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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Kent McMillan, et al.,  
Plaintiffs,  
v.  
Wells Fargo Bank, et al.,  
Defendants.

No. CV-12-1921-PHX-DKD

**BENCH TRIAL VERDICT AND  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

**I. INTRODUCTION**

This dispute arises out of the processing of a non-judicial foreclosure, a process the Arizona Legislature defined in A.R.S. §§ 33-801 *et seq.* Following a bench trial, the Court here issues its decision.<sup>1</sup>

Pertinent to the dispute at hand are the obligations of the trustee set forth in A.R.S. § 33-813(C) which provides:

On request from the trustor or any person entitled to notice pursuant to § 33-809, subsection B, at any time that the trust deed is subject to reinstatement, the trustee shall provide a good faith estimate of the sums that appear necessary to reinstate the trust deed.

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<sup>1</sup> The Court apologizes to the parties for the delay in filing this decision. During the time this matter was under advisement two of the five magistrate judges who sit in Phoenix retired or assumed higher office. These vacancies and the resulting increased workload during this time period delayed the more timely resolution of matters before the Court.

1 The Arizona Legislature further provided that this duty, among others, is a non-delegable  
2 duty. A.R.S. § 33-803.01(A)(2) specifies:

3 A. A trustee shall not delegate the following duties: 1. The preparation and  
4 execution of any of the following: (a) The notice of trustee sale. (b) The  
5 cancellation of notice of sale. (c) The trustee's deed upon sale. 2. The  
6 receipt and response to requests for reinstatement or payoff amounts.

7 B. This section does not prohibit the trustee from using clerical or office  
8 staff employed by the trustee and under the trustee's direct and immediate  
9 supervision to assist in the duties prescribed by subsection A.

10 **A. Did Plaintiffs submit a reinstatement request?**

11 Plaintiff Kent McMillan contends that he submitted reinstatement requests in at  
12 least two letters: First, a June 21, 2012 letter from Kent McMillan to Wells Fargo and  
13 copied to Senator John McCain, Pam Crabtree in the Office of the Arizona Attorney  
14 General, The Comptroller of the Currency, and Quality Loan Services (“QLS”); and  
15 secondly, a July 10, 2012 letter from McMillan’s attorney to Wells Fargo. Defendant  
16 contends that the June 21, 2012 letter cannot be a reinstatement request letter because it  
17 contains too much other information beyond a request for reinstatement or payoff  
18 amount. This letter contains the words “[s]top the foreclosure proceedings, and give me a  
19 clean explanation of where my payments have been applied and if I have a balance due so  
20 I may pay it” – which plainly constitutes a request for reinstatement or payoff amounts  
21 triggering the statutory obligations. Nevertheless, Defendant maintains that because the  
22 letter restates the lengthy historical record the borrower has had with respect to the  
23 servicing of the loan, these other words providing historical background create a pool  
24 through which QLS should not have to fish. The Court disagrees. The letter is a page  
25 and a quarter in length and contains the following specific request: “Stop the foreclosure  
26 proceedings, and give me a clean explanation of where my payments have been applied  
27 and if I have a balance due so I may pay it.” It does not seem too much to ask the trustee  
28 to read these words and provide the required response. This is especially so in light of  
the Arizona Supreme Court’s instruction that “the statutes and Deeds of Trust must be

1 strictly construed in favor of the borrower” and that “the trustee holds a power of sale  
2 permitting him to sell the property out of court with no necessity of judicial action. . . .  
3 thus strip[ping] borrowers of many of the protections available under a mortgage.”  
4 *Patton v. First Federal Savings & Loan*, 118 Ariz. 473, 477, 578 P.2d 156 (1978).  
5 Whether the letter was addressed to Wells Fargo and only cc’d to QLS is of no  
6 consequence because the statute dictates that the trustee is responsible for “[t]he receipt  
7 and response to requests for reinstatement or payoff amounts.” A.R.S. § 33-  
8 803.01(A)(2). The trustee received this request for reinstatement and thus, as supported  
9 by the opinion of the Plaintiffs’ expert at trial, the letter triggered the trustee’s statutory  
10 obligation. The Court’s finding is informed and supported by the fact that the trustee had  
11 directed the borrower to Wells Fargo as the appropriate addressee to contact “[t]o find out  
12 the amount you must pay or to arrange for payment to stop the foreclosure.” May 17  
13 Statement of Breach or Non-Performance.

