repay the debt and a discussion of options may occur during the initial contact or at a subsequent meeting scheduled for that purpose. At the initial contact, the borrower must be provided the toll-free telephone number made available by the department to find a department-certified housing counseling agency and the toll-free numbers for the department of financial institutions and the statewide civil legal aid hotline for possible assistance and referrals.

(d) Any meeting under this section may occur telephonically.

(2) A notice of default issued under RCW 61.24.030(8) must include a declaration, as provided in subsection (9) of this section, from the beneficiary or authorized agent that it has contacted the borrower as provided in subsection (1)(b) of this section, it has tried with due diligence to contact the borrower under subsection (5) of this section, or the borrower has surrendered the property to the trustee, beneficiary, or authorized agent. Unless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the declaration as evidence that the requirements of this section have been satisfied, and the trustee is not liable for the beneficiary's or its authorized agent's failure to comply with the requirements of this section.

(3) A beneficiary's or authorized agent's loss mitigation personnel may participate by telephone during any contact required under this section.

(4) Within fourteen days after the initial contact under subsection (1) of this section, if a borrower has designated a department-certified housing counseling agency, attorney, or other advisor to discuss with the beneficiary or authorized agent, on the borrower's behalf, options for the borrower to avoid foreclosure, the borrower shall inform the beneficiary or authorized agent and provide the contact information. The beneficiary or authorized agent shall contact the designated representative for the borrower for the discussion within fourteen days after the representative is designated by the borrower. Any deed of trust modification or workout plan offered at the meeting with the borrower's designated representative by the beneficiary or authorized agent is subject to approval by the borrower.

(5) A notice of default may be issued under RCW 61.24.030(8) if a beneficiary or authorized agent has not contacted a borrower as required

under subsection (1)(b) of this section and the failure to contact the borrower occurred despite the due diligence of the beneficiary or authorized agent. Due diligence requires the following:

(a) A beneficiary or authorized agent shall first attempt to contact a borrower by sending a first-class letter to the address in the beneficiary's records for sending account statements to the borrower and to the address of the property encumbered by the deed of trust. The letter must include the toll-free telephone number made available by the department to find a department-certified housing counseling agency, and the following information:

“You may contact the Department of Financial Institutions, the Washington State Bar Association, or the statewide civil legal aid hotline for possible assistance or referrals.”

(b)(i) After the letter has been sent, the beneficiary or authorized agent shall attempt to contact the borrower by telephone at least three times at different hours and on different days. Telephone calls must be made to the primary and secondary telephone numbers on file with the beneficiary or authorized agent.

(ii) A beneficiary or authorized agent may attempt to contact a borrower using an automated system to dial borrowers if the telephone call, when answered, is connected to a live representative of the beneficiary or authorized agent.

(iii) A beneficiary or authorized agent satisfies the telephone contact requirements of this subsection (5)(b) if the beneficiary or authorized agent determines, after attempting contact under this subsection (5)(b), that the borrower's primary telephone number and secondary telephone number or numbers on file, if any, have been disconnected or are not good contact numbers for the borrower.

(c) If the borrower does not respond within fourteen days after the telephone call requirements of (b) of this subsection have been satisfied, the beneficiary or authorized agent shall send a certified letter, with return receipt requested, to the borrower at the address in the beneficiary's records for sending account statements to the borrower and to the address of the property encumbered by the deed of trust. The letter must include the information described in (e)(i) through (iv) of this subsection.

(d) The beneficiary or authorized agent shall provide a means for the borrower to contact the beneficiary or authorized agent in a timely manner, including a toll-free telephone number or charge-free equivalent that will provide access to a live representative during business hours.

(e) The beneficiary or authorized agent shall post a link on the home page of the beneficiary's or authorized agent's internet web site, if any, to the

following information:

(i) Options that may be available to borrowers who are unable to afford their mortgage payments and who wish to avoid foreclosure, and instructions to borrowers advising them on steps to take to explore those options;

(ii) A list of financial documents borrowers should collect and be prepared to present to the beneficiary or authorized agent when discussing options for avoiding foreclosure;

(iii) A toll-free telephone number or charge-free equivalent for borrowers who wish to discuss options for avoiding foreclosure with their beneficiary or authorized agent; and

(iv) The toll-free telephone number or charge-free equivalent made available by the department to find a department-certified housing counseling agency.

