72505-0

No. 72505-0

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IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGOTN
DIVISION I

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KEVIN J. SELKOWITZ,

Plaintiff-Appellant,

v.

LITTON LOAN SERVICING LP, et al.,

Defendants-Respondents.

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# ANSWERING BRIEF OF RESPONDENT LITTON LOAN SERVICING LP

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## I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

Plaintiff's underlying lawsuit alleged claims against entities involved with his mortgage, or the foreclosure of his mortgage; to wit (1) New Century Mortgage Corporation, Plaintiff's original lender; (2) Mortgage Electronic Registration Systems, Inc., the named titleholder on Plaintiff's deed of trust, solely as nominee for the lender and its successors and assigns; (3) First American Title Insurance Company, the original trustee on Plaintiff's deed of trust; (4) Litton Loan Servicing, LP, a former servicer of Plaintiff's loan; and (5) Quality Loan Service Corporation of Washington, the successor trustee of Plaintiff's deed of trust.

Although claims were alleged against Litton, Plaintiff's Amended Complaint failed to allege *a single* specific affirmative act by Litton. Rather, each claim made against Litton and all other Defendants was predicated on a single legal conclusion; namely, that Mortgage Electronic Systems, Inc. ("MERS") was ineligible to act as a beneficiary under Plaintiff's Deed of Trust. (CP 153, ¶¶ 3.1-3.5.) Based solely on MERS' identification in Plaintiff's Deed of Trust, Plaintiff sought to avoid his contractual obligations under the Note and Deed of Trust; to obtain a free house by permanently enjoining any foreclosure sale and quieting title in his name; as well as obtain damages for violation of the Washington

Consumer Protection Act ("CPA"), for slander of title, and for malicious prosecution.

On summary judgment, Plaintiff raised a host of considerations not mentioned in his Complaint, raising issues regarding whether Litton was a servicer, whether the Trust declared Plaintiff in default, whether Litton possessed the note and was a holder, among other issues. (CP 871.) As discussed further below, none of these issues presented a genuine issue of material fact as to whether Litton committed any alleged violation under the CPA. More fundamentally, however, even if Plaintiff had presented evidence of a violation of the CPA, Plaintiff never established the other elements of his a CPA claim or of his claim for slander of title. Summary judgment was appropriate and this Court should affirm.

## II. COUNTERSTATEMENT OF THE ISSUES

1. Even assuming a violation of the DTA by Litton, or false statement in the Declaration of Ownership, did Plaintiff provide evidence supporting each element of his claim for violations of the CPA?

2. Even assuming a violation of the DTA by Litton, or false statement in the Declaration of Ownership, did Plaintiff provide evidence supporting each element of his claim for slander of title?

3. Did Plaintiff present evidence supporting a theory of *respondeat superior* liability on the part of Litton for conduct of Quality?

4. Was Plaintiff entitled to amend his complaint through mention of a new theory of liability against Litton in his opposition to summary judgment; i.e., that Litton provided false statements in the Declaration of Ownership?

5. Did Plaintiff establish a DTA violation by proving there were false statements in the Declaration of Ownership executed by Litton?

As explained below, each of these questions is answered in the negative and this Court should uphold the trial court's dismissal of Litton.

## III. COUNTERSTATEMENT OF THE CASE

The underlying facts and procedure pertinent to this appeal are as follows:

### A. Plaintiff Takes Out a Loan to Purchase Property

On or around October 30, 2006, Plaintiff took out a loan (the "Loan") from New Century Mortgage Corporation in order to buy a condominium unit. (CP 822, ¶ 3; CP 825-828). The Loan was evidenced by a promissory note that Plaintiff signed in favor of New Century in the original principal amount of $309,600.00 ("Note"). (*Id.*) The Note was secured by a deed of trust ("Deed of Trust")[1] on the Property. (CP 830-854.) The Deed of Trust names MERS, as beneficiary, "as a nominee for

[1] Collectively, the Note and Deed of Trust are referred to as the "Loan" or the "Loan Documents."

Lender and Lender's successors and assigns." (CP 12, ¶ (E).) Litton was not a party to the origination of the Loan, nor to any of the origination documents. (CP 830-854; CP 822 ¶ 5.)

### B. Possession and Ownership of the Note Subsequent to Origination

Shortly after the Loan origination, the Loan was securitized and transferred to the GSAA Home Equity Trust 2007-1 (the "Trust"). (CP 822, ¶ 6.) Deutsche Bank National Trust Company ("DBNTC"), as custodian of the GSAA Home Equity Trust 2007-1, took possession of the Note in November 2006. (CP 569, ¶ 3.) Pursuant to the Master Servicing and Trust Agreement ("MSA") between the Trust, DBNTC, and servicers of the Loan, DBNTC acted as the custodian charged with maintaining the original documents, including the Note. (CP 822 ¶ 7.) Under the MSA, the Note was deposited with DBNTC for safekeeping, but DBNTC was responsible for and required to deliver the Note to the servicer of the Loan upon request. (CP 822, ¶ 7; CP 384-85 at 93; CP 386-88.)

Litton acquired the servicing rights to the Loan from Avelo Mortgage, LLC on or about July 1, 2008, almost two years after the Loan was originated. (CPP 823, ¶ 9.) During the period of time in which Litton serviced the Loan, it had possession of the Note via DBNTC, and could enforce the terms of the Note and Deed of Trust, including initiating

foreclosure. (CP 441 at 42:17-43:15.) Indeed, DBNTC possessed the note continuously, on behalf of the servicer and the Trust, until DBNTC shipped the Note to the Trust's servicer on or about August 2013. (CP 569, ¶ 5; CP 822 ¶ 8.)[2]

### C. Plaintiff Defaults on the Loan

Plaintiff's Note provided, "If I do not pay the full amount of each monthly payment on the date it is due, I will be in default." (CP 827, ¶ 7(B).) It is undisputed that Plaintiff ceased making payments on his Loan in November 2009. (CP 823, ¶ 11.) During a deposition taken of Plaintiff, he admitted that he knew Litton was the servicer of the Loan and that he knew where to make his Loan payments, but he stopped making payments because his business revenue decreased when the "economy tanked," and he experienced financial hardship. (CP 550 at 37:22-38:12; CP 552 at 49:18-25; CP 559 at 70:5-12.) Indeed, at one point Selkowitz contacted Litton, requesting a loan modification. (CP 412 at 88:5-8.) After Selkowitz and Litton failed to reach agreement on the terms of a

[2] On or about September 1, 2009, Ocwen Loan Servicing, LLC ("Ocwen") acquired the servicing rights to the Loan from Litton. (*Id.*, ¶ 10.) During this time, from November 2006 to approximately August 2013, DBNTC remained in continuous possession of the note. (CP 822, ¶ 8; CP 569, ¶ 5.) On or about August 2013, DBNTC shipped the Note to Ocwen at Ocwen's request so that Ocwen could forward the Note to counsel defending Litton and the interest of the Trust in this litigation. (CP 569, ¶ 5; CP 822 ¶ 8.)

loan modification, Selkowitz hired a lawyer to initiate the underlying lawsuit. (CP 401 at 47:8-20.)

