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NO. 72506-8--I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

DAVID GUTTORMSEN and TERRY GUTTORMSEN, husband and wife,

Appellants,

v.

AURORA BANK, FSB, a federally chartered savings bank; AURORA LOAN SERVICES, LLC., a limited liability company; NATIONSTAR MORTGAGE, LLC, a Texas Limited Liability Company, FEDERAL NATIONAL MORTGAGE ASSOCIATION, a United States government sponsored enterprise; QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington Corporation; HSBC Mortgage Services, Inc., a Delaware Corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation; and DOE DEFENDANTS 1-10,

Respondents.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

The case that bears most relevance is not *Trujillo v. NWTS*, 181 Wn.App. 484, 326 P.3d 768 (2014) (hereinafter "*Trujillo*")[1], but *Lyons v. U.S. Bank, N.A.*, 181 Wn.2d 775, 790, 336 P.3d 1142 (2014) (hereinafter "*Lyons*"). Notably, *Lyons* was decided by the Washington Supreme Court after *Trujillo*, so to the extent *Trujillo* conflicts, *Lyons* is controlling. *Lyons* held allegations of a breach of the duty of good faith create issues of fact not properly disposed of in summary judgment proceedings. *Lyons*, at 788-789. That *Lyons* essentially supersedes *Truijillo* was tacitly acknowledge by this Court in *Jackson v. Quality Loan Service Corp.*, 2015 WL 1542060. --- P.3d. --- (2015) ("Since there was no allegation of bad faith here, the beneficiary declaration is sufficient.").

But here, there *is* an allegation of bad faith: specifically QLS failed to identify the authority under which AURORA sought to foreclose when it was aware or should have been aware that another entity was the owner of the Note; and in failing to properly proceed by relying on the different deeds at various points in this process. QLS was obligated to determine if the Note owner had granted adequate legal authority to AURORA to conduct

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[1] It should be noted that the Washington Supreme Court has accepted discretionary review of *Trujillo* and oral argument is now set before the Washington Supreme Court for June 23, 2015.

this foreclosure. It failed to do so, further compounding the errors made relating to the deeds of trust and subsequent assignments.

Lyons is on point because there are federally mandated programs available to borrowers with loans owned by quasi-federal entities like Fannie Mae that are not available to borrowers with loans owned by purely private entities like AURORA. The deceit perpetrated upon unsophisticated borrowers is that they are powerless in the face of big banks that will simply move forward with a foreclosure regardless of pleas for assistance. Instead, all of the opportunities granted by federal law must be made clear to borrowers in order that they can take action to save their homes. QLS and their principals sought to bully the Guttormsens despite inadequate and shoddy documentation supporting the foreclosure.

After Guttormsens brought suit to block Respondents wrongful foreclosure, Respondents now seek to wash their hands of the mess they created. As is typical of many bullies, the trustee and servicers abandoned their position when confronted, but only after the Guttormsens were forced to bring a civil action, and prevailed on their motion to block the sale. Respondents acknowledge this chain of events. Response Brief of Aurora Bank, FSB, *et al*, page 4-5. It is striking that a foreclosure process now so doggedly defended was abandoned in the first place.

The Guttormsens prevailed on the substance of the claim that the foreclosure sale was illegal. The trial court granted a preliminary injunction and the Respondents capitulated by discontinuing the sale. CP 912 and CP 345.

Further, bringing and prevailing in an action to block a wrongful foreclosure is injury under *Panag v. Farmers Ins. Co. Of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009) (hereinafter "*Panag*"). Guttormsen s' successful effort to block the illegal trustee's sale is separate and distinct from Guttormsens' Consumer Protection Act ("CPA") claim and, as such, is compensable under the CPA. Determining whether the proper party is acting as beneficiary is just as central as determining the nature of a debt as in *Panag*.

Unlike in the *Bakhchinyan v. Countrywide Bank, N.A.* (2013 WL 5574429) (W.D. Wash. October 9, 2013)[2] case cited by Respondents, Guttormsens have a separate and distinct claim brought to a successful conclusion in the trial court. Response Brief of Aurora Bank, FSB, et al, page 19-21. The Guttormsens had reason to block an illegal sale, brought by an illegal beneficiary, to avoid the wrongful foreclosure of their home,

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[2] See also *Bakhchinyan v. Countrywide Bank, N.A.* (2014 U.S. Dist. LEXIS 46943).

for which they are entitled to recovery their injuries and damages, in addition to their claims for injunctive relief and declaratory relief.

