

No. 73705-8-I

**COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON**

KAREN S. POOLEY,

Appellant/Plaintiff,

v.

FILED
Aug 01, 2016
Court of Appeals
Division I
State of Washington

QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a
Washington corporation; QUALITY LOAN SERVICE CORPORATION,
a California corporation; and McCARTHY & HOLTHUS LLP, a
California limited liability partnership,

Respondents/Defendants.

APPELLANT'S OPENING BRIEF

KOVAC & JONES, PLLC
Richard Llewelyn Jones
WSBA No. 12904
Attorney for Appellant
1750 112th Ave NE Ste D-151
Bellevue, WA 98004-2976
(425) 462-7322
(425) 450-0249 (fax)
rlj@kovacandjones.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	1
III. STATEMENT OF FACTS	3
IV. STATEMENT OF LAW AND ANALYSIS	13
A. Standard of Review	13
B. Strict Compliance with DTA Required.....	15
C. Violations of the DTA and Duty of Good Faith	15
D. Unlawful Reliance on 2010 NOD to the issue of the third NOTS.....	28
E. Joint Venture Liability of M & H.	31
F. Damages for Pre-Sale Violations of the DTA	
G. Claims for violation of the CPA	
H. Fees and Costs for alleged violation of CR 11 and CR 56(e)..	45
V. CONCLUSION.....	49
VI. CERTIFICATE OF SERVICE	51

TABLE OF AUTHORITIES

Cases

<i>Albice v. Premier Mortgages Services of Washington, Inc.</i> , 174 Wn.2d 560, 567, 276 P.3d 1277 (2012).....	15, 38, 48
<i>Amresco Independence Funding, Inc., v SPS Props, LLC</i> , 129 Wn.App. 532, 119 P.3d 884 (2005).....	43
<i>Bain v. Metropolitan Mortgage Group, Inc.</i> , 175 Wn.2d 83, 93, 285 P.3d 34 (2012).....	15, 39, 48
<i>Balise v. Underwood</i> , 62 Wn.2d 195, 381 P.2d 966 (1963)	14
<i>Bavand v. OneWest Bank, FSB</i> , 176 Wn.App 475, 485-486, 309 P.3d 636 (2013).....	15, 37, 39, 48
<i>Biggs v. Vail</i> , 124 Wn.2d 193, 197, 876 P.2d 448 (1994)	46, 47
<i>Brown v. Dept. of Commerce</i> , 184 Wn.2d 509, 359 p.3d 771 (2015)	24
<i>Bryant v. Joseph Tree Inc.</i> , 119 Wn.2d 210, 829 P.2d 1099 (1992)...	46, 47
<i>Central Washington Bank, v. Medelson-Zeller, Inc.</i> , 113 Wn.2d 346, 779 P.2d 697 (1989).....	48
<i>Cox v. Helenius</i> , 103 Wn.2d 383, 693 P.2d 683 (1985)	38, 48
<i>Dreiling v. Jain</i> , 151 Wn.2d 900, 908, 93 P.3d 861 (2004).....	14
<i>Failla v. FixtureOne Corp.</i> , 181 Wn.2d 642, 649, 336 P.3d 1112 (2014) <i>cert. denied</i> , 135 S.Ct. 1904, 191 L.Ed.2d 756 (2015)	14
<i>Felton v. Menan Starch Co.</i> , 66 Wn.2d 792, 405 P.2d 585 (1965).....	49
<i>Frias v. Asset Foreclosure Services, Inc.</i> , 181 Wn.2d 412, 417, 334 P.3d 529 (2014).....	passim
<i>Gilbrook v. City of Westminster</i> , 117 F.3d 839, 856 (9 th Cir. 1999).....	31

<i>Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	37, 44
<i>Housing Authority of Everett v. Kirby, supra.</i>	45, 46
In re: Riviera, 14-05108 (NC-13-1615-KuPaJu)	25
<i>John Doe v. Spokane & Inland Empire Blood Bank</i> , 55 Wn.App. 106, 780 P.2d 853 (1989).....	46
<i>Klem v. Washington Mutual Bank</i> , 176 Wn.2d 771, 789, 295 P.3d 1179 (2013).....	6, 11, 42, 48
<i>Knisely v. Burke Concrete Accessories, Inc.</i> , 2 Wn.App. 533, 468 P.2d 717, 720-21 (1970).....	31
<i>Koegel v. Prudential Mutual Savings Bank</i> , 51 Wn.App. 108, 111-112, 752 P.2d 385 (1988).....	39
<i>Lyons v. U.S. Bank</i> , 181 Wn.2d. 775, 783, 336 P.3d 1142 (2014)	passim
<i>Manteufel v. Safeco Insurance Co.</i> , 117 Wn. App. 168, 68 P.3d 1093 (2003).....	46
<i>Mason v. Mortgage America, Inc.</i> , 114 Wn.2d 842, 854, 792 P.2d 142 (1990).....	44
<i>North Coast Electric Co. v. Selig</i> , 136 Wn.App. 636, 649-650, 151 P.3d 211 (2007).....	46, 49
<i>Panag v. Farmers Insurance Co. of Washington</i> , 166 Wn.2d 27, 58, 204 P.3d 855 (2009).....	42, 43, 44
<i>Peoples National Bank v. Ostrander</i> , 6 Wn.App. 28, 491 P.2d 1058 (1971)	38
<i>Plein v. Lackey</i> , 149 Wn.2d 214, 67 P.3d 1061 (2003)	38
<i>Refrigeration Engineering Co. v. McKay</i> , 4 Wn.App. 963, 486 P.2d 304, 311 (1971).....	31

<i>Rhinehart v. Seattle Times, Inc.</i> , 59 Wn.App. 332, 340, 798 P.2d 1155 (1990).....	45
<i>Rucker v. Novastar Mortgage Inc.</i> , 177 Wn.App.1, 311 P.3d 31 (2013) .	42
<i>Rugg; Doherty v. Municipality of Metro</i> , 83 Wn.App. 464, 921 P.2d 1098 (1996).....	14
<i>Schroeder v. Excelsior Management Group, LLC</i> , 117 Wn.2d 94, 297 P.3d 677 (2013).....	13, 14, 15, 48
<i>Short v. Demopolis</i> , 103 Wn.2d 52, 691 P.2d 163 (1984)	37
<i>Sinclair v. Betlach</i> , 1 Wn.App. 1033, 467 P.2d 344 (1970); <i>Fite v. Lee</i> , 11 Wn.App. 21, 521 P.2d 964 (1974).....	49
<i>Skimming v. Boxer</i> , 119 Wn.App. 748, 82 P.3d 707 (2004).....	45
<i>State ex rel Bond v. State</i> , 62 Wn.2d 487, 383 P.2d 288 (1963).....	13, 14
<i>State v Kane</i> , 23 Wn.App. 107, 594 P.2d 1357 (1979).....	17
<i>State v. Smith</i> , 16 Wn.App. 425, 558 P.2d 265 (1976).....	17
<i>Sterling Business Forms, Inc. v. Thorpe</i> , 82 Wn.App. 446, 918 P.2d 531 (1996).....	31
<i>Stewart v. Good</i> , 51 Wn.App. 509, 754 P.2d 150 (1988).....	39
<i>Tiger Oil Corp. v. Department of Licensing</i> , 88 Wn.App. 925, 946 P.2d 1235 (1997).....	45
<i>Timson v. Pierce County Fire Disctrict</i> , 136 Wn.App. 376, 149 P.3d 427 (2006).....	45
<i>Trujillo v. NWTS</i> , 183 Wn.2d 820, 355 P.3d 1100 (2015).....	passim
<i>Udall v. T.D. Escrow Services, Inc.</i> , 159 Wn.2d 903, 915-916, 154 P.3d 882 (2007).....	15, 43
<i>Walker v. Quality Loan Service Corp.</i> , 176 Wn.App. 294, 306, 308 P.3d 716 (2013).....	passim

Washington Optometric Assoc. v. Pierce Co., 73 Wn.2d 445, 438 P.2d 861 (1968) 49

Watson v. NWTS, 180 Wn.App. 8, 321 P.3d 262 (2014) passim

Statutes

RCW 19.86, et seq. 3

RCW 19.86.010(2) 42

RCW 19.86.090 50

RCW 19.86.920 37

RCW 4.84.185 passim

RCW 5.45.020 17, 21

RCW 61.24, et seq. 2

RCW 61.24.005(2) 21

RCW 61.24.010 26, 27, 40

RCW 61.24.010(4) 22, 37

RCW 61.24.030 passim

RCW 61.24.030(6) 48

RCW 61.24.030(7) 20

RCW 61.24.030(7)(a) 11, 20, 22

RCW 61.24.030(7)(a) and (b) 2

RCW 61.24.030(7)(b) 22

RCW 61.24.031 passim

RCW 61.24.031(1) 10

<i>RCW 61.24.031(2)</i>	4
<i>RCW 61.24.040</i>	26
<i>RCW 61.24.040(1)(a) and (f)</i>	5
<i>RCW 61.24.040(1)(f)</i>	27
<i>RCW 61.24.130</i>	38, 39, 44
<i>RCW 61.24.135(2)(a) and (c)</i>	30
<i>RCW 61.24.135(2)(c)</i>	39, 42
<i>RCW 61.24.163</i>	10, 43
<i>RCW 61.24.163(7)</i>	28
<i>RCW 62.13.030(8)(l)</i>	27
<i>RCW 62A.3-604(a)</i>	40
<i>RCW 9A.82, et seq.</i>	48

Other Authorities

Black’s Law Dictionary, 4 th Ed. Rev., pg. 822	1
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Rules

<i>CR 11</i>	passim
<i>CR 12(b)</i>	47
<i>CR 12(b)(6)</i>	45
<i>CR 15</i>	47
<i>CR 26(b)</i>	11
<i>CR 30(b)(6)</i>	6
<i>CR 56</i>	12, 13, 14

<i>CR 56(e)</i>	17, 21, 45
<i>CR 56(g)</i>	3, 45, 49
<i>ER 803</i>	17, 21
<i>RAP 18.1</i>	50

GOOD FAITH. Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry. Black's Law Dictionary, 4th Ed. Rev., pg. 822.

I. INTRODUCTION

Appellant, KAREN POOLEY (hereinafter "Ms. Pooley") resists a non-judicial foreclosure initiated by Respondents, QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington corporation (hereinafter "QLSWA"), QUALITY LOAN SERVICE CORPORATION, a California corporation (hereinafter "QLSCA"), and McCARTHY & HOLTHUS LLP, a California limited liability partnership (hereinafter "M&H"). As amply demonstrated by the record on review, there were numerous issue of material fact in dispute before the trial court on summary judgment that were simply ignored.

Reversal and remand is the remedy.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting summary judgment dismissing Ms. Pooley's claims against Respondents where there were material issues of fact in dispute concerning:

A. The source of QLSWA's referral;

B. The identity of the party who actually held Ms. Pooley's Note and Deed of Trust upon referral to foreclose and issuance of the third Notice of Trustee's Sale (hereinafter "NOTS"), particularly in view of the loan servicer's

admission that the Note and Deed of Trust had been lost or intentionally destroyed at some undetermined time prior to foreclosure; CP 3661

C. The purported owner's/holder's/investor's standing to initiate a non-judicial foreclosure, given the loan servicer's admission that the original Note had been lost or intentionally destroyed at some undetermined time prior to foreclosure; CP 3661;

D. Respondents' failure to comply with their duty of good faith owed to Ms. Pooley under *RCW 61.24, et seq.* (Deed of Trust Act) (hereinafter "DTA") to investigate and verify the source of their referral to foreclose;

E. Respondents' failure to comply with their duty of good faith owed to Ms. Pooley under the DTA to investigate and verify the purported beneficiaries' right to foreclose;

F. Respondents' failure to comply with their duty of good faith owed to Ms. Pooley under the DTA in relying on a facially ambiguous and erroneous beneficiary declaration in violation of the requirements under *RCW 61.24.030(7)(a)* and *(b)*;

G. Respondents' failure to comply with their duty of good faith owed to Ms. Pooley under the DTA in failing to investigate and verify information provided by Ms. Pooley (CP 110-118) prior to issuance of the third NOTS that raised questions regarding the identity of the purported beneficiary of the obligation and right to foreclose;

H. Respondents' failure to comply with their duty of good faith owed to Ms. Pooley under the DTA in relying on improperly or fraudulently notarized or endorsed documents;

I. Respondents' compliance with their duty of good faith owed to Ms. Pooley under the DTA in preparing foreclosure documentation that misrepresented the identity of and contact information for the owner and holder of the obligation and servicer;

2. The trial court erred in denying Ms. Pooley's Motion for Partial Summary Judgment when there were no genuine issues of material fact in dispute concerning Respondents' wrongful reliance upon the 2010 Notice of Default (hereinafter "NOD") and failing to provide Ms. Pooley the notices required under *RCW 61.24.030* and *RCW 61.24.031* prior to issuing its third NOTS. See *Watson v. NWTS*, 180 Wn.App. 8, 321 P.3d 262 (2014) (hereinafter "*Watson*").

