

Case No. 47779-3-II

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

CYRIL J. WORM

Appellant.

v.

BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK
AS TRUSTEE FOR THE HOLDERS OF CWALT, INC.,
ALTERNATIVE LOAN TRUST 2004-J12, MORTGAGE PASS-
THROUGH CERTIFICATES, SERIES 2004-J12; RESIDENTIAL
CREDIT SOLUTIONS, INC.; NORTHWEST TRUSTEE SERVICES OF
WASHINGTON; MORTGAGE REGISTRATION SYSTEMS, INC.; and
JOHN DOES 1-20

Respondents.

OPENING BRIEF OF RESPONDENTS

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I. STATEMENT OF THE CASE

A. Origination of the Loan.

On or about October 28, 2004, in consideration for a mortgage loan, Appellant Worm executed a promissory note (the “Note”) in the amount of \$367,250.00. CP 36-39. In the Note, Mr. Worm agreed that if he did “not pay the full amount of each monthly payment on the date it is due,” he would be in default. *Id.*, ¶ 6(B).

Mr. Worm also executed a Deed of Trust securing the Note. CP 41-57; *see also* CP 136 (Compl., ¶ 3.1). The recorded Deed of Trust encumbers a piece of real property commonly known as NE 6551 North Shore Road, Belfair, WA 98528 (the “Property”). *Id.* Mr. Worm agreed the Note and Deed of Trust could be sold one or more times without prior notice to him. *Id.* at 51, ¶ 20. He further agreed that the lender could appoint a successor trustee, who would acquire all “title, power and duties” of the original trustee. *Id.* at 53, ¶ 24.

On June 11, 2010, October 1, 2012, and February 4, 2014, respectively, Assignments of the Deed of Trust were publicly recorded. CP 59-62; *see also* CP 136-138 (Compl., ¶¶ 3.5, 3.13, 3.18). These documents identify Bank of New York Mellon fka The Bank of New York as Trustee for the Holders of CWALT, Inc., Alternative Loan Trust 2004-

J12, Mortgage Pass-through Certificates, Series 2004-J12 (“Bank of New York”) as the assignee in the public record. *Id.*

B. Mr. Worm Modifies the Loan and Then Defaults.

On November 16, 2011, a loan modification agreement between Mr. Worm and BAC Home Loans Servicing, LP¹ was recorded with the Mason County Auditor. CP 64-70; *see also* CP 137 (Compl., ¶ 3.9).² In that document, Mr. Worm renewed his commitment to repaying the loan. *Id.*

On or about December 1, 2012, despite Mr. Worm’s assurance of repayment, he became delinquent on his monthly loan installments. *See* CP 76-79 (Notice of Default); *see also* CP 139 (Compl., ¶ 3.24).

C. Bank of New York, as the Beneficiary, Proceeds With Non-Judicial Foreclosure of the Property.

On January 13, 2014, Bank of New York, through RCS as its Attorney-in-Fact, executed an unambiguous declaration evidencing Bank of New York’s status as Note holder. CP 72: *cf.* CP 137 (Compl., ¶ 3.11, alleging the trust has no interest in the loan); CP 140 (Compl., ¶ 4.2,

¹ Although the cover page to Mr. Worm’s Opening Brief identifies BAC Home Loans as a Respondent, it was not a party to the action. CP 133 (Complaint caption).

² Mr. Worm apparently had no problem with a representative of MERS, acting as nominee for Bank of America, executing the modification agreement. *Id.*: *cf.* Amended Brief of Appellant at 16, 18-19.

alleging the same). The record therefore establishes that all actions taken in furtherance of foreclosure occurred *after* this sworn averment.

On February 4, 2014, an Appointment of Successor Trustee, naming NWTS as Successor Trustee and vesting NWTS with the powers of the original trustee, was recorded with the Mason County Auditor. CP 74; *see also* CP 138 (Compl., ¶ 3.19).

On or about February 14, 2014, as a result of Mr. Worm's default, NWTS sent him a Notice of Default. CP 76-79; *see also* CP 139 (Compl., ¶ 3.24).

On March 25, 2014, a Notice of Trustee's Sale was recorded with the Mason County Auditor, setting a sale date of August 1, 2014 for the Property. CP 81-85; *see also* CP 138-139 (Compl., ¶ 3.23). The sale date itself was later discontinued, with this fact publicly recorded in a Notice of Discontinuance. CP 87; *see also* CP 139 (Compl., ¶ 3.26).

On September 24, 2014, after Mr. Worm dismissed a prior lawsuit,³ NWTS recorded a new Notice of Trustee's Sale with the Mason

³ The prior lawsuit was filed in the United States District Court for the Western District of Washington: it resulted in Mr. Worm's voluntary dismissal prior to consideration of a Motion to Dismiss filed by former party Bank of America. *See* Case No. 14-5661-RBL, Dkt. No. 10 (W.D. Wash. Sept. 15, 2014).

County Auditor, setting a sale date of January 23, 2015 for the Property.

CP 89-94; *see also* CP 139 (Compl., ¶ 3.27).

On or about January 6, 2015, Mr. Worm wrote to NWTS demanding a discontinuance of the pending trustee's sale within 48 hours of his correspondence, or else he would commence a class-action lawsuit. CP 96; *see also* CP 139 (Compl., ¶ 3.31).⁴ On January 12, 2015, before any response could reasonably be made, Mr. Worm initiated a lawsuit.

On June 8, 2015, the Hon. Judge Daniel L. Goodell granted Respondents' joint Motion to Dismiss. CP 8-9. Mr. Worm then appealed.

II. RESPONSE TO ASSIGNMENTS OF ERROR⁵

1. The trial court did not err in granting the Motion to Dismiss.

III. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The evidence shows that Bank of New York has been the beneficiary at all times relevant to the subject 2014 foreclosure, regardless of who held the Note in March 2011.

