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No. 70629-2-1

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

RYAN HOWARD,

Appellant/Plaintiff,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee of the IndyMac INDA
Mortgage Loan Trust 2007-AR7, Mortgage Pass-Through Certificates, Series 2007-AR7 under
the Pooling and Servicing Agreement dated 8/9/2007, ET AL.,

Respondents/Defendants.

APPELLANTS' OPENING BRIEF

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON
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Ryan R. Howard

Pro Se

11310 Riviera PL NE, WASHINGTON 98125

ryan@ryanhoward.org

(206) 422-8892

FAX (866) 245-4406

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CONSTITUTIONAL PROVISIONS

- a) The Washington State Constitution holds that “no person shall be disturbed in his private affairs... without authority of law” (Article 1, §7);
- b) WA. Const. art. I, §3 (“No person shall be deprived of life, liberty, or property, without due process of law”);
- c) **U.S. Const.** - 14th Amendment, §1 “All Persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens and of the State wherein they reside. No State shall make or enforce any law which abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

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I. INTRODUCTION

Peirce Commercial Bank pursued Ryan Howard in order to provide loans for both commercial and personal purposes. At the time Howard had a relationship with Washington Mutual Bank receiving very competitive long term interest-only loans at approximately 3.25%; he was reluctant to trust a new bank.

The charismatic Shawn Portmann and his staff convinced Howard to utilize PCB in purchasing an additional property. Mr. Portmann is now serving a 10 year prison sentence and along with a majority of PCB employees was found guilty of numerous criminal acts.

Sonja Lightfoot who signed the Deed of Trust in question; indicted in August, 2011 by a federal grand jury for felony charges of "Conspiracy and Wire Fraud" committed between July 2004 and July 2008 performed in her role as Senior Vice President of Peirce Commercial Bank.

Howard has continually asserted fraud. Fraud not only via the actions of PCB but its purported successors and Defendants in the matter such as OneWest & IndyMac Bank, Regional Trustee Services and Deutsche Bank.

In this matter there is neither a true and correct "Instrument" nor proper recordings of Assignments. To be clear even if one *theoretically* construed fraudulent recorded documents and materials presented in this matter to be true, there still is no pathway to derive a "Chain of Title" to be a "Holder in Due Course" due to competing timelines and claims.

Senate Bill 6135 does a noteworthy job in clarifying the role of "Trust Company's" in Washington State; for the most part it redacts reference to them.

Mr. Howard did not have any knowledge or disclosure of any relationship between PCB and IndyMac Bank or Deutsche Bank prior to escrow.

Upon many phone calls to PCB it was clear that they were not going to make good on the promise of matching the interest rate already held by Howard in prior loans with other banks.

Given the high payments now on his credit report there was no way to refinance the loan with another bank because his income to debt ratio and subsequent credit deflation. There was no possible way to anticipate a 270% payment increase from approximately \$2,925 to \$7925; an additional \$5000 per month.

Differing from many situations Mr. Howard ended up paying this audacious rate until IndyMac & Country Wide pulled out over \$38,000.00 in just over 3 months; \$13,370.92 on March 24th 2009 one day after IndyMac declared bankruptcy.

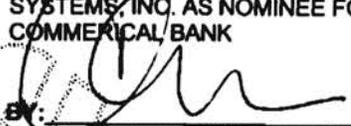
Mr. Howard received no response as to why random payments were being withdrawn from his accounts when calling PCB or IndyMac due to their Bankruptcy and collapse. These unauthorized withdrawals further damaged Mr. Howard's credit rating and lead to a cascading fiscal failures contributing to the loss of several businesses Howard had invested millions in, as well as being his primary income stream. The losses exceed the value of the property.

Howard was NOT in default when IndyMac collapsed on 3/23/2009. Its purported successor OneWest was no help either, dodging questions or sending him to voicemail. Howard believed to PCB to still be the holder of the loan and was told IndyMac was the "Servicer" by PCB; the King County Recorder's Office records support this assertion by PCB.

On 8/7/2009 exactly two years from his purchase date; the locks where changed on Howards residence inclusive of a key box. This was witnessed by the Seattle Police whom Howard had to call to break into his own home. This is on video via the Police car and the statement from the officer is in Exhibit A. This statement also mentions my conversations with IndyMac bank and the fact that he was told there were no actions pending by the bank, with no notice given as to a default.

Post mortem we find recording 20091204000610/11 on 12/04/2009 an assignment from MERS to OneWest and then from OneWest to Regional Trustee Services; both made by Chamagne Williams a known Robo-Signer signing in her capacity as "Authorized Signatory"; meaning none.

MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC. AS NOMINEE FOR PIERCE
COMMERCIAL BANK

By: 
Chamagne Williams Authorized Signatory
Name Title

ONEWEST BANK, FSB

By: 
Chamagne Williams Authorized Signatory
(Name Title)

Post this point it should be asserted that you need read no further to realize the "Chain of Title" is utterly severed at this point; making any arguments as to a

“Holder in Due Course” fruitless. Quiet Title should return to Howard.

Unfortunately it gets much worse, enter Deutsche Bank.

“Deutsche Bank was not involved in the origination of plaintiff’s loan, nor does it have an agency (or other) relationship with PCB.” CP21

Council Robison Tait P.S. as been represented Regional Trustee Services, Deutsche Bank and Pierce Commercial this matter and OneWest in others; this fact was recently found upon review of the pleadings and public information.

Joe Solseng the Vice President of Robison Tait appears on behalf of Deutsche Bank as shown in the March 4th 2011 RP.

The documents presenting by the above parties are so astonishingly defective that they show an intentional “Chain of Fraud”. MERS has been a painful subject since the decision in Bain for the banks; in the King County Recorder’s Office Inst # 20070817001240; Chicago Title is not listed on the first page of the purported DOT just MERS.

Fraud is a significant issue for Deutsche Bank. They have been dodging the silver bullet of justice regarding the sale of “Mortgage Pass-Through Certificates” of which they sold in the billions of dollars to Pension funds.

The U.S. Supreme Court granted the petition for a writ of certiorari on March 10th, 2014 for the plaintiff, Mississippi Public Employees’ Retirement System of Mississippi, v. IndyMac MBS, 13-640; the failed IndyMac Bank being a common denominator in both cases; IndyMac being comprised of many different entities.

To argue "IndyMac" & "Deutsche Bank" are a collective entity would be relative to the relationship and Jurisdiction. Section 15 of the Securities act it may sufficiently bind the entities along with overly broad Cross-Collateralization language. The point being entities involved in MBS transactions are trying to distance themselves claiming varies theories as to why they're not liable; many times it just the tolling of the statute as in the aforementioned case.

Simultaneously entities such as Deutsche Bank are claiming via the same Pooling and Service Agreements they are disavowing, the rights to act as conveyed to the true "beneficiary".

In reference to a property owned by a Washington State Resident it must be agreed in the Instrument and Recorded properly in the County Records; reverse assertions through association that a party holding even an unsigned Note do not hold water without proving "Chain of Title". It should not be inferred Howard believes Deutsche Bank has a legitimate claim on his property.

Howard's property, credit scores and other information where used without his knowledge in a widely utilized Prospectus involved in Mortgage Backed Securities offerings; in fact the Mississippi Public Employees Retirement System spent \$698,603,100.00 purchasing securities from the IndyMac and Deutsche via "INDA Mortgage Loan Trust 2007-AR7...Dated September 1st 2007";

Deutsche Bank erroneously asserted they claimed rights via the same INDA 2007-AR7 PASA but dated "8/9/2007"; the date of Howards property purchase in IndyMac's records.