3. The trial court erred in failing to find that Respondents' violations of their duty of good faith under the DTA constituted violations of the Consumer Protection Act (*RCW 19.86, et seq.*) (hereinafter "CPA").

4. The trial court erred in granting M&H costs and fees, pursuant to *RCW 4.84.185*, *CR 11* and *CR 56(g)*.

III. STATEMENT OF FACTS

On April 5, 2007, Appellant, KAREN S. POOLEY (hereinafter "Ms. Pooley") signed a Promissory Note (CP 46-51) and Deed of Trust (hereinafter

“DOT”) (CP 53-68) in favor of Washington Mutual Bank, FA. The subject Note provides in pertinent part as follows: “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 46. The subject Note also provides in pertinent part as follows: “If any of the Loan Documents are lost, stolen, mutilated or destroyed and the Note Holder delivers to me an indemnification in my favor, signed by the Note Holder, then I will sign and deliver to the Note Holder a Loan Document identical in form and content which will have the effect of the original for all purposes.” CP 50.

On February 19, 2010, a NOD was posted on Ms. Pooley’s home. CP 70-73. For the first time, Ms. Pooley was advised that the “current owner/beneficiary” was “Bank of America, National Associationas [sic] successor by merger to LaSalle Bank NA as trustee for WaMu Mortgage Pass-Through Certificates Series 2007-OA5 Trust”. CP 70. The 2010 NOD represented Washington Mutual Bank, FA to be the “Loan Servicer” even though Washington Mutual Bank, FA had been put into receivership and sold by the FDIC on September 25, 2008, over two years before the 2010 NOD was posted. CP 3246. For purposes of this litigation, the 2010 NOD was defective in several ways: (1) the 2010 NOD did not include the mandatory Loss Mitigation Form as required by *RCW 61.24.031(2)*; (2) the 2010 NOD did not contain the address or the phone number of the purported beneficiary, Bank of America National Association as successor by merger to La Salle Bank, N.A.,

as trustee for the WaMu Mortgage Pass-Through Certificates Series 2007-OA5 Trust¹ (hereinafter “the Trust”); and (3) the 2010 NOD did not contain the phone number of the wrongly identified “Loan Servicer”.

On February 24, 2010, Margaret Dalton as purported Vice President of “JP Morgan Chase Bank National Association, as Attorney in Fact for Bank of America, National Association as successor by merger to LaSalle Bank N.A. as Trustee for WaMu Mortgage Pass-Through Certificates Series 2007-OA5 Trust”, executed the first Appointment of Successor Trustee (hereinafter “AoST”), naming QLSWA as Successor Trustee under the subject DOT. CP 120-121.

On March 24, 2010, QLSWA executed, served, posted and recorded a NOTS. CP 37. This first NOTS referred to the 2010 NOD (CP 70-73) and scheduled a sale date of June 25, 2010.² That sale did not occur.

On May 24, 2010, JPMorgan Chase (hereinafter “JPMC”) executed an Assignment of Deed of Trust (hereinafter “ADOT”) to “Bank of America,

¹ It is significant to note that neither Bank of America, N.A., nor LaSalle Bank, N.A., nor the WaMu 2007-OA5 Trust had previously been identified by JPMC as being involved in the loan transaction in **any** correspondence with Ms. Pooley. CP 4559, lines 7-18; CP 4661-4680; CP 4800-4801.

² At the time this first NOTS was executed in March of 2010: (1) there was no assignment of any kind by Washington Mutual Bank FA to Bank of America National Association as successor by merger to LaSalle Bank NA as trustee for the Trust; and (2) Washington Mutual Bank, FA, was put into receivership two years before, on September 25, 2008. CP 3701. *RCW 61.24.040(1)(a) and (f)* states that the Notice of Trustee's Sale "shall be in substantially the following form" - which specifically refers to "Assignment recorded under Auditor's File No...."

National Association as successor by merger to LaSalle Bank N.A. as Trustee for WaMu Mortgage Pass-Through Certificates Series 2007-OA5 Trust”. CP 123-124. This ADOT was also signed by Margaret Dalton, who declared this time to be signing for “JPMorgan Chase Bank N.A., Successor of Interest from the Federal Deposit Insurance Corporation, as Receiver for Washington Mutual Bank.”³

On May 26, 2010, QLSWA executed, served, posted and recorded a second NOTS. CP 136-138. This second NOTS referred again to the same 2010 NOD. CP 70-73. The second NOTS re-scheduled the trustee sale to August 27, 2010. The second NOTS is notarized by Bonnie Jean Dawson.⁴ This sale did not occur.

³ The representations made in the first AoST and ADOT are factually irreconcilable: *if* Ms. Pooley’s loan had been securitized into the WaMu 2007-OA5 Trust, *then* Ms. Pooley’s loan could not be a part of the assets the FDIC acquired as receiver for Washington Mutual Bank. Moreover, Margaret Dalton has been verified by a government official to be a known robo-signer and/or surrogate signer (forgerer), who likely had no knowledge of what or why she was signing. CP 4709-4710. In addition, in a *CR 30(b)(6)* deposition of a JPMC employee who formerly worked at Washington Mutual, Lawrence Nardi, testifies that there is no schedule or database of any loans, allegedly acquired by JPMC, that were WaMu asset loans or loans merely serviced by WaMu. See Deposition of Lawrence Nardi, page 57, lines 19-25; page 58, lines 1-8. CP 2093-2094.

⁴ Ms. Dawson was employed by QLSCA and there are significant questions regarding the apparent forgery of Ms. Dawson’s signature and her notarial authority at the time the NOTS was executed. CP 14-16, CP 4716-4720, 4728, 4731, 4734, 4737, 4740. If her signature was forged, the document is either void or voidable. See *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 789, 295 P.3d 1179 (2013) (hereinafter “*Klem*”);

On August 17, 2010, Ms. Pooley filed a lawsuit under King County Superior Case No.10-2-29737-5 SEA against QLSWA and Bank of America, then identified as the “investor” of the loan⁵.

On August 26, 2010, Igor Borovinca executed a second AoST as “Foreclosure Officer” for Bank of America, N.A., as successor by merger to LaSalle Bank N.A. as Trustee for the Trust, naming QLSWA as Successor Trustee.⁶ CP 128-129.

On July 13, 2011, Ms. Pooley voluntarily dismissed the 2010 lawsuit against QLSWA and Bank of America, without prejudice.

On September 21, 2011, Ms. Pooley contacted the attorney for Bank of America, Mr. Fred Burnside, to inspect the document he had previously claimed to be the “original promissory note” then in his possession. Upon meeting with Mr. Burnside, Ms. Pooley was presented with a document that was clearly neither the original promissory note nor a copy of the original. The paper was thinner than that used in the original document, the signature looked to be photo-shopped (the signature was cyan blue color as used in color copiers)

⁵ Within Respondents’ Communication Log, an email dated July 26, 2013 from Daniel Goulding, purportedly general counsel to Respondents to Robert Farrington, of JPMC, identifies Bank of America, as trustee of the Trust as “the investor.” CP 1599.

⁶ It is significant to note that Counsel for QLSWA in hearing dated January 15, 2013, represented that it relied upon the first AoST as the document appointing QLSWA as trustee. CP 223-226. This is contradicted by another counsel for QLSWA who sent Ms. Pooley a letter representing that QLSWA relied on the second AoST. CP 4716-4720

and there was no indentation on the back of the photo-shopped image of the signature. The document presented was clearly not a copy of the original promissory note attached to the pleadings in this action, but a counterfeit. CP 4536-4538.

On the basis of the discrepancy between her closing documents and what was stated in the 2010 NOD, Ms. Pooley made numerous investigative inquiries. Ms. Pooley sent out several Qualified Written Requests⁷ under *12 USC 2605(e)* (hereinafter “QWR”) to the purported servicer, JPMC. JPMC’s⁸ responses to the QWR’s asserted that on April 1, 2010, the investor/owner⁹ of the loan was “Washington Mutual Mortgage Security Corporation”¹⁰ CP 95. However, this information is at odds with other QWR responses Ms. Pooley obtained from JPMC, specifically: (1) On August 17, 2011, the investor/owner

⁷ Please find references in Deposition of Karen S. Pooley (CP 5228-5685), pg 4, lines 16-18; pg. 183, lines 6-8; pg. 207, lines 17-23; pg. 233, lines 1-3; pg. 236, lines 7-20; pg. 257, lines 21-24; pg. 258, lines 17-25; pg. 259, line 1.

⁸ QWR responses were sent by “Chase.” Ms. Pooley has asked for clarification regarding exactly what corporation is represented by “Chase” but that query has been ignored.

⁹ For a definition of “investor”, please see Washington State Treasurer’s website: <http://www.tre.wa.gov/documents/waResourceGuide091710-FINAL.pdf> (page 8) and Washington State Department of Commerce’s website: <http://www.commerce.wa.gov/Documents/2015-Foreclosure-Prevention-Guide.pdf> (page 74). These links define “investor” as: “**The entity that owns the loan.** Lenders often sell mortgage loans to other entities after closing. Consequently, the investor is often different than the servicer or the lender. The servicer must follow the investor’s guidelines for servicing the loan.” The 2015 Guide goes further to describe “investor” as “the **beneficiary.**” Both Guides are supported by WA Attorney General McKenna and Attorney General Ferguson. (Emphasis added)

¹⁰ Ms. Pooley could not find any evidence this corporation exists. She made multiple queries to Chase to clear up this issue, but her queries were ignored.

was disclosed to be “JPM Chase” (CP 4669); (2) on September 14, 2011, the investor/owner was disclosed to be “Washington Mutual Securities Corporation” (CP 102); (3) on December 29, 2011 the investor/owner was disclosed to be “JP Morgan Chase Bank NA” (CP 104); (4) on May 30, 2012, the investor/owner was disclosed to be “WMMSC FBO US Bank” (CP 108); and (5) on February 21, 2013, the investor/owner is disclosed to be “U.S. Bank National Association, as Trustee, successor in interest to Bank of America, National Association as Trustee as successor by merger to LaSalle Bank National Association, as Trustee for Certificateholders of Bear Stearns Asset Backed Securities I LLC, Asset Backed-Certificates, Series 2005-HE10.”¹¹ CP 4801. (Emphasis added)

On July 12, 2012, Ms. Pooley wrote and recorded a Notice of Disclosure disclosing the outcome of her investigations and addressing the discrepancies in the identification of the investor/owner of the obligation provided in QWR responses from JPMC in an effort to protect and defend her properties’ title. CP 110-118. This document was prepared because Ms. Pooley understood she had a contractual duty under the DOT to defend the title to her home in view of the differing claims of those asserting themselves to be owner/investor/beneficiary of her Note and DOT. CP 55 (Borrower’s

¹¹ This is a significant disputed issue of material fact as this is the **second mortgage backed security**, after the WaMu Trust, identified by Respondents to be an owner/investor in Ms. Pooley’s Note.

