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Court of Appeals
Division I
State of Washington

Case No. 75043-7-I

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

JOHN P. HURNEY AND LESLIE A. HURNEY,

Appellants,

v.

HSBC BANK, USA, N.A., as Trustee for Merrill Lynch Alternative Note
Asset Trust, Series 2007-OAR2; ONEWEST BANK, F.S.B.; and Doe
Defendants 1 through 20, inclusive

Respondents.

APPELLANTS' SECOND AMENDED OPENING BRIEF

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INTRODUCTION

This is a case which demonstrates the manner in which mortgage loan servicers continue to avoid the clear requirements of the Deed of Trust Act, RCW 61.24, *et seq.* (“DTA”), in order to more swiftly bring a nonjudicial foreclosure, contrary to the requirements of the Deed of Trust Act and to the detriment of Washington property owners. The Hurneys defaulted on their mortgage loan because of a significant drop in business revenue and the need to make expensive home repairs. The Hurneys tried repeatedly to obtain a loan modification and to otherwise get a control of their significantly changed finances. While the Hurneys were making these efforts, their loan servicer, One West, acting through an entity that was never properly appointed as a substitute trustee, Regional Trustee Services Corporation (“RTS”) initiated two non-judicial foreclosures without the legal authority do so under Washington law.

The record in this case is replete with the Defendants/Appellees’ violations of the DTA in furtherance of their attempts to illegally foreclose nonjudicially on the Hurneys’ home. These violations include intentional misrepresentations about the identity of the holder of their Promissory Note and the authority of RTS to act as a foreclosing trustee. Most significantly, no competent evidence, executed in compliance with the requirements of the DTA, was presented to the trial court by One West or

HSBC that demonstrated One West or even HSBC was, at any time, the holder of the Hurneys' Promissory Note, consistent with DTA requirements. ("Beneficiary" is defined under the DTA as "noteholder". RCW 61.24.005(2)). Unfortunately, it appears that the trial court did not require the Defendants to adhere to the requirements of the DTA and was willing to relieve them from liability, in contravention of binding Washington case law.

Contrary to the determination made by the trial court, Defendant/Appellees' deceptive and misleading conduct constituted a Consumer Protection Act violation.¹

STANDARD ON REVIEW

An appellate court should independently determine whether the findings of fact support the conclusions of law. *Crystal China and Gold Ltd. v. Factoria Center Investments, Inc.*, 93 Wn.App. 606, 610, 969 P.2d 1093 (1999); *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 222, 797 P.2d 477 (1990); *Martin v. Seattle*, 111 Wn.2d 727, 733, 765 P.2d 257 (1988); and *Persing, Dyckman & Toynbee, Inc. v.*

¹ The Hurneys' Complaint include claims for injunctive relief to stop the nonjudicial foreclosure, breach of the duties under the Deed of Trust Act, violations of the Consumer Protection Act and intentional infliction of emotional distress. Since the filing of the Complaint, the Supreme Court issued its ruling in *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014), which rendered the breach of duties claim moot. Further, the Hurneys are not appealing dismissal of their claims for intentional infliction of emotional distress. This leaves only their claim for violation of the Consumer Protection Act, as the temporary injunctive relief was granted.

George Schofield Co., Inc., 25 Wn.App. 580, 582, 612 P.2d 2 (1980). Here, the trial court's factual findings are disconnected from the evidence provided by the Defendants and the standard articulated by the binding authority on the requirements of a Washington non-judicial foreclosure and liability flowing from failure or refusal to adhere to its requirements.

The Supreme Court has routinely held that courts must consider the DTA provisions in the homeowner's favor because it eliminates many protections enjoyed by borrowers in judicial foreclosures. *Bain*, 175 Wn.2d. at 93 (citing *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007)); see also *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 105, 297 P.3d 677 (2013); *Albice v. Premier Mortg. Svcs. of Wash., Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012). The DTA "must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting non-judicial foreclosure sales." *Bain*, 175 Wn.2d. at 93.

When determining whether an issue of material fact exists on summary judgment, a court must construe all facts and inferences in favor of the nonmoving party. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008); *McNabb v. Dep't of Corrs.*, 163 Wn.2d 393, 397, 180 P.3d 1257 (2008). A "material fact" for summary judgment

purposes is one upon which all or part of the outcome of the litigation depends. *Hill v. Cox*, 110 Wn.App. 394, 41 P.3d 495 (Div. III 2002), *review denied* 147 Wn.2d 1024, 60 P.3d 92. Summary judgment is proper if reasonable minds could reach only one conclusion from the evidence presented. *Cano-Garcia v. King County*, 168 Wn.App. 223, 277 P.3d 34 (Div. II 2012), *review denied* 175 Wn.2d 1010, 287 P.3d 594.

Conclusions of law are reviewed *de novo*, as are the application of the facts to the law. *Id.*; *see also, Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001).

ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO

The Hurneys maintain that the following errors were committed:

1. Since there was no credible evidence that either of the Defendants was the “noteholder” at any time, there remained genuine issues of material fact regarding the identity of “beneficiary” as defined under Washington law. RCW 61.24.005(2).
2. Because there was no credible evidence as to the identity of the “beneficiary”, the Appointment of Successor Trustee document could not be valid and in compliance with the requirements of the DTA.
3. Even if the HSBC Trust was the “noteholder”, the loan servicer, One West, could not sign an Appointment of Successor Trustee document as an “attorney in fact”? This is especially true because there was no valid Power of Attorney document executed as between the HSBC Trust and One West at the time the document was signed and no evidence of an agency relationship.
4. RTS, acting at the behest of and based upon instructions from One West, could not lawfully initiate a nonjudicial foreclosure because it had not been properly appointed as a successor trustee and it did

not have in its possession an unambiguous Beneficiary Declaration that conformed to the requirements of the DTA.

5. If neither One West nor RTS had the legal authority to foreclose, and there is no credible evidence that the HSBC Trust is even the noteholder, One West and HSBC committed unfair and deceptive acts that constituted violations of the Washington Consumer Protection Act (“CPA”)? RCW 19.86, *et seq.* and the Hurneys demonstrated to the trial court that they could prove all of the elements of a CPA claim.

STATEMENT OF THE CASE

The Hurneys have owned their home for more than thirteen years (“Property”). The Hurneys are self-employed and own a real estate magazine. Their business began suffering financially with the mortgage crisis beginning in 2008. Then, at the end of 2008, they had a furnace problem at the Property and could not make a payment on the mortgage in December 2008 due to the costs associated with repairing the furnace. CP 1-14; 56-59. When they tried to make the payment in January 2009, they were told that they could not do so unless they made both payments. The Hurneys did not have the money to make both payments, so they fell behind in their mortgage payments. *Id.*

The Hurneys obtained the loan originally on or about February 22, 2005 from IndyMac Bank, F.S.B. IndyMac Bank, F.S.B. was a national bank that failed in 2008 and was seized by the Federal Deposit Insurance Corporation (“FDIC”). The FDIC sold the assets of IndyMac Bank, F.S.B. to many entities, including the newly created IndyMac Bank, N.A.,

which is the entity that was a defendant below. However, it is clear from the documents used in this attempted foreclosure that IndyMac only acquired the rights to service the Hurneys' loan and it did not become the loan owner or the "noteholder". *Id.*

The Adjustable Rate Note signed by the Hurneys at origination identified IndyMac Bank, F.S.B. as the "Lender". They also signed a Deed of Trust securing the debt evidenced in the Note with the Hurneys' Property. That Deed of Trust identified IndyMac Bank, F.S.B. as the "Lender", but the "Beneficiary" was identified as Mortgage Electronic Registration Systems, Inc. ("MERS") and the Trustee was Ticor Title Insurance Co. CP 61-85.

