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SUPREME COURT
OF THE STATE OF WASHINGTON

KEVIN SELKOWITZ, an individual,

Plaintiff,

v.

LITTON LOAN SERVICING LP, a Delaware Limited Partnership; NEW CENTURY MORTGAGE CORPORATION, a California Corporation; QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington Corporation; FIRST AMERICAN TITLE INSURANCE COMPANY, a Washington Corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation, and DOE Defendants 1-20,

Defendants.

CORRECTED PLAINTIFF'S REPLY BRIEF

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I. INTRODUCTION

Mortgage Electronic Registration Systems, Inc. ("MERS") has consistently demonstrated a flagrant disregard for the interests of borrowers, sound mortgage banking practices, and compliance with state law, in Washington and throughout the nation. Compounding this pervasive wrongdoing MERS attempts to mislead the Court regarding the facts of the cases before it, while simultaneously seeking to obfuscate the issues the Honorable John C. Coughenour certified to this Court.

Mr. Selkowitz does not dispute that he has missed payments on his home loan or that he owes money on the underlying obligation that is secured by the Deed of Trust that is the subject matter of this action. However, that is not among the issues before this Court for resolution (it was also not before Judge Coughenour). The issues are whether the Deed of Trust identifying MERS as the nominee of the lender and "beneficiary" complies with *RCW 61.24.005* and the consequences to the parties if it does not. Repeating conclusory phrases and terms as incantations does not address these issues, nor does it cure the failure to comply with specific statutory language alleged by Mr. Selkowitz.

II. UNDISPUTED FACTS RELATED TO FORECLOSURE

Kevin Selkowitz executed a Deed of Trust on November 1, 2006

securing an obligation of \$306,900 to the lender, New Century Mortgage Corporation.¹ At no time relevant to this cause of action did Mr. Selkowitz owe any monetary or other obligation to MERS, make any payments to MERS, or have any contact with MERS for any reason.² At all times relevant to this cause of action, MERS was identified as the “nominee for Lender” and “the beneficiary under this Security Agreement. Dkt No. 9, Ex A.

On May 12, 2010, MERS executed, as beneficiary of the Deed of Trust, an Appointment of Successor Trustee nominating Quality Loan Services (“QLS”) as trustee.³ No evidence of written authorization for this act from MERS’ principal has ever been offered or produced.

On May 27, 2010, QLS, apparently in reliance upon MERS’ Appointment of Successor Trustee, executed a Notice of Trustee’s Sale on behalf of MERS in connection with the Property. Curiously, this document directed that once recorded that it be sent to QLS and Litton

¹ Dkt. No. 9, Ex. A. References to the record are based upon those documents certified to this Court and are cited by Docket Number (Dkt.) and Exhibit (Ex.) reference where appropriate.

² MERS asserts that all Notes are the same and the lack of the Selkowitz Note on the record should necessarily allow the Court to rely on the *Bain* Note as an analogue. This is not appropriate, while Mr. Selkowitz does not believe reference to either Note is necessary for resolution of the issues certified reliance on the *Bain* Note to determine the rights of Mr. Selkowitz would be improper and unfair.

³ Id., Ex. B.

Loan Servicing, LP - not MERS.⁴

MERS asserts in its “Statement of Facts” that MERS was acting as the “agent” for the lender and the lender’s successors.⁵ The descriptive term “agent” is used repeatedly in this opening section and throughout the brief.⁶ That assertion is a legal conclusion and not a fact. The legal status of MERS at the time the Deed of Trust was signed and all times thereafter is a matter of dispute. Nowhere within the Deed of Trust is MERS referred to as an “agent” and is instead referenced simply as a “nominee” within the document. MERS does not really identify its principal or offer any proof of authority to have taken the actions it did in this matter in any pleading before the Court or in its opening brief. Whether the language in the Deed of Trust confers agency status, whether it is sufficient to comply with Statute of Frauds or *RCW 61.24*, or if the issue is moot relative to the answers to the questions certified is a matter for determination by this Court. The use of the term without accompanying legal argument is intentionally misleading and demonstrates the sort of pervasive bad faith uncovered in litigation involving MERS transactions throughout the nation.

⁴ Id., Ex. C.

⁵ See Response Brief of MERS, at 6.

⁶ Id, at 9.

