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

JACOB D. BRADBURN, Plaintiff, v. RECONTRUST COMPANY, N.A., ET, AL., Defendants.	CASE NO. 11-2-08345-2 REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Factually, the MERS affiliated defendants'[1] opposition ("opposition") to Bradburn's Cross Motion for Summary Judgment (BMFSJ) is virtually identical to the MERS Affiliated Defendants' motion for summary judgment. Their legal arguments also parrot those made in their motion for summary judgment. As a result, Bradburn will simply incorporate those portions of his rebuttal arguments herein, where they will also serve as a reply to defendants' opposition.

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1 The defendants in this case include ReconTrust, the successor trustee; BANA, the successor in interest to Countrywide entities including both its banking and servicing divisions, and MERS. When referring to them collectively Bradburn uses the term "MERS affiliated defendants". The term is borrowed from the Washington Supreme Court's collective reference to MERS affiliated entities in *Bain v. Metropolitan Mortg. Grp., Inc.,* 175 Wn.2d 83, 285 P.3d 34 (2012)

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MERS' defendants have done quite well with the courts by arguing that borrowers, like Bradburn, are simply "deadbeat debtors". But even if this is true (and for purposes of this motion Bradburn will not dispute he is in default) several of the summary judgment issues at hand involve the construction of DTA provisions to determine whether defendants lawfully invoked the power of sale authorized by the DTA. If not, they unlawfully sold Bradburn's home through misuse of the DTA and are liable for the consequences of their illegal acts and omissions.

Because Bradburn is willing to concede (but only for purposes of BMFSJ) that he is in default, this Court needs construe the meaning of the following three provisions of the DTA: RCW 61.010(3) & (4)[2], RCW 61.24.030(7)[3]and RCW 61.24.005(2)[4] to determine whether the MERS affiliated defendants complied with these provisions. In construing Washington statutory provisions as a Superior Court of the State of Washington it is necessary to follow controlling precedent of Washington appellate courts; not the published and unpublished decisions of federal courts at any level, except for the United States Supreme Court. This is especially so with regard to construing the DTA.[5]

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[2] Provisions of the DTA which Bradburn claims required a "neutral judicial substitute" oversee the nonjudicial proceedings resulting in the sale of his home purportedly under the authority of the DTA.

[3] A requisite provision of the DTA imposing those standards of proof necessary for a "neutral judicial substitute" to initiate nonjudicial foreclosure proceedings on borrowers (i.e. deadbeat debtors) which can result in the sale of their home pursuant to the authority granted by the DTA.

[4] The statutory definition of "Beneficiary".

[5] A state court may find federal authority or common law persuasive or guiding, but the court, in doing so, is instructed to make such fact clear by plain statement of independent state grounds in its judgment or opinion. *See State v. Chrisman*, 100 Wn.2d 814, 817, 676 P.2d 419 (1984)(a plain statement of independent state grounds "advances the principles of federalism and comity between federal and state government which inhere in our system[;]" and, "[a] plain statement of independent state grounds is said to foster the development of state law free from federal interference"); *see also, State v. Chenoweth*, 160 Wn.2d 454, 470-71, 158 P.3d 595 (2007); *c.f., McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 100, 233 P.3d 861 (2010) (Whether federal law preempts state law depends upon whether that was the intent of Congress. Generally applicable state laws, such as contract or commercial law, are not preempted where "they only incidentally affect the lending operation [***] or are otherwise consistent with the purposes of [preemption]."); c.f., GR 14.1(b) (rules on citing only to published

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II. THE RULES OF STATUTORY CONSTRUCTION APPLICABLE TO DTA

A. THE COURT'S OBJECTIVE IS TO DETERMINE THE LEGISLATURE'S INTENT

When interpreting statutes "the court's objective is to determine the legislature's intent." *See State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, the court should " 'give effect to that plain meaning.' " *Id.* (citing, *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). In determining the plain meaning of a provision, the court looks to the text of the statutory provision in question, as well as "the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Id.* An undefined term is "given its plain and ordinary meaning unless a contrary legislative intent is indicated." *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 920-21, 969 P.2d 75 (1998). The term "plain meaning" necessarily means the court does not look beyond the statutory language itself. *Udall v. TD Escrow Services, Inc.*, 159 Wn. 2d 903, 915-16, 154 P.3d 882 (2007). "Where statutory language is plain and unambiguous, a court will not construe the statute but will glean the legislative intent from the words of the statute itself." Id., at 917 (citing *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005)). If, after this inquiry, the statute is susceptible to more than one reasonable interpretation, it is ambiguous and the court "may resort to statutory

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opinions of other jurisdictions). Because of the Washington Supreme Court's criticism of federal court rulings interpreting Washington's DTA as being decided without consideration of the DTA's statutory language, see Bradford's Opposition to defendants MFSJ, p. 23, note 17, an independent analysis of any DTA statutory requirement is merited in the absence of a controlling State Authority, see e.g., *Bain,* at 112-114, and the Supreme Court's most recent suggestion in *Klem v. Wash. Mutual Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013) that the DTA may violate the Washington Constitution; notwithstanding the urgings of four justices that this possibility should not have been raised by the majority. *Klem v. Wash. Mutual Bank*, 176 Wn.2d 771, at note 11, 295 P.3d 1179 (2013); Madsen Concurrence at 797; Fairhurst concurrence at 807.

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construction, legislative history, and relevant case law for assistance in discerning legislative intent." *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007).

B. STATUTORY CONSTRUCTION OF THE DTA

Additional rules have evolved over time relating to judicial interpretation of the DTA. For example, the "procedural requirements" of foreclosure statutes, like the DTA or Ch. 61.12, which deprive persons of real property must be given the strictest construction and be executed precisely as authorized. *State ex rel. Willars v. McConnaughey*, 33 Wash. 571, 575-576, 74 P. 678 (1903). Therein:

> [s]tatutes by the authority of which a citizen may be deprived of his estate must have the strictest construction, and the power conferred must be executed precisely as it is given, and any departure from it will vitiate the proceedings; and this is so whether it be in the exercise of a public or private authority, whether it be ministerial or judicial.

