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Division I
State of Washington

NO. 74347-3-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

MARISA BAVAND,

Appellant,

vs.

ONEWEST BANK, FSB, a federally chartered savings bank;
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a
Delaware Corporation, NORTHWEST TRUSTEE SERVICES, INC., a
Washington Corporation and DOE DEFENDANTS 1-10,

Respondents.

RESPONDENTS ONEWEST BANK, FSB AND MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC.'S OPENING BRIEF

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I. INTRODUCTION

The underlying case is one of many brought by Marisa Bavand (“Bavand”) before the courts in Washington. Ms. Bavand is a licensed attorney and her ownership of the subject property and many others arises out of a business arrangement of sorts with her husband, whereby he would manage single family rental properties of which she was the fee title holder and upon which she encumbered with Deeds of Trust. Bavand has consistently denied an active role in the management of these properties, including the subject property.

Nonetheless, Bavand brought a panoply of claims below which, after removal to the U.S. District Court, were dismissed in significant part. Bavand appealed the dismissal but failed to achieve a reversal. *Bavand v. OneWest Bank, FSB*, 587 Fed. Appx. 392, 395 (9th Cir. 2014).

The case was remanded back to the Snohomish County Superior Court, where Bavand unsuccessfully pressed her remaining claim under the Washington Consumer Protection Act. On November 20, 2015, the lower court entered an Order Granting Motion for Summary Judgment. From that Order, Bavand now appeals.

Bavand’s claims have been properly rejected by the lower court, and the federal court before that. Her arguments have been considered

and rejected, and this Court should do the same and affirm the lower court's ruling.

II. STATEMENT OF THE CASE

This appeal involves the Bavand's challenge to a non-judicial foreclosure action initiated as a result of her failure to comply with her mortgage obligations. When Bavand initiated the action, she also attempted to wholly invalidate the deed of trust she granted to secure repayment of her mortgage loan. The United States District Court and the Ninth Circuit Court of Appeals have already rejected all but one of the claims raised by the Plaintiff in this case, leaving on the Consumer Protection Act claim.

The remaining claim under the Consumer Protection Act is based on the allegation that the Defendants violated the CPA by promulgating false and improperly executed documents. Affirming the judgment of the lower court is appropriate as the evidence establishes that One West Bank, as the holder of the Note, had the requisite authority under Washington law to initiate the non-judicial foreclosure. The foreclosure notices were properly executed with the requisite authority. Similarly, the evidence also establishes that MERS took no action in the foreclosure at issue, and the one document it executed was done with the requisite authority.

Ultimately, none of the Plaintiff's alleged injuries were caused by One West Bank or MERS. Application of Washington law to the present case establishes that there was no genuine issue for trial. Thus, the trial court did not err in ruling that One West Bank and MERS were entitled to summary judgment.

A. Factual History

1. Bavand Loan Transaction.

On or about August 6, 2007, in consideration for a mortgage loan, Bavand executed a promissory note ("Note") in the amount of \$240,000.00 in favor of IndyMac Bank, FSB. CP 1632. On or about August 6, 2007, in order to secure repayment of the Note, Bavand, as a married woman as her sole and separate estate, executed a deed of trust ("Deed of Trust") encumbering real property located at 630 168th Place SW, Lynnwood, WA (the "Property"). The Deed of Trust was recorded on August 16, 2007 with the Snohomish County Auditor's Office as Ins. No. 200708160919. CP 1631.

2. Transfer of IndyMac Assets and Servicing Rights to OneWest Bank.

On July 11, 2008, the Office of Thrift Supervision closed IndyMac Bank, FSB and the Federal Deposit Insurance Corporation ("FDIC") was

appointed as its receiver.¹ The FDIC organized IndyMac Federal Bank, FSB, a new federal savings bank for which the FDIC was appointed as conservator. IndyMac Bank, FSB's assets were transferred to IndyMac Federal Bank, FSB.² On March 19, 2009, the FDIC completed the sale of IndyMac Federal Bank, FSB to One West Bank.³ Pursuant to the terms of the Purchase and Assumption Agreement, One West Bank acquired all of the servicing rights held by IndyMac Federal Bank, FSB.⁴ OneWest Bank serviced the Bavand mortgage loan on behalf of Freddie Mac, the owner of the Bavand mortgage loan. CP 1630, 32.

3. Possession of Promissory Note and Deed of Trust.

On March 19, 2009, One West Bank took possession of the Note and Deed of Trust. CP 1631. OneWest Bank utilized Deutsche Bank National Trust Company ("DBNTC") as its document custodian for the purposes of storing the original Bavand mortgage loan documents, including the Note and Deed of Trust. *Id.* The Note and Deed of Trust were immediately available to One West at any time. *Id.*

¹ Federal Deposit Insurance Corporation, *Information for IndyMac Bank, F.S.B., and IndyMac Federal Bank, F.S.B., Pasadena CA*, available at <https://www.fdic.gov/bank/individual/failed/IndyMac.html>

² *Id.*

³ Federal Deposit Insurance Corporation, *Amended and Restated Insured Deposit Purchase and Assumption Agreement*, (July 11, 2008) available at <https://www.fdic.gov/bank/individual/failed/IndyMac P and A.pdf>

⁴ *Id.* at 14, § 3.1(u).