Covenants). Ms. Pooley mailed this Notice of Disclosure to Respondents on July 17, 2012, putting Respondents on inquiry notice of many of the defects in the foreclosure process now before this Court. CP 4036. There was no evidence on summary judgment that any Respondent named herein investigated or verified any of the information contained in the Notice of Disclosure.¹²

On July 17, 2012, QLSWA executed, served, posted and recorded a third NOTS. CP 41-44. Instead of issuing a new NOD that complied with the amended provisions of *RCW 61.24.030* and *RCW 61.24.031*, then in force, the third NOTS again refers back to and relies on the 2010 NOD. CP 70-73. As a result, Ms. Pooley was effectively denied the statutorily mandated notifications¹³ and rights to state-sponsored mediation under *RCW 61.24.163* (hereinafter “FFA”) before a neutral third party.

¹² In 2013, and prior to receiving Ms. Pooley’s Notice of Disclosure (Interrogatory No. 3.1), Respondents alleged that they relied upon the referral received on January 29, 2010 from Lender Processing Services (hereinafter “LPS”) (CP 5712, line 25 thru CP 5713, lines 1-3) and a Declaration of Ownership received on February 9, 2010. CP 9268-9269. After receiving Ms. Pooley’s Notice of Disclosure (Interrogatory No. 3.2), Respondents changed their prior statements, asserting that they relied on the AoDOT. (CP 9269-9270) Yet in sworn testimony, both the Declaration of Ownership and the Assignment of Deed of Trust were prepared by Respondents, themselves – not the beneficiary. CP 5988, lines 10-23, CP 5834, lines 8-20. Subsequently, Respondents again changed their prior statements to assert that they relied solely on the Pooling and Servicing Agreement (hereinafter “PSA”) for the authority to foreclose. CP 5973, lines 9-22. Yet, the PSA was never provided to Ms. Pooley in discovery. CP 6238, lines 11-20. Their 2013 discovery was never updated to reflect any additional information.

¹³ The notice of pre-foreclosure required under *RCW 61.24.031(1)* would have allowed Ms. Pooley 30 days to respond. Ms. Pooley’s response would have triggered another 60 days to allow for a meet and greet with the lender. The issuance of a new notice of default would have allowed Ms. Pooley another 30 days to respond to that

On August 2, 2012, Respondents sent a letter to Ms. Pooley which included a copy of a Declaration of Ownership upon which they allegedly relied to initiate and prosecute their non-judicial foreclosure. CP 151. This Declaration of Ownership contained ambiguities and errors which did not comply with the provisions of *RCW 61.24.030(7)(a)*.

On August 15, 2012 and October 5, 2012, Ms. Pooley sent letters alerting Respondents to inconsistencies and errors within the ambiguously written and erroneous Declaration of Ownership and their duty to investigate all the facts. CP 177-178, CP 180-181. However, there is no evidence that Respondents conducted any investigation of Ms. Pooley's concerns until June 19, 2013, well after this litigation was brought.¹⁴

On November 5, 2012, Ms. Pooley initiated the above-captioned matter against Respondents.

On February 13, 2014, Ms. Pooley received an un-redacted communication log¹⁵ which included an email from Dan Golding, who

document with a request under the FFA. Time matters, and even a week can cause the borrower damage. *Klem*.

¹⁴ On June 19, 2013, Julie O. Molteni, Corporate Counsel for Quality Loan Service Corporation sent an email to Luis E. Pesantes and Brian S. Powers (both Chase employees) asking them to locate the original promissory note. Apparently, there was concern their client was not the holder of the obligation. CP 1687. .

¹⁵ It should be noted that Respondents were unscrupulous in their responses to Ms. Pooley's efforts to obtain discovery materials, submitting 90 pages of redacted communications within their Communications Log, when their Privilege Log showed 37 pages of those communications involved communications with third parties, eliminating any claim of privilege or trial preparation materials. *CR 26(b)*; CP 593, line 21 to CP 594, line 23. Respondents willingness to engage in unscrupulous discovery behavior appears to

presumable represented Respondents, to Andrew Nelson of JPMC, dated July 29, 2013, disclosing for the first time that the original promissory note could not be found.¹⁶ CP 1575. In another email, Brian Powers of JPMC advised Respondents “if you have a Bene Dec on record we are asking that you do not use it.” CP 461. (Emphasis added).

On April 2, 2015, Respondents filed Motions for Summary Judgment, pursuant to *CR 56*. Included in the materials filed with the trial court was confirmation that Ms. Pooley’s Note had been “lost or destroyed”. CP 3661. No evidence was adduced on summary judgment to clarify whether the Note were destroyed or lost or whether the destruction was intentional. No evidence was adduced on summary judgment to indicate that the contractual requirements relating to a destroyed or a lost note, noted above (requiring the “Note Holder” to indemnify to Ms. Pooley), were followed.¹⁷

be based on a lack of respect for the trial court and its judicial officers. See CP 1570, CP 4579, lines 1-5, CP 8118-8119.

¹⁶ In his e-mail of August 12, 2013, Dan Goulding stated: “We have been working with Brian Powers and Luis Peasantes with Chase on this issue and were recently informed that the Note cannot be located and that Chase is processing a LOST NOTE AFFIDAVIT process internally. This representation is quite troubling as it will certainly call into question the integrity of the 2010 5810 declaration we received and could ultimately call into question all of the 5810 decs that we have received from Chase that we might get in the future from Chase on all foreclosure referrals. . . .” (Emphasis added) CP 1575.

¹⁷ During these proceedings, Respondents suggested the problem could be addressed through a Lost Note Affidavit. CP 3847-3857. But a Lost Note Affidavit is *not* a remedy for Ms. Pooley’s lost or destroyed Note. Paragraph 12, of Ms. Pooley’s Note requires: “If any of the Loan Documents are lost, stolen, mutilated or destroyed and the Note Holder delivers to me an indemnification in my favor, signed by the Note Holder, then I will sign and deliver to the Note Holder a Loan Document identical in form and content which will have the effect of the original for all purposes.” CP 50.

The trial court heard Respondents Motions for Summary Judgment on May 1, 2005.

On May 7, 2015, the trial court summarily dismissed all of Ms. Pooley's claims. CP 7067-7076.

Ms. Pooley timely filed a Motion for Reconsideration. CP 7083-7129. This Motion was denied by the trial court on June 16, 2015. CP 7191.

On June 26, 2015, Ms. Pooley timely filed her Notice of Appeal. CP 7489-7505.¹⁸

IV. STATEMENT OF LAW AND ANALYSIS.

A. Standard of Review.

A trial court's summary dismissal of Ms. Pooley's claims under *CR 56* is reviewed *de novo*, taking all inferences in the record in favor of the non-moving party. *State ex rel Bond v. State*, 62 Wn.2d 487, 383 P.2d 288 (1963) (hereinafter "*Bond*"); *Schroeder v. Excelsior Management Group, LLC*, 117 Wn.2d 94, 297 P.3d 677 (2013) (hereinafter "*Schroeder*") (citing *Dreiling v.*

It must be noted that opposing counsel (and therefore the Respondents) understood that Ms. Pooley's Note had a specific remedy for lost Note, as they asked Ms. Pooley about Paragraph 12 of her Note during her deposition. CP 5304, line 16, to CP 5305, line 17. Respondents also make note of this contractual provision in their summary judgment brief. CP 3548, line 1-3. Therefore, they fully understood that the remedy for Ms. Pooley's destroyed or lost Note was not a Lost Note Affidavit.

¹⁸ Ms. Pooley offers the arguments herein in supplement to the arguments made before the trial court in her Response to Motion to Dismiss (CP 2881-2963), her Response to Motion for Summary Judgment of QLS (CP 5201-5223), her Response to Motion for Summary Judgment of M&H (CP 6308-6317) and her Motion for Reconsideration (CP 7083-7100), which are incorporated herein by this reference.

Jain, 151 Wn.2d 900, 908, 93 P.3d 861 (2004)); *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 649, 336 P.3d 1112 (2014) *cert. denied*, 135 S.Ct. 1904, 191 L.Ed.2d 756 (2015); and *Lyons v. U.S. Bank*, 181 Wn.2d. 775, 783, 336 P.3d 1142 (2014) (hereinafter “*Lyons*”). Summary judgment is only appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963) (hereinafter “*Balise*”); *Schroeder and Lyons*, at page 783. The initial burden on summary judgment falls on the moving party to prove that no material issue is genuinely in dispute. *CR 56*.

Summary judgment is appropriate if reasonable persons can reach but one conclusion from all of the evidence, viewed in a light most favorable to the non-moving party. *Rugg; Doherty v. Municipality of Metro*, 83 Wn.App. 464, 921 P.2d 1098 (1996). In reviewing the evidence submitted on summary judgment, facts asserted by the non-moving party and supported by affidavits or other appropriate evidentiary materials must be taken as true. *Bond; Reid v. Pierce Co.*, 136 Wn.2d 195, 961 P.2d 333 (1998). When there is contradictory evidence or the moving parties’ evidence is impeached, an issue of credibility is presented that the court cannot resolve on summary judgment. *Balise*.

Based upon the foregoing and the testamentary and documentary evidence that was offered to the trial court on summary judgment, there were numerous genuine issues of material fact before the trial court inconsistent with any summary dismissal of Ms. Pooley’s claims.

B. Strict Compliance with DTA Required.

The Washington Supreme Court has often stated that the DTA must be strictly construed in the borrower's favor. *Albice v. Premier Mortgages Services of Washington, Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012) (hereinafter “*Albice*”) (citing *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 915-916, 154 P.3d 882 (2007) (hereinafter “*Udall*”)); *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 93, 285 P.3d 34 (2012) (hereinafter “*Bain*”); *Schroeder*, at pg. 105. See also *Walker v. Quality Loan Service Corp.*, 176 Wn.App. 294, 306, 308 P.3d 716 (2013) (hereinafter “*Walker*”); *Bavand v. OneWest Bank, FSB*, 176 Wn.App 475, 485-486, 309 P.3d 636 (2013) (hereinafter “*Bavand*”). This standard leaves no room for excuse of “*de minimis*” technical violations: substantial compliance with the statutory provisions of the DTA is not enough..” RP 259, lines 5-14.

C. Violations of the DTA and Duty of Good Faith.

i. Issues of Fact concerning Identity of the Holder.

Respondents have alleged that Ms. Pooley’s loan was transferred to the Trust.¹⁹ But, Respondents offered no evidence on summary judgment to

¹⁹ It warrants reiteration that there were at least five (5) entities that claimed an interest in the subject Note and Deed of Trust based upon information received in response to Ms. Pooley’s QWR: (1) “JPM Chase” (CP 4669); (2) “Washington Mutual Securities Corporation” (CP 102); (3) “JP Morgan Chase Bank NA” (CP 104); (4) “WMMSC FBO US Bank” (CP 108); and (5) “U.S. Bank National Association, as Trustee, successor in interest to Bank of America, National Association as Trustee as successor by merger to LaSalle Bank National Association, as Trustee for Certificateholders of Bear

conclusively establish this allegation. There was, however, evidence to suggest that Ms. Pooley's loan was not transferred to the Trust and what evidence that was presented to the trial court was in conflict and most of their arguments are based upon Ms. Salyer's hearsay testimony.²⁰

The testimony in conflict involves the ADOT (CP 123-124), the Home Mortgage Disclosure Act (HMDA) records (CP 5154, CP 5161-5162), purported schedule of loans offered by Respondents' attorney (CP 4384-4405), and testimony of Lawrence Nardi (CP 2077-2371).

Although JPMC executed an Assignment of Deed of Trust (CP 123-124) on May 13, 2010, allegedly through the FDIC²¹, it is doubtful such an assignment would have been effective (see footnote 3), as the Trust governing documents do not permit transfers or assignments of notes beyond the May 24, 2007 closing date except in certain unusually circumstances that are not present here. CP 5157-5159, CP 8696-8714. Moreover, there is no evidence that any sale occurred, relating to WaMu selling any loans to the secondary marketplace, according to the HMDA evidence (CP 5148-5200) nor can a

Stearns Asset Backed Securities I LLC, Asset Backed-Certificates, Series 2005-HE10," CP 4801. The identity of the true holder remains a material issue of fact in dispute.

