IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON IN: KRISTIN BAIN, Plaintiff, v. METROPOLITAN MORTGAGE GROUP, INC.; INDYMAC BANK, FSB; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS; REGIONAL TRUSTEE SERVICE; FIDELITY NATIONAL TITLE; and Doe Defendants 1 through 20, inclusive, Defendants.	Case No. 86206-I **BAIN RESPONSE TO WASHINGTON BANKERS ASSOCIATIONS AMICUS BRIEF**

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Recent Rulings Claimed to Support MERS' Position do not Address the Issues Before This Court.

Amicus Washington Bankers Association ("WBA") cites to several recent court decisions involving MERS' practices and contends that these rulings support MERS' position in the instant appeal. (WBA Brief at 12-13). Few, if any, of these decisions addressed the issue before this Court. To the extent that the cases did address the authority of MERS to foreclose, they did so within the context of distinctly different state statutory foreclosure schemes.

For example, a number of litigants have broadly challenged MERS' practice of creating separate assignment paths for deeds of trust and promissory notes. Variations of this challenge assert that once parties have executed a deed of trust listing MERS as beneficiary and a separate note identifying a different party as the lender, the underlying obligation becomes unenforceable as a secured debt. Under this analysis, the beneficiary under the note simply cannot foreclose.[1] WBA refers to several of these cases in which MERS prevailed in having the complaints

[1]Complaints raising these types of claims can be downloaded from the internet, and pro se borrowers have filed many of them with the courts around the country. A search of an electronic database of court decisions will turn up hundreds of brief opinions by courts dismissing these claims.

dismissed.[2] Ms. Bain has not argued that MERS' appearance as beneficiary on a deed of trust renders the security interest permanently unenforceable.

In other cases relied upon by WBA, a clearly identified non-MERS party had either conducted a foreclosure or was attempting to foreclose. The borrowers challenged the validity of past assignments of deeds of trust or transfers of the beneficial interests by MERS to the foreclosing party or to an assignor in the foreclosing party's chain of title. The borrowers contended that the foreclosing non-MERS party lacked authority to foreclose because the prior assignments or transfers had no legal effect, leaving title and the right to enforce the debt obligation with the originating lender. [3] The instant appeal presents a fundamentally different question. MERS is the foreclosing party and MERS itself claims it is a beneficiary under the DTA. MERS refuses to disclose the identity of the real beneficiary who has the legal authority to enforce the debt obligation.

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[2] Commonwealth Property Advocates, LLC. V. Mortgage Electronic Registration Systems, Inc., 2011 WL 6739431 (10th Cir. 2011); Horvath v. Bank of New York, N.A., 641 F.3d 617 (4th Cir. 2011); Commonwealth Properties Advocates v. Mortgage Electronic Registration Systems, Inc., 263 P.3d 397 (Utah Ct. App. 2011); RMS Residential Properties , LLC v. Miller, 303 Conn. 224, 32 A.2d 307 (2011)

[3] Trotter v. Bank of N.Y. Mellon, -- P.3d --, 2012 WL 206004 (Idaho Jan. 25, 2012); Athey v. Mortgage Electronic Registration Systems, Inc., 314 S.W. 3d 161 (Tex. App. 2012).

Other cases cited by WBA involved lawsuits that raised various types of common law fraud claims against MERS. Specific pleading requirements, not at issue in this appeal, applied to these claims. For example, in *Cervantes v. Countrywide Home Loans, Inc.*[4] the Ninth Circuit affirmed the dismissal of a proposed class action complaint by Arizona borrowers alleging a broad conspiracy by loan originators, MERS, and trustees to commit fraud. The court held that the complaint failed to address many necessary elements of a fraud claim. Moreover, unlike Ms. Bain in the instant case, the plaintiffs in *Cervantes* had not averred that the defendants' actions violated their state's (i.e, Arizona's) foreclosure laws.[5] While the Ninth Circuit found no merit in the speculative claims raised by the plaintiffs, the court did observe that "[t]he legality of MERS's role as a beneficiary may be at issue where MERS initiates foreclosure in its own name" and specifically noted that this issue had not been presented.[6]