State ex rel. Willars v. McConnaughey, 33 Wash. 571, 575-576, 74 P. 678 (1903). These principles have recent modern day progeny. See also *Schroeder v Excelsior Mgmt. Grp.*, 177 Wn.2d 94, 297 P. 3d 677 (2013) (Statutory conditions precedent must be satisfied before the DTA can be invoked as a sword or shield); *Klem v. Wash. Mutual Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013) (only a neutral judicial substitute can oversee nonjudicial foreclosure proceedings intended to culminate in the taking and sale of a person's home).

Private sales must be completed under the strict terms of the DTA. *See Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 906-07, 915-16, 154 P.3d 882 (2007); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 111-12, 752 P.2d 385 (1988)(this is also because the DTA dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures); *see also, CHD, Inc. v. Boyles*, 138

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Wn. App. 131, 137, 157 P.3d 415 (2007)(further because nonjudicial foreclosures lack the oversight inherent in judicial foreclosures, we strictly apply and interpret the Act in the borrower's favor). "Procedural irregularities [***] can [and do] invalidate the [unlawful] sale." *Udall.*, 159 Wn.2d at 911; *See also Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 112-113, 297 P.3d 677 (2013); *Klem v. Washington Mut. Bank,* 175 Wn.2d 771, 788, 295 P.3d 1179 (2013); *Albice v. Premier Mortgage Servs. of Wash., Inc.*, 174 Wn.2d 560, 568, 276 P.3d 1277 (2012); *Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985); *Plein v. Lackey,* 149 Wn.2d 214, note 6, 67 P.3d 1061 (2003).

Finally, and importantly for purposes of the cross motions before this Court, the DTA must be construed to achieve the three objectives for allowing nonjudicial foreclosures. *See Cox v. Helenius*, 103 Wn. 2d 383, 387 693 P.2d 683 (1985). These objectives include: First, the nonjudicial foreclosure process should remain efficient and inexpensive. Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, the process should promote the stability of land titles. *Id.*

C. COURTS MUST CONSTRUE STATUTES SO AS TO BE CONSTITUTIONAL

As noted above, it is a familiar axiom of statutory construction that if a statute is subject to two possible interpretations; it is ambiguous and a court "may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." *Christensen v. Ellsworth*, supra. However, this rule is subject to an exception when a statute may violate the Constitution. Thus, if a statute is subject to two possible interpretations; one of which will render it constitutional and the other not, the legislature will be presumed to have intended a constitutional result, where possible to do so. *Cf. Yaw v.*

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Walla Walla School Dist., 106 Wn.2d 408, 413-14, 722 P.2d 803 (1986)(Constitutional interpretation is possible) with *Household Fin. Corp v State*, 40 Wn. 2d 451, 457, 244 P. 2d 260 (1952) (Constitutional interpretation is not possible.)

This principle trumps the rule of statutory construction that the plain language of a statute must be followed[6] and/or requires statutes to be altered where this can be done without frustrating legislative intent.[7] Recently, as will be discussed herein, the Supreme Court utilized this principle in construing provisions of the DTA relating to the duties of a trustee pursuant to RCW 61.24.010. See *Klem v. Wash. Mutual Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013). This is an important point to remember when being asked to apply federal precedent which fails to take the backdrop of Washington's Constitution into account.

III. APPLICATION OF ABOVE STATUTORY CONSTRUCTION PRINCIPLES TO PROVISIONS OF THE DTA PROVISIONS IN DISPUTE

A. *STATUTORY CONSTRUCTION OF RCW 61.24.010*

Bradburn will concede there is legislative history suggesting that some legislators[8] did not intend to impose a statutory requirement on a trustee to act impartially between a borrower and beneficiary when presiding over nonjudicial foreclosure proceedings under the DTA in three party deed of trust situations[9]. Of course, this will not matter if the meaning of

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[6] *Ledgering v State*, 63 Wn. 2d 94, 101-105, 385 P.2d 522 (1963)

[7] Compare *Hall v. Niemer,* 97 Wash.2d 574, 582-84, 649 P.2d 98 (1982) with *State v. Abrams*, 163 Wn. 2d 277, 178 P.3d 1021 (2008).

[8] Statements or opinions of individual legislators are not an authoritative guide in determining such intent. See *Snow's Mobile Homes, Inc. v. Morgan,* 80 Wash.2d 283, 494 P.2d 216 (1972).

[9] MERS defendants' argument in their opposition that suggests the legislature expressly approved of subsidiary corporations acting as trustee for their owner corporation beneficiary is based on language in *Cox v. Helenius*, 103 Wn.2d 383, 390, 693 P.2d 683 (1985) which recognized the legislature had removed an earlier restriction on subsidiaries serving as a trustees for a beneficiary in nonjudicial proceedings which led to a sale. However, MERS defendants misread the Supreme Court's reaction to the legislature's apparent attempt to allow a trustee to have such "conflict of interests". In Cox, the Court states: ***It appears that the dual responsibility of trustee and attorney for the beneficiary precipitated at least some of the trustee's breaches. Although the dual role***

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the statute is plain on its face and not inconsistent with other provisions of the DTA. As currently written RCW 61.24.010 provides in pertinent part:

> Trustee, qualifications - Successor Trustee.
> [* * *]
> (2) ... the beneficiary shall appoint a trustee or a successor trustee. Only upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee.
> (3) The trustee or successor trustee shall have no fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust.
> (4) The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor.

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this trustee had troubles us, the Legislature specifically amended the statute in 1975 to allow an employee, agent or subsidiary of a beneficiary to also be a trustee.