Plaintiff never cured his default and, consequently, as servicer of the Loan, Litton commenced nonjudicial foreclosure proceedings. (CP 823 ¶ 11.)

**D. Non-judicial Foreclosure Proceedings are Initiated**

As part of the non-judicial foreclosure proceedings, on or about May 20, 2010, an appointment of successor trustee ("Appointment of Successor Trustee") was recorded, naming Quality as the successor trustee. (CP 855-856.) The Appointment of Successor Trustee was recorded under King County Auditor's File No. 20100520000866. (*Id.*) The Appointment of Successor Trustee was executed by Debra Lyman, who, at the time of execution, was a vice president of MERS and an employee of Litton. (CP 425 at 71:12-17.) A MERS corporate resolution appointed Ms. Lyman to the office of vice president. (*Id.*) Pursuant to the resolution, Ms. Lyman was authorized to take certain actions with respect to Litton loans registered on the MERS® System, including execution of the Appointment of Successor Trustee. (CP 425-26 at 71:18-22; 73:22-74:14.) Litton was not a party to the Appointment of Successor Trustee. (CP 855-856.)

On or about May 25, 2010, Litton employee Diane Dixon executed a "Declaration of Ownership" on behalf of Litton. (CP 1780). The Declaration stated that Dixon was an employee of Litton and duly authorized to make the declaration; provided the address for the Property the declaration concerned; and stated that Litton was the holder of the Note at issue. (*Id.*)

On or about June 1, 2010, Quality recorded a Notice of Trustee's Sale (the "NTS") under King County Auditor's File No. 20100601001460. (CP 40-42.) Although the sale was scheduled to take place on September 3, 2010, it did not take place, and has since been discontinued. (CP 823 ¶¶ 15-16.) However, the Loan remains in default and due for the November 1, 2009 payment. (CP 823 ¶ 17.) As of June 26, 2014, the current outstanding total debt amount was $392,453, plus attorneys' fees and costs. (CP 823 ¶ 17.)

### E. Plaintiff Files a Lawsuit to Stop the Non-Judicial Foreclosure

On or about July 2, 2010, Plaintiff filed a complaint in King County Superior Court under Cause No. 10-2-24157-4 KNT, alleging claims against Litton Loan Servicing, LP ("Litton"), as well as Mortgage Electronic Registration Systems, Inc. ("MERS") and Quality Loan Service Corporation of Washington ("Quality"). (CP 1.) On August 18, 2010,

Plaintiff filed an Amended Complaint (the "Complaint"). (CP 150-158.) The Complaint sought claims for Quiet Title, Wrongful Foreclosure, Libel/Defamation of Title, Malicious Prosecution, and Violation of the CPA. (CP 150.)[3] The Complaint failed to plead or allege any specific affirmative act by Litton in relation to a cause of action. Plaintiff asserted Litton's place of business (CP 151 ¶ 1.2); but with regard to Plaintiff's CPA claim, Plaintiff grouped Litton with all other Defendants, stating without detail that Litton and the other Defendants had "violated the Consumer Protection Act, *RCW 19.86 et seq.*, through a course of conduct in executing, recording and relying upon documents that it knew or should have known to be false and that have the capacity to deceive a substantial portion of the public." (CP 154 ¶ 4.2.) Plaintiff's slander of title claim failed to mention Litton at all, but instead said "[s]everal named Defendants" were jointly and severally liable for QLS' conduct. (CP 155 ¶ 5.3.) Plaintiff's "wrongful foreclosure" claim, which his Opening Brief states was a claim for violations of the DTA, also did not mention Litton by name, or specific conduct of Litton. (CP 156.)

[3] Although the Complaint's caption also included the language "Temporary Restraining Order and Permanent Injunction," those causes were not pled in the Complaint. (CP 150-158.)

Litton, MERS, and Quality each moved for summary judgment. In response to Litton's Motion – which pointed out that there were no facts alleged in the Complaint and no evidence of actionable conduct by Litton – Plaintiff raised completely new facts, asserting that Litton had incorrectly and fraudulently told QLS, through the Declaration of Ownership, that (1) Litton was a servicer; (2) Litton acted on behalf of the trust on the basis of a power of attorney; (3) the Trust had declared Plaintiff to be in default; and (4) Litton was the "actual holder" of the Note. (CP 873). Plaintiff claimed these statements were false, and therefore slander. (*Id.*)

On July 23, 2014, the court granted Litton, MERS, and Quality's motions for summary judgment. (CP 2611-2619.) Nonetheless, the non-judicial foreclosure sale did not proceed (CP 823 ¶¶ 15-16), and instead a judicial foreclosure was brought. (Opening Br. at 1.)

**F. Plaintiff's Appeal**

Plaintiff filed a Notice of Appeal on September 18, 2014. His Opening Brief assigns error to the trial court's grant of summary judgment dismissing Litton, and denial of Selkowitz's subsequent Motion for Reconsideration. (Opening Br. at 3.) The first five issues Selkowitz presents with regard to Litton concern whether Litton made misrepresentations in the Declaration of Ownership. (*Id.* at 3-4.) The

sixth issue raised is whether Litton is vicariously liable for QLS' misconduct; the seventh issue is whether Litton committed a violation of the CPA; and the final issue is whether Litton slandered Appellant's title through wrongful recording of a Notice of Trustee's sale. (*Id.* at 4.)[4]

Accordingly, the only issues before the Court on appeal, with regard to Litton, are whether there is a material issue of fact as to whether Litton is liable – either for its own conduct or on a *respondeat superior* theory of liability – for violations of the CPA or for slander of title.

## IV. STANDARD OF REVIEW

This Court reviews a trial court's order de novo, engaging in the same inquiry as the trial court. *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 180 Wn. App. 689, 698, *rev. den.*, 181 Wn. 2d 1008 (2014). Summary judgment is appropriate where there is no genuine issue of material fact. *Id.* Although the moving party has the initial burden of showing there is no issue of material fact, once this is accomplished, the burden shifts to the non-moving party to show why summary judgment

[4] During the summary judgment proceedings, Selkowitz conceded that his claims for malicious prosecution and quiet title were not viable. (Opening Br. at n. 1; CP 872.) The issues as presented by Selkowitz also indicate that he has abandoned his claim for violations of the DTA (framed "Wrongful Foreclosure") in his Complaint and any claim for preliminary injunction/TRO.

should not be granted. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 (1989).

The Court may affirm a summary judgment order on any ground supported by the record. *Blue Diamond Grp., Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 453 (2011).