II. ARGUMENT

A. The terms "owner" and "holder" under the Deed of Trust Act (hereinafter "DTA") are distinct and both must be present to initiate and prosecute a non-judicial foreclosure.

Respondents assert that Guttormsens have offered a "convoluted and confused argument that persistently conflates the concepts of "holder" and "owner" status, arguing that the term "owner" is irrelevant in view of *RCW 61.24.005(2)* and *RCW 62A.1-201(21)(A).* This argument is in accord with arguments made by the trustee in *Trujillo.* But Respondents' reliance on *Trujillo* is misplaced.

The language of *RCW 61.24.030(7)(a)* is clear and unambiguous:

> 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. (Emphasis added)

The *Trujillo* court read the proof of ownership requirement out of the statute by holding that a foreclosing beneficiary "need not show that it is the owner of the note," and that "the legislature could have eliminated any reference to 'owner' of the note in this provision because it is the 'holder' of

the note who is entitled to enforce it, regardless of ownership."[3] *Trujillo*, at page 501. The *Trujillo* court substituted its judgment for that of the legislature by treating this statutory proof of ownership requirement as superfluous. This substitution of judgment violates the rule that "[c]ourts are not permitted to simply ignore terms in a statue." *In re the Parentage of J.M.K and D.R.K.*, 155 Wn.2d 374, 393, 119 P.3d 840 (2005). See also *Plein v. Lackey*, 149 Wn.2d 214, 227, 67 P.3d 1060 (2003) (when interpreting the DTA, it "must not be judicially construed in a way that renders any part of the statute superfluous.").

As noted in Guttormsens' Opening Brief, the provisions of *RCW 61.24.030(7)(a)* can be harmonized and read together, where the conclusion is certain: **where A [Owner] = B [Beneficiary] and B [Beneficiary] = C [Actual Holder]; A [Owner] should equal C [Actual Holder].** This is incontrovertible logic.

The *Trujillo* court should have ruled that a foreclosing trustee can only rely on declarations from beneficiaries who claim to *both* hold and own the note in question. The first sentence of *RCW 61.24.030(7)(a)* says that the beneficiary must prove it is the owner of the note and the second sentence says

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[3] The *Trujillo* court acknowledged that the "owner" of the note is the party that has the right to the economic benefits. *Trujillo*, at page 497, n. 53 (citing to *Cashmere Valley Bank v. Dept. of Revenue*, 181 Wn.2d 622, 625, 334 P.3d 1100 (2014) (when the original lender sells the loan, the "secondary market buyer acquires the right to receive the borrower's principal and interest payments on the home loan and also the right to foreclose on the loan if the borrower fails to make timely payments.") (Emphasis added). See also the definition of the "Note Holder" under the subject Note. CP 949-952.

the proof of ownership requirement in the first sentence (assuming the trustee can rely on it in good faith without violating *RCW 61.24.030(7)(b)*) must be provided by that same beneficiary. Thus, when the two sentences are read together, it follows that the beneficiary that provides the declaration must be the owner of the note. See *Timberline Air Service v. Bell Helicopter-Textron, Inc.,* 125 Wn.2d 305, 313-314, 884 P.2d 920 (1994) ("The meaning given the language in the first sentence of the provision should accord with that given this language in the second sentence."). See also *City of Olympia v. Drebick*, 156 Wn.2d 289, 295, 126 P.3d 802 (2006) ("'statutory provisions are interpreted in relation to each other and all provisions harmonized'".)[4]

The argument that the beneficiary must be both the owner and holder of the obligation is further bolstered by *RCW 61.24.030(7)(b),* which says that the trustee cannot rely on the declaration described in the second sentence of *RCW 61.24.030(7)(a)* to meet the proof of ownership requirement in the first sentence if the trustee "has violated" its duty of good faith to the borrower under *RCW 61.24.010(4).* Under *RCW 61.24.030(7)(b),* if the trustee knows or has reason to believe the beneficiary is not the owner, the trustee cannot accept

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[4] The DTA requires the trustee to determine the owner of the note by providing that at least thirty days before the trustee records the notice of trustee's sale, it sends the borrower a notice of default that identifies the owner. *RCW 61.24.030(8)(l).* Thus, harmonizing the first and second sentences of *RCW 61.24.030(7)(a)* to mean that the trustee need only rely on declarations from beneficiaries who claim to both hold and own the note does not impose any additional duty of inquiry on the trustee, which is already required to identify and disclose to the borrower who owns the note under *RCW 61.24.030(8)(l).*

the declaration from the beneficiary as proof of the known non-owner beneficiary's "ownership," because to do so, it will have violated the trustee's duty of good faith. *Lyons,* at page 790 (". . . if there is an indication that the beneficiary declaration might be ineffective, a trustee should verify its veracity before initiating a trustee's sale to comply with its statutory duty.").

