

No. 45149-2-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 Susan K. Serko

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APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	7
II. ASSIGNMENTS OF ERROR	8
III. STATEMENT OF THE CASE	9
IV. SUMMARY OF ARGUMENT	19
V. LEGAL ARGUMENT	20
A. <u>Standard of Review</u>	20
B. <u>The Irwins' Bankruptcy Schedules Are Not An Admission That Defendants are The Proper Beneficiaries to Whom the Debt is Owed, Appellants Had No Knowledge of MERS, and Judicial Estoppel Should Not Apply</u>	22
C. <u>Defendants Violated the Consumer Protection Act and The Deed of Trust Act</u>	26
1. <u>Defendants' Acts Were Unfair and Deceptive</u>	27
2. <u>Defendants' Act Had An Impact on the Public Interest</u>	32
3. <u>Appellant Suffered Damages From Defendants' Acts</u>	35
D. <u>Defendants Breached of the Covenant of Good Faith-Fair Dealing</u>	36
E. <u>Defendants Are Liable for Fraud and Misrepresentation</u>	38
1. <u>MERS Cannot Be a Beneficiary on the Deed of Trust, It Was Not a Party to the Note or the</u>	

	<u>Noteholder, and Has No Interests To Assign</u>	39
2.	<u>The Appointment of Successor Trustee and Assignment of Deed of Trust Are Based on Fraud</u>	42
F.	<u>Appellant Should Have Been Granted Leave to Amend the Complaint</u>	43
VI.	CONCLUSION	45

TABLE OF AUTHORITIES

**CASES**

<i>Albice v. Premier Mortg. Servs. Of Wash., Inc.</i> , 174 Wn.2d 560, 276 P.3d 1277 (2012)	26
<i>Ashcroft v. Iqbal</i> , 129 S. Ct 1937, 173 L. Ed. 2d 868 (2009)	20
<i>Badgett v. Security State Bank</i> , 116 Wn.2d 842, 807 P.2d 356 (1991)	36
<i>Bain v. Metropolitan Mortgage Group</i> , 175 Wn.2d 83, 285 P.3d 34 (2012)	26, 27, 30, 34, 38, 40, 41
<i>Bain v. Metropolitan Mortgage Group</i> , No. C09-0149-JCC (U.S. Dist. Ct. WD Wash. March 15, 2011), Order at 12.	41
<i>Bavand v. OneWest Bank, FSB</i> , ___ Wn. App. ___, 309 P.3d 636 (2013), Court of Appeals No. 68128-2, Div. I	21, 26, 24, 25, 34, 35
<i>Bravo v. Dolsen Cos.</i> , 125 Wn.2d 745, 888 P.2d 147 (1995)	16
<i>Carlile v. Harbour Homes, Inc.</i> , 147 Wn.App. 193, 194 P.3d 280 (2008), review granted in part, 210 P.3d 1019 (2009)	38
<i>Caruso v. Local Union No. 690</i> , 100 Wn.2d 343, 670 P.2d 240 (1983)	44
<i>Corvello v. Wells Fargo Bank, N.A.</i> , No. 11-16234, No. 11-16242, 2013 WL 4017279 (9 <sup>th</sup> Cir. Aug. 8, 2013)	29-30