It is believed that not only this property in question was not owned or in the MBS pool(s) sold but that another property Howard owned and discussed funding with PCB was inserted into the prospectus.. *PCB having "dual conduits" into IndyMac.*

Deutsche bank did not respond to Howard as to his questions about the PASA and has never responded to the fact that the INDA-AR7 PASA was not even drafted until September 1st 2007 and filed with the SEC September 27th 2007.

Evidence of this incorrect date starts showing up after Mr. Howard brought the issue up in his deposition which was never put on file; instead of correcting the error it was masked; going so far as to BID on the Sherriff's sale of Howard's residence with a credit bid under the "INDA-AR7 ..Dated September 1st 2007" verses "Dated 8/9/2007".

After Howard Objected to the Confirmation of Sale the record was changed back to "8/9/2007" as to the buyer name. The defective Notice Howard received in regards to the Redemption period had no date.

Why does this matter and is it pertinent to this case? It points out a multi-billion dollar motivation for masking the damaging information found by Howard and explains the absence of Deutsche Bank in the proceedings followed by a flurried rush to judgments.

The acts of perjury and fraud are relevant to Howards claims and show Deutsche Bank behaving as asserted. Intentional fraud to cover up liability penetrates the SOL issues faced by Mississippi Pension Fund and others, in the PASA

contractual language it specifically states that Deutsche Bank guarantee's the absence of errors due to their IT systems and processes in place. Furthermore they have the duty to promptly notify "Beneficiary's" to legal issues pertaining to the assets; Deutsche Bank was absent from the proceedings for over 10 months whilst it was trying to settle out of court with many Pension funds.

Notices given by Howard in this matter would have specifically been known to the common council for IndyMac, Deutsche and OneWest giving no defense of "Harmless Error" or otherwise as to disclosure's that where required to be given to these third party plaintiffs.

Howard wants this all ON RECORD and gives notice he is forwarding all of the materials herein and requested to both the Washington State Attorneys Generals Office and the Mississippi Public Employees Retirement System.

It is asserted that the aggressiveness described herein by Deutsche Bank to impel Howard to sign an Onerous set of Non-Disclosure, Non-Disparagement & overly Broad indemnifications clause's where related to suppressing liability.

Deutsche and Howard entered into mandated mediation in Bad Faith.

At the Mediation instead of negotiating a very substantial setoff and an interest rate similar to what was promised by PCB (if any balance remained); Howard was informed that his attorney David Leen had effectively lost all claims except for "Fraudulent Inducement" unbeknownst to Howard.

Given this shocking information Howard was convinced that he had 8 months to refinance the house with another bank or sell it to try and recoup his investment; to facilitate this a "fair market value" would be appraised on the property reflecting that it has significant structural and drywall damage and is in need of repairs that would be upwards of \$200,000.

In addition there were expensive and DOD restricted removable items in Mr. Howard's Physics lab such as Bullet-Proof Glass and other removable assets that were owned by his R & D firm that should not be construed as part of the property; the appraiser as a third party was to evaluate and document these assets and was to be called upon as a third party in any dispute. As demonstrated in the Draft language below:

- E. Personal Property. Any personal property and/or equipment, shelving, electronics, motors, tanks, pumps, lasers, all BP glass and various Hardware, Software and Inventory shall be considered Howard's personal property that vacated shall be deemed abandoned and may be discarded or otherwise disposed of without notice to Howard.

Beyond determining value for sale purposes; without an appraisal Howard did not have any accounting for the R & D lab assets. The value of the assets would be lost as well as creating other significant liabilities for Howard. This is why one of the **specific terms** was that Howard was to receive this appraisal within 14 days after Deutsche received it.

Deutsche breached this provision and does not deny it; a CR 2A ruling should have benefited Howard not Deutsche Bank.

Deutsch and the Mediator wrongfully withheld the appraisal from Howard in order to impel him to sign a *severely onerous agreement*. Howard made multiple drafted successions that were reasonable and fair; Deutsche insisted on the following language:

- G. Release. Howard hereby releases, acquits, and forever discharges Deutsche Bank and OneWest and all of their respective past, present, and future trustees, partners, members, shareholders, owners, investors, officers, directors, managers, employees, independent contractors, agents, insurers, attorneys, subsidiaries, affiliates, parent companies, successors, heirs and assigns from any and all rights, interests, claims, demands, liabilities, obligations, debts, suits, and/or causes of action, of any and every nature, known and unknown, matured and unmatured, liquidated and unliquidated, disputed and undisputed, which Howard has or ever had or may have arising out of or related to any actual or alleged fact, act, omission, transaction, practice, conduct, event, or other matter that occurred before the signing of this Agreement (the "Released Claims"). The Released Claims specifically include, but are not limited to, any and all claims for damages or relief of any and every nature, including but not limited to claims for economic and noneconomic damages, punitive damages, attorney fees, interest, costs, contribution, indemnity and/or injunctive or declaratory relief. This release does not include a release of claims for violating any provision of this Agreement.

The language above was far in excess of a release that would be granted if Deutsch had prevailed in the Trial Court *with prejudice*. The nature of the language also supports Howard's assertions that Deutsche is concerned about exposure and this is not "boiler plate language".

Howard could not reasonably prosecute or defend against ANY litigation with this language and it effects past and present claims specifically against JP Morgan Chase, a known partner of Deutsche Bank and suspected of parallel actions in violation of State and Federal Laws.

Phone conversations in which parties were unaware Howard was on the conference were collusive. There was illegal direct communication with the Mediators private email of margokeller@comcast.net; shown below:

From: Danielle Hunsaker [<mailto:dhunsaker@larkinsvacura.com>]
Sent: Tuesday, May 21, 2013 3:56 PM
To: David Leen
Cc: Margokeller
Subject: RE: Howard

David,

We discussed this issue at the last round and you told me that if we removed the one clause, he would sign. I have an email from you stating that exact thing. We removed the requested clause. I did not add any additional information from the last round until now. I am not recommending further changes to my client. We have acted in nothing but good faith, and every time we respond to an issue raised by Mr. Howard, he just moves the target. It has been over a month since the parties entered into the settlement. Enough is enough.

Danielle

From: David Leen [<mailto:david@leenandosullivan.com>]
Sent: Tuesday, May 21, 2013 3:52 PM
To: Danielle Hunsaker
Cc: Margokeller
Subject: RE: Howard

His hang up on the release is that it is still broad and seems to go beyond what issues were in the case (or could have been litigated in the case). You added more language to Par. G that is not limited to what was in controversy. Can't you just say he "Releases all claims that were or could have been raised in this lawsuit"? One sentence.

	David A. Leen Attorney at Law Leen & O'Sullivan, PLLC 520 East Denny Way, Seattle Washington 98122
--	--

This last email above was not included in Danielle Hunsaker's sworn affidavit stating "true and correct emails are attached" used to obtain a judgment in favor of Deutsche bank against Howard and resulting in a Sheriff Sale.

PCB's Fiscal Situation

In 2007 PCB did \$579M in loans increasing to \$2.4B in 2009; under the Department of Treasury's TARP program PCB received \$6.8M in January 2009. In 2003 the non-interest revenue of PCB was \$888,000 in 2007 it was \$13.4M. According to the Washington State Department of Financial Institutions and matching the FDIC data when PCB went into receivership as of September 30th 2010 it had \$221,082,000.00 in assets and \$193,473,000 in deposits.