Finally, in other litigation referred to by WBA, the courts considered the impact of the MERS system on state foreclosure laws that expressly allowed nominees or agents to foreclose for a beneficiary.[7] For

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[4] 656 F.3d 1034 (9th Cir. 2011)
[5] Id. 656 F.3d at 1044.
[6] Id.
[7] Calvo v. HSBC Bank USA, N.A. , 199 Cal. App. 4th 118, 130 Cal. Rptr. 3d 815 (2011).

example California Civ. Code § 2924, authorizes a " trustee, mortgagee, or beneficiary, *or any of their authorized agents*" to record a notice of default and "the mortgagee, trustee *or other person authorized to make sale*" may record the notice of sale.[8] California courts have divided on a number of issues regarding MERS role in foreclosure and the applicability of the Uniform Commercial Code to non-judicial foreclosures in general under that state's laws.[9]

In other states the MERS' role fit more clearly into a statutory framework allowing non-beneficiaries to foreclose. At MERS' instigation the Minnesota legislature adopted a statute that expressly allows non-judicial foreclosures in the name of a nominee.[10] This is something that MERS and the banks which belong to the WBA never bothered to do. Illinois also has a statute with expansive provisions defining a "mortgagee" entitled to foreclose as "(i) the holder of an indebtedness or obligee of a non-monetary obligation secured by a mortgage *or any person designated or authorized to act on behalf of such holder* and (ii) any

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[8] Cal. Civ. Code § 2924, subd. (a)(1), (a)(3), (a)(4).(emphasis added).

[9] Compare *Herrera v. Deutsche Bank Trust Co.*, 196 Cal. App. 4th 1366, 127 Cl. Rptr. 3d 362 (June 28, 2011) (requiring proof of foreclosing party's authority to foreclose); *Sacchi v. Mortgage Electronic Registration Systems, Inc.,* 2011 WL 2533029 (C.D. Cal. June 24, 2011) (same); *In re Doble*, 2011 WL 1465559 (Bankr. Apr. 14, 2011) (same) and *Gomes v. Countrywide Home Loans, Inc.* 192 Cal. App. 4th1149, 121 Cal. Rptr. 3d 819 (Cal. App. 4th May 18, 2011) (enforcement rights not subject to challenge in non-judicial foreclosure).

[10] Discussed in Jackson v. Mortgage Electronic Registration Systems, Inc., 770 N.W. 2d 487 (Minn. 2009).

person claiming through a mortgagee as successor." (emphasis added).[11] Washington's legislature could have added a provision to the definition of beneficiary allowing for foreclosure by agents, but did not do so.

In some of the cases cited by WBA the courts acknowledged that foreclosing parties must comply with U.C.C. requirements to enforce the terms of a promissory note in order to foreclose, a position that MERS rejects in this appeal.[12]

The suggested negative consequences of a decision against MERS are illusory.

WBA suggests that dire consequences could flow from a ruling contrary to MERS' positions in this appeal. However, WBA's parade of horribles focuses upon scenarios that are not possible under established Washington law. WBA suggests that barring MERS from foreclosing will cloud title to previously foreclosed properties. WBA Brief pp. 8-9. Contrary to WBA's suggestion, Washington law precludes a borrower from seeking to set aside a completed sale based on grounds that could have been raised in an action to enjoin the sale before it took place. *Brown v. Household Realty Corp.* 146 Wash. App. 157, 171, 189 P.3d 233, 239-40 (2008). The Washington legislature recently amended the

[11] 735 ILCS 5/15-1208. See *Mortgage Electronic Registration Systems, Inc. v. Barnes,* 406 Ill. Appl. 3d 1, 940 N.E. 2d 118 (2010) (holding MERS has authority to bring foreclosure action as mortgagee under the Illinois statutory definition of mortgagee).
[12] Horvath v. Bank of N.Y, N.A. , 641 F.3d 616 (4th Cir. 2011); RMS Residential Properties , LLC v. Miller, 303 Conn. 224, 32 A.3d 307 (2011).

