Civil Motions Judge
11/1/2013 at 9:30 A.M.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

JACOB D. BRADBURN, an individual, Plaintiff, vs. ReconTrust COMPANY, N.A., et. al., Defendants.	Case No. 11-2-08345-2 PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., RECONTRUST COMPANY, N.A., BANK OF AMERICA, N.A. AND THE FEDERAL NATIONAL MORTGAGE ASSOCIATION

I. RELIEF REQUESTED

NOW COMES Plaintiff Jacob D. Bradburn ("Bradburn"), by and through his attorneys, Stafne Trumbull, LLC, and moves for partial summary judgment that defendants ReconTrust Company N.A. ("Recon Trust"), Mortgage Electronic Registration Systems, Inc. ("MERS"), Bank of America, N.A. ("BANA"), and the Federal National Mortgage Association ("Fannie Mae") are liable to Bradburn for violations of the Deeds Trust Act, Ch. 61.24 RCW (DTA) and unfair or deceptive practices committed in a trade or business which affect the public interest under the Consumer Protection Act, Ch. 19.86 RCW (CPA). Bradburn reserves the issue of damages for the jury.

STAFNE TRUMBULL, LLC
239 NORTH OLYMPIC AVENUE
ARLINGTON, WA 98223
TEL. 360.403.8700 /FAX 360.386.4005

If partial summary judgment is not given, Bradburn moves in the alternative for a determination of those material facts not in substantial controversy, and for an order specifying those facts.

II. STATEMENT OF FACTS

Bradburn signed an "InterestFirst NOTE"[sic] with "HOMESTAR LENDING, A WASHINGTON CORPORATION" [sic]. Complaint Exhibit 3. Bradburn signed a deed of trust, which named MERS as the beneficiary; notwithstanding MERS never owned the note and never was a "Note Holder" as defined by the note. Complaint Exhibit 4. At some point Fannie Mae purportedly acquired a beneficial interest (claimed ownership) of Bradburn's "loan".[1] Countrywide Home Loan Servicing, LP ("Countrywide") serviced the loan for Fannie Mae. After Countrywide's demise, BANA, through a series of mergers, purportedly acquired merely the servicing rights with regard to Bradburn's obligation to pay off his debt.[2]

The deed of trust instrument named "FIDELITY TITLE" [sic] as the original trustee. Complaint Exhibit 4. MERS, claiming to be a beneficiary within the meaning of RCW 61.24.005(2), appointed ReconTrust as its successor trustee.[3] ReconTrust was a subsidiary of BANA, the servicer.[4] MERS then assigned its interests in the deed of trust to BANA.[5]

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[1] Declaration of Stafne Exhibit 12 Declaration of Beneficiary dated March 12, 2010.

[2] BAC Home Loans Servicing, LP has merged with BANA. See July 24, 2011 letter from Stephen A. Lybarger, Large

[2]Bank Licensing Expert, Comptroller of the Currency, to Ms. Radhi Thayu, Assistant General Counsel Bank of America

[2]Corporation re: Conditional Approval # 1003. (Declaration of Stafne Exhibit 4).

[3] Declaration of Stafne Exhibit 1 Appointment of Successor Trustee recorded on June 17, 2009.

[4] Declaration of Stafne quoting BANA response to RFAs #12-13.

[5] Declaration of Stafne Exhibit 3 Assignment of Deed of Trust recorded on March 30, 2010.

STAFNE TRUMBULL, LLC
239 NORTH OLYMPIC AVENUE
ARLINGTON, WA 98223
TEL. 360.403.8700 /FAX 360.386.4005

MERS' assignment purports to do this without naming any principal on whose behalf MERS was acting.[6]

It is undisputed that at all material times Fannie Mae claimed to own Mr. Bradburn's loan and all defendants were informed of and believed this to be true and each acted according to the instructions and for the benefit of Fannie Mae.[7] Notwithstanding that ReconTrust was informed and believed Fannie Mae was the owner of the "loan", it began the foreclosure process. As part of this process, ReconTrust sent out a Notice of Default which identified MERS as the beneficiary[8] and two Notice(s) of Trustee's Sale which identified BANA, the servicer, as the beneficiary;[9] when no reasonable trustee could have found "proof" that this was the case.

ReconTrust, claiming to be a trustee under the DTA, invoked the statute's power of sale authority and sold Bradburn's home on May 20, 2011 to Fannie Mae pursuant to a credit bid[10] despite not being identified as the beneficiary in the Notice of Trustee's Sale or Notice

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[6] *Id.*

[7] "At the time of the foreclosure, BANA was the holder of the subject promissory note **and possessed authority from Fannie Mae to enforce the subject note.**" See Decl. of Stafne quoting BANA response to RFA #19 (emphasis supplied); "BANA ADMITS that the [Mach 30, 2010] assignment was recorded with BANA's consent and in compliance with Fannie Mae's servicing guidelines." *Id.* quoting BANA response to RFA 22; "RECON ADMITS that the [March 30, 2010] assignment was recorded with RECON's consent and in compliance with the servicing guidelines of Federal National Mortgage Association." Id. quoting ReconTrust response to RFA #18; "BANA ADMITS that the [June 9, 2011] assignment was recorded with BANA's consent and in compliance with Fannie Mae's servicing guidelines." Id. quoting BANA response to RFA 21; "RECON ADMITS that the [June 9, 2011] assignment was recorded with RECON's consent and in compliance with the servicing guidelines of Federal National Mortgage Association." Id. quoting ReconTrust response to RFA #17; "RECON ADMITS that the subject bid amount was based, in part, on the monetary obligations due under the Note and was calculated pursuant to the servicing guidelines of Federal National Mortgage Association." Id. quoting ReconTrust response to RFA #22.

[8] Declaration of Stafne Exhibit 2 Notice of Default dated June 8, 2009.

