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70706-0

No. 70706-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

KELLY BOWMAN

Appellant,

vs.

SUNTRUST MORTGAGE, INC., FEDERAL NATIONAL MORTGAGE ASSOCIATION; NORTHWEST TRUSTEE SERVICES, INC.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; and DOE DEFENDANTS 1-10

Respondents

ANSWERING BRIEF OF RESPONDENT NORTHWEST TRUSTEE SERVICES, INC.

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I. STATEMENT OF THE CASE

A. Factual History.

On or about September 4, 2008, Appellant Kelly Bowman ("Bowman") executed a promissory note (the "Note") in the amount of $417,000.00, payable to SunTrust Mortgage, Inc. CP 258-260. Bowman secured repayment of the Note with a Deed of Trust. CP 205-219. On September 11, 2008, the Deed of Trust was recorded with the King County Auditor, and encumbered real property located in King County (the "Property"). *Id.*[1]

On June 1, 2010, Bowman defaulted on the terms of the Note and Deed of Trust when he failed to make any further required loan payments. CP 221-223; CP 255, ¶ 5; CP 665, ¶ 6.

On July 23, 2012, SunTrust executed a sworn declaration (the "Beneficiary Declaration") stating that it was the holder of the Note. CP 220. Almost one month later, on August 14, 2012, NWTS sent a Notice of Default to Bowman. CP 221-223.

On November 8, 2012, an Appointment of Successor Trustee,

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[1] On March 26, 2012, an Assignment of Deed of Trust in favor of SunTrust was recorded under King County Auditor's No. 20120326000276, and a corrective Assignment – to add a co-borrower's name – was later recorded under King County Auditor's No. 20121025000009. CP 42, CP 49-50 (respectively).

naming NWTS as Successor Trustee and vesting NWTS with the powers of the original trustee, was recorded under King County Auditor's No. 20120608001749. CP 224.

On November 29, 2012, a Notice of Trustee's Sale was recorded with the King County Auditor, setting a sale date of March 29, 2013. CP 225-228. The sale was subsequently postponed, and ultimately did not occur. CP 232-233; CP 863, ¶ 2.

B. Procedural History.

On March 14, 2013, Bowman filed a Complaint against SunTrust, Federal National Mortgage Association (Fannie Mae), Mortgage Electronic Registration Systems, Inc., NWTS, and "Doe Defendants 1-10." CP 1-62.

On July 12, 2013, the trial court granted summary judgment to all Defendants. CP 716-720. This appeal followed. CP 722.

On August 2, 2013, the trial court stayed enforcement of its judgment during the appeal provided that Bowman paid a $3,000 bond and continues to make monthly payments of $3,887.37 into the King County Superior Court Registry. CP 768-769. Bowman's motion for reconsideration of these terms was denied.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court did not err in relying on a declaration from SunTrust's Assistant Vice President for the purpose of summary judgment.

2. The trial court did not err in denying Bowman's CR 56(f) request, as both SunTrust and NWTS had already responded to discovery demands that Bowman served after the respective Motions for Summary Judgment were already filed, and Bowman could not articulate a proper basis for obtaining a continuance.

3. The trial court did not err in granting summary judgment to NWTS.

III. RESPONSE ARGUMENT

A. The Declaration of Ms. Young was Properly Considered.

The trial court reviewed several documents and declarations prior to its summary judgment ruling, one of which was a declaration from SunTrust Assistant Vice President Carmella T. Norman Young. CP 254-260. Bowman contends that "there is no factual basis upon which to gauge the reliability of Ms. Young's testimony." Brief of Appellant at 10.

"Affidavits and declarations supporting and opposing a motion for summary judgment 'must be made on personal knowledge, set forth facts

that would be admissible in evidence, and show that the affiant is competent to testify on the matter." *Nat'l Union Ins. Co. v. Puget Power*, 94 Wn. App. 163, 178, 972 P.2d 481 (1999); *see also Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988); CR 56(e). "[T]he requirement of personal knowledge imposes only a 'minimal' burden on a witness; if reasonable persons could differ as to whether the witness had an adequate opportunity to observe, the witness's testimony is admissible'." *Schultz v. Wells Fargo Bank, NA*, 2013 WL 4782157 (D. Or. Sept. 5, 2013), *citing Strong v. Valdez Fine Foods*, 2013 WL 3746097, * 1 (9th Cir. July 18, 2013), *quoting* 1 *McCormick on Evidence* § 10 (Kenneth S. Broun, 7th ed. 2013); *see also Nader v. Blair*, 549 F.3d 953, 963 (4th Cir. 2008) (custodian of records can speak from personal knowledge as to whether certain documents are admissible business records for purposes of summary judgment, even when not involved in their creation).

Washington courts have often affirmed the admissibility of declarations from bank employees just like Ms. Young. *See, e.g., Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 674-75 (2012) (rejecting challenge to bank employee declaration, holding that affiant's personal knowledge of how records are kept generally was sufficient for

business records exception); *Discover Bank v. Bridges*, 154 Wn. App. 722, 725-26 (2010) (same). In *Discover Bank*, the Court affirmed the admission of a declaration stating that the declarant (a) worked for the Defendant; (b) had access to the relevant account records; (c) made statements based on personal knowledge and review of those records and under penalty of perjury; and (d) the attached account records were true and correct copies made in the ordinary course of business. 154 Wn. App. at 726.

Here, Ms. Young similarly averred that her declaration was based on personal knowledge and a review of records kept by SunTrust in the ordinary course of business. CP 254, ¶ 1. Given that SunTrust was both the original lender and foreclosing beneficiary, it is reasonable that said records would evidence SunTrust's possession of the Note, relationship with the Federal National Mortgage Association ("Fannie Mae"), and the outstanding arrearage on the loan. CP 255, ¶¶ 3-5.

Had Bowman wished to inquire about the "scope of authority granted by Fannie Mae," "chain of custody for alleged possession of the Note," or "maintenance of the records," he could have conducted discovery on those inquiries. *Cf.* Brief of Appellant at 10. Yet he did none of those things, instead choosing to merely object to Ms. Young's

knowledge as a witness. Despite Bowman's contentions, Ms. Young's Declaration meets the requirements of CR 56(e) and it was suitably admitted as evidence in the summary judgment hearing.[2]

B. The Trial Court Correctly Denied Bowman's CR 56(f) Motion for a Continuance.

A trial court "may deny a motion for a continuance when (1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact." *Butler v. Joy*, 116 Wn. App. 291, 65 P.3d 671 (2003); *see also Molsness v. City of Walla Walla*, 84 Wn. App. 393, 400 (1997). Here, Bowman failed to overcome *any* of those bases, and even one reason is sufficient under *Butler* to defeat a CR 56(f) request.

First, CR 56(f) is not intended to reward Bowman's procrastination. *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999 (9th Cir. 2005).[3] Even though he filed this action in March 2013, Bowman sent discovery demands to SunTrust and NWTS on or about May 31, 2013 –

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[2] NWTS notes that its Motion for Summary Judgment did not rely exclusively on Ms. Young's testimony, and Bowman has not objected on appeal to either the Declaration of Alan Burton, Declaration of Counsel, Declaration of Jeff Stenman, or Declaration of Ashley Hogan. CP 234-238; CP 633-651.

[3] Washington state courts interpret CR 56(f) consistently with its federal counterpart. *Turner v. Kohler*, 54 Wn. App. 688, 693 (1989) (looking to Fed. R. Civ. P. 56(f)).

after Motions for Summary Judgment were already filed, and presumably for the purpose of bootstrapping the very CR 56(f) argument he then presented. *Compare* CP 188-238, CP 313-333, CP 429-563, CP 581,¶ 3. Bowman's CR 56(f) request offered no reason for this delay. CP 286-288.

