

Case No. 45953-1-II

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

SANDRA CABAGE

Plaintiff/Appellant,

v.

NORTHWEST TRUSTEE SERVICES, INC.; PNC MORTGAGE, a
division of PNC BANK N.A.; and DOE DEFENDANTS 1 through 20

Defendants/Appellees.

PLAINTIFF SANDRA CABAGE'S OPENING BRIEF ON APPEAL

Melissa A. Huelsman, WSBA #30935

Law Offices of Melissa A. Huelsman, P.S.
705 Second Avenue, Suite 601
Seattle, WA 98104
(206) 447-0103
Attorney for Plaintiff/Appellee Sandra
Cabage

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INTRODUCTION

The record in this case is replete with the Defendants' violations of the Deed of Trust Act, which include intentional misrepresentations of the location and physical possession of Ms. Cabage's Promissory Note, the identity of the owner of loan, the authority to make modifications to the loan and an absolute refusal to abide by the requirements of the Foreclosure Fairness Act ("FFA"). RCW 61.24.163. CP 1-20. The purported foreclosing trustee, Northwest Trustee Services, Inc. ("NWTs") violated its duties under the Deed of Trust Act ("DTA") throughout the nonjudicial foreclosure process. RCW 61.24, *et seq.* *Id.* Contrary to the determination made by the trial court, Ms. Cabage sustained multiple "injuries", as required to prove a claim under the Consumer Protection Act ("CPA"), and she sustained monetary damages. RCW 19.86, *et seq.* CP 41-55; 624-625; 1261-1320; 1321-1357; 1358-1364; 1441-1608.

Under Washington law, it is clear that Ms. Cabage may assert a damages claim for the injuries she suffered as a result of Defendants' violations of the requirements of the DTA, breach of their duties under the DTA, associated unfair or deceptive acts under the CPA, and the other claims. This is just as true in the absence of a completed foreclosure sale as it is after a sale, where such claims are indisputably recognized. Consistent with the language of the DTA and the CPA, the legislative history of RCW 61.24.127, and the public policy of this State, this Court should hold, just as the Division I of the Court of Appeals did in *Walker v. Quality Loan Service Corp.*, 176 Wn. App. 294, 308 P.3d 716, 720-24

(2013), that a borrower may assert a damages claim for injuries caused by violations of the DTA and/or CPA such as the violations committed by Defendants in this case, even if no foreclosure sale occurred. The trial court did analyze some of the recent DTA case law, but ignored the binding authority of *Walker*, wherein Division I made clear the proper measure of “injury” under the CPA in these types of cases and articulated items which are properly considered “monetary damages”, such as costs incurred in researching claims, parking and travel time to attend meetings, etc. which also support claims for damages for violations of the DTA. Ms. Cabage articulated her injury and her out of pocket damages and her testimony was ignored by the trial court when it improperly relied upon the trial court order in *Thurman v. Wells Fargo Home Mortgage*, 2013 WL 3977622 (W.D. Wash., August 2, 2013) instead of binding Washington appellate court authority.

As the Court of Appeals held in *Walker*, a claim for pre-foreclosure damages under the DTA is simply a “cause of action for damages . . . based upon a trustee’s failure to comply with the DTA, causing damage to the borrower.” *Walker*, 308 P.3d at 721.¹ Similarly, the elements of Plaintiff’s CPA claim for injuries suffered as a result of

¹ Such liability may extend to a controlling beneficiary under agency principles. As the Court stated in *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 791 n.12, 295 P.3d 1179 (2013), “[w]here the beneficiary so controls the trustee as to make the trustee a mere agent of the beneficiary, then as principal, the beneficiary may be liable for the acts of its agent.” See also *Walker*, 308 P.3d at 724 (“[W]e can plausibly hypothesize Select controlling Quality’s actions violating the DTA”).

Defendants' pre-foreclosure unfair or deceptive acts, which include their DTA violations, are the same principles that govern any other CPA claim under the standard *Hangman Ridge* factors. *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 782, 295 P.3d 1179 (2013). Contrary to the findings by the trial court, Ms. Cabage has been injured by the actions of the Defendants and she has suffered monetary damages, as was clearly articulated, and she is entitled to relief. CP 624-625; 1321-1357; 1414 (payoff statement showing outstanding corporate advances and recording fees owing on the loan balance). To hold otherwise, is an implicit finding by the trial court that mortgage loan servicers and foreclosing trustees are free to violate the requirements of the DTA at every stage in a foreclosure and foreclosure mediation proceeding with complete impunity. The Deed of Trust Act and Washington state case law make clear that the trial court's findings are inconsistent with the intent and purpose of the statute, and would contravene the Supreme Court's oft repeated assertion that the DTA must be strictly construed in favor of the homeowner with the intent to avoid a wrongful foreclosure. *Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985) (Courts "are required, when possible, to give effect to every word, clause and sentence of a statute"). "[L]enders must strictly comply with the statutes and courts must strictly construe the statutes in the borrower's favor." *Albice v. Premier Mortg. Svcs. of Wash., Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012).

STANDARD ON REVIEW

An appellate court should independently determine whether the

findings of fact support the conclusions of law. *Crystal China and Gold Ltd. v. Factoria Center Investments, Inc.*, 93 Wn.App. 606, 610, 969 P.2d 1093 (1999); *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 222, 797 P.2d 477 (1990); *Martin v. Seattle*, 111 Wn.2d 727, 733, 765 P.2d 257 (1988); and *Persing, Dyckman & Toynebee, Inc. v. George Schofield Co., Inc.*, 25 Wn.App. 580, 582, 612 P.2d 2 (1980).

Here, the trial court's factual findings are completely disconnected from the evidence provided and the standard articulated by the binding authority on these subjects.

Conclusions of law are reviewed *de novo*, as are the application of the facts to the law. *Id.*; see also, *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001). Here, the record is clear that Ms. Cabage proved she had suffered an "injury" and monetary damages, consistent with the requirements of the applicable law. Therefore, the trial court did not apply the proper facts to the law.