After falling behind on their payments in December 2009, the Hurneys spent the next few years trying to obtain a loan modification, to no avail. They made application to OneWest, who had begun acting as their loan servicer. The Hurneys were entirely unaware that their mortgage loan had apparently been sold back in 2007 to the HSBC Securitized Trust. CP 1-14; 56-59.

In March 2010, the Hurneys were served with a Notice of Default. CP 87-93. On or about March 23, 2010, an employee of OneWest, Kristin Kemp, signed an Assignment of Deed of Trust as an "officer" of MERS, purporting to assign the interest in the Hurneys' Deed of Trust to HSBC,

even though MERS had no real interest in the DOT. CP 31-35. Further, MERS did so as an alleged “nominee” for IndyMac Bank, FSB – an entity which had ceased to exist two years prior. The Assignment was recorded in the records of King County, Washington on July 15, 2010, returnable to Regional Trustee Services Corporation (“RTS”).² The Hurneys have maintained throughout this case that there is no evidence that anyone at IndyMac Bank, FSB instructed OneWest to execute the Assignment document or otherwise take action as regards their loan. The documentation provided by One West were attached to the Declaration of Ms. Marks, one of its employees. CP 165-200. Although Ms. Marks is employed by One West and does not describe having worked for any predecessor entities, testified that she had sufficient knowledge to provide the testimony based upon a review of One West records, including the “servicing” records of the IndyMac predecessors. CP 165-167. What Ms. Marks and One West repeatedly tried to avoid was the simple fact that One West only acquired servicing rights from the new IndyMac entity and the FDIC. *Id.*; CP 164, ¶7. Ms. Marks also asserts, based upon non-existent records, that in March 2010, “One West was an attorney in fact for HSBC.”

The very specific Declaration made by the HSBC employee, Mr.

² Defendant Regional Trustee Services, Inc. was dismissed from this lawsuit after it was placed into a receivership.

Acebedo, only describes the signing of the Limited Power of Attorney attached thereto. There is not one word in the Declaration about the location of the Note at any time or anything else in connection with this attempted nonjudicial foreclosure. CP 201-205. If HSBC had more information to provide to the Court about its alleged “noteholder” status or its role as the “principal” and One West’s role as its “agent”, it could have provided that information. It made a choice not to do so. *Id.* Given that at summary judgment all inferences must be taken in favor of the non-moving party, the trial court should have done the same. CR 56.

As regards the Assignment document, Ms. Marks asserts that the signer, Ms. Kemp, was a “MERS Officer” because of a Corporate Resolution between One West and MERS. Ms. Marks simultaneously asserts that HSBC owns the Hurneys’ Note and that IndyMac Bank, F.S.B. “maintain[ed] custody of the Note for HSBC” (CP 166, ¶5), but she does not state that One West has ever had possession of the Note. *Id.* She also asserts in Paragraph 1 that the Hurneys’ Note is “owned and held by HSBC”, but asserts that she has this information based upon One West’s records. *Id.* She makes no mention of having access to the records of HSBC or the “custodian” who is apparently holding the Note for HSBC. The conclusion urged by the Defendants therefore (along with other conclusions relating to the requirements of the DTA) is that Ms. Kemp

could sign the Assignment document as an officer of MERS because One West, the loan servicer, had approved it, even though the Assignment was executed on behalf of IndyMac Bank, F.S.B. – an entity which had ceased to exist on **July 11, 2008**. CP 51-55; 166. Nor did Ms. Marks assert that someone from the “successors or assigns” for the “nominee” of IndyMac Bank, F.S.B. had provided Ms. Kemp with instructions to sign the document.^{3, 4}

On or about March 23, 2010, Ms. Kemp also signed an Appointment of Successor Trustee document, purporting to appoint RTS as the new trustee under the Deed of Trust. The Appointment document was not signed by the “noteholder” or beneficiary, HSBC Trust. Rather, the document indicated on its face that an employee of OneWest signed the document as the “attorney in fact” for HSBC Trust. The Hurneys maintained in their Complaint that this assertion was untrue and that HSBC Trust never appointed One West as its “attorney in fact”, and the evidence presented to the trial court bore that out. The Limited Power of Attorney document, **dated January 12, 2011**, provided by the Defendants

³ This line of reasoning also begs the question as to who instructed Ms. Kemp to sign the Assignment in the first place. Apparently the records reviewed by Ms. Marks are devoid of this information.

⁴ The Hurneys are also adamant that as the Washington Supreme Court found in *Bain*, neither MERS nor any other party to a Deed of Trust may alter the requirements of the Deed of Trust Act in its contracts. *Bain v. Metropolitan Mrtg. Group*, 175 Wn.2d 83, 98-110 (2012).

in support of their motion for summary judgment might well have been in existence during the time that some of the actions complained of in this case took place, but it was executed **after** the actions described above, which took place in 2010.

Further, no evidence was submitted that the HSBC Trust ever acted as a “principal” giving direction to its alleged agent, OneWest as regards the Hurneys’ loan or any other loan, as required under Supreme Court precedent. *Bain*, 175 Wn.2d at 98-110. The only testimony provided by HSBC was the provision of the late created Limited Power of Attorney and an admission that no other document exists as between One West and HSBC, and an attempt to “fix” the refusal to adhere to the requirements of the DTA by “ratifying” the execution of documents which HSBC had no knowledge were even executed until it sought to escape liability in this case.⁵

The attempts at ratification of the alleged principal-agency relationship (which remains undocumented through any other means) years later by HSBC is an obvious subversion of the requirements of the DTA. The Legislature certainly did not intend for parties to make a business practice of violating the requirements of the DTA in order to

⁵ The PSA identifies the “Custodian” and the “Master Servicer” as Wells Fargo, or its successors, by makes clear in Section 3.03 that it is the Master Servicer who oversees the activities of the servicer. The Trustee of the HSBC Trust (HSBC) specifically does not have any control over the actions of the servicer. (CP 253, 260 and 294-295).

allow them to avoid liability thereunder by retroactively attempting to create the relationships that did not exist at the time that the parties were acting. In fact, such a position has been specifically rejected by the Washington Supreme Court. *See, Trujillo v. NW Trustee Servs., Inc.*, 183 Wn.2d 820, 355 P.3d 1100 (2015), fn 10. Further, there is nothing in any of the documents proffered that supports the notion that Mr. Acebedo, HSBC's declarant, is authorized by the Trust to make any assertions about authority to act or otherwise to authorize or approve the actions of another entity. CP 201-205.

The DTA does not permit anyone other than the "beneficiary" to appoint a successor trustee. RCW 61.24.010(4); RCW 61.24.005(2). There is nothing in the DTA that permits an "attorney in fact" to sign an Appointment of Successor Trustee document and it was therefore invalid. The Appointment was recorded in the records of King County, Washington on **July 15, 2010**, seconds after the Assignment document was recorded. It was also returnable to RTS. CP 34-35.

