

No. 45037-2-II

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

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RICHARD L. IRWIN,

Appellant

v.

NORTHWEST TRUSTEE SERVICES, INC., MORTGAGE  
ELECTRONIC REGISTRATION SYSTEMS, INC., a/k/a MERSCORP,  
EMC MORTGAGE CORPORATION, WELLS FARGO BANK, N.A.  
SUCCESSOR BY MERGER TO WELLS FARGO BANK  
MINNESOTA, N.A. f/k/a NORWEST BANK MINNESOTA, N.A.,  
SOLELY AS TRUSTEE FOR STRUCTURED ASSET MORTGAGE  
INVESTMENTS II TRUST 2007-AR4, MORTGAGE PASS-THOUGH  
CERTIFICATES SERIES 2007-AR4, and JP MORGAN CHASE  
BANK, N.A.,

Respondents.

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Appeal from Superior Court for Pierce County  
The Honorable Stephanie A. Arend

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APPELLANTS' OPENING BRIEF

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### **I. INTRODUCTION**

The court dismissed Plaintiffs' claims against all defendants for violation of the Consumer Protection Act, Fraud and Misrepresentation, and Breach of the Covenant of Good Faith/Fair Dealing under a Breach of Contract claim. Defendants JP Morgan Chase and MERS based their argument on a judicial estoppel theory, claiming that Mr. Irwin failed to mention MERS anywhere on his bankruptcy schedules, and should therefore be estopped from bringing a civil claim in Superior Court against the defendants regarding his note or deed of trust to stop a foreclosure.

Plaintiffs assert that this finding and the court's ruling was in error, and that the Irwins did not have enough knowledge that MERS could have liability when they filed their bankruptcy schedules, and should therefore not be estopped from bringing claims against MERS, JP Morgan Chase, and Northwest Trustee Services, Inc. for liability

regarding their unfair and deceptive acts, fraud and misrepresentation, and breach of contract.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred on May 31, 2013 when it granted Defendants' Motion to Dismiss, entered judgment in favor of the Defendants, and dismissed the Irwin's Consumer Protection Act, Fraud and Misrepresentation, and Breach of the Covenant of Good Faith and Fair Dealing claims with prejudice.

2. The trial court erred on May 31, 2013 when it granted the motions to dismiss of the Defendants, entered judgment in favor of the Defendants, and dismissed the Irwins' claims based on the finding that the bankruptcy schedules submitted in the Irwin's bankruptcy case were an admission that the defendants are the proper beneficiary to whom the debt is owed, and were therefore judicially estopped from bringing civil claims against the Defendants.

### *Issues Pertaining to Assignments of Error*

1. Did the trial court erroneously grant the Defendants' motions under CR 12(b)(6) where Mr. Irwin sufficiently stated claims in the complaint to allow the court to draw the reasonable inference that the Defendants were liable for the misconduct alleged and he was entitled to relief? (Assignment of Error No. 1)

2. Did the trial court erroneously grant the Defendants' motions to dismiss where Mr. Irwin sufficiently pled facts supporting all causes of action on the grounds that judicial estoppel applied because of

statements made or omitted by Mr. Irwin in his bankruptcy schedules? (Assignment of Error No. 2)

### III. STATEMENT OF THE CASE

On or about June 28, 2007, the Irwins entered into a financial arrangement through a mortgage broker and originator GreenPoint Mortgage Funding, Inc. to purchase real property located at 204 10<sup>th</sup> St. NW, Puyallup, WA 98373. (CP 3). The Deed of Trust issued with this financing arrangement was recorded with Pierce County on June 28, 2007 as instrument number 200706280953. This Deed of Trust named the Lender as GreenPoint Mortgage Funding, Inc., the Borrower as Richard L. Irwin and Miriam J. Irwin, Husband and Wife, and Chicago Title Insurance as the Trustee. (CP 3).

In addition to these three parties on this Deed of Trust, Defendant Mortgage Electronic Registration Systems, Inc. (hereinafter “MERS”) claims that it is “acting solely as a nominee for the Lender and Lender’s successors and assigns. **MERS is the beneficiary under this Security Instrument.**” (boldface in original). Paragraph 24 of the Deed of Trust provides that the “*lender*” may appoint a successor trustee. (CP 4).

The adjustable rate note indicated that the principal amount financed was \$233,750.00. The note indicates that the “*lender*” may transfer the note. The amount of the initial monthly payment was \$954.26. The

Irwins paid approximately \$26,000.00 as a down-payment towards the financing of the property. (CP 4).

Mr. Irwin received a letter from EMC dated August 20, 2007 that notified the Irwins that the servicing of the loan was transferred from Greenpoint Mortgage to EMC, effective September 3, 2007. (CP4).