## V. ARGUMENT

Plaintiff's theory of liability against Litton primarily relies on Plaintiff's claim that Litton made false statements in a Declaration of Ownership. Although this is incorrect and also not an allegation properly identified in Plaintiff's Amended Complaint, the allegation is also immaterial, because Plaintiff never established the other necessary elements of a claim for violations of the CPA or a claim for slander of title. Moreover, Plaintiff never provided evidence establishing *respondeat superior* liability for the conduct of QLS. Consequently, the following discussion addresses these points first in Sections A-C of this argument. Section D then discusses the Declaration of Ownership in more detail, explaining why – even if this Court was to consider Plaintiff's new allegations – there were no false representations in the Declaration under the Washington DTA.

### A. Plaintiff Failed to Present Evidence Establishing the Elements of his CPA Claim

The trial court properly granted summary judgment on Plaintiff's CPA claim because Plaintiff failed to establish the elements of the claim. Under the CPA, a plaintiff must provide evidence of: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) that impacts the public; (4) which causes injury to the plaintiff's business or property; and (5) that injury is causally linked to the unfair or deceptive act or practice. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 917 (2001). In the context of a motion for summary judgment, a plaintiff must "produce evidence on each element required to prove a CPA claim." *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 119 (2012). Here, as discussed further below, Plaintiff failed to do so, and summary judgment was appropriate.

#### 1. Plaintiff failed to identify any unfair or deceptive act by Litton

Plaintiff's Complaint raised MERS identification as a basis for liability against Litton, while Plaintiff's briefing in the summary judgment proceedings indicated that Plaintiff was more concerned with the Declaration of Ownership filed by Litton. Neither issue serves as a basis for finding an unfair or deceptive act.

*a. Litton was not involved in Loan origination or the identification of MERS in the Deed of Trust*

Plaintiff's CPA claim, as pled in the Complaint, was based solely upon his contention that the identification of MERS on a deed of trust results in the satisfaction of the enumerated elements above.[5] However, in 2012, the Washington Supreme Court specifically addressed the broad issue of MERS' ability to act as a beneficiary under the Washington Deed of Trust Act. In the *Bain* decision, the court addressed the validity of deeds of trust naming MERS as a beneficiary, as well as whether the identification of MERS on a deed of trust, standing alone, is sufficient to support a claim under the CPA. *Id.* at 115-19. The Supreme Court concluded that MERS' mere status as beneficiary in a deed of trust does not, as a matter of law, give rise to a viable claim against MERS, let alone a loan servicer. *Id.* Instead, a plaintiff must show precisely how MERS' mere presence as beneficiary *caused* injury, and more importantly, how

[5] *See* CP 153, which is the "Facts" section of Plaintiff's Amended Complaint, and is followed by paragraphs 3.1-3.5, discussing MERS' identification in the Deed of Trust (¶3.1), the fact that Plaintiff did not owe MERS money (¶ 3.2); MERS' execution of an Appointment of Successor Trustee identifying Quality as the trustee (¶ 3.3); Quality's subsequent execution of a Notice of Trustee's Sale (¶ 3.4); and the allegation that MERS never recorded an assignment of the Deed of Trust, never possessed the Note, and never owned the Loan. (¶ 3.5.)

any causation identified could be imputed to Litton when it was not a party to the Loan origination. *Id.* Plaintiff failed to establish these facts.

"[W]hether the [alleged] conduct constitutes an unfair or deceptive act can be decided by this court as a question of law." *Indoor Billboard Wash., Inc. v. Integra Telecom of Wash.*, 162 Wn.2d 59, 74 (2007). To establish the first element of a CPA claim, Plaintiff must identify an unfair or deceptive act in one of two ways: he must establish either (1) that an act or practice has a capacity to deceive a substantial portion of the public, or (2) that the alleged act constitutes a per se unfair trade practice. *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 344 (1989) (quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785-86 (1986)). A per se CPA violation may only be established by the Washington Legislature and requires a specific declaration by the legislature that violation of the statute affects the public interest or constitutes a per se violation of the CPA. *Hangman Ridge*, 105 Wn.2d at 787, 791. Here, Plaintiff did not plead a per se violation of the CPA.

Therefore, the only way Plaintiff can establish the first element of his CPA claim is by showing that Litton engaged in conduct that has a capacity to deceive a substantial portion of the public. *Saunders*, 113 Wn.2d at 344 (quoting *Hangman Ridge*, 105 Wn.2d at 785-86). "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, 226 (2006).

Plaintiff's Complaint alleged that Litton "violated the Consumer Protection Act, RCW 19.86, *et seq.*, through a course of conduct in executing, recording, and relying upon documents that it knew or should have known to be false and that have the capacity to deceive a substantial portion of the public." AC, ¶ 4.2. However, it is undisputed that Litton did not execute or record the documents complained of in Plaintiff's Complaint; that is, the Deed of Trust, the Appointment of Successor Trustee, and the Notice of Trustee's Sale. (CP 153, ¶¶ 3.1-3.5. *See also infra* n. 5.) Litton contends that none of these documents were false or had the capacity to deceive, and incorporates by reference the argument in MERS' Answering Brief as if set forth in full.[6] Importantly, however, this Court's analysis as to Litton is simplified as a result of the fact that Plaintiff presented no evidence as to Litton that supported the allegations in his Complaint.

[6] *See* Brief of Respondent Mortgage Electronic Registration Systems, Inc. at 33-48.

*b. Plaintiff's only arguments regarding CPA violations by Litton were made for the first time in summary judgment briefing and are not contained in the Complaint*

In Opposition to Litton's Motion for Summary Judgment pointing out Litton's lack of involvement in origination of the Loan, Plaintiff argued that the statements made in the Declaration of Ownership prepared by Litton raised material issues of fact preventing summary judgment – the crux of his appeal. The Declaration of Ownership is not mentioned once in Plaintiff's Complaint and was a new theory of liability improperly asserted for the first time in opposition to summary judgment. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 469-70 (2004) ("complaint must "apprise the defendant of the nature of the plaintiff's claims and the legal grounds upon which the claims rest"); *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn. 2d 342, 352 (2006) ("While inexpert pleadings may survive a summary judgment motion, insufficient pleadings cannot.") A complaint must be amended only pursuant to CR 15(a), and a "party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along." *Kirby*, 124 Wn. App at 472. *See also Shanaham v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996) ("A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment.") Although even Plaintiff's new theory

held no merit, as discussed further *infra* Section D, the trial court had no reason to consider it, and neither should this Court.

2. Plaintiff failed to identify any public interest impact

A successful CPA claim must also establish impact on the public interest. The factors to be considered when evaluating this element depend upon the context in which the alleged acts were committed. *Hangman Ridge*, 105 Wn.2d at 780. Because Plaintiff complains of a consumer transaction, the following factors are relevant: (1) Were 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; and (5) if the act complained of involved a single transaction, were many consumers affected or likely to be affected by it. *Id.* at 790.