In short, under the plain language of *RCW 61.24.030(7)(a),* the beneficiary must provide the trustee proof that it is the owner of the note before the trustee can record the notice of trustee's sale. As proof of the beneficiary's ownership of the note, the trustee may rely on a declaration stating that the beneficiary is the actual holder of the note, but that declaration must be provided by a beneficiary that is also the owner, and the trustee cannot rely on the declaration as proof of the beneficiary's ownership if in so doing, it will have violated the trustee's duty of good faith. *RCW 61.24.030(7)(b).* Good faith requires the trustee to investigate and verify ownership whenever the facts indicate a "beneficiary" is not also the owner – as is the case in 90% of the foreclosure referrals made to QLS from its "clients".

This interpretation of *RCW 61.24.030(7)(a)* is reinforced by several recent Supreme Court decisions. Most recently in *Lyons*, the Supreme Court emphasized that "RCW 61.24.030(7)(a) . . . instructs that a trustee must have proof the beneficiary is owner prior to initiating a trustee's sale." *Lyons,* at page 786 (Emphasis added). In *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 106-107, 297 P.3d 677 (2013) (hereinafter "*Schroeder*"),

the Washington Supreme Court held that *RCW 61.24.030* imposes non-waivable limits on the trustee's authority to foreclose, including the requirement under RCW 61.24.030(7)(a) that the trustee must "have proof that the beneficiary is the owner of the obligation secured by the deed of trust."[5] (Emphasis added). Finally, in *Bain v. Metropolitan Mortgage Group*, 175 Wn.2d 83, 94, 285 P.3d 34 (2012) (hereinafter "*Bain*"), the Washington Supreme Court made clear that the DTA requires the trustee to "have proof that the beneficiary is the owner of [the] promissory note . . . before foreclosing an owner-occupied home," citing *RCW 61.24.030(7)(a).* In each of these cases the Washington Supreme Court recognized that the proof ownership requirement found in *RCW 61.24.030(7)(a)* means just what it says.

If the Court goes beyond the plain statutory language and considers secondary evidence of legislative intent, it should consider the sequential drafting history of SB 5810, the 2009 bill that led to the adoption of the proof of ownership requirement in *RCW 61.24.030(7)(a).* See *Spokane County Health Dist. v. Brockett,* 120 Wn.2d 140, 153, 839 P.2d 324 (1992) and *State v. Turner*, 98 Wn.2d 731, 735-737, 658 P.2d 658 (1983).

The most significant change in the drafting history was the change from the requirement in the original version of the bill that the beneficiary must

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[5] In *Schroeder*, the court held that each of the eight "requisites" to a trustee's sale listed in *RCW 61.24.030*, including the proof of ownership requirement in *RCW 61.24.030(7)(a),* is a limitation on the trustee's power to foreclose that cannot be waived. *Schroeder,* at 106-107.

prove it is the "actual holder" of the note, to the requirement in the final, enacted version that the beneficiary must prove it is the "owner" of the note. The original version of SB 5810 proposed on February 3, 2009 did not have any of the language now contained in *RCW 61.24.030(7)(a)*. The next version, proposed on March 12, 2009, had language almost identical to the language now in *RCW 61.24.030(7)(a)*,[6] except it used the phrase "actual holder" where the word "owner" now appears.[7] Under this version as passed by the Senate, before the notice of trustee's sale was recorded, the trustee would have been required to have either "proof that the beneficiary is the actual holder of any promissory" or "possession of the original of any promissory note". However, in the final version, as proposed on April 9, 2009, and as ultimately enacted, the "actual holder" language was stricken and replaced by the current language requiring the trustee to have proof that the beneficiary is the "owner" of the note before issuing a notice of trustee's sale.[8]

Thus, Respondents' emphasis on the identity of the alleged "holder" of the Note is misplaced – it is the identity of the "owner" that matters. But, as noted in Guttormsens' Opening Brief, there was no clear evidence of who the

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[6] Available at: http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Senate%20Bills/5810.pdf.

[7] Available at: http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Amdnedments/Senate/5810%20AMS%20KAUF%20S2359.1.pdf.