(6) Subsections (1) and (5) of this section do not apply if any of the following occurs:

(a) The borrower has surrendered the property as evidenced by either a letter confirming the surrender or delivery of the keys to the property to the trustee, beneficiary, or authorized agent; or

(b) The borrower has filed for bankruptcy, and the bankruptcy stay remains in place, or the borrower has filed for bankruptcy and the bankruptcy court has granted relief from the bankruptcy stay allowing enforcement of the deed of trust.

(7)(a) This section applies only to deeds of trust made from January 1, 2003, to December 31, 2007, inclusive, that are recorded against owner-occupied residential real property. This section does not apply to deeds of trust: (i) Securing a commercial loan; (ii) securing obligations of a grantor who is not the borrower or a guarantor; or (iii) securing a purchaser's obligations under a seller-financed sale.

(b) This section does not apply to association beneficiaries subject to chapter 64.32, 64.34, or 64.38 RCW.

(8) As used in this section:

(a) "Department" means the United States department of housing and urban development.

(b) "Seller-financed sale" means a residential real property transaction where the seller finances all or part of the purchase price, and that financed amount is secured by a deed of trust against the subject residential real property.

(9) The form of declaration to be provided by the beneficiary or authorized agent as required under subsection (2) of this section must be in substantially the following form:

“FORECLOSURE LOSS MITIGATION FORM

Please select applicable option(s) below.

The undersigned beneficiary or authorized agent for the beneficiary hereby represents and declares under the penalty of perjury that [check the applicable box and fill in any blanks so that the trustee can insert, on the beneficiary's behalf, the applicable declaration in the notice of default required under chapter 61.24 RCW]:

(1) The beneficiary or beneficiary's authorized agent has contacted the borrower under, and has complied with, RCW 61.24.031 (contact provision to “assess the borrower's financial ability to pay the debt secured by the deed of trust and explore options for the borrower to avoid foreclosure”).

(2) The beneficiary or beneficiary's authorized agent has exercised due diligence to contact the borrower as required in RCW 61.24.031 (5) and, after waiting fourteen days after the requirements in RCW 61.24.031 were satisfied, the beneficiary or the beneficiary's authorized agent sent to the borrower(s), by certified mail, return receipt requested, the letter required under RCW 61.24.031.

(3) The borrower has surrendered the secured property as evidenced by either a letter confirming the surrender or by delivery of the keys to the secured property to the beneficiary, the beneficiary's authorized agent or to the trustee.

(4) Under RCW 61.24.031, the beneficiary or the beneficiary's authorized agent has verified information that, on or before the date of this declaration, the borrower(s) has filed for bankruptcy, and the bankruptcy stay remains in place, or the borrower has filed for bankruptcy and the bankruptcy court has granted relief from the bankruptcy stay allowing the enforcement of the deed of trust.”

RCW 61.24.130 Restraint of sale by trustee--Conditions—Notice

(1) Nothing contained in this chapter shall prejudice the right of the borrower, grantor, any guarantor, or any person who has an interest in, lien, or claim of lien against the property or some part thereof, to restrain, on any proper legal or equitable ground, a trustee's sale. The 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:

(a) In the case of default in making the periodic payment of principal, interest, and reserves, such sums shall be the periodic payment of

principal, interest, and reserves paid to the clerk of the court every thirty days.

(b) In the case of default in making payment of an obligation then fully payable by its terms, such sums shall be the amount of interest accruing monthly on said obligation at the nondefault rate, paid to the clerk of the court every thirty days.

In the case of default in performance of any nonmonetary obligation secured by the deed of trust, the court shall impose such conditions as it deems just.