14       It is a fact that Plaintiff sent his June 21 reinstatement letter to a particular  
15 individual at Wells Fargo at a different address than Wells Fargo provided, but this fact  
16 does not overcome the cardinal error here which was QLS<sup>2</sup> sending a mailing to a  
17 borrower which instructed, “[t]o find out the amount you must pay or to arrange for  
18 payment to stop the foreclosure” contact Wells Fargo Bank. A non-delegable duty is not  
19 respected by providing information to the intended beneficiary of that duty which  
20 instructs the beneficiary to seek the performance of that duty from someone else. This is  
21 particularly important in the context of a specific statutory framework with triggering  
22 events and specific time deadlines for performance of designated, non-delegable duties.  
23 QLS’s diversion of the borrower to Wells Fargo pulled Mr. McMillan out of the statutory  
24 framework and denied him the benefit of the time periods the Arizona legislature crafted  
25 for a trustor submitting a request for reinstatement or payoff amounts. It is approaching  
26 the ironic that Defendant complains that it was not the “top-of-the-letter” addressee of the

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28       <sup>2</sup> The Statement of Breach or Non-Performance was signed by QLS employee  
Mauro Guzman, acting as agent for Wells Fargo Bank.

1 June 21 letter, when it was the Defendant who mailed a letter to the borrower instructing  
2 him to contact Wells Fargo “[t]o find out the amount you must pay or to arrange for  
3 payment to stop the foreclosure.”

4 The diversion to Wells Fargo in the Statement of Breach is sufficient to determine  
5 that QLS violated its non-delegable duty to the trustor. But the same is true with respect  
6 to Mr. Yearin’s July 10, 2012 reinstatement letter which cites A.R.S. § 33-813(C). It is  
7 sent to the address provided in the Statement of Breach in care of QLS employee Mauro  
8 Guzman who is identified with the title “AZFC Support Processor.” The fact that this  
9 title only appears in the record in the Statement of Breach undercuts the Defendant’s  
10 argument that there is only conjecture to suggest Plaintiffs’ counsel took this address  
11 from the Statement of Breach. The earlier correspondence in the record which mentions  
12 Mr. Guzman does not include the title used in the July 10, 2012 letter.

13 **B. May Ms. McMillan assert a claim for breach of the statutory duty?**

14 The parties also disagree about whether Ms. McMillan has a claim in this action  
15 given that she was not a party to the deed of trust. Defendant contends that the scope of  
16 any duty owed is limited to those who are parties to the deed of trust. Plaintiffs counter  
17 that Arizona law does not narrowly limit the legislature’s intended beneficiaries for the  
18 applicable statute and that QLS owed a duty to Ms. McMillan to comply with its statutory  
19 obligations because Ms. McMillan is among the class of persons whom the statute was  
20 designed to protect. Yet, there is no case which so holds and all of the cases Plaintiffs  
21 cite are distinguishable. In particular Plaintiffs’ citation to *Veloz v. Green Tree Servicing,*  
22 *LLC*, 2014 WL 2215866 (U.S.D.C. Ariz. May 29, 2014), is inapposite because that case  
23 addressed whether a duty of care arose supporting a negligence action in favor of a  
24 plaintiff who was the identified beneficiary of the statutory requirement, i.e., the  
25 borrower. That case did not address whether the scope of permissible plaintiffs could be  
26 widened beyond those individuals who were the statute’s declared beneficiary. Also, the  
27 Arizona statute specifies those who may request information about the status of the loan.  
28 A.R.S. § 33-813(D) states “[o]n written request from the trustor or any person entitled to

1 notice pursuant to section 33-809”. Section 33-809 provides for a person other than the  
2 trustor to record a request for notice of a trustee sale. This is the only other class of  
3 persons entitled to receive notice under § 33-809. Noteworthy as well is that § 33-809(C)  
4 specifies that the trustee shall provide notice “to each of the persons who were parties to  
5 the trust deed.” (emphasis added). Section 33-809(B)(2) does provide for a notice of  
6 trustee sale to be sent to the address of a single family residential property but it makes  
7 no particularized reference to an individual or class of individuals who might reside there.  
8 It seems reasonable to limit any claims for failing to provide the information required by  
9 Arizona’s non-judicial foreclosure process to those who were entitled to notice under that  
10 statutory scheme. The Court will decline Plaintiffs’ invitation to extend the scope of the  
11 duty to a non-party to the deed of trust.