⁴ Only the first page of Mr. Worm's letter was provided in the record, for the purpose of showing his unilateral demand and associated timeframe.

⁵ Each of Mr. Worm's Assignments of Error relate to the dismissal order. The Assignments numbered 2-4 are impertinently raised as the trial court did not make findings on specific issues; rather, the trial court held that Mr. Worm's Complaint as a whole did not state a valid claim for relief.

2. *Brown v. Department of Commerce*, 184 Wn.2d 509, 359 P.3d 771 (2015), articulates that holder status, and not ownership, is dispositive for enforcement of a secured note under the Deed of Trust Act (“DTA”).

3. Washington courts recognize that a security instrument follows incident to transfer of the promissory note which it secures.

4. Mr. Worm lacks standing to challenge the propriety of an assignment that he was not a party to. Further, Mr. Worm contractually agreed that the subject loan could be sold one or more times without notice to him.

5. A Deed of Trust need not be independently “transferred by deed” in Washington because that instrument follows the debt obligation.

6. The DTA plainly does not require a “new” Notice of Default each time a Notice of Trustee’s Sale is recorded.

IV. RESPONSE ARGUMENT

A. Standard of Review.

An order of dismissal pursuant to CR 12(b)(6) is reviewed de novo. *Dave Robbins Const., LLC v. First Am. Title Co.*, 158 Wn. App. 895, 899, 249 P.3d 625 (2010), citing *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). However, this Court may affirm on any

supported ground, even without analyzing specific assignments of error. *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 214, 304 P.3d 914 (2013).

CR 12(b)(6) dismissal is proper where claims are legally insufficient even after considering hypothetical facts. *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005); *see also Zabka v. Bank of Am.*, 131 Wn. App. 167, 170, 127 P.3d 722 (2005). The inquiry should focus on whether the plaintiff's claim is legally sufficient, which is answered by looking to the face of the pleadings. *See Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725, 189 P.3d 168 (2008).

But in addition to the pleadings, “[d]ocuments whose contents are alleged in a complaint but which are not physically attached to the pleading may also be considered in ruling on a CR 12(b)(6) motion....” *Rodriguez v. Loudeye Corp.* at 726. Submission of extraneous material by either party, such as an affidavit, normally converts a CR 12(b)(6) motion into summary judgment. *See Hansen v. Friend*, 59 Wn. App. 236, 797 P.2d 521 (1990).

However, “if the court can say that no matter what facts are proven within the context of claim, plaintiffs would not be entitled to relief, motion remains one under CR 12(b)(6).” *Haberman v. Wash. Public*

Power Supply Sys., 109 Wn.2d 107, 744 P.2d 1032 (1987). Additionally, under ER 201(b), a court may take judicial notice of public documents if their authenticity cannot reasonably be disputed without converting a motion to dismiss into a motion for summary judgment. *Rodriguez, supra.* at 725.

Here, the presented facts did not entitle Mr. Worm to relief against Respondents. As such, the trial court's ruling should be upheld based on the arguments set forth below.

B. Mr. Worm's Complaint was Legally Insufficient to State Grounds for Relief.

Mr. Worm presented a single cause of action in his Complaint under the Consumer Protection Act ("CPA"), generally predicated on procedural aspects of the non-judicial foreclosure process. CP 140-141.

1. Elements of the CPA.

A CPA violation 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 Wash., 166 Wn.2d 27, 37, 204 P.3d 885

(2009), citing *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105

Wn.2d 778, 719 P.2d 531 (1986). The failure to meet any one of these

elements is fatal to the claim. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002).

Concerning the first prong, the CPA requires 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*. "Implicit in the definition of 'deceptive'... 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).

Here, Mr. Worm alleged several unfair or deceptive acts within his CPA claim, *i.e.*: 1) that MERS assigned its interests on two occasions, 2) the Note and Deed of Trust should have been placed in the loan trust within a certain time period, 3) the loan trust had no interest in the Note and Deed of Trust (either as holder or owner) and foreclosure should have not commenced, 4) the loan trust assigned the Note and Deed of Trust to itself, 5) NWTS acted as the successor trustee, 6) the Notice of Default should have been without effect after the first sale was discontinued, and

7) the Property sale date was too long after the original sale date. CP 140 (Compl., ¶ 4.2).⁶

2. Respondents Did Not Commit Unfair or Deceptive Acts.

a. The CPA Claim was Time-Barred as to Allegations Pertaining to the 2004 Loan Trust “Closing Date” and the 2010 Assignment.

As a threshold matter, “[a] statute-of-limitations defense may be raised in motion to dismiss if ‘it is apparent from the face of the complaint’ that the limitations period has expired.” *Stephenson v. First Am. Title Ins. Co.*, 2014 WL 2894692. *2 (W.D. Wash. Jun. 25, 2014), quoting *Seven Arts Filmed Entertainment Ltd. v. Content Media Corp.*, 733 F.3d 1251, 1254 (9th Cir. 2013). CPA claims have a four-year statute of limitations. RCW 19.86.120.

Traditionally, a cause of action accrues when the alleged harm occurs, regardless of whether the injured party knows he or she has the right to seek relief in the courts. See *Unisys Corp. v. Senn*, 99 Wn. App. 391, 398, 994 P.2d 244 (2000); *Malnar v. Carlson*, 128 Wn.2d 521, 529, 910 P.2d 455 (1996) (cause accrues when a party can apply to the court

⁶ The theories related to the Assignments of Deed of Trust will be addressed in a single section of this briefing, as will the theories related to the loan trust and applicable Pooling and Servicing Agreement.

for relief); *see also, e.g., Dees v. Allstate Ins. Co.*, 933 F. Supp. 2d 1299, 1310 (W.D. Wash. 2013) (rejecting CPA liability for “any alleged unfair or deceptive practice” occurring more than four years prior to suit); *Pruss v. Bank of Am. NA*, 2013 WL 5913431, *5 (W.D. Wash. Nov. 1, 2013) (same); *Westcott v. Wells Fargo Bank, N.A.*, 862 F. Supp. 2d 1111, 1116 (W.D. Wash. 2012).