On June 27, 2011, the Pierce County Office of Assessor-Treasurer mailed a "Real Property Value Change Notice" to Plaintiff declaring the value for taxes due in 2012 was assessed at \$190,300, and that the prior assessment value was \$205,900.00. (CP 4).

Sometime around the summer/fall period of 2011, Mr. Irwin contacted EMC to discuss a loan modification and EMC refused to speak to him in any manner whatsoever regarding a loan modification or any other workout, in violation of the Foreclosure Fairness Act, RCW §61.24.163 *et seq.* (CP 4).

On June 29, 2011 Defendants colluded to record an Assignment of Deed of Trust with Pierce County under instrument number 102206290251. This assignment alleges that one "Wanda Chapman" is the Vice President of MERS, and purports to assign the subject deed of trust to Wells Fargo Bank, N.A. successor by merger to Wells Fargo Bank Minnesota, N.A., f/k/a Norwest Bank Minnesota, N.S., solely as

Trustee for Structured Asset Mortgage Investments II Trust 2007-AR4, Mortgage Pass-Through Certificates, Series 2007-AR4. (CP 4-5).

Upon information and belief, Wanda Chapman is a robo-signer and did not review the document entitled “Assignment of Deed of Trust” referenced in the foregoing paragraph. Upon information and belief, Wanda Chapman is an employee of JP Morgan Chase in Florence County, South Carolina, and is not a corporate officer of MERS. (CP 5)

A letter entitled “Notice of Pre-Foreclosure Options” dated May 9, 2012 was sent to Mr. Irwin by JP Morgan Chase Bank, NA. (CP 5).

On September 12, 2012, Defendant NWTS executed a Notice of Default (“NOD”) alleging that Mr. Irwin was in default on an alleged debt, but did not reference any promissory note and did not state the loan number of the alleged debt. On this date, NWTS was not the lawful Trustee and therefore not empowered to issue a Notice of Default. The Notice of Default is the mandatory precursor to the Notice of Trustee’s Sale under the Washington Deed of Trust Act, RCW §61.24 *et seq.* (CP 5).

This NOD alleged that the amount required to cure the default was \$32,327.21. The NOD also alleged that as of the date of the notice, Mr. Irwin owed \$270,596.21, but does not itemize this amount as to how much represents the principle, the interest, fees or penalties. (CP 5).

This NOD alleged that failure to cure the alleged default within 30 days of the NOD may lead to sale of the Property at public auction no less than 120 days from the date of this notice. (CP 5).

The NOD alleged that the owner of the Note and the “creditor to whom the debt is owed” is Wells Fargo Bank, N.A. successor by merger to Wells Fargo Bank Minnesota, N.A., f/k/a Norwest Bank Minnesota, N.S., solely as Trustee for Structured Asset Mortgage Investments II Trust 2007-AR4, Mortgage Pass-Through Certificates, Series 2007-AR4, and that the loan *servicer* was JP Morgan Chase Bank, N.A. Mr. Irwin never received notice from EMC, JP Morgan Chase, or anyone else that the servicing was being transferred from EMC to Chase. (CP 5-6).

On September 13, 2012, NWTS recorded an “Appointment of Successir Trustee” [sic] with an emergency non-standard recording cover sheet attached allegedly pursuant to RCW 36.18.010. The underlying document attached to the cover sheet declares that the alleged present beneficiary, Wells Fargo Bank, N.A. successor by merger to Wells Fargo Bank Minnesota, N.A., f/k/a Norwest Bank Minnesota, N.S., solely as Trustee for Structured Asset Mortgage Investments II Trust 2007-AR4, Mortgage Pass-Through Certificates, Series 2007-AR4 appoints NWTS as the successor trustee. (CP 6).

This appointment of successor trustee is signed by one “Payne Davis,” allegedly Vice President of either JP Morgan Chase Bank, NA or Wells Fargo Bank, N.A. successor by merger to Wells Fargo Bank Minnesota, N.A., f/k/a Norwest Bank Minnesota, N.S., solely as Trustee for Structured Asset Mortgage Investments II Trust 2007-AR4, Mortgage Pass-Through Certificates, Series 2007-AR4. It is unclear from the document of which company Payne Davis alleges he or she is the Vice President. This signature and statement of the appointment is not dated, but the notary, Barbara J. Crowl, of Franklin County, Ohio, dated the jurat on August 14, 2012. (CP 6).

On December 11, 2012 NWTS executed, allegedly by one “Heather Smith,” a Notice of Trustee’s Sale (“NOTS”). This NOTS declared that the property would be sold at a trustee’s sale auction on March 22, 2013 at 10:00 a.m. (CP 6). This NOTS also alleged that the sale would be performed to secure an obligation in favor of MERS solely as nominee for GreenPoint Mortgage Funding, Inc. This NOTS alleged that the total amount due to reinstate the loan was \$35,750.19, and that the Principal balance of \$241,269.45 together with interest is the sum owing on the obligation. (CP 7).