### 12 C. Damages

13 Plaintiffs allege several categories of damages: the loss suffered because of the  
14 forced sale of the property, losses associated with the necessitated quick disposition of  
15 personalty and a claim for emotional distress. Defendant makes a separate attack on each  
16 theory of damages.

#### 17 1. Loss associated with the forced sale of the property

18 This dispute focuses on the date of valuation. Plaintiffs submitted an expert  
19 appraisal valuing the property as of August 6, 2013 and the same value at the time of trial  
20 whereas Defendant contends that the relevant date for valuation is the date of the  
21 property’s sale: August, 2012. Plaintiffs maintain that the value of the property a year  
22 after the forced sale is proper because tort remedies include all foreseeable loss and it was  
23 foreseeable that Plaintiffs would suffer the loss of future increases in the property’s value.  
24 Plaintiffs’ approach seems problematic and speculative as there is no defining rule as to  
25 the scope of time such appreciation might be provided. And it is speculative as to  
26 whether and when Plaintiffs might otherwise have sold their home. Again, there is no  
27 Arizona case which elucidates the measure of damages for a violation of a statutory duty  
28 that results in a forced sale of property. The contract cases Defendant cites nor the fraud

1 cases Plaintiffs cite seem pertinent. In the [a]bsence of controlling authority, the Court  
2 will limit the scope of damages to that suggested in Plaintiffs' First Amended Complaint:  
3 "[D]efendants are liable for [] the difference in the sale price Kent would have been able  
4 to obtain had he been able to timely and adequately market his home and obtain the  
5 highest and best sales price." Amended Complaint at ¶ 178. This approach avoids the  
6 speculation and imprecision intrinsic to Plaintiffs' approach while providing  
7 compensation for the forced sale which occurred. Although the "timely" element is  
8 undefined in Plaintiffs' allegation, the other language in the complaint which refers to the  
9 forced "fire sale" suggests that the timeliness would include a reasonable time to market  
10 and sell the property outside of the conditions of a forced or "fire sale." Unfortunately,  
11 Plaintiffs failed to proffer any such timely value. Plaintiffs' expert valued the property at  
12 a time a year later than the sale or at the time of trial – years subsequent to the sale and  
13 certainly far from any reasonable interpretation of a time period defined by "fire-sale"  
14 conditions. Thus the Court concludes that Plaintiffs suffer a failure of proof on their  
15 theory of damages. The record evidence of trial however does provide evidence that the  
16 sale price on the date of sale was \$427,000. However this price includes the transfer of a  
17 vacant lot appurtenant to the residential lot which was the subject of the threatened  
18 trustee sale. But again the record provides some relief from this problem because it  
19 includes evidence that the parties to the sale – the best evidence of a property's value on a  
20 given day -- had negotiated the value of this attached lot to be \$77,000. In light of this  
21 market information, and the fact that the Defendant's expert valued the residential lot at  
22 \$410,000 on the date of sale, the Court can conclude that the Plaintiffs only received  
23 \$350,000 for the sale of the relevant property. Thus the Court concludes that the value of  
24 Plaintiffs' damages due to the forced sale caused by Defendant's failure to comply with  
25 its statutory duty is \$60,000. Plaintiffs also met their burden of proof with respect to  
26 other costs associated with the forced sale: storage expenses of \$4,500.

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1                   2.     Loss of Personalty

2                   Mr. McMillan testified about the loss of personalty associated with the forced sale  
3 but there was no particularized testimony except for the value of the horses which were  
4 given away because there was no time to find a suitable buyer. Mr. McMillan testified  
5 that the value of the horses was \$5,000 each and Defendant did not challenge this  
6 testimony during trial. Accordingly the Court will value the loss of personalty at  
7 \$20,000.

8                   3.     Emotional Distress

9                   The question here is whether an element of damages for the breach of the statutory  
10 duty may include emotional distress. Plaintiffs argue that they “suffered emotional  
11 distress for having to sell their home on August 6, 2012 and move out of the home they  
12 had lived in and invested in during the 17 year period preceding August of 2012” and that  
13 “Mr. McMillan’s long term depression and mental illness, is an ‘illness’ and ‘impairment  
14 of the human body’ that constitutes a ‘bodily injury’ under Arizona law.” Plaintiff’s  
15 Reply to OLS’s Post Trial Brief at pp. 2-3 and p. 7.