In addition, the court may condition granting the restraining order or injunction upon the giving of security by the applicant, in such form and amount as the court deems proper, for the payment of such costs and damages, including attorneys' fees, as may be later found by the court to have been incurred or suffered by any party by reason of the restraining order or injunction. The court may consider, upon proper showing, the grantor's equity in the property in determining the amount of said security.

(2) No court may grant a restraining order or injunction to restrain a trustee's sale unless the person seeking the restraint gives five days notice to the trustee of the time when, place where, and the judge before whom the application for the restraining order or injunction is to be made. This notice shall include copies of all pleadings and related documents to be given to the judge. No judge may act upon such application unless it is accompanied by proof, evidenced by return of a sheriff, the sheriff's deputy, or by any person eighteen years of age or over who is competent to be a witness, that the notice has been served on the trustee.

(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.

(4) If a trustee's sale has been stayed as a result of the filing of a petition in federal bankruptcy court and an order is entered in federal bankruptcy court granting relief from the stay or closing or dismissing the case, or

discharging the debtor with the effect of removing the stay, the trustee may set a new sale date which shall not be less than forty-five days after the date of the bankruptcy court's 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.
- (5) Subsections (3) and (4) of this section are permissive only and do not prohibit the trustee from proceeding with a trustee's sale following termination of any injunction or stay on any date to which such sale has been properly continued in accordance with RCW 61.24.040(6).
- (6) The issuance of a restraining order or injunction shall not prohibit the trustee from continuing the sale as provided in RCW 61.24.040(6).

2. RULES AND REGULATIONS

12 C.F.R. § 560.2 Applicability of law.

(a) Occupation of field. Pursuant to sections 4(a) and 5(a) of the HOLA, 12 U.S.C. 1463(a), 1464(a), OTS is authorized to promulgate regulations that preempt state laws affecting the operations of federal savings associations when deemed appropriate to facilitate the safe and sound operation of federal savings associations, to enable federal savings associations to conduct their operations in accordance with the best practices of thrift institutions in the United States, or to further other purposes of the HOLA. To enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities, except to the extent provided in paragraph (c) of this section or § 560.110 of this part. For purposes of this section, "state law" includes any state statute, regulation, ruling, order or judicial decision.

(b) Illustrative examples. Except as provided in § 560.110 of this part, the types of state laws preempted by paragraph (a) of this section include, without limitation, state laws purporting to impose requirements regarding:

- (1) Licensing, registration, filings, or reports by creditors;
- (2) The ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements;
- (3) Loan-to-value ratios;
- (4) The terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;
- (5) Loan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees;
- (6) Escrow accounts, impound accounts, and similar accounts;
- (7) Security property, including leaseholds;
- (8) Access to and use of credit reports;
- (9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants;
- (10) Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages;
- (11) Disbursements and repayments;
- (12) Usury and interest rate ceilings to the extent provided in 12 U.S.C. 1735f-7a and part 590 of this chapter and 12 U.S.C. 1463(g) and § 560.110 of this part; and
- (13) Due-on-sale clauses to the extent provided in 12 U.S.C. 1701j-3 and part 591 of this chapter.

(c) State laws that are not preempted. State laws of the following types are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section:

- (1) Contract and commercial law;
- (2) Real property law;
- (3) Homestead laws specified in 12 U.S.C. 1462a(f);
- (4) Tort law;
- (5) Criminal law; and
- (6) Any other law that OTS, upon review, finds:

- (i) Furthers a vital state interest; and
- (ii) Either has only an incidental effect on lending operations or is not otherwise contrary to the purposes expressed in paragraph (a) of this section.

CERTIFICATE OF SERVICE

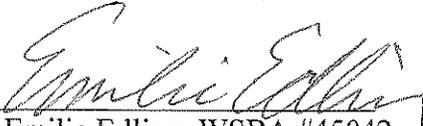
I certify that on the 21th day of October 2013, I caused a true and correct copy of this BRIEF OF RESPONDENT to be served on the following via first class mail, postage prepaid:

Joseph P. Delay
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Attorney for Defendant Regional Trustee Services Corporation, Trustee

Dated: October 21, 2013

HOUSER & ALLISON, APC

By 
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