²⁰ CP 3890-4522.

²¹ If the Note was transferred to the Trust properly prior to WaMu's receivership, this Assignment is not true and correct and evidences a deceptive act that weighs in favor of Ms. Pooley's CPA claim.

schedule of loans allegedly transferred from WaMu to JPMC be found within records of JPMC. CP 2093-2094, CP 2221.

Counsel for Respondents offered the trial court what was alleged to be a “Mortgage Loan Schedule”, Exhibit “7”. CP 4384-4405. First, counsel’s testimony was incompetent and inadmissible under *ER 803*, *CR 56(e)*, *RCW 5.45.020*; *State v. Smith*, 16 Wn.App. 425, 558 P.2d 265 (1976) and *State v Kane*, 23 Wn.App. 107, 594 P.2d 1357 (1979). Counsel declares no personal knowledge of the information she provided the trial court or that she is a records custodian for JPMC, QLSCA or QLSWA, Second, the purported schedule is illegible and unintelligible; nowhere can Ms. Pooley’s purported loan be identified in the document. Moreover, none of the third party documents Ms. Salyer provided the trial court should be relied upon, given the incompetency of her testimony and her lack to personal knowledge of the information she purports to offer²² and are irrelevant to the issue of what Respondents knew or relied upon. *CR 56(e)*.

However, even if the purported “Mortgage Loan Schedule” could be read and Ms. Pooley’s loan is listed, the Respondents’ allegations are rebutted

²² This includes, without limitation, the Form 8-K (Exhibit 3) (CP 4060-4063), the Mortgage Loan Purchase Agreement (Exhibit 4) (CP 4064-4114), Amended and Restated Administrative Agreement (Exhibit 5) (CP 4115-4127), Pooling and Servicing Agreement (Exhibit 6) (CP 4128-4383), the illegible and unintelligible Mortgage Loan Schedule (Exhibit 7) (CP 4384-4405), Purchase and Assumption Agreement (Exhibit 8) (CP 4406-4449), Merger Announcement (Exhibit 10) (CP 4454). None of these documents were provided in discovery.

and an issue of material fact created by the HMDA records, which fails to disclose any sale or transfer of Ms. Pooley's loan, or any WaMu loan, to the secondary market between the execution of the Note and Deed of Trust and the closing date of the Trust or at any time thereafter. CP 5154, CP 5161-5162. Moreover, Mr. Lawrence Nardi testifies that neither the FDIC nor WaMu ever provided JPMC a schedule of loans, in direct contradiction to Ms. Salyer's inadmissible testimony. CP 2093-2094, CP 2221. The fact that Respondents' attorney had to provide evidence from the internet, which was not on the record nor provided to Ms. Pooley in discovery, actually proves Ms. Pooley's argument that Respondents should not rely on the ambiguous and erroneous Declaration of Ownership.

Finally, even if the Trust did hold the Note at some time in the past, Mr. Matthew Dudas of JPMC testified that the original Note was either destroyed or lost²³ sometime, although he cannot say when or how, notably no chain of custody has been proffered. CP 3661, CP 1575. Mr. Fred Burnside alleged that he had the Note from June 1, 2011 to February 8, 2012. CP 3884. But Mr. Burnside's credibility on this point has been brought into question by Ms. Pooley, who testified that the note presented by Mr. Burnside on September 21, 2011, was a counterfeit and bore what appeared to be a fraudulent blank endorsement from Washington Mutual Bank, FA, by a person

²³ Mr. Dudas' testimony relating to Ms. Pooley's Note was either destroyed or lost, in itself, creates a material fact in dispute.

who was neither an employee or agent of Washington Mutual Bank or JPMC between the execution of the Note and Deed of Trust and the closing date of the Trust. CP 4536-4538, CP 2437-2438, CP 5159-5161.

Based on the foregoing, there were a number of material issues of fact in dispute as to whether the Trust, on whose behalf Respondents were purportedly acting, was ever the owner, holder or even in possession of Ms. Pooley's Note at any time relevant to this cause of action or otherwise entitled to initiate a non-judicial foreclosure of Ms. Pooley's home.

ii. Issues of fact regarding referral to Respondents.

Even if the Trust could establish it held Ms. Pooley's Note at the time foreclosure was initiated, there was no evidence the Trust ever referred the matter to QLSWA and QLSCA for foreclosure. Although QLSWA and QLSCA "presume" the referral to foreclosure came from JPMC, they did not verify that information, in violation of their duty of good faith. CP 5753, line 18, to CP 5754, line 18. See *Lions*. Indeed, the referral actually came from a company known as Lender Processing Services (hereinafter "LPS"), not the Trust or JPMC. Respondents could not "definitively" ascertain the source of information relied upon to initiate foreclosure proceeds against Ms. Pooley. CP 3350-3351; CP 7726-7740.

iii. Reliance on Ambiguous Beneficiary Declaration.

Notwithstanding the foregoing, under current Washington law, a foreclosing trustee "must 'adequately inform' itself regarding the purported

beneficiary's right to foreclose, including at a minimum, a ' cursory investigation to adhere to its duty of good faith.' *Lyons*, at page 787 (citing *Walker*, at pgs. 309-310). This duty can be fulfilled by receipt of an unambiguous and truthful beneficiary declaration issued pursuant to *RCW 61.24.030(7)*. *Lyons and Trujillo v. NWTs*, 183 Wn.2d 820, 355 P.3d 1100 (2015) (hereinafter "*Trujillo II*"). However, "if there is an indication that the beneficiary declaration might be ineffective, a trustee should verify its veracity before initiating a trustee's sale to comply with its statutory duty." *Lyons*, at pg. 790.

Here, Respondents relied on a Declaration of Ownership to fulfill their duties under *RCW 61.24.030(7)*. CP 151, CP 5841, line 11 to CP 5843, line 3. This Declaration of Ownership is signed by Barbara Hindman,²⁴ as a purported "employee of JPMorgan Chase Bank, NA". But rather than signing the document as the beneficiary, as required under *RCW 61.24.030(7)(a)*, Ms Hindman ambiguously signs the document as "Loan Servicer/Authorized Agent for the Beneficiary."²⁵ Indeed, the Declaration of Ownership

²⁴ Barbara Hindman has been identified as a prolific and notorious robo-signer and/or surrogate signer (forger) by a government official. CP 4711.

²⁵ The document is purportedly signed on February 3, 2010, but in un-redacted discovery, Mr. Daniel J. Goulding, General Counsel for QLSCA, states in an July 26, 2013, email to Andrew Nelson, JPMC, that: "...Quality needs to establish that we did not violate our duty of good faith and that we could rely on the 5810 dec [Senate Bill 5810 amended the DOTA requiring the beneficiary declaration] we received from Chase. In preparation for a MSJ we contacted Chase, who has not been named in the litigation, and advised that we would need a sworn declaration that Chase has been in possession of the Note at least back to when the 5810 was executed (**May 2, 2010**)." (emphasis added) CP 1643-1644.

ambiguously identifies the declarant as the “Beneficiary”, “authorized agent for the owner and actual holder” or “authorized agent for Bank of America”. CP 151. No unambiguous evidence was adduced on summary judgment to establish that JPMC or the Trust²⁶ was ever the holder of the obligation (which was declared destroyed or lost), or the beneficiary of the obligation²⁷, as defined by *RCW 61.24.005(2)* or that JPMC was ever the agent for Bank of America,²⁸ or U.S. Bank, as the purported new trustee of the Trust. Absent proof that the purported declarant was the beneficiary or the beneficiary’s agent, the Declaration of Ownership could not be relied upon by Respondents

²⁶ It is important to note that between the second NOTS and the third NOTS, the alleged trustee of the Trust, Bank of America, purportedly “sold” their beneficial rights to U.S. Bank, as purportedly the new trustee of the Trust. CP 9189-9193, CP 9210. The Respondents were alerted to this transfer of beneficial interest, prepared a new Assignment of Deed of Trust, and sent this Assignment to JPMC to sign. CP 7929-7931. The letter attached to this new Assignment states “this document is needed in order for us to advance the nonjudicial foreclosure that we are processing for you. Per your instructions, the attached document was prepare by us and contains information relative to this loan based on information provided . . . by either you or your vendor. . . **Should a challenge ever be made** to the foreclosure, you may be called to testify regarding this document.” CP 7929. (emphasis theirs)

²⁷ Throughout this litigation, Respondents have identified many differing entities as “beneficiary”: (1) on the NOD (CP 70-73), “Bank of America, as trustee for WaMu 2007-OA5 Trust” was claimed the beneficiary (investor) (CP 1575); (2) within the Respondents’ Response to Plaintiff’s Motion for In Camera Review, “Chase” was identified as having beneficial interest three times (CP 1353, lines 6-11, CP 1354, lines 4-11); (3) within discovery, Respondents have produced documents claiming “WMMSC FBO – US Bank” as “investor” (beneficiary) (CP 4692-4695). See also footnote 19, above.

²⁸ On summary judgment, Respondents’ attorney offered a Limited Power of Attorney (never produced in discovery), but this document specifically limited the powers enumerated and did not include within the enumerated powers the execution of a Declaration of Ownership. CP 4455-4462. Moreover, as argued above, this document should not have been admitted or considered by the trial court, given the incompetency of the testimony offering it. *ER 803, CR 56(e), RCW 5.45.020*. See also footnote 20, above.

to fulfill their duties under *RCW 61.24.030(7)(a)* and acceptance of an ambiguous and erroneous beneficiary declaration violates Respondents' duty of good faith under *Lyons* and *Trujillo II*. Without proof of the right to foreclose, neither the purported beneficiary nor Respondents had standing to foreclose. *Lyons* and *Trujillo II*.

Notwithstanding the ambiguity of and errors within the subject Declaration of Ownership, a trustee is entitled to rely on beneficiary declarations if they otherwise strictly comply with all provisions of the DTA. *RCW 61.24.030(7)(b)*. But, as amply demonstrated herein, Respondents failed to strictly comply with the provisions of the DTA and adhere to their duty of good faith under *RCW 61.24.010(4)* and were not entitled to rely on the Declaration of Ownership.²⁹

²⁹ In addition, there are multiple issues of fact in dispute surrounding the Pooley Declaration of Ownership: (1) the servicer, Chase, informed the Respondents on 8/7/2013 at 8:49 a.m. that they must not rely on the "Bene Dec" issued in Ms. Pooley's non-judicial foreclosure. CP 1578; (2) the Respondents themselves knew that the Declaration of Ownership was erroneous. CP 5972, lines 16-22, CP 5973, lines 15-22, CP 5988, lines 10-25 through CP 5989, lines 1-16; (3) Ms. Pooley alerted the Respondents to the error in the Declaration of Ownership prior to the issuance of the third Notice of Trustee Sale. CP 41-44; and (4) between the second NOTS and the third NOTS, the alleged beneficiary changed from Bank of America as trustee to U.S. Bank as trustee, yet the Declaration of Ownership never was altered or updated to reflect this transfer of interest (CP 151); (5) Paragraph 4 states that the Note has never been assigned or transferred to any other person or entity, yet Respondents' attorney claims JPMC transferred it a second time (see footnote 36). There are also facts in dispute as to when the Declaration of Ownership was provided to Respondents and how it was delivered: (1) sworn testimony claims that the Declaration was delivered via mail on Feb. 9, 2010. CP 4929, lines 8-10 & CP 4930, lines 10-17; 2) yet, alternate sworn testimony claims the Declaration was uploaded to the LPS system on Feb. 10, 2010. CP 3580, lines 17-21. (3) Disclosures provided in discovery shows an email to JPMC from Respondents' general counsel, Dan Goulding on 7/26/2013 at 3:28 pm,

Curiously, the third paragraph of the Declaration of Ownership erroneously states that Bank of America “is the actual holder of the Promissory Note....recorded in KING County under Auditor’s File No. 20070410001111.”³⁰ CP 151; CP 5972, line 16, to CP 5973, line 22. But it is undisputed that the Note was never recorded, only the Deed of Trust was. So the disputed issue of fact presented by this language is whether JPMC or Bank of America held the Note or only the Deed of Trust. This issue was ignored by the trial court on summary judgment.³¹

iv. Failure to Investigate Status of Alleged Beneficiary.