In *Shepard v. Holmes*, Division Three recently cited an older Supreme Court decision concerning a situation where facts constituting the plaintiff’s claim were easily ascertainable and therefore resulted in a statute of limitations bar:

[t]he public record serves as ‘constructive notice to all the world of its contents’ ‘[T]he defrauded party cannot be heard to say that he has not discovered the facts showing the fraud within the limit of the statute if the facts should have been discovered prior to that time by anyone exercising a reasonable amount of diligence.’

185 Wn. App. 730, 345 P.3d 786 (2014), *quoting Davis v. Rogers*, 128 Wash. 231, 236, 222 P. 499 (1924).

Here, both the Deed of Trust itself and the 2010 Assignment were recorded more than four years prior to Mr. Worm’s commencement of this action. Further, “startup date” information relating to the foreclosing loan trust was easily ascertainable to Mr. Worm, as trust documents have long been publicly available from the Securities and Exchange Commission.

See <http://www.sec.gov/edgar/searchedgar/companysearch.html> (EDGAR search).⁷

As such, Mr. Worm's arguments concerning either: 1) MERS' identification in the Deed of Trust, 2) the 2010 Assignment of Deed of Trust, or 3) the loan trust's 2004 "startup date" were all "time-barred under the four-year statute of limitations for a CPA claim." *Lapinski v. Bank of Am., N.A.*, 2014 WL 347274, *6 (W.D. Wash. Jan. 30, 2014), citing RCW 19.86.120; cf. CP 140 (Compl., ¶ 4.2).⁸

b. The Recorded Assignments Were Not Unfair or Deceptive.

Persuasive case law is in accord that Mr. Worm lacked standing to challenge *any* of the Deed of Trust Assignments. See, e.g., *Brodie v. NWTS*, 2014 WL 2750123, *1 (9th Cir. Jun. 18, 2014) (a borrower cannot attack assignments as non-party to them); *Cagle v. Abacus Mortg., Inc.*, 2014 WL 4402136, **4-5 (W.D. Wash. 2014) (same); *Borowski v. BNC Mortg., Inc.*, 2013 WL 4522253, *5 (W.D. Wash. 2013) (a borrower must possess a genuine claim of being at risk to pay the same debt twice if the

⁷ See also <http://en.wikipedia.org/wiki/EDGAR> ("Companies were phased in to EDGAR filing over a three-year period, ending 6 May 1996. As of that date, all public domestic companies were required to submit their filings via EDGAR, except for hardcopy paper filings, which were allowed under a hardship exemption.").

⁸ To the extent that the Complaint might be construed to have presented a theory of liability surrounding the October 2004 Deed of Trust itself, it would also be untimely.

assignment stands). In Washington, a borrower is never at risk of paying twice based on an assignment because the “recording of an assignment of a mortgage is not in itself notice to the mortgagor, his or her heirs, assigns or personal representatives, to invalidate a payment made by any of them to a prior holder of the mortgage.” RCW 65.08.120.

Additionally, an Assignment of Deed of Trust does not convey the right to initiate foreclosure in Washington. *See, e.g., St. John v. NWTs*, 2011 WL 4543658 (W.D. Wash. Sept. 29, 2011). The right to foreclose is strictly vested with the note holder because Washington law recognizes the general principle that a security instrument (Deed of Trust) follows the debt (Note) with or without formal assignment. *See, e.g., Deutsche Bank Nat. Trust Co. v. Slotke*, -- Wn. App. --, 2016 WL 107783, *5 (Jan. 11, 2016) (“Washington courts have long recognized that the security instrument follows the note that it secures.”); *see also Carpenter v. Longan*, 83 U.S. 271, 274, 21 L. Ed. 313 (1872).

Moreover, the 2010 Assignment *properly* transferred MERS’s agency interest, which has been recognized as assignable, and neither

unfair nor deceptive.⁹ See, e.g., *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 842, 347 P.3d 487 (2015) (“MERS, acting as the nominee... terminated its agency interest when it assigned its nominee interest in the deed of trust back to its principal...”); *Andrews v. Countrywide Bank, N.A.*, 2015 WL 1487093 (W.D. Wash. Apr. 1, 2015); *Smith v. NWTS*, 2014 WL 2439791, *4 (E.D. Wash. 2014); *Wilson v. Bank of Am.*, 2013 WL 275018, **8-9 (W.D. Wash. Jan. 24, 2013); *Estribor v. Mtn. States Mortg.*, 2013 WL 6499535 (W.D. Wash. Dec. 11, 2013); *Mickelson v. Chase Home Fin. LLC*, 901 F. Supp.2d 1286, *2, *aff’d* 549 Fed. Appx. 598 (9th Cir. Jun. 18, 2014) (“*Bain* does not hold that the presence of MERS in a mortgage creates a presumptive CPA claim.”).¹⁰

Washington law provides that a creditor *may* record an assignment reflecting a transfer of beneficial interest, even though it is not necessary

⁹ The October 2012 Assignment did not change anything in relation to MERS’s termination of its agency relationship, which had already been accomplished in June 2010. See CP 59-60.

