

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON IN:

KRISTIN BAIN,
Plaintiff,

v.

METROPOLITAN MORTGAGE GROUP, INC.; INDYMAC BANK, FSB; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS; REGIONAL TRUSTEE SERVICE; FIDELITY NATIONAL TITLE; and Doe Defendants 1 through 20, inclusive,
Defendants.

Case No. 86206-I

PLAINTIFF KRISTIN BAIN'S
REPLY TO RESPONSE TO OPENING
BRIEF

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I. REPLY

Ms. Bain is a young woman who wanted to own a home and acquire independence in spite of her problems, and she defaulted on her mortgage loan only after she lost her job and a large portion of her income. (Dkt. 1) Following the default, she took action to save the home and understands that she is going to have to make up the mortgage payments that have been missed in some fashion. Yet MERS and the other Defendants assert that because Ms. Bain has defaulted on the loan, she is precluded from asserting the claims related to a foreclosure conducted in violation of the Deed of Trust Act (“DTA”). RCW 61.24, *et seq.* The Defendants have elected to use the non-judicial foreclosure process to expedite the foreclosure process, but they want to be free from the requirement to comply with its provisions.

In an effort at deflecting from its own violations of Washington state law, MERS blames Ms. Bain for the delays which occurred in this case and for the fact that no payment has been made on her loan in years. As Judge Coughenour noted in his Order certifying the questions about MERS’ role in the non-judicial foreclosure sale process, Ms. Bain’s default does not vitiate or even minimize the claims against MERS for violations of the Deed of Trust Act (“DTA”). RCW 61.24, *et seq.*

Plaintiff admits that she has been delinquent on her

mortgage payments. A ruling favorable to Plaintiff in this case and others like it cannot and should not create a windfall for all homeowners to avoid upholding their end of the mortgage bargain – paying for their homes. But a homeowner’s failure to make payments cannot grant lenders, trustees and so-called beneficiaries like MERS license to ignore state law and foreclose using any means necessary.

Order dated March 15, 2011 (Dkt. 155; 12:5-9).

Further, the Defendants’ assertions that Ms. Bain cannot bring these claims makes no sense in the context of a non-judicial foreclosure since the provisions of the DTA only become relevant and useful once a borrower has defaulted. In other words, there is no need to use almost all of the provisions of the DTA unless and until a borrower defaults.¹ *Id.* It is specifically and solely because of a default that a “beneficiary” would make use of the provisions of the DTA in order to collect on the delinquent debt.

It is important to bear in mind the plain language of the DTA, which requires that the homeowner make payments to the court registry in the amount of the principal, interest and escrow payments owed on the loan during the pendency of the order restraining the sale. RCW 61.24.130(1). In this case, Ms. Bain initially obtained a temporary

¹ The only exception would likely be the potential need for a lienholder to substitute in a new trustee, using the provisions of the DTA regarding appointment of a successor trustee, in order to have the new trustee reconvey a deed of trust once the obligation was paid in full. RCW 61.24.010(4).

restraining order in the King County Superior Court, but was not required by that order to make the payments. Dkt 1. The Defendants, including MERS, removed the case to the U.S. District Court before a hearing could be held on the preliminary injunction that was scheduled following the issuance of the temporary restraining order. *Id.* Certainly any of the Defendants could have requested from either court that Ms. Bain make these payments and she may well have been ordered to do so. *See*, RCW 61.24.130(1). Neither MERS nor any of the other Defendants made such a request. MERS cannot now complain with any integrity about missing payments (to which it is not entitled) during the pendency of the litigation when it did not do anything to change the status quo.

1. REBUTTAL TO MERS' ASSERTION THAT IT MAY IGNORE WASHINGTON STATE LAW.

In its Response, MERS spends several pages trying to convince this Court of the purported advantages that it has over the centuries-old land record systems used first in England and eventually in all of the United States. MERS' Response, 9-17. The task of writing Washington's foreclosure laws is left to the Legislature, not to MERS, lenders, servicers, investors and/or trustees. Yet that is exactly what MERS contends was appropriate here and actually argues that this Court "must" understand "MERS and the MERS System" and the "advantages to consumers and the

residential housing system that they provide.” Response, 18.

That is an appropriate assertion for MERS to make to the Legislature, not to this Court. If MERS and its members believed that it was appropriate to change the land records system of this state, then they should have approached the Legislature and made an effort to change the laws of Washington. Instead, MERS and its members simply chose to ignore those laws and the laws of every other state and proceeded to create their own system while refusing to comply with state laws. As early as 1997, MERS was using self-serving propaganda to garner support in the industry for using its system and attempts to rely upon it now to persuade this Court. Response, 19-20, citing only to an article written by its CEO, R. K. Arnold, *Yes There is Life on MERS*, 11 Prob. & Prop. 33, 34, (1997). Yet, none of this information was presented to the Washington Legislature and there were no changes to Washington’s laws as a result. Thus, MERS and the other Defendants are required to adhere to Washington’s laws as they exist, and under Washington law, MERS is not and cannot be a beneficiary. RCW 61.24.005(2).

It is interesting to note that at the same time that MERS was pushing for industry acceptance, in the late 1990s, the Washington DTA was significantly amended, as Ms. Bain pointed out in her Opening Brief. It was at that time that the definition of “beneficiary” was added to the

statute and there was no mention at all of MERS. *Id.* In all of the amendments to the statute which have occurred since 1998, there is no mention of MERS. The silence of the Washington Legislature speaks volumes. The Legislature does not mean to substitute MERS for the land records system and it does not intend to change the definition of “beneficiary”. RCW 61.24.005(2).