[9] Declaration of Stafne Exhibits 5, Notice of Trustee's sale recorded on July 29, 2010, and 10, Notice of Trustee's sale recorded on February 17, 2011.

[10] "RECON ADMITS that the subject bid amount was based, in part, on the monetary obligations due under the Note

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239 NORTH OLYMPIC AVENUE
ARLINGTON, WA 98223
TEL. 360.403.8700 /FAX 360.386.4005

of Default. A document entitled "Declaration of Beneficiary" was executed by an employee of BANA stating that Fannie Mae was the beneficiary owner of the note or entitled to enforce the note.[11] As previously stated ReconTrust provided required notices under the DTA to Bradburn which falsely indicated either MERS or BANA was the beneficiary.

III. STATEMENT OF ISSUES

1. Whether MERS was a lawful beneficiary authorized to invoke the power of sale pursuant to the DTA? (Short answer: NO)

2. Whether BANA was a lawful beneficiary authorized to invoke the power of sale pursuant to the DTA? (Short answer: NO)

3. Whether ReconTrust, a subsidiary of (and a fiduciary for) the purported beneficiary, could be a trustee under the DTA? (Short Answer: No)

4. Whether ReconTrust was a neutral judicial substitute within the meaning of the DTA? (Short answer: NO)

5. Whether ReconTrust had authority to issue a Notice of Trustee's Sale? (Short answer: NO)

6. Whether ReconTrust had sufficient proof with regard to the identity of the beneficiary and owner of the note to initiate nonjudicial foreclosure proceedings on behalf of BANA? (Short answer: NO)

7. Whether the notices ReconTrust provided to Bradburn complied with the DTA? (Short answer: NO)

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[10] and was calculated pursuant to the servicing guidelines of Federal National Mortgage Association." Id. quoting

[10] ReconTrust response to RFA #22.

[11] Declaration of Stafne Exhibit 12 Declaration of Beneficiary dated March 12, 2010.

8. Whether nonjudicial foreclosure proceedings which violate any of the following provisions in the DTA are void: RCW 61.24.010 (2)-(4), RCW 61.24.030.020, and RCW 61.24.030 (7)(a) & (8)(l); RCW 61.24.040? (Short answer: YES)

9. Whether the prosecution of a nonjudicial foreclosure and sale of Bradburn's home by Defendants through ReconTrust on behalf of a false beneficiary violates the first three elements of the CPA?(Short answer: YES)

V. EVIDENCE RELIED UPON

____Mr. Bradburn relies on the complaint and declaration of Scott E. Stafne and the exhibits attached thereto.

VI. ARGUMENT

A. SUMMARY JUDGMENT STANDARD

"The initial burden under [CR 56] subsection (c) is on the moving party to prove that no issue is genuinely in dispute" and that the moving party is entitled to judgment as a matter of law. CR 56; *see also*, *Doherty v. Municipality of Metro. Seattle*, 83 Wn. App. 464, 921 P.2d 1098 (1996).

Thereafter, "the burden shifts to the non-moving party to establish that a triable issue exists." *Id.* "[T]he nonmoving party must demonstrate the existence of such an issue by setting forth specific facts which go beyond mere unsupported allegations." *Tokarz v. Frontier Fed. Sav. & Loan Ass'n*, 33 Wn. App. 456, 656 P.2d 1089 (1982).

Bradburn's motion for summary judgment is based in large part on the provisions of the DTA. Statutes, including the DTA, are interpreted to be consistent with the Washington Constitution, *Klem v. Washington Mut. Bank*, 175 Wn. 2d 83771, 790 , 295 P.3d 1179

STAFNE TRUMBULL, LLC
239 NORTH OLYMPIC AVENUE
ARLINGTON, WA 98223
TEL. 360.403.8700 /FAX 360.386.4005

(2013),[12] unless a court cannot do so and therefore must declare the statute invalid. *Household Finance Corp. v, State,* 40 Wn. 2d 451, 457, 244 P. 2d 260 (1952)[13].

In this case, both parties are moving for summary judgment.

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B. DEFENDANTS HAVE VIOLATED THE DEED OF TRUST ACT

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[12] *See also Haynes v. Seattle School Dist. No. 1, 111 Wn.2d 250, __, 758 P.2d 7, 1988 Wash. LEXIS 175 (1988),* Porter v. Seattle Sch. Dist. No. 1, 160 Wn. App. 872, 874, 248 P.3d 1111, 2011 Wash. App. LEXIS 724 (2011).

[13] For purposes of Bradburn's motions for summary judgment, this principle of statutory construction applies in two ways. First, as stated in *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013) constitutional principles of due process and separation of powers require, at a minimum, trustees to act as "impartial judicial substitutes" as part of the duty of good faith imposed by RCW 61.24.010(4). *Klem*, at 790. Second, and this is an argument of first impression, on its face the DTA appears to run afoul of the enumerated original (and therefore exclusive) jurisdiction of the Superior Court under Wash. Const. Art IV § 6 to hear cases at law involving title and possession of real estate. *Cf. State v. Posey*, 161 Wn. 2d 638, 167 P.3d 560 (2007) (" The constitution grants the superior courts original jurisdiction 'in all criminal cases amounting to felony … .') Wash. Const. Art IV § 6. The legislature cannot rescind this constitutional jurisdiction or vest it exclusively in another court.)" *Id.*, at 141. If the DTA's substitution of trustees for Superior Court judges to resolve cases at law involving the title and possession of real estate is an appropriate exercise of the legislature's authority to create appellate jurisdiction in the Superior Court, the Constitution requires a trustee's fact finding and legal decisionmaking be capable of judicial review. *See e.g., Loveless v. Yantis*, 82 Wn.2d 754, 762-63, 513 P.2d 1023 (1973), ("No adequate or intelligent judicial review is possible unless all the essential evidentiary material upon which the administrative agency predicates a quasi-judicial determination is in the record and before the court;") *Hattrick v. N. Kitsap Sch. Dist. No 400*, 81 Wn.2d 668, 670, 504 P.2d 302 (1972) (Statute allows de novo review, but requires school board to produce complete administrative record). This constitutional requirement will be discussed more fully in response to defendant's anticipated arguments as to how certain provisions of the DTA, *See also Board of Regents of University of Washington v. City of Seattle*, 108 Wn. 2d 545, 556, 741 P.2d 11 (1987) "Whether ordinance is quasi-judicial or legislative in nature, we are unable to review it absent a record of the City's proceedings." *Neah Bay Chamber of Commerce v. Department of Fisheries*, 119 Wn.2d 464, 474-5, 832 P.2d 1310 (1992) (A court must scrutinize the "record" to determine if the result was reached through a process of reason, not whether the result was itself reasonable in the judgment of the court.) *Abbenhaus v Yakima,* 89 Wn. 2d 855, 859, 576 P.2d 888 (1978) (For purposes of appellate jurisdiction the superior court should only consider the material presented to the city council and determine whether it adequately supports the action of the municipality). Bradburn alerts this Court to this constitutional precedent, and the decisions before it, because it may become an issue with regard to how RCW 61.24.030(7)(a), should be construed.