Heritage Bank appeared as a successor to Peirce Commercial Bank in this litigation; the entity signed a Stipulated Judgment of Foreclosure on December 2013; the mere appearance and the remaining assets of PCB support the loan either never left PCB or was defectively and fraudulently conveyed.

II. ASSIGNMENTS OF ERROR

- A. The trial court erred in affirming Deutsche Bank's motion to enforce an agreement between the parties to the litigation under *CR 2A based upon incomplete, fraudulent and misleading information clearly in dispute.*

- B. The trial court erred in dismissing claims of violations of the CPA, Deeds of Trust Act and claims for "RICO violations, deceptive practices, and promissory estoppel"; actions which were exemplified by the Defendant(s) willful disregard of the Temporary Restraining Order entered in this matter on March 4th, 2011, by the continued attempts at NJF sale(s) of Plaintiff's real property.

- C. The Trial court erred granting judgment on the pleadings and dismissing Plaintiff's claims in an order of June 7th, 2013; pursuant to CR 2A.

- D. The Trial Court erred in refusing to Hear Howard's Objections and Requests to be Heard given abnormalities with the proceedings and actors; depriving Howard of his Property; Due Process and unlawfully prejudicing his Constitutional and Legal Rights.

III. STATEMENT OF THE CASE

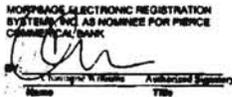
On August 9th, 2007, Plaintiff/Appellant, Ryan Howard AND (hereinafter "Mr. Howard") executed a Note and a Deed of Trust and Note in favor of a Defendant, PEIRCE COMMERCIAL BANK, (hereinafter "PCB"). -many different versions exist presented by Defendants and are considered fraudulent.

The Deed of Trust named PACIFIC NORTHWEST TITLE as trustee, in some versions of the DOT and PEIRCE COMMERCIAL BANK as "lender" and purported to make Defendant/Respondent, MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC., (hereinafter "MERS") the "beneficiary."

This Deed of Trust was recorded under King County Auditor's Recording No. 20070817001240. (Many versions presented, leave is asked of the court to file).

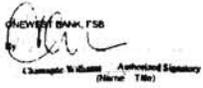
At no time relevant to this cause of action was MERS ever a "holder" of any promissory note or other evidence of debt, within the terms of *RCW 61.24.005(2)*, and. Plaintiff did not owe MERS any monetary or other obligation under the terms of any promissory note or other evidence of debt executed contemporaneously with the Deed of Trust.

On December 04, 2009, MERS as a Nominee for PIERCE COMMERCIAL BANK purportedly conveys to Defendant, ONEWEST BANK, FSB (hereinafter "OneWest") , an appointment "all beneficial interest" of the DOT.

A rectangular stamp from the Mortgage Electronic Registration System, Inc. (MERS). The text reads: "MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC. AS NOMINEE FOR PIERCE COMMERCIAL BANK". Below this text is a handwritten signature in black ink. Underneath the signature, there are two lines of text: "Name" and "Title", both of which are blank.

The document was apparently signed by Chamagne Williams (a known Robo-Signer) with no title except "Authorized Signatory" above the "Title" field on behalf of MERS; in Travis County, Texas; signed on August 20th 2009 much earlier than the King County Auditor's Recording No. 20091204000610 with a filing date of 12/04/2009; listed is Trustee Sale No. 01-FMB-82059 captioned

"ONEWEST BANK, FSB Attn: Foreclosure Department." CP 65



ONEWEST BANK, FSB
Chamagne Williams Authorized Signatory
(Name Title)

On December 04, 2010, Defendant OneWest purportedly executed, "as beneficiary" an appointment of successor trustee, appointing Defendant/Respondent, REGIONAL TRUSTEE SERVICES CORPORATION (hereinafter "RTS") a successor trustee, pursuant to *RCW 61.24.010*. The document was apparently signed again by Chamagne Williams with a title of "Authorized Signatory" for ONEWEST BANK, FSB on the same day August 20th 2009 in Travis County, Texas. This instrument was recorded under King County Auditor's Recording No. 20091204000611 on 12/04/2009.

Mr. Howard alleges that at the time this document was executed, Chamagne Williams was not an employee or agent of OneWest or MERS, that OneWest was not the beneficiary of the subject Deed of Trust and that One West had no express authority from the true and lawful holder and owner of the subject obligation to appoint a successor trustee, under *RCW 61.24.010*.

Plaintiff alleges that MERS had never maintained an office in Travis County, Texas, that Chamagne Williams was not a legitimate agent, employee or corporate officer of MERS at any time relevant to this cause of action and that the representations contained in the documents referenced therein regarding professional affiliations were false and known to be false at the time they were made. CP 52-59. Moreover, it is Mr. Howard's allegation that at the time this document was executed, IndyMac was under bankruptcy protection with the United States Bankruptcy Court Central District of California (Case No. 08-bk-21752-BB).

There is no evidence that the bankruptcy trustee abandoned the subject obligation and no order of the bankruptcy court exists that authorized MERS to execute the subject document on behalf of IndyMac or otherwise authorized MERS to act on IndyMac's behalf in connection with this matter. This bankruptcy case was open on the date MERS allegedly acted on IndyMac's behalf and there was an active dispute with the FDIC and the bankruptcy Trustee for IndyMac as to assets, with the FDIC having held custody of substantially all of IndyMac's documents.

Finally, it is Mr. Howard's allegation that MERS executed the subject Assignment of Deed of Trust without first obtaining the express authority to act from the true and lawful holder and owner of the obligations. CP 1-6.

Prior to the above recordings On October 19, 2009, (10/19/2009) RTS executed a Notice of Trustee's Sale purportedly at the direction of OneWest, pursuant to "*R.C.W. Chapter 61.24, et seq. and 62A.9A-604-(a)(2) et seq.*"

This instrument was not recorded in the King County Auditor's Recording Office and gave a Trustee Sale No. 01-FMB-82059 matching the later recorded conveyances from PCB → OneWest → Regional Trustee Services above on December 4th 2009.

It is Mr. Howard's contention that the Notice of Trustee's Sale was executed without the authority or knowledge of the true and lawful holder and owner of the subject obligation. CP 1-6.

On August 8th 2009, 12 days prior to the Notice and two years to the date after Howards purchase above the electric door locks were forcibly removed and a lock box was left in

place on the new locks; the sworn Narrative from Seattle Police Officer Michelle A. Heitman documents Howards conversation with IndyMac Bank that "there was no sale reported on the house and no foreclosure in affect." EX A

After the locks had been illegally changed on Howards house Regional Trustee and IndyMac went silent; calls to the bank lead to "Supervisor Voicemail Boxes" of which Howard's messages where never returned. Exactly 1 year later to the recordings mentioned above on 8/20/2010, Mr. Howard had a 1 page notice posted to his residence from Regional Trustee Services stating in part:

NOTICE REQUIRED BY THE FAIR DEBT COLLECTION PRACTICE ACT 15 U.S.C.

Section 1692The original creditor to whom the debt is/was owed is MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR PIERCE COMMERCIAL BANK. The current creditor is Deutsche Bank National Trust Company, as Trustee of the IndyMac INDA Mortgage Loan Trust 2007-AR7, Mortgage Pass-Through Certificates, Series 2007-AR7 under the Pooling and Servicing Agreement dated September 1, 2007

If the current creditor is not the original creditor, and if you make a request to REGIONAL TRUSTEE SERVICES CORPORATION within thirty days after the receipt of this Notice, the name and address of the original creditor will be mailed to you by REGIONAL TRUSTEE SERVICES CORPORATION.