[8] Available at http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Amendments/House/5810.E%20AMH%20JUDI%20TANG%20072.pdf.

true and lawful owner and holder ("beneficiary") of the obligation was on the date the Notice of Default and Notice of Trustee's Sale were issued by QLS before the trial court on summary judgment. Although there is considerable doubt as to whether Fannie Mae was or is the true and lawful owner and holder of the obligation, it is quite clear that neither AURORA nor NATIONSTAR, the entities that actual initiated the foreclosure proceedings, were actual "holders" of the obligation, as the term is defined under *RCW 61.24.005(2)* or the terms of the Note. At best, AURORA and NATIONSTAR, were merely acting as agents for Fannie Mae or whoever the true owner and holder of the obligation might be and agents for the owner cannot qualify as the holders. *Central Washington Bank v. Mendelson-Zeller,* 113 Wn.2d 346, 358, 779 P.2d 697 (1989) (hereinafter "*Central Washington Bank*"). CP 842-845, 897.

Turning to the facts, NATIONSTAR allegedly became beneficiary of the Note and Deed of Trust on October 11, 2012. CP 1020-1022. NATIONSTAR executed a "Beneficiary Declaration" on December 5, 2012, however according to Respondents, AURORA was the note custodian at this time. Response Brief of Aurora Bank, FSB, et al, page 4-5. In other words for purposes of summary judgment, NATIONSTAR was neither the owner (Fannie Mae) nor "actual holder" of the Note when QLS recorded the Notice of Trustee's Sale of the property. CP 1024. As alleged custodian of the Note and Deed of Trust for an undisclosed principal, AURORA had no rights in or to the Note and Deed of Trust. *Central Washington Bank*

B. Reliance on third party business records unfounded.

Respondents assert that the testimony of A.J. Loll regarding computer-generated business records of third-parties was appropriate, citing *State v. Smith*, 16 Wn.App. 425, 558 P.2d 271 (1976) (hereinafter "*Smith*") and *State v. Kane*, 23 Wn.App. 107, 594 P.2d 1357 (1979) (hereinafter "*Kane*"). However, Respondents misapply this authority. While it is true that a speaking agent for a the company offering testimony can rely on computer generated records of his or her own company under *RCW 5.45, et seq.*, the offer of computer generated records of third-parties is not. Indeed, none of the cases cited by Respondents deal with the admissibility of third party business records at all.

In *Smith*, the records at issue were bank records of American Federal Savings and Loan Association being offered by its vice-president who supervised the preparation and recording of the subject bank records. They were not records of some third party.

In *Kane,* the records at issue were also bank records of Peoples National Bank and Old National Bank, apparently offered by speaking agents for both banks. They were not records of any third party.

Here, A.J. Loll's testimony was not based solely on records created by NATIONSTAR, but necessarily relied on records of predecessors and agents whose records he/she could not be possibly be able to verify. A.J. Loll fails to provide the Court facts that would establish (1) what specific documents he is

referring to and obtained his information from; (2) how the documents he/she refers to or relies on are maintained, whether in hard copy or electronic; (3) if the records are maintained by electronic means, whether the computer document retrieval equipment used by NATIONSTAR is standard; (4) the original source of the materials maintained; (5) the identity of person who compiled the information contained in the files or computer printouts; (6) when the entries were made and whether they were made at or near the time of the happening or event; and (7) how NATIONSTAR relies on these records; or (8) any means by which the trial court could evaluate the authenticity of the documents provided and the reliability of A.J. Loll's testimony. See *RCW 5.45.020*; *Smith*; *Kane*. Absent establishment of each of these elements, the information A.J. Loll provides is unverifiable, unreliable and inadmissible – in sum, rank hearsay. *CR 56(e); RCW 5.45.020; ER 803*.

Respondents argue that Guttormsens' Note is self-authenticating, based on *ER 902(i),* and A.J. Loll's testimony regarding the Note and the purported allonges thereof had the necessary foundation for admissibility. This is a red-herring. There is no real dispute that the Note offered to the trial court on summary judgment was a true and correct copy of the one executed by Guttormsens on or about February 26, 2006. Rather, the issue focuses on whether A.J. Loll provides the necessary foundation to offer the purported allonges that may or may not have been affixed to the Note, as business records of NATIONSTAR when he/she does not testify that NATIONSTAR created

the allonges. Indeed, A.J. Loll cannot identify who prepared the allonges, who signed the allonges, testify as to the circumstances surrounding the execution of the allonges, the consideration that may have been paid for the allonges and by whom, or anything else that would give the Court assurance that A.J. Loll's testimony and the documents he/she offered are true and reliable.