DTA to allow former borrowers to bring limited claims for monetary damages after a non-judicial foreclosure sale. However, this legislation was carefully drafted to preclude post-sale challenges seeking equitable relief to set sales aside or raise other claims that would cloud title. RCW 61.24.127(2); *Moore v. FNMA*, 2012 WL 424583 (W.D. Wash. Feb. 9, 2012). A ruling that MERS is not a "beneficiary" under RCW 61.24.005(2) will not serve as a basis for challenges to titles obtained in the aftermath of past foreclosures in Washington conducted in MERS' name. And the fact that MERS and lenders might face liability that could result in monetary damages for their decision to ignore the requirements of Washington law is not a valid basis for ruling in their favor. In essence, MERS and the WBA members are attempting to hold the laws of Washington and its citizens hostage and to obtain a release from this Court by making false threats of title instability.

WBA's reference to recent litigation in Michigan as a cautionary tale for this Court is misplaced for a number of reasons. (WBA Brief pp. 8-9). In April 2011, the Michigan Court of Appeals ruled that MERS lacked authority to conduct foreclosures under Michigan's power of sale statute. *Residential Funding Co., L.L.C. v. Saurman*, 292 Mich. App. 321, -- N.W. 2d -- (2011). The Michigan Supreme Court overturned this decision in November 2011. *Residential Funding Co., L.L.C. v.*

Saurman, 490 Mich. 909, 805 N.W. 2d 183 (2011). Shortly after the Court of Appeals decision, a number of attorneys filed class action cases seeking to set aside all past Michigan foreclosure sales either conducted by MERS or that involved a property for which MERS appeared in the chain of title. These lawsuits were based on significant misunderstandings of the Court of Appeals' decision, misunderstandings that the Court of Appeals clarified in two opinions issued in August 2011. *In Bakri v. Mortgage Electronic Registration Systems, Inc.*, 2011 3476818 (Mich. App. Aug. 9, 2011) the Court of Appeals rejected borrower challenges to the underlying validity of MERS' mortgage assignments. Then, in *Richard v. Schneiderman & Sherman, P.C.*, – N.W. 2d --, 2011 WL 3760862 (Mich. App. Aug. 25, 2011), the Court of Appeals clarified the retroactive effect of its earlier decision barring MERS from conducting non-judicial foreclosures. In *Richard*, the Court of Appeals held that it intended its earlier *Saurman* ruling to apply only to foreclosures which had not yet been completed by the eviction of the borrower. Thus, the Court of Appeals ruling in *Saurman* could not serve as the basis for setting aside completed foreclosures. In its Amicus Brief, WBA focuses upon the meritless legal actions filed immediately after the Michigan Court of Appeals ruling in April 2011, yet fails to mention that the Court of Appeals disarmed these lawsuits shortly after they appeared.

More important than these factual omissions related to WBA's Michigan argument, is the status of Washington law, with its clear prohibition on bringing title challenges after completed sales. Washington law clearly precludes the kind of disruptive legal actions that WBA incorrectly claims presented a real threat in Michigan.[13]

A ruling against MERS will not impair mortgage servicers' role as agents for trusts owning securitized mortgage debt.

WBA contends that disallowing foreclosures in MERS name will be equivalent to barring all activities by agents in the DTA foreclosure process. (WBA Brief pp. 4-5). This is not the case. Acknowledging that MERS is not a beneficiary under the DTA does not preclude legitimate agents, such as mortgage servicers, from participating in foreclosures under the DTA. MERS' role must be distinguished from that of a mortgage servicer. Servicers act as agents of owners of mortgage debt, and some courts have recognized the authority of mortgage servicers to foreclose under certain statutory schemes. The Bain deed of trust defines the "loan servicer" at para. 20 as the entity that collects the periodic payments due under the note. MERS, and the Lender are separately defined in the deed of trust. MERS does not meet the deed of trust's definition of a loan servicer because it never collects any payments due under the note. Mortgage

[13] In the instant matter, WBA notes that if this Court decides contrary to MERS' position, lenders could comply prospectively without difficulty ("This could be accomplished easily enough" WBA Brief at p. 15. n. 19).

servicers perform tasks completely distinct from MERS' placeholder role. For securitized mortgage loans, a pooling and servicing agreement entered into between a trust owning mortgage debt and a servicing company defines the scope of the servicer's agency in great detail. In addition, mortgage servicers are heavily regulated at the federal level. They are subject to many consumer protection requirements designed to ensure transparency and accountability to homeowner, including the Real Estate Settlement Procedures Act ("RESPA")[14] and the Truth-in-Lending Act. [15] Whenever MERS is named as a party in an action seeking to enforce these federal laws regulating lenders and their agents, MERS quickly files motions asking that it be dismissed from the case as a party with no interest in the transactions.[16] In its interactions with homeowners, MERS is not subject to any regulatory oversight.