STATEMENT OF ISSUES

The issues in this case are as follows:

1. Ms. Cabage clearly articulated her "injury" caused by the Defendants, as well as monetary damages, such that she is entitled to relief under the CPA.
2. Ms. Cabage provided evidence of her "damages" incurred such that she is entitled to relief for her claims of violations of the DTA and for misrepresentation.
3. Ms. Cabage is not limited in proving her "injury" and "damages" in the manner set forth by the trial court in its Memorandum dated January 24, 2014, and she has proven that she has those damages.

The recent foreclosure opinions of the Washington Supreme Court and the intermediate appellate court decisions which have followed and relied upon them make clear that under Washington law, a plaintiff may state a claim for damages relating to a breach of duties under the DTA and/or failure to adhere to the statutory requirements of the DTA even in the absence of a completed trustee's sale of the real property.² These cases articulate the necessity under Washington law to conform to the strict parameters of the DTA at all times or face liability. As Division I emphasized in *Walker*, "No Washington case law relieves from liability a party causing damage by purporting to act under the DTA without lawful authority to act or failing to comply with the DTA's requirements." *Walker*, 308 P.3d at 724. Similarly, this Court should also look to *Walker* for guidance in how to measure injury and damages under similar circumstances, especially since in this case, the actions of the Defendants are so egregious. As will be explained in detail below, Defendant PNC affirmatively misrepresented its interest in Ms. Cabage's Note in the nonjudicial foreclosure process, during the FFA mediation and during the early stages of the litigation in this case. PNC was never the noteholder, never had physical possession of the Note and was never the loan owner.

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

CP 1239-1246. This fact was known to the purported foreclosing trustee, NWTS, and it too acted to attempt to foreclose knowing it did not have the authority under the DTA to do so. CP 1218-1238; 1279-1320. If this Court chooses to endorse the actions of PNC and NWTS against Ms. Cabage and ignore the injuries she has suffered as a result, it will have effectively gutted the requirements that any person or entity comply with the requirements of the DTA.

STATEMENT OF THE CASE

1. Following job loss, Ms. Cabage sought to save her home from foreclosure.

Ms. Cabage has owned and lived in her home located at 1342 Griggs St, Dupont, Washington (the “Residence”) along with her children, since March, 2006. She purchased the home by obtaining a loan from National City Mortgage, a division of National City Bank of Indiana (“National City”) on March 6, 2006, which included signing a Note payable to National City as the “Lender”. The Deed of Trust also listed National City as the “Lender” and beneficiary. CP 1-20; 41-55.

Ms. Cabage made payments on the loan until April, 2009, when she was laid off of her job. Ms. Cabage immediately PNC, who was servicing her loan by that time. She asked for them to work with her on a loan modification that would allow her to save her home. She applied for a modification and kept in touch with the staff at PNC about it, but got the runaround and repeated assertions that she sent incomplete paperwork, in spite of the fact that she sent in every requested document. She did fall

behind on the payments and sought a loan modification. CP 1-20; 41-55.

While she was trying to obtain a loan modification to save her home, Ms. Cabage was receiving nearly constant threatening letters from PNC about the looming foreclosure and the potential loss of her home. Ms. Cabage eventually began to panic and feared she would be thrown out of the house and into the street with her kids. When a friend had a house for rent that become available in December 2009, Ms. Cabage moved in and began paying rent monthly in the amount of \$1,200.00. This was only a couple of hundred dollars less than her mortgage payment, and was similar to the amount she was hoping would result from the requested modification. She desperately wanted a modification, but did not want to end up homeless with her kids on short notice. CP 1-20; 41-55.

In July 2010 Ms. Cabage received nonjudicial foreclosure notices at the Residence indicating NWTs would auction it on October 29, 2010. She expected that the Residence would be sold at the auction since she had never received a substantive response from PNC about a loan modification. Ms. Cabage filed a Chapter 7 bankruptcy in order to be rid of other debt and received a discharge of her debts. As a result, the foreclosure sale was continued and eventually discontinued. *Id.* Ms. Cabage indicated in her bankruptcy documentation that she was “surrendering” the house because she expected it to be sold at a future foreclosure sale. No new sale date was set for many months. Eventually, in October, 2011, when Ms. Cabage’s rental agreement was due to be terminated and she needed to move again, she decided to move back into

the Residence, as it had not been foreclosed and it had been sitting vacant for more two years. *Id.* She decided to try again to get a loan modification since the Residence value had declined further and she was hearing in media reports about banks being more willing to work with homeowners on loan modifications. Before she moved back in, she called PNC to see if anyone knew when a new foreclosure sale date might be noted, but there was no information. *Id.*

2. A second non-judicial foreclosure was begun by entities without the legal authority to foreclosure under Washington law.

By October 2011 Ms. Cabage had been working at a new employer for six (6) months when she submitted a new loan modification package to PNC. She was again denied without explanation less than a month after applying and a foreclosure was almost immediately commenced thereafter. CP This second foreclosure was commenced on November 7, 2011 by NWTS through the issuance of a new Notice of Trustee's Sale ("NOTS"). CP 43-51. The scheduled auction date was February 10, 2012. The foreclosure was apparently initiated based upon two other recorded documents. The first is an Assignment of Deed of Trust which was recorded in Pierce County on July 31, 2006. CP 134. The Assignment represented that the interest in Ms. Cabage's Deed of Trust was assigned from "National City Mortgage, as a division of National City Bank of Indiana" to "National City Mortgage Co., a subsidiary of National City Bank of Indiana". The notary block indicates it was signed on June 26, 2006 but the signature block is dated March 9, 2006. *Id.* There is no

assignment of Ms. Cabage's Deed of Trust to PNC in the records of Pierce County. CP 57.