Second, Bowman did not indicate how further discovery would be of assistance to him. *See Stranberg v. Lasz*, 115 Wn. App. 396, 406-407 (2003); *see also Molsness*, *supra.* at 401 (mere possibility that discoverable evidence exists is not sufficient). NWTS answered Bowman's CR 34 Requests for Production (the *only* discovery he attempted to seek from NWTS), and NWTS' responses were signed by counsel per CR 26(g). Despite Bowman's argument, CR 34 contains no "verification" requirement. *Cf.* Brief of Appellant at 11. Further, Bowman's counsel made no effort to confer about supposed deficiencies in NWTS' responses before implying that a discovery violation occurred. *Id.*; *cf.* CR 26(i).[4]

Third, Bowman did not identify how he was unable to "adequately

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[4] It is ironic that Bowman decries "boilerplate objections" when the requests themselves contain many of the same "boilerplate" and irrelevant demands that his counsel routinely uses in other foreclosure-avoidance litigation. *See, e.g.*, *Whitcomb v. BAC Home Loans Servicing*, Case No. 11-2-24445-8 SEA (King Co. Sup. Ct.), *Bavand v. OneWest,* Case Nos. 11-2-04945-9, 11-2-05131-3 (Snohomish Co. Sup. Ct.), *Butler v. OneWest*, Adv. Case No. 12-01209-MLB (Bankr. W.D. Wash.).

defend against portions of Respondents' Motion" or what "portions" of the brief he could not defend. Brief of Appellant at 12. Indeed, Bowman presented a 29-page opposition to summary judgment, plus the trial court gave him an opportunity to submit supplemental declarations prior to the summary judgment hearing – which Bowman did in the form of a declaration from his counsel consisting of mostly legal argument and speculation. CP 261-290; CP 630-632; CP 671-712. Bowman demanded additional time for affidavits, depositions, and "discovery," but he has never stated how such activity would raise a genuine issue of material fact. Brief of Appellant at 12.

Fourth, Bowman's request was not properly noted for the trial court's consideration. He asserted the need for a continuance in responsive briefing, but did not note a motion. CP 286-288. This violates the King County Local Rules, requiring service and filing with a Note for Motion form. KCLR 7(b)(4 & 5). Bowman's application for more time was both substantively and procedurally infirm.

Bowman is right about one point, however: "the homeowner bears the burden of proving there has been a violation of the DTA [Deed of Trust Act]." *Id.* As the Plaintiff, it was solely Bowman's responsibility to possess evidence supporting his claims, not just conjecture, denials, and

assumptions, upon all of which Bowman's Complaint is based.

Bowman's desire to postpone summary judgment – even after NWTS responded to a fishing expedition involving 32 Requests for Production – was merely designed to drive up the cost of defending this litigation, and forestall a ruling that the Defendants acted in accordance with the law and based on the terms of the loan documents to which Bowman assented. Consequently, the trial court did not err in denying a CR 56(f) continuance and then rendering summary judgment in NWTS' favor.

C. The Trial Court's Grant of Summary Judgment to NWTS Should be Affirmed.

1. Standard of Review.

An order granting summary judgment is reviewed *de novo*, with the Court of Appeals engaging "in the same inquiry as the trial court." *Beaupre v. Pierce County,* 161 Wn.2d 568, 571, 166 P.3d 712 (2007). However, this Court may affirm the ruling below on any ground supported in the record, "even if the trial court did not consider the argument." *King County v. Seawest Inv. Associates, LLC*, 141 Wn. App. 304, 310, 170 P.3d 53, 56 (2007), *citing LaMon v. Butler,* 112 Wn.2d 193, 770 P.2d 1027 (1989).

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* CR 56(c); *see also Knox v. Microsoft Corp.*, 92 Wn. App. 204, 962 P.2d 839 (1998), *rev. denied*, 137 Wn.2d 1022, 980 P.2d 1280 (1999); *Vacova Co. v. Farrell*, 62 Wn. App. 386, 814 P.2d 255 (1991). With the motion, a trial court can consider "supporting affidavits and other admissible evidence based on personal knowledge." *Id.*

If the moving party demonstrates that an issue of material fact is absent, the nonmoving party must then articulate specific facts establishing a genuine issue for trial. *See Young v. Key Pharm., Inc.,* 112 Wn.2d 216, 770 P.2d 182 (1989); *see also* CR 56(e) ("an adverse party may not rest upon the mere allegations or denials of his pleading, but... must set forth specific facts showing that there is a genuine issue for trial."). A genuine issue of material fact does not exist where insufficient evidence exists for a reasonable fact-finder to find for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986).

Unsupported conclusory allegations, or argumentative assertions, are insufficient to defeat summary judgment. *See Vacova Co.*, *supra.* at

395, *citing Blakely v. Housing Auth. of King Cy.*, 8 Wn. App. 204, 505 P.2d 151, *rev. denied,* 82 Wn.2d 1003 (1973), *Stringfellow v. Stringfellow,* 53 Wn.2d 639, 335 P.2d 825 (1959); *see also Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000). "Ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to raise a question of fact." *Id.*, *citing Grimwood v. University of Puget Sound, Inc.,* 110 Wn.2d 355, 753 P.2d 517 (1988); *see also Baldwin v. Sisters of Providence in Wash., Inc.,* 112 Wn.2d 127, 769 P.2d 298 (1989). Summary judgment is appropriate if, after considering the evidence, reasonable persons could reach only one conclusion. *See Hansen v. Friend,* 118 Wn.2d 476, 824 P.2d 483 (1992), *Wilson v. Steinbach,* 98 Wn.2d 434, 656 P.2d 1030 (1982).

Here, Bowman failed to advance a genuine issue of material fact precluding NWTS from receiving summary judgment. As such, the trial court's order should be affirmed for the reasons set forth below.

2. Bowman's Claim of Wrongful Foreclosure, Violations of the DTA, and Declaratory Relief.

a. SunTrust Has Been the Beneficiary Since the Origination of Bowman's Loan.

This cause of action is predicated on Bowman's assertion that no Defendant "had any right to initiate the non-judicial foreclosure...." CP 9

(Compl., ¶ 4.5). Not only does Bowman lack evidence to support this conclusion, but the documentation before the trial court on summary judgment firmly cuts against his position.

The DTA defines a beneficiary as "the *holder* of the instrument or document evidencing the obligations secured by the deed of trust." RCW 61.24.005(2) (emphasis added).[5] One becomes a note holder through possession of the instrument either payable to that party or to bearer. RCW 62A.3-201.[6]

The State Supreme Court expressly agrees that the UCC definition of "holder" is consistent with the term found in the DTA, stating in *Bain v. Metro. Mortg. Grp., Inc.*:

> [t]he plaintiffs argue that our interpretation of the deed of trust act should be guided by these UCC definitions, and thus a beneficiary must either actually possess the promissory note or be the payee.... We agree. This accords with the way the term 'holder' is used across the deed of trust act and the Washington UCC.

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[5] Washington defines beneficiary strictly in the context of holding a note, not just receiving the beneficial interest in a deed of trust, such as the Oregon or Idaho Trust Deed Acts require. *Compare* RCW 61.24.005(2), ORS 86.705(2) ("Beneficiary means a person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or the persons successor in interest...."), I.C. § 45-1502(1) (same definition).

[6] If a note is payable to bearer, it is negotiated by transfer of possession alone. *Id.* If a note is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. *Id.* This may be either a special indorsement, which identifies a person to whom the note is now payable, or a blank indorsement that makes the note bearer paper. RCW 62A.3-109.

175 Wn.2d 83, 104, 285 P.3d 34 (2012).[7] Given that Washington's adoption of the UCC does not define "owner," and the DTA specifically equates "beneficiary" with "holder," Bowman is simply wrong that an owner and holder must be the same entity in order to non-judicially foreclose under Washington law.[8]

If there is negotiation of a note, or if the note remains held by the original payee, that holder possesses the right to enforce it, as well as the right to enforce any instrument securing the note's repayment, *e.g.*, a deed of trust. *See Kennebec, Inc. v. Bank of the West*, 88 Wn.2d 718, 724-25, 565 P.2d 812, 816 (1977); *Carpenter v. Longan*, 83 U.S. 271, 275, 21 L. Ed. 313 (1872). If the borrower defaults on the note, a secured party may

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[7] The term "holder" under the DTA is consistent with, but not exclusively governed by the UCC; otherwise, a Deed of Trust could only ever secure negotiable instruments, which is not the case. *See, e.g., Rodgers v. Seattle-First Nat. Bank*, 40 Wn. App. 127, 129-30 & n.1, 697 P.2d 1009 (1985) (discussing notes secured by Deed of Trust, where the notes were not negotiable instruments).

[8] *See also John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 222–23 (1969) ("the holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument. It is *not necessary* for the holder to first establish that he has some beneficial interest in the proceeds.") (emphasis added, citation omitted); *State Fin. Co. v. Moore*, 103 Wash. 298, 174 P. 22 (1918); *In re Veal*, 450 B.R. 897, 912 (B.A.P. 9th Cir. 2011) ("one can be an owner of a note without being a holder."); *Rouse v. Wells Fargo Bank, N.A.*, 2013 WL 5488817 (W.D. Wash. October 2, 2013) ("courts have uniformly rejected that only the 'owner' of the note may enforce it."); *Sherman v. JPMorgan Chase Bank, N.A.*, 2012 WL 3071246 (W. D. Wash. July 29, 2012) (enforceability of note and deed of trust based on holder status, not ownership); RCW 62A.3-301 ("[a] person may be a person entitled to enforce the instrument even though the person is *not the owner* of the instrument....") (emphasis added); 11 Am. Jur. 2d *Bills and Notes* § 210 (2009) (discussing differences between a "holder" of a note, and an "owner" of a note).

exercise its rights under a deed of trust with respect to any property securing such obligation. *See, e.g.*, RCW 62A.9A-203(g), RCW 62A.9A-308(e).