Upon information and belief, the subject note was transferred to the securitized trust Structured Asset Mortgage Investments II Trust 2007-

AR4, Mortgage Pass-Through Certificates, Series 2007-AR4 after the cut-off date and after the closing date of this security, as registered with the federal Securities Exchange Commission (SEC), making the transfer fraudulent. (CP 7).

#### IV. SUMMARY OF ARGUMENT

The Irwins' bankruptcy schedules should not be considered an admission by the Irwins that the Defendants are the property parties to whom the debt is owed. In addition, The Irwins were unaware of any potential liability that may be attributed to MERS at the time of the filing of the bankruptcy in 2011, and they should not be judicially estopped from raising claims against MERS or any other defendant on this basis.

All respondents violated the Consumer Protection Act because they committed unfair and deceptive acts that had a public interest impact, and which caused harm to the Irwins. The Assignment of deed of trust and the Appointment of successor trustee were not in compliance with the Deed of Trust Act.

All respondents breached the Covenant of Good Faith-Fair Dealing when they initiated foreclosure proceedings that they knew or should have known were not in compliance with the Deed of Trust Act.

All respondents committed common law fraud & misrepresentation in the assignment of deed of trust and the appointment

of successor trustee. The decision of the court below should be reversed and the case remanded for further proceedings.

## V. LEGAL ARGUMENT

### A. Standard of Review

For purposes of a 12(b)(6) motion, the court presumes the allegations in the complaint to be true. *Cutler v. Phillips Pet. Co.*, 124 Wn.2d 749, 755, 881 P.2d 219 (1994). Dismissal of actions under CR 12 is appropriate only if it appears beyond a doubt that the Plaintiff can prove no set of facts, consistent with the complaint, which would entitle the Plaintiff to relief. *Holiday Resort Community Ass'n. v. Echo Lake Associates, LLC.*, 134 Wn. App. 210, 218, 135 P.3d 499 (2006); *Suleiman v. Lasher*, 48 Wn. App. 373, 376, 739 P.2d 712, *review denied*, 109 Wn.2d 1005 (1987). A CR 12(b)(6) motion should be granted “sparingly and with care” and “only in the unusual case in which plaintiff includes factual allegations that show on the face of the complaint that there is some insuperable bar to relief.” *Holiday Resort Community Ass'n.* at 218, citing *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998).

A claim is factually plausible when it contains factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 129 S. Ct 1937,

1949, 173 L. Ed. 2d 868 (2009). Washington courts hold that “we must take the facts alleged in the complaint, as well as hypothetical facts consistent therewith, in the light most favorable to the nonmoving party. *Davenport v. Washington Education Association*, 147 Wn. App. 704, 715, 197 P.3d 686 (2008), citing *Postema v. Pollution Control Hearings Board.*, 142 Wn.2d. 68, 122, 11 P.3d 726 (2000); *Bavand v. OneWest Bank, FSB*, Court of Appeals No. 68128-2, Div. I at 2, September 9, 2013. The court reviews “questions of fact by taking the facts and inferences, both real and hypothetical, in the light most favorable to the Plaintiff.” *Davenport*, 147 Wn. App. at 715. Ultimately, “any hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support a Plaintiff’s claim.” *Holiday Resort Community Ass’n.* at 218 citing *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995).

B. The Irwins’ Bankruptcy Schedules Are Not An Admission That Defendants are The Proper Beneficiaries to Whom the Debt is Owed and Judicial Estoppel Should Not Apply

The Irwins’ claims against the Defendants should be allowed to go forward regardless of his Bankruptcy filing in 2011, and the court was in error in dismissing their claims on this basis. Judicial estoppel applies when a litigant makes a statement or takes a position in litigation, where there are consequences not only for the case at hand, but potentially for

future litigation concerning the same subjects. 85 A.L.R.5th 353. Courts have reached a wide variety of conclusions regarding the preclusive effect of statements, positions, or omissions made in bankruptcy proceedings based on the doctrine of judicial estoppel. *Id.* Judicial estoppel will be imposed when the debtor has knowledge of enough facts to know that a potential cause of action exists during the pendency of the bankruptcy, but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784 (9<sup>th</sup> Cir. 2001).

In *Hamilton v. State Farm Fire & Cas. Co.*, the plaintiff/debtor listed a residential vandalism loss of \$160,000 for which he filed an insurance claim with State Farm. Lawyers for Mr. Hamilton sent letters to State Farm to pressure it to pay the claim, and threatened litigation in those letters, suggesting bad faith if State Farm did not pay. After the letters were sent, State Farm denied the claim. The letters were sent several months prior to Mr. Hamilton's bankruptcy filing. The court found that these events provided Mr. Hamilton with enough knowledge such that a potential bad faith lawsuit against State Farm should have been listed in the bankruptcy schedules. *Id.* at 784. The court held that Hamilton was precluded from pursuing claims about which he had knowledge, but did not disclose, during his bankruptcy proceedings. The

letters were express statements that showed knowledge of the potential liability of State Farm.