See Laws of 1975, lst Ex. Sess., ch. 129, § 2. The amendment furthers the general intent of the act that nonjudicial foreclosure be efficient and inexpensive, and in the ordinary case would present no problem. ***However, the statute may not allow attorneys to do that which the Code of Professional Responsibility prohibits. The spirit of CPR DR 5-105(B) would seem to condemn action of the nature that occurred here***. Where an actual conflict of interest arises, the person serving as trustee and beneficiary should prevent a breach by transferring one role to another person. [Emphasis Supplied] Cox, 103 Wn. 2d at 390.

The Court's statement that "the [DTA] statute may not allow attorneys to do that which the Code of Professional Responsibility prohibits" indicates the Court expects to continue to control the ethical conduct of attorneys under its role as the final arbiter of those matters involving the judicial sphere of the Separation of Powers inherent in our Constitution. In The Washington State Bar Ass'n v. State, 125 Wn.2d 901, 890 P.2d 1047 (1995) our Court stated that "***a legislative enactment may not impair this court's functioning or encroach upon the power of the judiciary to administer its own affairs. The ultimate power to regulate court-related functions . . . belongs exclusively to this court***." Id at 909. [Emphasis Supplied] The regulation of the practice of law is within the sole province of the judiciary and legislative encroachment may be held to violate the separation of powers doctrine by the court. *Zylstra v. Piva,* 85 Wn.2d 743, 539 P.2d 823 (1975); *Hagan & Van Camp*, 96 Wn.2d 443, 635 P.2d 730 (1981). *Cf., Jones v. Allstate Ins. Co.*, 146 Wash. 2d 291, 45 P.3d 1068 (2002). Similarly, control over all judical decision-makers and those who influence them, from district court judges to trustees exercising making judicial inquiries via the power of the state, remains firmly under the control of the Supreme Court. See generally, Code of Judicial Conduct, Canons 1-4; Rules of Professional Conduct, 1.12; 2.4; 3.4; 3.5. See generally Disciplinary rules for judges.Ever since *Cox* was decided the Supreme Court has hinted (and perhaps in *Klem* proclaimed) that it was not going to allow trustees to become an unchecked fourth branch of government even if this is what the legislature intended. See e.g. *Bain*, 175 Wn. 2d at 94, note 4 (In 2008, the legislature amended the deed of trust act to provide that trustees did not have a fiduciary duty, only the duty of good faith. LAWS OF 2008, ch. 153, § 1, codified in part as RCW 61.24.010(3) ("The trustee or successor trustee shall have no fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust. This case does not offer an opportunity to explore the impact of the amendment."). *Klem*, which did have occasion to proclaim the impact of RCW 61.24.010(4) decided that regardless of what the legislature intended the sister provision to RCW 61.24.010(3) must be interpreted so as to be consistent with the constitution and equity. *See infra*.

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The plain words of RCW 61.24.010(3) state: the "trustee shall have no fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust." The terms "fiduciary duty or obligation" are well understood under Washington law and American jurisprudence generally. *Bassan v. Investment Exch.*, 83 Wn.2d 922, 928,524 P.2d 233 (1974)[10]; *Cogan v. Kidder, Mathews & Segner, Inc.*, 97 Wash. 2d 658, 667, 648 P.2d 875, (1982)(quoting Restatement (Second) of Agency § 469 (1958))[11]; *State v. White*, 80 Wash. App. 406, 907 P.2d 310 (Div. 2, 1995).[12] They include, at a minimum, a "duty of loyalty" and a duty of confidentiality". Bradburn submits that RCW 61.24.010(3) requires, at a minimum, that a trustee performing a nonjudicial foreclosure not owe a fiduciary duty of loyalty or confidentiality to one of the parties claiming an interest in the property subject to the deed of trust as this would conflict with the plain language of the statute; which is not ambiguous.

Under the "plain language" Cannon of Statutory Construction this Court should next review RCW 61.24.010(3) in "the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." Section, RCW 61.24.010 of which subsection (3) is a part deals "the qualifications, duties, and authority of trustees" who can preside over nonjudicial foreclosure proceedings and ultimately exercise the power of sale

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[10] "Once the limited partner has joined the partnership he has no effective voice in the decision-making process. He must, then, be able to rely on the highest standard of conduct from the general partner. Any deviation from this must be clearly stated in terms that would give the limited partner the option of deciding whether or not, in the first instance, to join the partnership. The duty of loyalty resulting from a partner's fiduciary position is such that the severity of a partner's breach will not be questioned. The question is only whether there has been any breach at all."

[11] "An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty".

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under the DTA. In this regard, the first subsection (1) states what entities can be a trustee. The next subsection, (2) states when (after appointment by a beneficiary is recorded) a successor trustee shall "be vested with all powers of an original trustee". This next subsection, (3), requires the trustee to owe no fiduciary duty or obligation" to anyone claiming an interest in the property through the deed of trust. Finally, the last subsection, (4), states the "trustee has a duty of good faith to the borrower, beneficiary, and grantor." Like subsection (3), the meaning of RCW 61.24.010 as a whole section appears clear on its face.

The context of RCW 61.24.010 must be viewed with regard to the role a trustee plays in presiding over those proceedings which can, and did here, result in the taking of a man's home. In *Klem v. Washington Mut. Bank*, 175 Wn. 2d 771, 295 P.3d 1179 (2013) the Washington Supreme Court stated: "[T]he trustee undertakes the role of the judge…[in nonjudicial proceedings]". *Klem*, 175 Wn. 2d at 790.