Another statute which makes this point clear is the Recording, registration and legal publication statute codified at RCW 65. RCW 65.04.030 requires that “the auditor or recording officer **must**” record the following:

(1) Deeds, grants and transfers of real property, mortgages and releases of mortgages of real estate, instruments or agreements relating to community or separate property, powers of attorney to convey real estate, and leases which have been acknowledged or proved; PROVIDED That deeds, contracts and mortgages of real estate described by lot and block and addition or plat, shall not be filed or recorded until the plat of such addition has been filed and made a matter of record; . . .

RCW 65.04.030(1) (emphasis added). While there is no specific requirement to record assignments of deed of trust, the Legislature is clear about the importance of the land records reflecting correct records of real property ownership and the existence of a mortgage as well as the identity of the mortgage holder. When this statute is read in conjunction with the Deed of Trust Act, it is clear that there are no provisions in Washington

state law for a system such as MERS. Further, this statute makes clear the importance of the land records system as it presently exists, which includes all information available to the public, not as MERS would like it to exist – on its computer systems.

Although Ms. Bain maintains that the manner in which the MERS System operates is irrelevant, it is important to note that MERS has misled the Court about its system. In its Response, MERS asserts that its members have a “substantial interest in providing accurate and up-to-date information because MERS System members (and the public rely on it to obtain current information about note owners and servicers, as well as to obtain all legal notices regarding the property, which are served on MERS.” Response, 22-23. What MERS intentionally omits is when it first began providing this information to the public. As noted in the Press Release issued by MERS on July 16, 2010, which is appended hereto, it only made investor information available beginning on that date and the MERS ServiceId program only became available in June 2009, after MERS became the subject of multiple lawsuits and bad press. (The statement even includes reference to the President’s complaints about the lack of transparency in the mortgage loan system.) *See*, MERS July 16, 2010 Press Release.

At the time that Ms. Bain’s lawsuit was filed in 2008, this

information was not available to her at all. The Press Release also makes clear that investors can “opt out” of the system, thereby denying the public accurate information about the owner of the mortgage loan even though the supposedly superior MERS System.

In another Press Release dated October 9, 2010 in which MERS attempts to further spin the bad press it had been receiving, it asserts that it “holds legal title to a mortgage as an agent for the owner of the loan”. MERS October 9, 2010 Press Release, which is appended hereto. MERS then asserts that it can be the note holder, but only if the note is actually transferred to its possession, and clarifies that it “does not authorize anyone to represent it in a foreclosure unless both the mortgage and the note are in MERS (sic) possession.” *Id.* In this case, there is no evidence whatsoever that the Note was transferred to MERS and in fact, MERS never asserts, nor has it asserted in the underlying litigation, that it obtained physical possession of Ms. Bain’s Note. Therefore, according to MERS’ own public statements, it had no authority to foreclose on Ms. Bain’s home and there was no legal authority for a foreclosure to be initiated in its name at all, let alone under Washington law.

Nevertheless, MERS makes the specious argument that Ms. Bain and other homeowners have agreed to the use of its system simply because they signed a deed of trust document that was created and presented to

them without knowledge or understanding as to what the insertion of MERS into the document means and without the ability to negotiate its terms. Homeowners were at the mercy of lenders who presented them with these deeds of trust – true contracts of adhesion – and told them to sign or to be denied the loan.

MERS admits in its pleadings that the ownership interest in the Promissory Note must be transferred according to the requirements of the Uniform Commercial Code (UCC). Response, 25. In Washington, the UCC is codified at RCW 62A-3-101, *et seq.* However, MERS then ignores the requirements of the UCC which designate the means by which promissory notes must be transferred and tries again to convince the Court of the superiority of the MERS System, in spite of the plain language of the DTA. Response, 25-26.

2. MERS IS NOT THE “BENEFICIARY” UNDER WASHINGTON LAW, NO MATTER HOW HARD IT STRAINS TO STRETCH THE PLAIN LANGUAGE OF THE STATUTE.

MERS goes to great lengths to try to convince this Court that the plain language of the DTA Definitions section means something other than what it says. While the Legislature included the qualifying language of “unless the context **clearly** requires otherwise” in the Definition Section, using that language to completely pervert the definition contained

in the statute is inappropriate and inconsistent with clear legislative intent. RCW 61.24.005 (emphasis added). There is no context here which “clearly” requires this Court to find some other definition should attach to the word “beneficiary”. *Id.* As MERS admits in its pleadings, the promissory note must be negotiated pursuant to the requirements of the UCC and the language in the DTA mirrors that requirement. Response, 25. *See also*, RCW 61.24.005 and 62A-3-301, *et seq.* In fact, all of the other language used in the statute lends support to the plain language interpretation. *Id.*

As noted in Ms. Bain’s Opening Brief, the DTA underwent significant clarification and amendment in 1998, including the new definition section. Laws of 1998, ch. 295, ESSB 6191. The 1998 bill reports indicate that the intent of the amendments were to modernize the deed of trust act procedures and to reflect the current practices. ESSB 6191, Final Bill Report, at 1 (Wa. 1998). The plain language of the statute reads: “‘Beneficiary’ means the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.” Laws of 1998, ch. 295, ESSB 6191 p. 1; RCW 61.24.005(2).

A deed of trust foreclosure in Washington State can only occur when the “beneficiary” has declared the borrower or grantor to be in

default. RCW 61.24.030(8)(c). This means a foreclosure can only occur when the “beneficiary”, i.e., holder of the promissory note, has determined that the borrower has breached the terms of the promissory note. Since MERS’ stated purpose is to simply keep track of the ownership and servicer interests in the various mortgage loans, and it has no knowledge whatsoever about the facts of the actual servicing of the loan, how can it possibly declare a borrower to be in default and instruct anyone to initiate a foreclosure proceeding? Simply put, it is impossible for it to do so.