4. OneWest Bank and MERS® System Membership.

OneWest Bank is a member of the MERS® System. CP 1640 OneWest Bank has been a MERS® System member since 2009. *Id.* The relationship between MERS and MERS® System members such as One West Bank is governed by the MERS® System Rules of Membership (“Rules of Membership”), as well as the MERS® Terms and Conditions (“Terms and Conditions”). Pursuant to the Rules of Membership and the Terms and Conditions, MERS has a contractual obligation to follow and comply with the instructions of MERS® System members who hold promissory notes.⁵

5. MERS-OneWest Bank Corporate Resolution.

Through an April 25, 2011, corporate resolution (“Corporate Resolution”), MERS appointed certain officers of OneWest Bank, FSB as assistant secretaries and vice presidents of MERS, with the authority to assign the lien of any mortgage loan naming MERS as the mortgagee, when One West Bank was also the current holder of the promissory note secured by the specific mortgage. CP 1656.

⁵ CP 1581 (Rules of Membership), CP 1581 (Terms and Conditions).

6. Default.

Bavand fell into default under the terms of the Note and Deed of Trust by failing to perform monthly payment obligations beginning with the September 1, 2010 installment. CP 1632. On May 18, 2011, OneWest Bank authorized NWTS, as its agent, to issue a notice of default ("Notice of Default") to Bavand. CP 1632; see also CP 1783.

7. Assignment of the Deed of Trust.

On or about June 7, 2011, OneWest Bank instructed MERS to assign to OneWest Bank, MERS's interest in the Deed of Trust. CP 1635-36. On June 7, 2011, MERS executed an assignment of deed of trust ("Assignment of Deed of Trust") granting MERS's record and agency interest under the Deed of Trust to OneWest Bank. *Id.* The Assignment of Deed of Trust was recorded on September 8, 2011 with the Snohomish County Auditor's Office as Instrument Number 201109080241. CP 1636-37.

8. Appointment of Successor Trustee.

On July 27, 2011, OneWest Bank executed an Appointment of Successor Trustee, naming Northwest Trustee Services, Inc. ("NWTS") as successor trustee under the Deed of Trust. CP 1633. The appointment of successor trustee ("Appointment of Successor Trustee") was recorded with

the Snohomish County Auditor's Office on September 8, 2011 as Instrument Number 201109080242. Id.

9. Notice of Trustee's Sale.

On September 12, 2011, NWTS recorded a Notice of Trustee's Sale ("Notice of Trustee's Sale"), with the Snohomish County Auditor's Office as Instrument Number 201109120333. CP 1783-84. The Notice of Trustee's Sale scheduled a trustee's sale of the Property for December 16, 2011.

B. Procedural History

1. Complaint and Removal to Federal Court.

On December 22, 2011, Plaintiff filed the Complaint, initiating the present proceeding. On February 16, 2012, the action was removed to the United States District Court, Western District of Washington and on March 25, 2013, Judge Robart entered a ruling ("District Court Order") granting in part OneWest Bank, MERS, and NWTS's Motion for Summary Judgment. *Bavand v. One West Bank FSB, et al.*, Case No. 12-cv-00254-JLR, 2013 WL 1208997 (Mar. 25, 2013, W.D. Wash.) CP 1589.

Pursuant to the District Court Order, summary judgment was granted on Bavand's claims for Declaratory Judgment, Wrongful Foreclosure, Violation of the Fair Debt Collection Practices Act, and Quiet

Title. CP 1598. The Consumer Protection Act claim was remanded to the Snohomish County Superior Court. CP 1595-96.

2. *Ninth Circuit Appeal.*

On April 23, 2013, Plaintiff filed a Notice of Appeal, appealing Judge Robart's Order to the Ninth Circuit Court of Appeals. *Bavand*, No. 12-cv-00254-JLR. On October 20, 2014, the Ninth Circuit Court of Appeals rejected the Plaintiff's arguments and entered a Memorandum ruling ("Ninth Circuit Order") affirming Judge Robart's ruling in the District Court Order. *Bavand v. OneWest Bank, FSB*, 587 Fed. Appx. 392 (9th Cir. 2014). CP 1600

3. *Summary Judgment after Remand.*

On remand in the Snohomish County Superior Court, OneWest Bank and MERS brought a Motion for Summary Judgment on Bavand's remaining claim. In support of the Motion, OneWest Bank and MERS submitted Declarations of three witnesses: Boyle, Flannigan, and Blake. In her Opposition, Bavand submitted her own self-serving declaration which the trial court struck upon objection by OneWest and MERS. The trial court granted OneWest and MERS's Motion for Summary Judgment on November 20, 2015 and denied Bavand's Motion to Continue under CR 56(f). From these Orders, Bavand appeals.

III. RESPONSE TO THE ASSIGNMENTS OF ERROR

1. The trial court did not err in admitting declaration testimony of 3 (Boyle, Blake, and Flannigan) witnesses for the moving party because each adequately established his own personal knowledge based on business records.

2. The trial court did not err in striking Appellant's declaration in support of her opposition to the Motion for Summary Judgment as it was materially inconsistent with prior testimony.