Apparently acting in reliance upon the documents it had helped create and upon instructions from One West employees, RTS issued a Notice of Trustee's Sale ("NOTS") document signed on **July 13, 2010**. RTS signed this document two days before it was even purportedly appointed as the new trustee on **July 15, 2010**. (The Appointment

document has no power until it is recorded. RCW 61.24.010(2)). The NOTS was recorded in the records of King County, Washington seconds after the Appointment document was recorded – also on **July 15, 2010**. So, just as then foreclosing trustee did in *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013) (albeit without any evidence of falsified dates on notarizations in this case), RTS “pre-signed” a foreclosure document before the document that purportedly gave it the power to sign the document had been recorded as required. The NOTS scheduled the foreclosure date for October 15, 2010. CP 155-158.

The Hurneys were able to prevent that foreclosure sale in 2010 by filing a Chapter 11 bankruptcy. They were in the bankruptcy setting for some period of time but were not able to complete an effective reorganization of all of their debt. CP 56-59. They did lose other properties that they owned during that process, but they were able to retain their residence. *Id.*

Once the bankruptcy was dismissed, a new Notice of Default was issued to the Hurneys on March 4, 2013 by RTS. The NOD indicated that HSBC Trust was the “owner” of the Hurneys’ loan but provided an address for the Trust as “in care of” OneWest. This is a direct contravention of the requirements of the DTA, which requires that the NOD include the contact information for the loan owner – not merely that

of the loan servicer. RCW 61.24.030(8)(l). Included in the NOD was a demand for payments dating back to December 2009, which included 26 payments in the amount of \$5,820.00 per month. The Hurneys maintained that this was never their regular monthly payment amount. Further, the changes to the interest rate in the loan are permitted annually, according to the terms of the Promissory Note. Therefore, it is almost impossible for the Hurneys' regular mortgage payment to remain stagnant for a period of 26 months. Instead, the payment change times would be in 12 month increments. The other demands for payments are similarly questionable and inconsistent with the payment terms. CP 56-59. Notably, the Defendants ignored completely this assertion regarding demands for amounts which were not owed in their Motion. CP 102-123.

Once the Hurneys received the NOD, they obtained the services of an attorney who made a referral for them to participate in a foreclosure mediation under the Foreclosure Fairness Act ("FFA"), RCW 61.24.163. They participated in the FFA mediation and attended two mediation sessions. They were told that they did not qualify for a loan modification for various and assorted reasons and thus, the mediation was closed. CP 56-59. The mediator did not make a "not in good faith" finding. However, the mediator ignored the fact that OneWest, who participated in the mediation on behalf of HSBC Trust, did not provide adequate proof that it

had the legal authority to make decisions about the Hurneys' application for a loan modification. OneWest provided to the Hurneys and mediator a Beneficiary Declaration signed by Ms. Kemp of OneWest – not by the alleged “beneficiary” and loan owner, HSBC Trust. CP 56-59; 95. The DTA requires that the “beneficiary” provide proof to the trustee that it is the loan owner. The “beneficiary” may prove that it is the loan owner by signing a Declaration attesting to the fact that it is the “actual holder”. RCW 61.24.030(7). During an FFA mediation, a properly executed Beneficiary Declaration can be used to demonstrate that the FFA participant, in this case, OneWest, has the authority to act for the beneficiary, HSBC Trust. RCW 61.24.163(5)(c); 61.24.030(7). Instead of complying with the requirements of the DTA, OneWest provided a “Beneficiary Declaration” signed by the OneWest employee, Ms. Kemp, also on March 23, 2010. CP 95. The “Beneficiary Declaration” is not a valid affidavit on its face because it indicates that the assertion **may** be based upon Ms. Kemp’s personal knowledge **or** that she **may** “have made appropriate inquiry of those individuals having knowledge of the facts set forth in this Affidavit.” RCW 61.24.030(7); ER 801. The document reads that HSBC Trust is the loan owner and that OneWest is the “current holder” of the Hurneys’ Promissory Note. Thus, the Declaration does not provide the information that is required by the DTA. *Id.*; RCW

61.24.163(5)(c); 61.24.030(7). It should have been signed by the loan owner or the “actual holder”, which, the Hurneys maintain, on information and belief (and reference to the Pooling and Servicing Agreement), is HSBC, acting through a document custodian. CP 206-305.

It is notable that by the time that the trial court decided the summary judgment motion, the Defendants had not make an assertion about the location of the Note in any of their materials, at any time except Ms. Marks’ assertions about what had happened before One West even existed (CP 166, ¶5). Ms. Marks also provided the trial court with the “Loss Mitigation Declaration” (CP 167 ¶12; 199-200) and the Defendants argued in briefing that it was the document provided in mediation (CP 113), which was actually the Beneficiary Declaration (CP 95), as required by the statute. RCW 61.24.163(5)(c). The “Loss Mitigation Declaration” (CP 199-200) and “Beneficiary Declaration” (CP 95) are two separate documents that make separate factual assertions. But the Beneficiary Declaration is of particular importance since it is a **required** document in mediation (RCW 61.24.163(5)(c)) and it is a **requirement** that the foreclosing Trustee have a proper declaration in its possession before serving and recording the Notice of Trustee’s Sale. RCW 61.24.030(7) (“trustee **shall** have proof that the beneficiary is the owner of the promissory note . . .”) (emphasis added).

Plaintiffs made their arguments about who currently holds and has held the Promissory Note based upon the Defendants' own documents, including the HSBC Trust Pooling and Servicing Agreement ("PSA"). The PSA dictates the requirements of noteholding as between the HSBC Trust, its loan servicers and the document custodian. CP 206-305. Article II, Section 2.01(b)(I) of the PSA requires that the original loan documents, as well as powers of attorney, assignments and the like, be deposited with the "Trustee or Custodian" as its "agent". The Custodian is identified as Wells Fargo (also the Master Servicer) and the Trustee is HSBC. One West's predecessor, IndyMac, is identified as the servicer of the loans originated by IndyMac, and according to testimony of One West presented to the trial court, that is the only role it has ever performed. CP 165-167. PSA Section 2.02(a) requires that any defect in the transfer of documents be corrected within ninety (90) days. *Id.* Article III requires the Master Servicer to oversee the actions of the servicer, on behalf of the Trustee, and requires that the Trustee shall provide all necessary powers of attorney. *Id.* Yet, as the evidence makes clear, no power of attorney was even created until **July 2011** - long after the first actions taken to foreclose against the Hurneys. CP 201-205.

Following the completion of the FFA mediation, RTS, who had not been properly appointed as a successor trustee by the loan owner, HSBC

Trust, issued a new NOTS document setting a foreclosure sale for June 27, 2014. This NOTS continued to include demands for payments for 26 months and more that are significantly in excess of the actual amounts owed. CP 56-59.

Because the purported new trustee, RTS, was never appointed as the trustee by the “beneficiary”, and because RTS never had a Beneficiary Declaration which complied with the requirements of the DTA, none of the attempted nonjudicial foreclosures should have been initiated, the Notice of Trustee’s Sale documents should not have been served and recorded, and the mediation was not done in compliance with the requirements of the DTA. RCW 61.24.030(7); 61.24.163.