When confronted with a facially ambiguous and erroneous beneficiary declaration in Ms. Pooley’s Notice of Disclosure (CP 110-118) and letters to Ms. Hennesey (CP 177-178, CP 180-181), Respondents had a duty to investigate “the purported beneficiary’s right to foreclose,” but failed to do so in clear violation of their duty of good faith. *Lyons and Walker*. The testimony

which claimed that the Declaration was provided to Respondents on May 2, 2010. CP 1600-1601. (which was after the first Notice of Trustee’s Sale was recorded. CP 37.).

³⁰ At hearing on January 9, 2015, Judge Kenneth Schubert stated that the accuracy of the Declaration of Ownership was a material issue of fact in dispute. RP 17, lines 6-9. No additional evidence on this issue was presented the trial court on summary judgment.

³¹ The duty of good faith is the *only* duty the trustee, in a non-judicial foreclosure, has to adhere to. This duty is owed to both the borrower and the beneficiary. If the trustee violates their duty of good faith, as abundantly clear from this record on review and the arguments herein, they cannot rely on the beneficiary declaration. See *RCW 61.24.030(7)(b)*.

of Bounlet Louvan³² and Sierra Herbert-West established that Respondents essentially delegated this duty to the servicer, relying exclusively on the clearly erroneous Declaration of Ownership that Respondents themselves prepared.³³

As Sierra Herbert-West testified:

Q. Did anybody contact the WAMU Trust, anybody from Quality Loan Service Corporation of Washington, contact the WAMU Trust in March of 2010 to verify that it was the owner of the note and deed of trust?

A. Not that I'm aware of. CP 6231.³⁴

v. Destroyed or Lost Note.

As noted in *Brown v. Dept. of Commerce*, 184 Wn.2d 509, 359 p.3d 771 (2015) (hereinafter "*Brown*"), the party in actual possession of a note, either as owner/PETE, is the party with the right to foreclose under the DTA.

³² Mr. Bounlet Louvan, Respondents' 30(b)(6) designee, testified that he was an employee of QLSCA, from 2006 until he testified in April 7, 2015, (CP 5703, line 12-17) but alternate court proceedings state that Mr. Louvan testified he was an employee of Priority Posting & Publishing and was only a liason to QLSCA in 2012. CP 7744, lines 15-22.

³³ See Transcript of Deposition of Bounlet Louvan, CP 5687-6125, pg. 46, lines 19-24; pg. 62, line 6, to pg. 63, line 3; pg. 67, lines 11-18; pg. 163, line 10 to pg. 164, line 4; pg. 182, lines 4-20; 183, line 8 to pg. 184, line 2; pg. 186, lines 8-14; pg. 198, lines 2-19; pg. 200, line 10 to pg. 201, line 5; pg. 180, line 7, to pg. 182, line 20. See also Transcript of Deposition of Sierra Herbert-West, CP 6127-6307, pg. 18, line 19, to pg. 19, line 9; pg. 30, line 12, to pg. 31, line 11; pg. 61, lines 1-16; pg. 64, lines 4-23; pg. 66, line 22, to pg. 67, line 25; pg. 71, lines 16-23; pg. 77, line 21, to pg. 78, line 3; pg. 100, lines 4-13; pg. 103, lines 9-12; pg. 104, line 7-11, pg. 104, line 25, to pg. 105, line 8; pg. 107, lines 1-21. See also Respondents' Responses to Interrogatory No. 3.1, CP 9268-9269.

³⁴ Acceptance of information without verification appears to be a common business practice of QLSWA. See CP 3361, lines 15-22, CP 3336, lines 17-25, CP 3338, lines 13-22, CP 3357, lines 2-7, CP 3366, line 22 to CO 3367, line 25, CP 3368, lines 2-19, CP 3394, line 24, to CPO 3395, line 2, CP 3396, lines 14-23, CP 3400, line 13, to CP 3401, line 10, CP 3425, lines 1-25, CP 3449, lines 12-23.

Here, there is considerable doubt that any of the alleged owners/holders of the subject Note held or possessed anything. As Mr. Matthew Dudas, of JPMC testified, the original Note was destroyed or lost. CP 1575 and CP 3661. He does not testify as to when the Note was lost or, if destroyed, whether the destruction was intentional.

Moreover, Mr. Dudas does not identify in his testimony which version of the Note he is referring to. As noted above, the version of the subject Note produced by Fred Burnside, appeared to be a counterfeit and bore what appears to be a fraudulent blank endorsement from Washington Mutual Bank, FA, by a person who was neither an employee or agent of Washington Mutual Bank or JPMC between the execution of the Note and Deed of Trust and the closing date of the Trust.³⁵ RP 240, line 23, to RP 241, line5; CP 2966-2967; See Deposition of Cynthia Riley, the signator of the endorsement³⁶, attached to Request for Judicial Notice of July 21, 2014, pages 64-65. CP 2437-2438.

³⁵ A fraudulent WaMu/Chase endorsement, as are seen here, was also documented in a bankruptcy proceeding in the Ninth Circuit, In re: Riviera, 14-05108 (NC-13-1615-KuPaJu) CP 8859, lines 8-28 through CP 8860, line 1; CP 8872, lines 3-7.

³⁶ Opposing counsel stated in oral arguments on May 1, 2015, that **WaMu didn't endorsed the note** but that "But once Chase got these documents to make it more easily for them to transfer – because to transfer them a second time, they would need to be endorsed, Ms. Riley endorsed them,..." However, the stamped endorsement on the alleged Note states "Washington Mutual Bank FA" endorsed the Note, *not* JPMC. Opposing counsel doesn't tell us where JPMC was transferring this alleged Note, but *if* the Note was properly transferred to the Trust before the closing date of the Trust, as Respondents claim, *then* why did JPMC transfer this Note anywhere else? And to whom? We don't know. RP 240, lines 23-25 through R 241, lines 1-4.

Finally, Mr. Dudas does not testify that the “Note Holder” (as defined on the Note) attempted to contact Ms. Pooley to indemnify her as required by the contractual obligations of the Note.

Respondents and JPMC were well aware of this issue, admitting on July 29, 2013, after production of the original note was demanded, that “the Note cannot be located.” CP 1575. Unable to locate the Note, JPMC advised Respondents on August 7, 2013 that “if you have a Bene Dec on record we are asking that you do not use it” because the original note could not be found. CP 461. (Emphasis added.)

vi. Other Violations of DTA and Duty of Good Faith.

In addition to the foregoing, other violations of the DTA and Respondents’ duty of good faith under *RCW 61.24.010* ignored by the trial court are worth noting:

- Respondents failed to identify the actual beneficiary and fraudulently concealed to Plaintiff and to the court which entity is the beneficiary, in violation of *RCW 61.24.030* and *RCW 61.24.040*. If the status of the alleged beneficiary is in dispute, was QLSWA lawfully appointed? CP 70-73; CP 1353, lines 8-11, lines 24-27; CP 1354, lines 4-11.
- Respondents failed to investigate Ms. Pooley’s allegations of conflicting facts as to which entity was the beneficiary when Ms. Pooley presented them her recorded Notice of Disclosure. *Lyons* and *Trujillo II*. CP 5976, line 6 to CP 5977, line 12; CP 4928, line 17 to CP 4930, line 10.

- Respondents failed to provide any contact information for the claimed owner/holder of the Note and misrepresented the identity of the beneficiary in the 2010 Notice of Default, in violation of *RCW 62.13.030(8)(l)*. CP 70-73.
- Respondents failed to obtain a true and correct copy of Ms. Pooley’s Note until June 2013. All copies of the Note in the Respondents’ discovery file were unendorsed.³⁷ CP 5727, line 7, to CP 5728, line 24; CP 5735, lines 3-9; CP 5751, lines 10-14.
- Respondents knowingly relied upon two differing and conflicting Appointments of Successor Trustee, in violation of *RCW 61.24.010*. CP 4716-4720; CP 223, line 21, to CP 226, line 16.
- Respondents knowingly issued the first Notice of Trustee’s Sale when there was no Assignment of Deed of Trust to the entity claiming to appoint them as trustee, violating *RCW 61.24.040(1)(f)*.³⁸ CP 235, lines 4-17; CP 5834, line 8, to CP 5835, line 20.

While some of the alleged violations of the DTA refer to actions taken in connection with the first and second NOTS and could have been corrected at the time Respondents filed and served the third NOTS, they did not. Moreover,

³⁷ Yet, during litigation it was revealed that Respondents understood that “Chase” fraudulently endorsed the Note to negotiate it second time, while the Note reveals in a stamped endorsement that “Washington Mutual Bank, FA” purportedly endorsed the Note. See footnote 35. RP 240-241. But this is contradicted by Respondents’ Declaration of Ownership, Paragraph 4, which claims the Note has never been assigned or transferred to any entity other than the ambiguous claim of beneficiary in that document.

³⁸ Specific language of the Notice of Trustee’s Sale *RCW 61.24.040(1)(f)* requires: “which is subject to that certain Deed of Trust dated . . . , recorded . . . , under Auditor's File No. . . . , records of . . . County, Washington, from . . . , as Grantor, to . . . , as Trustee, to secure an obligation in favor of . . . , as Beneficiary, the beneficial interest in which was assigned by . . . , **under an Assignment recorded under Auditor's File No. . . .** . . . [Include recording information for all counties if the Deed of Trust is recorded in more than one county.]” Thus, if an assignment has occurred, it should be noted, regardless of whether recording is otherwise required. (Emphasis added)

the actions taken by Respondents in connection with the first and second NOTS demonstrate a callous disregard of their duty of good faith, strict compliance with the DTA and a pattern (business practice) of misconduct that prejudices homeowners across this State.

D. Unlawful Reliance on 2010 NOD to the issue the third NOTS.

The most significant and flagrant violation of the DTA in this matter was Respondents' unlawful reliance of the 2010 NOD to issue the third NOTS.

On or about July 22, 2011, the DTA was amended to require specific pre-foreclosure notices to inform borrowers like Ms. Pooley prior to the initiation of foreclosure proceedings that they have a right to "meet and greet" the Lender and seek state sponsored mediation under the FFA. See *RCW 61.24.030* and *RCW 61.24.031*. The purpose of mediation is to provide the homeowner and Lender a forum for working out alternatives to foreclosure in front of a neutral third party. See e.g. *RCW 61.24.163(7)*. However, homeowners like Ms. Pooley cannot effectively take advantage of the FFA mediation if their rights are not disclosed at the outset, as is required under *RCW 61.24.030* and *RCW 61.24.031*. Indeed, the FFA is intended to be remedial in nature to avoid foreclosure.

As this Court noted in *Watson*, at pgs. 13-15:

NWTS argues that under the FFA, the pre-foreclosure requirements are linked to the original notice of default sent in February 2011, before the FFA took effect. NWTS contends that the process that culminated in the trustee's sale was one continuous transaction.

Therefore the trial court erred by applying the July 2011 FFA amendments to the sale process.

Because the DTA eliminates many protections enjoyed by borrowers under judicial foreclosures, "lenders must strictly comply with the statutes and courts must strictly construe the statutes in the borrower's favor." Under the FFA it "shall be requisite to a trustee's sale" that a written notice of default containing specific information set forth in the statute first be transmitted by the beneficiary or the trustee to the borrower. A trustee, beneficiary, or authorized agent may not issue this notice of default until 30 days after satisfying certain due diligence requirements. The beneficiary or agent first must send a letter that includes information such as the borrower's right to meet with a HUD-approved housing counselor or attorney who can help with mediation, assist in arranging a meeting with the lender, or work toward a resolution such as a loan modification. This "Pre-Foreclosure Options Letter" or a "Notice of Pre-Foreclosure Options" must provide toll-free numbers to help borrowers find HUD approved housing counselors or civil legal aid resources.