Thus far there would appear to be nothing in the language of RCW 61.24.010(3) or the subsections within RCW 61.24.010 generally, or the DTA, RCW CH 61.24, generally which suggests any ambiguity which would make resort to legislative history appropriate for the proposition urged by the MERS affiliated defendants; namely, that the legislature did not intend that a successor trustee, like ReconTrust, could not owe a fiduciary duty or obligation to a purported beneficiary (in this case its corporate owner, BANA), while acting as a trustee. However, even if this Court were to indulge the MERS affiliated defendants and consider legislative history suggesting the legislature approved of such relationships, this Court would still need to construe the DTA in a manner so that the taking and sale of a Bradburn's home by a substitute judge who is "wholly owned" by one of the parties is undertaken consistent

[12] "[RPC 1.9's] prohibition against "side-switching" incorporates two ethical obligations: the duty of

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with the terms of Washington's Constitution. *Klem v. Washington Mut. Bank*, 175 Wn.2d 771, 790, 295 P.3d 1179 (2013).

Although the Supreme Court has not construed RCW 61.24.010(3), it did refer to this subsection in *Schroeder v Excelsior Mgmt. Grp.*, 177 Wn.2d 94, 297 P. 3d 677 (2013) at note 3. In *Schroeder* the purported beneficiary was represented by his attorney, who was also a trustee under the DTA: Mr. Haberthur. The borrower asked Haberthur (presumably in his role as trustee) to delay the sale so that he could investigate the appropriateness of the nonjudicial foreclosure proceedings. "According to Pfefer's declaration, Haberthur declined to postpone the foreclosure sale 'insisting he would not subject ***his client*** to fishing expedition by the Plaintiff [borrower]" *Id.*, 177 Wn.2d at 101-2 (emphasis supplied). The statement quoted above was followed by a footnote, in which the Supreme Court (in an unanimous decision) stated:

> The issue has not been briefed. It is not before us, and we do not mean to imply any finding of improper action by the trustee. However, we are uncomfortable reciting these facts without making an observation concerning the multiple roles played by Haberthur lest we seem to be tacitly approving of an attorney for a party acting as the trustee. The deed of trust act does not specifically permit or prohibit an attorney for a party acting as a trustee *but imposes a duty of good faith on the trustee that may, at least in contested foreclosure actions, be difficult for a party's attorney to execute. RCW 61.24.010(4). We note the act specifically states that the trustee "shall have no fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust." RCW 61.24.010(3). However, we also note this court has stated that to prevent property from being wrongfully appropriated through nonjudicial means and to avoid constitutional and equitable concerns, at a minimum, a foreclosure trustee must be independent and "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 debtor." Klem v. Wash. Mutual Bank, 176 Wn.2d 771, 790, 295 P.3d 1179 (2013). "The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence." RPC 1.8 cmt 17. "[A]ttorneys owe an undivided duty of loyalty to the client." Mazon v. Krafchick, 158 Wn.2d 440, 448-49, 144 P.3d*

confidentiality and the duty of loyalty.

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> *1168 (2006). At the very least, on review, it makes it difficult to determine which of Haberthur's acts were made in his capacity as trustee and which as counsel for the beneficiary.* Thus, we often simply say Haberthur instead of trustee or counsel.

Id., at note 3. (Emphasis Supplied)

Klem clearly relies on its interpretation of the constitution and equity for the proposition that a trustee should be a neutral judicial substitute; regardless of whether the trustee is also an attorney. This, of course, goes a step further than the Supreme Court did in *Cox*, where the Court's disapproval of that trustee's actions appeared premised on Separation of Powers concerns. See note 9, supra. In *Klem*, this Court quoting *Bain* stated:

> As a pragmatic matter, it is the lenders, servicers, and their affiliates who appoint trustees. Trustees have considerable financial incentive to keep those appointing them happy and very little financial incentive to show the homeowners the same solicitude. *Bain v. Metro. Mortg. Grp., Inc.* 175 Wn.2d 83, 95-97, 285 P.3d 34 (2012). However, despite these pragmatic considerations and incentives
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> > under our statutory system, a trustee is not merely an agent for the lender or the lender's successors. Trustees have obligations to all of the parties to the deed, including the homeowner. RCW 61.24.010(4) ("The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor."); *Cox v. Helenius*, 103 Wn.2d 383, 389, 693 P.2d 683 (1985) ("[A] trustee of a deed of trust is a fiduciary for both the mortgagee and mortgagor and must act impartially between them.") (citing GEORGE E. OSBORNE, GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 7.21 (1979)).
>
> In a judicial foreclosure action, an impartial judge of the superior court acts as the trustee and the debtor has a one year redemption period. RCW 61.12.040; RCW 4.12.010; RCW 6.23.020(1).
>
> In a nonjudicial foreclosure, the trustee undertakes the role of the judge as an impartial third party who owes a duty to both parties to ensure that the rights of both the beneficiary and the debtor are protected. *Cox*, 103 Wn.2d at 389. While the legislature has established a mechanism for nonjudicial sales, ***neither due process nor equity will countenance a system that permits the theft of a person's property by a lender or its beneficiary under the guise of a statutory nonjudicial foreclosure.*** [10] ***An independent trustee who owes a duty to act in good faith to exercise a fiduciary duty to act impartially to fairly***

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> ***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.***[11]

Klem, 176 Wn. 2d at 789-90 (emphasis supplied).

Significantly, the majority opinion in *Klem* (the result of which was concurred with by all the justices) does not ever clearly state which constitutional provision requires a trustee to be a neutral judicial substitute[13]. And this Court might not even have to consider this matter, if it believes the that the meaning of RCW 61.24.010(3) is plain on its face; i.e. that the successor trustee "shall have no fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust".

If this Court chooses to delve into the nature of those constitutional obligations which require a trustee to be a "neutral judicial substitute" Bradburn contends their genesis is in Washington's due process clause and/or Separation of Powers doctrine.