Bowman's joint response to the Defendants' Motions for Summary Judgment consisted of legal arguments about MERS' authority, the identity of the Note's "owner," and guesswork about NWTS' execution of documents; but Bowman presented no proof to call the aforementioned facts into question, and he lacked any support for the allegation that Fannie Mae is really the beneficiary, *i.e.*, Note holder, entitled to foreclose. CP 261-290.

Rather, the evidence consistently and completely shows that SunTrust held the Note when Bowman signed it, SunTrust held the Note even after selling Bowman's loan to Fannie Mae, and SunTrust started foreclosure proceedings when Bowman stopped paying the loan in June 2010. CP 235-236; CP 255. Thus, because SunTrust was the Note holder, *i.e.* beneficiary, at the time foreclosure commenced, it did not act "unlawfully." *See In re Brown*, 2013 WL 6511979 (B.A.P. 9th Cir. Dec. 12, 2013); *cf.* CP 10 (Compl., ¶ 4.7).[9]

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[9] The Complaint in *Brown* was notably similar to the Complaint in this action.

b. The Assignment of Deed of Trust is Irrelevant to the Propriety of Foreclosure.

A non-judicial foreclosure of owner-occupied residential real property in Washington includes: 1) issuing a Notice of Default (RCW 61.24.030), 2) recording an Appointment of Successor Trustee if applicable (RCW 61.24.010(2)), 3) possessing proof of the beneficiary's status (given only to a trustee, per RCW 61.24.030(7), not the borrower), 4) recording a Notice of Trustee's Sale (RCW 61.24.040), and 5) delivery and recording a Trustee's Deed to the purchaser at sale (RCW 61.24.050).[10] Noticeably absent is any requirement to "prove" one's authority, or execute an Assignment of Deed of Trust. Indeed, *the word "assignment" does not appear in the DTA requirements at all.*

The purpose of an Assignment of Deed of Trust "is to put parties who subsequently purchase an interest in the property on notice of which entity owns a debt secured by the property." *Corales v. Flagstar Bank, FSB*, 822 F. Supp. 2d 1102 (W. D. Wash. 2011), *citing* RCW 65.08.070. In fact, "an Assignment of a deed of trust... is valid between the parties whether or not the assignment is ever recorded.... Recording of the

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[10] Despite Bowman's ease of initiating this case, the DTA is an alternative to judicial foreclosure as it authorizes the foreclosure of deeds of trust *without* the need for litigation. *See* Joseph L. Hoffmann, Comment, *Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59 Wash. L. Rev. 323 (1984).

assignments is for the benefit of the parties." *In re United Home Loans*, 71 B.R. 885, 891 (Bankr. W.D. Wash. 1987).[11]

But even if the Assignment were somehow relevant to the foreclosure process, it is simply an agreement between MERS and SunTrust, and *not* NWTS. *Accord Salmon v. Bank of Am. Corp.*, 2011 WL 2174554, *8 (E.D. Wash. May 25, 2011) ("there is no basis for the Court to find that the [borrowers'] rights under the First Deed of Trust were affected by the recording of the [MERS] Corporation of Assignment of Deed.").[12] Therefore, Bowman's "questions of material fact" concerning the Assignment of Deed of Trust do not legitimately defeat the trial court's award of summary judgment to NWTS.

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[11] *See also Williams v. Wells Fargo Bank, N.A.*, 2012 WL 72727 (W.D. Wash. Jan. 10, 2012); *Fed. Nat. Mortg. Ass'n v. Wages*, 2011 WL 5138724 (W.D. Wash. Oct. 28, 2011); *St. John v. Northwest Trustee Services, Inc.*, 2011 WL 4543658 (W.D. Wash. Sept. 29, 2011) ("Washington State does not require recording of such transfers and assignments."); *In re Reinke*, 2011 WL 5079561, n. 10 (Bankr. W.D. Wash. Oct. 26, 2011) ("The WADOTA does not require that an assignment... be recorded in advance of the commencement of foreclosure.").

[12] Moreover, Bowman – who never even received the Assignment, and who is neither a party nor third-party beneficiary to it either – lacks standing to undermine the document's validity. *See, e.g., Brummett v. Washington's Lottery*, 171 Wn. App. 664, 678, 288 P.3d 48 (2012); *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 56, 80 (2012) (reversible error to hold stranger to contract had standing to challenge it); *McGill v. Baker*, 147 Wash. 394, 266 P. 138 (Wash. 1928) (only party to an assignment can challenge its validity); *Ukpoma v. U.S. Bank, N.A.*, 2013 WL 1934172, *4 (E.D. Wash. May 9, 2013) (citing cases); *Brodie v. Northwest Trustee Services, Inc.*, 2012 WL 6192723 (E.D. Wash. 2012) (borrower lacks standing to attack a MERS assignment).

c. Recent Case Law Does Not Help Bowman Based on the Record in This Case.

Bowman's Opening Brief cites to certain recent opinions from this Court as persuasive authority, but each of those cases contained markedly different facts from the case at bar.

For instance, in *Bavand v. OneWest Bank, FSB*, this Court could not identify the beneficiary based on a limited record; the Court observed that it did not have "any declaration or affidavit explaining more." 176 Wn. App. 475, 498, 309 P.3d 636 (2013). Here, such declaration exists, in the form of Ms. Young's testimony, plus the Court can rely on the multiple documents and declarations evidencing SunTrust's status as the Note holder. CP 220; CP 254-260; CP 634-637; CP 652-670.

In *Walker v. Quality Loan Serv. Corp.*, this Court, accepting the allegations as true under CR 12(b)(6), found a DTA violation due to an appointment before "MERS purported to assign [the] note." 176 Wn. App. 294, 308, 308 P.3d 716 (2013). By contrast, nothing in the record here suggests MERS asserted possession of the Note, attempted to

effectuate transfer the Note, or took actions in furtherance of foreclosure.[13]

Walker does not address what constitutes an injurious material violation of the DTA, nor does it analyze the content of any foreclosure notices; rather, the limited analysis was premised entirely on the alleged unlawful appointment of the successor trustee. Indeed, the Notice of Default never made it into the record in *Walker*, "and it is unclear from the record which party mailed the notice to Walker." *Id.* at 303, n.2. Here, the evidence is quite different, and shows that NWTS caused the Notice of Default to be issued – and although not required by statute – after receiving a sworn declaration averring to SunTrust's Note holder status. CP 235, ¶¶ 5-6.

In *Rucker v. Novastar Mortg., Inc.*, the servicer foreclosed under authority derived from a pooling agreement in which the servicer was expressly deemed an "independent contractor." 177 Wn. App. 1, 311 P.3d 31 (2013). Here, SunTrust's legal authority as holder, *i.e.* beneficiary, was based on its possession of the Note, and not pursuant to the same type of arrangement. *See* CP 255, ¶ 4; CP 656-663.

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[13] Even if the Assignment of Deed of Trust was relevant to SunTrust's authority, SunTrust has always been the payee of the Note and remains a secured party possessing all beneficial interest in the Deed of Trust as a matter of law. Thus, the assignment(s) "to" SunTrust evidenced MERS' termination of its agency relationship, but it did not result in an actual physical transfer of the Deed of Trust itself. CP 42; CP 49-50.

Bowman may also later cite to the Bankruptcy Court opinion where "all of the defendants had been dismissed from the case [on a discovery violation by plaintiff's counsel] except NWTS...." *In re Meyer*, 2014 WL 640981, *1 (Bankr. W.D. Wash. Feb. 18, 2014). Thus, the judge forced NWTS to establish "evidence that [the beneficiary, no longer a party at trial]... formally declared the Meyers in default...." *Id.*, *4.[14] The *Meyer* case is presently on appeal to the United States District Court for the Western District of Washington, based on multiple errors of fact and law in the Court's ruling.