III. ARGUMENT

A. No reading of RCW 61.24.005 can support a finding that MERS a proper "Beneficiary".

MERS asserts that the definition advanced by Selkowitz is "narrower than it should be."⁷ The definition that Selkowitz asks this Court to adopt is contained in the statute, while MERS is asking the Court to significantly expand upon the definition in order to ratify its conduct. Contained within MERS argument is the relevant standard of analysis ("Legislative definitions provided in a statute are controlling. . . .") for determining the meaning of a statute.⁸ Since the statute at issue is so clear and unambiguous, the next level of analysis should be whether reading the statute literally would give rise to an "unlikely, absurd, or strained consequence."⁹ However, before addressing that issue the strained and circuitous reading urged by MERS must be addressed.

First, MERS attempts to argue that the introductory phrase - "unless the context clearly requires otherwise"¹⁰ - modifies the definitions depending on the *transaction* at issue. Instead, it modifies the terms

⁷ Id, at 10.

⁸ Id., at 11. citing *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239 (2002).

⁹ *State v. McDougal*, 120 Wash.2d 334, 350, 841 P.2d 1232 (1992).

¹⁰ RCW 61.24.005.

depending on the context of use within the *chapter*. It is impossible to conceive how, or indeed why, the Washington Legislature would modify the second definition contained in the opening section of the statute which contains no genuine context on which to base the modification. It is this principle of statutory interpretation advanced by MERS, if adopted, which leads to absurd and strained consequences as it would be impossible for any party to rely solely on a statute for guidance, but instead require an attempt to define the statute within the context of each transaction as it arose. Additionally, MERS fails to demonstrate how even this strained reading is clearly required by anything other than a desire to ratify its proprietary business model.

Second, MERS asserts that the “document evidencing the obligation secured by the deed of trust”¹¹ means something other than the promissory note in these cases. This argument is completely without merit and attempts to complicate what is an otherwise perfectly simple phrase. Mr. Selkowitz may agree that “instrument or document evidencing the obligations secured by the deed of trust”¹² may mean something other than a promissory note in some cases. For instance, in commercial matters, a deed of trust could be used to secure performance of a contract, rather than

¹¹ *RCW 61.24.005(2)*.

¹² *RCW 61.24.005(2)*.

a note. However, in his case, as well as in the *Bain* case, there are promissory notes secured by the subject deeds of trust, each of which is owed to a lender and not MERS.

MERS attempt to argue that the subject Deed of Trust is the “instrument or document” secured by the deed trust is completely circular and irrational. The Deed of Trust is meant to secure a separate written obligation, not to security instrument itself. While a deed of trust may create certain rights and duties, if it conforms to the law, it does not magically transform it into a separate obligation.

Additionally, concealment of the true beneficiary may be used as a vehicle to violate *RCW 61.24.020*. Where MERS seeks to foreclose without disclosing the actual party in interest, a consumer has no way of determining whether the threatened sale violates the statute. Adopting the reasoning of MERS will result in unpredictable consequences and presents substantial opportunities for fraud and abuse.

B. Parties may not contractually alter *RCW 61.24*.

MERS asserts that Mr. Selkowitz did not point to any “statute or public policy that prohibits the parties from so contracting” when he has pointed to both *RCW 61.24.005(2)* and generally accepted doctrine

concerning the legal limitations imposed on contracts.¹³

Washington courts have consistently held that the statutory requirements of *RCW 61.24* are not meant to be flexible and vaguely defined procedures adopted to suit the needs of lenders and trustees. Rather, the statutory requirements are to provide (1) an efficient and inexpensive foreclosure process; (2) an adequate opportunity for interested parties to prevent a wrongful foreclosure, and (3) the promotion of stability in land titles.¹⁴ To adopt the reasoning of MERS would allow the grossly unequal bargaining positions of the borrowers to be abused by unscrupulous lenders and trustees. Instead, as noted, Washington courts have held that “strict compliance” with the requirements of *RCW 61.24* is necessary to preserve the integrity, transparency, and predictability of the system.¹⁵

In finding that a mortgagor may not contractually deprive a debtor of the right to redemption and other rights and privileges, this Court made note of established mortgage law:

Generally every one may renounce any privilege or surrender any right he has; but an exception is made in

¹³ Opening Brief, at 40.

¹⁴ *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985).