Further evidence of the Legislature’s clear intent that the “beneficiary” is as plainly defined is found at RCW 61.24.030(7)(a) where the trustee is required, “before the notice of trustee’s sale is recorded, transmitted, or served, the trustee shall have proof that **the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust.**” RCW 61.24.030(7)(a) (emphasis added). “A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.” *Id.* This section was added to the DTA in 2009, and if the Legislature had intended for MERS or some “fourth party” to a deed of trust to be included in the definition of “beneficiary”, it certainly would

have made mention of it when it was making changes to the DTA in 2009, and in changes that were made in 2008. *Id.*

Another 2009 amendment dealt with the duty of the trustee and the Legislature decided that a trustee had a duty of good faith to “the borrower, the beneficiary, and grantor.” RCW 61.24.010(4). Not a mention of MERS or a “fourth party” to the deed of trust.

The most significant amendment to the DTA in the last few years was the addition of RCW 61.24.031, which provided for loss mitigation efforts to be made by contacting borrowers. RCW 61.24.031. (This section was amended in 2011 and the Foreclosure Fairness Act was also passed this year, allowing for foreclosure mediations. The FFA has not yet been codified.) The loss mitigation provisions also discuss the beneficiary’s requirement to communicate with the borrower and to attempt to avoid the foreclosure. Although this might be done on behalf of the beneficiary through an agent, it is nevertheless the obligation of the beneficiary to engage in the loss mitigation. MERS could not participate in this process because has no knowledge of anything about the loan except the information about the purported servicer and/or investor.

RCW 61.24.070 requires the trustee to credit the beneficiary’s bid at the sale towards the amount owing. RCW 61.24.070(2). MERS cannot participate in this part of the process. RCW 61.24.100(7) describes the

process for a beneficiary to accept a deed in lieu in order to stop a foreclosure. A beneficiary must make a request in writing to the trustee to execute a reconveyance of a deed of trust. RCW 61.24.110. MERS cannot perform any of these tasks given its own definition of the manner in which it conducts its business. Response, 9-17. Thus, it is impossible for MERS to meet the definition of “beneficiary” under Washington law. RCW 61.24.005(2).

MERS’ assertion that somehow a homeowner with no knowledge or understanding about MERS and its role (and one without any power to change the contract terms) who signs a form deed of trust presented to her for signature by a lender agrees to a “four party deed of trust” rather than a “three party deed of trust” is unsupportable. A “four party deed of trust” exists nowhere except in the fictional MERS universe. The term does not appear in any law dictionary, real property treatises and it does not exist under Washington law. Certainly the Deed of Trust Act does not contemplate such an agreement. RCW 61.24, *et seq.* This is determined by reviewing every section of the DTA and there is no reference to a “four party deed of trust”.

The DTA does not specifically mention or define a “three party deed of trust”, but the language in the Act clearly contemplates only three parties involved in the deed of trust and any resulting foreclosure. The

parties specifically identified and defined in the DTA are the borrower/grantor, the beneficiary and the trustee. RCW 61.24.005. The only other person who is specifically identified and defined in the DTA is a “guarantor”, and his role is defined without reference to the deed of trust. Nevertheless, MERS continues to insist that somehow the Washington Legislature intended the existence of such a document to be acceptable and in conformity with Washington law, even though there is absolutely no evidence of such intent.

In another attempt at twisting the statute to serve its purpose, MERS asserts that the Legislature intended a note to be treated the same as a deed of trust in the definition section. Response, 30. “Beneficiary” is defined as “the holder of the **instrument or document** evidencing the obligations **secured by the deed of trust.**” RCW 61.24.005(2) (emphasis added). Ms. Bain has asserted that the definition means a promissory note, since that is the most common “instrument or document” evidencing a debt, which is “secured by a deed of trust”. However, the Legislature defined the term slightly more broadly because there are occasions when there are other sorts of documents that “evidence the obligation”. For instance, home equity lines of credit or other “second mortgage” type liens, including those for home improvements such as windows or siding, are not “evidenced” by promissory notes. Rather, those contractual

agreements are often called other things, such as “Agreement”. These obligations are nevertheless secured by the execution of a deed of trust. But that does not change these types of agreements into deeds of trust. They too needed separately executed deeds of trust in order to have the debt obligation secured by the real property.

If this Court were to accept MERS’ suggested interpretation of the definition of the word “beneficiary” it would be acceptable for it to read: “the holder of the [**deed of trust**] evidencing the obligations **secured by the deed of trust.**” RCW 61.24.005(2) (with changes). Of course, this is an absurd sentence. But if one were to insert “promissory note” or “home equity line of credit agreement” into the sentence, it makes sense. *Id.* I.e., “the holder of the [**promissory note**] evidencing the obligations **secured by the deed of trust.**” Or, “the holder of the [**home equity line of credit agreement**] evidencing the obligations **secured by the deed of trust.**” *Id.* These interpretations make sense and are consistent with the rest of the DTA. Clearly the “instrument or document evidencing the obligation” cannot be the deed of trust.

MERS stretches itself even further and asserts that it is the “holder” of the deed of trust. Response, 31. But what does this mean? There is no legal definition of a “holder” of a deed of trust because no such concept exists in the law. The term “holder” under the law refers to

the holder of a promissory note. Black's Law Dictionary. Further, there is no evidence at all that MERS "holds" anything. MERS has not provided Ms. Bain with any initial disclosures or documentation at all. Although she maintains that the assertion means nothing because there is no "holder of a deed of trust" in the law, MERS has not demonstrated to this Court that it is the "holder" of anything at all. While a deed of trust does outline a borrower's obligations as regards payment of property taxes, association dues and the like, and a default in the payment of such obligations can constitute a default, the DTA still makes clear that it is only the "beneficiary" or "holder" who can declare any default at all. RCW 61.24.005(2) and 61.24.030.

4. THE DEED OF TRUST FOLLOWS THE NOTE AND CANNOT EXIST SEPARATELY FROM THE NOTE.

The Deed of Trust "follows" the Note and exists solely to provide an alternative means of enforcing its terms besides litigation. "The debt manifested by the promissory note is the principal obligation; the mortgage only secures payment of the debt and typically cannot be transferred independently." National Consumer Law Center, Foreclosures § 4.4.4.2, The Primacy of the Note (3d ed. 2010).