C. Violations of the DTA.

QLS alleges that the Notice of Default (CP 590-594) comported with the provisions of *RCW 61.24.030(8).* This is only superficially so and not strictly true. Had QLS obtained a title report, it would have been alerted to the fact that Guttormsens' Deed of Trust had been recorded twice and would have taken action to remediate the problems that flowed from the dual recording before initiating foreclosure proceedings. The problems that flowed from the dual recording of Guttormsens' Deed of Trust were all matters of public record that would have put QLS on inquiry notice to investigate, verify and remedy. *RCW 61.24.010(4); Lyons.* This should have included reconveyance of the second Deed of Trust recorded, reissuance (if appropriate) of any purported assignment of the Deed of Trust and reissuance (if appropriate) of any appointment of successor trustee. Absent these steps, QLS violated its duty of good faith to Guttormsens.

QLS asserts that it was merely enough to notify Guttormsens that the "owner" of the Note and Deed of Trust was Fannie Mae, but providing Guttormsens' only AURORA's address and phone number for contact

information. However, this is misleading and highlights the violation of the DTA. *RCW 61.24.030(8)(l)* requires the trustee to provide "the name and address of the owner." This QLS did not do. This information is necessary to assist in resolving disputes or to take advantage of legal protections and to locate the party accountable and with full authority to correct the irregularity if there have been misrepresentations, fraud or irregularities in the foreclosure proceedings. See *Bain*, pages 97, 118. The Notice of Default issued by QLS did not fulfill these ends and short-circuited Guttormsens ability to deal directly with the purported owner and holder of their obligation.

The Debt Validation Notice (CP 600) was equally false and misleading. The subject debt has never been "owed" to AURORA. AURORA is at best a collection agent for the true and lawful owner of the Note and Deed of Trust. The only colorable basis for AURORA to make such a claim is the Assignment of Note and Deed of the Note and Second Deed of Trust (200603230407) (CP 971-986; 1003). But, as argued in Guttormsens' Opening Brief, this Assignment is of questionable validity given MERS apparent lack of authority as an ineligible beneficiary to execute the document and the existence of the Assignment of Note and First Deed of Trust (200603230406) (CP 954-969; 1020-1022). In any event, under the terms of the Note, only the true and lawful owner and actual holder of the obligation was entitled to the payments. (CP 949).

QLS claims there is no Fair Debt Collection Practices Act (*15 USC §1692*) (FDCPA) liability because they are not "debt collectors." However, this Court has held that debt collectors such as QLS that threaten to take non-judicial action to effect dispossession or disablement of property where there is no present right to possession or the property claimed as collateral, such as is alleged herein, may be liable for violations of *15 USC §1692(f)*. *See Walker v. QLS*, 176 Wn.App. 294, 314-317, 308 P.3d 716 (2013) (hereinafter "*Walker*").

Respondents argue that the dual recording of Guttormsens' Deed of Trust is "immaterial", but cite no authority for its immateriality. Indeed, the contrary is true. A properly recorded instrument provides constructive notice of the rights created by the instrument and subsequent trans-actors take subject to the effect of all previously recorded instruments and competing claimants will be bound by the information contained in the previously recorded instruments. *Wetzel v. Nichols,* 53 Wash. 285, 101 Pac. 869 (1909); *Jones v. Berg*, 105 Wash. 69, 117 Pac. 712(1919); *Lincoln County State Bank v. Martin*, 122 Wash. 186, 191 Pac 815 (1920). Such notice affects everyone who acquires an interest subsequent to the earlier recorded instrument. *Ackerson v. Elliott*, 97 Wash. 31, 165 Pac. 899 (1917); *Kendrick v. Davis*, 75 Wn.2d 456, 452 P.2d 222 (1969); *McVean v. Coe*, 12 Wn.App. 738, 532 P.2d 629 (1975). This means simply that the First Deed of Trust (200603230406) has priority in time to the Second Deed of Trust (200603230407), and all who acquired an

interest in the property based on the Second Deed of Trust (200603230407) take subject to the terms of the First Deed of Trust (200603230406).

Here, Respondents created interests in each of the recorded Deeds of Trust without any regard the priority of recording, appointing QLS as trustee under the Second Deed of Trust (200603230407) to foreclose the First Deed of Trust (200603230406), which QLS was not appointed to handle. Respondents would like this Court to ignore the problems created by their negligence, including the violations of the DTA, that flow from the dual recording to Guttormsen s' Deed of Trust, but these are problems of Respondents' own making from their failure to act in good faith.