Howard called RTS multiple times and served a FDCPA debt dispute with RTS on 9/19/2010; RTS responded on October 7th 2010. The letter claimed to include a copy of the Executed Note that was signed at closing - not a true and correct copy of the original note. Howard found Pierce Commercial Bank was under multiple Federal investigations for mortgage fraud; a Bank that had promised Howard a single loan at 3.25% and delivered two loans at 7.25% and 9.25% putting him at risk of losing over \$150,000 deposited if he did not agree to the loan terms. CP 70-91

Having paid out over \$300,000 in down payments and interest; sewer leak damages destroying 85% of the house; being locked out of his residence and as a final straw

multiple entities claiming to be "current creditors", Howard decided to litigate.

On February 2nd, 2011, Plaintiff, through counsel, served Notice under *RCW 61.24.130*, with a Summons and Complaint; Motion for Temporary Restraining Order and Order to Show Cause; Declaration of David Leen; Proposed Order, and Verification of Complaint. CP 1-18.

One of Mr. Howard's primary allegations was that RTS was improperly appointed as successor trustee and had acted without authority of the beneficiary then of record in violation of the Washington Deed of Trust Act, in apparent breach of RTS' duty of good faith, pursuant to *RCW 61.24.010(4)*.

On multiple dates, and subsequent to the entry of Commissioner Bradburn-Johnson TRO, RTS attempted to sell Mr. Howard's real property for \$560,000.00, \$520,000.00 less than the amount owed.

No evidence has ever been adduced that "REGIONAL TRUSTEE SERVICES, Inc." ever obtained an assignment of the subject Note and Deed of Trust prior to sale, was ever a beneficiary, within the terms of *RCW 61.24.005(2)*, or was ever authorized to act on behalf of IndyMac.

Plaintiff continued to allege that REGIONAL TRUSTEE SERVICES, Inc., was not the beneficiary or holder of the obligation secured by the subject Deed of Trust at the time(s) of sale and the recitations in the Deed were false and known to be false at the time that RTS recorded the Deed.

On August 24th 2012 under a CR 12(b)(6) motion the Trial Court dismissed Mr. Howards Affirmative Claims of RICO violations, Deceptive Practices and Promissory Estoppel; if remanded De Novo this issue is mute; otherwise lifting prejudice as to past actions is appropriate and requested. (RP-May 25th 2012 / August 24th 2012), CP 19-47

On May 23rd, 2013, Deutsche bank filed (but did not serve a copy to Mr. Howard) a Motion pursuant to CR 2A to Validate the Mediation agreement, having full knowledge of the fact that Plaintiffs' counsel was no longer representing Howard and that Howard was contesting the Mediation and related contracts. CP 91-152

On May 31, 2013, Mr. Howard E-Served (via the King County Superior Court), Faxed and Mailed Danielle Hunsaker representing Deutsche Bank, moving the Court to enforce the parties' prior agreements and Objected on multiple grounds incorporating a "Request to be Heard"; working papers for these pleadings were filed electronically with the Trial Court. The trial court did not consider Howards motion and ignored his requests to be heard. CP 94-109

On June 7th, 2013, the trial court denied Mr. Howard's motions and granted Deutsche Bank's motion noting "With NO Response Filed" CP 115-117

On September 5, 2013, Mr. Howard objected to the sale confirmation and moved to deny, again "Requesting to Be Heard" and cited other issues. CP 226-227

On July 8th, 2013, Mr. Howard filed a Notice of Appeal. CP 153-158

III. ARGUMENT

A. Standard of Review

A trial court's denial of Plaintiffs motion to enforce the CR 2A is subject to *de novo* review, as it relates to the proper interpretation of a statute or rule of court. *State v. Greenwood*, 120 Wn.2d 585, 845 P.2d 971 (1993) (rules of court).

Further, the validity of an agreement under contract law is also subject to *de novo* review. *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 840 P.2d 851 (1992).

When the facts are undisputed, the trial court's determination becomes a conclusion of law and is reviewable on appeal. *State v. Sykes*, 27 Wn. App. 111, 615 P.2d 1345 (1980).

In reference to A trial court's dismissal of a partial action under CR 12(b)(6) is a question of law that this court reviews *de novo*. *San Juan County v. No New GasTax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007). Interpretation of a statute is a question of law reviewed *de novo*. *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 488, 200 P.3d 683 (2009).

Trial courts should consider even a hypothetical situation conceivably raised by the complaint on a motion to dismiss under CR 12(b). *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995) (quoting *Halvorson v. Dahl*, 89 Wn.2d 673,674,574 P.2d 1190 (1978)). If the trial court dismisses a complaint for failure to state a claim (a motion normally heard on affidavits or other writings), and if the plaintiff appeals, the appellate court will consider even hypothetical facts that might give the plaintiff a cause of action. *Bravo v. Dolsen Companies, supra.*(trial court's dismissal reversed; extended discussion of dismissals for failure to state a claim).

B. Mr. Howard and Deutsche Bank had a Binding CR 2A Agreement that should have been enforced by the Trial Court.

In Washington, a trial court's authority to compel enforcement of a settlement agreement is governed by *CR 2A* and *RCW 2.44.010*. *CR 2A* provides as follows:

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same. *Morris v. Maks*, 69 Wn.App. 865, 868, 850 P.2d 1357, 1358 (1993). Settlement agreements are governed by general principles of contract law. *Stottlemire v. Reed*, 35 Wn.App. 169, 171, 665 P.2d 1383, *review denied*, 100 Wash. 2d 1015 (1983).

In determining whether informal writings such as letters are sufficient to establish a contract even though the parties contemplate signing a more formal written agreement, Washington courts consider whether (1) the subject matter has been agreed upon, (2) the terms are all stated in the informal writings, and (3) the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract. *Loewi v. Long*, 76 Wash. 480, 484, 136 Pac. 673 (1913). Courts have traditionally held that an exchange of correspondence between parties' attorneys is sufficient to establish a binding *CR 2A* agreement. For example, in *Morris* the attorneys for the parties discussed a settlement over the telephone. *Morris v. Maks, supra.*, at page 867. The attorneys conferred again and agreed to that they had a settlement agreement. *Id.* The plaintiffs' attorney sent a letter confirming the points of the settlement. *Id.* In response,

the defendant's attorney wrote a letter and stated in part,"[e]xcept as specifically set forth below, your letter accurately reflects the terms of the agreed settlement. I view the items listed below as clarifying or supplemental points rather than conflicts with your letter." *Id.* at 867-868.

Shortly thereafter, but before a formal written settlement had been executed, the defendant's attorney informed the plaintiff s attorney that his client had decided to terminate the settlement negotiations. *Id.* at 868. The trial court entered an order of enforcing the settlement agreement based on the exchange of two letters between the attorneys confirming the settlement. *Id.*

In reviewing whether the material terms of the agreement had been addressed in the letter, the court held that the terms at issue were adequately addressed notwithstanding the fact that subsequent drafts of the proposed settlement agreement had been more refined. *Id.* at 869-870. In addition, the court held that the parties intended to be bound by the exchange of letters. *Id.* at 870-71. The defendant argued on appeal that his intent was only to be bound upon execution of a final settlement agreement.