¹⁰ The Hon. Judge Pechman of the Western District of Washington wrote in *Estribor*: [T]here is no standard set out in *Bain* for an action against MERS when MERS is acting as a nominee. In the absence of a case directly on point or *per se* violation of a statute, *Estribor* bears the burden of showing an unfair or deceptive act. On this issue, the Court is not convinced that MERS’s assignment of the Deed of Trust was unfair, deceptive, or in violation of public interest. The 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.

Id. at *3 (citation omitted).

to proceed non-judicially under the DTA. *See, e.g.*, RCW 62A.9A-607(b). Mr. Worm’s contentions about the Assignments – including the 2014 Assignment, which simply re-confirmed Bank of New York’s authority – would mean that taking advantage of a statutory right is a CPA violation, which cannot be correct. *See Dwyer v. J.I. Kislak Mortg. Corp.*, 103 Wn. App. 542, 13 P.3d 240 (2000) (the “CPA should not be construed to prohibit practices reasonably related to the development and preservation of business, or which are not injurious to the public interest.”).

Indeed, although an assignment of the deed of trust is not necessary for a note holder to foreclose, most participants in a trustee’s sale want title insurance, which can only be obtained if a foreclosing entity can show it holds all rights and interests in the lien. *Accord Espeland v. OneWest Bank, FSB*, 323 P.3d 2, 11-12 (Alaska 2014) (title insurer required MERS assignment as a condition of insuring sale); Nelson & Whitman, 1 Real Estate Finance Law § 5.28 (5th ed. 2010) (“possession of the note leaves no permanent record that future title examiners can rely upon. Hence, there is often a felt need for a recorded document [to act as]

an assignment of the mortgage.”).¹¹

Based on the foregoing authorities, nothing about any of the three Assignments, or MERS’s termination of its agency interest, was unfair or deceptive to Mr. Worm as a matter of law.

c. Mr. Worm Could Not Challenge the Terms of the Loan Trust’s Pooling and Servicing Agreement.

Mr. Worm next asserted that the Note and Deed of Trust were not placed in the loan trust according to the relevant Pooling and Servicing Agreement (“PSA”), and based on the definition of “qualified mortgage” in the U.S. Code. CP 138 (Compl., ¶¶ 3.16-3.17). To that end, he concluded that Bank of New York never “owned or held any interest in the Note or [Deed of Trust].” *Id.* (Compl., ¶ 3.20).

Much like the Assignment, Mr. Worm lacked standing to attack the PSA and securitization of the loan. *See Deutsche Bank Nat. Trust Co. v. Slotke, supra.* at *6, citing *In re Nordeen*, 495 B.R. 468, 480 (B.A.P. 9th Cir. 2013); *see also, e.g., Alexander v. Wells Fargo Bank, N.A.*, 2015 WL 5123922, *3 (W.D. Wash. Sept. 1, 2015); *Ogorsolka v. Resid. Credit*

¹¹ An Assignment is also required under the MERS Rules of Membership. *See, e.g., Salgado-Fuentes v. Great S. Bank*, 2014 WL 1117530, *5 (D. Minn. Mar. 20, 2014); *Colton v. U.S. Nat. Bank Ass’n*, 2013 WL 1934560, *4 (N.D. Tex. May 10, 2013).

Solutions, Inc., 2014 WL 2860742, *3 (W.D. Wash. Jun. 23, 2014);
Sidorenko v. Nat'l City Mortg. Co., 2012 WL 3877749, *2 (W.D. Wash.
Sept. 6, 2012) (“a loans alleged securitization has no bearing on whether a
party may enforce the Note and Deed of Trust”); *Frazer v. Deutsche Bank
Nat'l Trust Co.*, 2012 WL 1821386, *2 (W.D. Wash. May 18, 2012)
 (“Plaintiffs are not parties to the pooling and servicing agreement and
present no authority suggesting standing to challenge it.”).

Said otherwise. arguments pertaining to an alleged faulty or
fraudulent securitization have been largely rejected given that a borrower
is neither a party, nor a third-party beneficiary, to a loan’s purchase and
sale agreement. *See e.g., Benoist v. U.S. Bank Nat'l Ass'n*, 2012 WL
3202180, *5 (D. Haw. Aug. 3, 2012); *Bascos v. Fed. Home Loan Mortg.
Corp.*, 2011 WL 3157063 (C.D. Cal. Jul. 22, 2011); *Greene v. Home Loan
Servs., Inc.*, 2010 WL 3749243, *4 (D. Minn. Sept. 21, 2010).

Further, even if the Court accepted Mr. Worm’s argument at face
value that the PSA “startup date” was not followed, it does not impact his
obligation to fulfill the terms of the Note. *See e.g., Citibank, N.A. v.
Wilbern*, 2013 WL 1283802 (N.D. Ill. Mar. 26, 2013) (citing with
approval the proposition that “compliance or noncompliance with the trust
agreement is not relevant to the validity of a loan’s assignment” and

rejecting claims based on alleged failure to properly transfer note to trust); *Bank of New York Mellon v. Fleming*, 2013 WL 241153 (N.D. Ill. Jan. 18, 2013) (“Even if the assignments violated the PSA, that had no effect on [borrowers’] obligations under the note and mortgage, as the PSA was a contract entirely separate from the note and mortgage.”); *Henkels v. J.P. Morgan Chase*, 2011 WL 2357874, *7 (D. Ariz. Jun. 14, 2011) (claim for unauthorized securitization of his loan denied as borrower “cited no authority for the assertion that securitization has had any impact on [his] obligations under the loan); *cf.* CP 138 (Compl., ¶ 3.17).