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[14] RESPA defines mortgage servicing as "receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts . . . , and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan." 12 U.S.C. § 2605(i)(3). See also RESPA regulation 24 C.F.R. § 3500.21(a) distinguishing between a "master" servicer (the owner of the right to service) and a "subservicer" (a servicer who performs the servicing on behalf of the master servicer).

[15] 15 U.S.C. § 1641(f)(2) and § 1640 (penalty provision).

[16] See e.g. *Horton v Country Mortgage Services,* 2010 WL 55902 * (ND Ill Jan 4, 2010) (granting MERS' motion to be dismissed as defendant on borrower's Truth in Lending claims); *Castro v Executive Trustee Services, LLC*, 2009 WL 438683 (D Ariz. Feb 23, 2009) (granting MERS' motion to dismiss HOEPA and TILA claims against MERS); *Lane v Viet Real Estate Industries Group*, 713 F Supp. 2d 1092 (ED Cal 2010)(MERS not subject to servicer obligations under RESPA); *Nyguyen v LaSalle Bank,* 2009 WL 3297269 (CD Cal Oct 13, 2009) (granting MERS' motion to dismiss TILA claims.).

In certain jurisdictions mortgage servicers may institute foreclosures. The manner in which they do so contrasts sharply with what MERS purports to do in the instant case. In certain judicial foreclose states a servicer may bring an action in which it clearly identifies itself as the agent for a disclosed principal and can present evidence of its principal's standing to foreclose. In non-judicial foreclosure states a common procedure is for the beneficial owner of the loan to transfer the promissory note to the servicer in accordance with U.C.C. rules for negotiation of a negotiable instrument. In this way the servicer becomes the party entitled to enforce the note. After foreclosure, the servicer deeds the property to the owner of the debt. Fannie Mae's Single Family Servicing Guide incorporates such a procedure for use in foreclosure of loans that it owns or insures.[17] MERS never holds a promissory note or has the right to enforce the note. Its role cannot be equated with that of a mortgage servicer that acts in accordance with well-established laws in carrying out a foreclosure. To be clear, Ms. Bain does not contend or agree that a mortgage servicer who does not comply with the requirements of the U.C.C. can enforce a note. Rather, a mortgage servicer has the ability through well-established processes to comply with the U.C.C. if it desires to foreclose in its name.

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[17] Fannie Mae Single Family Servicing Guide Part VIII § 102, also Part I § 202.7 (June 10, 2011) available at https://www.efanniemae.com/sf/guides/ssg/ .

The MERS System Has Impaired Rather than Improved the Reliability of Land Title Records.

In another variation of its parade of horribles scenario, WBA suggests that denying MERS "beneficiary" status under RCW 61.24.005(2) would significantly interfere with the conduct of future foreclosures and lead to an inefficient reliance on recorded assignments of deeds of trust. (WBA Brief pp. 9-11) According to WBA, land records were in disarray in the 1990s. MERS came to the rescue and inaugurated an efficient and reliable alternative that is friendly to consumers, lenders, and the general public. *Id.*

Initially, it must be noted that the historical sources WBA relies upon for its summary of the history of MERS are current or former officers either of MERS or of MERS' shareholders.[18] (WBA Brief. p. 10). The cited articles are essentially MERS puff pieces that contain little or no factual data. For example, in his article, R. K Arnold, the former MERS CEO, refers to the dire condition of land record in the 1990s, when "[r]ecording error rates as high as 33%" supposedly existed.