Id. In interpreting intent, the court relied on the objective manifestation theory in construing the words and acts of the alleged contractual parties. *Id.* at 871.

The objective manifestation theory requires the court to impute to a person an intention corresponding to the reasonable meanings of his words and acts. *Id.* The court found that without any evidence of defense counsel's subjective intent in the agreement, the parties intended to be bound by the terms set forth in the letter. *Id.*

In the present case, Mr. Howard presented, through the declaration of counsel, ample evidence of the existence of a valid and binding agreement between the parties and Deutsche Bank intention to be bound by the terms of the agreement: that Deutsche Bank would simply provide a copy of the Appraisal; they refused to do so and instead used their own breach to achieve a CR 2A with less than the required notice period.

Turning to the communications in question, Defendants intentions were clear, unequivocal and unconditional.

One could speculate that Defendants basis for agreeing; by electing to breach the CR 2A agreement, Deutsche Bank and its principals compromised the integrity of the process and deprived the Mr. Howard potential options to contest the sale.

See *RCW 61.24.127*. For this Defendants should be promissory estopped from denying their agreement.

In sum, the trial court wrongfully ignored the parties CR 2A agreement and, in the process, prejudiced Mr. Howard's rights. The trial court's failure to enforce the parties' CR 2A 16 agreement has deprived Mr. Howard all benefit he may have derived through this litigation.

Accordingly, this Court should reverse the trial Court's Order of June 7th, 2013, nullify the Sheriffs sale conducted on August 9th, 2013 and remand this matter back to the trial court for consideration of the matter on the merits.

C. Mr. Howard's Complaint was Wrongly Dismissed

On a *CR 12(b)(6)* motion to dismiss, the Court may only dismiss an action if it appears beyond doubt that the plaintiff cannot prove any set of facts that would (a) be consistent with the complaint and (b) warrant relief. *Postemav. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000); *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 744 P.2d 1032 (1987); *Havsy v. Flynn*, 88 Wn.App. 514, 945 P.2d 221 (1997).

Motions brought under *CR 12(b)(6)* should be granted sparingly and only in cases where the plaintiff includes allegations that demonstrated an insurmountable bar to relief. *Tenore v. AT & T Wireless Servs.* 136 Wn.2d 322, 330, 962 P.2d 104 (1998) 330 (citing *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988), *affd*, 113 Wn.2d 148, 776 P.2d 963 (1989), *Bravo v. Dolsen Co.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995)» Caution should be especially exercised when the area of law involved is "in the process of development", as it is here with regard to the "MERS issue." *Haberman v. WPPSS*, *supra*.

A trial court's dismissal under *CR 12(b)(6)* is appropriate only if it appears beyond a reasonable doubt that the plaintiff cannot prove any set of facts that would justify recovery. *Tenore*, 136 Wn.2d at 329-330 (citing *Hoffer v. State*, *supra*. and *Bravo v. Dolsen Co.*, *supra*.). In deciding a motion brought under *CR 12(b)(6)* a court may choose to consider hypothetical facts that may not be included in the record. *Tenore*, 136 Wn.2d at 330.

Moreover, if the trial court believed that the Mr. Howard's Complaint was deficient in any

technical sense, Mr. Howard should have been permitted leave to amend the Complaint, pursuant to *CR 15*, in lieu of dismissal, as requested in his responsive pleadings. Sharon S. Armstrong (RP-May 25th 2012 / August 24th 2012) CP 19-47

However, Mr. Howard's Complaint plead various meritorious claims upon which relief should have been provided.

i. The Defective Deed of Trust and Non-Judicial Foreclosure Process Entitle Mr. Howard to Equitable Relief under *RCW 61.24*.

The Washington Deed of Trust Act was enacted in 1965 to provide an alternative to the state's mortgage foreclosure process and authorizes the foreclosure of deeds of trust without judicial intervention.

In striking a balance between borrowers and lenders, the Washington Deed of Trust Act was established and the Washington Supreme Court annunciated its three goals:

(1) that the non-judicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and (3) that the process should promote stability of land titles. *Cox v. Helenius*, 103 Wash.2d 383, 387, 693 P.2d 683 (1985) (emphasis added); *Country Express Stores, Inc. v. Sims*, 87 Wash. App. 741, 747-48, 943 P.2d 374 (1997).

The fulfillment of these three goals requires strict compliance with the statutory provisions. *Albice v. Premier Mortg. Services of Washington, Inc.*, 276 P.3d 1277 (2012)

(citing *Udall v. T.D. Escrow Servs., Inc.*, 159 Wash.2d 903, 915-16, 154 P.3d 882); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 752 P.2d 385 (1988) (the statutes and Deeds of Trust must be strictly construed in favor of the borrower). Failure by the lender to comply with the statutory provisions leads to invalidation of the sale. *Cox v. Helenius, supra.*; *Albice v. Premier Mortg. Services of Washington, Inc., supra.*

A borrower's failure to enjoin a sale under *RCW 61.24.130* will result in a loss of the borrower's rights to contest the sale after it occurs:

We agree that the waiver rule applied by the Court of Appeals in *Country Express Stores, Steward, Koegel* and like cases appropriately effectuates the statutory directive that any objection to the trustee's sale is waived where presale remedies are not pursued. See *RCW 61.24.040(1)(f)(IX)*. *Plein v. Lackey*, 149 Wash.2d 214, 67 P.3d 1061 (2003).

Mr. Howard sought protection under *RCW 61.24.130* in the form of a temporary restraining order prior to seeking later and more permanent injunctive relief blocking the sale by the parties and under the documents issued prior to the Aug 9th, 2013 sale. These arguments began with the assertion that the Deed of Trust was itself defective under Washington's statutory framework.

At the core, Mr. Howard argues in his Complaint that the lender's utilization of MERS perverted the security and foreclosure process, rendering his Deed of Trust voidable

and the efforts of these Defendants, who apparently acted without the authority of the true and lawful holder and owner of the subject obligation, unlawful.

RCW 61.24.005(2) provides as follows:

2) "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.

(Emphasis added)

A beneficiary's authority to act depends upon the recording of the deed of trust or the recording of the beneficial interest in the deed of trust. Only a beneficiary defined under RCW 61.24.005(2) can appoint a successor trustee (RCW 61.24.010) or declare a default (RCW 61.24.030(7)(c)) or initiate a non-judicial foreclosure.

In the absence of judicial oversight there is an expectation that trustees, and the parties that have retained them, will act consistently with the procedural requirements which are meant to provide borrowers notice of the process and an opportunity to object to the process if necessary. *Cox v. Helenius*, supra.; *Albice v. Premier Mortg. Services of Washington, Inc.*, supra. Underlying all these procedures is the implicit assumption that the borrower will have knowledge or have the ability to reach the holder of the obligation.

MERS was designated as beneficiary under the subject Deeds of Trust at the outset by the lender. At no time relevant to this cause of action did MERS have an interest in the

underlying Note, as required by statute. Accordingly, MERS was not a proper "beneficiary" under RCW 61.24.005(2), which provides that the beneficiary must be "the holder of the instrument or document evidencing the obligations secured by the deed of trust," a use of language that is similarly found and used in the UCC. If MERS never had an interest in the underlying Note, it could never be a proper beneficiary under RCW 61.24.005(2) and never had 21 the right to assign the Deed of Trust, making any subsequent assignment a nullity.

The only potential exception to this would be if MERS had the express authority of the principal, IndyMac, the original lender.