As to the MERS issues described in Plaintiff's Complaint, Plaintiff never articulated or presented evidence showing how the public interest was impacted by Litton (particularly when he did not even identify an act by Litton). On appeal, Plaintiff fails to even argue that his unpled allegations regarding Litton's Declaration of Ownership had a public impact. This element is also not satisfied.

3. Plaintiff failed to plead any compensable injury

Plaintiff's CPA claim also failed because he could not show an actionable injury *caused* by Litton. As a threshold matter, only injury to business or property is compensable under the CPA. RCW 19.86.090. Plaintiff's Complaint alleged injuries as follows: (1) Plaintiff was distracted and "lost time to pursue business and personal activities as a result of prosecuting this action; and (2) attorneys' fees. (CP 154, 157, ¶¶ 4.7, 9.2, 9.3.) Plaintiff clarified his alleged injuries during his deposition, and listed further: (3) a threat of loss of the Property; (4) stress of dealing with the potential loss of the Property in litigation; and (5) damage to credit. (CP 404 at 59:8-13.) On appeal, Plaintiff argues further that he was injured by a reduction in the inability to sell the Property and by an inability to contact the lender to take advantage of options to foreclosure. (Opening Br. at 44.)

None of these injuries are compensable under the CPA. In *Demopolis v. Galvin*, 57 Wn. App. 47, 54-55 (1990), the Washington Court of Appeals held that injuries "resulting from having had to bring suit to protect against Lenders' foreclosure action" was not sufficient to satisfy the injury element of a CPA claim. Although Plaintiff's self-serving declaration indicates that Plaintiff has incurred fuel cost, parking cost, purchase of office supplies, copying, faxing, and postage expenses, as well

as hired investigators, (Opening Br. at 42, ¶ 22), he fails to state that the expenses were incurred outside of the scope of litigation efforts, which are precluded.

Other Courts have noted that damages for stress, mental distress, and inconvenience are also not compensable under the CPA. *White River Estates v. Hiltbruner*, 134 Wn.2d 761, 765-766 (1998); *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 57 (2009). Plaintiff mistakenly argues that *Lyons v. U.S. Bank Nat. Ass'n*, 181 Wn. 2d 775 (2014) allowed emotional distress as an allegation defeating summary judgment where the complainant could "bear a high burden of proof." (Opening Br. at 41 (citing *Lyons*, 181 Wn. 2d at 792-93).) The cited discussion in *Lyons* concerned the *Lyons* plaintiff's claim for intentional infliction of emotional distress. 181 Wn. 2d at 792-93. As to the same plaintiff's CPA claim, however, the *Lyons* Court specifically stated that "emotional distress, embarrassment, and inconvenience" were not injuries under the CPA. *Id.* at 786, n. 4. *See also Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 317-18 (1993) (emotional distress damages not available under the CPA because the statute, by its terms, makes no mention of damages other than with respect to harm to "business or property"). Consequently, Plaintiff's "personal time" (inconvenience)

investigating is not a compensable injury, nor is his worry about losing his home.

As to Plaintiff's argument in his Opening Brief that he was damaged by not being able to work out alternatives to foreclosure with his Lender, there is no evidence to support that assertion. To the contrary, Plaintiff testified during his deposition that he knew Litton was the servicer of his Loan and the appropriate party from whom to ask for a loan modification, and that he did ask them for a modification. (CP 401 at 44:15-18; 47:8-20.) Plaintiff admitted he did not know if he qualified for a loan modification, and that he needed a modification simply because he could not afford the original loan. (CP 407:68:10-16; 70:5-12.) There is no evidence that Plaintiff could have gotten any different terms or other foreclosure alternatives from the Trust.

4. Plaintiff failed to plead any causal link between Litton and Plaintiff's alleged injury

Even if Plaintiff had established a compensable injury under the CPA, he was unable to provide evidence of a causal link between the alleged unfair act or deceptive practice and the purported injury. *Hangman Ridge*, 105 Wn.2d at 793. Post *Hangman Ridge*, the Washington Supreme Court clarified this requirement by imposing a proximate cause standard: "A plaintiff must establish that, *but for* the

defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." *Indoor Billboard*, 162 Wn.2d at 83 (emphasis added).

Here, there is no evidence linking any of Plaintiff's alleged harm to an act of Litton. In fact, during Plaintiff's deposition with respect to his alleged stress, he stated that he was "stressed by the lack of money." (CP 405 at 61:24-25.) Even when he was directly asked whether he saw a doctor "specifically because of stress caused by the foreclosure," Plaintiff declined to answer in the affirmative and responded that he visited the doctor because of the "[s]ituation as a whole." (CP 405 at 61:4-8.)

Similarly, the alleged damage to Plaintiff's credit was not caused by any act of Litton. When Plaintiff was asked what he objected to in relation to his credit report, he replied that he didn't object to it, but that the score was low. (CP 406 at 65:4-23.) Given the opportunity to state what was reported "falsely," Plaintiff admitted he did not know if anyone was reporting incorrectly, and also acknowledged that he was not paying on his loan during the time of the reporting. (CP 406 at 65:9-66:5.)

Clearly, any alleged damage to Plaintiff's credit was caused by Plaintiff's own substantial default. Indeed, Plaintiff's "failure to meet his debt obligations is the 'but for' cause of the default, the threat of foreclosure, any adverse impact on his credit, [] the clouded title," and all of Plaintiff's investigative and out of pocket expenses to avoid

foreclosure. *Babrauskas v. Paramount Equity Mortgage*, No. C13-0494RSL, 2013 WL 5743903, at *4 (W.D. Wash. Oct. 23, 2013). *Accord Massey v. BAC Home Loans Servicing LP*, No. C12-1314JLR, 2013 WL 6825309, at *8 (W.D. Wash. Dec. 23, 2013) ("Any injuries associated with the foreclosure proceedings . . . were caused solely by her own default."). *See also McCrorey v. Fed. Nat. Mortg. Ass'n*, No. 67177-4-1, 2013 WL 681208, at *4 (W.D. Wash. Feb. 25, 2013) (plaintiffs' failure to pay led to default, destruction of credit, and foreclosure). There was certainly no evidence to the contrary.