The Hurneys filed this lawsuit and then obtained injunctive relief in order to stop the nonjudicial foreclosure. CP 99-101. They were required to make monthly payments to the Court Registry in order to obtain the injunctive relief. *Id.*⁶

As a result of the actions of the Defendants herein, the Hurneys faced the potential loss of their home even though it is most often in the best interests of the loan owner and borrowers to agree to a loan modification. The Hurneys paid an attorney \$350.00 to investigate their ability to pursue their claims and to decide upon the appropriate course of

⁶ There was a hearing on the Preliminary Injunction scheduled but it was eventually cancelled pursuant to agreement among the parties.

action in the amount of \$350.00. CP 56-59. They have incurred travel time and parking costs associated with attending that meeting and has other expenses incurred in providing information to their attorney in order to complete the investigation and decide upon a course of action. These costs are approximately \$100.00. *Id.* They also owed their attorney \$4,000.00 for work involved in seeking injunctive relief. *Id.* The Hurneys know that they are not “entitled” under the law to a loan modification; however, they are entitled to relief when the entities who have sought twice to foreclose nonjudicially on their home did not comply with the requirements of Washington’s Deed of Trust Act.

ARGUMENT

I. There were general issues of material fact that remained to be determined with respect to the Hurneys’ Consumer Protection Act (“CPA”) claim against Defendant/Appellees.

A. Defendant/Appellees engaged in unfair and deceptive conduct in their attempts to conduct a non-judicial foreclosure of the Hurneys’ home.

Defendants/Appellees in this case have engaged in a continuous course of conduct for years wherein they have repeatedly made false representations about the identity of the beneficiary and who had possession of the Hurneys’ original Promissory Note, which is what provides the right to nonjudicially foreclose under Washington law. The actual Beneficiary Declaration was not in conformity with the

requirements of the DTA and should not have been relied upon either in the foreclosure mediation or in connection with the two attempted nonjudicial foreclosures. One West and HSBC provided information regarding the history of the IndyMac entities and the alleged custodian role that the original IndyMac entity performed for HSBC, but no other information about the possession since then. CP 165-169; 201-205. The answer to the question about the location of the Note and who possesses it is of critical importance during a nonjudicial foreclosure.

If the contents of the PSA are to be believed (and it is appropriate to point out that it was the Hurneys who provided the document to the trial court), then the Note is the possession of the document custodian, Wells Fargo, which is acting as the “agent” for HSBC and no one else. CP 205-206; 253. Therefore, there are genuine issues of material fact which remain regarding the identify of both the “noteholder” and the loan owner. RCW 61.24.005(2); 61.24.030(7).

1. One West was only a servicer and never the “beneficiary”.

Washington state case law is clear about the liability that attaches to the types of actions that have occurred here. Analysis of the recent foreclosure case law begins with *Bain v. Metropolitan Mrtg. Group*, 175 Wn.2d 83, 98-110 (2012). The three questions sent to the Supreme Court in *Bain* included who may act as the “beneficiary” under the DTA;

if the “beneficiary” must be the “note holder”, what is the effect of someone who is not a “note holder” initiating a foreclosure; and whether a plaintiff can pursue a claim for violation of the Consumer Protection Act, RCW 19.86, *et seq.* (“CPA”), if an entity falsely asserts it is a “beneficiary”. *Bain* at 85-87. The Court made clear that the “beneficiary” statute means what it says and that it must be “the actual holder of the promissory note or other instrument evidencing the obligation” and that entity has “the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property.” *Id.* The Court did not determine the effect of such a misrepresentation, but subsequent case law has helped to clarify.

2. One West did not have the authority to appoint RTS as a successor trustee nor to instruct anyone to foreclose nonjudicially.

The *Bain* case was particularly focused on the use of MERS as the particular entity who was claiming to be the “beneficiary”, but the decision and analysis used by the Supreme Court would apply to any person or entity who falsely claims to be a “beneficiary”. In this case though, there are actual assertions being made in the recorded Assignment that MERS was not only the beneficiary, which was false, but that it had been directed to execute documents. Even taking the position of the Defendants at face value, that the execution of the 2010 Assignment done on behalf of a defunct entity, was done by the One West employees on

behalf of one of the “successors” or “assigns” of that IndyMac entity, MERS was still not a “beneficiary”. And the only entity involved in signing that Assignment was One West, who also was never a “beneficiary”, according to Ms. Marks’ silence on the subject. CP 165-169.

3. RTS’ initiation of a non-judicial foreclosure sale of the Hurneys’ home at the behest of OneWest and in reliance on a defective “beneficiary declaration” constituted an unfair and deceptive act.

The same analysis is true as regards the Appointment of Successor Trustee document, and it is even more important than an Assignment since it is required under the DTA. RCW 61.24.010(2). It is the document that gives a new “trustee” the power to initiate and complete a nonjudicial foreclosure. It was executed by a OneWest employee as an alleged “attorney in fact”, but the only Power of Attorney provided by the Defendants is dated from 2011. The testimony of Mr. Acebedo is merely an attempt by HSBC to excuse its refusal to adhere to the requirements of the DTA after it had been sued. Further, there is zero evidence that the supposed acts of the “principal”, HSBC, involved giving direction to and exercising control over an alleged “agent”, One West, consistent with the *Bain* requirements. CP 201-205.

When analyzing the effect of its decision that the plain language of the DTA definition of “beneficiary” means what it says and that the entity

initiating the foreclosure must be the “note holder”, the Supreme Court in *Bain* pointed out that in order to demonstrate who may initiate a foreclosure as the “beneficiary”,

[T]he equities of the situation would likely (though not necessarily in every case) require court to deem that the real beneficiary is the lender whose interests were secured by the deed of trust or that lender’s successors. If the original lender had sold the loan, that purchaser would need to establish ownership of that loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions. Having “MERS” convey its interests would not accomplish this.

Bain at 98. Here, the Defendants collectively participated in creating the false documentation. RCW 61.24.030(4) provides, in part, that a nonjudicial foreclosure cannot be held unless all of its requirements have been met. No one is required to use the non-judicial foreclosure process, but if they choose to do so, they must adhere to all of its requirements. It cannot “redefine” any portions of the statute in the Deed of Trust, as noted by the Court in *Bain*. What a lender inserts into a Deed of Trust cannot alter DTA statutory requirements.

The Legislature has set forth in great detail how non-judicial foreclosures may proceed. We find no indication the legislature intended to allow the parties to vary these procedures by contract. We will not allow waiver of statutory protections lightly. **MERS did not become a beneficiary by contract or under agency principals.**

Bain at 98-99. RCW 61.24.010(2) specifies who may act as a trustee and

the process by which a trustee is substituted by the “beneficiary”. RCW 61.24.010(2). There are no provisions allowing for this act to be performed by anyone other than the “beneficiary”, but if the courts are so inclined to allow entities acting as “attorneys in fact” perform this task, then the parties so contending must meet the “principal” and “agent” requirements are outlined in *Bain*. And just as the Court found in *Bain* that there was no evidence whatsoever presented that such a relationship existed, none has been presented here.

4. The DTA’s legislative history shows the Legislature intended to protect homeowners by providing that only the “beneficiary” may take key actions.