Indeed, the holding in *Meyer* is inapposite to the decision of District Court Chief Judge Marsha Pechman in *Zalac v. CTX Mtg. Corp.*, 2013 WL 1990728 (W.D. Wash. May 13, 2013). The *Zalac* case involved the *same* claims as Bowman's action, including an Amended Complaint virtually identical in both form and substance.[15] Every claim in *Zalac* was dismissed under Fed. R. Civ. P. 12(b)(6).[16]

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[14] Yet the opinion recognizes that Wells Fargo, acting as custodian for U.S. Bank as trustee of a securitized loan trust, was the note holder, and NWTS "was already the successor trustee" upon issuing the Notice of Default. *Id.*, *2, *11.
[15] Case No. C12–01474 MJP (W.D. Wash.), Dkt. No. 3 at 117-130.
[16] The Court in *Zalac* found, based on a strikingly similar set of facts to the case at bar, that the authority to foreclose was derived from possession of a note indorsed in blank, regardless of the plaintiff's claim it "knew or should have known the actual holder to be Fannie Mae." *Id.*, *3.

In sum, Bowman's reliance on *Bavand*, *Walker*, *Rucker*, and perhaps *Meyer* cannot defeat the evidence establishing SunTrust's status as beneficiary, and its proper appointment of NWTS as the successor trustee.

d. NWTS Adhered to the DTA.

Even if a pre-sale cause of action for "Violations of Washington Deed of Trust Act" exists[17], it would be defined as the "[f]ailure of the trustee to *materially* comply with the provisions of this chapter [i.e. the DTA]." RCW 61.24.127(1)(c) (emphasis added); *see also Walker v. Quality Loan Serv. Corp.*, *supra.* at 311.[18] Bowman's entire lawsuit was premised on multiple challenges to numerous aspects of the foreclosure process, but RCW 61.24.127(1)(c) does not allow for an "open season"-approach on all of a trustee's actions taken during foreclosure.

Rather, the DTA is clear that only *material* non-compliance with the Act's provisions – *and* those violations prejudicing the borrower, as argued below – are subject to this type of claim. Here, NWTS followed

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[17] Assuming that Bowman could bring a cause of action for the wrongful initiation of a foreclosure in Washington; an issue the State Supreme Court has certified for review. *See Frias v. Asset Foreclosure Services, Inc.*, 2013 WL 6440205 (W.D. Wash. Sept. 25, 2013).

[18] Raising a broad challenge to the beneficiary's identity does not fall under this limited type of claim.

all required and material steps under the DTA, and the trial court accurately found that it was not liable for any violation of that law.

i. Bowman Cannot Show NWTS' Actions Resulted in Prejudice to Him.

It is settled law in Washington that a borrower must show prejudice from actual material defects in foreclosure notices. *See Amresco Independence Funding, Inc. v. SPS Props., LLC*, 129 Wn.App. 532, 119 P.3d 884 (2005); *Steward v. Good,* 51 Wn.App. 509, 515, 754, P.2d 150 (1988) (noting a "requirement that prejudice be established" where a "'technical violation' of the DTA occurs and finding that there [was] no showing of harm to the debtor"); *see also Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 581 n.4, 276 P.3d 1277 (2012) (Stephens, J., concurring).

The Washington Supreme Court has held because of the DTA's anti-deficiency provision – providing that after a nonjudicial foreclosure, a borrower is absolved of any further liability on the Note, even if the foreclosure is wrongful – that where, as here, the borrower is in default and cannot cure, the borrower is economically indifferent to any defects in the foreclosure process and cannot suffer prejudice. *Udall v. T.D. Escrow Serv., Inc.*, 159 Wn.2d 903, 154 P.3d 882 (2007) (reversing holding that

wrongful foreclosure should be vacated).

Although the DTA "must be construed in favor of borrowers," a wrongful foreclosure where the borrower admits default and cannot cure "does not injure the borrower's interests, because the debt secured by the trustee's deed is per se satisfied by the foreclosure sale due to the Act's anti-deficiency provision." *Id.* (citations omitted). Said otherwise, the DTA is a strictly construed statute, but not a strict-liability statute. It still requires prejudice.

For example, in *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 113, 752 P.2d 385 (1988), this Court declined to invalidate a sale where a plaintiff identified "technical, formal error[s], non-prejudicial, and correctable." Thus, even where technical errors exist, a foreclosure may proceed in the absence of prejudice.[19]

Here, NWTS' role in this matter involved receiving a sworn Beneficiary Declaration, acting as SunTrust's authorized agent to issue a

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[19] In *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034 (9th Cir. 2011), the Ninth Circuit Court of Appeals lists several examples of actionable prejudice. *Cervantes* at 1043, *citing Ed Peters Jewelry Co. v. C & J Jewelry Co., Inc.*, 124 F.3d 252, 263, n. 8 (1st Cir.1997). For instance, if a sale notice alleged that the sale would take place on a Friday, but instead it took place the day before, such information would materially violate the DTA and prejudice the borrower. *See* RCW 61.24.040(5). Or, if a notice informed the borrower that he or she could reinstate the loan up to five days prior to the sale, when the DTA instead requires reinstatement eleven days prior to sale; that would also materially violate the DTA and prejudice the borrower. *See* RCW 61.24.090.

Notice of Default, then being appointed as the successor trustee, and subsequently recording a Notice of Trustee's Sale. This sequence was performed in satisfaction of the DTA, and none of the documents involved in each of the necessary steps resulted in prejudice to Bowman.

ii. The Beneficiary Declaration.

The DTA requires a trustee to have "proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust" before recording a Notice of Trustee's Sale. RCW 61.24.030(7)(a). One possible means of accomplishing this requirement is through a declaration averring that "the beneficiary is the actual *holder* of the promissory note or other obligation." *Id.* (emphasis added).[20] Moreover, "[u]nless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is *entitled to rely on the beneficiary's declaration as evidence of proof required* under this subsection." RCW 61.24.030(7)(b) (emphasis added).

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[20] Federal judges that have reviewed claims related to RCW 61.24.030(7) uniformly agree that a declaration of holder status is adequate "proof" for the trustee to rely on. *See, e.g., Rouse v. Wells Fargo Bank, N.A., supra.; Petheram v. Wells Fargo Bank*, 2013 WL 4761049, *10 (W.D. Wash. Sept. 3, 2013); *Elene-Arp v. Fed. Home Fin. Agency*, 2013 WL 1898218 (W.D. Wash. May 6, 2013) ("[a]lthough there are probably many ways to satisfy the statute's proof requirement, the statute itself establishes one way."); *Abram v. Wachovia Mortg.*, 2013 WL 1855746 (W.D. Wash. Apr. 30, 2013); *Beaton v. JPMorgan Chase Bank N.A.*, 2013 WL 1282225 (W.D. Wash. Mar. 25, 2013).

Prior to the Notice of Trustee's Sale at issue – and even before a Notice of Default was issued – SunTrust executed a declaration affirming its status as Note holder. CP 220. While it is peculiar for a declaration that one holds a note to be deemed sufficient evidence that one owns a note, SunTrust's declaration established the precise proof that the Washington Legislature expressed in RCW 61.24.030(7)(a), and NWTS was therefore entitled to rely on that document when it later recorded the Notice of Trustee's Sale.

Additionally, state law does not mandate that a borrower such as Bowman should receive a copy of the Beneficiary Declaration, nor is it publicly-recorded. It is inconceivable that one can be prejudiced or injured from something never seen, received, or relied upon. *See Massey v. BAC Home Loans Servicing LP*, 2013 WL 6825309 (W.D. Wash. Dec. 23, 2013), *citing Zalac*, *supra.* ("the issue of ownership… is largely immaterial to the issues before the Court…. [U]nder Washington law, the focus of the analysis is on who is the *holder* of the note, and thus the *beneficiary*….") (emphasis in original). Thus, the *immateriality* of an ownership interest with respect to the foreclosure process results in NWTS not having committed a *material* violation of the DTA through its reliance on SunTrust's declaration.

iii. NWTS Acted in Good Faith.

In terms of NWTS' adherence to its statutory duties, RCW 61.24.010(3) provides that a "trustee or successor trustee shall have *no fiduciary duty* or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust." (Emphasis added.) Yet, Bowman erroneously asserts that NWTS has breached a "fiduciary duty" that it does not have. Brief of Appellant at 21.

In *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013), the Supreme Court addresses a trustee's "fiduciary duty," although as the concurrence notes, such duty existed in *Klem* only because *the underlying facts dated from an earlier version of the Deed of Trust Act.*[21]

As Chief Justice Madsen notes:

> [t]he majority repeatedly refers to the fiduciary duty of the trustee. In the present case, the trustee owed fiduciary duties because among other things the nonjudicial foreclosure sale occurred early in 2008. However, the judicially imposed 'fiduciary' standard applies, at the latest, only in cases arising prior to the 2008 amendment of RCW 61.24.010. The 2008 amendment expressly rejected the 'fiduciary' standard.