"It is axiomatic that [a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876, 129 S. Ct. 2252, 173 L. Ed. 2d 1208

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[13] The requirement that a trustee be neutral is a common one; but Klem is one of the few decisions to claim it is constitutionally based. *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 noteholder 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 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."). In *Cox v. Helenius*, 693 P.2d 683, 686 (Wash. 1985) our Supreme Court stated "[A] trustee of a deed of trust is a fiduciary for both the mortgagee and mortgagor and must act impartially between them"; 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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(2009) (alteration in original) (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955)). "This applies to administrative agencies which adjudicate as well as to courts." *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975)[14]. There is, of course, no reason why such a rule should not apply to DTA trustees, who must apply the DTA to the facts of those disputes, which come before them in order to invoke and perform a State sanctioned power of sale.

Justice Hugo Black writing for a six member majority stated this constitutional "principle of fairness" simply and eloquently:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. ***Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."*** *Tumey v. Ohio*, 273 U.S. 510, 532. (Emphasis Supplied)

In re Murchison, 349 U.S. at 136. *Bain* and *Klem* set out in clear terms why modern integrated foreclosure enterprises, like the one which took Bradburn's home, must be viewed by the judiciary with a jaundiced eye. "As a pragmatic matter, it is the lenders, servicers, and their affiliates who appoint trustees. Trustees have considerable financial incentive to keep those appointing them happy and very little financial incentive to show the homeowners the same solicitude." *Klem*, 175 Wn. 2d at 789 (quoting *Bain*, 175 Wn. 2d at 95-97).

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[14] Bradburn's claims are based on the Washington Constitution. However, this Court has held that federal precedent relating to similar provisions of the Washington Constitution, such as the due process clause, also constitute precedent under the equivalent state Constitutional provision. See e.g. *State v Gunwall* 106 Wn. 2d 54, 720 P.2d 808 (1986).

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Another likely source for the holding by the *Klem* majority that the Constitution and equity require, at a minimum, that the trustee be neutral judicial substitute is the separation of powers doctrine. See *Cox,* at 389 and *Klem*'s citation to Cox, at 176 Wn. 2d at 778. A recent decision handed down by the Supreme Court on October 17, 2013 explains that Washington's

> ... separation of powers jurisprudence guards the balance of powers between branches. While we have acknowledged the important role that separation of powers principles play in maintaining individual liberty, our separation of powers jurisprudence directly "protects institutional, rather than individual, interests." [cites]. This recognizes that "the damage caused by a separation of powers violation accrues directly to the branch invaded," weakening its ability to check the other branches. *Id.* Consequently, we test for separation of powers violations by asking "'whether *10] the activity of one branch threatens the independence or integrity or invades the prerogatives of another.'" *Brown,* 165 Wn. 2d at 718 (quoting *Carrick,* 125 Wn. 2d at 135.

Freedom Found. v. Gregoire, __ Wn. 2d __, __ p. 3rd. __, 2013 Wash. LEXIS 858 at **9-10 (2013).

As will be seen *infra.,* considerations of judicial integrity necessary to protect the judicial sphere of power from a loss of public confidence (which likely has already begun) require the Supreme Court demand the same fairness for borrowers appearing before trustees as would be afforded by a Superior Court pursuant to its enumerated original jurisdiction to hear all cases involving the title and possession of real estate. *Klem* makes clear that a trustee is acting as a legislatively created judge for purposes of applying the DTA to the facts of any proposed nonjudicial foreclosure proceedings.

The powers the legislature has given the trustee are not legislative or administrative. Ledgering v. State, 63 Wn.2d 94, 101-5, 385 P.2d 522, (1963). They are clearly judicial. See e.g. In *Prentis v Atlantic Coast Line Co.*, 211 U.S. 210, 53 L.Ed. 150, 29. S. Ct. 67 (1908) Justice Oliver Wendell Holmes described the distinction between judicial and other types governmental powers:

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> A judicial inquiry investigates, declares, and enforces liabilities as the stand on present or past facts and under laws supposed to exist. That is its purposes and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter.

Id., 211 U.S. at 226.

The Supreme Court has declared its role in the judicial sphere cannot be abridged by the other branches of government. Thus, even to the extent the legislative and executive branches wanted to create a biased court for their benefactors they cannot do so without the acquiescence of the judiciary; which has long signaled that it will not allow judicial decision-makers to have, or even to appear to have, conflicts of interest. *Cox*, 103 Wn.2d at 390; Klem, 175 Wn.2d at 790.

B. STATUTORY CONSTRUCTION OF RCW 61.24.070(a)

RCW 61.24.070(a) 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.

It is discussed at length in Bradburn's opposition to MERS defendants' motion for summary judgment. *See* Opposition, pp. 21-26. There is no reason to repeat those statutory construction arguments here. But counsel will take this opportunity to make clear that the quoted material at page 25 of his opposition can be found at *Beaton v. JPMorgan Chase Bank N.A.*, 2013 U.S. Dist. LEXIS 42806, at **17 (W.D. Wash. Mar. 25, 2013).

Bradburn will also urge this Court yet another time not to buy into MERS reliance on federal judges to protect Fannie Mae and its MERS affiliated defendants. These decisions ignore Bain's rejection of the Hovarth premise that a UCC holder is the equivalent of a DTA

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beneficiary. They then go a step further to protect MERS affiliated clients by reading the word owner out of RCW 61.24.030(7)(a) which prevents nonjudicial foreclosure by a beneficiat that does not own the note.

Each of these federal cases (and all the others like them) ignore our State Supreme Court's instruction that each word in the DTA should be given it own meaning.

> "We are required, when possible, to give effect to every word, clause and sentence of a statute. [cite], *citing* 2A C. Sands, *Statutory Construction* § 46.06, at 63 (4th ed. 1973). No part should be deemed inoperative or superfluous unless the result of obvious mistake or error. 2A C. Sands, *supra*."

See Cox v Helenius, 103 Wn. 2d at 388-9.

It should have been obvious to these federal judges had they studied the DTA that the words "owner" and "beneficiary" are used separately and distinctly numerous times in the statute. If these same judges had followed our Supreme Court's instruction that the DTA must be interpreted strictly in favor of the debtor, there is no way they could have simply *written* the word "owner" out of the DTA by construing the statute as if the legislature had not written the word in.