[13]Additionally, as this Court knows, the Supreme Court has consistently held the DTA must be construed to further the three policies underlying the statute. *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn. 2d 83, 94, 285 P.3d 34 (2012); Cox v. Helenius, 103 Wn. 2d 383, 387, 693 P.2d 683 (1985). Those policies are:

> [13]"(1) that the nonjudicial 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
> [13]titles.

[13]*Bavand* at 20 (quoting *Plein v. Lackey*, 149 Wn.2d 214, 225, 67 P.3d 1061, 1066 (2003) (citing Cox 103 Wn. 2d at 387).
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239 NORTH OLYMPIC AVENUE
ARLINGTON, WA 98223
TEL. 360.403.8700 /FAX 360.386.4005

This case involves one of the most egregious nonjudicial foreclosure sales imaginable. Many of the facts are hotly disputed. The homeowner claims he came home one day to find his house locked up with a realtor's sign out front without ever knowing an actual sale was about to occur. While the parties have different stories as to how *and whether* this sale occurred in the manner Bradburn contends, the facts are undisputed that ReconTrust, a subsidiary of, and trustee for, the purported beneficiary, BANA, did not comply with those conditions precedent set forth in RCW 61.24.010; 020; and 030(7)(a) and (8) and; 040 which were necessary to invoke the power of sale under Washington's DTA. *See* infra. Further, defendants and their agent trustee, failed to comply with RCW 61.24.040(6) setting a maximum time for continuance of a sale at 120 days. Failure to adhere to this requirement divested ReconTrust of any power of sale under the DTA. *See* infra. As a result Bradburn seeks a partial summary judgment of liability against all defendants for the wrongful nonjudicial foreclosure of his home and their violations of the CPA.

Bradburn reserves his right to have a jury decide the amounts of his damage resulting from these and the other causes of action alleged in his complaint..

1. Violation of RCW 61.24.005(2): MERS Not a Lawful Beneficiary

Under Bain, MERS could never be a lawful beneficiary. *Bain v. Metro. Mortg. Grp., Inc.,*

175 Wn.2d 83, 89, 285 P.3d 34, 37 (2012); *Walker v. Quality Loan Service Corp. of Washington*, No. 659758I, Slip Op. at 4 (Aug. 26, 2013); *Bavand v. Onewest Bank FSB*, No. 682172I, Slip Op. at 11 (Sept. 9, 2013). MERS never held the note or any instrument or document evidencing the obligations secured by the Deed of Trust.

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239 NORTH OLYMPIC AVENUE
ARLINGTON, WA 98223
TEL. 360.403.8700 /FAX 360.386.4005

In fact, MERS, BANA, and ReconTrust do not dispute that MERS was never the beneficiary.[14]

2. Violation of RCW 61.24.010(2): ReconTrust Not a Lawful Trustee

It is undisputed MERS appointed ReconTrust.

It is indisputable MERS' appointment does not indicate MERS undertook this appointment in any capacity other than that of the beneficiary in its own right. The appointment reads in the relevant part: "Mortgage Electronic Registration Systems, Inc. who is the present beneficiary under said deed of trust." Declaration of Stafne Ex.1. The signature line reads: Mortgage Electronic Registration Systems, Inc. Beneficiary by ~~Hollie N. Ortiz~~, Assistant Secretary and is signed by G. Hernandez. *Id.*

ReconTrust was never lawfully appointed trustee as MERS was not a lawful beneficiary or acting on behalf of a lawful beneficiary and therefore had no authority to appoint a successor trustee. RCW 61.24.020(2); *Bain* at 37; *Walker* at 7; *Bavand* at 6.

3. Violation of RCW 61.24.010(3): ReconTrust's Fiduciary Duty to BANA

It is undisputed ReconTrust is a wholly-owned subsidiary of BANA.[15]

61.24.010(3) prohibits a trustee from having a fiduciary relationship with any party having an interest in the deed of trust.

A wholly-owned subsidiary owes its parent a fiduciary duty. J. Haskell Murray, Latchkey Corporations: Fiduciary Duties in Wholly Owned, Financially Troubled Subsidiaries, 36 Del. J. Corp. L. 577, 580 (2011) ("[W]hen the subsidiary is solvent: [it's duty is to] act in the best interest of the parent corporation, which is both the only party that can

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[14] Declaration of Stafne quoting MERS response to RFA #6; BANA response to RFA #16; ReconTrust response to RFA #9.