Respondents also allege the existence of a default that triggered the trustee's power of sale. But, what trustee? If QLS was not properly appointed, QLS never had authority to initiate a non-judicial foreclosure of either Deed of Trust under any circumstance. Moreover, only the true and lawful owner and holder of the obligation has the right to declare a default. *RCW 61.24.030(8)(c).* The declaration of default is not something the trustee has the right to declare for themselves regardless of the status of the borrower's payments.

D. Violations of the Consumer Protection Act ("CPA").

i. Unfair and Deceptive Acts.

As noted in Guttormsens' Opening Brief, the *Bain* court specifically ruled that the unfair and deceptive act or practice element can be presumed

based upon MERS' business model and the manner in which it has been used.[9] *Bain* at pages 115-117; *Klem v. Washington Mutual Bank,* 176 Wn.2d 771, 784-788, 295 P.3d 1179 (2013) (hereinafter "*Klem*"). See also *Walker,* at pages 318-319 and *Bavand v. OneWest Bank, FSB,* 176 Wn.App. 475, 504-506, 309 P.3d 636 (2013) (hereinafter "*Bavand*"). The need not be an intent to deceive, merely that the acts in question have the capacity to deceive a substantial portion of the public. *Panag.* Indeed, the improper assignment of the obligation by MERS (CP 1003) and appointment of QLS based upon that assignment (CP 1005-1006), among other violations of the DTA alleged herein, can constitute unfair and deceptive acts or practices. *Walker*, at pages 319-320, and *Bavand*, at page 505. In

MERS' execution of its Assignment of Note and Deed of Trust (CP 1003), as a ineligible beneficiary, constituted an unfair and deceptive act in that it prepared, executed and filed for record a document that it had no authority or right to prepare, execute or file. *Bain.* This Assignment was relied upon by Respondents to prosecute their wrongful non-judicial foreclosure. Certainly, the extent of MERS' authority was a genuine issue of material fact in dispute on summary judgment.

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[9] This is in accord with other case law in Washington. An unfair or deceptive act can include misrepresentations of facts related to the legal status of a debt. *Panag v. Farmers Ins. Co. Of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009) (hereinafter "*Panag*") (deceptive methods used by a collection agency to recover money on behalf of an insurance company). See also *Klem.*

AURORA's execution of the Appointment of Successor Trustee (CP 1005-1006) constituted an unfair and deceptive act in that AURORA had no authority to prepare and execute the document as it was not the true and lawful owner and actual holder of the obligation (beneficiary), within the terms of *RCW 61.24.010.* This Appointment of Successor Trustee was relied upon by Respondents to prosecute their wrongful non-judicial foreclosure. Certainly, the extent of its authority was a genuine issue of material fact in dispute on summary judgment.

NATIONSTAR's execution of the Assignment of Note and Deed of Trust (CP 1020-1022), apparently to itself, constituted an unfair and deceptive act and practice as MERS, who purportedly assigned the Note and Deed of Trust to AURORA was an ineligible beneficiary with no authority to assign the obligation. If the assignment of the obligation to AURORA was ineffective, NATIONSTAR, apparently acting on behalf of AURORA, had nothing to assign, even to itself. This Assignment of Note and Deed of Trust was relied upon by Respondents to prosecute their wrongful non-judicial foreclosure. Certainly, the efficacy of the Assignment of Note and Deed of Trust was a genuine issue of material fact in dispute on summary judgment.

Finally, QLS' failure to verify the alleged "holder's" or "beneficiary's" right to foreclose constitutes an unfair and deceptive act and practice. See *Lyons,* at page 786-787. Here, notwithstanding serious doubts regarding whether any named Respondent had standing as a true and lawful owner or

actual holder of the subject obligation to initiate a non-judicial foreclosure against Guttormsens, and the lawfulness of AURORA's appointment of QLS as successor trustee, QLS engaged in an unethical process of unreasonably relying upon documents it knew or should have known to be false and misleading. By failing to verify any of the records it was provided by Respondents to initiate a non-judicial foreclosure; relying on an Assignment of Deed of Trust executed by an ineligible "beneficiary" (CP 1003); relying on an Appointment of Successor Trustee executed by an entity that had sold the Note and Deed of Trust to Fannie Mae without verifying its authority (CP 1005-1006); relying on a Declaration of Ownership that failed to identify the true and lawful owner of the obligation and failed to comport with *RCW 61.24.030(7)(a)* (CP 998); relying on a Debt Validation Notice that failed to identify the true and lawful owner of the obligation and failed to comport with *RCW 61.24.030(7)(a)* (CP 1080); and otherwise failing to verify the ownership of the obligation, QLS breached the "fiduciary duty of good faith" by attempting to prosecute a non-judicial foreclosure on Respondents' behalf without strictly complying with all requisites of sale. This misconduct constitutes unfair and deceptive acts and practices. *Lyons,* at page 786-787. The extent of QLS' failure to act in good faith was a material issue of fact in dispute on summary judgment.

ii. Affecting the public interest.