Moreover, any state law claim by Plaintiff – including under the CPA – related to his credit score is preempted by the Fair Credit Reporting Act ("FCRA"). *Dvorak v. AMC Mortg. Services, Inc.*, No. CV-06-5072, 2007 WL 4207220, at *4-5 (E.D. Wash. Nov. 26, 2007) (holding CPA claim for credit defamation preempted). Had Plaintiff intended to make a FCRA claim, he was required to report his dispute to the credit reporting agency, which in turn would notify the supplier of the information. 15 U.S.C. § 1681 i(a)(2); 15 U.S.C. § 1681s-2(b); *Dvorak*, 2007 WL at *3 (citing *Royalbal v. Equifax*, 405 F. Supp. 2d 1177, 1180 (E.D. Cal. 2005) (holding private right of action against furnisher of credit information exists only if consumer notifies the credit reporting agency; furnisher's duty to investigate does not arise until the furnisher receives notice of the

dispute from the credit reporting agency directly); *Betts v. Equifax Credit Information Services, Inc.*, 245 F. Supp.2d 1130, 1134 (W.D. Wash. 2003) (for § 1681s-2(b) purposes, "[t]he threshold question is whether Topco ever received notice of a dispute from Equifax . . . [h]aving received notice, Topco was obligated to comply with § 1681 s-2(b)(1)"); *Yelder v. Credit Bureau of Montgomery, LLC*, 131 F. Supp. 2d 1275, 1289 (M.D. Ala. 2001) ("[A] furnisher of information has no duty under § 1681 s-2(b) until a consumer reporting agency, and not a consumer, provides notice to the furnisher of information in dispute). The undisputed evidence before the Court establishes that neither Litton nor any other servicer received notice of any credit reporting dispute from any credit reporting agency. Plaintiff's CPA claim is thus preempted and Plaintiff failed to take the requisite steps to make a FCRA claim.

Consequently, Plaintiff cannot satisfy the damages or causation prong of his CPA claim, nor can he satisfy *any* prong of the applicable CPA standard. That fact is fatal to his claim and this Court should affirm the trial court's grant of summary judgment.

### B. Plaintiff Failed to Present Evidence Establishing the Elements of his Slander of Title Claim

The trial court appropriately granted summary judgment on Plaintiff's slander of title claim because Plaintiff had no evidence of the

five required elements: "(1) false words; (2) maliciously published; (3) with reference to some pending sale or purchase of property; (4) which go to defeat plaintiff's title; and (5) result in plaintiff's pecuniary loss." *Rorvig v. Douglas*, 123 Wn.2d 854, 859 (1994). Plaintiff's Complaint did not plead any facts related to Litton concerning this claim. (CP 155-156). Rather, the sole allegation in the Complaint related to Quality's issuance of the Notice of Trustee's Sale, which Plaintiff admits Litton did not execute. (CP 153 at ¶ § 3.4). On summary judgment, Plaintiff impermissibly attempted to alter his theory, alleging that the Declaration of Ownership executed by Litton was false. (CP 873.)

Even if true (which it is not), there was absolutely no evidence of malice. "Malice is not present where the allegedly slanderous statements were made in good faith and were prompted by a reasonable belief in their veracity." *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 375 (1980). In the foreclosure context, the act of initiating non-judicial foreclosure proceedings is not inherently malicious even when the authority to start such proceedings is in question. *McDonald v. OneWest Bank, FSB*, 929 F.Supp.2d 1079, 1099 (W.D.Wash. 2013). Here, Plaintiff failed to allege any facts showing either QLS or Litton recorded documents without a reasonable belief in their veracity. Plaintiff was admittedly delinquent on his mortgage loan. As discussed further below, Litton and Quality

appropriately executed and/or recorded documents to proceed with a warranted foreclosure of the Property. Even if there was some error in the documents recorded or executed, there was no evidence of malice.

Plaintiff fails to satisfy the third element requiring a sale or pending sale of the Property, because there is no pending sale. The original sale date in the Notice of Trustee's Sale has passed (and has since been discontinued), and the sale never took place. *See Ringler v. Bishop White Marshall and Weibel, PS*, No. C13-5020BHS, 2013 WL 1816265, at *2 (W.D. Wash. Apr. 29, 2013) (dismissing slander of title claim where no trustee's sale took place, and where the sale date listed in the Notice of Trustee's Sale had already passed). Plaintiff admitted in his deposition that he never attempted to sell or lease the Property. (CP 417 at 122:14-20.) Therefore, there was never a pending sale date, or a contract for lease or sale, or foreclosure sale. Plaintiff's slander of title claim fails for this reason alone.

Finally, Plaintiff did not suffer any pecuniary loss. To the contrary, Plaintiff's Complaint admits that he has had "actual and uninterrupted possession of the Property." (CP 157 ¶ 8.3.) Absent evidence of pecuniary loss, summary judgment was appropriate.

### C. There Was No Basis to Impose Vicarious Liability on Litton

Even if this Court were to conclude that MERS or Quality did somehow violate the DTA or CPA or slandered Plaintiff's title, Plaintiff still has no cause of action against Litton. While it is true under *Walker* that a beneficiary "may have vicarious liability" for a trustee's acts where the beneficiary "so controls *the trustee* so as to make *the trustee a mere agent* of the beneficiary," Plaintiff provided no evidence of such control. *Walker*, 176 Wn. App. at 313 (emphasis added). *See also Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, at 791 n.12 (2013) (same). Therefore, Litton is not vicariously liable for the acts of MERS or Quality.

Neither the *Klem* nor *Walker* courts described the sort of control to which they referred; however, the Washington Supreme Court held that the characterization as either an agent or independent contractor is "essentially a question of law," and the factors to be considered are listed in the Restatement (Second) of Agency § 220(2) (1958). *Larner v. Torgerson Corp.*, 93 Wn. 2d 801, 804-05 (1980). The most crucial factor is the right to control the details of the work. When there is no right of control, liability cannot attach. *Id.*

Beyond the right to control the details of the work, the remaining Restatement factors include: (1) the parties' intentions; (2) whether the

subordinate business is engaged in a distinct business; (3) whether the subordinate business is paid via salary or per job; (4) whether the subordinate business supplies its own office, employees, and instrumentalities of work; (5) whether the industry standard is to use employees or independent contractors for the work at hand; and (6) the skill required to perform the work. Restatement (Second) of Agency § 220(2) (1958).

The Restatement factors and the undisputed evidence establish that Quality was acting as an independent contractor. As to "the most crucial factor," i.e., "the right to control the details of the work," there is no evidence that Litton controlled the details, substance, or recordation of the documents of which Plaintiff complains. In fact, the documents drafted and recorded by Quality are Quality-created templates merged by its internal file system, IDS. (CP 1678 at 25:22-26:12; CP 1691 at 72:9-24; CP 1699 at 103:17-21.)

Furthermore, and in addition to any information contained in the referral, Quality relies on its own review of the Deed of Trust and trustee sale guarantee to enter information into IDS, which then populates into various foreclosure documents. (CP 1698 at 98:23-24; CP 1701-02 at 113:25-114:4.) Litton initiated the foreclosure process by sending Quality a referral for the foreclosure; however, the expectation then followed that

Quality would conduct the foreclosure in a legal manner with little oversight from Litton. Indeed, for each document required by the DTA, Quality generally only communicated with Litton at its completion, rather than prior to drafting or prior to recording. (CP 1683 at 40:6-41:17.) Therefore, Litton had little control over Quality's work.