The Washington DTA has three objectives: (1) that the nonjudicial foreclosure process remains efficient and inexpensive; (2) that the process provides an adequate opportunity for interested parties to prevent wrongful foreclosure; and (3) that the process promotes the stability of land titles. *Cox v. Helenius*, 103 Wn.2d 383, 387-88, 693 P.2d 683 (1985). *See also* RCW 61.24.030(6). “Because the deed of trust foreclosure process is conducted without review or confirmation by a court, the fiduciary duty imposed on the trustee is exceedingly high.” *Id.* at 388-89. In *Cox*, the Washington Supreme Court noted that even if the plaintiffs had not properly acted to restrain the sale, it would have nevertheless been voided because of the trustee’s action. *Id.*

The recent foreclosure opinions of the Supreme Court and the intermediate appellate court decisions which have followed and relied on them make clear that under Washington law, a plaintiff may state a claim for damages relating to a breach of duties under the DTA and/or failure to adhere to the statutory requirements of the DTA even in the absence of a completed trustee's sale of the real property.⁷ These cases articulate the necessity under Washington law to conform to the strict parameters of the DTA at all times or face liability. As Division I emphasized in *Walker*, “No Washington case law relieves from liability a party causing damage by purporting to act under the DTA without lawful authority to act or failing to comply with the DTA’s requirements.” *Walker v. QLS*, 176 Wn. App. 294, 308 P.3d 716, 724 (2013). The Supreme Court has clarified that claims for violations of DTA requirements must be made under already recognized tort theories and/or other statutes, but the remainder of *Walker* remains good law. *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014); *Lyons v. U.S. Bank*, 336 P.3d 1142 (2014).

Since Washington case law makes clear that a plaintiff may pursue

⁷ See *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013); *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013); *Bain v. Metropolitan Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012); *Albice v. Premier Mortg. Svcs. of Wash., Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012); *Rucker v. Novastar Mortg., Inc.*, 177 Wn.App. 1, 15-16, 311 P.3d 31 (2013); *Bavand v. OneWest Bank, FSB*, 176 Wn. App. 475, 309 P.3d 636 (2013); *Walker v. Quality Loan Service Corp.*, 176 Wn. App. 294, 308 P.3d 716, 720-24 (2013).

these claims, we must look to the same cases to instruct us as to what principles guide the plaintiff's claims under the DTA and the CPA. *Id.* Citing to *Klem*, the *Walker* court noted that it "supports our conclusion that the specific remedies provided in the DTA are not exclusive." *Walker*, 308 P.3d at 721. With the exception of *Albice*, which did not address the issue because a CPA claim was not pled, all of the recent Washington foreclosure cases have consistently held that breach of duties and failure to adhere to the DTA's statutory requirements also constitute violations of the CPA and subject defendants to liability thereunder.

The Washington Supreme Court has recently and repeatedly reiterated the availability of a CPA cause of action for violations of the requirements of the DTA. *Frias v. Asset Foreclosure Services, Inc.*, *supra*; *Lyons, supra*; *Bain v. Metro. Mortg. Grp., Inc.*, *supra*; and *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013). These cases articulate the necessity under Washington law to conform to the strict parameters of the DTA at all times or face liability.

In *Frias* and *Lyons*, the Supreme Court rejected the argument that plaintiffs may bring direct claims for violations of the DTA pre-foreclosure, but strengthened its position on the ability of plaintiffs to bring claims for violations of the CPA and other tort claims that already exist under the law which are predicated upon violations of the DTA's

requirements. In *Frias*, the Supreme Court stated: “**even when there is no completed foreclosure sale and no allegation that plaintiff has paid foreclosure fees, it is possible for a plaintiff to suffer injury to business or property caused by alleged DTA violations that could be compensable under the CPA.**” *Frias* 181 Wn.2d at 18, citing to *Panag v. State Farm Ins. Co. of WA*, 166 Wn.2d 27, 57 (2009); *Lyons*, 336 P.3d at 1142 (emphasis added).

Numerous other DTA cases decided by the Supreme Court require that language in the DTA be construed strictly in the homeowner’s favor because it eliminates many protections enjoyed by borrowers in judicial foreclosures. *Bain*, 175 Wn.2d. at 93 (citing *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007)); *see also Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 105, 297 P.3d 677 (2013) (same); *Albice v. Premier Mortg. Servs. of Washington, Inc.*, *supra*. The DTA “must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers’ interests and the lack of judicial oversight in conducting non-judicial foreclosure sales.” *Bain*, 175 Wn.2d. at 93.

A plaintiff who alleges a violation of the Washington Consumer Protection Act must prove five elements: “(1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact;

(4) injury to plaintiff in his or their business or property; (5) causation.”
Hangman Ridge Training Stables v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, (1986). The Hurneys have described with particularity the unfair and deceptive acts and practices of the Defendants in great detail above. These included the use of One West employees to sign documents that the statute requires be signed by the “beneficiary”, including the Appointment of Successor Trustee document, and the issuance, service and recording of a Notice of Trustee’s Sale in 2010 before the Appointment document purporting to appoint RTS as the new trustee had been recorded. Further, the Beneficiary Declaration provided by One West, on behalf of HSBC, and relied upon by RTS to pursue foreclosures was facially defective. The Defendants knew it was defective and pursued foreclosure nevertheless.

As the Supreme Court also noted in *Bain*, a homeowner may pursue a claim for a violation of the CPA, provided that the plaintiff be able to provide the Court with sufficient facts to support the claim. *Bain*, at 98-110. The Court noted that “characterizing MERS as the beneficiary has the capacity to deceive” and that there is certainly a presumption that the public interest element is met because MERS is involved in “an enormous number of mortgages in the country”. *Id.* The same analysis applies to the Defendants here, just as the Court noted in *Bain*. *Id.* The Hurneys can prove that these acts constituted violations of the CPA,

consistent not only with the recent CPA cases relating to claims under the DTA, but also consistent with older CPA cases. *Sato v. Century 21*, 101 Wn.2d 599, 681 P.2d 242 (1984); *St. Paul Ins. Co. v. Updegrave*, 33 Wn.App. 653, 656 P.2d 1130 (1983); *Talmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 605 P.2d 1275 (1979). Specific monetary damages are not even necessary but a court is nevertheless required to award a prevailing plaintiff attorneys fees. *Mason v. Mortgage America*, 114 Wn.2d 842, 792 P.2d 142 (1990).

In their briefing below, Defendants virtually ignored completely the precedential and binding Washington appellate court decisions in their briefing, relying instead on trial court orders from the federal district courts, which are nothing more than court orders and which were decided before the recent decisions. CP 102-123. Unfortunately, it appears that the trial court relied upon them to reach its decision to dismiss the Hurneys' case. The Washington Supreme Court noted in *Klem* that claims for violations of the CPA, RCW 19.86, *et seq.* can be brought against defendants for acts that are “unfair or deceptive”, including in the context of a non-judicial foreclosure sale. *Klem* at 11. The Court went on to cite extensively and discuss its decision in *Panag v. Farmers Ins. Co. of WA*, 166 Wn.2d 27, 48, 204 P.3d 885 (2009), and then it expressly clarified that a violation of the CPA may be brought because of a “*per se* violation of a

statute, an act or practice that has the capacity to deceive the substantial portions of the public, or an unfair or deceptive practice not regulated by statute but in violation of public interest.” *Klem* at 16. They quoted from this portion of *Panag*:

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would have undertaken an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of the country.