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239 NORTH OLYMPIC AVENUE
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TEL. 360.403.8700 /FAX 360.386.4005

sue derivatively on behalf of the subsidiary corporation and is also the subsidiary's only shareholder."). The inverse is true as well-- that a parent of a wholly owned subsidiary has a fiduciary relationship with the subsidiary. See e.g. *Supt. of Insurance v. Bankers Life & Cas. Co.*, 404 U.S. 6, 92 (1971) (quoting *Pepper v. Litton*, 308 U. S. 295, 307.).

ReconTrust was ineligible to carry out a trustee's sale on behalf of BANA under the clear language of this provision.

4. Violation of RCW 61.24.010(4): ReconTrust's Breach of the Duty of "Good Faith" Owed to Bradburn

The Washington Supreme Court held the "good faith" standard set forth in this provision required, at a constitutional minimum, that a trustee act as a "neutral judicial substitute" or face the consequences that both the trustee and its principle could be held liable to the borrower. *Klem,* 176 Wn. 2d at 790. ("An independent trustee who owes a duty to act in good faith to exercise a fiduciary duty to act impartially to fairly respect the interests of both the lender and the debtor is a minimum to satisfy the statute, the constitution, and equity, at the risk of having the sale voided, title quieted in the original homeowner, and subjecting itself and the beneficiary to a CPA claim.") *Klem's* "neutral judicial substitute" standard of good faith is not a new standard in Washington. *See Id.* at 788-90, *citing*, *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985). Nor is this standard unique with regard to states allowing nonjudicial foreclosures[16].

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[15] Declaration of Stafne quoting BANA response to RFAs #12-13.

[16] *See e.g. Bonilla v. Roberson*, 918 S.W.2d 17, 21 (Tex. App.1996) ("When exercising a power contained in a deed of trust, the trustee becomes a special agent for both parties, and he must act with absolute impartiality and with fairness to all concerned. . . ."); *Perry v. Va. Mortg. & Inv. Co.*, 412 A.2d 1194, 1197 (D.C. 1980) ("In this jurisdiction 'a trustee under a deed of trust owes fiduciary duties both to the note holder and to the borrower.'"); *McHugh v. Church*, 583 P.2d 210, 214 (Alaska 1978) ("The trustee under a deed of trust generally is regarded as

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239 NORTH OLYMPIC AVENUE
ARLINGTON, WA 98223
TEL. 360.403.8700 /FAX 360.386.4005

Here, BANA's ownership of ReconTrust, as well as ReconTrust's documented refusal to comply with the statutory conditions precedent to invoke the power of sale (*see supra. and infra.*) for discussion of each statutory violation) are sufficient to establish defendants' violations of the DTA, which clearly requires the party that institutes a nonjudicial foreclosure be a beneficiary that actually owns the note and not a mere servicer, who, at best, owns servicing rights. *Bain*, 175 Wn. 2d at 97-8 and note 7.

> Critics of the MERS system point out that after bundling many loans together, it is difficult, if not impossible, to identify the current holder of any particular loan, or to negotiate with that holder. While not before us, we note that this is the nub of this and similar litigation and has caused great concern about possible errors in foreclosures, misrepresentation, and fraud. Under the MERS system, questions of authority and accountability arise, and determining who has authority to negotiate loan modifications and who is accountable for misrepresentation and fraud becomes extraordinarily difficult. [7] The MERS system may be inconsistent with our second objective when interpreting the deed of trust act: that "the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure."

Id. See also RCW 61.24.030(7)(a) and (8) (l). Footnote 7 makes very clear the Court did not equate a servicer, like BANA in this case, with a beneficiary, as that term is defined in RCW 61.24.005(2).

> MERS insists that borrowers need know only the identity of the servicers of their loans. However, there is considerable reason to believe that servicers will not or are not in a position to negotiate loan modifications or respond to similar requests. *See generally* Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 Wash. Law. Rev. 755 (2011); Dale A. Whitman, *How Negotiability Has Fouled Up the Secondary*

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owing a fiduciary duty to both the trustor and the beneficiary and is required to perform his duties impartially."); *Smith v. Haley*, 314 S.W.2d 909, 913 (Mo. 1958) ("The trustee sustains a fiduciary relationship to the debtor and the creditor. Reason and justice exact of him the most scrupulous fidelity in transferring one man's property to another."); *Lake Hillsdale Estates, Inc. v. Galloway*, 473 So. 2d 461, 465 (Miss. 1985) ("In a deed of trust the trustee is under a duty to perform his duties in good faith and act fairly to protect the rights of all parties equally."). It is also worth noting that even in states that don't use the word "neutral" to describe the duty of a trustee, the language may still approximate this duty. *See, e.g.*, *Russell v. Lundberg*, 120 P.3d 541, 546 (Utah Ct. App. 2005) ("While a trustee's primary duty and obligation is to the beneficiary of the trust, 'the trustee's duty to the beneficiary does not imply that the trustee may ignore the trustor's rights and interests.'").

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239 NORTH OLYMPIC AVENUE
ARLINGTON, WA 98223
TEL. 360.403.8700 /FAX 360.386.4005

> *Mortgage Market, and What To Do About It*, 37 Pepp. L. Rev. 737, 757-58 (2010) Lack of transparency causes other problems. *See generally U.S. Bank Nat'l Ass'n v Ibanez,* 458 Mass. 637, 941 N.E. 2d 40 (2011) (noting difficulties in tracing ownership of the note).

Additionally, in *Walker* the Court of Appeals held that at a minimum a DTA trustee is required to do a cursory investigation to determine the identity of the **beneficiary** and **note owner**. *Walker* at 12. Here, the evidence is undisputed that the trustee was informed and believed Fannie Mae owned the loan, but nonetheless advised Bradburn first MERS then BANA were the beneficiary and owner of the note entitled to nonjudicially foreclose under the DTA. See Stafne declaration, Notice of Default; Ex. 2, Notice(s) of Trustee's Sale; Ex. 5 and 10; compare with Ex. 11 Trustee's Deed (identifying Fannie Mae as beneficiary.) ReconTrust's refusal to follow the plain language of the statute in order to benefit its owner, the servicer, violates the duty of good faith imposed by RCW 61.24.010(3), *see* supra., as well as RCW 61.24.010(4).