Nor is there any evidence that Litton or Quality intended for Quality to be Litton's employee or for Litton to be vicariously liable for Quality's actions.

Similarly, there is no evidence that Litton engages in the business of serving as a foreclosure trustee. The industry standard – and the DTA – require that trustees be separate from beneficiaries. *See Bain*, 175 Wn.2d at 93 ("[U]nder our statutory system, a trustee is not merely an agent for the lender or the lender's successors"). As evidenced by the numerous cases concerning the DTA, effectuating a valid trustee's sale requires significant skill. *See Vawter v. Quality Loan Svc. Corp.*, 707 F. Supp. 2d 1115, 1123 (W.D. Wash. 2010) (recognizing that the DTA is a "comprehensive scheme for the nonjudicial foreclosure process"); *McPherson v. Homeward Residential*, No. C12-5920BHS, 2013 WL 4498695, at *2 (W.D. Wash. Aug. 21, 2013) (temporarily restraining trustee's sale "because the trustee failed to technically comply with the DTA"). As a result, Litton relies on Quality for its specific knowledge of

Washington foreclosure law and its ability to legally complete non-judicial foreclosure sale. The record contains no evidence to the contrary.

Last, the undisputed record shows that Litton and Quality have separate offices, separate employees and separate instrumentalities of work, and there is no evidence that Quality is paid via salary (as opposed to per job). For all these reasons, Quality is an independent contractor for which there is no vicarious liability.

### D. Plaintiff Did Not Establish Any Violation of the CPA by Litton and there was No Willful Misrepresentation Contained in the Declaration of Ownership

As noted above, Plaintiff's Opposition to Litton's Motion for Summary Judgment, and arguments on appeal, improperly focus on the Declaration of Ownership executed by Litton prior to foreclosure, when facts and allegations regarding that Declaration are not mentioned in the Complaint. This Court should not consider the new allegations; and moreover, it need not consider the allegations in order to find that the requisite elements of a CPA or slander of title claim were not established. *See infra* Sections A-C.

However, Plaintiff's claims are also unfounded. According to Plaintiff, Litton's Declaration of Ownership falsely and fraudulently stated: (1) that Litton was the "actual holder" of the Note; (2) that Litton was the "beneficiary" and authorized agent for the owner; (3) that the Note

had not been assigned or transferred to another entity (i.e., that no other entity held the Note); (4) that Diane Dixon was the attorney in fact for the beneficiary; (5) that Litton was the Loan servicer. (Opening Br. at 3-4.) There was no evidence in the record establishing a material issue of fact as to the falsity of any of these statements.

1. No Evidence in the Record Created a Material Issue of Fact as to Whether Litton Held the Note or was the Beneficiary

Plaintiff contends that Litton improperly represented it was the beneficiary and holder of the Note, but never proved these facts. (Opening Br. at 16-17.) To the contrary, there was ample evidence in the record that Litton was the holder and beneficiary under the DTA because it was in constructive possession of the Note.

*a. Litton was holder and beneficiary because, under the DTA, the holder of a note is the beneficiary and the holder is anyone in possession of the note*

Under the DTA, an entity in possession of the note is the holder and is also considered the beneficiary. This was discussed in *Bain*, wherein the Washington Supreme Court first acknowledged that the deed of trust's beneficiary is traditionally the lender who loaned money to the homeowner. 175 Wn. 2d at 88. But lenders are free to sell the secured debt, typically by selling the note. The DTA recognizes that the deed of trust's beneficiary at any one time might not be the original lender. 175

Wn. 2d at 88. Therefore, RCW 61.25.005(2) of the DTA defines "beneficiary" broadly as the "holder of the instrument or document evidencing the obligations secured by the deed of trust." *Bain*, 175 Wn. 2d at 88. In other words, it is the holder of the note who is the "beneficiary" under the DTA. *Id.*

The *Bain* Court then held that where there is a dispute about who is the holder (for the purpose of determining who is the "beneficiary" under the DTA), the Uniform Commercial Code ("UCC")'s definition of holder applies. 175 Wn. 2d at 104. The UCC provides that a "holder" of a promissory note is "the person in possession if the instrument is payable to bearer . . . ." *Id.* (quoting RCW 62A.1-201(20)(2001), now codified at RCW 62A.1-201(b)(21)(A)). A note is "payable to bearer" if it is indorsed in blank. RCW 62A.3-205(b). The Note in this case is indorsed in blank. (Opening Br. at 15-16.) Accordingly, the holder is the entity in possession of the Note.

Because Litton held the Note at all times during the nonjudicial foreclosure, through the custodian, DBNTC, Litton was both the holder of the Note and the beneficiary of the Deed of Trust under the DTA. There is no evidence, therefore, that the Declaration of Ownership statement that Litton held the Note, and describing Litton as the beneficiary, was incorrect. Further, Litton's Assistant Vice President Diane Dixon

appropriately signed the Declaration of Ownership as agent for the "beneficiary," who was Litton, and there is no evidence that she was not authorized by Litton to do so.

*b. Washington law recognizes that an entity can be a holder through "constructive possession" of a note*

Plaintiff contends that Litton was not the holder because Litton was not in "actual possession" of the Note at the time the Declaration of Ownership was executed. Washington law recognizes that constructive possession is sufficient to make one a holder of a note. *Gleeson v. Lichty*, 62 Wn. 656, 659 (1911) ("But, if we assume that the note was not in [defendant's] actual possession, it was clearly under his control, and therefore constructively in his possession."); RCW 62A.1-103(b) (common law, including agency law, applies to UCC transactions); *State v. Spillman*, 110 Wn. 662, 667 (1920) (constructive possession exists "where there is a right to the immediate, actual possession of property.")[7]

[7] *See also* Report of the Permanent Editorial Board for the Uniform Commercial Code, *Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes*, at 5 (Nov. 14, 2011) ("UCC Report"), available at http://www.ali.org/00021333/PEB%20Report%20-%20November%202011.pdf (noting possession under "UCC Section 3-301 includes possession by a third party on behalf of the holder); RCW 62A.3-201, cmt. 1 ("[N]obody can be a holder without possessing the instrument, either directly ***or through an agent***.") (emphasis added); RCW 62A.3-402, cmt. 1 ("Delivery to an agent [of a payee] is delivery to the payee."); RCW 62A.9-313 Official Comment No. 3 (may possess through an agent). *See also In re McFadden*, 471 B.R. 136 (Bankr. D.S.C.