Klem, at 16, citing to *Panag*, 166 Wn.2d at 48 (quoting *State v. Schwab*, 103 Wn.2d 542, 558, 693 P.2d 108 (1985) (Dore, J. dissenting) (quoting H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914))). The *Klem* Court further noted that “an act or practice can be unfair without being deceptive” and that the statute clearly allows claims for “unfair acts **or** deceptive acts or practices.” *Klem*, at 16-17. Citing to *Panag*, the *Walker* Court also noted that Walker had valid claims even without the foreclosure being complete because he had suffered harm:

In *Panag v. Farmers Insurance Co. of Washington*, our Supreme Court held, “[T]he injury requirement is met upon proof the plaintiff’s property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal.” Investigative expenses, taking time off from work, travel expenses, and attorney fees are sufficient to establish injury under the CPA.

....

Because Walker pleads facts that, if proved, could satisfy all five elements, we conclude that the trial court erred by dismissing his CPA claim.

Walker at 720-724, citing to *Panag*, 166 Wn.2d at 53. The Court of Appeals also decided *Rucker v. Novastar, Inc.*, 177 Wn.App. 1 (2013) the same day as *Walker*. The *Rucker* Court noted: “[W]hen an unlawful beneficiary appoints a successor trustee, **the putative trustee lacks the legal authority to record and serve a notice of trustee’s sale;**” “such actions by the improperly appointed trustee, we have explained, constitute ‘material violations of the DTA.’” *Rucker*, at 12, citing *Walker* (quotation marks omitted; emphasis added).

B. RTS’ unfair and deceptive conduct affected the public interest.

The CPA allows for proof that the complained of practice is injurious to the public by actually injuring other persons or it “had the capacity to injure other persons” or “has the capacity to injure other persons”. RCW 19.86.093. It is clear that these actions are part of the Defendants’ regular business practices, which have the potential to injure others in a similar fashion in the future. *Id.* The Washington Supreme Court found in *Bain, Frias* and *Lyons* that such false information is “unfair” and “deceptive” under the CPA, as did the Court of Appeals in *Walker* and *Rucker*.

The Defendants made note of the change to the CPA “public interest” element in 2009. RCW 19.86.093 allows for proof of the “public interest” element by proving the “**unfair or deceptive act or practice**”:

(3)(a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.

RCW 19.86.093(3) (emphasis added). Contrary to the assertions made by the Defendants in the trial court, the Legislature did not change the statute to make it more difficult to prove the public interest element, it was designed to make it easier, consistent with the history of the CPA. Thus, it is the “act” and “practice” of using false information and improper documentation to pursue a nonjudicial foreclosure which is unauthorized by the DTA that are the actions and practices of the Defendants that meets the elements in this case. The fact that One West and HSBC, and RTS prior to its collapse, regularly engage in bringing nonjudicial foreclosures in Washington and elsewhere demonstrates the fact that their actions and practices **has** the capacity to injure others by continuing to engage in these activities.

One such example of its involvement in other wrongfully initiated nonjudicial foreclosures is the case of *Bavand v. OneWest Bank, FSB*, 176 Wn. App. 475, 309 P.3d 636 (2013), which involved OneWest, acting on behalf of an successor to IndyMac and the same alleged trustee, RTS. The

problems with the signing of documents by OneWest employees on behalf of MERS and others in *Bavand* is similar to the allegations made in this case. In *Bavand*, the Court of Appeals held that the Appointment of Successor Trustee, when done by OneWest when it was not the “beneficiary” was invalid. While in *Bavand* the OneWest signer purported to do so on behalf of MERS, and in this case it did so on behalf of HSBC, what matters is that OneWest was not the “beneficiary” and there is no record at all of anyone from HSBC, the purported “beneficiary” and loan owner, instructing OneWest to take any action whatsoever, let alone under a Power of Attorney document that was not created until the year following the actions of the Defendants in 2010. OneWest admitted at oral argument in *Bavand* that it was never the noteholder and given the lack of evidence here, one must assume that same would be true if it were forced to testify truthfully to this Court. Certainly, Ms. Marks does not provide any testimony on this subject. CP 165-169. The *Bavand* Court goes on to engage in an analysis of the CPA claims that is similar to that employed later by the Supreme Court in *Frias*, *Lyons* and *Trujillo*, rejecting the same sort of arguments made below by OneWest. It was unavailing in 2013, and it is an argument that has no support whatsoever at this time.

The Hurneys described their injuries and damages, which were occasioned by the actions of the Defendants in making a choice not to

comply with the requirements of the Washington DTA, in Mr. Hurneys' Declaration. CP 56-59. The injuries and damages described by the Hurneys are consistent with the Supreme Court's holding that the same sort of injury and damages were compensable under the CPA in *Frias* and *Lyons*. The Hurneys' injury includes demands for monies which were not owed included in all of the nonjudicial foreclosure documents, and which have been added to their loan balance. They also pointed out problems with the amounts being demanded in the foreclosure documents for monthly payments – something that went unanswered by the Defendants. CP 56-95. Their out of pocket monetary damages also include attorneys' fees incurred to investigate their rights, mediation fees, the costs of filing suit and serving the complaint and travel and parking costs associated with meeting with an attorney and attending mediations and hearings. *Id.*

In *Frias*, the Supreme Court found that a borrower could suffer an injury based upon “unlawful debt collection practices, even when there is no dispute as to the validity of the underlying debt.” *Frias*, citing to *Panag* at 55-56, n. 13. While also noting that under the CPA, a plaintiff need only prove an “injury”, and not necessarily “damages”, it reiterated that consulting with an attorney “to dispel uncertainty regarding the nature of an alleged debt is distinct from consulting an attorney to institute a CPA claim” and is therefore compensable under the CPA. *Frias* at 20, citing to

Mason v. Mortgage America, 114 Wn.2d 842, 792 P.2d 142 (1990). Here, the same can be said regarding an attorney consultation regarding how to proceed under the circumstances and what to do about the looming foreclosure. It is separate from the bringing of a CPA claim. The *Frias* Court noted that “business and property injuries compensable under the CPA are relatively expansive.” *Frias* at 19.

Similar to its refusal to acknowledge other binding authority, the Defendants ignores the most recent DTA decision by the Supreme Court in *Trujillo*. Portions of the Court of Appeals decision, *Trujillo v. NWTS*, 181 Wn. App. 484, 326 P.3d 768 (2014), have been rejected in the Supreme Court decision, and the remainder of the issues raised in *Trujillo* will be determined in another case that the Court is working on. The Court rendered its decision, relying upon *Lyons*, because the Beneficiary Declaration was, on its face, defective. While the document in this case was not an exact replica of the problem declaration used in *Lyons* and *Trujillo*, it nevertheless contains ambiguous language that should have resulted in further inquiry by the trustee before issuing the trustee documents, and it should have resulted in a refusal to proceed according to the instructions of OneWest because there was no legal authority. *Trujillo v. NW Trustee Servs., Inc.*, 183 Wn.2d 820, 355 P.3d 1100 (2015). There was no “principal” at HSBC who was providing direction and guidance to

OneWest and there was no Power of Attorney even in existence in 2010. CP 201-205.