[18] Katie Oppy is MERS Business Integration Director. R.K. Arnold is the former CEO of MERS. Allen H. Jones is a former Bank of America/Countrywide Mortgage Executive for Default Management (Bank of America is a MERS shareholder. http://www.mersinc.org/about/shareholders.aspx.).Phylis K. Slesinger is Senior Vice President of the Mortgage Bankers Association (MBA) MBA is a MERS shareholder, charter member of MERS and one of the key organizers of the MERS system. *See generally,* Christopher L. Peterson, *Foreclosure, Subprime Mortgage lending, and the Mortgage Electronic Registration System*, 78 U. of Cincinnati Law Review, 1359 (Summer 2010).

WBA Brief p. 10). The article itself contains absolutely no support for this statement.

The suggestion that MERS stepped in and fixed a real problem related to the accuracy of land records is simply untrue. MERS was created to save parties interested in creating and transferring securitized mortgage debt the expenses of multiple recordings of mortgage assignments. It was not created to establish a more reliable and transparent recording system. In initially promoting its system MERS' major claim was that it would save the securitization participants millions of dollars in recording fees.[19]

Contrary to WBA's representations about the MERS' system's accuracy and accessibility, several features of the MERS system invite inaccuracies and at a minimum fail to encourage accurate reporting of mortgage and loan transfers.[20] Reporting of loan ownership information on a MERS database available to the public is optional. Servicers and owners of mortgage debt face no consequences from MERS if they report the

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[19] Slesinger and McLaughlin, *Mortgage Electronic Registration System*, 31 Idaho L Rev 805, 810-12 (1995) (citing 1994 Ernst & Young study commissioned by MERS showing potential cost savings of $77.9 million annually from omitting public recording of loan transfers).

[20] Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 Wm. & Mary L. Rev. 111 (2011), http://scholarship.law.wm.edu/wmlr/vol53/

information inaccurately or not at all. Servicers that MERS counts as "reporting" loan ownership information may report simply an owner's decision not to disclose its identity. Peterson, *supra* at 14-15. At most, a generic trustee, not the name of the trust owning the loan, is reported. One trustee may serve for hundreds of individual trusts owning mortgage-backed securities and each trust will have its own rules for loss mitigation reviews. To the extent MERS provides any information to non-members, the information does not assist borrowers or their attorneys in tracking down the pooling and servicing agreements that describe loan modification protocol designated by the individual trust owning the loan. *Id.* On a fundamental level, because mortgage assignments themselves are not retained under the MERS system, the public and government officials have no way of scrutinizing the accuracy of the documents themselves. As a result, the courts face increasingly frequent disputes over whether and when valid mortgage assignments took place.[21]

A bankruptcy court in Nevada reviewed the status of twenty-seven motions for relief from the bankruptcy stay filed in MERS' name in its court. *In re Mitchell,* 2009 WL 1044368 (Bankr. D Nev. Mar. 31, 2009) aff'd 423 BR 914 (D Nev. 2010). The court's review turned up numerous instances of MERS certifying officers inaccurately documenting the

[21] See e.g. *U.S. Bank v. Ibanez*, 458 Mass. 637 (2011).

current status of loan ownership. *In re Mitchell,* 2009 WL 1044368 * 4-5. The bankruptcy court found that "[t]here appears to be absolutely no requirement that these Certifying Officers have any knowledge of the loan in question." *Id.* at * 5. According to the court, the MERS system created an entirely new set of obstacles that obscured land title searches:

> One cannot assume that just because MERS was named as the initial nominee in the deed of trust that it still retains that relationship with the holder of the note. Moreover, by virtue of the fact that some of the motions were filed even after the note was transferred out of the MERS system, it is apparent that MERS has not tracked (or been appropriately advised of) the assignment of the note to a non-member. *Id.* at * 4.

In affirming the bankruptcy court in *In re Mitchell*, the Nevada District Court noted the negative impact that an unreliable, private recording system had upon the requirement under a local court rule that authorized representatives of parties must negotiate before proceeding with court actions. *In re Mitchell*, 423 BR at 916-917. As discussed below, MERS' practices create similar obstacles for parties seeking to participate in Washington's conference and mediation programs.