It appears that NWTs initiated the foreclosure as the new trustee by relying upon an Appointment of Successor Trustee document which was signed by an "Authorized Officer" of PNC on June 25, 2010 and recorded in the records of Pierce County on July 7, 2010. CP 408-410. It is a requirement of the DTA that the appointment of a successor trustee may only be done by the "beneficiary" or "noteholder". RCW 61.24.005(2). Yet, Jeff Stenman, testifying for NWTs, admitted that when its employees were reviewing the foreclosure documentation, they were only looking for documentation to "match" in the real property records with the documents it had in its possession. CP 1279-3120 (Stenman Dep., 1297:3-1299:15). More importantly, the record is clear that PNC was not ever the "beneficiary" or loan owner, as defined by the DTA, and that this information was known to NWTs because it had access to the same electronic records as PNC. The electronic records identified an "investor", Bank of New York Mellon, who was later found to be the "Master Servicer" of the securitized trust that owned her loan. CP 1311:6-1313:18; 1314:1-25; 1315:25; 1319:10-25. The fact that NWTs has never been appointed as the successor trustee by the "beneficiary" and loan owner did not stop NWTs from proceeding with both attempts at a nonjudicial foreclosure sale of the Residence. RCW 61.24.030(7).

The Second NOTS document identified the "beneficiary" as National City in one portion of the document and PNC in another portion.

CP 418-423. Ms. Cabage was not served with a new Notice of Default, which should have been done since the previous Notice of Default was more than two years' old by the time the second foreclosure had commenced nor was she provided with the Notice of Pre-Foreclosure Options that was required with the passage into law of the FFA. RCW 61.24.163. *See, Watson v. Northwest Trustee Services, Inc.*, Case No. 69352-2-I (Wash. Ct. App., Div. I, March 18, 2014). While the DTA does not require the issuance of the new Notice of Default, but it does require that the information contained therein be accurate. Given that the sums owing had changed significantly, the Notice issued in 2010 was completely inaccurate in 2012. RCW 61.24.030(8)(c), (d) (requiring statement of default amount and itemized accounting). Ms. Cabage maintains that the Defendants did not want to send new notices to her because then she would become aware of her ability to participate in an FFA mediation due to the law change on July 22, 2011. RCW 61.24.163. This is consistent with their behavior, similar to that identified in the *Watson* case involved the same defendant - NWTS.

3. Even though she did not receive proper notice from NWTS, Ms. Cabage learned about FFA mediation and requested it.

Ms. Cabage did learn about FFA mediation and a request to participate was made on her behalf. Her foreclosure sale date was stayed until the process was complete. RCW 61.24.163, *et seq.* CP 1321-3126. Ms. Cabage participated as required under the FFA and submitted all of the required documentation in support of her request for a loan modification.

Id. Prior to the actual mediation session, PNC, who was participating in the mediation session under the false assertion that it is the “beneficiary” and loan owner, did submit some documents, but not all of the documents required under the FFA. At the mediation session, PNC was represented by its attorney Chuck Katz of the law firm Routh Crabtree Olsen, P.S., whose principal Steven Routh is the President and only real officer of NWTS. It is the same law firm that represents NWTS. Another PNC employee Marcus Moreland, participated in the session by telephone. *Id.*

When Ms. Cabage and her attorney entered the room for the mediation session, they were advised that the calculations PNC provided to the mediator for the “net present value”, as required by RCW 61.24.163(9)(c) & (12)(e), prior to the session, were incorrect. This much was obvious because PNC had not provided the numbers that were supposed to be used to calculate the NPV, consistent with FFA requirements, but instead provided a summary of its own internal NPV analysis which indicated that Ms. Cabage “failed” – meaning that the loan owner would make more money foreclosing than on modifying the loan. *Id.*; CP 56-133. Mr. Katz, acting for PNC, provided Ms. Cabage, her counsel and the mediator with a new NPV summary, again using PNC’s own internal calculations rather than providing the numbers required under the statute, but this time, the result was a “pass” for Ms. Cabage – meaning that the loan owner would make more money modifying the loan than foreclosing. *Id.* PNC did provide the mediator with the numbers required for the NPV test mandated by the FFA and the mediator entered

those numbers into the statutorily approved program during the session. However, the mediator did not have access to a printer and did not print out the results of that NPV test. The test did result in a “positive” for Ms. Cabage – meaning that the loan owner would make more money modifying the loan than proceeding with a foreclosure. *Id.*³

As the mediation session proceeded though, Mr. Katz, speaking for PNC, made clear that it did not even review or consider Ms. Cabage for a loan modification. CP 41-46; 56-133. Mr. Katz and Mr. Moreland spent the session insisting that the “investor” who owned the loan had provided complete authority to PNC to make all decisions about the loan and that PNC had decided not to consider a modification because Ms. Cabage had received a Chapter 7 discharge without reaffirming the debt. *Id.* Thus, PNC, by and through its counsel and employee, made clear that the repeated assertions it was the “beneficiary” (noteholder) were false and in fact, it was only at this mediation session that Ms. Cabage learned that an investor” owned her loan while PNC was merely the loan servicer. *Id.*

Under the FFA, the person who is participating in the mediation on behalf of the alleged beneficiary is required to have full authority to make a decision about a loan modification. RCW 61.24.163(7)(b)(ii). Since

³ This assessment is designed to determine the difference between the anticipated recovery for the owner of the loan in the event of a loan modification and in the event of a foreclosure. There are only two NPV tests which can be used during the mediation process and those are one found at www.checkmynpv.com and the other is described as the FDIC’s “Loan-Mod-In-A-Box”. Instead, PNC provided a summary of its own internal calculations.