Id. Thus, contrary to Bowman's argument, the current statute provides: "[t]he trustee or successor trustee has a duty of good faith to the borrower,

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[21] This version of the DTA – also relied upon in *Walker, supra.* – did not have a "beneficiary declaration" requirement.

beneficiary, and grantor." RCW 61.24.010(4).[22]

Furthermore, there is *no* statutory authority or controlling case law that required NWTS to conduct an additional investigation and "confirm" certain issues regarding the sworn declaration they received. *Cf.* Brief of Appellant at 23. In addressing whether a trustee has an "affirmative duty of investigation," the United States District Court for the Western District of Washington found in *Mickelson v. Chase Home Fin. LLC*, that:

> [t]he duty of good faith does not create a duty to conduct an independent verification of sworn affidavits. This expansive view of good faith remains untenable. NWTS relied, as they are specifically permitted to do, on a declaration made under penalty of perjury. They did not breach their duty of good faith in so doing.[23]

2012 WL 6012791, *3 (W.D. Wash. Dec. 3, 2012); *see also US Bank Nat'l Ass'n v. Woods*, 2012 WL 2031122 (W.D. Wash. June 6, 2012) (finding the borrower's claim of a violation under RCW 61.24.030(7) is

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[22] In general, "good faith" is also the "absence of intent to defraud or to seek unconscionable advantage." *See* Black's Law Dictionary, 701 (7th ed. 1999); *see also Indus. Indem. Co. of the Northwest, Inc. v. Kallevig,* 114 Wn.2d 907, 792 P.2d 520 (1990). (A "covenant of good faith and fair dealing cannot be read to prohibit a party from doing that which is expressly permitted by an agreement.")

[23] *Mickelson* adds that"Plaintiffs would have every trustee conduct a secondary investigation into the papers filed by the beneficiary, which is simply too great a demand." *Id. Accord Hallquist v. United Home Loans, Inc.*, 715 F.3d 1040, 1048 (8th Cir. 2013) ("[I]n the absence of unusual circumstances known to the trustee, he may, upon receiving a request for foreclosure from the creditor, proceed upon that advice without making any affirmative investigation and without giving any special notice to the debtor.").

"without merit.").

At any time after the July 2009 statutory creation of a "beneficiary declaration," the Legislature could have amended the DTA and compelled trustees to conduct an open-ended investigation into every transfer of a secured note and to investigate unchallenged sworn documents provided by the beneficiary or its authorized agent. Yet, the Legislature did not take such action.

Here, the sworn declaration from SunTrust is unambiguous concerning SunTrust's status as Note holder, and NWTS received this declaration prior to recording the Notice of Trustee's Sale. *Compare* CP 220, CP 225. Both RCW 61.24.010(4) and RCW 61.24.030(7) were therefore followed in all respects.

iv. The Notice of Default.

Under the DTA, a notice of default may be delivered by the beneficiary, its agent, *or* the trustee. *See* RCW 61.24.030(8); *see also* RCW 61.24.031 ("A trustee, beneficiary, or authorized agent" may issue notice of default) (emphasis added); *see also*, *e.g.*, *In re Reinke*, 2011 WL 5079561 at *31, n. 10 (Bankr. W.D. Wash. Oct. 26, 2011) ("[a]lthough RCW 61.24.030 does not expressly authorize an agent to act for the beneficiary, the Court concludes that an authorized agent of the

beneficiary may issue a notice of default on its behalf."), *Klinger v. Wells Fargo Bank, NA*, 2010 WL 4237849 (W.D. Wash. 2010). Washington courts have long recognized that even "an employee, agent, or subsidiary of a beneficiary" can be a trustee. *Singh v. Federal Nat'l Mtg. Ass'n*, 2014 WL 504820 (W.D. Wash. Feb. 7, 2014), *citing Meyers Way Development LP v. University Savings Bank*, 80 Wn.App. 655, 910 P.2d 1308 (1996), *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985).

Prior to its appointment as successor trustee, NWTS did not possess any statutory duties with respect to DTA requirements. *Cf.* Brief of Appellant at 23. That fact notwithstanding, Bowman argues that because NWTS was aware of Fannie Mae's ownership interest in the loan, NWTS could not "rely on SunTrust's representations of authority to foreclose or the existence of a default or rely on the Beneficiary Declaration" (which is not even required until recording a Notice of Trustee's Sale). *Id.* But Bowman cites no authority for the proposition that an "obligation to halt the prosecution of the non-judicial process to clarify the identity of the true party in interest," among various other acts, must occur before a Notice of Default can be issued. *Id.*

The Notice of Default in this case comports with the mandate of RCW 61.24.030, and contains all requisite information to be given to a

borrower. CP 221-223. This includes identifying the Note owner, loan servicer, and other relevant information set forth in the statute. *Id.* Bowman cannot show non-compliance with the Notice of Default as a result.

v. The Appointment of Successor Trustee.

As noted above, in order to have a statutory duty of good faith, one must become a trustee. *See* RCW 61.24.010(4). Moreover, only a beneficiary is vested with the right to appoint a trustee under the DTA. *See* RCW 61.24.010(2).

Thus, if NWTS had a duty of good faith, it was because NWTS was properly appointed by the beneficiary. That is the only manner, besides a prior trustee's resignation, in which to become a successor trustee. Because Bowman contends NWTS violated that duty – despite no evidence on that point – he necessarily concedes SunTrust had the lawful authority to appoint NWTS to its role as trustee.

The inherent self-contradiction of Bowman's arguments is therefore clear: Bowman cannot argue that NWTS had a duty, yet it was not appointed by the proper party for said duty to accrue. *Compare* Brief of Appellant at 18 (the "real 'beneficiary'… was Fannie Mae, not

SunTrust"), 23 (Notice of Default was issued "prior to the appointment of NWTS as successor trustee"), 26 (NWTS permitted "misconduct in its role as trustee").

By contrast, NWTS position is logically consistent, *i.e.*, that SunTrust was the beneficiary and made a legally-valid appointment of NWTS as the successor trustee.

vi. The Notice of Foreclosure.

Bowman argues that the Notice of Foreclosure which accompanies a Notice of Trustee's Sale contained "false and/or misleading information." Brief of Appellant at 24.

A Notice of Foreclosure must be provided in "substantially" the form proscribed by statute. RCW 61.24.040(2). Bowman argues that NWTS "left out… any declaration that SunTrust was the beneficiary and the owner of the obligation as required…." Brief of Appellant art 25. But the Notice of Foreclosure informed Bowman that the "Notice of Trustee's Sale is a consequence of default(s) in the obligation to the [*sic*] SunTrust Mortgage…." CP 497. If NWTS had instead identified SunTrust as the "beneficiary of your Deed of Trust *and* owner of the obligation secured thereby," as Bowman demands based on RCW 61.24.040(2), then that information would have been a misstatement. (Emphasis added.)

Here, NWTS followed the law by substantially following the Notice of Foreclosure form and including pertinent information of the beneficiary's identity. Given the Supreme Court's principal concern in *Bain* was that "the beneficiary must *hold* the promissory note," the mere omission of Fannie Mae from a Notice of Foreclosure is not a material defect in compliance with the DTA or prejudicial – especially when Bowman was already aware of Fannie Mae's ownership interest through the Notice of Default. *See* 175 Wn.2d at 102, 120 (emphasis added).

vii. The Notice of Trustee's Sale.

Bowman also argues that NWTS "appeared to have engaged in a practice of falsely dating mandated foreclosure documents," *i.e.*, the Notice of Trustee's Sale itself. Brief of Appellant at 25-26.[24] Bowman bases his conclusion on the use of an "effective date" in the Notice. *Id.*[25]

The trial court posed a similar question, and consequently permitted the parties to submit supplemental declarations; the testimony of

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[24] Presumably, Bowman uses the word "appeared" because there is no actual evidence in support of his theory.

[25] In *Klem*, the facts are distinguishable:

> [t]he plaintiff submitted evidence that the purpose of *predated* notarizations was to *expedite the date of sale* to please the beneficiary. Given the evidence that if the documents had been properly dated, the earliest the sale could have taken place was one week later. The plaintiff also submitted evidence that with one more week, it was 'very possible' Puget Sound Guardians [acting on the borrower's behalf] could have closed the sale [and prevented foreclosure]."

176 Wn.2d at 795 (2013) (emphasis added).

Jeff Stenman and Ashley Hogan both squarely address this issue. CP 633-651. Mr. Stenman explained that NWTS "routinely include[s] an 'effective date' on the Notice of Sale which evidences the date of its drafting." CP 636-637, ¶ 13. He added that "NWTS' policy is that all notarizations of documents occur upon their execution." *Id.*

Ms. Hogan testified that:

> [o]n November 27, 2012, I witnessed the signature of Nanci Lambert... on the Notice of Trustee's Sale related to the Bowman Nonjudicial Foreclosure. Ms. Lambert's signature was not already present on the Notice of Trustee's Sale at the time I witnessed her signing said document, and then immediately notarized the same. The Notice of Trustee's Sale was later recorded....