16                  Defendant maintains that “[n]o Arizona cases have recognized a right to emotional  
17 distress damages where there is only a pecuniary loss.” QLS Post Trial Brief at p. 2.  
18 Each case Defendant cites in support of this proposition arises in the context of  
19 professional negligence either by attorney or veterinarian malpractice. Plaintiffs however  
20 cite an Arizona case which allowed emotional distress damages where plaintiffs alleged a  
21 loss involving interference with real property rights. *Thomas v. Goudreault*, 163 Ariz.  
22 159, 786 P.2d 1010 (App. 2009). This case commands the result here and thus Plaintiff  
23 may recover for “mental suffering, anguish, discomfort or annoyance.” *Id.* at 168, 786  
24 P.2d at 1016.

25                  Plaintiff and his wife testified about the emotional distress associated with the  
26 precipitous forced sale of their home of 17 years. In particular, Mr. McMillan testified  
27 about the unique nature of the property which provided ample land for large animals,  
28 gardens and family gatherings and the personal improvements he made to the property

1 which were the product of his personal labor such as the planting of 35 trees by hand  
2 which had grown to maturity, the digging and maintenance of their man-made lake and  
3 the construction of a rock waterfall. Ms. McMillan testified about the emotional strain on  
4 the family that affected her husband. Mr. McMillan testified about the medical treatment  
5 he received for the depression he experienced.

6 The home, as recognized by many foundational laws in our country from the  
7 Fourth Amendment to the statutory homestead exemption, enjoys a special sanctity and  
8 its loss understandably produces an emotional distress. Quantifying that distress is  
9 difficult however because no monetary award can address the distress which has already  
10 been experienced. Plaintiffs suggested at closing argument that no less than one million  
11 dollars could be appropriate but Plaintiffs offered no basis or argument to support this  
12 number. The Court, as the trier of fact, reflecting on the testimony about what was lost,  
13 what it likely meant to the Plaintiffs and the emotional distress with the attendant  
14 physical symptoms, believes that an emotional distress award of \$100,000 is just.

15 The Court therefore returns a bench trial verdict in favor of Plaintiff and awards  
16 the following damages:

17	Forced Sale of Real Property:	\$64,500
18	Personalty:	\$20,000
19	Emotional Distress:	\$100,000
20	Total:	\$184,500

21 In accordance with the foregoing, the Court makes the following findings of fact  
22 and conclusions of law:

23 1. On June 20, 2008, Plaintiff Kent McMillan (“KM”) executed a Promissory  
24 Note (“Note”) in the principal sum of \$350,000.00. The Note was secured by a Deed of  
25 Trust on KM’s home, which was recorded on June 30, 2008. Wells Fargo Bank N.A.  
26 (“WF”) was the lender and beneficiary pursuant to the Deed of Trust.

27 2. On October 6, 2010, Quality Loan Service Corporation (“QLS”) was  
28 appointed as the successor trustee of the Deed of Trust.



1           3.     On April 25, 2012, QLS mailed to KM a letter advising that WF had  
2 referred the loan on his home for foreclosure and advised KM to contact WF if he wanted  
3 to evaluate alternatives to avoid the foreclosure.

4           4.     On April 30, 2012, KM called QLS and advised that his home was  
5 improperly placed into foreclosure because WF was not giving him credit for several  
6 mortgage payments he had made. KM advised QLS that he disputed the amount WF  
7 claimed was owed to bring his loan current.

8           5.     In response to KM's telephone call on April 30, 2012, QLS informed KM  
9 that he would have to contact WF to go over the payment history. (See Plaintiff's exhibit  
10 48, document bate stamped 472).

11          6.     On May 8, 2012, KM again contacted QLS on two occasions by telephone  
12 and advised QLS that "he is only behind one month and that we shouldn't be foreclosing  
13 on his property." (See Plaintiff's exhibit 48, document bate stamped 472-473).

14          7.     On May 8, 2012, QLS's employees informed KM that he would need to  
15 contact WF for information on his loan and the amount he would need to pay to have the  
16 foreclosure cancelled.