As noted in *Panag,* "the business of debt collection affects the public interest." *Panag,* at page 54. Therefore, there is no dispute that Respondents' misconduct affect the public interest.

iii. Damages and Causation.

As noted in *Frias v. Asset Foreclosure Services, Inc.,* 181 Wn.2d 412,417, 334 P.3d 529 (2014) (hereinafter "*Frias*"), since "the CPA addresses 'injuries' rather than 'damages,' quantifiable monetary loss is not required" in a CPA claim for violation of the DTA, citing *Panag*, at page 58. *Frias,* at page 431. Comparing a DTA claim to an unlawful debt collection action, the *Frias* court noted: "[a] CPA plaintiff can establish injury based on unlawful debt collection practices even where there is no dispute as to the validity of the underlying debt. [citing *Panag* at 55-56, & n. 13.] Where a business demands payment not lawfully due, the consumer can claim injury for expenses he or she incurred in responding, even if the consumer did not remit the payment demanded. . . . The injury element can be met even where the injury alleged is both minimal and temporary." *Frias,* at page 431.

Respondents appear to argue that since Guttormsens have failed to make payment, they have not been damaged. However, as noted in *Panag*, pages 55-56: "a person's blameworthiness . . . is not relevant in deciding whether a collection practice is unfair or deceptive: the focus is on the conduct of the collection agency, not the alleged debtor." Accordingly, the fact that

Guttormsen s may have missed payments does not diminish their claims under the CPA.

In addition to their claims for declaratory relief, injunctive relief and damages, Guttormsens claim Respondents deceived and prevented them from meaningfully pursuing their options under the federal Home Affordable Modification Program (HAMP). Specifically, Respondents violated *RCW 61.24.030(8)(l)* by failing to provide contact information for Fannie Mae in the Notice of Default. The address and phone number provided belonged to AURORA – not Fannie Mae. (CP 1008-1009). Accordingly, Guttormsens had no meaningful way of contacting the owner of their obligation. Had they been given the proper contact information, Guttormsens could have pursued Fannie Mae sponsored programs that might have provided them a modification of their loan. Fannie Mae borrowers are eligible to a modification of the loan when: (1) you are ineligible to refinance; (2) you are facing a long-term hardship; (3) you are behind on your mortgage payments or likely to fall behind soon; (4) your loan was originated on or before January 1, 2009 (i.e., the date you closed your loan)' and (5) your loan is owned by Fannie Mae or Freddie Mac – or is serviced by a participating mortgage company.[10]

Appellants did not become aware of Fannie Mae's involvement until well after they were allegedly tens of thousands of dollars in arrears, making

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[10] http://www.knowyouroptions.com/modify/home-affordable-modification-program

any modification at that time problematic. Respondents all participated in concealing Fannie Mae's involvement in Guttormsen s' Note and Deed of Trust and colluded in leading Guttormsen s to believe they did not have options under the federal programs, when, in fact, the opposite was true.

As a direct and proximate result of Respondents' misconduct, Appellant, David Guttormsen, has identified Appellants' injuries and damages as follows:

> 14. As a direct and proximate result of [respondents'] misconduct, my wife and I have been injured and damaged.
>
> a. First, my wife and I have had our financial reputation injured by Defendants' wrongful foreclosure and collection effort through the reporting of their efforts to credit reporting agencies, together with loss of professional goodwill. Our credit was also adversely impacted by the wrongful filing of the Notice of Trustee's sale with the Snohomish County Auditor to foreclose a Deed of Trust that AURORA was never assigned and to which QLS was never appointed the successor trustee – an obligation in which they have no interest. My wife and I have attempted to obtain loans for personal and/or business purposed since Defendants' declared default and filed and served their Notice of Trustee's Sale, and been denied because of the adverse report on their credit report. To that extent, I have been injured. But for Defendants' misconduct, my wife and I might have been able to refinance our home. However, even if Defendants had not wrongfully filed the Notice of Trustee's Sale, my wife and I would not have been able to refinance our property because Defendants' wrongfully filed a second Deed of Trust on my home.
>
> b. Second, my wife and I have incurred investigative expenses; we have taken time from work, incurred travel expenses and attorney's fees in our efforts to determine who our lender is and to save our home.
>
> c. Third, there are injuries intrinsic to wrongful foreclosure that cannot be calculated monetarily. Foreclosure or the prospect of foreclosure is almost *per se* an emotional harm. Thus, we may have a

basis to claim damages for outrage based on Defendants' irregularities in these foreclosure proceedings which was not previously plead.