<i>Cutler v. Phillips Pet. Co.</i> , 124 Wn.2d 749, 881 P.2d 219 (1994)	20
<i>Davenport v. Washington Education Association</i> , 147 Wn. App. 704, 197 P.3d 686 (2008)	20, 21
<i>Del Guzzi Constr. Co. v. Global N.W., Ltd.</i> , 105 Wn.2d 878, 888, 719 P.2d 120 (1986)	44
<i>Edmonson v. Popchoi</i> , 256 P.3d 1223 (Wash. 2011)	36
<i>Hamilton v. State Farm Fire &amp; Cas. Co.</i> , 270 F.3d 778 (9 <sup>th</sup> Cir. 2001)	22-24
<i>Hangman Ridge Training Stables Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986)	26, 27, 32, 33, 35
<i>Herron v. Tribune Pub 'g Co.</i> , 108 Wn.2d 162, 736 P.2d 249 (1987)	44
<i>Holiday Resort Community Ass'n. v. Echo Lake Associates, LLC.</i> , 134 Wn. App. 210, 135 P.3d 499 (2006)	20, 21
<i>Holman v. Coie</i> , 522 Wn.App. 195, 522 P.2d 515 (1974)	37
<i>Klem v. Washington Mutual Bank</i> , No. 87105-1, Slip Op. (Feb. 28, 2013)	28
<i>Lavey v. JP Morgan Chase Bank, et al.</i> , Stevens County Superior Court No. 11-2-00598-2 (filed November 30, 2011).	33
<i>Leingang v. Pierce County Med. Bureau</i> , 131 Wash.2d 133, 930 P.2d 288 (1997)	27
<i>Liebergessell v. Evans</i> , 93 Wn.2d 881, 613 P.2d 1170 (1980)	37
<i>Lightfoot v. MacDonald</i> , 86 Wn.2d 331, 544 P.2d 88 (1976)	23
<i>McRae v. Bolstad</i> , 101 Wn.2d 161, 676 P.2d 496 (1982)	23
<i>Miller v. Othello Packers, Inc.</i> , 67 Wn.2d 842, 410 P.2d 33 (1966)	36

<i>Panag v. Farmers Ins. Co. of Wash.</i> , 166 Wn.2d 27, 204 P.3d 885 (2009)	27, 35
<i>Pedersen v. Bibioff</i> , 64 Wn.App. 710, 828 P.2d 1113 (1992)	38
<i>Postema v. Pollution Control Hearings Board</i> , 142 Wn.2d. 68, 11 P.3d 726 (2000)	21
<i>Price v. Northern Bond &amp; Mortg. Co.</i> , 161 Wash. 690, 297 P. 786 (Wash. 1931)	31
<i>Schroeder v. Excelsior Management Group, LLC</i> , 177 Wn.2d 94, 297 P.3d 677 (Wash. 2013)	26
<i>Short v. Demopolis</i> , 103Wn.2d 52, 691 P.2d 163 (1984)	27
<i>State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.</i> , 87 Wn.2d 298, 553 P.2d 423 (1976)	27
<i>Suleiman v. Lasher</i> , 48 Wn.App. 373, 739 P.2d 712, <i>review denied</i> , 109 Wn.2d 1005 (1987)	20
<i>Sutcliffe v. Wells Fargo Bank, N.A.</i> , 283 F.R.D. 533 (N.D. Cal. 2012)	30
<i>SW Sunsites Inc. v. Fed. Trade Comm'n</i> , 785 F.2d 1431 (9 <sup>th</sup> Cir. 1986)	27
<i>Tank v. State Farm Fire and Casualty Co.</i> , 105 Wn.App. 195, 522 P.2d 515 (1974)	37
<i>Tenore v. AT &amp; T Wireless Servs.</i> , 136 Wn.2d 322, 962 P.2d 104 (1998)	20
<i>Udall v. T.D. Escrow Servs., Inc.</i> , 159 Wn 2d 903, 154 P.3d 882 (2007)	26
<i>Walker v. Quality Loan Service Corp.</i> , ___ Wn. App. ___ 308 P.3d 716 (No. 65975-8-I at 7, August 5, 2013)	39
<i>Walla v. Johnson</i> , 50 Wn. App. 879, 751 P.2d 334 (1998)	44

<i>West v. JP Morgan Chase Bank, N.A.</i> , 154 Cal. Rptr. 3d 285, 299 (Ct. App. 2013)	30
<i>Wigod v. Wells Fargo Bank, N.A.</i> , 673 F.3d 547 (7 <sup>th</sup> Cir. 2012)	29, 30
<i>Young v. Wells Fargo Bank, N.A.</i> , No. 12-1405, 2013 WL2165262 (1 <sup>st</sup> Cir. May 21, 2013)	29