Plaintiff offers no credible authority for the proposition that Washington does not recognize that a holder may constructively possess a note. Plaintiff refers to *Bain*, (Opening Br. at 25 (citing 175 Wn. 2d 83)), but the issue of constructive possession was not present in that case. Plaintiff states that RCW 61.24.030(7)(a) requires actual possession (*id.*), but that statute only states that a Declaration of Ownership must state the beneficiary is the "actual holder" of the note. RCW 61.24.030(7)(a). "Actual holder" is not synonymous with "actual possession;" rather, a party is not *actually* a holder under the UCC unless they fall within the UCC definition for the same. The definition requires possession, and the appropriate interpretation of the UCC allows constructive possession.

Plaintiff also argues spuriously that Washington law precludes an agent from being a "holder" of a note, citing *Central Washington Bank v. Mendelson-Zeller*, 113 Wn.2d 346 (Wash. 1989). (Opening Br. at 39-40.) *Central Washington* is not on point; the case concerned whether an agent who accepted an instrument on behalf of another party was a "holder in

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2012) (owner of the Note can have constructive possession of the Note through an agent servicer, and amount to a holder, even if the Note never leaves the servicer's site) (citing cases); *Bankers Trust (Del.) v. 236 Beltway Invest.*, 865 F. Supp. 1186, 1195 (E.D. Va. 1994) (finding constructive possession under PSA where Note held by agent); *Midfirst Bank, SSB v. C.W. Haynes & Co.*, 893 F. Supp. 1304, 1314-15 (D. S. Car. 1994) ("cases generally hold that constructive possession exists when an authorized agent of the owner holds the note on behalf of the owner") (citations omitted).

due course," not a holder. *Id.* A "holder in due course" differs from a holder in that, if a party satisfies the criteria to qualify as a holder in due course, it "enjoys certain privileges and immunities which [a holder] does not have." *Wesche v. Martin*, 64 Wn.App. 1, 10 (1992). Contrary to Plaintiff's assertion, the *Central Washington* court expressly held that the agent in the case who accepted a note on behalf of his clients was a holder; however, he was not a "holder in due course" because the parties for whom he was an agent did not qualify as a holder in due course. 113 Wn.2d at 358. Thus, that case holds the exact opposite of what Plaintiff suggests, establishing that an agent can be a holder:

> "Although the checks from the buyers were made payable to MZ, thus making MZ a 'holder,' see § 1-201(20), MZ was not accepting the instruments on its own behalf, but as an agent of the Stirlings, who were the owners of the instruments . . . . Thus MZ was a holder of the instruments [but] only for its ultimate principal, the Stirlings." *Id.* (emphasis added).

An odd result would occur if Washington courts deviated from the authorities interpreting the UCC to allow constructive possession – parties would not be able to send the original note to their counsel for use during foreclosure litigation; nor would they be able to make use of an outside custodian especially equipped to store and preserve documents securely. There is no authority supporting Plaintiff's absurd interpretation, and this Court should reject it.

The MSA submitted into evidence during summary judgment proceedings established that, while DBNTC served as the custodian for the Note, DBNTC was required to deliver the Note to the Trust's servicer at the instruction of the servicer. (CP 822, ¶ 7, CP 384-85 at 93; CP 386-88.)[8] The declaration of DBNTC witness Barbara Campbell and Litton witness Kevin Flannigan confirmed that DBNTC held the Note in safekeeping but immediately provided the Note to the Trust's servicer on request. (CP 568-569; CP 822, ¶ 8.) Accordingly, Litton had constructive possession of the Note by virtue of its ability to obtain the Note from DBNTC, the custodian. *See Gleeson*, 62 Wn. at 659 (constructive possession occurs where item is under one's control).

[8] To the extent Plaintiff argues that any portion of the MSA was not strictly complied with, or that obligations were not transferred into the Trust as required by the MSA, Litton contends this is not accurate; however, more importantly, Plaintiff has no standing to challenge these matters because he is not a party to the MSA. *In re Davies*, 595 Fed. Appx. 630, 633 (9th Cir. 2014) (recognizing the clear "weight of authority hold[ing] that debtors in the Davies' shoes – who are not parties to the pooling and servicing agreements – cannot challenge them.") (citing authorities); *Ogorsolka v. Residential Credit Solutions, Inc.*, No. 2:14-CV-00078, 2014 WL 2860742, at *3 (W.D. Wash. Jun. 23, 2014) ("Plaintiffs do not allege that they were investors in a trust or a party to any purchase and sale agreement and as third party borrowers, they lack standing to enforce any terms of the pooling and servicing agreement.")

*c. Washington law does not entitle a borrower to require proof from a holder that it possesses the Note*

Here, Litton provided a Declaration of Ownership attesting that it was the actual holder of the Note at issue in this matter – in other words, that Litton satisfied the definition of holder as constructive possessor of the Note. Further, under the DTA, a borrower is not entitled to require proof from the holder that it is in possession of the Note; rather, the DTA only requires a foreclosing lender to demonstrate to the foreclosure trustee (through its declaration) that it holds the note. *See Frase v. U.S. Bank, N.A.*, No. C11-1293JLR, 2012 WL 1658400, at *5 (W.D.Wash. May 1, 2012); *Bowler v. ING Direct*, No. 3:10-cv-05871-RBL, 2012 WL 1536216, at *3 (W.D.Wash. May 1, 2012). The DTA states explicitly that the only proof required prior to foreclose is "[a] declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note." RCW 61.24.030(7)(a). That Declaration was provided, and there is no admissible evidence in the record presenting a material issue of fact regarding whether the declaration is false.

*d. It is irrelevant that Litton was not the "owner" of the Note as that term is traditionally understood, so long as Litton was the "owner" under the DTA*

Plaintiff's Brief complains that Litton was not the "true owner" of the Note and that reference to another entity as the true owner "repudiates [Litton's] claims to be holders and beneficiaries of the Note and Deed of Trust." (Opening Br. at 17.) To the contrary, it is irrelevant that Litton was not the "owner" of the Note as that term is traditionally understood, so long as Litton was the "holder" under the DTA. *Trujillo v. Northwest Trustee Servs., Inc.*, 181 Wn. App. 484, 506 (2014), *rev. granted* (Wash. Apr. 2, 2015). As noted in the UCC Report, "[t]he concept of 'person entitled to enforce' a note is not synonymous with 'owner' of the note. A person need not be the owner of a note to be the person entitled to enforce it . . . ." To the contrary, one party may own the right to the Note's proceeds, while its servicer may have the ability to enforce it. *Cameron v. Acceptance Capital Mortg. Corp.*, No. C13-1707-RSM, 2013 WL 5664706, at *3 (W.D. Wash. Oct. 16, 2013) ("This Court has repeatedly rejected the theory that only the owner of the Note has the authority to enforce its terms."); *Rouse v. Wells Fargo Bank, N.A.*, No. 13-5706-RBL, 2013 WL 5488817, at *5 (W.D. Wash. Oct. 2, 2013) (same). This has been the law in Washington for 45 years. *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.") (citation omitted).