However, no evidence of such express authority being given by IndyMac has been provided and such an assignment would have required proceedings under the U.S. Bankruptcy Code.

The purported subject Deed of Trust provides, in pertinent part, as follows:

"MERS" is Mortgage Electronic Registration Systems, Inc., MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument....

It is important to note that nothing in any of the documents or instruments executed on August 9th, 2007 or at any time thereafter ever assigned an interest in the underlying Notes to MERS. The role of MERS in the subject transactions and its legal interest in the Note and/or Deed of Trust is crucial, because if MERS had no authority to act under the subject Deeds of Trust then all subsequent actions taken under the authority granted by the Deed must fail. This is the conclusion reached by other courts across the nation.

The Supreme Court of Arkansas rejected the designation of MERS as a beneficiary under that states Deed of Trust statutes. ("MERS is not the beneficiary, even though it is so designated on the deed of trust"). Mortgage Electronic Registration Systems, Inc. v. Southwest Homes of Arkansas, 2009 Ark. 152 (2009).

The relevant Arkansas laws closely mirror RCW 61.24.005, the Arkansas Code states in pertinent part:
"Beneficiary" means the person named or otherwise designated in a deed of trust as the person for whose benefit a deed of trust is given or his successor in interest; Arkansas Code § 18-50-101.

The Supreme Court of Kansas ruled that MERS had no interest in either the property or the obligation it secured. Landmark Nat 'l Bank v. Kesler, 216 P .3d 158 (2009). The *Landmark* court noted, after finding a non-lender had no right to intervene in a foreclosure action, that:

What stake in the outcome of an independent action for foreclosure could MERS have?

It did not lend the money to Kesler or to anyone else involved in this case.

Neither Kesler nor anyone else involved in the case was required by statute or contract to pay money to MERS on the mortgage. See Sheridan ("MERS is not an economic 'beneficiary' under the Deed of Trust. It is owed and will collect no money from Debtors under the Note, nor will it realize the value of the Property through foreclosure of the Deed of Trust in the event the Note is not paid."). If MERS is only the mortgagee, without ownership of the mortgage instrument, it does not have an enforceable right. See Vargas, 396 B.R. 517 ("[w]hile the note is 'essential,' the mortgage is only 'an incident' to the note" [quoting Carpenter v. Longan, 16 Wall. 271, 83 U.S. 271,275,21 L. Ed 313 (1872)]).

The Arkansas and Kansas Supreme Courts are not the only courts to question the role of MERS in matters such as these. The Washington Supreme Court is currently considering the role of MERS under Washington law.

In addition to the legal defects created by involving MERS in the lending process, and the fraudulently executed Assignment while IndyMac was in bankruptcy, there was a procedural defect in the appointment of RTS as successor trustee.

On December 4th, 2009, OneWest purportedly executed, "as beneficiary" an appointment of successor trustee, appointing RTS as successor trustee, pursuant to *RCW 61.24.010*. Accordingly, applying the strict compliance requirement set forth in *Albice* and *Udall*, and assuming the efficacy of the Assignment of Deed of Trust, which Mr. Howard does not, at the time the Assignment of Deed of Trust was executed, OneWest was not the beneficiary of record under the Deed of Trust and had no authority to appoint RTS a successor trustee, under *RCW 61.24.010*. Absent an appropriate appointment, RTS lacked legal authority to initiate or conduct any sale of the property or to issue a Trustee's Deed under *RCW 61.24*.

It is further Mr. Howard's contention that RTS know or should have known of these defects. Indeed, most, if not all, of the documents prepared, executed and recorded after August 9th, 2009, were done by RTS. Accordingly, RTS has breached its duty of good faith to Mr. Howard, under *RCW 61.24.010(4)*.

ii. Defendants have Violated the Washington Consumer Protection Act

The acts that give rise to Mr. Howard's claim under the WCPA include, without limitation, the following: (1) the assignment of the Note and Deed of Trust by MERS to OneWest despite the fact that MERS was not a proper beneficiary under *RCW 61.24.005(2)* and otherwise having no interest in the subject Note; (2) the appointment

of RTS as successor trustee by OneWest when it had no authority to make such an appointment under *RCW 61.24.010(2)*; (3) declaration of a default in the obligation by a party who was not the beneficiary, in violation of *RCW 61.24.030(7)(c)*; (4) the deceptive and misleading efforts by OneWest and RTS through the wrongfully execution and recording of documents each knew or should have known contained false statements related to the Appointment of Successor Trustee and Assignment of Deed of Trust; and (5) the engagement of acts by MERS, OneWest and RTC in violation of the FDCPA.

The elements of a claim under Washington's Consumer Protection Act (hereinafter "WCPA"), *RCW 19.86, et seq*, include the following:

- (1) an unfair or deceptive act or practice,
- (2) occurring in trade or commerce,
- (3) affecting the public interest,
- (4) injury to a person's business or property, and
- (5) causation.

Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 719 P.2d 531 (1986). The WCPA should be "liberally construed that its beneficial purposes may be served." *RCW 19.86.920; Short v. Demopolis*, 103 Wn.2d 52, 691 P.2d 163 (1984).

The Washington Supreme Court has further implied that the violations of another Washington law or statute might constitute a *per se* violation of the WCPA. The Court in *Perry v. Island Sav. and Loan Ass'n.*, 101 Wn.2d 795, 684 P.2d 1281 (1984), held that a savings and loan association's attempt to enforce a due-on-sale clause in a deed of trust didn't constitute a *per se* violation of the WCPA because there is no statute that

exists which restricts the enforcement of such clauses. *Perry v. Island Sav. and Loan Ass'n, surpa.*, at 810-11, n. 9. The obvious inference of this holding is that the violation of another statute with regard to a citizen's claim under the WCPA would support the contention that there has been a *per se* violation of the WCPA

At the very least, a violation of another statute may constitute a *per se* violation of the public interest element of the above-mentioned five part test. In *Haner v. Quincy Farm Chems., Inc.*, 97 Wn.2d 753, 649P.2d 828 (1982) the Court specifically held that violation of a statute wherein there is a legislative declaration of public interest constitutes a *per se* violation of the public interest requirement of RCW 19.86.090. *Haner v. Quincy Farm Chems., Inc., surpa.*, at 762.

Even if a trial court might ultimately find that there is no *per se* violation of RCW 61.24 in this matter, the facts of this case satisfy the five above-mentioned elements supporting a private cause of action under the WCPA as stated in *Hangman Ridge*. The WCPA expressly states that its provisions "shall be liberally construed" as a means of protecting the public against "unfair, deceptive, and fraudulent acts or practices." RCW 19.86.920.

Determining whether a particular act is an unfair or deceptive act within the terms of the WCPA is a question of law for the court, if there is no factual dispute. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 930 P.2d 288 (1997). Of importance to the facts of the present controversy, an unfair or deceptive act can include misrepresentations of facts related to the legal status of a debt. *Panag v. Farmers Ins. Co. Of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009) (deceptive methods used by a collection agency to recover money on behalf of an insurance company).

In applying *Panag* to the facts of the present controversy, it is undisputed that OneWest retained the services of RTS to represent OneWest in the non-judicial foreclosure of Mr. Howard's property. The actions of One West, and its agent RTS, in asserting that they were acting in accordance with the provision of *RCW 61.24, et seq.* to collect a debt and specifically asserting their actions that OneWest was the current and proper "beneficiary" to act under *RCW 61.24.005(2)* and *RCW 61.24.010*, were materially false or misleading to the extent that the purported transactions were not consistent with *RCW 61.24, et seq.*, and therefore failed to meet the legal standards for non-judicial foreclosures in this state. This is especially so where OneWest took action to appoint RTS prior to having the colorable authority to do so under *61.24.010(2)*.