Nothing about securitization of the loan affects the validity of its enforcement by Bank of New York. *See, e.g., McGough v. Wells Fargo Bank, N.A.*, 2012 WL 2277931, *4 (N.D. Cal. Jun. 18, 2012) (“Theories that securitization undermines the lender’s right to foreclose on a property have been rejected by the courts.”); *Reyes v. GMAC Mortgage LLC*, 2011 WL 1322775, *2 (D. Nev. Apr. 5, 2011) (“securitization of a loan does not in fact alter or affect the legal beneficiary’s standing to enforce the deed of trust”); *Hafiz v. Greenpoint Mortg. Funding, Inc.*, 652 F.Supp.2d 1039, 1043 (N.D. Cal. 2009) (rejecting claim that a power of sale was lost by assignment of note to a trust pool).

Lastly, Mr. Worm’s citation to the U.S. Code definition of a

“qualified mortgage” in his Complaint was also puzzling. CP 138 (Compl., ¶ 3.16), *citing* 26 U.S.C. § 860G(a)(3)(i, ii). The stated section pertains to the *taxation* of real estate mortgage investment conduits, or REMICs. *Id.*; *see also* 26 U.S.C. § 860A(a) (“Except as otherwise provided in this part, a REMIC shall not be subject to taxation under this subtitle.”). Whether the subject loan is considered a “qualified mortgage” according to 26 U.S.C. § 860G is immaterial to Bank of New York’s status as beneficiary under Washington law or the propriety of foreclosure on the Property after Mr. Worm’s default.

In sum, the trial court properly rejected Mr. Worm’s contention that the Note and Deed of Trust were not placed in the loan trust.

d. The Appointment of Successor Trustee was Proper.

i. Mr. Worm Lacked Standing and Did Not Plead Prejudice.

Just as with the Assignment of Deed of Trust and PSA addressed above, Mr. Worm could not assert a defect with the Appointment of Successor Trustee. CP 140 (Compl., ¶ 4.2). The United States District Court for the Eastern District of Washington has found that a borrower:

[d]oes not have standing to contest the appointment [of successor trustee]. Because Plaintiff is neither a party to nor a third-party beneficiary of this agreement, he could not have been injured by

the alleged fraud.

Brophy v. JPMorgan Chase Bank, 2013 WL 4048535, *7 (E.D. Wash. Aug. 9, 2013), citing *Javaheri v. JPMorgan Chase Bank*, 2012 WL 3426278 (C.D. Cal., Aug. 13, 2012)¹²; see also *Brophy v. JPMorgan Chase Bank*, 2015 WL 1439346, *5 (E.D. Wash. Mar. 27, 2015) (“Whatever claim Plaintiffs have regarding the alleged fraudulent execution of the appointment of successor trustee can only be pursued against Defendant JPMorgan Chase, not Defendant NWTs. The DTA does not impose a duty upon Defendant NWTs to verify the validity of an appointment.”); *Brodie v. NWTs*, 2012 WL 6192723, *3 (E.D. Wash. Dec. 12, 2012), *aff’d*, 2014 WL 2750123 (9th Cir. Jun. 18, 2014) (dismissing challenge to assignment of security interest and trustee’s appointment; “[a]t bottom, the alleged misconduct had no bearing whatsoever upon Plaintiff’s obligation to make her... payments.”). The Western District of Washington also adopted similar reasoning in *Cagle v. Abacus Mortg., Inc.*, *supra.* at *5.

But even if Mr. Worm could assail the Appointment of Successor

¹² See *Javaheri* at *6 (“The only injury [plaintiff] alleges is the pending foreclosure on his home, which is the result of his default on his mortgage. The foreclosure would occur regardless of what entity was named as trustee, and so [plaintiff] suffered no injury as a result of this substitution.”).

Trustee, Washington law mandates a showing of prejudice must be made before a court will entertain DTA-process challenges. *See Amresco Independence Funding, Inc. v. SPS Props., LLC*, 129 Wn. App. 532, 119 P.3d 884 (2005), *citing Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 752 P.2d 385 (1988); *see also Meyer v. U.S. Bank*, 2015 WL 3609238, *5 (W.D. Wash. Jun. 9, 2015) (“[t]echnical violations of the DTA do not constitute unfair or deceptive acts or practices actionable under the CPA absent a showing of materiality or prejudice.”).¹³ Thus, while DTA is a strictly construed statute, it is not a strict-liability statute. Prejudice must be shown to demonstrate liability predicated on a DTA violation.

Mr. Worm’s Complaint does not articulate that he has suffered any prejudice from the Appointment, and the Deed of Trust evidences that Mr. Worm assented to the lender appointing a successor trustee. CP 53, ¶ 24;

¹³ The Supreme Court has held that, because of the DTA’s anti-deficiency provision, a borrower is absolved of any further liability on the Note after non-judicial foreclosure. *See Udall v. T.D. Escrow Serv., Inc.*, 159 Wn.2d 903, 154 P.3d 882 (2007) (reversing holding that wrongful foreclosure should be vacated). Therefore, when a borrower is in default and cannot cure, he or she is economically indifferent to any defects in the foreclosure process and does not suffer prejudice. *Id.* For purposes of CR 12(b)(6), even if we assume Mr. Worm is correct that “someone [else] has the right to foreclose,” yet decided to simply ignore his default for over three years, a completed foreclosure by Bank of New York still cannot prejudice Mr. Worm as this other “mystery beneficiary” could then pursue a claim against Bank of New York to recover what it is owed. Mr. Worm’s debt, however, would be satisfied. *Cf.* Amended Brief of Appellant at 26.

see also Bavand v. OneWest Bank, FSB, 2014 WL 5317145 (9th Cir. Oct. 20, 2014) (“any technical, non-prejudicial issues should not bar foreclosure proceedings.”); *Mickelson v. Chase Home Fin. LLC*, 579 F. App’x 598, 601 (9th Cir. Jun. 18, 2014) (where beneficiary held the note, there could be no prejudice to the borrower even if allegations relating to the propriety of the trustee’s “proof” were true); *Meyer v. U.S. Bank*, 530 B.R. 767 (W.D. Wash. Apr. 10, 2015), *reconsid. denied* (Jun. 9, 2015) (no prejudice when information NWTs received was correct); RCW 61.24.020(2) (“The trustee may resign at its own election or be replaced by the beneficiary.”).¹⁴ The trustee’s appointment by itself – which occurred after Bank of New York swore to being the beneficiary – was not an unfair or deceptive act.

ii. An Attorney-in-Fact Can Execute the Appointment.