In this case, the Irwins should not be precluded from filing his claims against Defendants because he did not have enough knowledge of all the pertinent facts at the time of his bankruptcy filing. The facts in the case at bar differ significantly and can easily be distinguished from the *Hamilton* case because the Irwins, as unsophisticated borrowers, did not have knowledge of all the material facts that give rise to this action. In fact, the decision in the Bain case, which specifically addresses the liability of MERS, was not even issued until 2012, a full year after the Irwins filed their bankruptcy case. Nowhere in the record do the Irwins make any statements, claims, or declarations about the role of MERS and the other defendants prior to filing his bankruptcy case, nor can Defendants point to any. The Irwins were not aware of the fraudulent assignments by MERS and the misrepresentations, which surrounded the unlawful tardy appointment of Northwest Trustee Services as successor trustee.

Defendants' reliance on the policy enunciated in *Hamilton*, that judicial estoppel is invoked "not only to prevent a party from gaining an advantage by taking inconsistent positions, but also because of general consideration[s] of the orderly administration of justice and regard for the

dignity of judicial proceedings, and to protect against a litigant playing fast and loose with the courts”<sup>1</sup> (internal quotations omitted), is misplaced. In fact, the Irwins’ present case clearly raises none of the policy problems identified by the *Hamilton* court. The court in *Hamilton* focuses most of its discussion of the question of judicial estoppel on the element of thwarting inconsistent positions in future litigation.

The claims raised in the Irwins’ present case are not inconsistent with his bankruptcy schedules. First, listing a creditor on a bankruptcy schedule when that alleged creditor has held itself out as the true creditor when they had with no knowledge of any civil legal claims that may be available to them should not be considered an “admission” that the creditor has acted lawfully in every way, is free of liability, and that the party is even the correct party to whom the debt is owed. Any facts that may indicate the creditor has acted outside the law would certainly not be willingly disclosed to the debtor by the creditor, and the creditor is in the sole possession of any documents or information that would bring those facts to light. Defendants make a specious argument when they claim that Mr. Irwin made “admissions” by listing a particular creditor in a bankruptcy filing, or that his position now is inconsistent with the bankruptcy filing.

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<sup>1</sup> *Hamilton*, 270 F.3d at 782.

Second, the fact that MERS was not listed as a potential liable party should not invoke judicial estoppel. If the Irwins were required to list MERS as a potentially liable party, it would require the Irwins to possess special expertise or to be legal experts in the field of real estate finance and mortgage litigation. In fact, it was very unlikely that the Irwins would have filed for bankruptcy if the Defendants had acted lawfully during the loan modification process.

Bankruptcy courts frequently issue orders that expressly state that a debtor may not bring a civil action in Superior Court under the Deed of Trust Act, and there is no such express statement in any court order connected with Plaintiff's bankruptcy case that prohibits such actions. The bankruptcy court could well have imposed such an express provision in one of its orders but declined to do so. Thus, Mr. Irwin should not be barred from bringing such an action.

C. Defendants Violated the Consumer Protection Act

To sustain a claim for unfair and deceptive business practices under the Washington Consumer Protection Act (CPA), Plaintiff must establish: (1) an unfair or deceptive act or practice (2) caused by the defendant (3) that occurred in trade or commerce (4) which impacted public interest (5) and caused injury to Plaintiff in his or her business or property. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*,

105 Wn.2d 778, 780 (1986); RCW 19.86.020; RCW 19.86.093. To the extent that a violation of the Deed of Trust Act can create a cause of action under the CPA, the Deed of Trust Act must be strictly construed in favor of the borrowers, because lenders do not need the authority of the courts to initiate foreclosure proceedings. This principle has been repeatedly upheld by Washington courts. *Walker v. Quality Loan Service Corp.*, \_\_\_ Wn. App. \_\_\_ 308 P.3d 716 (No. 65975-8-I at 7, August 5, 2013),<sup>2</sup> *Albice v. Premier Mortg. Servs. Of Wash., Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012) (citing *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007), *Bavand v. OneWest Bank*, \_\_\_ Wn. App. \_\_\_, 309 P.3d 636 (2013) (No. 68217-2-I, Sept. 9, 2013),<sup>3</sup> *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 105, 297 P.3d 677, 682 (Wash. 2013), *Bain v. Metro. Mortg. Group, Inc.*, 175 Wn.2d 83, 93, 285 P.3d 34 (2012).