Beginning with *Bain*, 175 Wn.2d at 88-89, 93, the Supreme Court found that “beneficiary” was defined by the legislature in the DTA to mean the “noteholder.” RCW 61.24.005(2). The Supreme Court further found in *Bain* that the trustee in a non-judicial foreclosure “shall have proof that the beneficiary is the *owner* of any promissory note or other obligation secured by the deed of trust,” *id.* at 93-94 (quoting RCW 61.24.030(7)(a); emphasis added), and that “[i]f the original lender [has] sold the loan, that purchaser would need to establish *ownership* of the loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions.” *Id.* at 111 (emphasis added). It is inconsistent with *Bain* for the *Trujillo* court to find that after the legislature amended the DTA to include an express proof of ownership requirement for the noteholder in RCW 61.24.030(7)(a) and required that the owner be identified under RCW 61.24.030(8)(l), it intended there to be an even lower standard for use under the DTA which allows parties with a lesser relationship to the note – less than the “noteholder” and “owner” requirements recognized in *Bain* – to non-judicially foreclose.⁸

⁸ The legislature added this additional “proof of ownership” requirement to the DTA in 2009. *See* Laws of 2009, ch. 292, § 8 (7)(a). At the same time, it added the requirement that in any non-judicial foreclosure on residential real property, the notice of default must

The Defendants below made the same argument that made in by another foreclosing trustee in *Trujillo* and in other cases before the Supreme Court: that because the Hurneys defaulted on their loan, none of their injuries or damages can be attributable to the entities involved in nonjudicially foreclosing. Not only is this argument absurd, in that the DTA has built in protections and requirements which must be adhered to irrespective of whether or not the loan is actually in default. Thus, it is irrelevant whether or not the borrowers have actually defaulted on the loan when evaluating CPA claims based upon refusals by trustees and creditors to adhere to the requirements of the DTA. In every precedential case issued in the last few years by the Washington appellate courts, none of the published decisions have involved a borrower who alleged that he or she was not in default. Therefore, the notion that the fact of a default precludes the bringing of a claim has been rejected by Washington courts again and again, and again. *Trujillo v. NWTS*, at 833-837 (2015).

The Defendants in this case were intentionally obtuse about asserting the alleged “agent” relationship because they merely provided the Court with a Power of Attorney document and tried to assert that some other mysterious version existed prior to the 2011 document, and that all prior acts are retroactively approved by HSBC through an employee with

identify the “name and address of the owner of any promissory notes or other obligations secured by the deed of trust.” *Id.* § 8 (8)(l).

no documented power to do so. However, it is clear that they are attempting to misuse “agent” language in *Bain*. *Bain* makes clear the exact opposite of what the Defendants argue – that in order to be an “agent” under Washington law, there must be a principal who exerts authority and control over said agent. No such relationship exists here and there is no evidence of such. Moreover, the Hurneys maintain that the portions of the DTA which are at issue here may not be performed by “agents”. RCW 61.24.005(a); 61.24.030(7); 61.24.030(8); 61.24.163(5). (*Bain* noted that there are provisions in the DTA that allow for agents to act, and cited to RCW 61.24.031. This is one of the very few portions of the DTA where there is mention that acts may be performed by an “authorized agent”.) *Bain*, 175 Wn.2d at 97-98. The Court found that the capacity and incentive to engage in alternatives to foreclosure was a centrally important role of a DTA beneficiary given the passage of the FFA. *Id.* at 102-03. Because the FFA aimed to create a framework “for homeowners and beneficiaries to communicate with each other and reach a resolution and avoid foreclosure whenever possible,” DTA beneficiaries must be able to “negotiate a deal in the face of changing conditions.” *Id.* at 103; Laws of 2011, ch. 58, § 3(2). Here, OneWest was acting as the purported agent for HSBC in the mediation, but did not provide documentation that supported its alleged authority to so act. RCW 61.24.163(5)(c); 61.24.030(7)(a).

This was an additional “unfair and deceptive” act in which the Defendants engaged, which supports their CPA claims.

When the legislature amended the statute in 2009, it did so because it recognized the gravity of the problems being caused by the lack of transparency regarding the ownership of promissory notes during the non-judicial foreclosure process and amended the DTA.⁹ The legislature both added RCW 61.24.030(7)(a), requiring that a non-judicial foreclosure trustee have evidence that the beneficiary is the owner of the promissory note, not just the holder, before initiating foreclosure proceedings, and added RCW 61.24.030(8)(1) to require that the Notice of Default identify and provide an address for the owner of the promissory note, not just the noteholder. *Id.* Also during the 2009 amendments, the additions were also consistent with the ownership language that had long existed in RCW 61.24.040(2), which supports the conclusion that the legislature had always intended that the “noteholder” or “beneficiary” was also the owner. While the ownership language in RCW 61.24.030(7)(a) has essentially been read out of the statute by the Supreme Court’s decisions in *Trujillo* and *Brown v. Dep’t of Commerce*, 184 Wn.2d 509, 539, 359 P.3d 771 (2015), the requirement that the party acting to foreclose be the “beneficiary” (noteholder) has remained unchanged.

⁹ See Laws of 2009, ch. 292, § 8 (7)(a); Laws of 2009, ch. 292, § 8 (8)(l).

Division III of the Court of Appeals recently published a decision in *Blair v. Northwest Trustee Services*, Case No. 32816-3-III (March 17, 2016) which ignored the language in *Trujillo* regarding the standard that courts should use to measure the alleged noncompliance with the requirements of the DTA. *Trujillo*, 183 Wn.2d at 834, n. 10. The *Blair* Court confirmed the following from *Trujillo*:

A trustee must have the requisite proof of the beneficiary's ownership of the note *before* recording, transmitting, or serving the notice of trustee's sale. See Br. of Amicus Curiae of Att'y Gen. of State of Wash. at 10; RCW 61.24.030(7)(a) ("*B*efore the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust." (emphasis added)). A court must assess the propriety of the trustee's conduct based upon the trustee's evidence and investigation at that time.

Trujillo, 183 Wn.2d at 834, n. 10. In *Blair*, Div. III noted, "Because NWTS relied on the ambiguous beneficiary declaration prior to recording, transmitting, or serving the notice of trustee's sale, it violated RCW 61.24.030(7)(a)." Op., 18. The Court then went on to analyze whether or not Mr. Blair met the injury elements of a CPA claim and concluded that he met that element because he had incurred attorneys' fees and costs associated with consulting with an attorney to investigate NWTS' authority to foreclose. Opinion, 18-19. The same analysis would apply to

the Hurneys in this case.

Turning to the question of whether Mr. Blair proved the casual element of a CPA claim, the *Blair* Court held, in its Amended Opinion:

Moreover, NWTS's wrongful act was its violation of RCW 61.24.030(7)(a). This provision requires the trustee to have proof that the beneficiary is the owner of the note prior to the trustee recording, transmitting, or serving the notice of trustee's sale. The purpose for requiring such proof is to prevent wrongful foreclosures. But the CPA has a causation requirement. A borrower must prove more than the trustee violated the statute, and he was injured. A borrower must prove, but for the violation of the statute, he would not have been injured. *Indoor Billboard*, 162 Wn.2d at 84. Had NWTS complied with RCW 61.24.030(7)(a), it would not have relied on an ambiguous declaration. Instead, it would have contacted BoA before instituting foreclosure, learned BoA was the holder of the note endorsed in blank, thus having the proof required by the statute and allowing it to proceed with foreclosure against Mr. Blair's property. Thus, Mr. Blair would have been injured even had NWTS complied with RCW 61.24.030(7)(a). We conclude Mr. Blair has failed, as a matter of law, to establish the causal link element of his CPA claim against NWTS.