¹⁵ *Koegel v. Prudential Mut. Sav. Bank*, 51 Wash.App. 108, 752 P.2d 385 (1988).

favor of debtors who have mortgaged their property, for the reason that their necessities often drive them to make ruinous concessions in order to raise money.¹⁶

To adopt the reasoning of MERS would allow lenders to depart from any requirement contained within *RCW 61.24*, as MERS has provided no argument concerning precisely where the line would or should be drawn for contractual language that conflicts with provisions of the statute. If the statute is merely advisory, then presumably consumers could be requested to shorten or relinquish notice requirements, mediation rights, or any other provisions of the statute a lender may request as a precondition to issuance of a loan.

Washington has adopted a specific and clear statute to govern the creation and utilization of deeds of trust. These statutes are periodically amended after careful legislative investigation and consideration. Substantial deviations from the requirements contained within the statute will inevitably lead to unintended and potentially adverse consequences.

The widespread abuses in the mortgage lending market that precipitated recent mortgage banking melt-down and related problems within the nation's economy were the result of the "market efficiencies" that MERS urges this Court to adopt. It is not a coincidence that the

¹⁶ *Boyer v. Paine*, 60 Wash. 56, 110 P. 682 (Wash. 1910).

market for securitized mortgages became a bubble during the lifetime of MERS. Without MERS the market was relatively small, limited and stable, as noted in MERS responsive brief, and did not expand until an “efficient mechanism” to securitize residential mortgages was created. The share of subprime mortgages in the mortgage market increased from 8% in 2001 to 20% in 2006, while the securitized share of subprime mortgages (i.e., those passed to third-party investors via MBS) increased from 54% in 2001, to 75% in 2006.¹⁷ A sample of 735 CDO deals originated between 1999 and 2007 showed that subprime and other less-than-prime mortgages represented an increasing percentage of CDO assets, rising from 5% in 2000 to 36% in 2007.¹⁸ Mr. Selkowitz is not claiming that MERS is solely blame for the current economic malaise triggered by the troubles in the mortgage banking industry, however it is impossible to argue that MERS was not an integral and necessary part of the system that caused the problems.

MERS cites *RCW 61.12.020* which provides that “parties may insert in [a] mortgage any lawful agreement or condition”¹⁹ as allowing a

¹⁷ *Demyanyk, Y., & Van Hemert, O.* (2011). Understanding the subprime mortgage crisis. *Review of Financial Studies*, 24(6), 1848.

¹⁸ *Katherine Barnett-Hart*, *The Story of the CDO Market Meltdown: An Empirical Analysis*, March 2009

¹⁹ *RCW 61.12.020*.

deviation from the statutory mandates. On the contrary, the language at issue is an unlawful agreement that is specifically prohibited. Allowing MERS to serve as a beneficiary violates an explicit requirement concerning the identity of a party, which, if allowed, would undermine the very purpose of the statute and allow other provisions of the act to be subverted.

MERS reliance on the *Cervantes* case is grossly misplaced. The *Cervantes* court made the following statement in its opinion:

The legality of MERS's role as a beneficiary may be at issue where MERS initiates foreclosure in its own name, or where the plaintiffs allege a violation of state recording and foreclosure statutes based on the designation. See, e.g., Mortgage Elec. Registration Sys. v. Saunders, 2 A.3d 289, 294-97 (Me. 2010) (concluding that MERS cannot foreclose because it does not have an independent interest in the loan because it functions solely as a nominee); Landmark Nat'l Bank, 216 P.3d at 165-69 (same); Hooker v. Northwest Tr. Servs., No. 10-3111, 2011 WL 2119103, at *4 (D. Or. May 25, 2011) (concluding that the defendants' failure to register all assignments of the deed of trust violated the Oregon recording laws so as to prevent non-judicial foreclosure). But see Jackson, 770 N.W.2d at 501 (concluding that defendants' failure to register assignments of the beneficial interest in the mortgage loan did not violate Minnesota recording laws so as to prevent non-judicial foreclosure). This case does not present either of these circumstances and, thus, we do not consider them.²⁰

²⁰ *Cervantes v. Countrywide Home Loans, Inc.*, --- F.3d ---, 2011 WL 3911031 (9th Cir. Sept. 7, 2011). Similarly, *Horvath v. Bank of NY, N.A.*, 641 F.3d 617 (4th Cir. 2011) involved different issues and statutes ("[t]he party secured by the deed of trust, or

(Emphasis added). Mr. Selkowitz has alleged both factors that the *Cervantes* court specifically stated it did not address or consider. As noted by the *Cervantes* court, and Mr. Selkowitz' opening brief, it is not unheard or even uncommon for courts to find MERS attempts to serve as beneficiary illegal under relevant state law despite "contractually agreed" language to the contrary.