3. The trial court did not err in dismissing plaintiff's remaining Consumer Protection Act claim because she failed to demonstrate that OneWest or MERS engaged in unfair or deceptive conduct, or that any injury was caused by the defendants. In addition, plaintiff failed to establish the public interest impact.

IV. ARGUMENT IN RESPONSE

A. The Trial Court did not Err in Considering the Declarations of 3 witnesses offered in support of Respondents' Motion for Summary Judgment.

The trial court appropriately considered the Declarations of Brian Blake, Kevin Flannigan, and Charles Boyle. Despite Bavand's inaccurate assertion that this Court should review these declarations for admissibility under a de novo standard, a trial court's decision to admit evidence of a qualifying witness regarding the content of business records is reviewed

under an abuse of discretion standard. *State v. Ben-Neth*, 34 Wn. App. 600, 603, 663 P.2d 156 (1983). Courts admit declarations in which the personal knowledge of the declarant is informed by a review of business records. *Barkley v. GreenPoint Mrtg. Funding, Inc.*, 190 Wn. App. 58, 67, 358 P.3d 1204 (2015). Based on the evidence presented, the trial court did not abuse its discretion in considering the three declarations.

Bavand now argues that the declarations of Kevin Flannigan ("Flannigan Declaration"), Brian Blake ("Blake Declaration") and Charles Boyle ("Boyle Declaration") should have been stricken by the trial court for three reasons: (1) failure to demonstrate sufficient personal and testimonial knowledge, (2) failure to identify business records, and (3) failure to identify how the business records are maintained. The trial court did not err because Washington case law and the Uniform Business Records as Evidence Act, RCW 5.45 *et seq.* ("UBRA") establish that these evidentiary objections are meritless.

Affidavits submitted as part of a summary judgment proceeding shall (1) be made on personal knowledge, (2) set forth facts as would be admissible in evidence, and (3) show affirmatively that the affiant is competent to testify to what is in the affidavit. CR 56(e). Washington courts consider the personal knowledge requirement to be satisfied if the proponent of the evidence satisfies the business records statute. *See*

Discover Bank v. Bridges, 154 Wn. App. 722, 725-726, 226 P.3d 191

(2010). Pursuant to the UBRA,

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020. Reviewing courts broadly interpret the statutory terms “custodian” and “other qualified witness” under the business records statute. *See, e.g., State v. Smith*, 55 Wn.2d 482, 348 P.2d 417 (1960). Under the statute, the person who created the record need not identify it. *Cantril v. Am. Mail Line, Ltd.*, 42 Wn.2d 590, 257 P.2d 179 (1953). Under the UBRA, business records are presumptively reliable if made in the regular course of business and there was no apparent motive to falsify. *State v. Fleming*, 155 Wn. App. 489, 499, 228 P.3d 804 (2010) (citations omitted). Testimony by one who has custody of the record as a regular part of his work or who has supervision of its creation will be sufficient to introduce the record. *State v. Iverson*, 126 Wn. App. 329, 338, 108 P.3d 799 (2005).

The Blake, Boyle and Flannigan declarations each satisfy the personal knowledge requirement. Bavand argues that each declarant fails to demonstrate sufficient personal and testimonial knowledge of the facts beyond conclusory statements and statements based exclusively on hearsay. This conclusory argument is meritless. As set forth below, the testimony establishes that each declaration has custody of the record as a regular part of his or her employment, and obtained personal knowledge based on their review of such business records.

The Flannigan Declaration sets forth testimony establishing that Mr. Flannigan has personal knowledge based on his own review of business records, maintained in the ordinary course of business, related to the Bavand mortgage loan documents and business records of Ocwen. CP 1634-36. The declaration also sets forth testimony regarding Mr. Flannigan's access to Ocwen's business records in the regular course of her work. *Id.*

The Blake Declaration sets forth testimony establishing that Mr. Blake has personal knowledge of MERS's business records based on a review of such records. CP 1640-41. Mr. Blake's testimony also establishes his employment by MERSCORP Holdings, Inc. the parent company to MERS and his status as corporate counsel to MERS, as well as his familiarity with MERS's business records and how those records are

maintained by MERS in the ordinary course of its business. Id. Finally, the Boyle Declaration establishes that Mr. Boyle reviewed the business records of One West Bank and has personal knowledge of the business records of One West Bank relating to the Bavand mortgage loan. CP 1629-30.

Mr. Boyle's declaration further establishes his employment with One West Bank, his familiarity with business records maintained by One West Bank, and how those records are maintained in the ordinary course of business. CP 1630. A review of the Boyle, Flannigan and Blake declarations establish that they are based on personal knowledge from their own personal review of the business records pertaining to the Plaintiffs mortgage loan. Moreover, Bavand misapprehends Washington law in her argument that the declarations constitute conclusory statements in violation of CR 56(e). The facts required by CR 56(e) are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 360, 753 P.2d 517 (1988) (citations omitted). The testimony in the Flannigan, Boyle and Blake declarations are not conclusory, nor do they constitute ultimate facts or conclusions of fact. To the contrary, the language at issue explains the basis for the declarant's testimony, their personal review of business records.