PNC had refused to even consider a modification for Ms. Cabage, it is clear that Mr. Moreland had no authority whatsoever and his participation by telephone was nothing more than a sham designed to waste the time of all involved. In fact, PNC did not meaningfully participate in the mediation process at all and by extension, neither did the entity on whose behalf it was purportedly acting. PNC refused to provide all of the required FFA documentation, including a complete payment history and other documentation, and it refused to even identify the loan owner. *Id.*

The DTA defines the “beneficiary” as the “holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.” RCW 61.24.005(2). In order to comply with the requirements of the FFA, the “beneficiary” must provide documents to the borrower in advance of the mediation, which will be used during the mediation process. RCW 61.24.163(5). This includes proof that the entity claiming to be the beneficiary is the “owner” of any promissory note or obligation secured by the deed of trust. RCW 61.24.163(5)(c). The “beneficiary” must also be the “owner” of the Note, something else the Legislature included as a prerequisite to foreclosure at RCW 61.24.030(7). Under the FFA, the “beneficiary” **may** use the Beneficiary Declaration as proof of ownership, but that document is not incontrovertible.⁴ The beneficiary shall submit:

⁴ The “Beneficiary Declaration” is required before a foreclosing trustee may proceed with a nonjudicial foreclosure of residential real property. RCW 61.24.030(7)(a) requires that “the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under

“(c) Proof that the entity claiming to be the beneficiary is the owner of any promissory note or obligation secured by the deed of trust. Sufficient proof **may** be a copy of the declaration described in RCW 61.24.030(7)(a).” RCW 61.24.163(5)(c) (emphasis added). PNC submitted such a Declaration in its mediation package, which was dated June 25, 2010 and signed by Kaycee M. Kleehamer, “Authorized Officer”. The form indicated that “PNC Bank, National Association sbm National City Mortgage a division of National City Bank of Indiana nka National City Bank is the actual holder of the promissory note or other obligation evidencing the above-referenced loan **or has requisite authority under RCW 62A.3-301 to enforce said obligation.**” CP 409. This statement was completely untrue and PNC and NWTS knew it to be untrue. PNC was NOT the noteholder and even if it had derived the appropriate authority under RCW 62A.3-301 to enforce the terms of the Note, that would not meet the requirements of the DTA. RCW 61.24.030(7). (Ms. Cabage maintains that there was never any proof in this case that PNC had obtained authority to enforce the terms of the Note under RCW 62A.3-301 either.) There is no language in the DTA which allows someone other than the “noteholder” and loan owner to nonjudicially foreclose and participate in an FFA mediation. RCW 61.24.030(7); RCW 61.24.163(5)(c). Thus, on its face, the purported Beneficiary Declaration

penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.” This mirrors the proof of ownership language in RCW 61.24.163(5)(c).

did not comply with the requirements of the DTA. PNC Bank knew this and NWTs knew it.⁵ In fact, Mr. Stenman admitted during deposition that an attorney from the law firm representing PNC at the mediation and the same firm representing NWTs in this case, Routh Crabtree Olsen, drafted that version of the Beneficiary Declaration used in connection with this foreclosure and others. CP 1316:23-1318:3). So, it was the attorneys for both defendants who crafted a Beneficiary Declaration with language not permitted under or in compliance with the statute by adding the caveat of “or authorized to enforce” under Article 3.

The DTA does not contain any language permitting “a person with authority to enforce under Article 3” to perform acts therein. In spite of that, PNC and NWTs, acting in concert with the lawyers at RCO, decided to avoid the requirements of the DTA for their own benefit. This is especially important in this case since PNC was not ever the noteholder and was certainly not the loan owner. The record is clear that NWTs and its lawyers were quite willing to suborn perjury and to use a false declaration to attempt to nonjudicially foreclose on Ms. Cabage’s residence, while also refusing to mediate in good faith under the FFA, including identifying the loan owner. RCW 61.24.163(5)(c).

⁵ That same law firm, acting on behalf of NWTs, just obtained a published opinion from Division I in *Trujillo v. NWTs*, Case No. 705920 (Wash. Ct. App., June 4, 2014), confirming that the use of this form, which is not in conformity with the requirements of the DTA, is nevertheless permissible. Ms. Cabage urges this Court to reject the analysis as being incomplete and inconsistent with all of the other recent DTA cases.

The FFA requires that if a loan modification denial is predicated upon “investor” guidelines, it is required to provide the documentation that prevents the modification. RCW 61.24.163(5)(j). PNC refused to provide any documentation identifying the “investor” or a statement detailing the efforts to obtain a waiver of the supposed requirements of the pooling and servicing agreement prohibiting the modification. CP 41-46; 51-58. PNC asserted, through its counsel Mr. Katz, that it did not have to escalate any request for waiver or do anything at all except state the supposed policy of the alleged “investor”. *Id.* While refusing to identify the “investor”, Mr. Katz just kept repeating that PNC had “full and complete authority” to make all decisions about the loan from the “investor”. *Id.* Mr. Moreland also confirmed that PNC was charging Ms. Cabage interest at 6.5% per annum, even though the interest rate had changed back in April 2011. He contended that PNC was entitled to charge her that rate because she had defaulted on the loan. The Note signed by Ms. Cabage had no such provisions regarding an increased default interest rate. *Id.* Thus, it clear that all information regarding Ms. Cabage’s regarding the amounts allegedly due and owing in order to prevent the foreclosure were incorrect. *Id.*

In spite of the glaring refusal of PNC to mediate in good faith, the mediator issued a certification of the mediation and refused to find PNC as having acted “not in good faith”. RCW 61.24.163(9). CP 51-58. The mediator’s notes on the Certificate indicate that “attached inputs during mediation session shows “discrepancys” (sic) and she marked the box

indicating “No Agreement”. The Certificate did not include the NPV calculations that the mediator ran during the session, even though she was required under the FFA to provide it. RCW 61.24.163(12)(e). This is just one of the many instances in this mediation where the mediator absolutely refused to require adherence to the FFA by PNC. CP 821-823. However, the refusal of the mediator to fulfill her duties and to require adherence to the statute does not preclude Ms. Cabage’s claims.⁶

4. The record is clear that PNC was never the “beneficiary” nor the loan owner, merely a servicer. The third-party custodian maintained physical possession of the Note for the loan owner.