17          8.     On May 23, 2012, QLS mailed to KM a Statement of Breach letter from  
18 Wells Fargo Bank, NA by Quality Loan Service Corp., as agent, which was signed by  
19 QLS employee Mauro Guzman and which advised KM that "To find out the amount you  
20 must pay or to arrange for payment to stop the foreclosure or if your property is in  
21 foreclosure for any other reason, contact: WELLS FARGO BANK, 1 Home Campus  
22 X2504-017, Des Moines, IA 50328".

23          9.     On or about May 23, 2012, QLS mailed to KM a DEBT VALIDATION  
24 NOTICE claiming that the amount KM was past due and would need to pay to bring his  
25 loan current was \$13,135.05. The notice also provided that the outstanding amount  
26 owing on the loan would increase from day to day and stated that QLS would assume that  
27 the outstanding amount due as of May 17, 2012 was valid unless KM advised QLS in  
28 writing that he disputed the amount of the outstanding debt.

1           10. On May 28, 2012, KM wrote a letter to WF and mailed copies of the letter  
2 to QLS at 2141 N. 5th Avenue, San Diego, CA, Senator John McCain, Arizona Attorney  
3 General's Office and the Comptroller of Currency which stated in part:

4                   ...Currently, May of 2012, I received a letter from WF and Quality  
5 Home Loan Services stating I am behind in my mortgage and my home was  
6 in foreclosure with a sell date of August 22, 2012. I immediately called  
7 Quality Loan Services, on April 30, 2012, and spoke to a "Fernando". He  
8 stated that he didn't have the file from WF yet. I hung up with him and  
9 called WF and spoke to employee, "Yan". On May 08, 2012 I called WF  
10 and spoke to Marcella with WF to see how they were coming up with the  
11 amount due of \$14,308.02. Marcella said that this amount was incorrect  
12 and that I actually had a credit of \$3,200.00 that was not showing on my  
13 statement. She could not explain why this amount hasn't been disclosed to  
14 me or in the "unapplied funds". I also spoke to "AJ", employee number  
15 007 on May 24, 2012 at WF and requested a payment history and a  
16 statement of where they were applying the money I have been sending  
17 them.

18                   I have since paid WF a total of \$10,400.00. I am currently a month  
19 behind in my mortgage. I have never been more than 2 months behind and  
20 always have been able to make it current. From what I have been told by  
21 WF employees from when I was in the HARP program, as per my contract  
22 with WF my home cannot be foreclosed on unless the payments are three  
23 months or more behind.

24                   ...I am requesting for you, Mr. Windust, to look into this matter and  
25 to adequately explain where the money I have given to WF has been  
26 applied, make sure that any "credit" or "unapplied funds" be credited to my  
27 mortgage and reimburse me for any late fees, foreclosure fees and interest  
28 that are not justified and you are charging me for. I also demand that you  
to stop this foreclosure process now!

11. QLS received KM's letter dated May 28, 2012.

12. QLS's letter of May 28, 2012 informed QLS in writing that KM disputed  
the amount that WF and QLS had claimed KM needed to pay to bring his loan current.

13. QLS did not respond in writing or otherwise to KM's letter of May 28,  
2012 which disputed that the amount he was past due and needed to pay to bring his loan  
current.

1           14. Mr. McMillan received written responses to his complaints that the amount  
2 WF and QLS claimed he needed to pay was incorrect from WF, Senator John McCain,  
3 the Arizona Attorney General's Office and the Comptroller of Currency.

4           15. On June 15, 2012, QLS mailed to KM another copy of the Statement of  
5 Breach letter dated May 17, 2012 which was signed by QLS employee Mauro Guzman  
6 and which again advised KM "To find out the amount you must pay or to arrange for  
7 payment to stop the foreclosure or if your property is in foreclosure for any other reason,  
8 contact: WELLS FARGO BANK, 1 Home Campus X2504-017, Des Moines, IA  
9 50328".

10           16. KM mailed another letter and complaint to WF at "Office of Complaints,  
11 Wells Fargo, 1 Home Campus, MAC X2302-02J" dated June 21, 2012 and also mailed  
12 copies of the letter to QLS at 2141 N. 5th Avenue, San Diego, CA, Senator John McCain,  
13 Pamela Crabtree with Arizona Attorney General's office and the Comptroller of  
14 Currency. The June 21, 2012 letter again disputed the amount WF and QLS claimed was  
15 past due and requested that KM be advised of the true and correct amount he needed to  
16 pay to avoid the foreclosure:

17           I have been in my home for about 17 years. I do not wish to have my home  
18 foreclosed on. Nor do I plan on defaulting on my mortgage. I have acted  
19 in good faith, but WF has not. Stop applying funds to an unapplied funds  
20 account. If I get behind in my mortgage I will catch up the payments as  
21 quick as possible. I have never been three months behind in my payments.  
22 Stop the foreclosure proceedings, and give me a clean explanation of where  
23 my payments have been applied and if I have a balance due so I may pay it.  
24 However, I cannot make a payment or clear up any misunderstanding  
25 unless you keep your word and communicate with me.