Contrary to Bavand's argument, the Boyle, Blake and Flannigan declarations properly identify the documents reviewed by each declarant. A review of the respective declarations establishes that each declarant properly identifies the business records in accordance with RCW 5.45.020 and Washington case law.

The Flannigan declaration expressly identifies the business records he relies upon in his testimony. CP 1634-35. Mr. Flannigan testified that Ocwen's servicing records include electronic data compilations and imaged documents obtained through the course of servicing the loan. Mr. Flannigan identifies documents relating to the servicing and transactions regarding the Bavand mortgage loan, as well as the servicing records of the prior servicer, One West Bank. *Id.* Importantly, the business records exception does not require that the person who actually made the document provide the foundation but allows testimony by a person who has custody of the document as a regular part of his work or supervision over its creation. *State v. Quincy*, 122 Wn. App. 395, 399, 95 P.3d 353 (2004). The testimony establishes that Ocwen has custody of the business records of the prior servicer and that in the regular performance of his employment, Mr. Flannigan is familiar with, and has access to, such records. CP 1634-35.

Moreover, Mr. Flannigan testified that based on his personal knowledge of the common practices and procedures in the loan servicing industry, the prior servicer's records are also made at or near the time of the occurrence of the recorded events, and are relied on by the subsequent servicer as part of its business records in ascertaining the history and background of the loan. CP 1635. Thus, the Flannigan Declaration properly identifies its business records in accordance with RCW 5.45.020.

The Blake declaration similarly identifies the business records relied upon in the Blake declaration. Mr. Blake identifies contractual agreements between MERS and other entities, as well as corporate resolutions issued by MERS. CP 1640-1641. The testimony establishes that MERS is a party to the subject contracts and resolutions, which are prepared and executed in the normal course of MERS's business. *Id.* The Plaintiffs contention that these records are unidentified, or are submitted by third-parties, is baseless.

The Boyle Affidavit identifies business records pertaining to One West Bank's servicing of mortgage loans including data compilations and electronically imaged documents. CP 1630. Overall, the Blake, Boyle and Flannigan declarations identify the business records underlying their testimony. The Plaintiff's claim that these records must be authenticated by a third party who compiled the records is baseless. Testimony by a

person who has custody of the document as a regular part of his work or supervision over its creation satisfies the UBRA. *Quincy*, 122 Wn.App. at 399.

Bavand's arguments regarding the maintenance of documents have been rejected by Washington courts. Bavand argues, as she did below, the Flannigan, Blake and Boyle declarations are deficient as they fail to (1) establish whether the documents are maintained electronically or in hard copy, (2) establish whether any computer document retrieval equipment is standard, (3) the original source of materials maintained, (4) the identity of the person who compiled the information, (5) when the records or entries were made, and (6) how the employer of each declaration relies on these records. App. Op. Br. at 19. None of the authorities cited by Bavand support her assertion that the listed items of information are required for the Blake, Boyle and Flannigan declarations to be admissible. Regardless, the trial court did not error in considering the evidence for multiple reasons.

First, RCW 5.45.020 does not require testimony regarding whether documents are maintained electronically or in hard copy, or "the original source of materials maintained." Similarly, the UBRA does not require testimony as to how the employer of declaration relies on the specific business record. The custodian of the records or other qualified witness

must testify to the (1) record's identity; (2) its mode of preparation; (3) if it was made in the regular course of business; and (4) if it was made at or near the time of the act, condition, or event. RCW 5.45.020. An affidavit that touches upon each of these elements is generally admissible. *See Discover Bank v. Bridges*, 154 Wn. App. 722, 726, 226 P.3d 191 (2010) (holding that affidavits that collectively touched upon these elements supported admission of business records).

Second, the declarant is not required to establish whether any computer document retrieval equipment is standard. In *State v. Kane*, the court expressly rejected the defendant's claim that the State had to present technical information concerning the type of computer or program used. 23 Wn. App. 107, 112, 594 P.2d 1357 (1979).

Third, the identity of the person who compiled the information is not required by RCW 5.45.020. The business records exception does not require that the person who actually made the document provide the foundation but allows testimony by a person who has custody of the document as a regular part of his work or supervision over its creation. *Quincy*, 122 Wn. App. at 399.

Fourth, the contention that the declarations fail to identify when the records were made is baseless. Each declaration states that the business records were prepared at or near the time of the act, condition, or

even described therein. CP 1635, 1640-41, 1630. Washington courts have affirmed the admissibility of declarations from employees like Mr. Blake, Mr. Boyle and Mr. Flannigan with virtually identical language. *See, e.g., Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 674-675, 292 P.3d 128 (2012) (rejecting challenge to bank employee declaration, holding affiant's statement that transactions were recorded at the time of occurrence was sufficient).

Finally, the trial court correctly disregarded testimony from other cases that did not create an evidentiary issue in the proceedings below. Bavand again cites to an unrelated case for the proposition that the testimony provided in that case somehow renders the Blake, Boyle, and Flannigan declarations invalid. App. Op. Br. at 28. The *McDonald* case, a federal opinion, fails to explain how the Blake, Boyle, and Flannigan declarations in this case fail to comply with the business records exception. As set forth above, the declarations filed in this case establish that the declarants have the requisite personal knowledge and foundation pursuant to the UBRA. Accordingly, this argument should be disregarded in its entirety. Each of the Blake, Boyle, and Flannigan declarations comply with the requirements of the business records exception codified at RCW 5.45.020. As the evidentiary objections find no support in

Washington law, the trial court did not abuse its discretion in considering the declarations.