5. Violation of RCW 61.24.020: ReconTrust's Improper Relationship with BANA

It is undisputed that ReconTrust is a wholly-owned subsidiary of BANA. In *Klem* the Washington Supreme Court discussed the history of trustee provisions in the DTA.

> "Prior to 1975, the deed of trust act strictly forbade agents, employees, or subsidiaries of a beneficiary to act as a trustee. Former RCW 61.24.020 (1965). The 1975 legislature saw fit to remove that limitation, but neither did it expressly authorize agents of beneficiaries to act as trustees. LAWS OF 1975, 1st Ex. Sess., ch. 129, § 2; *Cox,* 103 Wn.2d at 389, 693 P.2d 683 (citing *Osborne, supra*). As we have said, without an independent trustee, the nonjudicial foreclosure process is subject to challenges based upon constitutional and equitable grounds."

Klem 176 Wn.2d 792 at fn. 13.

The relevant portion of RCW 61.24.020 reads "the trustee is authorized to sell all or any portion of the grantor's interest in that real and personal property at a trustee's sale." RCW

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TEL. 360.403.8700 /FAX 360.386.4005

61.24.020 is **the provision** that grants authority to a trustee to carry out a sale. Implicit in the reading of RCW 61.24.020 is the trustee must be a person as defined by and qualified under other provisions of the DTA. Appointment of an unqualified person is a violation of RCW 61.24.020.

While it might be argued that RCW 61.24.020 no longer explicitly prohibits subsidiaries acting as trustees where their parent is the beneficiary, *Klem* requires .020 to be read consistently with equity and Washington's constitution to prohibit the appointment of a trustee who is incapable or unwilling to act as a fair and impartial judicial substitute. ReconTrust is disqualified by the fact that a subsidiary owes its parent a fiduciary duty. J. Haskell Murray, Latchkey Corporations": Fiduciary Duties in Wholly Owned, Financially Troubled Subsidiaries, 36 Del. J. Corp. L. 577, 580 (2011) ("[W]hen the subsidiary is solvent: [it's duty is to] act in the best interest of the parent corporation, which is both the only party that can sue derivatively on behalf of the subsidiary corporation and is also the subsidiary's only shareholder.").

Under *Klem* an independent impartial judicial substitute is required by the constitution and equity. The Deed of Trust Act itself prohibits the trustee from having a fiduciary duty to any party with an interest in the deed at RCW 61.24.010 (3); any party having a fiduciary relationship with a party with an interest in the deed of trust is statutorily disqualified from accepting appointment or acting thereunder.

ReconTrust fails muster on both counts and was not eligible for appointment, or to continue acting, as a trustee of Bradburn's Deed of Trust where its parent BANA was the putative beneficiary; especially in this case where everyone knew BANA was only a mere

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239 NORTH OLYMPIC AVENUE
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TEL. 360.403.8700 /FAX 360.386.4005

servicer for Fannie Mae, which contended it owned the loan, but never offered any proof it was a beneficiary within the meaning of RCW 61.24.005(2).

6. Violation of RCW 61.24.030(7)(a): ReconTrust had Proof BANA was not the Beneficiary

It is indisputable that BANA made a declaration on behalf of Fannie Mae. Moreover, BANA acknowledged they believed Fannie Mae was the beneficiary and ReconTrust was so informed prior to the issuance of either Notice of Trustee's Sale.

RCW 61.24.030(7)(a) is unambiguous. It states:

> That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served; the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.

The record before this Court establishes beyond dispute that each defendant, including the trustee, was informed and believed Fannie Mae was the owner of Bradburn's note[17]. Under RCW 61.24.030(7)(a) ReconTrust could not have had sufficient proof of any claim by BANA to be the beneficiary and ReconTrust did not rely on any declaration of BANA that BANA was the beneficiary because no such declaration existed. Nevertheless, ReconTrust issued not one but two Notices of Trustee's Sale identifying BANA as the beneficiary. These facts show that RCW 61.24.030(7)(a) was facially violated, and further, it looks as if defendants were intentionally disregarding the law.

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[17] For clarity purposes, it should be noted the purported owner of the note is not necessarily the equivalent of the "beneficiary" as that term is defined pursuant to RCW 61.24.005(2). Although Fannie Mae claims to be the beneficial owner of the "loan", what does "loan" mean?

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239 NORTH OLYMPIC AVENUE
ARLINGTON, WA 98223
TEL. 360.403.8700 /FAX 360.386.4005

It is worth noting here that the declaration in March of 2010 should also have reasonably led ReconTrust to conclude, if it had not already known, that the appointment by MERS and Notice of Default identifying MERS as the Beneficiary were nullities and therefore several conditions precedent to issuance of a Notice of Trustee's Sale were unfulfilled. *See* supra.

7. Violation of RCW 61.24.030(8): The Only Notice of Default was Transmitted by ReconTrust as the Agent of MERS

It is undisputed and indisputable that the only Notice of Default issued was transmitted by ReconTrust on behalf of, as the agent of, and identifying MERS as the beneficiary.

RCW 61.24.030(8) requires that "at least thirty days before notice of sale shall be recorded, transmitted or served, written notice of default shall be transmitted ***by the beneficiary or trustee*** to the borrower…" (Emphasis added).

At the time the Notice of Default was transmitted MERS was not the beneficiary, and could not have lawfully been so, and ReconTrust was not yet appointed as trustee, and would never lawfully be so appointed. Additionally, ReconTrust did not send the Notice of Default as trustee it sent it as agent of MERS.