*e. Plaintiff's argument that definitions in the Note control analysis under the DTA are without merit*

Plaintiff contends that the Note defines the holder as the party "entitled to receive payments under [the] Note," and consequently, that is the party that should be considered the holder as a matter of law, regardless of definitions set forth by statute in Washington's DTA and UCC provisions. (Opening Br. at 22-23.)

Importantly, none of the cases that Plaintiff cites in support of this argument regard the DTA. The argument is contrary to the express directive from Washington appellate courts that nonjudicial foreclosures must "strictly comply with [Washington] statutes, and courts must strictly construe the statutes . . . ." *Amresco Indep. Funding, Inc. v. SPS Properties, LLC*, 129 Wn. App. 532, 537 (2005). Presumably, if a term is defined in the DTA, "strict compliance" with the DTA requires interpreting the term as it is defined.

Second, there is ample evidence that Litton was a holder as defined by the Note executed by Plaintiff. The complete sentence at issue in the

Note states: "I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.'" (CP 825 at ¶ 1.) The Deed of Trust further stated that "[a] sale [of the Note] might result in a change in the entity (known as the 'Loan Servicer') that collects Periodic Payments due under the Note and this Security Instrument . . . . There also might be one or more changes of the Loan Servicer unrelated to the sale of the Note." (CP 841, ¶ 20.) Here, there was ample evidence (and no contrary evidence) that Litton serviced the Loan. (*See, e.g.,* CP 823, ¶ 9.) Indeed, Plaintiff testified that Litton was the servicer, whom he needed to make payments to. (CP 398 at 35:19-25; CP 340 at 36:12-20.) Thus, even if the Court accepts Plaintiff's argument that the definition of "holder" in the Loan Documents controls, Litton has still established it is a holder.

2. There was no evidence that the Note had been transferred or assigned to an entity other than Litton

Plaintiff contends that the Declaration of Ownership was false in stating that the "Note has not been assigned or transferred to any other person or entity," referring to the fact that the original Note was transferred to the Trust shortly after origination. (Opening Br. at 16-17.) The statement is contained in paragraph (4) of the Declaration, and was

made immediately after stating, in paragraph (3), that "Litton Loan Servicing LP is the actual holder of the Promissory Note . . . ." (CP 1780.) It is clear that the statement in the Declaration of Ownership that the Note has not been transferred is not meant to be a historical account, but is a statement of the current status of the Note; i.e., that the Note is held by Litton and has not been transferred to an entity other than Litton.

3. There was no evidence that Litton was not the Loan servicer

Plaintiff designates as an issue on appeal that the Declaration of Ownership falsely declares that Litton was the Loan servicer. (Opening Br. at 4, ¶ 5.) However, Plaintiff's Brief then admits repeatedly that Litton was a servicer. (*Id.* at 9, 10, 17, 31.) Former Litton employee Kevin Flannigan, as well as Plaintiff himself, both testified that Litton was the servicer of the Loan. (CP 823, ¶ 9; CP 398 at 35:19-25; CP 340 at 36:12-20.) There is no material issue of fact, therefore, as to the falsity of this statement.

### E. The Stephenson and Patterson Declarations Did Not Provide Admissible Evidence Showing a Material Issue of Fact and Were Subject to a Motion to Strike

Plaintiff's Brief refers to the Declarations of Tim Stephenson and Jay Patterson as providing various evidence against Respondents and pertaining to alleged issues with the Loan, Loan Documents, and the chain

of title of the Property. These Declarations should have been stricken, and this Court should disregard them. First, both Patterson and Stephenson offer a series of legal conclusions, which are not admissible evidence. *Orion Corp. v. State*, 103 Wn. 2d 441, 461 (1985) ("Experts are not state opinions of law."); *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 791–92 (2007) ("Courts will not consider legal conclusions in a motion for summary judgment."). *See also In re Butler*, 512 B.R. 643 (Bankr. W.D. Wash. 2014) (characterizing Tim Stephenson's similar declaration as constituting legal conclusions). The declarations are just variations on the "loan audits" regularly rejected by courts. *See Fidel v. Deutsche Bank Nat'l Trust Co.*, No. C10-2094 RSL, 2011 WL 2436134, at *1 (W.D. Wash. Jun. 4, 2011) (disregarding forensic audit because plaintiff cannot rely on legal conclusions from a report); *Abarquez v. OneWest Bank, FSB*, No. C11-0029RSL, 2011 WL 1459458, *1 (W.D. Wash. Apr. 15, 2011) (same). The Washington Attorney General and the Federal Trade Commission warn borrowers not to pay for these kinds of reports. (CP 2447-2452.)

Second, neither Patterson nor Stephenson offer "facts as would be admissible as evidence," as required under CR 56(e), because, among other reasons, Selkowitz did not serve expert disclosures complying with King County LCR 26(k)(3)(C). (CP 2436, 2454-55.) A Court order in

this case required service of expert disclosures prior to offering evidence from the experts in the form of a declaration or affidavits. (CP 2454-55.) As the expert opinions were not appropriately disclosed, they were not admissible on summary judgment.

## VI. ENTITLEMENT TO ATTORNEY FEES

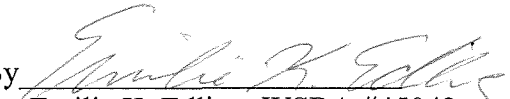
Respondent respectfully requests an award of costs and attorneys' fees as the prevailing party pursuant to RAP 14. Respondent also requests an award of its reasonable attorney fees on appeal pursuant to RCW 4.84.330 and RAP 18.1. It is undisputed that the deed of trust and note provide for an award of attorney fees to the prevailing party who is required to litigate to enforce or interpret the provisions of the contract. Although Plaintiffs' claims for relief cannot be construed as litigation to enforce the provisions of the contract (as the claims do not rely on any contractual provisions), Litton's defense of the lawsuit has been necessary to enforce its right to foreclose under the deed of trust. Attorney fees are therefore appropriately awarded to Litton pursuant to RCW 4.84.330. *Deere Credit, Inc. v. Cervantes Nurseries, LLC*, 172 Wn. App. 1 (2012) (awarding attorney fees to prevailing party on appeal where contract allowed fees); *IBF, LLC v. Heuft*, 141 Wn. App. 624, 638-39 (2007) ("[a] contractual provision for an award of attorney fees at trial supports an award of attorney fees on appeal.")

## VII. CONCLUSION

For the reasons set forth above, Litton requests that the Court affirm the trial court's rulings.

DATED this 15th day of May, 2015

HOUSER & ALLISON, APC

By 
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## CERTIFICATE OF SERVICE

I certify that on the 15th day of May, 2015, I caused a true and correct copy of this **ANSWERING BRIEF OF RESPONDENT LITTON LOAN SERVICING, LP** to be served on the following via first class mail, postage prepaid:

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