Op. 19. Unfortunately, this conclusion is disconnected from the facts of how nonjudicial foreclosures are conducted and misconstrues what is properly identified as the “unfair or deceptive act”. RCW 19.86.020. It would be a mistake for this Court to reach the same faulty conclusion in this case.

The beneficiary declaration is not a document that is provided to a homeowner. Rather, RCW 61.24.030(7) requires that the document be

provided to the trustee. The only reason that Mr. Blair saw the document was because he initiated litigation. He then restrained the sale and questioned the entire foreclosure process because of the totality of the actions taken by the Defendants, including NWTS. He was only able to do this because he sought assistance from a lawyer to investigate his claims and for which he made payment. Op., 17-18. During that process, he discovered that just as he alleged in his Complaint, NWTS did not have the proper legal authority to issue the Notice of Trustee's Sale document because it did not have a proper beneficiary declaration. RCW 61.24.030(7)(a). *Id.*

C. Defendant/Appellees' unfair and deceptive conduct occurred in trade or commerce.

The Appellate Court incorrectly concluded that the "unfair and deceptive act" at issue was the execution of the improper beneficiary declaration. In fact, the actual "unfair and deceptive" act was NWTS' reliance upon the ambiguous beneficiary declaration to issue the NOTS document and the scheduling of a foreclosure auction, which Mr. Blair was required to enjoin. Mr. Blair would not have had to take this action were it not for NWTS' refusal to adhere to its statutory duties, and he might not have ever needed to take that action if he had obtained a loan modification before NWTS ever got around to enforcing the requirements

of the DTA on its customers. Further, NWTs' reliance upon this exact same ambiguous declaration is part of its regular business activities, as evidenced not only by the testimony of Mr. Blair's attorney (CP 1096-1097), but by the facts and findings in *Trujillo* and *Lyons v. U.S. Bank*, 181 Wn.2d 775, 336 P.3d 1142 (2014). "A foreclosure 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 789; citing to *Walker v. Quality Loan Serv. Corp of Wash.*, 176 Wn.App. 294, 309-10, 308 P.3d 716 (2013).

In this case, the Hurneys only had the Beneficiary Declaration because it was used in support of the FFA mediation process. The Defendants herein offered to the trial court the "Loss Mitigation Declaration" as if it were of the same value as the noncompliant Beneficiary Declaration. The Beneficiary Declaration in this case was just as "ambiguous" as the beneficiary declaration that was the subject of the *Lyons* and *Trujillo* cases, if not more so, since the declarant qualified the signing as being based upon information that "may" have been available. CP 95.

As the Supreme Court noted in *Trujillo*,

Following our recent decision in *Lyons v. U.S. Bank National Ass'n*, 181 Wn.2d 775, 336 P.3d 1142 (2014), we hold that **a trustee cannot rely on a beneficiary**

declaration containing such ambiguous alternative language. Trujillo therefore alleged facts sufficient to show that NWTs breached the DTA and also to show that that breach could support the elements of a Consumer Protection Act (CPA) claim.

Trujillo at 820 (emphasis added). If a trustee “**cannot**” rely upon such a declaration, and therefore could not issue an NOTS and cause it to be recorded, and the foreclosure was only stopped because the Hurneys paid a lawyer to obtain injunctive relief, just as Ms. Trujillo, then how does this activity fail to meet the causal requirement under the CPA?

The facts of the *Lyons* case should also help inform the Court. While there were a multitude of matters at issue in that case which are not directly analogous to the facts of the Hurneys’ case, the issues surrounding the import of the beneficiary declaration are the same. There was no evidence whatsoever that Ms. Lyons knew the contents of the beneficiary declaration before she filed her case. But the Supreme Court noted that Ms. Lyons had raised issues related to a wrongfully initiated nonjudicial foreclosure by the trustee. *Lyons* at 783-785. The Supreme Court found that what mattered as to the trustee was that it tried to use the ambiguous and improper beneficiary declarations to initiate and continue to pursue a nonjudicial foreclosure through the NOTS document and that this was the action that was the “unfair and deceptive acts”.

The *Lyons* case involved the reversal of a summary judgment and the Supreme Court found that because the trustee had not demonstrated that it had proof other than the defective beneficiary declaration that would have allowed it to issue the NOTS, Ms. Lyons' claims should have survived summary judgment. *Lyons* at 789. This Court indicated that the trustee in *Lyons* could later find that Wells Fargo had possession of the Note, but it did not indicate that such a finding would relieve it from liability for its acts prior to making that discovery. *Id.* Here, the only evidence before the Court is that all of the Defendants at least relied upon the "ambiguous" beneficiary declaration and at least One West and RTS participated in its creation. And RTS, upon instructions from One West, used that beneficiary declaration, as well as the improper Assignment and Appointment of Successor Trustee, to issue and record the two NOTS documents. RTS did not provide any testimony or evidence because it had ceased to exist shortly after the case was filed, so the Court must rely upon the record from the Defendants, which is silent as to the Beneficiary Declaration and it is clear that it cannot be relied upon. *Trujillo* at 820.

D. Defendant/Appellees' unfair and deceptive conduct proximately caused the Hurneys' injuries and damages.

The "causal" connection to the Hurneys' injuries and damages, as approved by this Court, is to the wrongful "recording, transmitting, or

serving the notice of trustee's sale" when the trustee did not know that the entity signing the beneficiary declarations had physical possession of the Hurneys' Note. *Id.* But for the trustee relying upon the defective ambiguous beneficiary declaration, it would not have issued the two Notices of Trustee Sale and the Hurneys would not have been required to meet with a lawyer to investigate his claims, to file suit and to pay a lawyer to enjoin the foreclosure sale when they did so.

The Defendants have a choice about how to operate in conformity with the requirements of the DTA, and it would vitiate the importance of the requirements of the DTA if their business operations can be predicated upon the regular reliance upon defective documentation and a hope that the information will really turn out to be correct.

CONCLUSION

The Hurneys' claims under the Consumer Protection Act based upon violations of the requirements of the DTA, as outlined above, are supported by the facts that are known and there remain genuine issues of material fact that must be resolved by a trier of fact, such as the physical location of the Note since loan inception. For these reasons, the granting of summary judgment by the trial court was in error and it should be reserved and the case remanded to the trial court for trial of the matter.

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Respectfully submitted this October 6, 2016.



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Attorney for Appellants Hurneys

CERTIFICATE OF SERVICE

I, Tony Dondero, declare under penalty of perjury as follows:

1. I am over the age of eighteen years, a citizen of the United States, not a party herein, and am competent to testify to the facts set forth in this Declaration.

2. That on October 6, 2016, I caused the foregoing document attached to this Certificate of Service plus any supporting documents, declarations and exhibits to be served upon the following individuals via the methods outlined below:

Fred B. Burnside, WSBA #32491 Davis Wright Tremaine 1201 Third Ave., Suite 2200 Seattle, WA 98101 Telephone: (206) 622-3150 Email: fredburnside@dwt.com Attorney for Defendants HSBC and OneWest	<input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Federal Express <input type="checkbox"/> Other: <u>Regular U.S. mail, postage prepaid</u>
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing statement is both true and correct.

Dated this Thursday, October 6, 2016, at Seattle, Washington.

/s/Tony Dondero
Tony Dondero, Paralegal