The cases that MERS relies on concerning parties attempting to disclaim contractual liability are not useful where the issues do not involve contractual provisions directly contrary to statute.²¹

C. MERS has not established agency.

Whether MERS may serve in the capacity of a beneficiary under *RCW 61.24.005* even if it was a properly designated agent is an open question.²² Of course, it is also quite bizarre that in one breath MERS

the holders of greater than fifty percent of the monetary obligations secured thereby, shall have the right and power to appoint a substitute trustee or trustees for any reason." Va. Code Ann. § 55-59(9)).

²¹ *Michak v. Transnation Title Ins. Co.*, 148 Wash.2d 788, 64 P.3d 22(case implicated no statute); *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 140 Wash.2d 568, 998 P.2d 305 (2000)(issue did not involve conflicting statute); *National Bank of Washington v. Equity Investors*, 81 Wash.2d 886, 506 P.2d 20 (1973)(issue did not involve contractual provisions conflicting with statute).

²² As noted earlier, there are other provisions of *RCW 61.24* implicated by the use of MERS: *RCW 61.24.020* bars a beneficiary and trustee from being the same party, *RCW 61.24.030(8)* requires a statement that the beneficiary has declared a default. This is the central problem with the MERS system, there is simply no way to know who MERS is purportedly acting on behalf of unless the identity of the real party in interest is disclosed. It must be noted that at least in the case of Mr. Selkowitz, the identity of

claims to be a beneficiary, while in another it claims to be an agent of a true beneficiary. It is unclear in precisely what circumstances one can determine in which capacity MERS is acting at any given moment. However, if MERS, as a “nominee” for the lender, did not hold the note or have express authority from the undisclosed principal and note holder, MERS’ actions in this matter were invalid. Additionally, the question of agency is generally a question of fact and would be difficult to enshrine within *RCW 61.24* for all purposes.²³

It was determining exactly what role MERS was playing that troubled the Supreme Court of Kansas.²⁴ In *Landmark* the Court reasoned that since a MERS was acting “solely as nominee” and “nominee” was not defined in the document, it was left to the Court to determine what the role of the nominee was in the case before it and it found that a nominee lacked a legally cognizable interest in a foreclosure. In holding that MERS was not a necessary party to the foreclosure action, the *Landmark* court noted that MERS had previously argued in Nebraska that it was not authorized to engage in practices that would make it a party to either the enforcement

MERS purported principal remains unknown.

²³ *O'Brien v. Hafer*, 122 Wash.App. 279, 93 P.3d 930 (2004).

²⁴ *Landmark Nat'l Bank v. Kesler*, 289 Kan. 528, 216 P.3d 158 (2009).

of mortgages or the transfer of mortgages.²⁵

Significantly, by specifically electing not to identify MERS as agent of the beneficiary, one is left to wonder why this decision was made. Among possible reasons: (1) MERS did not have a proper understanding of the parties to a deed of trust, (2) MERS made a conscious decision to avoid "agency" for the liability which comes with it, and/or (3) the deed of trust would have required the signature of MERS as well as the beneficiary in order to manifest creation of the relationship.

MERS baldly asserts that an agency relationship was "contractually agreed to by MERS and New Century".²⁶ However, there is no documentary support for this assertion and certainly no document indicating the creation or scope of any such relationship has been adduced. The Deed of Trust was signed by Mr. Selkowitz, but neither MERS or New Century signed the document and no alternative document supporting this contention is in evidence. Since legal title "does not necessarily signify full and complete title or beneficial interest,"²⁷ evidence of such authority is necessary to determine whether a sufficient agency relationship exists, putting aside its propriety under *RCW*

²⁵ Id.

²⁶ Response Brief of MERS, at 22.