The lack of transparency of the MERS system affects not only the reliability of property title records but also the entire system of non-judicial foreclosures. Non-judicial foreclosures rely upon private parties to conduct sales only when they have ensured that valid title will be

conveyed through the process. The court in *Hooker v Northwest Trustee Services, Inc.*, 2011 WL 2119103 (D. Or. May 25, 2011) recently summed up the effect of MERS practices upon non-judicial foreclosures in Oregon and states as follows:

> I recognize that MERS, and its registered bank users, created much of the confusion involved in the foreclosure process. By listing a nominal beneficiary that is clearly described in the trust deed as anything but the actual beneficiary, the MERS system creates confusion as to who has the authority to do what with the trust deed. The MERS system raises serious concerns regarding the appropriateness and validity of foreclosure by advertisement and sale outside of any judicial proceeding. *Id.* at * 6.

WBA asserts that borrowers like Ms. Bain really do not need to know who owns their loans. According to WBA, if the borrower can contact the servicer, that should be enough. (WBA Brief p. 18). There are several problems with WBA's assertion. First, the actual owners of securitized mortgage debt often have interests that are not aligned with those of the servicers. Servicers' payment incentives favor quick foreclosure and reimbursement of fees and costs. On the other hand, the actual owners of the securitized mortgage debt often benefit from loan modifications that produce a reliable long term cash flow.[22] Many owners of securitized mortgage debt are government entities, non-profits, and

[22] *See generally* Diane Thompson, Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications 86 Wash. L. Rev. 755 (December 2011).

pension funds. These investors frequently complain that servicers foreclose inappropriately rather than modify loans.[23]

Rules for loan modification programs such as the Home Affordable Modification Program (HAMP) require that servicers implement affordable modifications for all eligible homeowners. However, a servicer can refuse to approve a HAMP modification if it claims an investor restriction applies.[24] A major impediment to implementation of the HAMP program has been the frequency of servicer claims that an investor will not allow a modification, when in fact no such restriction exists.[25] Homeowners need to know who owns a loan in order to verify the existence of such a restriction when a servicer refuses to modify a loan for this reason.

Issues related to investor control over servicer actions become critically important in the context of a foreclosure mediation program. In 2011 Washington implemented its own mediation program under the

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[23] American Association of Mortgage Investors, White Paper, The Future of the Housing Market for Consumers After the Housing Crisis: Remedies to Restore and Stabilize America's Mortgage and Housing Markets (Jan. 2011) *available at* http://the-ami.com/wp-content/uploads/2011/01/AMI_State_AG_Investigation_Remedy_Recommendations_Jan_2011.pdf.

[24] U.S. Dept. of Treasury Making Home Affordable Program Handbook for Non-GSE Mortgages Version 3.2 June 1, 2011 §§ 1.3, 2.2, 6.5 at .https://www.hmpadmin.com//portal/programs/docs/hamp_servicer/mhahandbook_32.pdf

[25] *See e.g.,* Karen Weise, "When Denying Loan Mods, Loan Servicers Often Wrongly Blame Investors," *ProPublica* July 23, 2010.

"Foreclosure Fairness Act."[26] The new program is similar to those that now exist in about twenty states. These programs uniformly require that a party seeking to foreclose participate in conferences through a representative who is authorized to modify a loan and make decisions about other loss mitigation options. Washington's statutes contain a provisions requiring that the "beneficiary" must participate in both a pre-mediation settlement negotiation and mediation session.[27] In addition, Washington law expressly provides that if a servicer participating in mediation claims that it cannot modify a loan because of an investor restriction, the servicer must provide proof of that restriction.[28]

The Foreclosure Fairness Act relies heavily upon open disclosure of the interests of all stakeholders in a securitized mortgage transaction – by the servicer and by the trust owning the debt. Two recent decisions by the Nevada Supreme Court stressed the intersection between consideration of loss mitigation options in foreclosure mediation and disclosure of the true identity of the parties entitled to enforce the debt obligation.[29] In *Leyva v. National Default Servicing Corp.* the court concluded that a party must be sanctioned for bad faith participation in mediation because it

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[26] RCW 61.24.163.
[27] RCW 61.24.031 (settlement) and 61.24.163 (mediation)
[28] RCW 61.24.163(8)(b)(x).
[29] *Pasillas v. HSBC Bank USA*, 255 P.3d 1281 (Nev. 2011); *Leyva v. National Default Servicing Corp.*, 255 P.3d 1275 (Nev. 2011).

could not show its authority to mediate options related to the note.[30] MERS' role in concealing ownership interests in securitized mortgage debt frustrates the important task of loss mitigation review, making unnecessary foreclosures more likely.