In addition, Mr. Worm’s claim that Residential Credit Solutions, Inc. could not execute the Appointment was legally erroneous. CP 138

¹⁴ Mr. Worm’s citation to *Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 308 P.3d 716 (2013) is inapposite because, in that case, Division One did not have the benefit of a beneficiary declaration unequivocally swearing to note holder status. Indeed, the facts in *Walker* pre-dated the statutory existence of such declaration. Here, Bank of New York introduced a declaration which directly refuted Mr. Worm’s argument that it was not the beneficiary at all times relevant to the foreclosure. CP 72; *see also Brown, supra*.

(Compl., ¶ 3.19), CP 140 (Compl., ¶ 4.2).¹⁵ The use of an attorney-in-fact to execute documents is a well-established principle under Washington law, and particularly in the DTA context.¹⁶

A power of attorney is a written instrument by which one person, as principal, appoints another as agent and confers on the agent authority to act in the place of the principal for the purposes set forth in the instrument. *Bryant v. Bryant*, 125 Wn.2d 113, 882 P.2d 169 (1994). The DTA and UCC both contemplate that the actions of a beneficiary can be performed by agents. See *Barkley v. GreenPoint Mortg. Funding, Inc.*, 190 Wn. App. 58, 69, 358 P.3d 1204 (2015); *Bain v. Metro. Mortg. Group, Inc.*, 2010 WL 891585 (W.D. Wash. Mar. 11, 2010) (“[t]here is simply nothing deceptive about using an agent to execute a document, and this practice is commonplace in deed of trust actions.”); see also *Knecht v. Fid. Nat. Title Ins. Co.*, 2013 WL 7326111 (W.D. Wash. Mar. 11, 2013) (beneficiary declaration signed by attorney-in-fact was proper); *US Bank v. Woods*, 2012 WL 2031122 (W.D. Wash. Jun. 6, 2012) (same).

¹⁵ Mr. Worm does not appear to have briefed this issue on appeal, but given the Court’s *de novo* review of the ruling below, Respondents will address the contention as presented in the Complaint.

¹⁶ The beneficiary declaration accepted as valid by the Supreme Court in *Brown v. Department of Commerce* was executed by Bayview Loan Servicing, LLC as attorney-in-fact for beneficiary M&T Bank. Case No. 90652-1 (Wash. Sup. Ct.), CP 142-43.

Mr. Worm's claim that the Appointment of Successor Trustee constituted an unfair or deceptive act was appropriately dismissed.

e. There is No Requirement to "Own" the Note in Order to Foreclose.

Mr. Worm cites to *Brown v. Wash. State Dep't of Commerce*, *supra.*, and then promptly argues the *precise opposite* of its recent holding. Amended Brief of Appellant at 11. In *Brown*, the Supreme Court resolved a significant debate as to who could initiate non-judicial foreclosure under the DTA – a note holder or owner. 184 Wn.2d at 514 (finding "[t]he holder of the note satisfies these provisions and is the beneficiary because the legislature intended the beneficiary to be the party who has authority to modify and enforce the note.").

Brown concluded, "Washington's Uniform Commercial Code (UCC) authorizes [the] division of note ownership from note enforcement." *Id.* at 777. It should now be abundantly clear that, for purposes of non-judicial foreclosure, only "the note *holder* is the party entitled to modify and enforce the note." *Id.* at 789 (emphasis added).

Mr. Worm's theories are quite similar to those raised – and rejected – in *Deutsche Bank Nat. Trust Co. v. Slotke*, *supra.* (the borrower alleged that "all assignments of interests in real property in Washington

must 'be accomplished by deed.' " and being the note owner is "a prerequisite for foreclosure."). 2016 WL 107783, **4-5, *citing, inter alia, In re Butler*, 512 B.R. 643, 653 (Bankr. W.D. Wash. 2014). Although *Slotke* addressed judicial enforcement of a Deed of Trust, Division One observed that "[e]ven in the nonjudicial foreclosure setting, recent case law confirms that the holder of a note has authority to commence a nonjudicial foreclosure." *Id.* at *4. This Court should agree with that conclusion.

f. The Notice of Default Was Not Rendered Invalid Upon the Recording of a Subsequent Notice of Trustee's Sale.

Mr. Worm further alleged in his Complaint that the September 24, 2014 recorded Notice of Discontinuance of Trustee's Sale also discontinued the "legal effectiveness of the initial process of which the [Notice of Default] was a part." CP 140 (Compl., ¶ 4.2). This statement, however, was inaccurate.

First, the Notice of Discontinuance of Trustee's Sale expressly terminated "that certain trustee's sale set by the Notice of Trustee's Sale

recorded [March 25, 2014]. . . .” CP 87.¹⁷ The Notice continues:

This discontinuance shall not be construed as waiving any breach or default under the aforementioned deed of trust or as impairing any right or remedy thereunder, or as modifying or altering in any respect any of the terms, covenants, conditions, or obligations thereof, but is and shall be deemed to be only an election, without prejudice, not to cause the sale to be made pursuant to the aforementioned Notice of Trustee’s Sale.

Id. No mention is made of the Notice of Default, and there was no effect on pursuing foreclosure because of Mr. Worm’s default. The only thing discontinued was the scheduled sale date itself, and a new Notice of Trustee’s Sale was then recorded immediately thereafter, in accordance with RCW 61.24.040. CP 89-94.