Not surprisingly, MERS completely ignores the relevant Washington cases in its briefing and instead cites to this Court decisions

rendered by federal courts interpreting the laws of other states. Response, 36-38. The opinions of the Fourth Circuit Court of Appeals and the Ninth Circuit Court of Appeals have no relevance to this Court. Horvath v. Bank of New York, N.A., 641 F.3d. 617 (4th Cir. 2011); Cervantes v. Countrywide Home Loans, Inc., --- F.3d ---, 2011 WL 3911031. Neither opinion addressed state law language such as that before this Court in the “Definition” section. Further, the Ninth Circuit case involved a fraud analysis, claims which were not made here, and arguments that a homeowner was defrauded because he did not know the identity of the owner of his loan. Ms. Bain has not asserted that she was defrauded for that same reason, but rather that Washington law requires that the act of foreclosure be done by the “beneficiary”. No such requirement apparently exists in the Arizona statute and so reliance upon that case is inappropriate. Further, Ms. Bain has not argued, as the homeowner apparently did in Cervantes, that there was a separation of the note and deed of trust which rendered the loan unsecured. Ms. Bain has never contended that the loan is unsecured. And the assertion by MERS that her arguments would “require the unraveling of decades-old contract jurisprudence by this Court” is astonishing given the blatant disregard that MERS has shown for the laws of the state of Washington. Response, 38.

Next MERS contends that because certain of the beneficiary’s

duties may be performed by agents under the DTA, the Legislature intended the role of the beneficiary to be subsumed by these agents. Response, 39, citing to RCW 61.24.031. The problem for MERS with this assertion is that when the Legislature authorizes necessary acts of the beneficiary to be performed by “agents”, as it does in RCW 61.24.031, it specifically states “beneficiary or its agent”. Thus, the Legislature makes clear those specific instances when an agent may perform the task assigned to the beneficiary. That means that when there is an absence of the word “agent”, the Legislature must have intended that only the beneficiary perform the described act.

MERS even asserts that in the absence of legislative intent to overturn the common law, it is presumed that the common law applies. Response, 40. This argument makes no sense at all in this context. A non-judicial foreclosure is only a statutory scheme and does not exist at common law. Similarly and predictably, MERS ignores the few Washington cases that deal with anything that is similar to the issues presented herein, and instead cite to out of state cases and federal court opinions. But as Ms. Bain has repeatedly noted, very few other states have language in their statutes that is similar to the Washington statute, and the federal courts are not the proper entities to be rendering questions of first impression about Washington state law. It is further inappropriate

for the federal courts to be rendering decisions about foreclosure laws given that they have no experience whatsoever in this area of law and they have demonstrated a willingness to completely ignore the requirements of Washington's foreclosure laws. It is the province of this Court to render the seminal decision about MERS' role in the Washington non-judicial foreclosure process.

Interestingly, if this Court is interested in considering the actions being taken in order states with regard to MERS' participation in their foreclosure schemes, then it should review the lawsuits which have been recently filed by various attorneys general. *See*, Appendix.

While MERS goes to great lengths to talk about the federal cases which wrongly decided that non-compliance with Washington foreclosure laws was an acceptable course of conduct, it dismisses the only Washington cases which even come close to looking at the issues presented in this case. Fidelity & Deposit Co. of Maryland v. Ticor Title Ins. Co., 88 Wash.App. 64 (1997) stands for the well-established legal principle that it is the note that matters when attempting to collect on the payments due. While the facts of that case are very different than those presented herein, it nevertheless demonstrates the importance of the note as being the evidence of the debt. The Court held that the forgery was irrelevant, that the "note only evidences the debt." Fidelity & Deposit Co.

of Maryland, at 66. The assignment of the deed of trust had no meaning because Fidelity did not have the valid note. “The forgery does matter. . . . If the obligation for which the mortgage was given fails for some reason, the mortgage is unenforceable.” Id. (Citing to Anderson v. County Properties, Inc., 14 Wn.App. 502, 503, 543 P.2d 653 (1975); Koster v. Wingard, 50 Wn.2d 855, 314 P.2d 928 (1957); see also, George v. Butler, 26 Wash. 456, 467-68, 67 P. 263 (1901).) “It is the default that gives rise to the power to sell. . . . The recording statute cannot make valid the invalid note that Home Federal/Fidelity received” Id.

As noted in the Opening Brief, another similar case is Walcker v. Benson and McLaughlin, 79 Wash.App. 739, 904 P.2d 1176 (1995), *review denied*, at 129 Wn.2d 1008 (1996). The Walcker Court made clear that the deed of trust could not be considered separately from the note as it only secures the obligation evidenced in the note. If the deed of trust could form a separate obligation to pay that could be foreclosed without the note, then the Court could not have reached such a decision. This Court had the opportunity to overturn the decision in Walcker and it declined to do so. Thus, the decision must be viewed as representative of the position of this Court on that subject.

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5. THE CONSUMER PROTECTION ACT MUST BE BROADLY CONSTRUED AND AS SUCH, THE DEFENDANTS ARE LIABLE TO MS. BAIN.

MERS asserts that because the Deed of Trust Act does not specifically provide for a violation of the Consumer Protection Act, it cannot support such a claim. RCW 61.24, *et seq.*; RCW 19.86, *et seq.* This assertion is completely contrary to the body of CPA case law and the plain language of the statute. The Legislature made clear that the CPA “shall be liberally construed” to fulfill its objective of protecting the public against “unfair, deceptive, and fraudulent acts or practices.” RCW 19.86.920. The remedies available under the CPA are not exclusive, but may be in addition to other remedies. *See, MacCormack v. Robins Constr.*, (1974) 11 Wash.App. 80, 521 P.2d 761.