Once PNC was forced through litigation to identify the loan owner (identified as the “investor”), and Ms. Cabage learned that the loan was sold to a securitized trust and the Note was held by a custodian, for the loan owner. The custodian’s only function was to maintain physical possession of the Note. CP 654-802; 1358-1359. PNC, as a successor to National City, was only the loan servicer. It never had physical possession of Ms. Cabage’s Note. *Id.* None of this information was provided to Ms. Cabage during the mediation process or in Defendant PNC’s initial pleadings filed with the Court, even though identification of the loan owner is a requirement for a nonjudicial foreclosure (in the Notice of

⁶ PNC was also required under the FFA to provide an explanation regarding any denial for a loan modification in sufficient detail for a reasonable person to understand why the decision was made. RCW 61.24.163(5)(h). In spite of the fact that Defendant PNC flat out refused to even consider Ms. Cabage for a loan modification, it contended that it was not required to make any disclosure to Ms. Cabage about who made this decision and why whoever made it was refusing to recognize that there was no legal prohibition on modifying a loan because of a previous Chapter 7 discharge. CP 1358-1359.

Default) and during the FFA mediation process.⁷ RCW 61.24.030(8)(1); RCW 61.24.163(5)(c). Notably, neither the corporate representative, Ms. Thomas, nor any declarants on behalf of PNC ever mentions the physical location of Ms. Cabage's Note, except for the transfer to its attorneys after this litigation was filed and a judicial foreclosure was made as a counter-claim. But other than mentioning that the Note was transferred, there was no explanation of the process in any of PNC's pleadings and the entity that sent it to the attorneys is not identified.

Ms. Cabage demonstrated to the trial court the contradictions and refusal to answer questions in PNC's testimony and assertions. Included in the Notice of Deposition under CR 30(b)(6), there was a requirement that the witness identify the "(6) The physical location of the Plaintiff's Promissory Note at all times since the document was signed by her." CP 1358-1359. Ms. Thomas could not answer that question, and many others.

When PNC finally produced the documents surrounding the sale of Ms. Cabage's loans, it identified the following:

1. Servicing Agreement, which outlines the sale and servicing of the subject loans, makes clear in Section 3.2(xiii) that "the Company", National City (predecessor to PNC) is the "owner" of the loans and is selling those loans to the Purchaser, Goldman Sachs, which then became the "owner" of the identified loans. No one else is the "owner". CP 654-801.

2. The Custodial Agreement identified J.P. Morgan Chase as the document custodian initially. (Later documentation indicated that

⁷ This included an Opposition to Ms. Cabage's Motion for Preliminary Injunction wherein she sought to enjoin the pending nonjudicial foreclosure sale consistent with the requirements of the DTA. RCW 61.24.040.

subsequently there was another document custodian, Deutsche Bank.) *Id.*

3. The Assumption Agreement documents the sale of the loans to Goldman Sachs and National City's role as the Servicer – and nothing more. Deutsche Bank and Wells Fargo are identified as the custodians, and JP Morgan Chase as the Master Servicer. The Trustee of the securitized trust is listed as U.S. Bank. *Id.*

These documents make the record abundantly clear that PNC was not the loan owner or noteholder, and that any instruction that PNC might have received about this loan – and there is absolutely no evidence at all that any such direction took place – would have come from the Master Servicer, JP Morgan Chase. Yet, the Master Servicer does not have the authority to act under Washington law to initiate a non-judicial foreclosure nor to appoint a successor trustee, but PNC asserted through the Justice Declaration that PNC was receiving direction from Bank of New York Mellon (something which remains entirely undocumented) and that that was in conformity with the statute. There is no evidence the relationship Bank of New York Mellon has to Ms. Cabage's loan nor how it can meet the definition of a "noteholder" in order to meet the requisites to a nonjudicial foreclosure. PNC has not provided the Court with any testimony about its relationship except references by Ms. Thomas, where she calls it the Master Servicer. CP 1358-1359; Thomas Dep., 75:5-79:40.

Ms. Thomas' CR 30(b)(6) deposition testimony included the following highlights, among others:

1. Confirmed PNC has a secure document facility in Ohio but that Ms. Cabage's Note was never in that facility. Thomas Dep., 36:2-40:19.

2. Confirmed PNC was only the servicer, and was never anything more. It was never the noteholder and it never owned the loan. Further, Ms. Thomas had no documentation to support the assertion that

the loan could not be modified because of the Chapter 7 bankruptcy. Thomas Dep., 40:22-45:13. (In spite of representations by opposing counsel that the documentation of explaining this purported prohibition would be provided, it never was. CP 1441.)

3. Clarified PNC was not charging the correct interest rate on the Note. Thomas Dep., 50:1-52:10.

4. Clarified that the entity to whom PNC purported to defer in refusing to consider modification, Bank of New York Mellon, was the Master Servicer – not the investor. Thomas Dep., 75:5-79:40.

CP 1358-1359.

Much of Ms. Thomas' testimony was later contradicted by the Justice Declaration submitted in support of PNC's motion for summary judgment. CP 647-823. Mr. Justice admits throughout his Declaration that PNC was the **servicer** and only the servicer, apparently deriving whatever rights it did have from the Master Servicer, which was either JP Morgan Chase and/or Bank of New York Mellon at various times. *Id.* But certainly, PNC never had physical possession of the Note at any time during the years that this foreclosure process played out. Then in complete contravention of Washington's non-judicial foreclosure statute, PNC asserted that because the Servicing Agreement between National City and its successors and the investor gave it authority to act as the servicer, including initiating foreclosure actions, it was free to do so. CP 448:9-23). Of course, a contractual agreement between National City and any other entity does not determine how non-judicial foreclosures are done in Washington state, and they certainly do not dictate how foreclosure mediations occur in Washington state.