**STATUTES**

RCW 19.86.020	26
RCW 19.86.093	26
RCW 19.86.920	27
RCW 36.18.010	15
RCW 61.16.020	31
RCW 61.24 <i>et seq.</i>	35
RCW 61.24.010(2)	37, 39
RCW 61.24.010(4)	36
RCW 61.24.020	31

**RULES**

CR 9(b)	38-39
CR 12	33
CR 12(b)(6)	20, 21
CR 15(a), (c)	44

## **OTHER AUTHORITIES**

American Law Reviews, 85 A.L.R. 5 <sup>th</sup> 353	21-22
Restatement of Contracts § 472 (1932)	37
Restatement (Second) of Contracts § 205 cmt. a, cmt. d (1981)	36
Black's Law Dictionary 822, (4 <sup>th</sup> Ed. 1951)	37

### **I. INTRODUCTION**

The court dismissed Mr. Irwin's claims against all defendants for violation of the Consumer Protection Act, Fraud and Misrepresentation, violation of the Deed of Trust Act, and Breach of the Covenant of Good Faith/Fair Dealing under a Breach of Contract claim. Defendants based their arguments on a judicial estoppel theory, claiming that Mr. Irwin failed to mention MERS anywhere on his bankruptcy schedules, and that listing JP Morgan Chase as a creditor is an admission that they are the proper party to whom the debt is owed, and should therefore be estopped from bringing a civil claim in Superior Court against the defendants.

The Irwins argue 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, Deed of Trust Act violations, and breach of contract.

The Irwins were also denied the opportunity to amend the complaint to add facts that clearly invoke liability against EMC and Chase for failing to provide the Irwins with a permanent loan modification after they timely made all three trial period payments and were given written assurance by EMC/Chase that they would receive a permanent loan modification if all three trial payments were made on time.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred on June 21, 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, violation of the Deed of Trust Act, and Breach of the Covenant of Good Faith and Fair Dealing claims with prejudice.

2. The trial court erred on June 21, 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 that MERS was not listed as a potential defendant in a

lawsuit, and were therefore judicially estopped from bringing civil claims against the Defendants.

3. The trial court erred on June 21, 2013 when it granted Defendants' Motion to Dismiss, entered judgment in favor of the Defendants, and dismissed the Irwin's claims with prejudice without granting leave to amend the complaint to add facts that clearly invoke liability against EMC and Chase, facts that took place after the bankruptcy was dismissed.

#### **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).
3. Did the trial court erroneously deny Plaintiff leave to amend the complaint to add material facts under the Consumer Protection Act claim and the Breach of the Covenant of Good Faith/Fair Dealing/Breach of Contract claim? (Assignment of Error No. 3).

#### III. STATEMENT OF THE CASE

On or about July 2, 2007, the Irwins entered into a financial arrangement with American Home Mortgage Acceptance, Inc. to finance

the purchase of real property. The amount financed was \$412,500.00. (CP 142). The monthly mortgage payments were to be \$1,326.76, and the note carried an adjustable interest rate to be capped at 9.950%. (CP 143). The Deed of Trust issued with this financing arrangement was recorded with Pierce County on July 10, 2007 as instrument number 200707100355. The financed property is the Irwins' personal residence in Puyallup, Washington. (CP 3-4).

This Deed of Trust named the Lender as American Home Mortgage Acceptance, Inc., the Borrower as Richard L. Irwin and Miriam J. Irwin, Husband and Wife, and Chicago Title Insurance as the Trustee. (CP 149-150). 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). (CP 4, CP 150).

Over the course of twelve to fifteen months, beginning in early 2010, Mr. Irwin engaged in extensive communications with EMC including phone calls and faxes to apply for a HAMP loan modification and to submit the required documents. (CP 290). At the end of March

2010, EMC representatives told Mr. Irwin everything looked fine. The Trial plan was set up for April, May, and June 2010. (CP 290).