The Legislature has specifically described those actions or transactions which are **not** subject to the CPA. RCW 19.86.070. This section identifies other regulatory statutes which are exempt from the CPA, but the exemption does not include the Deed of Trust Act. *Id.*; RCW 61.24, *et seq.* *See also, Sato v. Century 21*, 101 Wn.2d 599, 681 P.2d 242 (1984); *St. Paul Ins. Co. v. Updegrave*, 33 Wn.App. 653, 656 P.2d 1130 (1983); *Talmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 605 P.2d 1275 (1979); *Mason v. Mortgage America*, 114 Wn.2d

842, 792 P.2d 142 (1990). And in fact, the Attorney General's Office recently filed suit against a foreclosing trustee for violating numerous provisions of the Deed of Trust Act and asserted that these violations constitute violations of the Consumer Protection Act. *Id.*; *see also*, Complaint filed by Washington Attorney General against ReconTrust in the King County Superior Court, attached to the Appendix.

CONCLUSION

Ms. Bain maintains that the questions presented to this Court by Judge Coughenour are relatively simple to answer by referring to the plain language of the Deed of Trust Act. RCW 61.24, *et seq.* The Legislature has made clear in its definition of "beneficiary" that persons utilizing the expedited process of non-judicial foreclosure must be the "holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation." RCW 61.24.005(2). MERS cannot meet the definition of "beneficiary" and therefore it did not have the legal authority to appoint a successor trustee under RCW 61.24.010(2). The initiation of a foreclosure in the name of MERS was in direct contravention of the requirements of the DTA and therefore MERS and all of the defendants are liable to Ms. Bain for that initiation of a foreclosure in violation of the duties under the Deed of Trust Act. RCW 61.24.005(2) and 61.24.010(2).

MERS is now, years after its creation, trying to re-write the laws of this state in large part by arguing about all of its supposed good reasons to exist. It is apparently dissatisfied with the manner in which the Legislature has decided to allow non-judicial foreclosures in this state and seeks to obtain a stamp of approval for its decision to contravene Washington law. Whether or not any other states have allowed MERS to get away with its desired business practices should not be persuasive. If MERS could convince the Washington Legislature to change its foreclosure laws, then it should have done so. But as the law stands now, the Legislature has made clear who may initiate a foreclosure and that group of entities does not and should not include MERS. MERS is not the “holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.” RCW 61.24.005(2). MERS is nothing more than a name on a deed of trust that bears no relationship to the debt that is owed and any alleged defaults thereunder. Thus, MERS is not a “beneficiary” under the requirements of the Deed of Trust Act. *Id.* Further, MERS and the other defendants are liable to Ms. Bain for the violations of the DTA, but they are liable to her under the CPA. RCW 19.86, *et seq.*; Dkt. 155.

This Court needs to clearly answer the questions regarding MERS’

involvement in its non-judicial foreclosure scheme and that answer must be a resounding affirmation that pursuant to the scheme devised by the Legislature, MERS cannot be a “beneficiary” under the DTA and therefore Ms. Bain’s foreclosure was wrongfully initiated by MERS and all of the defendants involved in perpetrating the wrongdoing.

RESPECTFULLY SUBMITTED this 31st day of October, 2011.

By Melissa A. Huelsman / PL /
Melissa A. Huelsman, WSBA # 30935
Law Offices of Melissa A. Huelsman
Attorney for Plaintiff Kristin Bain



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MERS Expands Website To Disclose Loan Investor Information

FOR IMMEDIATE RELEASE
For more information, please contact:
Karmela Lejarde, (703) 761-1274

Reston, Va., July 16, 2010—MERSCORP, Inc. (MERS) announced today that Investor Information for loans registered on the MERS® System is now available to borrowers at no charge.

Through the MERS® ServicerID website, both servicer and Investor Information are now displayed. The added investor information is an expansion of the MERS® InvestorID program launched in June 2009, which mails a notice to borrowers when the identity of their loan's owner or investor changed.

"MERS is an enthusiastic supporter of President Obama's goal to bring more transparency to the mortgage banking process," said MERS President & CEO R.K. Arnold. "I am pleased that we now have the capability to show the identity of a loan's owner or investor to whomever wishes to see that data."

The expanded MERS InvestorID program is an opt-out system which displays investor information on all MERS-registered loans unless the investor has specifically opted out of disclosure (servicer information will continue to be displayed). If a borrower wishes to find the investor on a loan with an opted-out investor, they can do so by sending a written request to their servicer for the information.

"Now both servicer and investor information are readily available to the public," said Arnold. "Consumers and lenders want and need greater transparency and that's what MERS is delivering."

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10/9/2010
Statement by R.K. Arnold, President and CEO of MERS CORP, Inc.

FOR IMMEDIATE RELEASE
October 9, 2010
Contact: Karmela Lejarde
703-761-1274
703-772-7156

RESTON, Virginia (October 8, 2010) – MERS CORP, Inc. (MERS) President and Chief Executive Officer R.K. Arnold today issued the following statement regarding the organization and clarifying certain aspects of its operations:

"MERS is one important component of the complex infrastructure of America's housing finance system. Billions of dollars of mortgage money flow through the financial system every year. It takes many, often-unseen mechanical processes to properly get those funds into the hands of qualified homebuyers.

Technology designed to reduce paperwork has a very positive effect on families and communities. They may not see it, but these things save money and time, creating reliability and stability in the system. That's important to keep the mortgage funds flowing to the consumers who need it.

With millions of Americans facing foreclosure, every element of the housing finance system is under tremendous strain. What we're seeing now is that the foreclosure process itself was not designed to withstand the extraordinary volume of foreclosures that the mortgage industry and local governments must now handle.

MERS helps the mortgage finance process work better. The MERS process of tracking mortgages and holding title provides clarity, transparency and efficiency to the housing finance system. We are committed to continually ensuring that everyone who has responsibilities in the mortgage and foreclosure process follows local and state laws, as well as our own training and rules."