d. Moreover, my wife and I seek to enjoin Defendants' foreclosure effort until the true and lawful owner and holder of our Note and Deed of Trust is identified and for the Court to declare MERS to be an ineligible beneficiary and declare the identity of the true and lawful owner and holder of our obligation. This declaratory relief is necessary to assure a clear title to our property when we resolve all outstanding issues concerning our loan.

CP 526-528.

This is certainly specific enough for summary judgment purposes, where it is the existence of a material issue of fact in dispute that is germane.

Injury to a person's business or property is broadly construed and in some instances, where "no monetary damages need be proven, and that non-quantifiable injuries, such as loss of goodwill would suffice for this element of the *Hangman Ridge* test." *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987); *Klem. Lyons,* at page 9, ftn 4. The expenditure of out-of-pocket expenses for postage, parking, and consulting an attorney are sufficient proof of an injury under *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wn.2d 778, 719 P.2d 531 (1986). *Panag,* at pages 59-65. Here, Guttormsens had to repeatedly take time off from work at a loss of wages and incurred travel expenses to consult with an attorney to dispel uncertainty regarding the ownership of their Note, prepare and incur the expense of submitting Qualified Written Requests to address Respondents' misconduct.

(CP 519-529z) Such damages have been recently found to be compensable under Washington law. See *Lyons* and *In re Meyer.*

All of the injuries and damages alleged by Guttormsens were the direct and proximate cause of respondents' misconduct, including QLS, and viewing the evidence in a light most favorable to the non-moving party, all five elements for a private cause of action under the CPA have been met.

E. Violation of *RCW 9A.82.*

Respondents appear to believe that *RCW 9A.82* requires the commission of a crime. It does not. *RCW 9A.82* has been applied to misconduct associated with the DTA under circumstances similar to this case. *Bowcutt v. Delta North Star Corp.*, 95 Wn.App. 311, 976 P.2d 643 (1999).

First, Respondents collectively attempt to collect a debt for which they have no lawful interest which constitutes a violation of *RCW 9A.82.045.*

Second, Respondents are demanding payment on a debt to which they have no lawful interest and threatening to take Guttormsens' property by non-judicial means constitutes extortion, within the terms of *RCW 9A.56.120* and *RCW 9A.56.130.* See also *RCW 9A.04.110(27)(j) and 15 USC §1692(f).* .

The pattern of misconduct alleged herein is the similar to what others in the State of Washington in Guttormsens' position suffer. The pervasiveness of MERS transactions in the mortgage lending marketplace were noted by the *Bain* court. See *Bain* at page 118. The misconduct of the servicers takes on fairly predictable patterns as they are intentionally transacted as "cookie cutter"

transactions to lower costs and speed the process. See *Bain, Klem, Schroeder, Walker, Bavand, Lyons,* etc.

There are at least issues of material fact that preclude summary judgment on this claim.

III. CONCLUSION

The trial court's summary judgment entered despite the existence of disputed factual claims. The trial court ignored the competency of Respondents' witnesses who clearly had no personal and testimonial knowledge of the matters they were testifying to, in violation of CR 56(e), and contained inadmissible evidence which could have been challenged through discovery, had it been allowed. The trial court misread the requirements of the DTA and excused Respondents from their responsibility to clearly establish their factual and legal entitlement to summary judgment and to foreclose on the Guttormsen s' home. Reversal is the remedy.

Moreover, Guttormsens should be awarded taxable costs and attorney's fees on appeal, pursuant to *RAP 18.1,* based on the terms of the subject deeds of trusts.

REPECTFULLY SUBMITTED this 6th day of May, 2015.

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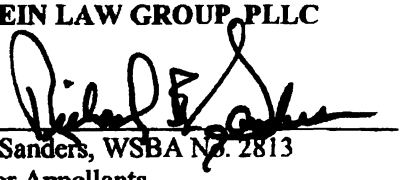

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on May 6, 2015, I caused a copy of the foregoing Appellants' Reply Brief to be served to the following in the manner indicated:

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DATED this 6th day of May 2015, at Bellevue, Washington.

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