Mr. Irwin received a 4-page letter from EMC dated March 11, 2010 stating, "After successful completion of the Trial Period Plan, EMC will send you a Modification Agreement for your signature which will modify the Loan as necessary to reflect this new payment amount." The letter set the trial period plan payments for \$770.82 to be received by April 1, 2010, \$770.82 to be received by May 1, 2010, and \$770.82 to be received by June 1, 2010. (CP 290). Mr. Irwin signed and returned the RMA Acknowledgement and accompanying documents to accept the loan modification and made all three payments on time as required. Mr. Irwin actually completed the Trial Payment Plan (TPP) offered to him by EMC. These payments were auto-deducted from his checking account plus six more of the same amount. (CP 291).

On April 20, 2010 EMC also told Mr. Irwin everything looked fine several times by several different telephone representatives. On July 20, 2010, EMC representatives told Mr. Irwin they needed additional paperwork. The documents they requested, such as a 2009 tax return and an IRS form 4506-T Request for Transcript of Tax Return, had already been submitted by Mr. Irwin and were not documents that were subject to

becoming stale. Nevertheless, Mr. Irwin sent those documents as requested by EMC. (CP 291).

An EMC representative set up an automatic deduction payment of \$770.82 for October 2010 to continue the payments. Mr. Irwin received a rude and abrasive phone call from an EMC representative in October 2010, telling him the loan modification was “dead” because he didn't send documents the previous July. (CP 291). EMC told Mr. Irwin at least twenty times over the course of six months that everything was fine, and he did not need to send any more documents. (CP 291).

Defendants breached the trial period agreement when they failed to send him a permanent Modification Agreement after he successfully made all three required payments under the trial payment plan (plus an additional six more payments of the same amount). (CP 291).

On March 15, 2011, EMC issued a notice to The Irwins that the servicing was being transferred from EMC to Chase. A letter entitled “Notice of Pre-Foreclosure Options” dated May 9, 2012 was also sent to the Irwins. Mr. Irwin responded to this letter prior to the expiration of 30 days by requesting a meeting with the Chase representative in the Tukwila office. Mr. Irwin notified “Danielle” in the Jacksonville, Florida office that he would be meeting with a local representative. (CP 4, 274).

On May 29, 2012, a “Customer Assistance Specialist” named Stephen Oldham sent a letter to the Irwins with Mr. Oldham’s contact information. On May 30, 2012, Mr. Oldham sent a letter to the Irwins informing them that Chase received the Irwins’ request for a HAMP loan modification, and provided the current eligibility requirements for HAMP. (CP 4, 274).

On June 4, 2012, Chase issued an “Acceleration Warning (Notice of Intent to Foreclose)” to the Irwins. The Irwins were confused by this letter, since just days before this, they received information from Mr. Oldham concerning applying for a HAMP loan modification. This deceptive communication from Chase caused the Irwins to wonder whether they actually would be considered for a loan modification, and began to suspect that the communication from Mr. Oldham was merely window-dressing to appear to be working with borrowers. The June 4 letter declared that the total amount past due was \$54,365.85. (CP 4-5, 274).

On June 5, 2012, Mr. Oldham issued a letter to Mr. Irwin declaring that Chase still needed some additional information from The Irwins before his request could be reviewed by Chase. (CP 5, 274). On June 28, 2012, Mr. Oldham sent another letter to the Irwins which stated that Chase completed “two reviews of the information you sent us...” and

that Chase had determined that they were not eligible for a modification under the HAMP program, “or under any other modification programs.” (CP 5, 274). This letter also stated that the reason for the Irwins’s ineligibility was that “You were sent a mortgage assistance package, then told us you do not want to participate in a HAMP or other modification program and you did not make your first Trial Period Plan payment by the due date.” (CP 5, 274-275).