Second, contrary to Mr. Worm’s arguments, the plain language of the DTA does not mandate that a new Notice of Default must be issued after the one described in RCW 61.24.030(8). *Cf.* Amended Brief of Appellant at 22-23. The *only* statutory requirement is that a Notice of Default must pre-date the Notice of Trustee’s Sale by at least thirty days, and contain certain information; a Notice of Default itself does not grow stale. RCW 61.24.030(8); *but see Watson v. NWTs*, 180 Wn. App. 8, 321

¹⁷ The DTA does not contain a provision requiring a Notice of Discontinuance, and its recording therefore was of no import to the non-judicial process beyond public notice of the original sale date being stopped.

P.3d 262 (2014), *review denied*, 181 Wn.2d 1007 (2014) (change in pre-foreclosure statutory requirements necessitated new process, which is not the situation presented here).

For example, in *Meyers Way Dev. Ltd. P'ship v. Univ. Sav. Bank*, the foreclosing creditor added requirements to cure an existing default; Division One recognized that the DTA “does not explicitly include or exclude a requirement that the notices of default and sale issued after the bankruptcy mirror those before the bankruptcy.” 80 Wn. App. 655, 672, 910 P.2d 1308 (1996). *Meyers Way* focused on the fact that a new Notice of Sale was mandated, and the Court dispelled the argument that the *entire* foreclosure process should have been reinitiated back to the Notice of Default. *Id.*

In this case, the February 14, 2014 Notice of Default properly preceded both Notices of Trustee’s Sale, and the Notice of Discontinuance did not affect the Notice of Default’s validity. CP 76-94. As a result, no unfair or deceptive act occurred concerning the timing of these notices.

g. The Trustee’s Sale Date was Permissible.

Mr. Worm lastly contended that it was a DTA, and consequently a CPA, violation for the latter Notice of Trustee’s Sale to schedule a sale date 175 days after the “original sale date.” CP 140 (Compl., ¶ 4.2). Mr.

Worm's assertion, however, was predicated on a misunderstanding of the relevant statutes.

“RCW 61.24.040(1)(f), (2) provides the requirements for a deed of trust foreclosure, including the notice requirements for the trustee's sale and foreclosure.” *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 568, 276 P.3d 1277 (2012). A trustee's sale can be *continued from the scheduled date* for no more than 120 days. *Id.*; see also RCW 61.24.040(6). In order to schedule a sale beyond the 120-day limit, a trustee must reissue the statutory notices. *Id.*

Here, such reissuance is precisely what transpired. The “original” Notice of Trustee's Sale was recorded on March 25, 2014 and scheduled an August 1, 2014 sale date. CP 81-85. When the sale did not occur, a Notice of Discontinuance was recorded to reflect that fact. CP 87. Then, a new Notice of Trustee's Sale was recorded on September 24, 2014, scheduling a January 23, 2015 sale date. CP 89-94. This new Notice comported with both RCW 61.24.040 and the *Albice* holding, and it was neither unfair nor deceptive.

Because Mr. Worm's CPA claim could not survive even the first-prong test of *Hangman Ridge*, Respondents were entitled to CR 12(b)(6) dismissal on this basis alone.

3. Mr. Worm Did Not Sufficiently Plead a Public Interest Impact.

Regarding the second prong of a CPA claim, Mr. Worm's Complaint also failed as a matter of law on the question of impacting the general public.

It is "the likelihood that additional plaintiffs have been or will be injured in *exactly the same fashion* that changes a factual pattern from a private dispute to one that affects the public interest." *Hangman Ridge*, 105 Wn.2d at 790 (emphasis added); *see also Tran v. Bank of Am.*, 2013 WL 64770 (W.D. Wash. Jan. 4, 2013) ("[t]he public interest in a private dispute is not inherent."); *McCrorey v. Fed. Nat. Mortg. Ass'n*, 2013 WL 681208 (W.D. Wash. Feb. 25, 2013) ("[t]he purpose of the CPA is to protect consumers from harmful practices, which is why plaintiff must allege an actual or potential impact on the general public, not merely a private wrong."); *Segal Co., Inc. v. Amazon.com*, 280 F.Supp.2d 1229 (W.D. Wash. 2003) (dismissing 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).

Much like *Segal Co., Inc.*, Mr. Worm pled, in boilerplate fashion, that Defendants' activities and conduct "are currently being repeated in

foreclosures all over the state, adversely affecting the people of the State of Washington.” CP 140 (Compl., ¶¶ 4.4, 4.5).

But Mr. Worm did not explain, in even the barest sense, how the facts of a *particular* foreclosure involving himself and the subject Property are being repeated or likely to result in injury to other persons. *Id.*¹⁸ Each of the alleged acts claimed exclusively relate to conduct directed at Mr. Worm *personally, i.e.*, whether certain DTA procedures were followed.

These purported acts did not, and could not, have the capacity to deceive other individuals, let alone a substantial portion of the public. *Accord Brown ex rel. Richards v. Brown*, 157 Wn. App. 803, 816, 239 P.3d 602 (2010), *citing Burns v. McClinton*, 135 Wn. App. 285, 290-91, 143 P.3d 630 (2006) (CPA claim defeated because of no evidence that Wells Fargo’s actions had “the capacity to deceive a large portion of the public.”).

4. Respondents Did Not Cause Injury to Mr. Worm.

CPA liability also requires a causal link between the alleged misrepresentation or deceptive practice and the purported injury.

¹⁸ Mr. Worm now impermissibly seeks to make new arguments on this prong, and expand the scope of his Complaint, for the first time on appeal. *Accord Cannabis Action Coal. v. City of Kent*, 180 Wn. App. 455, n. 10, 322 P.3d 1246 (2014) (striking arguments not raised to the trial court), *review granted sub nom., Sarich v. City of Kent* (Oct. 9, 2014).