²⁷ Black's Law Dictionary 1523 (8th ed. 2004)

61.24.005. A note holder will have "equitable title" which confers "the right to acquire formal legal title."²⁸

It is not established that MERS had authority from New Century to take the actions it did nor is it at all clear that New Century, or some other party, even had the legal rights necessary to confer upon MERS authority to act. A mortgage or deed of trust is unenforceable if held by a party with no right to enforce the obligation secured.²⁹ Separation of the obligation from the mortgage results in the obligation becoming unsecured.³⁰

It is not established that it was "necessary to comply with law or custom"³¹ for MERS to be empowered to take any actions under the deed of trust. This language is insufficient to create an agency relationship empowering MERS to take action. Nowhere within *RCW 61.24* is there a requirement that an entity acting "solely as nominee"³² be empowered to take any action.

D. Courts and Governments Increasingly Challenge MERS Authority to Act

In addition to the cases cited in the opening brief there are an

²⁸ Id.

²⁹ Restatement (Third) of Property, Mortgages § 5.4 cmt. e.

³⁰ Id. cmt. a.

³¹ Dkt. 9, Ex. A, 3.

³² Id.

increasing number of governmental actions being brought against MERS for a variety of alleged violations of state law, such as failing to record transfers and pay recording fees or deceptive trade practices.³³ The significance of actions by government agencies is particularly telling since public prosecutors generally do not sue private companies unless they have acted in flagrant disregard for local law and custom.

In an opinion, resolved on separate grounds, U.S. Bankruptcy Judge Robert E. Grossman disputed the notion that MERS had influence too wide to question the validity of the transactions it was involved in stating:

The Court recognizes that an adverse ruling regarding MERS's authority to assign mortgages or act on behalf of its member/lenders could have a significant impact on MERS and upon the lenders which do business with MERS throughout the United States. However, the Court must resolve the instant matter by applying the laws as they exist today. It is up to the legislative branch, if it chooses, to amend the current statutes to confer upon MERS the requisite authority to assign mortgages under its current business practices. MERS and its partners made the decision to create and operate under a business model that was designed in large part to avoid the requirements of the traditional mortgage recording process. This Court does not accept the argument that because MERS may be involved

³³ *Dallas County v. MERSCORP Inc., et al*, CC-11-06571-E (filed September 20, 2011)(recording fees); *State of Delaware v. MERSCORP Inc.*, CA6687, Delaware Chancery Court (filed October 27, 2011)(deceptive practices among multiple claims); *MERS, Inc. v. Chong*, No. 09-661 (D. Nev. 2009) ("MERS provided no evidence that it was the agent or nominee for the current owner of the beneficial interest in the note, it has failed to meet its burden of establishing that it is a real party in interest with standing.").

with 50% of all residential mortgages in the country, that is reason enough for this Court to turn a blind eye to the fact that this process does not comply with the law.³⁴

Similar concerns undoubtedly led Judge Coughenour to certify this matter to this Court, rather than continue the ill-considered intrusion of Federal Courts into novel matters of state law as had occurred in *Vawter*, *Daddabbo* and *St. John*. One consistent theme running through MERS litigation is the willingness of Federal District Court judges to ratify the conduct of MERS, while State Courts and Bankruptcy Court judges are more skeptical, if not hostile, to MERS' actions. Perhaps the reason is that states are more sensitive to issues implicating state law. Or it might be that since there is no federal real property law, federal judges outside the debtor/creditor arena are ignorant of the implications associated with their decisions. Whatever the reason, only recently are many of these issues moving into the highest state appellate courts for resolution where MERS increasingly finds itself unable to defend its positions.

While attacking the decision from Michigan in *Residential Funding Co., LLC v. Saurman*,³⁵ MERS minimizes the importance the Michigan Court placed on the statutory requirements in place.

³⁴ *In re Agard*, 2011 WL 499959 (Bankr. E.D.N.Y. Feb. 10, 2011)

³⁵ *Residential Funding Co., LLC v. Saurman*, --- N.W. 2d ---, 2011 WL 1516819 (Mich. App. April 21, 2011).

Where the Legislature has limited the availability to take action to a specified group of individuals, parties cannot grant an entity that falls outside that group the authority to take such actions.³⁶

Similarly, in this matter, various provisions of *RCW 61.24* limit specified actions to those meeting the statutory definition of beneficiary. As in the Michigan case, MERS does not have an interest in the obligations owed, despite its unsupported contentions to the contrary, and should not be entitled to act as if it does.