Facts about MERS

(NOTE TO EDITORS: The following is attributed to MERS Communications Manager Karmela Lejarde)

FACT: Courts have ruled in favor of MERS in many lawsuits, upholding MERS legal interest as the mortgagee and the right to foreclose. This legal right springs from two important facts:

1. MERS holds legal title to a mortgage as an agent for the owner of the loan
2. MERS can become the holder of the promissory note when the owner of the loan chooses to make MERS the holder of the note with the right to enforce if the mortgage loan goes into default.

MERS does not authorize anyone to represent it in a foreclosure unless both the mortgage and the note are in MERS possession. In some cases where courts have found against MERS, those cases have hinged on other procedural defects or improper presentation of MERS's legal interests and rights. Citations can be found at the end of this document.*

Oct 9 2010

FACT: MERS does not create a defect in the mortgage or deed of trust.

Claims that MERS disrupts or creates a defect in the mortgage or deed of trust are not supported by fact or legal precedents. This is often used as a tactic by lawyers to delay or prevent the foreclosure. The mortgage lien is granted to MERS by the borrower and the seller and that is what makes MERS the mortgagee. The role of mortgagee is legal and binding and confers to MERS certain legal rights and responsibilities.

FACT: The trail of ownership does not change because of MERS.

MERS does not remove, omit, or otherwise fail to report land ownership information from public records. Parties are put on notice that MERS is the mortgagee and notifications by third parties can be sent to MERS. Mortgages and deeds of trust still get recorded in the land records.

The MERS® System tracks the changes in servicing rights and beneficial ownership. No legal interests are transferred on the MERS System, including servicing and ownership. In fact, MERS is the only publicly available comprehensive source for note ownership.

While this information is tracked through the MERS® System, the paperwork still exists to prove actual legal transfers still occurred. No mortgage ownership documents have disappeared because loans were registered on the MERS® System. These documents exist now as they have before MERS was created. The only pieces of paper that have been eliminated are assignments between servicing companies because such assignments become unnecessary when MERS holds the mortgage lien for the owner of the note.

FACT: MERS did not cause mortgage securitization.

MERS was created as a means to keep better track of the mortgage servicing and beneficial rights as loans were getting bought and sold at a high rate during the late 1990s.

At the height of the housing market, low interest rates prompted some homeowners to refinance once, twice, even three times in the space of months. Banks were originating loans at more than double their usual rate. Assignments—the document that names the holder of the legal title to the lien—primarily between servicing companies, were piling up in county land record offices, awaiting recording. Many times the loans were getting refinanced before the assignments could get recorded on the old loan. The delay prevented lien releases from getting recorded in a timely manner, leaving clouds on title.

MERS was created to provide clarity, transparency and efficiency by tracking the changes in servicing rights and beneficial ownership interests. It was not created to enable faster securitization. MERS is the only publicly available source of comprehensive information for the servicing and ownership of the more than 64 million loans registered on the system. The Mortgage Identification Number (MIN), created by MERS, is similar in function to a motor vehicle VIN, which keeps track of these loans. Without MERS the current mortgage crisis would be even worse.

FACT: Lenders cannot "hide" behind MERS.

MERS is the only comprehensive, publicly available source of the servicing and ownership of more than 64 million loans in the United States. If a homeowner needs to identify the servicer or investor of their loan, and it is registered in MERS, they can be helped through MERS® ServicerID or via toll-free number at 888-679-6377.

FACT: MERS fully complies with recording statutes.

The purpose of recording laws is to show that a lien exists, which protects the mortgagee and any bona fide purchasers. When MERS is the mortgagee, the mortgage or deed of trust is recorded, and all recording fees are paid.

***NOTABLE LEGAL VICTORIES:**

a. [IN RE Mortgage Electronic Registration Systems \(MERS\) Litigation](#), a multi-district litigation case in federal court in Arizona who issued a favorable opinion, stating that "The MERS System is not fraudulent, and MERS has not committed any fraud."

b. [IN RE Tucker](#) (9/20/2010) where a Missouri bankruptcy judge found that the language of the deed of trust clearly authorizes MERS to act on behalf of the lender in serving as the legal title holder.

c. Mortgage Electronic Registration Systems, Inc. v. Bellistri, 2010 WL 2720802 (E.D. Mo. 2010), where the court held that Bellistri's failure to provide notice to MERS violated MERS' constitutional due process rights.

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STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

Plaintiff,

v.

RECONTRUST COMPANY, N.A.,

Defendant.

NO.

COMPLAINT FOR INJUNCTIVE
AND OTHER RELIEF UNDER
THE CONSUMER PROTECTION
ACT

The Plaintiff, State of Washington, by and through its attorneys Robert M. McKenna, Attorney General, and James T. Sugarman, Assistant Attorney General, brings this action against the defendant named below. The State alleges the following on information and belief:

I. PLAINTIFF

1.1 The Plaintiff is the State of Washington.

1.2 The Attorney General is authorized to commence this action pursuant to RCW 19.86.080 and RCW 19.86.140.

II. DEFENDANT

2.1 Defendant RECONTRUST COMPANY, N.A, (ReconTrust or Defendant) is a for-profit business entity permitted by the U.S. Office of the Comptroller of the Currency as a nondepository, uninsured, limited-purpose national trust bank.

2.2 ReconTrust is a California corporation and is a wholly-owned subsidiary of Bank of America, N.A.

Handwritten signature/initials

1 ReconTrust's services or the cost of the third party services ReconTrust chooses, and they
2 cannot direct ReconTrust's activities. This vulnerable situation is compounded for
3 homeowners by the complexities of the foreclosure process, by the homeowners' highly
4 distressed financial circumstances, and the high stakes nature of the proceeding. Foreclosure
5 sales are usually irreversible. Any defense must be asserted before the sale occurs. Because
6 courts are not involved in foreclosures, homeowners' only protections are the detailed
7 procedures and requirements contained in the Deed of Trust Act, and a neutral foreclosure
8 trustee who insures those procedures are followed to the letter.