B. The Trial Court Appropriately Struck Appellant's Contradictory Declaration.

The trial court acted well within its discretion to strike the self-serving and contradictory Declaration of Marisa Bavand presented in support of the Response to the Motion for Summary Judgment below. Bavand now argues it was error but fails to demonstrate why the trial court abused its discretion. In the Declaration at issue, Bavand stated she has lost over \$17,000 due to issues relating to the rent and upkeep of the Property. CP 158. Notably, Bavand declared that she communicated with tenants, and she lost time and money by not being able to rent the property. *Id.* This testimony directly contradicts statements Bavand made under oath at her own deposition. Bavand does not contest that her testimony in the deposition is contrary, but tries to explain that she would have learned information from her husband in the intervening time period.

The trial court properly struck this testimony as it violates CR 56(e). “When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.”

Marshall v. A.C. & S, Inc., 56 Wn. App. 181, 185, 782 P.2d 1107 (1989). In this case, the Bavand testified under oath that she was not involved with the management of the Property. CP 135. Bavand also testified that she had no personal knowledge regarding the 4-month vacancy period. *Id.* This information was relayed to Bavand by her husband. *Id.* Again, Bavand does not now contest that she learned all of this information from her husband. App. Op. Br. at 23. As evidenced by her deposition testimony, it is curious as to how the Bavand herself, who testified she was not involved in the management of the Property, lost time and money by not being able to rent the Property during a “very good landlord market.” CP 157-58. Similarly, Bavand refers to communications she had with prospective tenants regarding the foreclosure and lawsuit. CP 158. These statements contradict the Bavand’s own deposition testimony regarding her involvement with the Property management, as well as her communications and interactions with tenants. Bavand’s deposition transcript establishes that her declaration was not based on personal knowledge, in violation of CR 56(e). In fact, this deficiency is expressly admitted in her testimony. Accordingly, the trial court did not abuse its discretion in striking Bavand’s Declaration.

Even if this Court were to find error, it is harmless. Given the trial court’s conclusions regarding the other elements of the Appellant’s CPA

claim, her testimony would not have been sufficient to save the claim from summary dismissal. All elements of a CPA claim must be demonstrated. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 74, 170 P.3d 10 (2007). The lost rent testimony would go to the injury element of the CPA claim. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986) (holding that a plaintiff under a CPA claim must have suffered an injury to her business or property). However, as will be discussed below, Appellant failed to establish any of the other elements below, and so any error would be harmless.

C. Bavand's Predicate Claims under the Deed of Trust Act Lack Merit and were Properly Dismissed by the Trial Court.

While the issue of liability under the Deed of Trust Act had previously been adjudicated on summary judgment, Bavand continues to allege a violation of the Act as a predicate to liability under the Consumer Protection Act. However, the trial court properly concluded there is no genuine issue regarding One West Bank's status as beneficiary of the Deed of Trust and holder of the Note. Again in her appeal, Bavand argues that there are a number of outstanding factual disputes as to which party is the

duly authorized beneficiary with the authority to foreclose. App. Op. Br. at 24. Bavand's arguments are meritless.

First, Bavand argues that Northwest Trustee Services ("NWTS") should not have relied on the beneficiary declaration. For the sake of brevity, OneWest and MERS defer to the Brief of NWTS and incorporate the trustee's arguments herein by reference.

Second, Bavand revives her argument that the beneficiary declaration is problematic because it implies there is one not but in reality there are somehow two notes. App. Op. Br. at 29. This argument is belied by the evidence. The evidence establishes that IndyMac Bank, F.S.B., not OneWest Bank or MERS, stamped the certified copy of the Note. CP 1631. Moreover, the contention that the Note is denominated as an original is a blatant misrepresentation. The certified copy expressly states "CERTIFIED A TRUE COPY". Id. There is no genuine issue of material fact as to whether the copy of the Note expressly states that it is just that, a copy.

To the extent Bavand argues she is conceivably exposed to twice the liability she bargained for, this claim fails as a matter of law. A person is not liable on an instrument unless the person signed the instrument or the person is represented by an agent or representative who signed the instrument and the signature is binding on the represented person. RCW

62A.3-401(a). A signature may be made manually, by means of a device or machine, and by the use of any name, symbol, word, or mark executed or adopted by the person with present intention to authenticate a writing. RCW 62A.3-401(b). As a matter of law, a copy of a signature is not a signature as defined by the UCC. Accordingly, Bavand cannot be exposed to double liability for the certified copy of the Note

D. Bavand's Consumer Protection Act claim Lacks Merit and the Trial Court Properly Dismissed it.

Bavand's Consumer Protection Act, RCW 19.86 *et seq.*, ("CPA") claim failed as OneWest and MERS complied with the Deed of Trust Act and committed no unfair or deceptive acts or practices, and there is no reason why this Court should disturb the trial court's conclusion on review. Bavand's claim is based on the allegation that the Defendants violated the CPA by promulgating false and improperly executed documents. One West Bank and MERS are entitled to summary judgment as the evidence presented with this motion establishes that (1) any claims regarding MERS's designation as a beneficiary in Deed of Trust are time barred by the CPA's 4-year statute of limitations, (2) MERS acted properly when it assigned its agency interest in the Deed of Trust pursuant to the instructions of its principal and holder of the Note, One West Bank, (3) One West Bank was in fact the holder of the Note when the foreclosure

notices were issued, and (4) none of the alleged injuries were caused by MERS or One West Bank. A review of the District Court Opinion, Washington case law, and the evidence adduced below provides guidance.