1. *Defendants' Actions Were Unfair and Deceptive*

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<sup>2</sup> “Because the DTA ‘dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures, lenders must strictly comply with the statutes, and courts must strictly construe the statutes in the borrower’s favor.’” *Walker* at 7, quoting *Albice v. Premier Mortg. Servs. Of Wash., Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012).

<sup>3</sup> “The supreme court has repeatedly stated that the Deeds of Trust Act ‘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.’” *Bavand* at 6 quoting *Schroeder v. Excelsior Mgmt. Group, LLC* 177 Wn.2d 94, 105, 297 P.3d 677, 682 (Wash. 2013).

The CPA does not define the term “unfair.” The CPA is to be “liberally construed that its beneficial purposes may be served.” RCW 19.86.920; *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984). The Supreme Court of Washington recently addressed Consumer Protection Act violations in *Bain v. Metropolitan Mortgage Group, Inc.* in the context of the Deed of Trust Act and mortgages in Washington. In summarizing, the *Bain* Court held the following:

To prove that an act or practice is deceptive, neither intent nor actual deception is required. The question is whether the conduct has “the capacity to deceive a substantial portion of the public.” *Hangman Ridge*, 105 Wash.2d at 785 [719 P.2d 531]. Even accurate information may be deceptive “if there is a representation, omission or practice that is likely to mislead.” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wash.2d 27, 50, 204 P.3d 885 (2009) (quoting *Sw. Sunsites, Inc. v. Fed. Trade Comm’n*, 785 F.2d 1431, 1435 (9<sup>th</sup> Cir. 1986)). Misrepresentation of the material terms of a transaction or the failure to disclose material terms violates the CPA. *State v. Ralph Williams’ N.W. Chrysler Plymouth, Inc.*, 87 Wash.2d 298, 305-09, 553 P.2d 423 (1976). Whether particular actions are deceptive is a question of law that we review de novo. *Leingang v. Pierce County Med. Bureau*, 131 Wash.2d 133, 150, 930 P.2d 288 (1997).

*Bain v. Metropolitan Mortgage Group, Inc.*, 285 P.3d 34, 49-50, 185 Wn.2d 83 (2012).

It is clear that it is not necessary for an act or practice to be a per se violation of the Deed of Trust Act to state a Consumer Protection Act claim. The Supreme Court in *Klem v. Washington Mutual Bank*

emphasized that, “To resolve any confusion, we hold that a claim under the Washington CPA may be predicated upon a per se violation of 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. Washington Mutual Bank*, No. 87105-1, Slip Op. 16 (Feb. 28, 2013). In other words, an act or practice may be unfair or deceptive if it has the capacity to deceive and it is not a requirement that the specific unfair or deceptive act be defined in a statute as a per se violation of a statute for that act or practice to violate the CPA. To the extent that the court dismissed the case on this basis, the court was in error.

MERS’ actions were unfair and deceptive when it unlawfully made an assignment of the Deed of Trust to Wells Fargo as Trustee for SAMI II 2007 AR-4. JP Morgan Chase and EMC’s actions as the servicers were unfair and deceptive when they refused to speak to Mr. Irwin in violation of the Foreclosure Fairness Act, which provides an avenue for the borrower to meet with the lender in a mediation setting.

NWTS’ actions were unfair and deceptive when they unlawfully issued a Notice of Default before they lawfully became the successor trustee. Trustees routinely send out notices of default as the mandatory precursor to the notice of trustee’s sale, and in most cases, the NOD is

issued prior to the recording of the appointment of successor trustee. Since the notice of default is a mandatory precursor to the Notice of Trustee's Sale, the court should not restrict its analysis of what constitutes the powers and duties of the trustee only to the recording of a notice of trustee's sale. A trustee has very well defined duties under the Deed of Trust Act, and if a trustee is going to initiate a foreclosure, which begins with the notice of default, not the notice of trustee's sale, it is not merely acting as an agent for the beneficiary. It must act as the neutral party who has a good faith duty to all parties, including the borrower. To act simply as the agent for the beneficiary would be a conflict of interest because an agent owes a duty of loyalty to the principle, who is the beneficiary, so it would be impossible or unlawful for the trustee to act as a neutral party as agent for the beneficiary.

Defendant Wells Fargo as Trustee for SAMI-II 2007 AR-4 were unfair and deceptive when they unlawfully claimed to be the beneficiary when the closing date and the cutoff date of the security was long before the Assignment was made from MERS, even if the MERS assignment was found to be valid. Pursuant to RCW 61.24.020, a deed of trust is subject to all laws relating to mortgages on real property. An assignment of a mortgage is not effective until recording. RCW 61.16.020; see *Price v. Northern Bond & Mortg. Co.*, 161 Wash. 690, 696, 297 P. 786 (Wash.

1931) (where the assignment of a mortgage is not recorded, purchaser has right to assume no assignment has been made).

All these acts of defendants were unfair and deceptive, and even if they were found to be lawful, certainly had the capacity to deceive.