E. Voiding the Deed of Trust Does Not Erase the Debt

Mr. Selkowitz has never disputed that there may be an entity entitled to collect on his Promissory Note. Instead he has repeatedly and consistently asserted that MERS and the other Defendants named herein are not that entity. As argued in his Opening Brief, there are additional mechanisms besides foreclosure in the name of an impermissible party available for collection of the obligation.³⁷ Regardless of whether the deed is void or not, the Note at issue remains valid.

MERS assertion that finding the deed to be invalid will create instability in land titles is simply false. The result of such a finding will be the requirement that deeds of trust and foreclosure documents must

³⁶ Id.

³⁷ Opening Brief, at 42.

contain the actual parties in interest, rather than “straw men” of an undisclosed principal. Mr. Selkowitz instigation of this action was not as a sword, but as a shield against the unwarranted and improper institution of a non-judicial foreclosure action by a party to whom he had never owed any monetary obligation. The public policy at issue is the integrity of the system of land records and the non-judicial foreclosure process, which are both being undermined by the use an entity with dozens of employees that is responsible for millions of loans. This is aside from the millions of dollars that are lost as a result of the internal system of transfers that MERS has created diverting revenue from local governments.

F. Consumer Protection Act Claim

Though the resolution of the first two questions certified does not necessarily impact the answer to the third question, the acts giving rise to a Washington Consumer Protection Act claim are related to allegations of wrong-doing discussed above. The first element, that of a deceptive act, is established by the use of MERS as a beneficiary at the outset of the transaction and actions of the Defendants in using MERS as a foreclosing party when MERS does not have an interest sufficient to support foreclosure.

The use of MERS, by the lender and trustees, is analogous to instances where collection agencies take actions or claim interests that are

contrary to law. The deceptive act element was deemed established where notices sent to individuals misrepresented the legal status of a debt.³⁸ Here, as in *Stephens* and *Panag*, the use of MERS to conceal the true party in interest misled Mr. Selkowitz, and the public, as to the true nature of the transactions at issue and limited his ability to negotiate and fully assert his rights. This is particularly true where the use of MERS as the foreclosing party denied Mr. Selkowitz the ability to investigate and assert any defenses he may have against the lender or negotiate with the lender for a modification of his obligation. The use of MERS in these circumstances is inherently deceptive as it denies consumers a basic piece of knowledge concerning what is often the most important financial transaction of their lives.

An affirmative finding on the first element will by necessity lead to an affirmative finding on the public interest element. It cannot be legitimately disputed that the actions in Mr. Selkowitz' case, and the *Bain* case, are not part of "a pattern and practice of unfair and deceptive conduct."³⁹ *Banks* sets forth the five factors courts use to determine the

³⁸ *Stephens v. Omni Ins. Co.*, 138 Wash.App. 151, 159 P.3d 10 (2007); *Panag v. Farmers Ins. Co. of Washington*, 166 Wn. 2d 27, 204 P.3d 885 (2009).

³⁹ *Ethridge v. Hwang*, 105 Wash.App. 447, 458, 20 P.3d 958 (2001).

public interest element.⁴⁰ Though all the factors need not be present for a Plaintiff to prevail,⁴¹ in this case each factor is present.

The injury element of the WCPA can be met if there is a loss of use of property which is causally related to an unfair or deceptive act, including injury without specific monetary damages.⁴² Even non-quantifiable injuries, such as loss of goodwill or defamation of title, may satisfy the injury element of the CPA.⁴³ Mr. Selkowitz has alleged injury, however given the stage at which the litigation in the case was stayed, it is premature to resolve any factual dispute over this element without additional opportunity to conduct discovery and submit evidence.

G. Claims Related to Actions of Trustee

Effective July 26, 2009, *RCW 61.24.030(7)* required that trustees “shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust.”⁴⁴ A trustee is entitled to rely on a declaration made under penalty of perjury by the beneficiary that it actually held the obligation.⁴⁵ No evidence of such proof or any

⁴⁰ *Banks v. Nordstrom, Inc.*, 57 Wash. App. 251, 787 P.2d 953 (1990).

⁴¹ *Mayer v. Sto Industries, Inc.*, 123 Wash. App. 443, 98 P.3d 116 (2004).

⁴² *Panag*, 166 Wash.2d at 57.