To state a CPA claim, the Plaintiff must allege: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) that impacts the public interest; (4) causes injury to plaintiffs' business or property; and (5) that injury is causally linked to the unfair or deceptive act. *Hangman Ridge Training Stables, Inc.*, 105 Wn.2d at 780. The failure to establish even one of these elements is fatal to the claim. *Indoor Billboard*, 162 Wn.2d at 74.

A plaintiff may predicate the first CPA element on a “per se violation of a statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest.” *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013). To state a claim for a per se CPA violation, the plaintiff must allege the existence of a pertinent statute and its violation. *Mellon v. Regional Trustee Services Corp.*, 182 Wn. App. 476, 488, 334 P.3d 1120 (2014) (citations omitted). If a defendant's act or practice is not per se unfair or deceptive, the plaintiff must show the conduct is “unfair” or “deceptive” under a case-specific analysis of those terms. *Id.* at 489. A defendant’s act is

“deceptive” if it “has a capacity to deceive a substantial portion of the public.” *Hangman Ridge Training Stables*, 105 Wn.2d at 785. A defendant’s act or practice might be “unfair” if it ‘offends public policy as established ‘by statutes [or] the common law,’ or is ‘unethical, oppressive, or unscrupulous, among other things.’” *Klem*, 176 Wn.2d at 786.

1. MERS committed no unfair or deceptive act.

All documents executed by MERS were done so with the requisite authority. The evidence establishes that MERS took only two actions in this case. First, it was designated as beneficiary under the Deed of Trust. Second, MERS assigned its nominee interest in the Deed of Trust to OneWest Bank, the holder of the Note. As acknowledged by the Ninth Circuit Court of Appeals, MERS took no action to effectuate the foreclosure: *Bavand v. One West Bank, FSB*, 587 Fed.Appx. 392, 394 (9th Cir. 2014) (“But here, MERS did not seek to foreclose in its own name, nor did it violate the DTA by acting as a holder or a beneficiary in its own right.”). MERS was entitled to summary judgment as none of its actions can support a CPA claim.

Bavand’s claims regarding the Assignment of Deed of Trust fail to support a CPA claim. Below, Bavand alleged that MERS produced and caused to be recorded documents without having the actual legal authority

to execute the documents. CP 2133-35. The evidence establishes that MERS acted properly, and legally, when it assigned its agency interest in the Deed of Trust pursuant to the instructions of its principal, OneWest Bank. While *Bain v. Metropolitan Mortgage Group* holds that MERS cannot act as a beneficiary if it does not hold the promissory note, the opinion expressly notes that lenders and assigns are entitled to name MERS as their agent. 175 Wn.2d 83, 106, 285 P.3d 34 (2012).

Here, the evidence establishes that MERS acted at the instruction of its principal, OneWest Bank. Specifically, MERS was instructed to assign its interests in the Deed of Trust by One West Bank, the holder of the Note. CP 1635-36. This instruction is consistent with the Rules of Membership, as well as the Terms and Conditions, which govern the relationship between MERS and MERS Members, such as One West Bank.

The Rules of Membership establish that MERS must follow the note holder's instructions:

MERS shall at all times comply with the instructions of the holder of the mortgage loan promissory notes. In the absence of contrary instructions from the beneficial owner, MERS and Mortgage Electronic Registration Systems, Inc. may rely on instruction from the servicer.

CP 1644-47. Similarly, the Terms and Conditions state that “MERS shall at all times comply with the instructions of the holder of the mortgage loan promissory notes.” CP 1653-54. The MERS Rules of Membership and Terms and Conditions manifest consent by MERS, to act on behalf of, and subject to the control of, the holder of the note. The MERS Rules of Membership and Terms and Conditions also establish consent by the principal, OneWest Bank, to have MERS act on its behalf and subject to its control. This consent is the hallmark of agency. *See, e.g., Moss v. Vadman*, 77 Wn.2d 396, 402-403, 463 P.2d 159 (1970).

In sum, the Assignment of Deed of Trust is not deceptive as it does not mislead or misrepresent something of material importance. The assignment does not impact the non-judicial foreclosure, or alter the Plaintiffs obligations under the mortgage loan. Neither is it unfair. The evidence establishes that MERS properly executed the Assignment of Deed of Trust, consistent with its contractual obligations, pursuant to the directions of its principal, OneWest Bank, the holder and beneficiary of the Note. As recognized by the Washington Supreme Court, “Washington law, and the deed of trust act itself, approves of the use of agents.” *Bain*, 175 Wn.2d at 106.