2. Defendants' Actions Had An Impact on the Public Interest

There is ample support for the position that the acts of Chase and MERS that caused harm to the Irwins are acts that impact the public interest. A plaintiff may show that a deceptive commercial act or practice has affected the public interest by satisfying any of five different factors.

(1) Were the alleged acts committed in the course of defendant's business? (2) Are the acts part of a pattern or generalized course of conduct? (3) Were repeated acts committed prior to the act involving plaintiff? (4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?

*Hangman Ridge*, 105 Wn.2d at 790; *Bavand* at 31. The court in *Hangman Ridge* continued their analysis, finding in this context that:

Ordinarily, a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest. *Lightfoot v. MacDonald*, *supra* 86 Wash. at 334, 544 P.2d 88. However, it is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to

one that affects the public interest. *McRae v. Bolstad, supra*, 101 Wash. at 166, 676 P.2d 496. Factors indicating public interest in this context include: (1) Were the alleged acts committed in the course of defendant's business? (2) Did defendant advertise to the public in general? (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining positions? As with the factors applied to essentially consumer transactions, not one of these factors is dispositive, nor is it necessary that all be present. The factors in both the “consumer” and “private dispute” contexts represent indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact.

*Hangman Ridge*, 105 Wn.2d at 790-791.

The problems the Irwins encountered with these defendants were more than just a private dispute. Chase, EMC, Wells Fargo, MERS and NWTS are engaged in the same processes with countless other borrowers and homeowners and the identical behavior has been, and is likely to be repeated. In fact, another homeowner has brought very similar allegations against Chase and MERS in *Lavey v. Chase*, a case in Stevens County, Washington where the borrower tried in vain to obtain a loan modification through Chase, and in frustration with Chase’s failure to act in good faith or even make a decision on the application, sought a deed-in-lieu of foreclosure, which was also thwarted.<sup>4</sup> It is unlikely that *Lavey v. Chase* is the only other case in existence where Chase has used these

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<sup>4</sup> *Lavey v. JP Morgan Chase Bank, et al.*, Stevens County Superior Court No. 11-2-00598-2 (filed November 30, 2011).

tactics to thwart a loan modification or other attempt to workout a resolution to avoid foreclosure. The Irwins were seeking a loan modification under the HAMP program, a publicly-funded federal program available to millions of homeowners. This should not simply be viewed as limited to a private dispute.

It is also especially salient that the Irwins and Chase/EMC certainly occupied unequal bargaining positions. Like many homeowners seeking to refinance their mortgage under HAMP or other programs, the borrower is at the mercy of the lender's decision-making process and must rely on the lender, who often has no compulsion to offer a loan modification, for their advice and expertise in the loan modification or servicing process. Chase and other lenders clearly seem to prefer a foreclosure to other loss mitigation options that would make the loan more affordable and keep the homeowner in the home.

In *Bavand v. OneWest Bank, FSB*, the court held that "In the context of a similar CPA claim based on MERS's representation that it was a beneficiary, the *Bain* court noted that 'there is considerable evidence that MERS is involved with an enormous number of mortgages in the country (and our state)...' It then concluded that '[i]f in fact the language is unfair or deceptive, it would have a broad impact. This

element is also presumptively met.”<sup>5</sup> Here, as in *Bavand*, “MERS’s status as the named beneficiary in this deed of trust presumptively meets the public interest element of a CPA claim. As in *Bain*, the alleged acts of MERS were done in the course of its business, and MERS listing itself as a “beneficiary” was a generalized practice that was a course of conduct repeated in hundreds of other deeds of trust.” *Bavand* at 31.

3. *The Irwins Suffered Damages From Defendants’ Acts*

As the court in *Hangman Ridge* concluded, “the injury need not be great, but it must be established.” But, as the supreme court noted in *Panag v. Farmers Insurance Co. of Washington*, “ ‘Injury’ is distinct from ‘damages.’ Monetary damages need not be proved; unquantifiable damages may suffice.” *Panag*, 166 Wn.2d at 58, quoted in *Bavand* at 33. Because of the unfair and deceptive acts of Chase and MERS, the Irwins suffered damage to credit, loss of credit opportunities, loss of business opportunities and potential loss of their home to foreclosure, which is still a looming possibility. Since the Irwins alleged these facts in the Complaint, they have fully stated a CPA claim against the defendants, and the court should be overturn the dismissal of this claim.

D. *Breach of Covenant of Good Faith-Fair Dealing*

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<sup>5</sup> *Bain*, 175 Wn.2d at 118, quoted in *Bavand* at 31.