The statements in this letter are false, fraudulent and deceptive, because as of the date of that letter (June 28, 2012), the Irwins had not yet submitted any information for a HAMP loan to Mr. Oldham or Chase for this second attempt to obtain a loan modification after the bankruptcy was dismissed, never declined to participate in the HAMP program, and were never given a “trial period plan” by Chase or any other defendant during this second attempt to obtain a loan modification. (CP 5, 275). This June 28, 2012 letter confirmed their suspicions that Chase had no intention of offering the Irwins a loan modification, or even engaging in the HAMP process with them. (CP 275:12-13).

On June 28, 2012, Chase issued a letter to the Irwins asserting that they “may be eligible for a mortgage modification that could make your payments more affordable, such as the Home Affordable Modification Program or another program that may be available to you at this time.”

This letter was received after the letter issued by Mr. Oldham on June 28 described in paragraph 21 of the Complaint. (CP 5, 275:8-12). This caused further confusion for the Irwins as they now believed they were being deceived by Chase, EMC and MERS.

On July 11, 2012 the deception continued when Chase issued a letter to the Irwins stating that they “may be eligible for a mortgage modification” that could make the payments “more affordable, such as the Home Affordable Modification Program or another program that may be available” at this time. At this point, Mr. Irwin presumed that Chase had no interest in working out a loan modification for them, and that the letters were an attempt to harass them. (CP 6, 275:15-20).

On July 24, 2012 the deception, fraud, and misleading acts continued when Chase issued a letter to the Irwins identical to the July 11, 2012 letter. (CP 6). Again, on August 7, 2012, Chase issue another letter to The Irwins identical to the two previous letters, but this one included a list of nationwide “Chase Homeownership Center Locations.” (CP 6, 275: 22-24). Mr. Irwin met with Mr. Oldham, both in person at the Tukwila office and on the telephone prior to receiving these letters. (CP 6, 276:1-2).

On October 31, 2012, NWTS recorded an Appointment of Successor Trustee which was signed by one Douglas Theener, allegedly

Vice President of JP Morgan Chase Bank, N.A. The Appointment was allegedly signed on October 18, 2012 (CP 243) and included a cover sheet for an “emergency nonstandard recording” pursuant to RCW 36.18.010. (CP 242) The cover sheet alleged that Northwest Trustee Services, Inc., was the “Grantee.”

On November 16, 2012, Defendant NWTS executed a Notice of Default (NOD) alleging that the Irwins were in default on an alleged debt, but did not reference any promissory note and did not state the loan number of the alleged debt. (CP 6, 248). This NOD stated 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 the notice (November 16, 2102). (CP 247). The amount alleged in the NOD to cure the default was \$69,666.87. (CP 7, CP 248).

The NOD alleged that the owner of the Note 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. (CP 7, 249).

On December 21, 2012 NWTS executed, allegedly by Heather L. Smith, a Notice of Trustee’s Sale (NOTS), which was recorded on

December 28, 2012 as Pierce County instrument number 201212280648. (CP 252). This NOTS declared that the property would be sold at a trustee's sale auction on May 3, 2013 at 10:00 a.m. at the County-City Building in Tacoma. (CP 7, CP 253). The NOTS also alleged that the sale would be performed to secure an obligation in favor of MERS solely as nominee for American Home Mortgage Acceptance, Inc. its successors and assignors, as Beneficiary, the beneficial interest in which was assigned by MERS as nominee for AHMAI its successors and assignors to 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-Through Certificates, Series 2007-AR4, under an Assignment/Successive Assignments recorded under Auditor's File No. 201210170786. (CP 7, CP 253). This NOTS alleged that the Principal Balance was \$429,030.01 and the amount to reinstate the loan by December 21, 2012 was \$69,655.92. (CP 6, CP 254). The NOTS asserted that the "effective" date was "12/21/2012," but the signature of Heather Smith was notarized on "12/26/12," which appears to be a fraudulent jurat, (CP 256) and in violation of the Deed of Trust Act requirement that the NOTS must be recorded and the recording date is the "effective" date (which is December 28, 2012).

Upon information and belief, American Home Mortgage Acceptance, Inc. was not the lender, but was merely the broker and the servicer of the loan. Nor was MERS the lender, the beneficiary, or party to the deed or note at any time whatsoever. Paragraph 24 of the Deed of Trust provides that the “*lender*” may appoint a successor trustee. (CP 7, CP 161).