For the purposes of compliance with the DTA, which requires strict compliance, whether or not Bradburn ever received this Notice of Default or not is moot. The Notice of Default was insufficient to comply with the statute and could not be a predicate for a nonjudicial sale under the DTA. *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 106-7, 297 P.3d 677 (2013).

8. Violation of RCW 61.24.030(8)(l): The Only Notice of Default Identified MERS as the Beneficiary

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239 NORTH OLYMPIC AVENUE
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RCW 61.24.030(8)(l) requires that the Notice of Default provide "the name and address of the **owner** of any promissory notes or other obligations secured by the deed of trust". (Emphasis added).

The Notice of Default, see Stafne Declaration, Ex. 2, identifies MERS as the beneficiary. It is undisputed MERS was never the owner of the note. The Notice of Default was insufficient to comply with the statute. Compliance with this notice requirement was a condition precedent to invoking the DTA. *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d at 106-7. See also *Klem*, 176 Wn.2d at 729 quoting *Bain:*

> Among other things, "the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust" and shall provide the homeowner with "the name and address of the owner of any promissory notes or other obligations secured by the deed of trust" before foreclosing on an owner-occupied home. RCW 61.24.030(7)(a). (8)(l).

Bain, 175 Wn. 2d at 93-4.

9. Violation of RCW 61.24.040(1)(f): The Notice(s) of Trustee's Sale Misidentify the Beneficiary and MERS Ability to Assign any Beneficial Interest

RCW 61.24.040(1)(f) provides the form of the Notice of Trustee's Sale and requires it be in substantially the form provided. The relevant part, part 3, provides:

> which is subject to that certain Deed of Trust dated . . . . . ., . . ., recorded . . . . . ., . . ., under Auditor's File No. . . . ., records of . . . . . . County, Washington, from . . . ., as Grantor, to . . . ., as Trustee, to secure an obligation in favor of . . . ., **as Beneficiary**, the **beneficial interest in which was assigned by** . . . ., under an Assignment recorded under Auditor's File No. . . . . [Include recording information for all counties if the Deed of Trust is recorded in more than one county.] (Emphasis added).

As MERS was not a lawful beneficiary and did not have any interest in the note or deed of trust to convey, the statement that "the beneficial interest in [that certain Deed of Trust securing an obligation in favor of BANA] which was assigned by" MERS is false,

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239 NORTH OLYMPIC AVENUE
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deceptive and misleading. See *Kendrick v. Davis*, 75 Wn. 2d 456, 464, 452 P.2d 222 (1969) (quoting *Stansbery v. MedoLand Dairy, Inc.*, 5 Wn.2d 328, 337, 105 P.2d 86 (1940) (Assignee's interest can be no greater than the interest of the assignor at the time of assignment)); *Norlin v. Montgomery*, 59 Wn. 2d 268, 272 367 P.2d 621 (1961) ("Mrs. Palmer could not abrogate the lien by accepting a quit claim deed to the property from Montgomery for the reason that, when Mrs. Palmer took the quit claim deed from Montgomery, she received no better title to his equity in the contract than he was able to convey").

As BANA was not lawfully the beneficiary either because MERS assignment conveyed no interest in the note, debt, or deed or because BANA concedes as much in the March 12, 2011 declaration by BANA indicating Fannie Mae was the beneficiary, the identification of BANA as the beneficiary in the Notice(s) of Trustee's Sale is also false, deceptive and misleading.

10. Violation of RCW 61.24.040(6): ReconTrust Continued the Sale Beyond 120 Days

A trustee may not continue a sale beyond 120 days. RCW 61.24.040(6); *Albice v. Premier Mortgage Servs. of Wash., Inc.*, 157 Wn. App. 912, 921, 239 P.3d 1148 (Div. 2, 2010); *affirmed*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012). ReconTrust continued the sale of Bradburn's Property from October 29, 2010 until May 20, 2011 when the sale was executed, a span of 203 days. *See* Notice[s] of Postponement of Trustee's Sale dated October 12, 2010 (Declaration of Stafne Exhibit 6); November 2, 2010 (Declaration of Stafne Exhibit 7); December 13, 2010 (Declaration of Stafne Exhibit 8); and January 12, 2011 (Declaration of Stafne Exhibit 9).

ReconTrust issued a Notice of Trustee's Sale, which was recorded on February 17, 2011,

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239 NORTH OLYMPIC AVENUE
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between the January 12, 2011 Notice of Postponement of Trustee's Sale and the May 20, 2011 sale. This may have been an attempt to revive a dying sale at the 111th day but it cannot be permitted to have that effect. This "Notice of Trustee's Sale" was not but a Notice of Postponement of Trustee's Sale.

"Therefore, strictly applying the statute as required, we agree with the Court of Appeals and hold that under RCW 61.24.040(6), a trustee is not authorized, at least not without reissuing the statutory **notices [plural]**, to conduct a sale after 120 days from the original sale date, and such a sale is invalid." Albice 174 Wn.2d at 568 (emphasis added). The notices that are statutorily required are the Notice of Default and the Notice of Trustee's Sale. A second Notice of Default was not issued. Therefore, a second Notice of Trustee's sale could not be legally issued.

If the issuance of an intermediate Notice of Trustee's Sale were permitted, then ReconTrust would still not have had the authority to issue it for the reasons discussed supra; they still had not been appointed by a lawful beneficiary, did not have proof the putative beneficiary was the owner of the note, had actual knowledge the purported beneficiaries were not the owner of the note, no Notice of Default had been issued by a beneficiary or trustee--nothing changed, except defendants, through the agent trustee, stole Mr. Bradburn's home.

C. SALES IN VIOLATION OF RCW 61.24.010, 020, 030 AND 040 ARE VOID

Procedural irregularities <u>will</u> invalidate the sale if the procedural requirement under the DTA is one that never "invests" or "divests the trustee of authority to perform the sale." *Albice v. Premier Mortgage Servs. of Wn., Inc.,* 157 Wn. App. 912, 921, 239 P.3d 1148 (Div. 2, 2010); *affirmed*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012).