⁴³ *Stephens*, 138 Wash.App. at 179.

⁴⁴ *RCW 61.24.030(7)*.

⁴⁵ *Id.*

declaration has arisen in this case and Mr. Selkowitz is certain that no such proof exists.⁴⁶

The duty owed by the trustee to borrower, beneficiary, and grantor (the first and third of which were both Mr. Selkowitz) was a duty of “good faith.”⁴⁷ QLS failed in any respect to meet this duty, particularly where it failed to verify that the beneficiary foreclosing held the obligation and relied upon the MERS’ Appointment of Successor Trustee, when the Deed of Trust of record clearly identifies MERS to be a mere “nominee”. It is believed that QLS never had any contact with MERS related to the foreclosure, or at any time prior to sending any Notice of Default or filing the Notice of Trustee’s Sale.

QLS asserts that it was under no duty to verify the authority of MERS to foreclose, however that is clearly contrary to the statutes cited above. Trustees are obliged to follow the requirements of *RCW 61.24* without exception and the mandates contained therein are not subject to discretion.⁴⁸ Contrary to the assertions of QLS, there was no request to invalidate a completed sale before the Court, but rather an insistence that

⁴⁶ It should be noted that claims related to the foreclosure and failure to adhere to statutory duties apply only the foreclosing trustee, Quality Loan Service. First American Title may be a necessary party under the rules of pleading, but faces no allegation for any misconduct.

⁴⁷ *RCW 61.24.010(4)*.

⁴⁸ *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 912, 154 P.3d 882 (2007).

QLS fulfill its straightforward and simple duties as a trustee. To hold that QLS was under no obligation to ascertain whether MERS had either the authority or possession of the Note would be absurd.

The analysis of the claim under the Washington Consumer Protection Act in the previous section applies to QLS in addition to other Defendants, and the failure of QLS to meet its statutory duties only reinforces the conclusion that the WSPA has been violated. While repeatedly stating that it relied on the Deed of Trust, QLS at no point claims to have taken any steps to demonstrate it acted in good faith relative to the borrower or took any steps to determine whether MERS held the obligation upon which the foreclosure was premised.

IV. CONCLUSION

It is Mr. Selkowitz's position that MERS is not a lawful "beneficiary" within the terms of *RCW 61.24.005(2)* because at no time relevant to this cause of action was it the "holder of the instrument evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for different obligation." Accordingly, MERS had no lawful authority to appoint QLS as successor trustee under *RCW 61.24.010(2)*, to declare a default under *RCW 61.24.030(7)(c)*, or to authorize foreclosure proceedings against Mr. Selkowitz's home.

The legal effect of MERS acting as an unlawful beneficiary is to

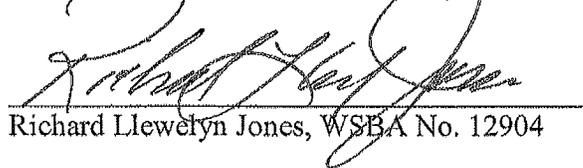
render the subject Deed of Trust void, which entitles Mr. Selkowitz to rescission of the security instrument. This would not necessarily leave the true holder without a remedy, as a trial court could establish an equitable mortgage in the true holder's favor.

However, it is clear that in addition to all other rights and remedies available to Mr. Selkowitz, MERS designation as an unlawful beneficiary violates the provisions of the WCPA and entitles Mr. Selkowitz to pursue his rights and remedies under *RCW 19.86*.

The arguments proffered by Defendants in response to Judge Coughenour's Certification and in reply of Mr. Selkowitz's Opening Brief are without merit. Simply put, MERS was designed to be a profit-engine for the mortgage banking industry, without regard to its infringement of essential public and individual rights under *RCW 61.24*, and this Court should so find.

RESPECTFULLY SUBMITTED this 31st day of October, 2011.

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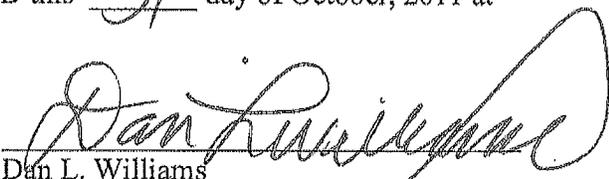
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SIGNED AND DATED this 31st day of October, 2011 at

Bellevue, Washington.



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