On October 3, 2012 Defendants colluded to record a Corporate Assignment of Deed of Trust with Pierce County under instrument number 201210170786. (CP 172). This assignment alleges that one “Kaduna Slaughter” (signature somewhat illegible) is the Assistant Secretary of MERS, and purports to assign and transfer 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 7-8, CP 172). Upon information and belief, Kaduna Slaughter is a robo-signer and did not review the document entitled “Corporate Assignment of Deed of Trust”. (CP 8). Upon information and belief, Kaduna Slaughter is not a corporate officer of MERS. (CP 8).

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 and defeating the REMIC tax-exempt status of the security. (CP 8).

The true lender of the funds has never been identified to The Irwins and the documents reflect that the roles of the lender, servicer, and originator were fraudulently identified, leaving the Irwins in the dark regarding the identity of the party with whom they were entering into a financing and mortgage agreement. (CP 8).

#### IV. SUMMARY OF ARGUMENT

The Irwins' bankruptcy schedules should not be considered an admission by the Irwins that the Defendants are the proper 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 Notice of Default,

Notice of Trustee's Sale, the Corporate Assignment of Deed of Trust and the Appointment of Successor Trustee were not in compliance with the Deed of Trust Act or the CPA. All respondents violated the CPA when the NOTS alleged a principal balance due (\$429,030.01) that was higher than the original amount financed in the Note (\$412,500.00).

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, and when MERS claimed to be a beneficiary on the Deed of Trust.

All respondents committed common law fraud and misrepresentation in the assignment of deed of trust and the appointment of successor trustee, when MERS claimed to be the beneficiary on the Deed of Trust, when the defendants employed robo-signers to execute recorded documents, and when JP Morgan Chase declared in writing that the Irwins declined to participate in the HAMP program and denied them a loan modification on that basis.

The court erred when it failed to grant the Irwins leave to amend the complaint to add allegations regarding the trial period plan that the Irwins complied with, yet were denied a permanent loan modification. 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 the Irwins 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, they had no knowledge of MERS, and Judicial Estoppel Should Not Apply

The Irwins’ claims against the Defendants should be allowed to go forward regardless of the 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 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, Mr. Irwin should not be precluded from bringing his claims against Defendants under a judicial estoppel theory 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 Mr. Irwin, as an unsophisticated borrower, 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 execution of the recorded documents – the Deed of Trust and the Corporate Assignment of Deed of Trust issued by MERS.

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 the bankruptcy schedules. First, listing a creditor on a bankruptcy schedule when that alleged creditor has fraudulently held itself out as the beneficiary, when the Irwins had no knowledge of any potential 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 unlawfully 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 potentially 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 first trial period plan in the HAMP loan modification process in 2011.

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 The Irwins'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 estopped from bringing such an action.

C. Defendants Violated the Consumer Protection Act and the Deed of Trust Act

To sustain a claim for unfair and deceptive business practices under the Washington Consumer Protection Act (CPA), The Irwins 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 The Irwins 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).

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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).

1. Defendants' Actions Were Unfair and Deceptive

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. MERS’ actions were also unfair and deceptive when it declared itself to be the beneficiary on the Deed of Trust.

JP Morgan Chase and EMC’s actions as the servicers were unfair and deceptive when they utterly failed to provide Mr. Irwin a permanent loan modification when all three trial payment plans were timely made as agreed and they promised in writing to provide a permanent loan modification if those conditions were met. (CP 310). The Ninth Circuit