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239 NORTH OLYMPIC AVENUE
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Under *Schroeder v. Excelsior Management Group*, 177 Wn. 2d 94, 106-7, 297 P.3d 677, 687 (2013) failure to comply with the statutory requisites for invoking the DTA will make any sale thereunder void. The court states in *Schroeder* that:

> RCW 61.24.030 is not a rights-or-privileges-creating statute. Instead, it sets up a list of "requisite[s] to a trustee's sale." Among other things, it is a requisite to a trustee's sale that the deed contain the power of sale, .030(1); that the property not be used primarily for agricultural purposes, .030(2); that a default has occurred, .030(3); that there is no other pending action by the beneficiary to seek satisfaction of the obligation, .030(4); that the deed has been recorded in the relevant counties, .030(5); that the trustee maintain an address for service of process, .030(6); that the trustee have proof that the beneficiary is the owner of the obligation secured by the deed of trust, .030(7); and that the beneficiary has given written notice of the default to the debtor containing specific statutory language advising the debtors of their rights, .030(8). These are not, properly speaking, rights held by the debtor; instead, they are limits on the trustee's power to foreclose without judicial supervision.

At page 112, the unanimous Court also states:

> Again, the simple fact is that if Schroeder's property was primarily agricultural, then the trustee lacked the statutory power to foreclose nonjudicially. RCW 61.24.020, .030(2). Schroeder [the borrower] could not vest the trustee with authority the statute did not. Nor could the trial court. RCW 61.24.020, .030.

Accord *Albice v. Premier Mortgage Servs. of Wash., Inc.*, 157 Wn. App. 912, 921, 239 P.3d 1148 (Div. 2, 2010); *affirmed*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012). (After a sale has been appropriately commenced the trustee's failure to follow some DTA provisions, such as those relating to notice and timing, may divest a trustee of authority to conduct a sale.)

Defendants were required to nonjudicially foreclose on Bradburn's home in the property in strict compliance with the provisions of the DTA. Defendants' failure to substantially comply with the conditions precedent to invoking the DTA means the statute does not apply because the trustee was either not invested with the power of sale, or divested of the power of sale, and the nonjudicial foreclosure process was wrongful and renders the sale of Bradburn's

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house by these cooperating defendants void as a matter of law. *Schroeder*, at 106-7. Under such circumstances the DTA cannot be used as a sword against Bradburn or as a shield to protect defendants from liability from stealing his home and personal property. Id.

Pursuant to RCW 7.28.230 Bradburn continued to enjoy the right to sole and exclusive possession of the property absent foreclosure and sale by law. *Norlin v. Montgomery*, 367 P.2d 621, 59 Wn. 2d 268 (1961); *Kendrick v. Davis*, 75 Wn. 2d 456, 464, 452 P.2d 222 (1969); *Coleman v. Hoffman*, 115 Wn. App. 853, 64 P.3d 65 (Div. 2, 2003). Defendants are therefore liable to Bradburn for such damages as a jury may determine at trial for unlawful possession and damage to his property during unlawful possession.

D. DEFENDANTS HAVE VIOLATED THE CPA

To prevail on a CPA action, five elements must be established "(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

1. Unfair or Deceptive Practices- Violation of the DTA Provisions

Whether particular actions are deceptive or unfair is a question of law. *Leingang v. Pierce County Med. Bureau*, 131 Wn. 2d 133, 150, 930 P. 2d 288 (1997).

An act committed in violation of the DTA is unfair or deceptive under the CPA. See *Klem*, 176 Wn. 2d at 785. "To resolve any confusion we hold that a claim under the Washington CPA may be predicated upon a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest." *Klem*, 176 Wn.2d at 787.

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239 NORTH OLYMPIC AVENUE
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Each violation of the DTA was an unfair or deceptive act or practice. *Klem*, at 174. *See also e.g. Bavand* at 30 (violation of RCW 61.24.010(2) serves to fulfill the first element of a CPA claim); *Bain,* 175 Wn. 2d at 51 (Representing MERS as a beneficiary presumptively fulfills the first element of a CPA claim).

2. Unfair or Deceptive Acts - Robosigning

In *Klem* our Supreme Court set forth the following definition of "robosigning":

> Generally, robo-signing refers to "assembly-line signing and notarizing of affidavits for foreclosure cases, mortgage assignments, note allonges and related documents, all filed in courts and deed recorders in counties across the United States." Alan M. White, *Losing The Paper*— **[***34]** *Mortgage Assignments, Note Transfers and Consumer Protection,* 24 Loy. Consumer L. Rev. 486, 470 (2012).

Thus far, Washington courts have indicated robosigning practices violate the DTA where they are unfair or deceptive. Id. *See also Bavand.*

MERS, BANA, and ReconTrust have recorded false and misleading documents in the public record falsely indicating to borrower the entity which is entitled to foreclose on his home under the DTA. Further, these entities have submitted recordings to Snohomish County purporting to evidence interests in the land which they do not have and claiming to exercise powers under the DTA which they do not lawfully possess. Recording false or misleading documents in the public record is an unfair or deceptive act or practice and violates public policy. See RCW 40.16.030. *Klem*, 175 Wn. 2d 83 at 792-96.

The appointment of and continuance of proceedings to conduct an unlawful judicial sale of Bradburn's property by ReconTrust, on behalf of BANA and Fannie Mae, constitute unfair and or deceptive acts or practices. *Walker* at 16-17 ("Our Supreme Court has recognized, in the context of a CPA claim, "Where the beneficiary so controls the trustee so as

STAFNE TRUMBULL, LLC
239 NORTH OLYMPIC AVENUE
ARLINGTON, WA 98223
TEL. 360.403.8700 /FAX 360.386.4005

to make the trustee a mere agent of the beneficiary, then as principle [sic], the beneficiary may be liable for the acts of its agent." Here, we can plausibly hypothesize Select controlling

Quality's actions violating the DTA."). *Cf. Bain*, 175 Wn. at 117.