26           17. QLS received a copy of KM's letter dated June 21, 2012. The Court finds  
27 that Mr. and Ms. McMillan were more credible about sending this letter than the  
28 Defendant was about how it handled mail especially in light of the fact that no one  
testified about the handling of this particular file at QLS and that there are incidences in  
the record where documents that should be in the trustee's file are not.

1           18.    KM's June 21, 2012 letter must be construed in favor of KM and is  
2 interpreted to be a written notice delivered to QLS, trustee, which requested an  
3 itemization of the amount KM needed to pay to stop the foreclosure.

4           19.    A.R.S. § 33-813(D) required that QLC provide to KM within five business  
5 days from receipt of the June 21, 2012 request, an itemization of the "exact amount  
6 necessary to reinstate the trust deed, separately specifying costs, fees and any other  
7 amounts necessary to reinstate the trust deed".

8           20.    QLS did not provide to KM within five days of its receipt of KM's June 21,  
9 2012, an itemization specifying the exact amount which KM needed to pay to reinstate  
10 the trust deed.

11           21.    KM reasonably relied on information from QLS, which included five  
12 Statement of Breach letters, QLC's April 25, 2012 letter and information QLS advised  
13 KM during telephone conversations on April 30 and May 8, 2012, all which indicated  
14 that KM should address his requests for the amount he needed to pay to stop the  
15 foreclosure to WF.

16           22.    During July and early August, KM continued to correspond with WF,  
17 Senator John McCain, the Arizona Attorney Office and Comptroller of Currency in an  
18 effort to obtain the actual and exact amount he needed to pay to reinstate his trust deed  
19 and avoid the foreclosure.

20           23.    KM hired an attorney on or before July 10, 2012, Don Yearin, because in  
21 part, neither WF or QLS had provided him with the exact amount he needed to pay to  
22 stop the foreclosure.

23           24.    On July 10, 2012, counsel for KM sent a letter to Mauro Guzman, QLS's  
24 employee, specifically demanding that pursuant to A.R.S. § 33-813(D), he be provided  
25 with a written statement within five days itemizing all amounts that KM needed to pay to  
26 reinstate his loan and avoid the foreclosure.

27           25.    The letter from KM's attorney dated July 10, 2012 was addressed and  
28 mailed to Mauro Guzman, QLS's employee, and was mailed to the address which Mr.

1 Guzman provided in his May 17, 2012 Statement of Breach letter which stated “to find  
2 out the amount you must pay or to arrange for payment to stop the foreclosure or if your  
3 property is in foreclosure or for any other reason, contact: WELLS FARGO BANK, 1  
4 Home Campus, Des Moines, IA 50328, 800-662-3806.”

5 26. KM’s attorney’s letter dated July 10, 2012 must be construed in favor of  
6 KM and is interpreted to be a written notice delivered to QLS, trustee, which requested  
7 an itemization of the amount KM needed to pay to stop the foreclosure.

8 27. A.R.S. § 33-813(D) required that QLC provide to KM’s attorney within  
9 five business days from receipt of the July 10, 2012 request, an itemization of the “exact  
10 amount necessary to reinstate the trust deed, separately specifying costs, fees and any  
11 other amounts necessary to reinstate the trust deed”.

12 28. QLS failed to provide KM’s attorney with an itemization of the exact  
13 amount KM needed to pay to reinstate the trust and avoid the foreclosure within five days  
14 of the July 10, 2012 letter being delivered to the address provided by Mr. Guzman.

15 29. KM hired a realtor and listed his home for sale on or about July 11, 2012,  
16 out of fear that despite his complaints and numerous requests for the exact amount he  
17 could pay to stop the foreclosure, his residence would be improperly sold at the Trustee’s  
18 Sale scheduled for August 22, 2012.