held “the servicer could not unilaterally and without justification refuse to send the offer” if all the TPP requirements were met. *Corvello v. Wells Fargo Bank*, No. 11-16234, No. 11-16242, 2013 WL 4017279 at \*12 (9th Cir. Aug. 8, 2013), citing *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7<sup>th</sup> Cir. 2012). *Wigod* is the leading case on the contractual obligations of banks under TPP agreements, and the court in that case held that banks were required to offer permanent modifications to borrowers who completed their obligations under the TPPs, unless the banks timely notified those borrowers that they did not qualify for a HAMP modification. *Wigod* at 562-63, *Corvello* at 10. The court in *Corvello* found that “Other courts have followed the reasoning of *Wigod*. See, e.g. *Young v. Wells Fargo Bank, N.A.*, No. 12-1405, 2013 WL2165262, at \*6 (1<sup>st</sup> Cir. May 21, 2013); *Sutcliffe*, 283 F.R.D. at 549-52; *West v. JP Morgan Chase Bank, N.A.*, 154 Cal. Rptr. 3d 285, 299 (Ct. App. 2013).” *Corvello* at 10-11.

“The Seventh Circuit rejected Wells Fargo’s position [that Paragraph 2G of the TPP means there can be no contract unless the servicer sends the borrower a signed Modification Agreement] because it made the existence of any obligation conditional solely on action of the bank, and conflicted with other provisions of the TPP, including the bank’s promise to send the borrower a Modification Agreement if the

borrower complied with the obligations under the TPP and the borrower's representations continued to be true. *Wigod*, 673 F.3d at 563.” *Corvello* at 11. Judge Noonan, in a concurring opinion, found that “the document makes these benefits illusory [receiving a permanent loan modification] because they depend entirely on the will of Wells Fargo...No purpose was served by the document Wells Fargo prepared except the fraudulent purpose of inducing Corvello to make the payments while the bank retained the option of modifying the loan or stiffing him. ‘Heads I win, tails you lose’ is a fraudulent coin toss. Wells Fargo did no better.” *Corvello* at 16.

The clear guidance given by Congress and supported by the Court in *Corvello* is unequivocal in that the HAMP program seeks to maximize assistance for homeowners and encourages the servicers to take advantage of the program to minimize foreclosures. The EMC/JP Morgan Chase unfairly and deceptively did just the opposite: they attempted to thwart every attempt by Mr. Irwin to protect his interests in his home by seeking a loan modification and following the rules for applying for a loan modification by submitting the required documents in a timely manner. This invidious behavior is unfair and deceptive to borrowers who attempt to avail themselves of the HAMP program.

NWTS' actions were unfair and deceptive when they recorded documents with a fraudulent jurat, and attempted to foreclose when any authority given to them by the Appointment of Successor Trustee was based on fraud, and the true beneficiary was not identified.

Defendant Wells Fargo as Trustee for SAMI-II 2007 AR-4 was unfair and deceptive when it 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 EMC/Chase, NWTS and MERS that caused harm to the Irwins are acts that impact the public interest. Plaintiffs 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 the plaintiffs? (4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving the plaintiffs? (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 the 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 the plaintiffs, indicating potential solicitation of others? (4) Did the plaintiffs 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, for example, 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 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. Any decision they make on the Irwin's HAMP request is likely to be repeated. Plaintiff is not required to come forward with proof in a CR 12 motion, he is only required to show that the pleading was sufficient.

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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).

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

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

repeated in hundreds of other deeds of trust.” *Bavand* at 31. The same rationale should apply to the defendants Chase and EMC who service millions of mortgage loans nationwide, and to NWTS who processes thousands of foreclosures in Washington every year.

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*

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> As successor 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 intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with an absence of

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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.”

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. *Liebergesell 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).

Northwest Trustee Services, Inc. violated this provision of the Deed of Trust Act as well, as a party to the contract as successor trustee, and the remaining respondents breached the implied covenant of good faith and fair dealing that inheres in every contract.

Respondents engaged in bad faith by attempting to foreclose when their actions leading up to and initiating the foreclosure process were unlawful. 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). If the Appointment of Successor Trustee contains a fraudulent jurat, and the parties to the Deed are not lawful parties, the recorded Appointment should be of no force or effect. 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. Respondents are Liable For Fraud and Misrepresentation

A pleading for fraud merely requires facts be sufficient to present a question of fraud. CR 9(b); *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) the plaintiff’s ignorance of the falsity; (7) the 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. The only requirement in

the civil rules is that fraud must be pled with particularity. Plaintiff met this requirement.<sup>7</sup>

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

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<sup>7</sup> CR 9(b) “Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.”