Panag stands for the proposition that such statutory violations related to the collection of a debt are a *per se* unfair or deceptive act under the first element of the WCPA claim. As applied here, at no time relevant to this cause of action did OneWest have the right to possession of the subject properties at the time RTS threatened Mr. Howard with non-judicial foreclosure of the subject property.

Whether an act occurs in trade or commerce IS an Issue of whether the act "directly or indirectly affect[s] the people of the State of Washington." *RCW 19.86.010(2)*. Misrepresentations concerning the legal status of a debt related to real property and the party to whom the debt is owed clearly affects the people of Washington. The court in *Panag* interpreted the WCPA broadly in order to give maximum effect to the Act in circumstances similar to those alleged in this matter.

Additionally, the Defendants in this case are companies engaged in similar transactions across the State of Washington and nationally. Their misconduct clearly occurred in connect with their trade. The WCPA defines "trade or commerce" to include the "sale of assets or services, and any commerce directly or indirectly affecting the people of the State of Washington." *RCW 19.86.010(2)*. Enforcement of notes and deeds of trust and foreclosure of the same in Washington clearly falls under the umbrella of "trade or commerce" as defined by the WCPA.

Among the factors set forth in *Hangman Ridge* in determining if the public interest element is met are: (1) were the alleged acts committed in the course of defendant's business? (2) are the acts part of a pattern or generalized course of conduct? (3) were repeated acts committed prior to the act involving plaintiff? (4) is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? *Hangman Ridge v. Safeco.supra*.

For disputes more private in nature, courts will consider whether (1) the acts alleged were committed in the course of defendant's business? and (2) whether plaintiff and defendant occupy unequal bargaining positions? The answer to most of these questions is an unequivocal "Yes." The conduct alleged here was in the normal course of their respective businesses and substantially the same in form when conducting business with homeowners throughout the State of Washington.

There is no genuine argument that both the prevention of wrongful foreclosure and the promotion of stability in land titles fall within the auspices of the public interest. *Cox v. Helenius, supra.*; *Albicev. Premier Mortg. Services of Washington, Inc., supra.* *Hangman Ridge* court stated that the "*per se* method requires a showing that a statute has been violated which contains a specific legislative declaration of public interest impact." RCW 61.24.135 makes such a declaration for violation for several specific actions, including the offering of a property for sale "if it appears ... the sale might have been void." In addition, there are other statutory violations addressed in Mr. Howard's Complaint that could give rise to other *per se* violations, such as violation of the Federal Fair Debt Collection Practices Act.

The injury to Mr. Howard's property occurred in the necessity for investigation and consulting with professionals to address wrongful legal procedures related to violations of RCW 61.24, *et seq.* The expenditure of out-of-pocket expenses for postage, parking, and consulting an attorney are sufficient proof of an injury under *Hangman Ridge. Panag, supra,* at 902. Here, Mr. Howard had to take time off from work and incurred travel expenses to consult with an attorney to address the misconduct of the OneWest, Deutsche Bank, RTS and MERS.

Additionally, injury to person's business or property is broadly construed and in some instances where "no monetary damages need be proven, and that non-quantifiable injuries, such as loss of goodwill would suffice for this element of the *Hangman Ridge* test." *Nordstrom; Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987). All of the injuries outlined were the direct and proximate result of the misconduct of One West, RTS and MERS.

All of these injuries were the direct and proximate cause of the misconduct alleged in the Complaint and subsequent pleadings related to the wrongful foreclosure of Mr. Howard's home and, had the trial court properly presumed the validity of all of Mr. Howard's allegations and all inferences that could be inferred therefrom, all five elements for a private cause of action under the WCPA are met.

iii. Mr. Howard's Claim for Quiet Title Lies as a Matter of Law

The final claim addressed in Mr. Howard's Complaint relates to the dismissal of his action to quiet title. Mr. Howard is the owner of the subject real property, and has been in the actual and uninterrupted possession of the property at all times relevant to this cause of action. It is Mr. Howard's contention that (1) MERS has never been a legitimate beneficiary of the Deed of Trust under *RCW 61.24.005*, and (2) the acts of the original lender and several Defendants named herein has irreparably severed the Note from the Deed of Trust, thus rendering the subject Deed of Trust an invalid lien upon the property.

The Corporate Assignment of Deed of Trust purportedly executed by MERS states: "Assignor hereby assigns unto the above named Assignee, the said Deed of Trust together with the Note." CP 65-66. At no time did MERS ever hold the Note. Even if MERS had the express authority to transfer the beneficial interest of the Deed of Trust, which Mr. Howard does not, the Deed of Trust does not contain a grant of authority to MERS to transfer the Note.

In the case of *In Re: Wilhelm et al.*, Case No. 08-20577-TLM (opinion of Hon. Terry L. Myers, Chief U.S. Bankruptcy Judge, July 9, 2009), Judge Myers analyzed the decisional law as to MERS' purported standing to assign the Note where MERS was nothing more than the "nominal beneficiary" under the Deed of Trust. The Court concluded that even if MERS is granted authority to foreclose if required by "custom or law" (as set forth in the Deed of Trust), this language does not, either expressly or by implication, authorize MERS to transfer promissory notes.

The Court cited to the cases of *Saxon Mortgage Services v. Hillery*, 2008 WL 5170180 (N.D. Cal., Dec. 9, 2008) and *Bellistri* as being in accord, holding that MERS presents no evidence as to who owns the note or of any authorization to act on behalf of the present owner of the note. Both cases were effectively dismissed (*Hillery* by outright dismissal; *Bellistri* by summary judgment), finding that there was no standing as there was no authority for the MERS assignment of the note.

The *Wilhelm* Court quoted the pertinent portion of the *Bellistri* Opinion:

The record reflects that BNC was the holder of the promissory note. There is no evidence in the record or the pleadings that MERS held the promissory note or that BNC gave MERS the authority to transfer the promissory note. MERS could not transfer the promissory note; therefore the language in the assignment of the deed of trust purporting to transfer [the] promissory note is ineffective."

This is relevant to the underlying title as the separation of the Note from the Deed of Trust renders the subject Deed of Trust unenforceable. In other words, separation of the Note from the Deed of Trust results in the Note being unsecured. Restatement (Third) of

Property: Mortgages § 5.4, Comment e (1997) ("in general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation").

See also *Jackson v. MERS*, 770 N.W.2d 487 (Minn. 2009) ("by acting as the nominal mortgagee of record for its members, MERS has essentially separated the promissory note and the security instrument, allowing the debt to be transferred without an assignment of the security instrument." *Id* at 494.)

The *Landmark* court and was cited by a Missouri court in finding that an assignment of deed of trust (which also purported to assign the underlying note) was of no force or effect. *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619 (Mo. App. 2009). When the subject Note is divorced from the Deed of Trust, the Deed of Trust becomes void and is an inappropriate and unlawful cloud on the owner's title.

The United States Supreme Court addressed this issue in *Carpenter v. Longan*, 83 U.S. 271 (1872) and stated succinctly:

"The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity." *Carpenter* at 274.