Bavand does not, and cannot, direct this Court’s attention to any evidence that would establish that MERS acted as the foreclosing

beneficiary. There is no genuine issue regarding MERS's involvement in the non-judicial foreclosure process. MERS did not issue any default notices, or any foreclosure notices required under the DTA. The evidence establishes that MERS took no action whatsoever to effectuate the nonjudicial foreclosure. Accordingly, Bavand cannot establish any unfair or deceptive conduct, MERS was entitled to summary judgment.

2. *One West Bank did not commit an unfair or deceptive act.*

As beneficiary, One West Bank had the requisite authority to appoint NWTS as successor trustee to effectuate the non-judicial foreclosure. Summary judgment was appropriate below as the evidence presented established that each signature and document at issue was executed with the requisite authority of the beneficiary of the Deed of Trust and holder of the Note, OneWest Bank. The evidence also establishes that MERS acted properly when it assigned its agency interest in the Deed of Trust pursuant to the instructions of its principal, OneWest Bank.

The law of the case (after the U.S. District Court ruling) is that OneWest Bank held the Note through the foreclosure, making it the beneficiary of the Deed of Trust with the requisite authority to appoint a successor trustee: "OneWest is the lawful beneficiary of Bavand's

promissory note because OneWest is the note's holder.” *Bavand*, 587 Fed.Appx. at 393. The foreclosure notices at issue in this case are neither unfair nor deceptive as they were issued with the requisite authority by the beneficiary of the Deed of Trust.

First, the Notice of Default was properly executed pursuant to the requirements of the Deed of Trust Act. The evidence establishes that on May 18, 2011, One West Bank authorized NWTS, as its agent, to issue the Notice of Default to Plaintiff. CP 1641-42. The DTA expressly authorizes the trustee, beneficiary, or authorized agent to issue a Notice of Default. RCW 61.24.031(1)(a). As the evidence establishes that the Notice of Default was issued by the beneficiary of the Deed of Trust through its authorized agent, the Notice of Default was neither unfair nor deceptive.

Second, the Appointment of Successor Trustee was issued by OneWest Bank, the holder of the Note. As set forth by the DTA, the beneficiary shall appoint a trustee or a successor trustee. RCW 61.24.010(2). There is no genuine issue that the holder of the Note and beneficiary, OneWest Bank, appointed NWTS as successor trustee.

In sum, OneWest Bank held the Note and had the requisite authority as the beneficiary of the Deed of Trust to appoint NWTS to effectuate the non-judicial foreclosure. As OneWest Bank complied with the DTA, its actions have no capacity to deceive a substantial portion of

the public. Similarly, OneWest Bank's actions are not unfair as they comply with the state legislature's mandates set forth in the DTA.

3. The CPA claim fails as One West Bank did not cause any of Bavand's alleged injuries.

The trial court properly dismissed Bavand's CPA claim against OneWest Bank because she could not establish causation. To establish the causation element in a CPA claim, a plaintiff must show that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury. *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 214, 194 P.3d 280 (2008). Compensable injuries under the CPA are limited to "injury to [the] plaintiff in his or her business or property." *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 430, 334 P.3d 529 (2014).

As established below, OneWest Bank had the requisite authority to initiate the foreclosure based on the uncontested default and its authority as the holder of the Note and the beneficiary of the Deed of Trust. *Bavand*, 587 Fed. Appx. at 393. Plaintiff had a contractual obligation to make her mortgage payments and chose not to. Instead, she filed a lawsuit to challenge OneWest Bank's standing to enforce the Note and Deed of Trust. The but-for cause of any of the Plaintiffs alleged injuries associated with the foreclosure is her own default on her contractual obligations. *See*,

e.g., Babrauskas v. Paramount Equity Mortgage, No. C13-0494RSL, 2013 WL 5743903, *4 (W.D. Wash. Oct. 23, 2013) (finding no injury under the CPA because “plaintiffs failure to meet his debt obligations is the ‘but for’ cause of the default, the threat of foreclosure, any adverse impact on his credit, and the clouded title”).

Notably, to the extent the Bavand she was injured based on her concerns regarding the ownership of the Note, this claim fails to establish any causation as to OneWest Bank for multiple reasons. CP 2139-40.

First, the information regarding Freddie Mac's ownership interest in the Note did not cause the default or the Plaintiffs injuries. As set forth in Bavand’s deposition testimony, the allegations regarding Freddie Mac derive solely from the printout attached to her Complaint as Exhibit F:

Q: Besides that website you referenced, which I believe you said is attached to your complaint, is there any other documentation or information concerning Freddie Mac's involvement with respect to the loan?

A: I don't know. Not that I'm aware of. There might be but I don't have that knowledge.

CP 1542. Pursuant to the plaintiff's own *verified* Complaint, the printout from the Freddie Mac website was obtained on December 15, 2011. CP 2139-40. There is no genuine issue that Freddie Mac's ownership interest in the Note caused the default and subsequent foreclosure. The Complaint

and Bavand's testimony establish that at the time she accessed the Freddie Mac website, she was already in default of her contractual obligations for over a year. Importantly, the Freddie Mac website itself directs the Plaintiff to make mortgage payments to the mortgage servicer. CP 2140. This directive was ignored.