CP 648, ¶ 5. Ms. Hogan's Declaration also included a copy of the page from her log book evidencing her attestation on the Notice of Trustee's Sale, including the corresponding line and file number. CP 650-651.

Bowman can choose not to believe the Declarations of Mr. Stenman and Ms. Hogan, and he can impugn their credibility, but he offered no *evidence* in opposition to their testimony. *See Laguna v. Washington State Dep't of Transp.*, 146 Wn. App. 260, 266, 192 P.3d 374, 377 (2008), *quoting Howell v. Spokane & Inland Empire Blood Bank,* 117

Wn.2d 619, 626, 818 P.2d 1056 (1991).[26] As a substitute for actual proof, Bowman's counsel submitted his own supplemental declaration questioning the meaning of the word "effective," asserting there were "unanswered issues," and expressing a desire to "physically inspect the subject 'log book'...." CP 676-677, ¶ 9.[27] These are the very sort of "unsupported conclusory allegations" and "argumentative assertions" that this Court has held cannot defeat summary judgment. *See Vacova Co.*, *supra.* at 395.

Furthermore, the Notice of Trustee's Sale must contain some date upon which arrearage figures are effective. RCW 61.24.040(1)(f)(III, IV) (Notice must include information on "the following amounts which are now in arrears."). Consequently, the Notice of Trustee's Sale in this case, like so many others, includes a reinstatement amount as of November 19, 2012 – the very same "effective date" Bowman claims "makes no sense." Brief of Appellant at 26. But it does make sense that the Notice lists arrearage figures as of the date it is drafted, because otherwise a trustee

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[26] "An issue of credibility is present only if the party opposing the summary judgment comes forward with evidence which contradicts or impeaches the movant's evidence on a material issue."

[27] It is illogical to even suggest that notarizing a document *later* in time would have resulted in speeding up the sale process like in *Klem*. CP 676, ¶ 9. The key date of recordation occurred after the Notice of Trustee's Sale at issue here was signed and notarized. RCW 61.24.040(1)(a).

would be utilizing either outdated or speculative amounts. This fact does not mean that the Notice of Trustee's Sale was falsely notarized or recorded in a manner that violated NWTS' duty of good faith.

The Notice of Trustee's Sale, like all the foreclosure documents being challenged in this case, complied with the DTA, and no basis exists to reverse the trial court's summary judgment ruling on this issue.

3. Bowman's Consumer Protection Act (CPA) Claim.

A violation of the CPA requires:

> (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation.

Panag v. Farmers Ins. Co. of Washington, 166 Wn.2d 27, 37, 204 P.3d 885, 889 (2009), *citing Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986). The failure to meet any one of these elements is fatal and necessitates dismissal. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298 (2002).

a. Bowman Failed to Show an Unfair or Deceptive Act or Practice Involving NWTS Affecting a Substantial Portion of the Public.

Under the CPA, Bowman was required to show that NWTS engaged in an act or practice with either: 1) "a capacity to deceive a substantial portion of the public," or 2) that "the alleged act constitutes a

per se unfair trade practice." *See Saunders v. Lloyd's of London*, 113 Wn.2d 330, 779 P.2d 249 (1989), *quoting Hangman Ridge*, *supra*; *see also* RCW 19.86.093.[28] "Implicit in the definition of 'deceptive' under the CPA is the understanding that the practice misleads or misrepresents something of material importance." *Holiday Resort Comm. Ass'n v. Echo Lake Assoc., LLC,* 134 Wn. App. 210, 135 P.3d 499 (2006). An "act performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law." *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 155, 930 P.2d 288 (1997).

Here, Bowman did not allege a per se CPA violation, so the only method by which he could have established a CPA violation was to show that NWTS engaged in conduct that has a capacity to deceive a substantial portion of the public. *See Saunders, supra.* at 344, *quoting Hangman Ridge, supra.* at 785-86. However, Bowman failed to meet this burden because each of the alleged unfair or deceptive acts alleged against NWTS relate to conduct directed at him, and not the public. These alleged acts

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[28] An unfair trade practice "requires a showing that a statute has been violated which contains a specific legislative declaration of the public interest impact." *Hangman Ridge*, 105 Wn.2d at 791.

did not, and could not, have the capacity to deceive any other member of the public, let alone a substantial portion of the public. Thus, Bowman was unable to establish the existence of an unfair act with "a capacity to deceive a substantial portion of the public."

b. Bowman Identified No Impact on the Public Interest.

Under the second prong of *Hangman Ridge*, Bowman was also required to show that the acts in question were likely to impact the public interest. The factors to be considered when evaluating this element depend upon the context in which the alleged acts were committed. *See Hangman Ridge*, 105 Wn.2d at 780. Because Bowman complained of a consumer transaction, the following factors were relevant:

> (1) [w]ere the alleged acts committed in the course of defendant's business? (2) Are the acts part of a pattern or generalized course of conduct? (3) Were repeated acts committed prior to the act involving plaintiff? (4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?

Id. at 790. Moreover, "[t]he public interest in a private dispute is not inherent." *Tran v. Bank of America,* 2013 WL 64770 (W.D. Wash. Jan. 4, 2013), *citing Hangman Ridge*, *supra.* at 790.

Here, despite Bowman's conclusory and unsupported allegations

suggesting a conspiracy among Defendants to deceive him, he was unable to plead facts sufficient to show that the public interest had been impacted. *See e.g., Segal Co. (Eastern States), Inc. v. Amazon.com*, 280 F.Supp.2d 1229, 1234 (W.D. Wash. 2003) (granting motion to dismiss CPA claim as allegation "on information and belief that defendant engages in a 'pattern and practice' of deceptive behavior" is insufficient to satisfy public interest requirement).

Each of the alleged acts on which Bowman relies exclusively relates to conduct directed at him personally, *i.e.*, whether SunTrust was the beneficiary and had authority to execute documents during foreclosure of the subject Property. These acts do not, and cannot, have the capacity to deceive any other individual, let alone a substantial portion of the general public. Bowman's allegations were wholly insufficient to satisfy the CPA's public impact requirement as to NWTS.

c. The Role of MERS Does Not Impute Liability to NWTS.

In *Bain*, the Washington Supreme Court found that MERS's representation that it was the beneficiary of the Deed of Trust in its own right – rather than as an agent for a disclosed principal – had the capacity to deceive within the meaning of the CPA, because MERS was not the Note

holder. 175 Wn.2d at 117.[29] The Supreme Court also held, however, that "[t]he mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury." *Id.* at 120.

The relevant question certified to the Supreme Court was: "[d]oes a homeowner possess a cause of action *against Mortgage Electronic Registration Systems, Inc.*, if MERS acts as an unlawful beneficiary under the terms of the Washington Deed of Trust Act?" *Id.* at 115. Nothing in the *Bain* decision, or any case in Washington, holds that the first element of a CPA claim is satisfied against a non-judicial foreclosure trustee. *Accord Lynott v. MERS,* 2012 WL 5995053, *2 (W.D. Wash. Nov. 30, 2012) ("*Bain* did not... create a per se cause-of-action based solely on MERS's involvement."), *Zalac v. CTX Mtg. Corp.*, *supra.* at *8, *citing Bain* at 120; *Florez v. OneWest Bank, F.S.B.*, 2012 WL 1118179 (W.D. Wash. Apr. 3, 2012) (authority to foreclose based on holding note, independent of MERS), *Bhatti v. Guild Mortg. Co.*, 2011 WL 6300229 (W.D. Wash. Dec. 16, 2011), *aff'd,* 2013 WL 6773673 (9th Cir. Dec. 24, 2013) (no declaratory relief based on MERS's capacity as nominee in deed of trust).

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[29] On remand, the trial court granted MERS' Motion for Summary Judgment on Plaintiff's CPA claim due to a lack of injury and causation. *See* Summary Judgment Order, King County Superior Court Case No. 08-2-43438-9 SEA (Aug. 30, 2013).

Because NWTS was not a party to the loan's origination, it did not participate in executing the Deed of Trust, and thus made no representation that MERS was a Note holder in its own right.[30] The Notice of Trustee's Sale compels a description of the original Deed of Trust, listing MERS as a nominee for the Lender, its successors and assigns, but it did not assert that MERS is the beneficiary or attempting to foreclose. *See* CP 226; *see also* RCW 61.24.040(1)(f). According to *Bain*, any public interest impact would relate to MERS's actions (whatever they may have been), and not those of NWTS. *Accord Estribor v. Mtn. States Mtg.*, 2013 WL 6499535, *6 (W.D. Wash. Dec. 11, 2013) ("[t]he deed of trust clearly states MERS is a nominee for the lender and lender's successors and assigns. It is unclear how actions within that capacity are unfair or deceptive.").