The Supreme Court of California arrived at the same conclusion in *Kelley v. Upshaw*, 39 Ca1.2d 179 (1952) ("purported assignment of the mortgage without an assignment of the debt which is secured was a legal nullity").

The Kansas Court in *Landmark* similarly explained the consequences of such scenarios:

Indeed, in the event that a mortgage loan somehow separates interests of the note and the deed of trust, with the deed of trust lying with some independent entity, the mortgage may become unenforceable.

"The practical effect of splitting the deed of trust from the promissory note is to make it impossible for the holder of the note to foreclose, unless the holder of the deed of trust is the

agent of the holder of the note. [Citation omitted.] Without the agency relationship, the person holding only the note lacks the power to foreclose in the event of default. The person holding only the deed of trust will never experience default because only the holder of the note is entitled to payment of the underlying obligation. [Citation omitted.]

The mortgage loan becomes ineffectual when the note holder did not also hold the deed of trust." *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619,623 (Mo. App. 2009).

The Missouri court found that, because MERS was not the original holder of the promissory note and because the record contained no evidence that the original holder of the note authorized MERS to transfer the note, the language of the assignment purporting to transfer the promissory note was ineffective. "MERS never held the promissory note, thus its assignment of the deed of trust to Ocwen separate from the note had no force." 284 S.W.3d at 624; see also *In re Wilhelm*, 407 B.R. 392 (Bankr. D. Idaho 2009) (standard mortgage note language does not expressly or implicitly authorize MERS to transfer the note);

In re Vargas, 396 B.R.511, 517 (Bankr. C.D. Cal.2008) ("[I]f FHM has transferred the note, MERS is no longer an authorized agent of the holder unless it has a separate agency contract with the new undisclosed principal. MERS presents no evidence as to who owns the note, or of any authorization to act on behalf of the present owner."); *Saxon Mortgage Services, Inc. v. Hillery*, 2008 WL 5170180 (N.D. Cal. 2008) (unpublished opinion)("[F]or there to be a valid assignment, there must be more than just assignment of the deed alone; the note must also be assigned.... MERS purportedly assigned both the deed of trust and the promissory note.... However, there is no evidence of record that establishes that MERS either held the promissory note or was given the authority ... to assign the note.").

Absent an effective assignment by the real holder and owner of the underlying obligation to the person or entity conducting the sale, the non-judicial foreclosure is void. Absent proper parties to the original Deed of Trust that document must also be found void. In sum, there is a very real possibility that one result of MERS' action in this case is to void the very Deed of Trust the Defendants/Respondents seek to foreclose.

V. CONCLUSION

Based on the foregoing, Mr. Howard respectfully request that this Court to:

- (1) reverse the trial court's Orders June 7th, 2013 and June 10, 2013,
- (2) vacate and set aside the Sale August 9th, 2013,
- (3) remand this matter for trial on the merits; and
- (4) award Mr. Howard his taxable costs and reasonable attorney's fees incurred herein.

RESPECTFULLY SUBMITTED this 21st day of April, 2014.

/s/ Ryan Howard

Signature

Ryan Howard – Pro Se Appellant
11310 Riviera PL NE
Seattle, WA 98125



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Author: 7434 - HEITMAN, MICHELLE A
Subject: NARRATIVE
Related date/time: Aug-08-2009 (Sat.) 1622

EX. A

This incident was video and audio recorded.

On 08/08/2009 at approximately 1415hrs I was working two officer car with Officer Miller #7544, in a marked patrol vehicle (unit 2L23) when we were dispatched to investigate a suspicious circumstance at 11310 Riviera Pl. N.E. The call stated that someone had changed the lock on his residence, and his electronic lock was broken and barred, replaced with a lock box.

We arrived on scene and contacted the victim; Ryan R. Howard (W/M/04/01/1975) who stated that he left his residence at approximately 0100 hrs on 08/06/2009 and returned at 1600hrs on 08/07/2009 to find his locks had been changed. Howard informed us that he had contacted his bank; Indy Mac Bank and they stated that there was no sale reported on the house and no foreclosure in affect.

We were able to determine that the residence was Howard's primary residence through the following steps; We ran his name on our MDT and the DOL return displayed the physical characteristics which matched those of Howard and the residence listed on the return was the one provided above. There was a report on the RMS system that listed this residence as the primary residence for Howard. Howard was able to describe the interior of the residence and where in the residence construction was taking place and these places are not visible from the outside. Howard also knew the electronic combination to the door lock, which was heard functioning but did not allow the door to open. Additionally, while conducting the investigation several neighbors stopped by to inquire about the circumstances of our visit and all knew Howard as the owner of the residence. Based on the information listed above we were able to establish that this was Howard's primary residence.

The front door of the residence had an electronic lock, which was disabled by having the center piece of the lock removed exposing the electronic interior and disabling the locking function. The chrome colored door handles both interior and exterior associated with the electronic lock were removed and replaced with gold handles with a key entry and a black key lock box with a combination. There were no other entry points to the house that were disturbed or have viable entry access.



SEATTLE POLICE DEPARTMENT
GENERAL OCCURRENCE HARDCOPY
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GO# 2009-278961 INACTIVE

2202-0 BURGLARY-FORCE-RES

While being video and audio-recorded Howard was able to extract the lock box off of the door and with the assistance of tool enter the lock box and retrieve two gold keys. One of the keys and all sets of door handles were sent to the finger print analysis unit to determine if latent prints are present. The original handles were located inside the residence just to the west of the door.

We did a walk through of the residence with Howard and at this time Howard stated that things had been rifled through on the 3rd floor (his bedroom) however it appeared that nothing was missing at this time. The rest of the house is currently under construction.

Howard stated that he did not own any pets cat or dogs, however we located animal feces on the main level of the residence in the living room area on the east side.

I gave Howard a business card with case #09-278961 and contact information. I also provided him with a victim follow up sheet and instructed him on its proper use.

I hereby declare (certify) under penalty of perjury under the laws of the State of Washington that this report is true and correct to the best of my knowledge and belief (RCW 9A.72.085)

Electronically signed:

HEITMAN, MICHELLE A

Date: Aug-08-2009

Place: Seattle, WA

1
2 IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

3 RYAN HOWARD

Appellant(s)

No. 70629-2-I

CERTIFICATE OF SERVICE

4 vs.

5 DEUTSCHE BANK NATIONAL TRUST
6 COMPANY, as Trustee of the IndyMac
7 INDA Mortgage Loan Trust 2007-AR7,
Mortgage Pass-Through Certificates, Series
8 2007-AR7 under the Pooling and Servicing
Agreement dated 8/9/2007,

Respondent(s)

9
10 I certify under penalty of perjury under the laws of the State of Washington that, on the
date(s) stated below, I did the following:

11 On the 21st day of April, 2014, I

12 Mailed by regular U.S. Mail, postage prepaid; and/or

13 Faxed Electronically, (Receipt attached); and/or

14 Hand-delivered

15 a true copy of the APPELLANTS' OPENING BRIEF_70629-2-I [*name of paper(s) served*] to
16 COURT OF APPEALS OF THE STATE OF WASHINGTON DISTRICT I [*Name of Plaintiff*
or the Attorney for Plaintiff] at the following address: 600 University St, One Union Square,
Seattle, WA 98101-1176 with the FAX number of (206) 389-2613.

17 Dated this 21 day of April 2014 in Seattle (City), WA (State).

18
19 
Signature

20 Patricia Sribniak
21 Print or Type Name

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 APR 28 PM 1:32