As to Bavand's argument that Freddie Mac should have been identified as the owner of the Note in the Notice of Default instead of OneWest Bank, this designation was not prejudicial. The 9th Circuit ruled on her prior appeal:

Here, even if Bavand is correct in her assertion that NWTS should have listed Freddie Mac as an owner and not One West under Wash. Rev. Code § 61.24.030(8)(1)-which requires trustees to provide "the name and address of the owner of any promissory notes" in the notice of default these notations were not prejudicial to Bavand. The notice of default provided all the necessary information to Bavand by identifying OneWest as the foreclosing party, and any technical, non-prejudicial issues should not bar foreclosure proceedings.

Bavand, 587 Fed. Appx. at 395. Notably, the Notice of Default did not cause the underlying default, or the alleged damages associated with the foreclosure. Moreover, as noted by the Ninth Circuit, Bavand suffered no prejudice as a result of the Notice of Default, as she knew who to pay, and

ultimately, decided to ignore her contractual obligations in reliance on an incorrect legal theory. Accordingly, as OneWest Bank did not cause any of the alleged injuries suffered by Bavand, the trial court was correct to dismiss her CPA claim.

E. Bavand was not entitled to a Continuance under CR 56(f).

Bavand argues that the trial court's refusal to grant a 90-day continuance was prejudicial because there was no other means of addressing the existence of an endorsed copy of the Note. The purpose of CR 56(f) is to "allow[] a party to move for a continuance so that it may gather evidence relevant to a summary judgment proceeding." *Old City Hall LLC v. Pierce County AIDS Found.*, 181 Wn. App. 1, 15, 329 P.3d 83 (2014). The rule provides a remedy "for a party who knows of the existence of a material witness and shows good reason why he cannot obtain the affidavit of the witness in time for the summary judgment proceeding." *Lewis v. Bell*, 45 Wn. App. 192, 196, 724 P.2d 425 (1986). "Whether a motion for continuance should be granted or denied is a matter of discretion with the trial court, reviewable on appeal for manifest abuse of discretion." *Trummel v. Mitchell*, 156 Wn.2d 653, 670, 131 P.3d 305 (2006). A trial court's decision will not be disturbed where "(1) the requesting party does not offer a good reason for the delay in obtaining the

desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.” *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989). Bavand does not satisfy the first and third elements of this inquiry, and thus the trial court was correct in denying the motion.

First, Bavand did not establish any good reason for delay in obtaining the stated evidence. The only reason provided for the delay in obtaining the requested evidence is that “Defendants have withheld this information to date, alleging the information to be irrelevant, immaterial, proprietary, or subject to the attorney/client privilege.” CP 156. Bavand’s request is baseless. This lawsuit was filed in On December 22, 2011, almost four-years ago. Bavand had nearly four-years to conduct and finalize discovery on the issue of OneWest Bank's authority to foreclose under the Deed of Trust Act. But on the eve of the summary judgment hearing, she requested a continuance to conduct discovery to verify whether OneWest Bank had the authority to act as the beneficiary and appoint NWTs as successor trustee. No explanation was provided why she waited four years to take any action in response to the alleged withholding of information.

Second, the information sought would be immaterial to the proceedings below. Even assuming the Plaintiff did obtain information regarding prior ownership of the Note and Deed of Trust, none of this information would raise any genuine issue of material fact as to OneWest Bank's possession of the Note, or its status as holder of the Note. Washington law establishes that ownership of the note is irrelevant with regards to status as beneficiary under the Deed of Trust Act. *Trujillo v. Nw. Tr. Servs., Inc.*, 181 Wn. App. 484, 497, 326 P.3d 768 (2014); *see also Brown v. Dept. of Commerce*, 184 Wn.2d 509, 359 P.3d 771 (2015). Moreover, the UCC expressly recognizes that a person may be entitled to enforce an instrument as a holder even though the person is not the owner of the instrument or is in wrongful possession of the instrument. RCW 62A.3-301. As established by the Washington Supreme Court, the beneficiary of the Deed of Trust is the holder of the Note. *Bain*, 175 Wn.2d at 89. The term "holder" in the DTA is guided by definition of "holder" in the UCC. *Id.* at 104. Moreover, as Bavand concedes in her brief, evidence of ownership is immaterial in light of the *Brown* decision. 184 Wn.2d at 523 (holding the UCC authorizes division of note ownership from note enforcement.)

Accordingly, as the requested evidence regarding ownership of the Note would not raise any genuine issue as to One West Bank's status as

holder and authority under the DTA (which has already been ruled upon), the Motion for Continuance was properly denied.

V. CONCLUSION

In light of the foregoing, Bavand cannot establish any error by the trial court that warrants reversal or remand for further consideration. Bavand has been heard by the courts of this state and of the federal system and has not succeeded in demonstrating the existence of any questions of material fact. This Court should affirm the decision below.

Dated this 2nd day of June, 2016.

/s/Ryan M. Carson
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CERTIFICATE OF MAILING

I, the undersigned, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I hereby declare that on June 2, 2016, I caused to be served a copy of the RESPONDENT’S OPENING BRIEF via first-class, postage prepaid mail as follows:

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