The false testimony of Mr. Justice continued when he asserted that Bank of New York Mellon, whom he calls the "investor", but which is

really nothing more than the Master Servicer, did not participate in HAMP or other loan modification programs and therefore Ms. Cabage was ineligible for a loan modification. CP 647-651; 9. Yet, a review of the Servicing Agreement belies the assertion, as the document authorizes National City (and later PNC, as its successor-by-merger), the servicer, to “waive, modify or vary any term of any Mortgage Loan . . . if in [PNC’s] reasonable and prudent determination such waiver, modification, postponement or indulgence is not materially adverse to the Purchaser.” *Id.* CP 695 Ex. A. § 4.1). The Servicing Agreement specifically directed PNC to “employ procedures (including collection procedures) and exercise the same care that it customarily employs and exercises in servicing and administering mortgage loans for its own account.” *Id.* CP 445:9-27. In addition, there is no prohibition anywhere in the Servicing Agreement which support PNC’s position that the loan could not be modified because of a Chapter 7 discharge, in spite of PNC’s assertions to that effect at the mediation. CP 654-801.

After the litigation was commenced, PNC for the first time that it was acting as an “agent” for the real loan owner, but only in an attempt to avoid liability.⁸ The fact is, PNC has never had the legal authority to foreclose nonjudicially in Washington state on Ms. Cabage’s Residence because it was not the loan owner nor the noteholder. Nor did it have the

⁸ It should be noted that there are claims related to the judicial foreclosure proceeding in light of the bankruptcy discharge.

requisite legal authority to participate in an FFA mediation. When PNC did show up for the mediation session, it did not participate meaningfully and in fact, PNC lied to Ms. Cabage, her attorney and the mediator about its role. It continued to repeatedly and falsely assert that it was the “beneficiary” or “noteholder”, even though it had never had physical possession of the Note and the securitized trust owned Ms. Cabage’s loan. The custodian had physical possession of the Note.

PNC adamantly refused to even consider Ms. Cabage for a loan modification during the mediation, but when the hearing on its summary judgment motion was set to be heard, PNC suddenly asserted for the first time that it complied with the requirements under the FFA, RCW 61.24.163(5)(j), that in the event a loan modification is denied due to restrictions in a pooling and servicing agreement (“PSA”), the mediation participant must seek a waiver of the PSA prohibition from the loan owner. *Id.* PNC did absolutely nothing of the sort in connection with the subject mediation and in fact, admitted during the mediation that it had not reviewed Ms. Cabage and her documentation for a loan modification. CP 41-55; 56-59. It asserted during the deposition that some document other than the PSA prohibited modification review because Ms. Cabage had filed a Chapter 7 bankruptcy and did not reaffirm the debt and refused to identify the relevant document. CP 1358-1359. Yet, PNC asserted that it had complied with the “waiver” portion of the DTA because back in 2009, when the government loan modification programs first came into existence, the previous loan servicer made a generalized request regarding

whether the securitized trust that owns Ms. Cabage's loan wanted to participate in those programs. CP 1441. Ms. Cabage was required to take more deposition testimony from PNC through Christian Martin regarding these new factual assertions. *Id.*

Mr. Martin testified as a 30(b)(6) deponent on the topic of "communications with BoNY regarding HAMP". *Id.*; Martin Dep., 5:22-25. Mr. Martin first confirmed that in his communications with securitized trusts while working at National City and then PNC after the acquisition, "most of the time" he (and PNC) communicated with the "master servicer" and not with the trustee of the securitized trust. *Id.*; Martin Dep., 13:23-37:3. In fact, he admitted that he is unaware of there ever being communications with the trustee of the securitized trust nor was he aware of any information being relayed to PNC from the trustee or the master servicer about those communications. *Id.* There was a significant portion of the deposition testimony wherein Mr. Martin tried to alter his testimony and then mischaracterize previously provided testimony, which is outlined in the designated pages. His testimony clarified that there had never been any communications with the loan owner about Ms. Cabage's loan and a foreclosure or a potential loan modification. *Id.*; Martin Dep., 37:4-44:21; 46:11-48:15; Exh. 1; 51:5-61:15; 64:6-68:14; 74:20-75:9. He admitted that Exhibit 18 and 19 govern the relationship between the trust and its servicers, including PNC and acknowledged that JP Morgan Chase is identified in those documents as the Master Servicer, but he did not know when or how BoNY became the

Master Servicer. CP 1448-1603; Martin Dep., 78:20-86:4.⁹

But more importantly, the entire record remained clear about these facts – PNC Bank was not the noteholder nor the loan owner at any time during and before the initiation of the nonjudicial foreclosure process and during the FFA mediation. PNC’s only communications with the loan owner, if any ever occurred, was with the master servicer BoNY in 2009. Therefore, at no time was PNC or NWTS ever in compliance with the requirements of the DTA and the FFA, and they are liable to Ms. Cabage as a result of their intentional and oft repeated false assertions.

5. Ms. Cabage provided proof of her injury and monetary damages that she suffered as a direct result of the Defendants.

Ms. Cabage has been trying to save her home for years and was repeatedly thwarted by PNC. She moved out of the house because she was afraid of being thrown out on the street and when another two (2) years passed and no foreclosure had occurred, she moved back in. CP 41-46; 621-633. During those years she could have been using the funds that she paid in rent to pay the mortgage on the house and the house would have been better maintained. The rental amount was only slightly less than the mortgage payment and she would not have had to move her kids in and out of the Residence, and the costs incurred as a result. *Id.* Ms.

⁹ During deposition, Mr. Martin tried to alter his testimony through questions asked by PNC’s attorney. The record was absolutely clear that Mr. Martin was coached by his attorney while on break and tried to assert that he suddenly had knowledge that he previously did not have and asserted attorney-client privilege as the basis for not explaining his new testimony. Martin Dep., 86:14-93:9.