2. Trade or Business Element

There is no dispute that the above acts and/or practices occurred while defendants were engaged in their trades or businesses. MERS trade or business was always to hold itself out as something it could never be under Washington's DTA; namely a "beneficiary" within the meaning of the DTA.

Robosigning was a rampant business practice by the other defendants in this lawsuit within the context of nonjudicial proceedings based in deed of trust which deceptively and unfairly named MERS as a beneficiary.

3. Public Interest Requirements

The acts of MERS satisfy the public interest requirement as MERS is unlawfully represented to be the beneficiary in millions of security instruments, many of them in Washington. See *Bain,* 175 Wn. 2d at 51. The acts of the remaining Defendants satisfy the public interest requirement as these parties regularly engaged in, and continue to engage in, the making, collection, and enforcement of financial contracts and security interests therein for profit, reaching even greater numbers than MERS, and foreclosure under the DTA, which number in the thousands in most Washington counties and tens if not hundreds of thousands statewide, requires strict compliance.

As previously noted, thousands of Washington citizens are subject of foreclosure each year. The vast majority of such foreclosures occur at the hands of a handful of trustees like

STAFNE TRUMBULL, LLC
239 NORTH OLYMPIC AVENUE
ARLINGTON, WA 98223
TEL. 360.403.8700 /FAX 360.386.4005

ReconTrust, Quality Loan Service Corporation of Washington and Northwest Trustee Services, Inc. who "specialize in providing default services to mortgage lenders" and act at the behest of a handful of major banks engaged as servicers.

Failure to comply with the provisions of the DTA, recording false assignments and documents in support of an unlawful foreclosure, and the appointment of a trustee who would not or could not act as an impartial judicial substitute have caused Bradburn, and thousands of other Washington residents, to lose their homes without foreclosure and sale in accordance with the statutory or common law of Washington. See RCW 7.28.230; *Bavand* at 33 ("Here, Bavand's property was sold as a result of MERS's, OneWest's and RTS's actions. Thus, Bavand can show an injury to her property sufficient to withstand summary judgment as to her CPA claim.").

Further, the property itself, and personal property inside, was damaged upon the unlawful possession. This provides sufficient injury to allow a jury to determine the amount of damages which were proximately caused by defendants' undisputed violations of the DTA. See *Bavand* at 34 ("Further, as we have explained MERS's failure to comply with the Deeds of Trust Act and the consequent invalidity of the trustee's sale caused Bavand to lose her property and incur expenses. This evidence of injury and causation is sufficient to withstand a motion for summary judgment.").

Each of these unfair and deceptive acts or practices was undertaken pursuant to the instructions by and on behalf of Fannie Mae.[18]

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[18] "At the time of the foreclosure, BANA was the holder of the subject promissory note and **possessed authority**

STAFNE TRUMBULL, LLC
239 NORTH OLYMPIC AVENUE
ARLINGTON, WA 98223
TEL. 360.403.8700 /FAX 360.386.4005

VIII. CONCLUSION

This Court should grant Mr. Bradburn a partial summary judgment that ReconTrust, clothed by defendants BANA and Fannie Mae, misused the immense power granted under the DTA and through their actions caused Bradburn damages by wrongfully "stealing" Bradburn's home in violation of the aforementioned provisions of the DTA, and that defendants are liable for such damages as a jury determines. Further, this Court should grant Mr. Bradburn a partial summary judgment that defendants misuse of the DTA and related robosigning practices constituted violations of the CPA for which defendants are liable.

Dated this 4th Day of October, 2013

Respectfully submitted by,

STAFNE TRUMBULL, LLC

S.E. Sty

Scott E. Stafne, WSBA #6964
Stafne Trumbull, LLC
239 N. Olympic Avenue
Arlington, WA 98223
(360) 403-8700
scott@stafnetrumbull.com
Attorneys for Plaintif

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[18] **from Fannie Mae to enforce the subject note.**" See Decl. of Stafne quoting BANA response to RFA #19 (emphasis supplied); "BANA ADMITS that the [Mach 30, 2010] assignment was recorded with BANA's consent and in

[18] compliance with Fannie Mae's servicing guidelines." *Id.* quoting BANA response to RFA 22; "RECON ADMITS that

[18] the [March 30, 2010] assignment was recorded with RECON's consent and in compliance with the servicing guidelines of Federal National Mortgage Association." Id. quoting ReconTrust response to RFA #18; "BANA ADMITS that the [June 9, 2011] assignment was recorded with BANA's consent and in compliance with Fannie Mae's servicing guidelines." *Id.* quoting BANA response to RFA 21; "RECON ADMITS that the [June 9, 2011] assignment was recorded with RECON's consent and in compliance with the servicing guidelines of Federal National Mortgage Association." *Id.* quoting ReconTrust response to RFA #17; "RECON ADMITS that the subject bid amount was based, in part, on the monetary obligations due under the Note and was calculated pursuant to the servicing guidelines of Federal National Mortgage Association." Id. quoting ReconTrust response to RFA #22.

Certification of Service

I am a citizen of the United States, a resident of the State of Washington, over the age of 21 years, competent to be a witness in the above action, and not a party thereto; that on the 4th day of October, 2013 I caused to be served, by certified mail, a true copy of the foregoing PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT upon:

Stephen E. Todd

P.O. Box 13635

Mill Creek, WA 98082

Abraham K. Lorber

Lane Powell, PC

1420 5th Ave Suite 4200

Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

October 4, 2013

Shaina Dunn
Paralegal
Stafne Trumbull, LLC
239 N. Olympic Avenue
Arlington, WA 98223
(360) 403-8700