9 4.3 ReconTrust is a foreclosure trustee that has failed to comply with the procedures
10 of the Deed of Trust Act in each and every foreclosure it has conducted since at least June 12,
11 2008, and it is a trustee who is wholly owned by the loan servicer seeking to foreclose.

12 V. FACTS

13 5.1 ReconTrust regularly acts as a successor trustee for deeds of trust secured by
14 residential real property located in the State of Washington.

15 5.2 ReconTrust has been at all times relevant to this action in competition with
16 others engaged in similar activities in the state of Washington and engages in the acts below as
17 a matter of practice.

18 ReconTrust Fails to Maintain an Office in the State of Washington as Required by 19 Law.

20 5.3 Defendant has failed to maintain the statutorily-required physical presence in
21 the State of Washington, with telephone service at that address. RCW 61.24.030(6).

- 22 a. By issuing Notices of Trustee's Sale, conducting trustee's sales, and
23 issuing Trustee's Deeds without maintaining the required physical
24 presence, Defendant has misrepresented its authority to issue such
25 notices, conduct trustee's sales, and issue Trustee's Deeds.

1 b. By conducting the nonjudicial foreclosure process while failing to
2 maintain a physical presence with telephone service, the Defendant has
3 unfairly: i) prevented homeowners from having face-to-face contact with
4 their trustee, ii) prevented homeowners from gaining responses to time-
5 sensitive foreclosure issues, iii) prevented homeowners from physically
6 presenting time-sensitive payments to stop a foreclosure, iv) prevented
7 homeowners from delivering payments in a manner that insures that the
8 beneficiary can not deny payment was made, v) prevented homeowners
9 from physically presenting mortgage-related documents in a manner that
10 will stop the beneficiary from claiming the homeowner failed to provide
11 such documents, and vi) potentially clouded title to homes it has sold at
12 auction.

13 **ReconTrust Fails to Conduct Foreclosures as a Neutral Third Party With a Duty**
14 **of Good Faith Towards the Borrower and the Lender.**

15 5.4 As a trustee on deeds of trust, Defendant has a duty of good faith towards the
16 borrower and grantor on the deed of trust, as well as to the beneficiary.

17 5.5 ReconTrust has agreements with beneficiaries and/or their agents to the effect
18 that ReconTrust will only cancel or continue non-judicial foreclosure sales if the beneficiary or
19 agent approves.

20 5.6 When borrowers have asked ReconTrust to cancel a sale date because of issues
21 they believe require cancellation or continuance of the sale, ReconTrust has told borrowers that
22 it will not or cannot stop a sale without the permission of the lender or servicer.

23 5.7 ReconTrust has committed unfair and deceptive acts and violated its duty of
24 good faith by noticing and conducting trustee sales while failing to perform statutory requisites
25 for conducting such sales as contained in the Deed of Trust Act, RCW 61.24.030 and .040.
26 Those failures include:

- 1 a. Failing to maintain a physical presence with telephone service at that
2 address.
- 3 b. Failing to identify the actual owner of the Promissory Note in the Notice
4 of Default.
- 5 c. Failing to obtain proof that the beneficiary is the owner of the
6 promissory note secured by the deed of trust.
- 7 d. Failing to clearly and conspicuously identify in the Notice of Trustee's
8 Sale the defaults, other than nonpayment, that entitle the beneficiary to
9 foreclose and which may be cured by the borrower. Instead,
10 ReconTrust's Notices identify every possible default and demand those
11 defaults be cured whether those defaults have actually occurred or not.
- 12 e. Conducting foreclosure sales in non-public places such as the garage of
13 a private office building and a hotel ballroom.
- 14 f. Creating or using documents essential to a valid trustee's sale, or to a
15 reconveyance of the deed of trust, that are improperly executed,
16 notarized or sworn to, including: i) documents that were not signed in
17 front of a notary, ii) documents that had both the signature and
18 notarization applied mechanically while claiming that the signatory
19 personally appeared before the notary, iii) using signatories who
20 simultaneously claim to be officers of the beneficiary, of MERS, and of
21 a servicer, all while actually being employees of ReconTrust, and
22 iv) executing documents without direct knowledge of the facts contained
23 therein.
- 24 g. Conducting joint prosecution and/or defense of legal claims with the
25 beneficiary or its agent on matters related to its duty of good faith to the
26 borrower.

1 5.8 Homeowners have the right to stop a foreclosure by paying an amount (the
2 “reinstatement amount”) set by statute and itemized by the foreclosure trustee.
3 RCW 61.24.090.

4 5.9 The Deed of Trust Act limits the reinstatement amount to the following charges:
5 arrearages on the loan; expenses “actually incurred” by the trustee to enforce the note; a
6 reasonable trustee’s fee; a reasonable attorney’s fee; and, the costs of recording a notice of
7 discontinuance of the foreclosure. RCW 61.24.090.(1)(a) and (b).

8 5.10 Defendant has failed to properly itemize and/or misrepresented the
9 reinstatement amount by, including but not limited to, overcharging for recording fees, posting
10 fees, and mailing fees.

11 5.11 By demanding inaccurate amounts and failing to properly itemize amounts,
12 Defendant has prevented borrowers from determining whether fees are reasonable, has
13 overcharged borrowers and has prevented borrowers from curing their default within the
14 statutory guidelines for reinstatement.

15 **ReconTrust Conceals or Misrepresents the Identity of the Actual Owner of the**
16 **Debt.**

17 5.12 Defendant systematically conceals, misrepresents or inaccurately divulges the
18 true parties to the mortgage transaction in its foreclosure notices and related documents.