In *Myers v. MERS, Inc. et al.*, the Ninth Circuit Court of Appeals affirmed the Fed. R. Civ. P. 12(b)(6) dismissal of a claim for "wrongful foreclosure" and a "violation of the [DTA]," in addition to claims of fraud, a breach of good faith, the CPA, and gross negligence. 2013 WL 4779758 (9th Cir. Sept. 9, 2013). The District Court opinion upheld in *Myers*

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[30] The naming of MERS in the Deed of Trust as a basis for a CPA violation was also time-barred under the four-year statute of limitations applying to claims under RCW 19.86.120. *See Ward v. Stonebridge Life Ins. Co.*, 2013 WL 3155347 (W.D. Wash. June 21, 2013), *citing Moratti v. Farmers Co. of Wash.*, 162 Wn.App. 495, 254 P.3d 939 (2011).

rejected the notion that "MERS's involvement taints the foreclosure process." *Myers v. MERS, Inc. et al.*, 2012 WL 678148 (W.D. Wash. Feb. 24, 2012). The District Court further found that the plaintiff failed "to allege that MERS took any action in regards to him... [or that] MERS initiated or participated in the foreclosure process in any way." *Id.* at *6.

Moreover, the District Court correctly recognized "the bottom line;" namely that Flagstar (in that action) was "empowered as the beneficiary to appoint the trustee because it holds [the] Note, not because of the Assignment [of Deed of Trust]." *Myers*, 2013 WL 4779758 at *2, *citing* 2012 WL 678148 at *6.[31] The same conclusion was warranted in this case as well.

Just recently, Judge Coughenour of the United States District Court for the Western of Washington also addressed this issue, and found that "the presence of MERS on the deed of trust is not fatal." *Coble v. SunTrust Mortgage, Inc. et al.*, 2014 WL 631206, *4 (W.D. Wash. Feb. 18, 2014). *Coble* also found no defect in the Notice of Default, which named Freddie Mac as the "owner of the note" and SunTrust as "the loan

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[31] The District Court also denied leave to amend because the facts were not in dispute, and "sole issue [was] whether there is liability as a matter of substantive law...." *Id.* at *9, *citing Albrecht v. Lund*, 845 F.2d 193 (9th Cir. 1988).

servicer." *Id.* *Coble* resulted in the dismissal of both DTA and CPA claims against the trustee. *Id.*

In sum, *Bain* should not be stretched to infer presumptions against NWTS, or to suggest it is somehow liable under the CPA, and thus, a genuine issue regarding the second prong of the applicable CPA test was not evident below against NWTS as a specific defendant.

d. NWTS Did Not Cause Injury to Bowman.

Finally, a CPA claim must plead and prove that there is a causal link between the alleged misrepresentation or deceptive practice *and* the purported injury. *Hangman Ridge, supra.* at 793; *see also Cooper's Mobile Homes, Inc. v. Simmons,* 94 Wn.2d 321, 617 P.2d 415 (1980) (alleged deceptive acts must result in injury). A plaintiff must demonstrate that the "injury complained of... would not have happened" if not for defendant's acts. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.,* 162 Wn.2d 59, 82, 170 P.3d 10 (2007).[32]

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[32] "[T]he term 'proximate cause' means a cause which in direct sequence unbroken by any superseding cause, produces the injury [or] even complained of and without which such injury [or] event would not have happened." *Schnall v. AT&T Wireless Servs., Inc.,* 171 Wn.2d 260, 278, 259 P.3d 129, 137 (2011); *see also Carlile v. Harbour Homes, Inc.,* 147 Wn. App. 193, 194 P.2d 280 (2008) ("The injury must be expressly "*by*" a violation of RCW 19.86.020, meaning that "but for" a defendant's conduct, the alleged injury would not have occurred.").

An award under the CPA is strictly limited to damage "in... [a plaintiff's] business or property...." RCW 19.86.090, *see also Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009). Lost wages or personal injuries, including pain and suffering, are not compensable under the CPA. See *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993), *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 959 P.2d 1158 (1998), *cf.* Brief of Appellant at 30 (suggesting emotional distress is compensable).

As the Ninth Circuit Court of Appeals recently held concerning a CPA claim in the foreclosure context:

> Plaintiffs' foreclosure was not caused by a violation of the DTA because Guild [the foreclosing entity] was both the note holder and the beneficiary when it initiated foreclosure proceedings, and therefore the 'cause' prong of the CPA is not satisfied.

Bhatti v. Guild Mortg. Co., 2013 WL 6773673, *3 (9th Cir. Dec. 24, 2013).[33]

Likewise in this case, Bowman did not identify an injury that was proximately caused by NWTS's conduct, *i.e.*, related to NWTS's role in conducting the non-judicial foreclosure. *Cf. Demopolis v. Galvin,* 57 Wn.

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[33] Consistent with RCW 61.24.005(2), *Bhatti* finds that "only beneficiaries who *hold* the note may appoint successor trustees." *Id.* (emphasis added).

App. 47, 786 P.2d 804 (1990) (litigation expenses are *not* an "injury" under the CPA); *Massey v. BAC Home Loans Servicing LP*, *supra.*, *8 (a "laundry list... including attorney fees, 'wear and tear' on [a] vehicle, and buying postage stamps, is inapposite.").[34] Rather, Bowman suggests that he "could have" pursued certain loan modification programs, which has no bearing on NWTS as a trustee. Brief of Appellant at 31.

Moreover, the proximate cause of any purported "harm" to Bowman was his own default, not NWTS's fulfillment of its statutory duties as trustee. *See Massey*, *supra.* at *16, *citing Babrauskas v. Paramount Equity Mortgage*, 2013 WL 5743903 (W.D. Wash. Oct. 23, 2013) (plaintiff's failure to meet obligation "is the 'but for' cause of the default" and foreclosure), *McCrorey v. Fed. Nat. Mortg. Ass'n*, 2013 WL 681208 (W.D. Wash. Feb. 25, 2013) (plaintiffs' failure to pay led to default and foreclosure), *Peterson v. Citibank, N.A.*, 2012 WL 4055809 (Wash. Ct. App. Div. I 2012) ("[R]egardless of MERS's conduct as the beneficiary under the deed of trust, the Petersons' property would still have been

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[34] *See also Thurman v. Wells Fargo Home Mortgage*, 2013 WL 3977622 (W.D. Wash. Aug. 2, 2013), *citing Gray v. Suttel & Assocs.*, 2012 WL 1067962 (E.D.Wash. Mar. 28, 2012) ("time and financial resources expended to... pursue a WCPA claim do not satisfy the WCPA's injury requirement."), *Coleman v. Am. Commerce Ins. Co.*, 2010 WL 3720203 (W.D. Wash. Sept. 17, 2010) ("The cost of having to prosecute a CPA claim is not sufficient to show injury to business or property.").

foreclosed upon based on their failure to make payments on the loan.")[35]; *see also Reid v. Countrywide Bank, N.A.*, 2013 WL 7801758, *5 (W.D. Wash. Apr. 3, 2013) (alleged deception in making payments to "parties who are not the true holders and owners of the Note" suggested no factual basis for injury); *cf.* Brief of Appellant at 30.[36] Indeed, Bowman openly concedes that, at the time of receiving the Notice of Default, he "owed over $100,000 in payments." *Id.* at 32. It is Bowman, and not NWTS, who defaulted and gave rise to the commencement of foreclosure.

Bowman's argument below offered no facts demonstrating that, because of NWTS's conduct, he suffered injuries merely as a result of

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[35] NWTS recognizes that this Court's opinion in *Peterson* is unpublished, but the citation stems from the listed cases referenced in *Massey*, *supra.* This citation is permitted in accordance with GR 14.1(b), as the United States District Court for the Western District of Washington permits the use of unpublished case law in briefing and decisions. *See Macon v. United Parcel Serv., Inc.*, 2012 WL 5410289 (W.D. Wash. Nov. 5, 2012), *citing Cont'l Western Ins. Co. v. Costco Wholesale Corp.*, 2011 WL 3583226 (W.D. Wash. 2011) ("The distinction between 'published' and 'unpublished' federal district court decisions is meaningless and this court [*i.e.* federal court] may consider 'unpublished' district court decisions as persuasive authority.").