The Deed of Trust Act, RCW 61.24 *et seq.*, mandates that the trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor. RCW 61.24.010(4).<sup>6</sup> The trustee, Northwest Trustee Services, Inc., is a party to the contract, the Deed of Trust. A basic principle of contract law dictates that in every contract there is an implied covenant of good faith and fair dealing. “An implied covenant of good faith inheres in every contract.” *Edmonson v. Popchoi*, 256 P.3d 1223, 1227 (Wash. 2011), citing *Miller v. Othello Packers, Inc.*, 67 Wash.2d 842, 844, 410 P.2d 33 (1966). The duty of good faith requires “faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.” Restatement (Second) Of Contracts § 205 cmt. a (1981); *see id.* cmt. d (“[B]ad faith may be overt or may consist of inaction.”).

Good faith and fair dealing duties obligate the parties to cooperate with each other so that each may obtain the full benefit of performance. *Badgett v. Security State Bank*, 116 Wash.2d 842, 807 P.2d 356 (1991). Good faith and fair dealing are defined as honesty and lawfulness of purpose. *Tank v. State Farm Fire and Casualty Co.*, 105 Wash.2d 381, 715 P.2d 1133 (1986). Good faith and fair dealing involve: “[a]n honest

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<sup>6</sup> “(4) The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor.”

intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with an absence of all information, notice or benefit or belief of facts which render transaction unconscientious.'" *Holman v. Coie*, 522 Wash.App. 195, 522 P.2d 515 (1974) *quoting* Black's Law Dictionary 822 (4th ed. 1951). These duties include a duty to disclose relevant facts while negotiating. *Liebergessell v. Evans*, 93 Wn.2d 881, 613 P.2d 1170 (1980). Withholding such facts is considered fraudulent concealment. *Id*; *also see* Restatement of Contracts § 472 (1932).

The Trustee, Northwest Trustee Services, Inc., violated this provision of the Deed of Trust Act, and the remaining respondents breached the implied covenant of good faith and fair dealing that inheres in every contract. Respondents knew or should have known that The respondents made a bad faith attempt to foreclose on property that would cause harm to the Irwins.

Respondents also engaged in bad faith by attempting to foreclose when they had no legal right to do so. Although a recording of an Assignment of the Deed of Trust may not be required by statute, a recording of an Appointment of Successor Trustee is required by statute to be effective, and to give the successor trustee the powers of the original trustee. RCW 61.24.010(2). Simply put, if the Appointment has

not been recorded, the Appointment has no effect and the “successor trustee” is not a trustee and is not empowered to take the actions of a trustee. Simply executing an Appointment of Successor Trustee without recording does not give effect to the Appointment. The parties cannot privately waive the terms of the statute and claim that because there may be some agency arrangement, they are entitled to alter the requirements of the statute. *Bain*, 285 P.3d at 175.

E. Defendants are Liable For Fraud and Misrepresentation

A pleading for fraud merely requires facts be sufficient to present a question of fraud. *Pedersen v. Bibioff*, 64 Wn. App. 710, 828, P.2d 1113 (1992). Pleadings are sufficient where the term “fraud” is used in the complaint and defendant is apprised of a transaction where fraud is alleged. *Id.* The elements of fraud that a plaintiff must establish at trial are (1) representation of an existing fact; (2) materiality of the representation; (3) falsity of the representation; (4) the speaker’s knowledge of its falsity; (5) the speaker’s intent that it be acted upon by the plaintiff; (6) plaintiff’s ignorance of the falsity; (7) plaintiff’s justified reliance; and (8) damages. *Carlile v. Harbour Homes, Inc.*, 147 Wn.App. 193, 194 P.3d 280 (2008), *review granted in part*, 210 P.3d 1019 (2009). Civil Rule 9(b) states that malice, intent, knowledge, and other conditions of the mind may be averred generally. These elements of fraud are

elements of *proof* required to sustain the claim at trial, not elements that must be stated in the complaint.

1. *MERS Cannot Be a Beneficiary on the Deed of Trust, It Was Not a Party to the Note or the Noteholder, and Has No Interests To Assign*

Since the Assignment from MERS to Defendant Wells Fargo Bank as Trustee for SAMI-II-2007 AR-4 was unlawful, the actions that flow from that unlawful assignment, which took place by that alleged “beneficiary,” are also unlawful. The Court in *Walker* held that:

Under the DTA, if a deed of trust contains the power of sale, the trustee may usually foreclose the deed of trust and sell the property without judicial supervision. Only a lawful beneficiary has the power to appoint a successor trustee, and only a lawfully appointed successor trustee has the authority to issue a notice of trustee’s sale. Accordingly, when an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice trustee’s sale. [See RCW 61.24.010(2)] *Walker* at 7.