Hangman Ridge, *supra* at 793; *see also Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 82, 170 P.3d 10 (2007) (a plaintiff must prove that the “injury complained of... would not have happened” if not for the defendant’s acts). If a claimed expense would have been incurred regardless of whether a CPA violation existed, causation is not established. *Panag*, *supra*. at 64.

An award under the CPA is strictly limited to damage “in... business or property....” RCW 19.86.090, *see also Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009); *cf.* Amended Brief of Appellant at 26 (alleging other sorts of injuries). 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*, 122 Wn.2d 299, 858 P.2d 1054 (1993); *Demopolis v. Galvin*, 57 Wn. App. 47, 786 P.2d 804 (1990) (litigation expenses are *not* an “injury” under the CPA); *Thurman v. Wells Fargo Home Mortg.*, 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... [prosecuting] a CPA claim is not sufficient to show

injury to business or property.”); *see also* *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007) (tort recovery is barred where damages are purely economic losses based on a contract).

In *Bain v. Metro. Mortg. Group, Inc.*, the Supreme Court cited to *Bradford v. HSBC Mortg. Corp.*, 799 F.Supp.2d 625 (E.D. Va. 2011), for an example of an injury in the foreclosure context. 175 Wn.2d 83, 119, 285 P.3d 34 (2012). In *Bradford*, three different companies attempted to foreclose on property after the borrower attempted to rescind a mortgage under the Truth in Lending Act. *Id.* All three companies claimed to hold the note. *Id.* Nothing like the harm in *Bradford* was alleged in Mr. Worm’s Complaint.

As the Ninth Circuit Court of Appeals 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). In the same way, none of Mr. Worm’s vague injuries were proximately caused by Respondents. *See Mickelson v. Chase Home Fin. LLC*, 579 F. App’x 598 (9th Cir. Jun. 18, 2014); *Massey v. BAC Home*

Loans Serv. LP, 2013 WL 6825309 (W.D. Wash. Dec. 23, 2013), *citing Babrauskas v. Paramount Equity Mortg. et al.*, 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, supra*. at *4 ("[i]t was the failure to meet their debt obligations that led to a default, the destruction of credit, and the foreclosure.").

Nowhere in the Complaint did Mr. Worm describe how the issuance of foreclosure notices caused injury to him. Likewise, Mr. Worm did not suggest that foreclosure suddenly commenced for no valid reason whatsoever, or that he was at risk of making loan payments to multiple parties. Instead, Mr. Worm merely recited that he "has suffered injury due to the distractions and loss of time to pursue business and personal activities necessitated by the need to address [Defendants' conduct]...." CP 141 (Compl., ¶ 4.7).

Just as with the aforementioned criteria for a CPA violation, this conclusory statement failed to satisfy the causation and injury prongs of the applicable *Hungman Ridge* test, and the trial court was within its discretion to dismiss the action.

C. Bank of New York Should Receive Attorneys' Fees and Costs Upon Prevailing in This Appeal.

Under R.A.P. 18.1(a), “[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.” *See also Podbielancik v. LPP Mortg. Ltd.*, -- Wn. App. --, 362 P.3d 1287 (2015), citing *Durland v. San Juan Cnty.*, 182 Wn.2d 55, 76, 340 P.3d 191 (2014) (Awarding fees to the lender; “[t]he general rule in Washington is that attorney fees will only be awarded when “authorized by contract, statute, or recognized ground of equity.”); R.A.P. 18.1(b) (requiring that a “party must devote a section of its opening brief to the request for the fees or expenses.”).

Additionally, under R.A.P. 14.2, “[a] commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.” Under R.A.P. 14.3(a), certain expenses are allowed as awardable costs.

The evidence showed that Bank of New York unequivocally held the secured Note during the time relevant to Mr. Worm’s allegations. CP

72. Therefore, upon prevailing in this appeal, Bank of New York respectfully requests that it be awarded attorneys' fees based on the Deed of Trust, which permits recovery of fees "incurred by Lender... on appeal." CP 53, ¶ 26. Bank of New York should also be awarded costs for those items specified in R.A.P. 14.3(a) upon the presentation of a cost bill pursuant to R.A.P. 14.4.

V. CONCLUSION

Although Mr. Worm pled a host of allegations seeking to prevent Bank of New York from foreclosing despite his unchallenged default, Mr. Worm did not state sufficient facts to defeat Respondents' CR 12(b)(6) Motion. The actions of Respondents were all authorized and proper, and the record supports the trial court's decision to grant dismissal of Mr. Worm's Complaint in its entirety.

For these reasons, the ruling below should be affirmed.

DATED this 26th day of February, 2016.

RCO LEGAL, P.S.



By: /s/ Joshua S. Schaer
Joshua S. Schaer, WSBA #31491
Attorneys for Respondents

Declaration of Service

The undersigned makes the following declaration:

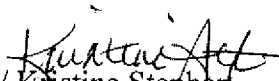
1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. On February 26, 2016 I caused a copy of the **Opening Brief of Respondents** to be served to the following in the manner noted below:

Cyril J. Worm 6551 NE North Shore Road Belfair, WA 98528 <i>Pro Se</i> Appellant	<input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> VIA ECF Electronic Notice
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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.

Signed this 26th day of February, 2016.


/s/ Kristine Stephan
Kristine Stephan, Paralegal

RCO LEGAL PS

February 26, 2016 - 2:21 PM

Transmittal Letter

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Case Name: Cyril Worm v. Bank of New York Mellon, et al.

Court of Appeals Case Number: 47779-3

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Personal Restraint Petition (PRP)

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Comments:

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