In concluding its Amicus Brief, WBA asserts that in Washington any concern for ensuring that borrowers make payments for promissory notes to the entities entitled to enforce the notes is unfounded. WBA Brief p. 20. According to WBA, such concerns are irrelevant because of the provisions of DTA, RCW 61.24.100, which preclude deficiency judgments after non-judicial foreclosures completed under the Act. Apparently WBA contends that if a complete stranger to the loan transactions goes through the motions of a non-judicial foreclosure sale of a borrower's property in Washington, this will relieve the borrower of any personal obligation to re-pay the debt created by a promissory note. WBA fails to explain how this interpretation impacts upon the rights of the party entitled to enforce the note under U.C.C. § 3-301. Nor does WBA explain how a non-beneficiary is to comply with the many other obligations that the DTA places upon a beneficiary that go beyond simply conducting a foreclosure sale. A further problem with the argument is that there are

[30] "Therefore, because the mortgage note is payable to MortgageIT, unless Wells Fargo can prove that the note was properly endorsed or validly transferred, thereby making it the party entitled to enforce the note, it has not demonstrated authority to mediate the note." *Leyva v. National Default Servicing Corp., supra* 255 P.3d at 1281.

significant exceptions to coverage of RCW 61.24.100. Borrowers under the popular single family insured home loan programs administered by the FHA, VA, and the Rural Housing Service (USDA) do not receive protections under state anti-deficiency statutes. The courts have generally held that federal laws governing these programs preempt state anti-deficiency statutes.[31]

CONCLUSION

Ms. Bain maintains that the questions presented to this Court by Judge Coughenour are simple to answer by referring to the plain language of the Deed of Trust Act. RCW 61.24, *et seq.* In particular, the definition of "beneficiary" in the DTA makes clear the Legislature's intent that persons utilizing the expedited process of non-judicial foreclosure must be the "holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation." RCW 61.24.005(2). MERS cannot meet the definition of "beneficiary" and therefore it did not have the legal authority to appoint a successor trustee under RCW 61.24.010(2). There was no legal authority for a foreclosure to be initiated in MERS' name and therefore the actions of the other defendants in this case relating to the

[31] U.S. v. Jacobson, 319 F.3d 323 (8th Cir. 2002) (RHS/USDA single family loan); Carter v. Derwinski, 987 F.2d 611 (9th Cir. 1993 (VA loan); In re Landers, 956 F.2d 278 (10th Cir. 1992 (Table) (FHA-insured loan); U.S. v. Johnson, 946 F. Supp. 915 (D. Utah 1996) (SBA loan).

initiation of a foreclosure were also done in violations of the requirements of the DTA. RCW 61.24.005(2) and 61.24.010(2).

MERS made a choice when choosing to conduct business in Washington state. It could have followed the same course of action that it apparently followed in Colorado, which was not to initiate foreclosures in its name because Colorado law prohibited the same. Washington's statute has very similar language and yet it chose to participate in this foreclosure and many others as though it had the legal authority to do so. Not only are MERS and the other defendants liable to Ms. Bain for the violations of the DTA, but they are liable to her under the CPA. RCW 19.86, *et seq.*; Dkt. 155.

This Court needs to clearly answer the questions regarding MERS' involvement in its non-judicial foreclosure scheme and that answer must be a resounding affirmation that pursuant to the scheme devised by the Legislature, MERS cannot be a "beneficiary" under the DTA and therefore Ms. Bain's foreclosure was wrongfully initiated by MERS and all of the defendants involved in perpetrating the wrongdoing.

RESPECTFULLY SUBMITTED this 2nd day of March, 2012.

By Melissa Huelsman /s/ MPJ

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CERTIFICATION OF SERVICE

I certify that on the 2nd of March, 2012 I caused a true and Correct copy of the RESPONSE TO AMICUS BRIEF be served on the following in the manner indicated below:

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DATED this 2nd day of March, 2012.

/s/ Monique Lefebvre
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