- 19 a. ReconTrust accepts and records in county land records Appointments of
20 Successor Trustee from purported beneficiaries such as Bank of
21 America, NA, knowing, or duty-bound to know, that they are not the
22 holders of the loans and are therefore not beneficiaries under the Deed of
23 Trust Act.
- 24 b. In Notices of Default, ReconTrust misrepresents the owner of the
25 Promissory Note by only naming the servicer, such as BAC Home
26 Loans Servicing, LP, when the actual owner is a securitization trust.

1 Defendant does not identify the actual owner anywhere on the Notices
2 of Default. The Deed of Trust Act requires ReconTrust to identify both
3 the owner of the note and the servicer of the note, with their respective
4 addresses, as well as the servicer's phone number, on each Notice of
5 Default. RCW 61.24.030(8)(I).

6 c. In a form document with the title "Important Legal Notice" ReconTrust
7 claims that BAC Home Loans Servicing, LP is the "Creditor to whom
8 the debt is owed" when Defendant knows, or should know, that BAC is
9 not the creditor to whom the debt is owed.

10 d. In Notices of Trustee's Sale ReconTrust claims that the current
11 beneficiary is "BAC Home Loans Servicing, LP FKA Countrywide
12 Home Loans Servicing LP, (BAC)", or "Bank of America, N.A,
13 Successor by Merger to BAC Home Loans Servicing, LP FKA
14 Countrywide Home Loans Servicing LP", when Defendant knows or
15 should know that these entities are loan servicers and not beneficiaries of
16 the deed of trust. In some Notices of Trustee's Sale, Defendant fails to
17 name any current beneficiary.

18 e. In Notices of Trustee's Sale ReconTrust claims that the deed of trust
19 secures an obligation in favor of Mortgage Electronic Registration
20 Systems, Inc, (MERS) as beneficiary, when Defendant knows or should
21 know that MERS is never the party to whom the obligation is owed.

22 f. In its Trustee's Deeds ReconTrust claims that the promissory note was
23 executed in favor of MERS when MERS never appears in promissory
24 notes and is never the party to be repaid.

25 g. In its Trustee's Deeds ReconTrust claims that BAC Home Loans
26 Servicing, LP FKA Countrywide Home Loans Servicing LP, was "the

1 holder of the indebtedness secured by the Deed of Trust" at the time it
2 requested that the Defendant foreclose when Defendant knew or should
3 have known BAC was not the holder of the indebtedness.

4 **ReconTrust's Trustee's Deeds Contain Material Misrepresentations.**

5 5.13 ReconTrust's duty of good faith includes creating and recording a Trustee's
6 Deed after the foreclosure sale which transfers the property from the homeowner to the highest
7 bidder at the foreclosure auction.

8 5.14 The Trustee's Deed must recite facts showing that the sale was conducted in
9 compliance with the specific requirements of the Deed of Trust Act so that the successful
10 bidder at the sale may rely on these recitals as conclusive evidence the Act was followed, and
11 clear title is delivered. RCW 61.24.040(7).

12 5.15 ReconTrust's Trustee's Deeds claim that it has complied with every provision
13 of the Deed of Trust Act when ReconTrust does not comply with every provision of that Act.
14 ReconTrust believes the Deed of Trust Act is preempted by federal law and therefore
15 consciously does not comply with provisions of the Act.

16 5.16 ReconTrust's Trustee's Deeds claim that copies of the Note were served on the
17 homeowner when Defendant knew or should have known that copies of the Note were not
18 delivered to the homeowner.

19 5.17 ReconTrust's Trustee's Deeds make contradictory assertions regarding a
20 material fact of the trustee's sale: whether the transaction was sold to the highest bidder for
21 cash or whether it was a "credit bid" where the owner of the debt bid the amount owing in
22 satisfaction of the debt. This distinction has important ramifications regarding title, excise tax
23 consequences, and whether a void foreclosure can be set aside.

24 5.18 Defendant's failures to abide by the Deed of Trust Act have concealed material
25 information needed by homeowners to assert rights and defenses stemming from their loan
26 transaction, to meaningfully negotiate the terms of a loan modification, to exercise their

1 | statutory right to reinstate their mortgage, to cure their defaults, and to postpone or stop a
2 | foreclosure sale.

3 | **VI. CAUSES OF ACTION**

4 | **A. Misrepresentations**

5 | 6.1 In the course of conducting its business Defendant made numerous
6 | misrepresentations and failed to disclose material terms as alleged in paragraphs 1.1 through 5.18.
7 | Such conduct constitutes unfair or deceptive acts or practices in trade or commerce, and/or unfair
8 | methods of competition in violation of RCW 19.86.020, is contrary to the public interest, and is
9 | not reasonable in relation to the development and preservation of business.

10 | **B. Unfair Practices**

11 | 6.2 In the course of conducting its business Defendant engaged in numerous unfair
12 | acts and practices as alleged in paragraphs 1.1 through 5.18. Such conduct constitutes unfair
13 | practices and violates RCW 19.86.020, is contrary to the public interest, and is not reasonable in
14 | relation to the development and preservation of business.

15 | **VII. PRAYER FOR RELIEF**

16 | **WHEREFORE**, Plaintiff, State of Washington, prays for relief as follows:

17 | 7.1 That the Court adjudge and decree that the Defendant has engaged in the conduct
18 | complained of herein.

19 | 7.2 That the Court adjudge and decree that the conduct complained of constitutes
20 | unfair or deceptive acts and practices and an unfair method of competition and is unlawful in
21 | violation of the Consumer Protection Act, Chapter 19.86 RCW.

22 | 7.3 That the Court issue a permanent injunction enjoining and restraining the
23 | Defendant, and its representatives, successors, assigns, officers, agents, servants, employees, and
24 | all other persons acting or claiming to act for, on behalf of, or in active concert or participation
25 | with the Defendant, from continuing or engaging in the unlawful conduct complained of herein.
26 |