The Deed of Trust in question states clearly in paragraph (E) in bold type: “**MERS is the beneficiary under this security instrument.**”

The Supreme Court of Washington recently resolved the question of whether MERS can be a beneficiary on a deed of trust in Washington. *Bain v. Metropolitan Mortgage Group*, 175 Wn.2d 83, 285 P.3d 34 (Wash. 2012). The court in *Bain* was asked to review three questions, one of them being whether MERS is a lawful beneficiary with

the power to appoint trustees within the Deed of Trust Act if it does not hold the promissory notes secured by the deeds of trust. “A plain reading of the statute leads us to conclude that only the actual holder of the promissory note or other instrument evidencing the obligation may be a beneficiary with the power to appoint a trustee to proceed with a non-judicial foreclosure on real property. Simply put, if MERS does not hold the note, it is not a lawful beneficiary.” *Bain*, 175 Wn.2d at 89, 285 P.3d at 36-37.

Neither MERS, NWTS, EMC, Wells Fargo as Trustee for SAMI-II 2007 AR-4, JP Morgan Chase, nor any other party, can contract around a statute. The Supreme Court in *Bain* rejected the notion that the courts should give effect to a contractual modification of a statute. The Court held that “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 108.

In the Order from the case referred to the Washington Supreme Court, Judge Coughenour observed the following considerations:

A ruling favorable to the plaintiff in this case and others like it cannot and should not create a windfall for all homeowners to avoid upholding their end of the mortgage bargain – paying for their homes. But a homeowner's failure to make payments cannot grant lenders, trustees and so-called beneficiaries like MERS license to ignore the law and foreclose using any means necessary.<sup>7</sup>

In this case, there is no evidence in the record granting MERS the authority to assign the Note. At best (and Mr. Irwin does not admit this), MERS only assigned the Deed of Trust, not the Note. MERS did not hold the Note, so it is incapable of transferring the Note. And where Defendants' logic truly fails is that on December 21, 2012, when the NOTS was recorded, MERS was incapable of acting as nominee or in any other role for that matter, for Wells Fargo Bank, NA Successor by Merger to Wells Fargo Bank Minnesota, N.A. f/k/a Norwest Bank Minnesota, NA, Solely as Trustee for SAMI II Trust 2007-AR4, Mortgage Pass-through Certificates Series 2007-AR4. MERS was never the beneficiary and thus incapable of lawfully making an assignment.

The Deed of Trust does not give MERS authority to transfer the promissory note. MERS seems to presume by their assignment of the deeds of trust, that the assignment, standing alone, would entitle JP Morgan Chase and Wells Fargo as Trustee for SAMI II to enforce the

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<sup>7</sup> *Bain v. Metropolitan Mortgage*, No. C09-0149-JCC (U.S. Dist. Ct. WD Wash. March 15, 2011) Order, 12.

underlying Notes. Since there is no evidence that the promissory notes were properly transferred, MERS could only transfer whatever interest it held in the Deed of Trust, which was nothing. Since MERS had no authority to transfer the Note or the Deed of Trust in June 2011 2010, the assignment to SAMI-II may be of no force or effect. As a result, SAMI-II is without any interest in the subject Notes or Deeds of Trust.

2. The Appointment of Successor Trustee and Assignment of Deed of Trust Are Based on Fraud

In the Corporate Assignment of Deed of Trust recorded October 17, 2012 Defendant MERS, “solely as nominee for American Home Mortgage Acceptance, Inc., Its Successors and Assigns” purports to assign to Defendant Wells Fargo Bank as Trustee for SAMI-II 2007 AR-4 all the beneficial interest under the Deed of Trust. MERS could not assign the Deed of Trust because it was not the lender or the beneficiary. The Assignment was signed by Wanda Chapman, who is very likely a robo-signer and did not read or verify the contents of the document. Further discovery should be allowed in order to permit Mr. Irwin to produce proof of this claim. The appointment of successor trustee was signed by Payne Davis, who is also very likely a robo-signer and did not review any documents in the file before making the appointment. NWTS sent a notice of trustee’s sale dated

December 11, 2012 wherein it alleged that the sale would be performed to secure an obligation in favor of MERS solely as nominee for GreenPoint Mortgage Funding, Inc., even though GreenPoint had no interest in the Note at least as of June 29, 2011 when the Assignment of Deed of Trust was recorded with Pierce County.

Mr. Irwin justifiably relied on the presumption that if a foreclosure would be initiated, it would be executed by the proper parties entitled to foreclose. He also relied on the presumption that the defendants would operate in good faith with him in the loan modification process. He had no knowledge of the falsity of the statements made by defendants.

#### IV. CONCLUSION

Accordingly, this Court should reverse the trial court order granting the motions to dismiss, and remand for further proceedings consistent with the Court's opinion.

Signed and dated this 20<sup>th</sup> day of December, 2013.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury that the attached document was served upon the Court of Appeals for Division II, and properly served to the counsel listed below, on December 20, 2013.

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# NATURAL RESOURCE LAW GROUP

**December 31, 2013 - 9:55 AM**

## Transmittal Letter

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