Federal Courts (and judges) were never intended to be the final arbiters of the meaning of state law. See e.g., *Huddleston v. Dwyer*, 322 U.S. 232, 64 S.Ct. 1015, 88 L.Ed. 1246 (1944)(Federal courts are bound to follow the decisions of the highest court of the state). Of course, they can avoid this Constitutional restriction on their power by just ignoring it.

Abuses of power by the federal government, like those being imposed on Washington homeowners by the federal government now, were contemplated by our founding fathers, who devised a federalist system based on dual sovereignty. Both the National and State Governments have elements of sovereignty the other is bound to respect. Arizona v. United States, 132 S. Ct. 2492, 2500, 183 L. Ed. 2d 351 (2012). See also, Gregory v. Ashcroft, 501

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U.S. 452, 457, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995) (Kennedy, J., concurring). From the existence of two sovereigns follows the possibility that laws can be in conflict or at cross-purposes. Arizona v. United States, 132 S. Ct. at 2500. Prior to the advent of MERS and the attempted securitization of mortgages, matters relating land were considered to be issues of local (State) concern. Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25, 79 S. Ct. 1070, 3 L. Ed. 2d 1058 (1959); Cf. Burford v. Sun Oil Co., 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943). That changed when MERS affiliated entities devise their illicit scheme to destroy the traditional methods states used to regulate title and possession of land through an open process.

James Madison argued in The Federalist that the division of power between national and state governments would check abuses of governmental power. The Federalist No. 51, at 351 (J. Madison) (J. Cooke ed. 1961). Madison contended that "[i]n the compound republic of America a double security arises to the rights of the people. Id. The different governments will control each other; at the same time that each will be controlled by itself." Id.

Thomas Jefferson stated similar beliefs in a letter he wrote in 1816. See Jones Merritt, D., The Guarantee Clause and State Autonomy: Federalism For A Third Century, 88 Colum. L. Rev 1, 22 (Jan., 1988)(internal quotations and citations omitted). In that letter Jefferson wrote:

> [T]he way to have good and safe government is not to trust it all to one, but to divide it among the many, distributing to every one exactly the functions he is competent to . . . . It is by dividing and subdividing these republics from the great national one down through all its subordinations, until it ends in the administration of every man's farm by himself; by placing under every one what his own eye may superintend, that all will be done for the best . . . . The elementary republics of the wards, the county republics, the State republics,

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> and the republic of the Union, would form a gradation of authorities, standing each on the basis of law, holding everyone its delegated share of powers, and constituting truly a system of fundamental balances and checks for the government.
> Id.

Alexander Hamilton, coauthor of The Federalist, agreed federalism would restrain governmental tyranny. See The Federalist No. 28, at 179 (A. Hamilton) (J. Cooke ed. 1961). Hamilton predicted that dual sovereignty would keep both the state and federal government in check. He noted that, "Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, ***and these [state governments] will have the same disposition towards the general government.***" Id. at 179. [Emphasis Supplied] Hamilton wrote further and said that "***[i]t may safely be received as an axiom in our political system that the state governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority.***" Id. at 179-80.

But MERS and affiliated foreclosure machines, aided by federal judges who divine the law from the heavens, rather than discovering the law in words of statutes, have changed all this. At least where the DTA is concerned state judges should not follow federal courts blindly because they have repeatedly demonstrated that they would rather create state common law, than certify issues involving the construction of the DTA to the Washington Supreme Court for resolution.

Bradburn continues to maintain as a part of this reply theme, that this Court must construe this RCW 61.24.030(7) in a manner consistent with the plain language of the statute and so that it is constitutional. *See* supra., at pp. 2-5. None of the federal cases cited by defendants interpreting RCW 61.24.030(7) meet these standards.

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The legislature intended the trustee have proof that there is a beneficiary who owns the promissory note secured by the deed of trust.

The Bank's "legislative construction" mantra regarding the first sentence of RCW 61.24.030(7)(a) is the legislature did not mean the beneficiary needed proof the beneficiary ***"owned"*** the note even though this subsection plainly states so, there is no ambiguity in the statute, and our Supreme Court has ruled that the trustee must have proof the "beneficiary" owns the note. *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn. 2d 83, 93-94[15], 285 P.3d 34 (2012). Even, if this Court ignored the clarity of the statute and its interpretation by our Supreme Court and looked at the legislative history of this sentence, this would do nothing more than drive the nails deeper into the coffin of defendants' argument the statute does not mean what it says. See Dkt 48, Motion to Take Judicial Notice of the Legislative History of the DTA. In the version of RCW 61.24.030(7)(a) enacted into law the legislature struck the words "actual holder" and replaced this term with the word "owner". Now why would the legislature have done this if they believed the two words meant the same thing?

What proof is necessary for compliance with RCW 61.24.030(7)(a)?

Both sentences of RCW 61.24.030(7)(a) are based on the premise that there is a "beneficiary", but nowhere do the MERS affiliated defendants acknowledge that there must be any proof of the existence of a beneficiary which meets the definition of RCW 61.24.002(5). The plain language of the statute that 1.) There must be proof the "beneficiary" is the owner of the promissory note and 2.) a declaration by the "beneficiary" can be accepted as proof indicates that trustee must have proof there is a "beneficiary". In this case, Bradburn or

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[15] The Supreme Court identifies as part of the trustee's duties: "Among other things, 'the trustee shall have proof [***94**] 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

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challenges the very existence of any beneficiary within the meaning of the DTA and the MERS affiliated defendants have not responded with "proof" that any "beneficiary" exists.

It is not enough for the trustee to simply accept a declaration of some unknown person with unstated personal knowledge expressing a legal conclusion based on unauthenticated hearsay as to who is the "beneficiary". See ER 602, 701, 801.