* * *

NWTS claims its original March 22, 2011, notice of trustee's sale fulfilled its obligations under the DTA. But this notice described a sale scheduled for June 24, 2011. NWTS first continued and ultimately canceled this sale. RCW 61.24.040(6) allowed continuance of the June 24, 2011, sale date for no more than 120 days, or until October 22, 2011. After that date, the DTA required a new notice. Therefore, although NWTS labeled its second notice an "amended" notice of trustee's sale, this notice necessarily scheduled a new sale. Because NWTS recorded the "amended" notice in November 2011, the notice requirements of the FFA applied.

The *Watson* goes on to hold, at pgs. 15-16:

It is an unfair or deceptive act in trade or commerce and an unfair method of competition in violation of the consumer protection act, chapter 19.86 RCW, for any person or entity to: (a) Violate the duty of good faith under RCW 61.24.163; (b) fail to comply with the requirements of RCW 61.24.174; or (c) fail to initiate contact with a borrower and exercise due diligence as required under RCW 61.24.031.

Failure to provide the requisite notices is a *per se* violation of the CPA.
RCW 61.24.135(2)(a) and (c). (Emphasis added.)

While these pre-foreclosure notices were not required prior to the first and second NOTS (CP 37-39 and CP 136-138), they were required prior to QLSWA's issuance of the third NOTS of July 17, 2012. CP 41-44. However, it is undisputed that the pre-foreclosure notices required under *RCW 61.24.031* were not provided Ms. Pooley when the third NOTS was issued and recorded by Respondents. CP 6235.

Based upon the foregoing, there were no genuine issues of material fact as to whether QLSWA violated the provisions of the DTA and the FFA by issuing the third Notice of Trustee Sale without providing Ms. Pooley the pre-foreclosure notices (or ensuring Ms. Pooley received them) statutorily mandated under *RCW 61.24.030* and *RCW 61.24.031* as a prerequisite to foreclosure, denying Ms. Pooley a number of protections that could have obviated the need for this litigation by offering her the remedial remedies statutorily available to her and thereby violated its duty of good faith.³⁹ The trial court's refusal to grant Ms. Pooley the relief she requested in her Motion for Partial Summary Judgment under *Watson* and granting Respondents summary judgment of dismissal of Ms. Pooley's *Watson* claims was patent

³⁹ It must be noted that Respondents 30(b)(6) designee, Ms. Sierra Herbert-West, appears to concede this point in her testimony. CP 6234-6235.

error and this Court should so declare. The only remedy for the trial court's error is reversal and remand.

E. Joint Venture Liability of M&H.

The trial court misapprehended the nature of Ms. Pooley's claims against M&H. While it is true that all three corporate Respondents are owned by the same two individuals, Kevin McCarthy and Thomas Holthus (CP 5713, line 11, to CP 5714, line 5), Ms. Pooley is not trying to "pierce the corporate veil" to reach the shareholders of M&H as alleged. CP 3535-3537. Ms. Pooley offered the trial court evidence that each of the corporate Respondents named herein should be jointly and severally liable for their misconduct under theories of civil conspiracy and joint venture liability based upon the facts of this case. See *Gilbrook v. City of Westminster*, 117 F.3d 839, 856 (9th Cir. 1999), *Sterling Business Forms, Inc. v. Thorpe*, 82 Wn.App. 446, 918 P.2d 531 (1996), *Refrigeration Engineering Co. v. McKay*, 4 Wn.App. 963, 486 P.2d 304, 311 (1971) and *Knisely v. Burke Concrete Accessories, Inc.*, 2 Wn.App. 533, 468 P.2d 717, 720-21 (1970).

Ms. Pooley's civil conspiracy/joint venture liability claims are based on the commingling of resources (employees and finances) between the corporate Respondents, without apparent regard for their corporate identities. This is addressed throughout Ms. Pooley's Declaration submitted in response to Respondents summary judgment. CP 4523-5147. Specifically, Ms. Pooley

states, based on her investigation and receipt of discovery materials as a *pro se* litigant:

54. Inconsistencies with Commingling of Employees between QLSWA, QLSCA and M&H:

(a) Mr. Andrew Boylan:

Within the Deposition of Sierra West, Ms. West identifies Andrew Boylan as part of the “compliance team” QLSWA relies upon⁴⁰. Mr. Andrew Boylan is identified in the California Bar Association website on 4/13/2015 as doing business at the address: 1770 4th Ave, San Diego, CA 92101⁴¹. Yet, Mr. Boylan is listed in the United Trustees Association specifically “Twelve New Members Join UTA” as employed by Quality Loan Service Corp., San Diego, CA. In a letter from M&H to Supreme Court of the State of Nevada, dated November 27, 2013, Mr. Andrew Boylan is identified as an attorney employed at the California M&H location. Mr. Andrew J. Boylan, Esq. is identified in an ALFN TE@CH Onsite Regional Training Seminar as a speaker at the seminar and is identified as “Director of Risk Management and Compliance, McCarthy & Holthus, LLP.” In Yelp Inc.’s Complaint Case No. CGC 13-533654 filed August 20, 2013, in the Superior Court of the State of California, County of San Francisco, Mr. Andrew Boylan’s resume is attached to this California Complaint as Exhibit 4. Mr. Boylan allegedly committed conduct complained of by Yelp, Inc. Mr. Boylan’s resume lists him working as Legal Operations Analyst at QLSCA. Copies of all these documents are attached as *Exhibit 44* (CP 4853- 4900) and incorporated as if fully set forth herein.

(b) Ms. Susan Hurley:

Within the Defendants’ Communication Log, Ms. Susan Hurley’s email signature line shows her employment as QLSCA⁴². Bounlet

⁴⁰ CP 6164, lines 15-25, to CP 6165, lines 1-7.

⁴¹ CP 6091, lines 18-21.

⁴² Within CP 8014-8080, Communication Log, (Bate Stamp obscured), but pagination at top of page shows page 135 (CP 8077), email from Susan Hurley to Legal Resolution dated August 26, 2010, at 12:35, shows Ms. Hurley’s signature line as “Quality Loan Service Corporation.” And again on page 137 (CP 8079), email from Ms. Hurley to Doc Control, dated May 3, 2010, at 5:02 pm shows her signature line as “Quality Loan

Louvan identifies Ms. Hurley as employed by QLSWA.⁴³ Mr. Louvan also identifies “shtsounit” as defining “Susan Hurly Trustee Sales Officer Unit.” Yet, within the Defendants’ Communication Log, “shtsounit” has an email address listed as: shtsounit@mccarthyholthus.com. Ms. Hurley’s LinkedIn account shows her employed by QLSCA (*Exhibit 6*) (CP 4616). The significance of the evidence that Ms. Susan Hurley is the Trustee Sales Officer in charge of the commencement and advancement of my non-judicial foreclosure and yet her connection to QLSWA⁴⁴, QLSCA⁴⁵ and M&H should not be ignored by this Court. It shows clear co-mingling and blurring the lines of corporations.

(c) Ms. Ashley Hennessee:

Ms. Ashley Hennessee communicated multiple times to me identifying herself as general counsel for “Quality” on QLSCA’s letterhead. Bounlet Louvan identifies Ms. Hennessee as employed by QLSCA. Yet, in Court Case #2:11-cv-02953-LKK-DAD within United States District Court, Eastern District of California, Ms. Ashley Hennessee represents herself to the California court as an attorney for M&H. (*Exhibit 33*) (CP 4757-4759) Finally, I found a website on the internet called “aiHitData” at www.aihitdata.com. This website stores and continually updates huge amounts of company data. AiHitData monitors and understands the changes that occur on company websites and records these changes as time series transactions. I attach the aiHitData information regarding M&H and a brief introduction regarding what aiHitData’s website provides as *Exhibit 46* (CP 4916-4923). This data shows that Ashley Hennessee wasn’t removed from M&H database as one of their attorneys until November 29, 2013 (found on document entitled “McCarthy & Holthus – History of Changes, page 3 of 4, approximately half-way down the page.)

(d) Adriana Hernandez:

Service Corporation.” Both emails bear a subject line of “WA-10-340179-SH which is the trustee sale number that refers to Ms. Pooley’s non-judicial foreclosure.

⁴³ CP 6048, lines 3-10, CP 6054, lines 7-16, and CP 6063, lines 11-21.

⁴⁴ CP 6048, lines 3-10, CP 6054, lines 7-16, and CP 6063, lines 11-21.

⁴⁵ CP 6070, lines 5-25, to CP 6071, lines 1-4.)

Ms. Adriana Hernandez is identified within the Defendants' Communication Log as having both a Quality Loan and a M&H email address⁴⁶:

From Adriana Hernandez
Sent Thursday, May 17, 2012 6:55 AM
To: Title Res
Subject: FW: Recorded Docs From Bwr- WA-10-340179-SH (item redacted)
Importance:High

Hello:

Please see attached document.

Attentively,
Adriana L Hernandez
Assistant trustee sales officer
Phone: (619) 645-7711 xi 2182
Unit Phone: (619) 645-771J. xt5302
Fax: (866) 772-5335
Email: adhernandez@qualityloan.com
Unit E-mail: shtsounit@mccarthyholtlms.com
(emphasis added) (CP 8068)

(e) Evelyn Vargas:

Ms. Evelyn Vargas is identified as an employee of QLSCA but the Defendants' Communication Log identifies her as a M&H employee. Bounlet Depo. (See Decl. of Counsel, Ex. D, Page 259, lines 22-25, Page 260, lines 1-4.) (CP 6048 - 6049)

(f) Paul Hitchings:

Bounlet Louvan identifies Mr. Paul Hitchings as an employee of QLSWA⁴⁷, yet an online resume identifies Mr. Paul Hitchings as an employee of QLSCA employed between 08-01-2012 and 08-01-2013. (*Exhibit 45*) (CP 4902-4903)

⁴⁶ CP 6054, lines 7-16, and CP 6063, lines 11-21.

⁴⁷ CP 6059, line 25, to CP 6060, line 1-2.

(g) Cynthia Mendez:

Ms. Cynthia Mendez is identified by Mr. Bounlet Louvan as working in the accounting department of QLSCA and QLSWA. The accounting department where Ms. Mendez worked at is located at the M&H location of 1770 4th Ave, San Diego, CA 92101. (Louvan Deposition, see Decl. of Counsel, Ex. D, page 189, lines 24-25 and page 190, lines 1-4, page 302, lines 18-21.) (CP 5977 – 5978; CP 6091)

Clearly, the employees of each of the corporate Respondents are frequently listed as employees of the others, depending on the immediate circumstances. Each company was essentially a revolving door, with shared offices, shared employees, shared expenses and shared expense accounting.

Finances among the three corporate Respondents were essentially handled the same. Based on Ms. Pooley's investigation and receipt of discovery materials as a *pro se* litigant:

55. Accounting Inconsistencies amongst QLSWA, QLSCA and M&H:

(a) Bounlet Louvan testifies under oath that the accounting department of QLSWA and/or QLSCA is located within the M&H building located at 1770 4th Ave, San Diego, CA 92101. He also testifies that there is one accounting department for both QLSCA and QLSWA. (CP 5977, line 24, to CP 5978, line 4; CP 6084, line 19, to CP 6085, line 9) Yet, within Declaration of Annette Cook in support of M&H's summary judgment motion (CP 3539-3940), she **falsely** declares in Paragraph 6:

“M&H has a California office located at 1770 4th Ave, San Diego, CA 92101. Neither QLSWA nor QLSCA operate out of that office.” (CP 3540)

And in the same Declaration, Ms. Cook declares:

“I declare under the penalty of perjury under the Laws of the State of Washington that the foregoing is true and correct.” (CP 3540)

(b) All invoices provided in discovery by Defendants have been addressed to either QLSCA or “Quality Loan Services.” (CP 8088-8134) In addition, all of the invoices provided by Defendants are addressed to either the 1770 4th Ave, San Diego address or the 2141 5th Ave, San Diego address. (same exhibits as previous) Additionally, Mr. Bounlet Louvan testifies that he has no idea if QLSWA paid for the invoices that were affiliated with T.S. #WA-10-340179-SH. (CP 6091, line 22, to CP 6092, line 2) Discussion of the accounting practices and the ignorance of the 30(b)(6) designee of whether or not QLSWA actually paid for any of these invoices is found in Mr. Louvan’s Deposition. (CP 6084, line 4, to CP 6089, line 19).