[36] Bowman cites to opinions from the Seventh Circuit Court of Appeals and United States District Court for the Northern District of Illinois that do not address the CPA, let alone Washington law in general.

receiving foreclosure notices due to his own failure to pay the secured loan.[37] As such, Bowman could not satisfy either the damages or causation prongs of his CPA claim, and the trial court correctly found in NWTS' favor.

4. Bowman's Criminal Profiteering Claim.

Bowman's final cause of action asserted a violation of RCW 9A.82 *et seq.* – the criminal profiteering law. CP 12. RCW 9A.82.100 restricts the nature of suits brought under that chapter (within a three-year statute of limitations) to occurrences where a person has sustained injury from "an act of criminal profiteering that is part of a pattern of criminal profiteering activity," or because of specific statutes such as relating to organized crime. *See, e.g.*, RCW 9A.82.060.[38]

The definition of "criminal profiteering" is found in RCW 9A.82.010(4):

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[37] Indeed, if the mere act of initiating a non-judicial foreclosure were to serve as grounds for damages to a plaintiff who may experience "emotional distress" because of foreclosure caused by their own default on a secured loan, then *every* non-judicial foreclosure in Washington State would give rise to CPA liability. See Brief of Appellant at 30. While Bowman may wish to see this outcome, it wholly lacks legal authority. *Accord McCurry v. Chevy Chase Bank*, 169 Wn.2d 96, 233 P.3d 861 (2010) (a deed of trust creates an agreement between the parties executing it).

[38] It is unclear whether Bowman ever followed RCW 9A.82.100(10) in this action. That subsection states, in relevant part: "A person other than the attorney general or county prosecuting attorney who files an action under this section shall serve notice and one copy of the pleading on the attorney general within thirty days after the action is filed with the superior court." The statute does not prescribe what Bowman's penalty for non-compliance would be, although dismissal of the claim may be a reasonable option.

> [a]ny act, including any anticipatory or completed offense, committed for financial gain, that is chargeable or indictable under the laws of the state in which the act occurred and, if the act occurred in a state other than this state, would be chargeable or indictable under the laws of this state had the act occurred in this state and punishable as a felony and by imprisonment for more than one year....

A "pattern of criminal profiteering activity" is defined under RCW 9A.82.010(12) as:

> [e]ngaging in at least three acts of criminal profiteering... the last of which occurred within five years, excluding any period of imprisonment, after the commission of the earliest act of criminal profiteering. In order to constitute a pattern, the three acts must have the same or similar intent, results, accomplices, principals, victims, or methods of commission, or be otherwise interrelated by distinguishing characteristics including a nexus to the same enterprise, and must not be isolated events.

Thus, to have survived summary judgment in this case, Bowman needed to have shown evidence of three acts in five years that NWTS committed for financial gain, and which constitute felonies.

The sole case Bowman relies on, *Bowcutt v. Delta North Star Corp.*, 95 Wn. App. 311, 976 P.2d 643 (1999) is distinguishable on its facts. In *Bowcutt*, the foreclosing lender did not dispute the existence of a scheme through which "Delta North Star Corporation, sought out vulnerable homeowners with substantial equity in their homes...." *Id.* at 315. Division Three observed that the corporation's president was "a

convicted felon and bankrupt to whom no reputable lender would advance funds...." *Id.* The corporation then arranged to buy homes by persuading the homeowners to finance part of the purchase price by a deed of trust." Another lender (Cabbell) financed the balance "at 25 percent interest; the entire principal was due as a balloon payment after one year." *Id.* The Court's opinion addressed whether RCW 9A.82 permitted private plaintiffs from obtaining injunctive relief based on those uncontested allegations. That scenario presents neither the facts nor the legal issue germane to this action.

Bowman also did not plead the elements of his claim with the particularity required by CR 9(b), including the "time, place, and specific content of the false representations." *See Kauhi v. Countrywide Home Loans Inc.*, 2009 WL 3169150, *4 (W.D. Wash. Sept. 29, 2012) (applying heightened pleadings standard to criminal profiteering claim). In fact, he did not offer any specific allegations relating to this claim at all; he simply tossed out general allegations implicating every Defendant. CP 12-13 (Compl., ¶¶ 6.2, 6.3).

Additionally, several identified bases for the claim are undercut by other assertions in Bowman's Complaint. For example, he seems to believe that a trustee's sale has already occurred. CP 12, ¶ 6.2(A)

(deception allegedly affects "potential buyers [of] foreclosed properties"), CP 13, ¶ 6.2(C) (Defendants "exert[ed] possession and control over real property") & CP 13, ¶ 6.2(F) ("means by which they could resell unlawfully obtained (stolen) home of Plaintiff"). But Bowman could not possibly allege a trustee's sale of the occurred, because it did not. And since receiving the Notice of Default, showing no payments on the loan dating back to June 2010, he did not allege making any further payments -- let alone "extorted" payments or for "unjust fees and interest." CP 222. Furthermore, a non-judicial foreclosure, even if defective under the DTA, is not listed as one of the felonies which constitute indictable criminal acts under Washington law, nor is compliance with the DTA a "threat."

Ultimately, Bowman's argument was premised on the belief that NWTS conspired with its co-Defendants to initiate and execute an unlawful non-judicial foreclosure through filing false documents and executing false statements in various notices. CP 13.[39] In other words, Bowman relied on the same erroneous theories underlying his wrongful

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[39] It is important to note that Bowman's mere allegations on this issue need not be "accept[ed] as true under CR 56;" Bowman is confusing the applicable standard here with CR 12(b)(6). Brief of Appellant at 35.

foreclosure and CPA claims.[40]

As such, because none of Bowman's other claims created a genuine issue of material fact, his criminal profiteering claim necessarily failed as well. Moreover, the facts in this case show that SunTrust's attempt at foreclosure was not unlawful or wrongful. Bowman simply cannot establish any Defendant – let alone NWTS – falsely represented the identity of the beneficiary through recording "fraudulent" instruments affecting "real property titles." CP 13 (Compl., ¶ 6.2).

There was no factual basis for Bowman to have theorized that NWTS committed criminal profiteering, i.e. three felonious acts in five years for financial gain. Summary judgment was warranted as a result.

IV. CONCLUSION

The record in this case demonstrates certain key facts: 1) Bowman signed the Note and secured repayment of it with a deed of trust naming the Property as collateral (CP 205-219; CP 258-260), 2) SunTrust was the original payee of the Note and secured party under the Deed of Trust (CP 205; CP 258), 3) the Note was indorsed in blank (CP 260), 4) SunTrust

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[40] Bowman's accusations in the Complaint of "unjust fees," manipulating the interest rate, extorting payments, or reselling "stolen" property do not apply to NWTS in its capacity as trustee. CP 13 (Compl., ¶ 6.2). In fact, NWTS is precluded by law from bidding at the Trustee's Sale to purchase the Property. *See* RCW 61.24.070.

sold Bowman's loan to Fannie Mae but SunTrust continued to have physical possession of the Note (CP 255, ¶¶ 3-4), 5) Bowman defaulted on the Note (*Id.*, ¶ 5), 6) SunTrust commenced foreclosure of the Property in its own name (CP 235, ¶4; CP 236, ¶ 7), and 7) Bowman knew precisely both who to pay and who had authority to modify the loan, *i.e.*, SunTrust (CP 297, ¶ 12).

The totality of Bowman's allegations against NWTS and the other Defendants attacked SunTrust's authority as the beneficiary, focused on non-material, non-prejudicial wording in notices, and sought to shift the burden of proof on each aspect of the foreclosure's propriety while conspicuously downplaying his own default since June 2010. Bowman's claims and theories, however, were insufficient to raise genuine issues of fact and overcome the contrary evidence presented.

Thus, the trial court did not err by granting summary judgment, and this Court should affirm the ruling below.

DATED this 7th day of March, 2014.

RCO LEGAL, P.S.

By: 
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Of Attorneys for Respondent
Northwest Trustee Services, Inc.

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

KELLY BOWMAN,

Plaintiff,

v.

SUNTRUST MORTGAGE, INC., a Virginia Corporation, a subsidiary of SUNTRUST BANKS, INC.; FEDERAL NATIONAL MORTGAGE ASSOCIATION, a United States government sponsored enterprise; NORTHWEST TRUSTEE SERVICES, INC., a Washington Corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corportation; and DOE DEFENDANTS 1-10,

Defendants.

No. 70606-0-I

DECLARATION OF SERVICE

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. That on March 7, 2014, I caused a copy of the **Answering Brief of Respondent Northwest Trustee Services, Inc.** to be served to the following in the manner noted below:

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

Sign this 7th day of March, 2014.

Kristine Stephan, Paralegal

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