Bain establishes that it is the law, i.e. statutory definition of "beneficiary" applied to the facts, i.e. evidence, which must be determinative. In *Bain* the facts showed the contractually identified beneficiary MERS was not a "beneficiary" within the meaning of the DTA because MERS never held the promissory note. Based on *Bain* and the language RCW 61.24.030(7)(a) it is Bradburn's contention that the trustee must have proof not only of the existence of a beneficiary within the meaning of RCW 61.24.002(5), but must also demonstrate the beneficiary's identity and ownership of the promissory note secured by the deed of trust before the MERS affiliated defendants could have utilized the DTA to take and sell Bradburn's home.

Further, in accordance with the principle of statutory construction that statutes must be interpreted so that they are constitutional[16], Bradburn contends the trustee was required to have created and maintained an administrative record of the proof it relied upon for establishing the existence of a beneficiary and owner of the promissory note. See BMFSJ,

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other obligations secured by the deed of trust, before foreclosing on an owner-occupied home." (citing RCW 61.24.030(7)(a), (8)(l)I. Id., at pp. 93-4.

[16] Bradburn expresses no opinion with regard to whether the DTA can be construed so as to be constitutional where it purports to give statutorily created trustees original jurisdiction over disputes involving the title and possession of real estate. *See* Const. art. 4, § 6., which states in pertinent part: "The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property...". *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 ... .') Const. art. 4, § 6. The legislature cannot rescind this constitutional jurisdiction or vest it exclusively in another court.)" *Id.*, at 141.

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note 13[17]. *See also* Campbell, John E., Can We Trust Trustees? *Proposals for Reducing Wrongful Foreclosures*, 63 Cath. U. L. Rev. ____ (forthcoming 2014); available at http://ssrn.com/abstract=2191738 (Attached in Non-Washington authority), pp. 54-61. See also *Freedom Found. v. Gregoire*, __ Wn. 2d __, __ p. 3rd. __, 2013 Wash. LEXIS 858 at **25-31 (Wash. 2013) (Holding the governor must keep a record of communications for purposes of of judiciary performing judicial review.)

C. STATUTORY CONSTRUCTION OF RCW 61.24.005(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." RCW 61.24.005(2). Bradburn contends there can be no "beneficiary" within the meaning of this statutory provision if the note obligations secured by the deed of trust at the time of signing are severed after the loan was made in such a manner as to frustrate the DTA's three objectives: First, the nonjudicial foreclosure process should remain efficient and inexpensive. Second, the process should provide an adequate opportunity for interested

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[17] 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 of such matters in the Superior Court, then Bradburn contends the Constitution requires a trustee's fact finding and legal decisionmaking under RCW 61.24.030(7)(a) must be capable of meaningful appellate review, which requires consideration of the evidence the trustee relied upon. *See e.g., Loveless v. Yantis*, 82 Wn.2d 754, 762-63,513 P.2d 1023 (7973), ("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*,8 I Wn.2d 668, 670, 504 P .2d 302 (1972) (Statute allows de novo review, but requires school board to produce complete administrative record). *See also Board of Regents of University of Washington v. City of Seattle*, 108 Wn. 2d 545, 556, 741 P.zd 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 l3l0 (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).

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parties to prevent wrongful foreclosure. Third, the process should promote the stability of land titles. *Cox*, 103 Wn.2d at 387.

III. APPLICATION OF LAW TO THE FACTS BEFORE THIS COURT

A. FACTS (EVIDENCE AND OBJECTIONS THERETO) BEFORE THIS COURT

The evidence before this Court on these cross motions for summary judgment includes:

Dispenza Declaration, Dkt 35: Ex. A: Copy of Interest First Note endorsed by Countrywide followed by a separate blank page endorsement by the purported original lender; Ex. B: an alleged along by the purported original lender; Ex. C: certificate of filing for name change to BAC home loan servicing; Ex. D: Bradburn's alleged payment history; Ex. E: May 23, 2008 Fannie Mae Amendment to Servicing Guides; Ex. F: MERS appointment of ReconTrust as successor trustee; Ex. G: Corporate Assignment of deed of trust from MERS to BAC; Ex H: Letter from Comptroller of Currency regarding merger of BAC and BANA.

ReconTrust Declaration, Dkt. 34: Ex. A: June 8, 2009 Notice of Default, which states at K2 sates: "The creditor to whom the debt is owed: MERS"; Ex. B: July 29, 2010 notice of trustee sale which identifies BANA as having become beneficiary through an assignment from MERS; Ex. C: "Declaration of Beneficiary pursuant to RCW 61.24.030 (SB 5810)"; Ex. D: February 11, 2011 notice of trustee sale notice of trustee sale which identifies BANA as having become beneficiary through an assignment from MERS; Ex. E: declaration of mailing for February 11, 2011 notice of trustee sale; Ex. F: Declaration of posting notice of February 11, 2011 notice of trustee sale.

Lorber Declaration, Dkt. 36: Ex. A: deed of trust naming MERS as beneficiary; Ex. B: July 29, 2010 notice of trustee sale which identifies BANA as having become beneficiary

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through an assignment from MERS; Ex. C: MERS appointment of ReconTrust as successor trustee; Ex. D: Corporate Assignment of deed of trust from MERS to BAC; Ex. E: February 11, 2011 notice of trustee sale notice of trustee sale which identifies BANA as having become beneficiary through an assignment from MERS; Ex F: June 10, 2011 corporate assignment of deed of trust from BANA to Fannie Mae; Ex G: June 9, 2011 Trustee Deed to Fannie Mae; Ex. H; Excerpts of Bradburn declaration; and Ex. I: Excerpts from 2011 Fannie Mae Servicing Guide.