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 plaintiffs 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>8</sup>

In this case, there is no evidence in the record granting MERS the authority to assign the Note. MERS did not hold the Note, so it was incapable of transferring any interests whatsoever in the deed of trust or the Note. And where Defendants' logic truly fails is that on December 28, 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

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<sup>8</sup> *Bain v. Metropolitan Mortgage*, No. C09-0149-JCC (U.S. Dist. Ct. WD Wash. March 15, 2011) Order, 12.

deeds of trust, that the assignment, standing alone, would entitle JP Morgan Chase and Wells Fargo as Trustee for SAMI II to enforce the underlying Note. 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 October 2012, the assignment to SAMI-II should be of no force or effect. As a result, SAMI-II is without any interest in the subject Note 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 apparently signed by Kaduna Slaughter, who is very likely a robo-signer and did not read or verify the contents of the document. The appointment of successor trustee was signed by Douglas Theener, allegedly Vice President of JP

Morgan Chase Bank, who is also very likely a rob-signer and did not review any documents in the file before making the appointment.

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 who would act in compliance with the Deed of Trust Act, the Consumer Protection Act, and other state and federal laws and regulations. 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.

F. Appellant Should Have Been Granted Leave to Amend the Complaint

CR 15 provides in pertinent part:

[A] party may amend his pleading only by leave of the court...and **leave shall be freely given when justice so requires....**

Whenever a claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrences set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

CR 15 (a) and (c) (emphasis added.)

A plaintiff may amend his pleading by leave of court, which “leave shall be freely given when justice so requires.” CR 15(a). “Rule 15 of the Federal Rules of Civil Procedure, from which CR 15 was taken,

‘was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result.’” *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983). The fact that the added claims could have been included in the original pleading will not preclude amendment in the absence of prejudice to the nonmoving party. *Herron v. Tribune Pub’g Co.*, 108 Wn.2d 162, 166, 736 P.2d 249 (1987). Similarly, mere delay, if not accompanied by prejudice to the nonmoving party, is insufficient to justify denial. *Caruso*, 100 Wn.2d at 350-351, 670 P.2d 240 (1983).

The principal factor in determining whether amendment will be granted is the presence or absence of prejudice to the nonmoving party. *Del Guzzi Constr. Co. v. Global N.W., Ltd.*, 105 Wn.2d 878, 888, 719 P.2d 120 (1986). In order for the nonmoving party to successfully challenge a motion to amend, the adverse party must demonstrate that actual prejudice would result from the amendment, and unsubstantiated allegations about difficulties in preparing for trial are not sufficient. *Walla v. Johnson*, 50 Wn. App. 879, 751 P.2d 334 (1998).

There will be no prejudice to the defendants if Mr. Irwin is allowed to amend the Complaint and add the additional facts to the existing claims. The defendants will continue to be able to defend these claims, and since this case is still in its initial phase and nowhere near a trial date, there will

be plenty of time for the defendants to respond to the new set of facts. In addition, allowing the Complaint to be amended now will prevent further litigation of these issues in the future. The new facts to be added to an amended complaint as supportive of the existing claims are the facts in the Statement of the Case herein concerning the failure of EMC to give Mr. Irwin a permanent loan modification after he made all three trial plan payments.

Justice requires that the Complaint be amended. The court was in error in failing to grant leave to amend the complaint.

#### 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 24<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 24, 2013.

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# NATURAL RESOURCE LAW GROUP

## January 23, 2014 - 11:10 AM

### Transmittal Letter

Document Uploaded: 451492-Amended Appellant's Brief.pdf

Case Name: Irwin v. Northwest Trustee Services, Inc.

Court of Appeals Case Number: 45149-2

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