Cabage was denied a meaningful participation in the foreclosure mediation because although a session did not occur, it was nothing more than a session. PNC lied to everyone involved, it presented untruthful information throughout and absolutely refused to even consider Ms. Cabage for a loan modification. Thus, all fees and costs incurred by Ms. Cabage in association therewith, including the fact that she had to take time off of work even if it was paid by her employer, constitute an injury and a portion of her monetary damages. *Id.*

Ms. Cabage also then incurred additional injury and monetary damages when she had to pay attorneys fees and costs associated with initiating a lawsuit and paying an attorney to obtain a temporary restraining order and then a preliminary injunction to stop the nonjudicial foreclosure, as well as her time and costs incurred in attending the associated hearings. *Id.* Simply put, the findings by the trial court that Ms. Cabage has not suffered an injury or incurred damages as a result of the actions of PNC and NWTS are completely contradicted by the record. *Id.* The trial court just ignored Ms. Cabage's testimony about her injury and damages, including the attorneys fees and costs incurred in obtaining injunctive relief, the cost of moving in and out of the Residence, her investigative costs and others. The Court also improperly found that Ms. Cabage's wasted time and the expenses associated with the mediation that was meaningless did not constitute an injury or damages. CP 1610-1612. The record is clear that there was no part of the nonjudicial foreclosure process, including the FFA mediation, in which PNC was truthful about its

role nor was it acting in compliance with the requirements of the DTA and the FFA. Similarly, NWTS proceeded with initiating a nonjudicial foreclosure when it had never acquired the authority to act as a trustee because it was not appointed as the “beneficiary” and loan owner, and it knew the falsity of the documentation it had been presented by PNC. PNC and NWTS’ actions in this case are outrageous and egregious, and Ms. Cabage has lost her home and a significant sum of money and time as a result. It is imperative that this Court reverse the trial court and remand this case for further proceedings consistent with the evidence in the record.

ARGUMENT

Despite several recent Washington Supreme Court decisions reiterating the long-held position of Washington courts that the DTA must be construed strictly to require adherence to its provisions and to protect vulnerable homeowners, and a binding decisions by Division I of the Washington Court of Appeals, the trial court in this case refused to allow Ms. Cabage to pursue her claims for injury and damages based upon violations of the requirements of the DTA. While no Washington authority had directly addressed, prior to August 2013, the question of whether a homeowner may pursue claims for injury and damages related to violations of the DTA requirements when no foreclosure sale has occurred and how to measure the damages that might arise therefrom, at least three published Washington Court of Appeals opinions have since recognized that homeowners may have claims under the DTA where non-judicial foreclosure is wrongfully instituted or pursued, *even if a sale is*

not completed. The trial court in this case seems to have ignored these cases entirely, finding somehow that in spite of testimony by Ms. Cabage about her injury and monetary damages that mirror those discussed in *Walker*, she did not suffer an injury or incur damages.

Ms. Cabage submits that Washington’s non-judicial foreclosure statute itself recognizes claims for damages relating to violations of the Deed of Trust Act irrespective of whether or not a trustee’s sale is completed. No textual language in the DTA limits recovery to cases where a trustee’s sale occurs. Moreover, the DTA implicitly recognizes that claims exist in the absence of a trustee’s sale, as a plaintiff’s claims *may* be “waived” if a plaintiff fails to bring them prior to a sale. *See* RCW 61.24.127; *see also Albice v. Premier Mortg. Servs.*, 174 Wn.2d 560, 569, 270 P.3d 1277 (2012) (“Waiver, however, cannot apply to all circumstances or types of postsale challenges....”). The Court of Appeals, Division I, has thoughtfully considered the goals of the DTA in its recent cases, and has concluded that claims for damages may exist even in the absence of a sale. *See Walker*, 308 P.3d at 720-24 (holding that claim for damages exists in absence of trustee’s sale).

Ms. Cabage further maintains that Washington’s CPA’s familiar “injury” standard allows recovery for violations of the non-judicial foreclosure process even where consumer injury takes a form other than a completed trustee’s sale of the plaintiff’s home. As the Supreme Court recently recognized in *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013), foreclosing entities’ violations of the DTA may

form a proper basis for claims under the CPA.

Finally, Ms. Cabage offered uncontroverted evidence of her injury and her monetary damages that resulted from the actions of the Defendants herein. Without reliance upon a proper legal standard, the trial court determined that Ms. Cabage had not been injured by having to participate in the sham of a mediation, and pay for the costs associated with it, including attorneys' fees and the mediation fee; that some portion of Ms. Cabage's claimed damages were not recoverable; and completely ignored Ms. Cabage's other monetary claim for damages. CP 621-633.

A. Washington recognizes claims for damages relating to violations of the Deed of Trust Act in the absence of a completed trustee's sale of real property.

1. Washington courts have properly held that homeowners such as Ms. Cabage may pursue claims for nonjudicial foreclosures initiated in violation of the requirements of the Deed of Trust Act.

Ms. Cabage has pointed out specific facts which support her claims against both of the Defendants, which all begin from the fact that PNC was never the "beneficiary" (noteholder under RCW 61.24.005(2)) nor was it the loan owner. RCW 61.24.030(7). PNC repeatedly falsely asserted throughout the attempt at nonjudicial foreclosure and FFA mediation that it was the "noteholder" and NWTS helped it perpetuate that fiction. NWTS knew that PNC was not the noteholder and that it was not the loan owner, and therefore knew that it had not been appointed as a successor trustee under the Deed of Trust. RCW 61.24.010(2).

Nevertheless, PNC and NWTs proceeded to try to foreclosure on Ms. Cabage and to improperly deny her the opportunity to be considered for a loan modification, resulting in injury and monetary damages.