Stafne Declaration, Dkt 42: Ex. 1: Appointment of Successor Trustee recorded on June 17, 2009; Ex. 2: Notice of Default dated June 8, 2009; Ex. 3 Assignment of Deed of Trust recorded on March 30, 2010; Ex. 4 July 24, 2011 Comptroller of the Currency Conditional Approval # 1003; Ex. 5 Notice of Trustee's Sale recorded on July 29, 2010; Ex. 6 Notice of Postponement of Trustee's Sale dated October 12, 2010; Ex. 7 Notice of Postponement of Trustee's Sale dated November 2, 2010; Ex. 8 Notice of Postponement of Trustee's Sale dated December 13, 2010; Ex. 9 Notice of Postponement of Trustee's Sale dated January 12, 2011; Ex. 10 February 15, 2011 Notice of Trustee's Sale; Ex. 11 Trustee's Deed recorded on June 9, 2011;Ex. 12 Declaration of Beneficiary; Ex. 13 Assignment of Deed of Trust recorded on June 9, 2011; Defendant responses to certain Requests for Admissions and Interrogatories propounded by the Plaintiff.

Stafne Declaration, Dkt. 49, requesting this Court take notice of adjudicative fact that federal court's frequently ignore the word "owner" in the first sentence of RCW 61.24.030(7)(a). Ex. 1: Mortgage Loan Servicing Rights Purchase and Servicing Agreement; Ex 2: Fannie Mae regulations indicating Fannie Mae's ***servicers are not agents***.

Declaration of Bradburn Dkt. 47.

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Documents relating to the Legislative History of the DTA. Dkt. 48.

Bradburns objections to defendants and summary judgment pleadings and evidence submitted therewith. Dkt. 46.

REPLY TO DEFENDANTS OPPOSITION ARGUMENTS

With the exception of Defendants Opposition argument B(5) and perhaps C, Defendant's other Opposition arguments are duplicative of argument to which Bradburn has already responded; Accordingly, as stated in his introduction Bradburn incorporates his Response to Defendants Motion for Summary Judgment Dkt.45 as if stated fully herein.

Bradburn's Response to Opposition B(5): RCW 61.24.030(8)(l)

Defendants are correct, to a point. The argument for this proposition was not concise. RCW 61.24.030(8)(l) was not effective until July 27, 2009, approximately seven weeks after the June 8, 2009 Notice of Default was issued.

Bradburn argues the February 17, 2011 Notice of Trustee's Sale was effectively a continuance of the original sale and therefore the sale was continued for a period exceeding 120 days in violation of RCW 61.24.040(6).

The Defendants counter-propose that this was a new sale which is where the confusion originates. See Opposition at 13.

Bradburn rejects this assertion. However, Bradburn contends if this court accepts this interpretation then, as an alternative, the Defendants violated RCW 61.24.030(8), generally, and .030(8)(l), specifically, by relying on a Notice of Default, a prerequisite to the issuance of a Notice of Trustee's Sale (RCW 61.24.030(8)), that was stale and would not comply with the statute as it existed when the second Notice of Trustee's Sale was issued and at the time the sale occurred. Moreover, Bradburn would point out that Notice of Default identified a

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different entity, MERS, than was named as the beneficiary in the Notice of Trustee's Sale. In that Notice of Default MERS is identified as a "creditor to whom the debt is owed", presumably therefore the then purported beneficiary.

Bradburn's Response to Opposition C: Defendants Violated the CPA

Defendant's only challenge proof of an unfair and deceptive act or practice and injury. The other three elements are conceded by silence.

Defendants assert that the foreclosure of Bradburn's home was lawful, the CPA claims are derived therefrom and therefore the unfair and deceptive act or practice element is not met. Opposition at 16. This rests on the presumption of prevailing on those claims. The Defendants do not even suggest that where they are found to have violated the DTA the acts constituting those violations would not be unfair and deceptive acts or practices. As this is the only defense offered by the Defendants on the unfair and deceptive act or practice element, where the Defendants are found to have violated the DTA this one and only defense offered on the unfair and deceptive act or practice element fails as well.

The Defendants challenge injury solely on the basis Bradburn failed to make loan payments. Opposition at 16. As previously stated, for the purposes of this motion the court may consider this point conceded, because whether or not Bradburn defaulted or not is irrelevant to the nature of the violations. See *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012)(Bain was admittedly in default but the Supreme Court indicated a plausible CPA claim based on violation of the DTA); *Klem v. Washington Mut. Bank*, 175 Wn.2d 771, 295 P.3d 1179 (2013)(Halstien, whose estate was represented by Klem, undisputedly in default but the Supreme Court reverses the Court of Appeals and affirms jury award for CPA claims derived from violations of the DTA); *Schroeder v.*

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Excelsior Mgmt. Grp., LLC, 177 Wn.2d 94, 297 P.3d 677 (2013)(while undisputedly in default Supreme Court reverses dismissal of Schroeder's CPA claims derived from violation of the DTA); *Walker v. Quality Loan Service Corp. of Washington*, No. 659758I, Slip Op. (Div. 1, Aug. 26, 2013)(Division One reversing Trial Court's dismissal of CPA claims derived from DTA violations despite default); *Bavand v. Onewest Bank FSB, No. 682172I*, Slip Op. (Div. 1, Sept. 9, 2013)(Division One, again, reversing Trial Court's dismissal of CPA claims derived from DTA violations despite default).

Simply put, where Bradburn prevails on DTA claims then the unlawful foreclosure, not any default on Bradburn's part, is the direct cause of Bradburn's injury. Default is not a defense to unlawful use of non-judicial foreclosure. If the Defendants could have lawfully foreclosed then they should have done so. Further, unlawful foreclosure, not default, has unlawfully deprived Bradburn of use and enjoyment of the property and resulted in damage to the property during the Defendants unlawful possession.

CONCLUSION

For the reasons stated herein Bradburn's motion for summary judgment partial summary judgments of liability against the MERS affiliated defendants should be granted.

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DATED this day 28th of October, 2013.

Respectfully submitted,

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