19 30. On July 31, 2012, Mr. McMillan’s realtor, Jesse Herfel, informed Mr.  
20 McMillan that they were running out of time and that it would be extremely difficult to  
21 accept an offer, perform property inspections, obtain funding and have a successful close  
22 of escrow before the trustee’s sale on August 22, 2013.

23 31. McMillan’s realtor was so concerned that a sale would not be completed by  
24 August 22, 2012, and KM would lose all of his equity in the home that he made KM sign  
25 an acknowledgment on July 31, 2012 which stated:

26 Seller acknowledges the Listing Agent has presented offers to the Seller as  
27 of July 31, 2012 and understands by not accepting the offers, the property  
28 may go into foreclosure on August 22, 2012 and forfeit any equities he may

1 have. Seller agrees to hold listing Agent/Keller Williams Integrity First  
2 Realty harmless as a result of the above actions.

3 32. On August 2, 2012, Mr. McMillan's attorney sent an email and fax to QLS,  
4 with a draft of a lawsuit and his July 10, 2012 demand for a reinstatement itemization,  
5 and advised that unless someone contacted counsel by August 3, 2012 or canceled the  
6 trustee sale, he was going to file the lawsuit.

7 33. As of August 6, 2012, no one from QLS had contacted KM or his attorney  
8 or provided the reinstatement amount.

9 34. On August 6, 2012, KM's realtor sent him the following email:

10 ...Here is the latest information from Wells Fargo on getting your  
11 foreclosure postponed. It's imperative that we move forward on one of our  
12 offers as time is running out. You can see from the info below that a  
13 postponement is not guaranteed in any way even if we do get everything in.  
14 This is simply the information needed for them to consider a  
15 postponement...

16 35. Based on QLS's failure to provide the reinstatement amount on or before  
17 August 6, 2012, and out of fear that Mr. McMillan would lose all of the equity in his  
18 home, KM accepted an offer to sell Plaintiffs' home on August 6, 2012.

19 36. Had QLS timely provided the reinstatement amount as required by A.R.S. §  
20 33-813(D), Mr. McMillan would have reinstated his loan and would not have been forced  
21 to sell his home when he did.

22 37. Under the circumstances, KM's decision to enter into a contract to sell his  
23 home on August 6, 2012, to avoid the risk of losing all of the equity in his home was  
24 reasonable.

25 38. In *Patton v. First Federal Savings & Loan*, 118 Ariz. 473, 477, 578 P.2d  
26 152, 156 (1978), the Court stated:

27 Compared to mortgage requirements, the Deed of Trust procedures  
28 authorized by statute make it far easier for lenders to forfeit the borrower's  
interest in the real estate securing a loan, and also abrogate the right of  
redemption after sale guaranteed under a mortgage foreclosure. See A.R.S.  
§ 33-726 and A.R.S. § 1281 et seq. A mortgage generally may be

1 foreclosed only by filing a civil action while, under a Deed of Trust, a  
2 trustee holds a power of sale permitting him to sell the property out of court  
3 with no necessity of judicial action. The Deed of Trust statutes thus strip  
4 borrowers of many of the protections available under a mortgage.  
5 Therefore, lenders must strictly comply with the Deed of Trust statutes, and  
6 the statutes must be strictly construed in favor of the borrower.

7 39. Pursuant to Arizona case law, the applicable Arizona Deed of Trust Statutes  
8 at issue in this case, A.R.S. §§ 33-813(D) and 33-803.01(A)(2), must be interpreted  
9 strictly in favor of the borrower, KM.

10 40. QLS had a legal duty to respond to KM's letter dated May 28, 2012 and  
11 QLS breached this duty.

12 41. QLS breached its legal duty under A.R.S. § 33-813(D) by failing to respond  
13 to KM's letter dated June 21, 2012.

14 42. QLS breached its duty under A.R.S. § 33-813(D) by failing to respond to  
15 The Yearin Law Group's letter dated July 10, 2012 on or before August 8, 2012.

16 43. QLS improperly delegated its non-delegable duty under A.R.S. § 33-  
17 803.01(A)(2) to receive and respond to requests for reinstatement by sending to KM five  
18 Statement of Breach or Non-Performance letters, including the letter dated May 17, 2012  
19 which stated:

20 NOTICE IS HEREBY GIVEN that a breach or non-performance of the  
21 Trust Deed mentioned in the "Notice of Trust's Sale" to which this  
22 Statement of Breach of Non-performance is attached has occurred....