(c) In response to my interrogatory and request for production asking “Identify the phone service carrier that provides Quality with phone service at Quality’s location: 19735 10th Ave NE, Ste. N-200, Poulsbo, WA 98370.” (CP 4933) I received multiple invoices which invoiced McCarthy & Holthus, LLP, 1770 4th Ave, San Diego, CA 92101-2607. (CP 5111, 5113, 5115) Some of these invoices are identified to a “Cynthia Mendez” who was identified by Mr. Bounlet Louvan as an employee of the accounting department that is both QLSCA and QLSWA (CP 5001, 5019, 5022, 5025, 5033, 5045, 5051, 5052, 5054, 5056, 5058, 5063, 5066, 5079, 5089, 5095) Attached are the interrogatory responses dated December 30, 2013, and the corresponding phone service invoices produced in response as *Exhibit 47*. (CP 4970-5128)

Significantly, QLSWA’s letterhead was populated with a telephone number assigned to M&H. CP 7929. See, for example, the phone number listed on M&H’s pleading paper. CP 340.

All accounting (accounts receivable and accounts payable) for QLSWA and QLSCA was handled by M&H. CP 5977, line 24, to CP 5978, line 4; CP 6084, line 19, to CP 6085, line 9. What the foregoing evidences is

this: Respondents effectively disregarded their individual corporate identities and acted in concert with each other as one collective entity.

F. Damages for Pre-Sale Violations of the DTA.

The Washington Supreme Court has held that while damages for pre-sale violations of the DTA, including violations of a trustee's duty of good faith under *RCW 61.24.010(4)*, are not recoverable, a claim under the CPA may be maintained regardless of the status of the property. *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 417, 334 P.3d 529 (2014) (hereinafter "*Frias*") and *Lyons*, pg. 784.

G. Claims for violation of the CPA.

The elements of a claim under the CPA include the following: (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. *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986) (hereinafter "*Hangman Ridge*"), *Frias*, *Lyons*, *Walker* and *Bavand*. The CPA should be "liberally construed that its beneficial purposes may be served." *RCW 19.86.920*; *Short v. Demopolis*, 103 Wn.2d 52, 691 P.2d 163 (1984). In *Lyons*, the court held that when a CPA claim is predicated on an alleged violation of the DTA, a question of fact is automatically created if the issue is disputed. *Lyons*, at pgs. 786-787. Here, each element of the CPA claim were in dispute.

While Respondents appear to acknowledge that they must strictly comply with the DTA, they nevertheless argue that “technical” violations of the DTA do not give rise to a CPA claim absent a showing of prejudice. If strict compliance with the DTA is required, it would be inapposite for this Court to ignore “technical” violations of the DTA in evaluating a homeowner’s pre-sale CPA claims and the trustee’s failure to adhere to its duty of good faith to strictly comply with all statutory requirements of the DTA. Indeed, Respondents fail to distinguish and conflate pre-sale challenges to trustee’s sales from post-sale challenges to trustee’s sales.

Traditionally, post-sale challenges to non-judicial foreclosures have not been favored as the courts of this State have generally found that the homeowners have effectively waived their rights by failing to seek remedy under *RCW 61.24.130* and Washington courts have refused to upset a trustee’s non-judicial sale except under extraordinary circumstances. *E.g. Peoples National Bank v. Ostrander*, 6 Wn.App. 28, 491 P.2d 1058 (1971) and *Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003). However, under extraordinary circumstances, the Supreme Court has been compelled to upset a trustee’s sale. See *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985) and *Albice*. It is within the context of such post-sale challenges, where the homeowner failed to restrain a scheduled non-judicial sale and effectively waived his or her rights under *RCW 61.24.130*, that courts of this State have refused to grant post-sale relief citing mere “technical violations”. See *Stewart v. Good*, 51 Wn.App.

509, 754 P.2d 150 (1988) (hereinafter “*Stewart*”) and *Koegel v. Prudential Mutual Savings Bank*, 51 Wn.App. 108, 111-112, 752 P.2d 385 (1988) (hereinafter “*Koegel*”).

On the other-hand, no reported Washington decision addressing the issue has ever relieved a trustee of liability under the CPA for failure to strictly comply with the DTA where the homeowner has initiated action pre-sale under *RCW 61.24.130*. See *Frias*, *Lyons* and *Trujillo II*, *Walker* and *Bavand*. See also *Bain*, at pgs. 115-120.

Here, we consider a pre-sale challenge to a non-judicial foreclosure in which Ms. Pooley asserted her rights under *RCW 61.24.130* in a timely fashion. Thus, Respondents must be judged by their strict compliance with the DTA and cannot escape liability under the CPA by asserting their misconduct was merely “technical”, “immaterial” or “not prejudicial”.

i. Unfair and Deceptive Acts.

First, it needs to be reiterated that Respondents failure to provide Ms. Pooley the pre-foreclosure notices to which she was entitled prior to the recording and service of their third Notice of Trustee’s Sale (CP 41-44), in violation of *RCW 61.24.030* and *RCW 61.24.031*, constituted an unfair and deceptive business practice and a per se violation of the CPA. *Watson*; *RCW 61.24.135(2)(c)*. However Respondent’s unfair and deceptive misconduct is not isolated to this one mistake.

The *Lyons* court held that a trustee's failure to act impartially, in violation of its fiduciary duty of good faith under *RCW 61.24.010(4)* as QLSWA did here, is actionable under the CPA as an unfair and deceptive act or practice. *Lyons*, at pgs. 788-789. See also *Trujillo II*.

Specifically, QLSWA's failure to verify the alleged "holder's" or "beneficiary's" right to foreclose constitutes an unfair and deceptive act and practice. See *Lyons*, at page 786-787. Here, notwithstanding serious doubts regarding whether any beneficiary had standing (intentional destruction of the promissory note discharges the debt, *RCW 62A.3-604(a)*) as the actual holder of the subject obligation (which was declared destroyed or lost) to initiate a non-judicial foreclosure against Ms. Pooley, and the continued doubts of QLSWA's lawful appointment as successor trustee, QLSWA engaged in an unethical process of unreasonably relying upon documents it knew or should have known to be false and misleading. Certainly, Ms. Pooley's Notice of Disclosure (CP 110-118) revealing the existence of multiple investor/owners in Pooley's Note and should have prompted QLSWA to engage in an investigation of the WaMu 2007-OA5 Trust's right to foreclose. By failing to verify any of the records it was provided through LPS to initiate a non-judicial foreclosure⁴⁸;

⁴⁸ Respondents changed their positions on many occasions, one example pertains to what the Respondents relied upon for their "due diligence" before and after receiving Ms. Pooley's Notice of Disclosure (CP 110-118). In 2013 discovery responses, Respondents' claimed to rely on a referral from LPS, an Assignment of Deed of Trust, and a Declaration of Ownership (CP 9268-9270), Yet in depositions and summary judgment in 2015, Respondents claim to have relied upon the Pooling and Servicing Agreement to

relying on an ADOT which was ambiguous; relying on an AoST executed before any beneficial interest had been assigned; relying on an erroneous and ambiguous Declaration of Ownership, and failing to verify the ownership of the obligation after being alerted to serious issues by Ms. Pooley, QLSWA breached the “fiduciary duty of good faith” by attempting to prosecute a non-judicial foreclosure on Ms. Pooley’s home without strictly complying with all requisites of sale. This misconduct constitutes unfair and deceptive acts and practices. *Lyons*, at page 786-787. The extent of QLSWA’s failure to act in good faith was a material issue of fact in dispute on summary judgment completely ignored by the trial court.

But, Respondents failed to make any inquiry to investigate and verify Pooley’s claims. By failing to verify any of the records Respondents breached the “fiduciary duty of good faith” by attempting to prosecute a non-judicial foreclosure of Ms. Pooley’s home without strictly complying with all requisites of sale.

ii. Affecting the public interest.

As noted in *Trujillo II*, pgs. 835-836:

. . . . The court considers four factors to assess the public interest element when a complaint involves a private dispute: (1) whether the defendant committed the alleged acts in the course of his/her business, (2) whether the defendant advertised to the public in general, (3) whether the defendant actively solicited this particular plaintiff, and (4)

initiate the non-judicial foreclosure, which was never produced to Ms. Pooley in discovery. CP 6238, lines 11-28.

whether the plaintiff and defendant have unequal bargaining positions. *Id.* (citing *Hangman Ridge*, 105 Wn.2d at 791). The plaintiff need not establish all of these factors, and none is dispositive. *Id.* Trujillo's allegations satisfy the second and third elements because they relate to the sale of property, RCW 19.86.010(2), and they state that other plaintiffs have or will likely suffer injury in the same fashion. *Id.* (citing *Hangman Ridge*, 105 Wn.2d at 790). (Emphasis added).

Moreover, as noted in *Panag*, “the business of debt collection affects the public interest.” *Panag*, at pg. 54.

Like the facts of *Trujillo II*, Ms. Pooley’s claims “relate to the sale of property.” *RCW 19.86.010(2)*. Moreover, much of the conduct complained of here has actually occurred numerous times before. CP 1543-1571. See *Klem, Walker and Rucker v. Novastar Mortgage Inc.*, 177 Wn.App.1, 311 P.3d 31 (2013).

At hearing, it was undisputed that a CPA claim had been established by Ms. Pooley. RP 13, lines 11-17 Moreover, failing to provide the pre-foreclosure notices as required by *RCW 61.24.031* is a per se violation of the CPA. *Watson, RCW 61.24.135(2)(c)*.

iii. Damages and Causation.

As noted in *Frias*, at pg. 417, since “the CPA addresses ‘injuries’ rather than ‘damages,’ quantifiable monetary loss is not required” in a CPA claim for violation of the DTA, citing *Panag v. Farmers Insurance Co. of Washington*, 166 Wn.2d 27, 58, 204 P.3d 855 (2009) (hereinafter “*Panag*”). *Frias*, at pg. 431. Comparing a DTA claim to an unlawful debt collection action, the *Frias*

court noted: “[a] CPA plaintiff can establish injury based on unlawful debt collection practices even where there is no dispute as to the validity of the underlying debt. [citing *Panag* at 55-56, & n.13.] Where a business demands payment not lawfully due, the consumer can claim injury for expenses he or she incurred in responding, even if the consumer did not remit the payment demanded. . . . The injury element can be met even where the injury alleged is both minimal and temporary.” *Frias*, at pg. 431. Accordingly, Ms. Pooley can establish a claim for injury and damage for Respondents’ violations of the DTA, even without challenging the existence or extent of the underlying debt. Such claims could include threatened loss of title, postage, recording fees and legal fees. *Frias*, at pg. 432.

As noted above, Respondents fraudulently concealed the identity of the true beneficiary/PETE, failed to ensure Ms. Pooley received the statutorily required pre-foreclosure notices and, in so doing, prevented Ms. Pooley from meaningfully pursuing her options under the FFA. *RCW 61.24.163*. This is a *per se* violation of the CPA and the trustee’s duty of good faith in which injury and damage can be presumed.

Respondents assert that prejudice must be shown to establish CPA claims predicated on DTA violations, citing *Amresco Independence Funding, Inc., v SPS Props, LLC*, 129 Wn.App. 532, 119 P.3d 884 (2005) and *Udall*. While Respondents’ recitation of the holding of the reported cases cited is accurate, their reliance on this line of cases is misplaced because under

Washington law, the prejudice requirement has only been applied to post-sale cases and has never been applied in pre-sale cases where the homeowner sought relief under *RCW 61.24.130* as more fully discussed above.

Moreover, requiring a borrower to establish prejudice as a precondition to a CPA claim for violations of the DTA would effectively graft an additional element onto the *Hangman Ridge* test, which Washington courts have consistently refused to do. For example, in *Panag*, at pg. 38, the Washington Supreme Court declined to create an additional “standing” element for a private CPA claim.