23 The Beneficiary elects to sell or cause to be sold such property under the  
24 Trust Deed.

25 Dated 5/17/2012 Wells Fargo Bank, NA by Quality Loan Service Corp, as  
26 agent

27 \_\_\_\_\_  
28 Mauro Guzman, AZ FC Support Processor

IF YOUR PROPERTY IS IN FORECLOSURE because you are delinquent  
in payments, it may be sold without any court action... You have the legal

1 right to bring your account in good standing by paying all your past due  
2 payments plus permitted costs and expenses...

3 To find out the amount you must pay or to arrange for payment to stop the  
4 foreclosure or if your property is in foreclosure or for any other reason,  
5 contact: WELLS FARGO BANK, 1 Home Campus, Des Moines, IA  
6 50328, 800-662- 3806

7 44. The Law of the Case Doctrine dictates that pursuant to the Court's Order  
8 filed on April 4, 2013, WF did not have a legal duty to provide plaintiffs with an  
9 accounting or to provide the amount they needed to pay to reinstate the loan.

10 45. QLS, as Trustee, was the only entity with a legal duty to provide KM with  
11 an itemization of the exact amount he needed to pay to stop the foreclosure.

12 46. As a result of QLS's breach of legal duties, Plaintiffs were forced to  
13 prematurely sell their home and proximately incurred lawful damages which include a  
14 loss of appreciation in their home and emotional distress and other damages.

15 47. Plaintiffs decision to sell their home on August 6, 2012 was reasonable  
16 under the circumstances.

17 48. Plaintiff was not required under the then existing exigent circumstances to  
18 bring an action to enjoin the Trustee's Sale scheduled for August 22, 2012 and Plaintiffs  
19 did not waive any rights by failing to attempt to enjoin the sale.

20 49. Plaintiffs' foreclosure law expert testified that the trustee's duties are clear  
21 and that they are non-delegable because "the legislature said so." In contrast,  
22 Defendant's expert testified that the requirements of § 33-809(C) were "loosey-goosey"  
23 and that the trustee is free not to follow the law if it does not in the trustee's mind make  
24 sense in a particular case. Defendant's expert made the explicit statement that he was a  
25 trustee ("I'm a trustee, remember.") suggesting that he too accepted the bias that was  
26 evident in his testimony as he sought to delimit the duties of the trustee and complained  
27 about the borrower here "driving a stake in the trustee's heart" and almost suggesting that  
28 it was a set up by the borrower. There was nothing in the testimony of this case that  
supported this execration. Indeed, it was apparent that the frustration this borrower



1 encountered from the actions of the lender and the trustee was legitimate and the product  
2 of abandoned or misassigned duties. Any wound in the “trustee’s heart” was self-  
3 inflicted. The Court did not find Defendant’s expert’s libertine view of the plain meaning  
4 of the law persuasive. If the law does not make sense, it is not for the trustee or the Court  
5 to ignore it. It is a matter to be submitted to the legislative process for repeal or  
6 amendment – something Defendant’s expert also testified he has successfully done.

7 Plaintiffs were caught in a bureaucratic maelstrom which the Arizona legislature  
8 had sought to avoid by prescribing clear duties to an uninterested third party which would  
9 have the non-delegable duty to provide the requested information and provide a  
10 mechanism to allow the borrower to stop the non-judicial foreclosure. The legislature  
11 provided a lighthouse to guide the way and made sure that the lighthouse keeper would  
12 accomplish this task by providing for specific, non-delegable duties. Here the trustee  
13 failed in that obligation and the consequences were dire. Having abandoned these duties,  
14 the trustee also failed in its last clear chance to avoid the debacle that was this family’s  
15 experience. Defendant’s chief in-house lawyer testified that he often places phone calls  
16 in cases to help borrowers and expeditiously address emergent issues. No phone call or  
17 timely letter was forthcoming in this case even after the Plaintiffs’ lawyer pleaded for the  
18 information necessary to forestall the need to sell the house before the foreclosure sale.  
19 As the Defendant’s in-house lawyer also testified, their beneficiary clients “push hard”  
20 for them to direct borrowers to the beneficiary. This perhaps explains the business reason  
21 for the trustee’s departure from assuring that in the first and last instance, its statutory  
22 obligations are respected.

23 Dated this 21st day of November, 2014.

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David K. Duncan  
United States Magistrate Judge