Nevertheless, a showing of prejudice, to the extent relevant, is logically subsumed in a showing of causation, injury and damage, and, as frequently noted, injury resulting from a deceptive act or practice need only be slight, minimal and/or temporary to satisfy that element of a CPA claim. See *Panag*, *Frias*, at pg. 417, *Lyons*, at pg. 783, *Trujillo II*, *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990). Indeed, if one has been injured or damaged as a direct and proximate result of some deceptive act or practice, one has necessarily been prejudiced.

Ms. Pooley’s actual damages were exhaustively outlined and were generally undisputed on summary judgment. CP 4575-4578.

But for Respondents’ failure to properly investigate and verify their authority to act and the alleged beneficiary’s right to foreclose and their failure to provide the statutorily mandated pre-foreclosure notices, Ms. Pooley would

not have initiated this action nor would her home be threatened by foreclosure as these issues and disputes herein may have been resolved within an FFA mediation in front of a third party. As noted above, Ms. Pooley's alleged arrearage in payments is irrelevant to the injury and damaged Ms. Pooley has sustained as a result of Respondents' strict compliance with the DTA.

H. Fees and Costs for alleged violation of CR 11 and CR 56(e).

On June 24, 2015, the trial court entered an Order granting M&H fees in the amount of \$8,600.00 and costs in the amount of \$157.43 pursuant to *RCW 4.84.185, CR 11 and CR 56(g)*. CP 7485-7486.

An action is "frivolous" within the terms of *RCW 4.84.185* if it "cannot be supported by any rational argument on the law or facts," considering the action in its entirety. *Skimming v. Boxer*, 119 Wn.App. 748, 82 P.3d 707 (2004) (citing *Tiger Oil Corp. v. Department of Licensing*, 88 Wn.App. 925, 946 P.2d 1235 (1997)); *Housing Authority of Everett v. Kirby, supra*. This standard of review is essentially the same analysis used to evaluate claims under *CR 12(b)(6)*: "[i]f an action can be supported by *any rational argument*, then the trial court properly exercised its discretion in not finding the action to be frivolous." *Rhinehart v. Seattle Times, Inc.*, 59 Wn.App. 332, 340, 798 P.2d 1155 (1990); *Timson v. Pierce County Fire District*, 136 Wn.App. 376, 149 P.3d 427 (2006).

Under *CR 11*, sanctions are warranted only if three criteria are met: (1) the action is not well grounded in fact; (2) the action is not warranted by

existing law; **and** (3) the attorney signing the pleading failed to conduct a reasonable inquiry into the factual or legal basis of the action. *John Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn.App. 106, 780 P.2d 853 (1989); *Manteufel v. Safeco Insurance Co.*, 117 Wn. App. 168, 68 P.3d 1093 (2003); *Housing Authority of Everett v. Kirby*, 154 Wn.App. 842, 226 P.3d 222 (2010). Each element must be established before sanctions can be imposed. *Bryant v. Joseph Tree Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (1992) (hereinafter “*Bryant*”). But, the fact that a complaint fails on its merits on summary judgment does not mean the complaint was frivolous, unfounded or brought in bad faith. *Bryant*. Indeed, “*CR 11* is not a mechanism for providing attorney’s fees to a prevailing party where such fees would otherwise be unavailable” or a “meant to act as a fee shifting mechanism.” *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994) (hereinafter “*Biggs*”); *John Doe v. Spokane & Inland Empire Blood Bank*, at page 111; *Bryant*, at page 220.

Proof of violation of *RCW 4.84.185* and *CR 11* of must be identified with specificity on an objective basis and cannot be based on conjecture, surmise and speculation. *Biggs*, at page 197 (“Courts should employ and objective standard in evaluating any attorney’s conduct”); *North Coast Electric Co. v. Selig*, 136 Wn.App. 636, 649-650, 151 P.3d 211 (2007) (“the court must make explicit findings as to which pleadings violated *CR 11* and as to how such pleadings constituted a violation of *CR 11*. . . before awarding attorney fees under *RCW 4.84.185*, the court must make written findings that the lawsuit in

its entirety is frivolous and advanced without reasonable cause.”). (Emphasis added). Moreover, motions for sanctions should be made promptly, not several months after the offending pleadings were filed. *Biggs*, at page 198 (“possible violation of *CR 11* must [be brought] to the offending party’s attention as soon as possible. Without such notice, *CR 11* sanctions are unwarranted.) (citing *Bryant*, at page 224).

Here, it’s hard to argue that Ms. Pooley Amended Complaint was frivolous, unfounded or brought in bad faith, within the terms of *CR 11* or *RCW 4.84.185*. But, Ms. Pooley’s Amended Complaint was vetted and approved by this Court on two separate occasions.

Ms. Pooley sought leave to file her Amended Complaint pursuant to *CR 15* and submitted a copy of her proposed Amended Complaint for the Court’s review. CP 2482-2543. QLSWA and QLSCA objected to Ms. Pooley’s proposed Amended Complaint, raising many of the same objections to Ms. Pooley’s claims as were interposed by M&H on motion for fees and costs. CP 2881-2902. After due consideration of the allegations contained in Ms. Pooley’s Amended Complaint and Respondents objections thereto, the Court granted Ms. Pooley leave to amend her Complaint in the form now before the Court.

Subsequent to the filing of Ms. Pooley’s Amended Complaint, Respondents brought a motion to dismiss, pursuant to *CR 12(b)*, to challenge “Plaintiff’s claims for Criminal Profiteering, certain violations of the

Consumer Protection Act (“CPA”), and fraudulent concealment.” Apparently, QLSWA and QLSCA found all of Ms. Pooley’s other claims, not specifically addressed in their Motion to Dismiss, to be well founded in law and fact or otherwise frivolous or brought in bad faith. Respondents’ motion was argued before the Honorable Kenneth Schubert on January 9, 2015. RP 1-43. At the end of the hearing, Judge Schubert granted Respondents’ motion to dismiss Ms. Pooley’s action for criminal profiteering under *RCW 9A.82, et seq.* and Ms. Pooley’s CPA claim to the extent it is based on a violation of *RCW 61.24.030(6)*. RP 39-42. Otherwise, Respondents’ Motion to Dismiss was denied. At this point in time, Ms. Pooley’s Amended Complaint and the claims asserted therein were thoroughly vetted and found to be well grounded in fact, warranted by existing law⁴⁹ and otherwise brought in good faith.

Many of Respondents’ allegations of bad faith are based solely on superfluous and self-serving “findings” that were included in Respondents’ proposed orders on summary judgment that were never properly presented after

⁴⁹ Please see *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985) (hereinafter “*Cox*”); *Central Washington Bank, v. Medelson-Zeller, Inc.*, 113 Wn.2d 346, 779 P.2d 697 (1989) (hereinafter “*Central Washington Bank*”); *Albice v. Premier Mortgages Services of Washington, Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012) (hereinafter “*Albice*”); *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 93, 285 P.3d 34 (2012); *Schroeder v. Excelsior Management Group, LLC*, 117 Wn.2d 94, 297 P.3d 677 (2013) (hereinafter “*Schroeder*”); *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 789, 295 P.3d 1179 (2013) (hereinafter “*Klem*”); *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014) (hereinafter “*Frias*”); *Lyons v. U.S. Bank, N.A.*, 181 Wn.2d 775, 336 P.3d 1142 (2014) (hereinafter “*Lyons*”); *Walker v. Quality Loan Service Corp.*, 176 Wn.App. 294, 308 P.3d 716 (2013) (hereinafter “*Walker*”); *Bavand v. OneWest Bank, FSB*, 176 Wn.App. 475, 485, 309 P.3d 636 (2013) (hereinafter “*Bavand*”); *Watson v. NWTS*, 180 Wn.App. 8, 321 P.3d 262 (2014) (hereinafter “*Watson*”).

the Court took the matter under advisement on May 7, 2015, leaving Ms. Pooley no opportunity to object the terms of the findings contained in the Court's final Order.⁵⁰ CP 7037-7074, RP 283-284.

Moreover, the trial court failed to “make explicit findings as to which pleadings violated *CR 11* and as to how such pleadings constituted a violation of *CR 11*. . . before awarding attorney fees under *RCW 4.84.185*” in contradiction to the express mandate of *North Coast Electric Co. v. Selig*, supra.136 Wn.App. 636, 649-650, 151 P.3d 211 (2007). The subject Order simply made conclusory reference to *RCW 4.84.185*, *CR 11* or *CR 56(g)*, regurgitating the statutory and court rule language without a single reference to an act or pleading.

There was simply no basis in law or fact to grant fees and costs to M&H on the basis of this record under *RCW 4.84.185*, *CR 11* or *CR 56(g)*. Accordingly, the trial court erred in granting M&H any fees and costs and the trial court should be reversed.

V. CONCLUSION.

Based on the record on review, the foregoing argument and analysis, the trial court had numerous issues of material fact in dispute before it when it

⁵⁰ Findings of fact are superfluous in summary judgement proceedings. *Felton v. Menan Starch Co.*, 66 Wn.2d 792, 405 P.2d 585 (1965); *Washington Optometric Assoc. v. Pierce Co.*, 73 Wn.2d 445, 438 P.2d 861 (1968); *Sinclair v. Betlach*, 1 Wn.App. 1033, 467 P.2d 344 (1970); *Fite v. Lee*, 11 Wn.App. 21, 521 P.2d 964 (1974).

entered summary judgment dismissing Ms. Pooley's claims and ignored the absences of any genuine issues of material fact when it denied Ms. Pooley's Motion for Partial Summary Judgment, based on *Watson*.

Accordingly, Ms. Pooley respectfully request that this Court to: (1) reverse the trial court's the trial court's Order Granting Respondents; Motion for Summary Judgment of May 7, 2015 (CP 7493-7498), the trial court's Order Dismissing Defendant McCarthy & Holthus, LLP of May 7, 2015 (CP 7499-7500), the trial court's Order and Judgment for Attorney's Fees and Costs of June 24, 2015 (CP 7485-7486), and the trial court's Order denying Plaintiff's Motion for Reconsideration of June 17, 2015 (CP 7101-7102); (2) grant Ms. Pooley's Motion for Partial Summary Judgment of May 7, 2015 (CP 3194-3208); (3) remand this matter for trial on the merits; and (4) award Ms. Pooley her taxable costs and reasonable attorney's fees incurred herein, pursuant to *RAP 18.1* and *RCW 19.86.090*.

Justice demands no less.

REPECTFULLY SUBMITTED this 1st day of August, 2016.

KOVAC & JONES, PLLC

/s/ Richard Llewelyn Jones
Richard Llewelyn Jones
WSBA No. 12904
1750 – 112th Ave., N.E.
Suite D-151
Bellevue, WA 98004
425.462.7322
rlj@kovacandjones.com

VI. CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury under the laws of the State of Washington that on August 1, 2016, I caused to be served a true and correct copy of the foregoing Brief of Appellant on the following party(ies) and in the manner(s) indicated:

Eleanor A. DuBay
TOMASI SALYER BAROWAY
121 S.W. Morrison St., Suite 1850
Portland, Oregon 97204-3120
Tel. 503.894.9900
Fax 971.544.7236
edubay@tsbnwlaw.com

_____ Facsimile
_____ Messenger
_____ U.S. 1st Class Mail
_____ Overnight Courier
 Electronically
_____ CM/ECF

Kathryn P. Salyer
TOMASI SALYER BAROWAY
121 S.W. Morrison St., Suite 1850
Portland, Oregon 97204-3120
Tel. 503.894.9900
Fax 971.544.7236
ksalyer@tsbnwlaw.com

_____ Facsimile
_____ Messenger
_____ U.S. 1st Class Mail
_____ Overnight Courier
 Electronically
_____ CM/ECF

Joseph Ward McIntosh
McCARTHY & HOLTHUS LLP
108 1st Avenue South, Suite 300
Seattle, Washington 98104-2104
Tel. 206.319.9049
jmcintosh@mccarthyholthus.com

_____ Facsimile
_____ Messenger
_____ U.S. 1st Class Mail
_____ Overnight Courier
 Electronically
_____ CM/ECF

SIGNED this 1st day of August, 2016, at Bellevue, Washington.

s/ Marie Parks
Marie Parks, Legal Assistant