The Supreme Court in *Bain v. Metro. Mrtg. Group, Inc.*, 175 Wn.2d 83, 97, 285 P.3d 34 (2012), answered three questions: who may act as the “beneficiary” under the DTA; what is the effect of someone who is not a “note holder” initiating a foreclosure; and can a plaintiff pursue a claim for violation of the CPA, RCW 19.86, *et seq.*, if an entity falsely asserts it is a “beneficiary.” *Bain*, at 85-86. (The *Bain* case involved a foreclosure that was initiated in 2008, before the 2009 amendments to the DTA, including RCW 61.24.010(4), 61.24.030(7), 61.24.031 and 61.24.127, among others.) Ms. Cabage maintains that the person or entity with the power to cause the initiation of a nonjudicial foreclosure under the DTA must be more than the mere “noteholder” because of the DTA additions in 2009, including RCW 61.24.030(7)(a) and 61.24.030(8)(I). The “noteholder” must also be the “owner” of the loan. *Id.*¹⁰

In the *Bain* decision, the Supreme Court made clear that the “beneficiary” definition contained in the DTA means what it says and that a “beneficiary” must be “the holder of the promissory note or other instrument evidencing the obligation” and that entity has “the power to appoint a trustee to proceed with a nonjudicial foreclosure on real

¹⁰ In 2011, the Legislature reiterated its requirement that the “noteholder” must also be the loan owner in order to foreclose when it included that requirement in the FFA amendments to the DTA. RCW 61.24.163(5)(c).

property.” *Id.*; RCW 61.24.005(2). The Supreme Court did not determine the effect of such a misrepresentation to a homeowner and left it to the trial court to decide that issue in both cases that were consolidated in *Bain*. But it also made clear that a homeowner may pursue a claim for a violation of the CPA based violations of the DTA, “but it will turn on the specific facts of each case.” *Id.* While the trial court engaged in a purported analysis of Ms. Cabage’s claimed injuries and monetary damages in support of her CPA claim, it intentionally disregarded the facts surrounding Ms. Cabage’s expenditures and the guidance provided in analyzing damages claims in *Walker*.

The trial court identified three items which Ms. Cabage claimed as monetary damages – her attorneys’ fees and costs paid in connection with the FFA mediation; her attorneys’ fees and costs paid in connection with the bringing of the motion for temporary restraining order and for preliminary injunction; and her time missing from work to attend the mediation and the hearings. While Ms. Cabage maintains that these items are recoverable under all of her causes of action, she also points out that she claimed monetary damages for the costs associated with moving in and out of the property; for her travel to and from the mediation and hearings, including mileage and parking costs; and for the attorneys fees she paid to investigate her claims and ability to mediate. She also suffered an injury by being denied a review of her financial information for a loan modification during the sham mediation session. *Id.* The trial court completely ignored her claims for these injuries and damages in its ruling.

As the Supreme Court observed in *Queen City Sav. & Loan Ass'n v. Mannhalt*, 111 Wn.2d 503, 760 P.2d 350 (1988), citing to 1 V. Towne, *Wash. Prac.* § 605 (2d ed. 1976), “[F]oreclosure proceedings must conform exactly to the statute.” *Id.* at 514. “Because the deed of trust foreclosure process is conducted without review or confirmation by a court, the fiduciary duty imposed upon a trustee is exceedingly high.” *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985).

Although the standard for foreclosing trustees has been clarified by the legislature since *Cox*, the importance of adherence to the requirements of the statute remains the same and has been reiterated repeatedly by this Court and other Washington appellate courts. *See Klem, supra* at 789 (the Supreme Court “has frequently emphasized that the deed 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 nonjudicial foreclosure sales.’”) (citations omitted); *Walker*, at 6 (“No Washington case law relieves from liability a party causing damage by purporting to act under the DTA without lawful authority to act or failing to comply with the DTA’s requirements.”); RCW 61.24.010(3) and (4). As Justice Dore noted in his eloquent dissent in *Queen City*,

Relatively unsophisticated borrowers used to be able to rely on the judiciary to prevent overreaching by lenders who make it their business to obtain every advantage from the foreclosure process. *See*, RCW 61.12. Since the judiciary is not involved in deed of trust foreclosures under the Act, only the words of the Act itself stand between the borrower and the lender eager to foreclose. Unless we strictly

construe the Act, that protection will erode away to zero. *Queen City, supra*, at 515. This language has been cited favorably by this Court, including its decisions in *Bain* and *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 916, 154 P.3d 882 (2007).

Moreover, as the Supreme Court stated in *Schroeder*, RCW 61.24.030, entitled “Requisites to trustee’s sale”, is “not a rights-or-privileges creating statute. Instead, it sets up a list of ‘requisites to a trustee’s sale.’” *Schroeder v. Excelsior Mgmt. Gr., LLC*, 177 Wash.2d 94, 106, 297 P.3d 677 (2013). “These are not, properly speaking, rights held by the debtor; instead, they are limits on the trustee’s power to foreclose without judicial supervision.” *Id.* at 107.

2. Recent Washington case law correctly concludes that homeowners may recover for abuses of the Deed of Trust Act irrespective of whether or not a trustee’s sale is completed.

Although the trial court did not specifically address the argument as to whether or not a borrower may bring a claim for violations of the DTA in its Memorandum, instead dismissing Ms. Cabage’s claims for breach of the duties under the DTA because she did not sustain an injury, she must nevertheless address the arguments since they were made by the Defendants in their briefing. The trial court did apparently ignore entirely the decisions in *Walker*, *Rucker* and *Bavand*, since it makes no reference to them and ignored their holdings.

First, the DTA is clear regarding who may appoint a successor trustee and initiate a foreclosure under the DTA:

The trustee may resign at its own election or be replaced by

the *beneficiary*. The trustee shall give prompt written notice of its resignation to the *beneficiary*. The resignation of the trustee shall become effective upon the recording of the notice of resignation in each county in which the deed of trust is recorded. If a trustee is not appointed in the deed of trust, or upon the resignation, incapacity, disability, absence, or death of the trustee, or the election of the *beneficiary* to replace the trustee, the *beneficiary* shall appoint a trustee or a successor trustee. Only upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee.

RCW 61.24.010(2) (emphasis added). PNC was never the “beneficiary” or noteholder and it was never the loan owner. NWTS knew that PNC was not the beneficiary and that it was not the loan owner. Therefore, the Defendants knowingly initiated a nonjudicial foreclosure and participated in the FFA mediation representing an entity that did not comply with the statute. RCW 61.24.030(7).

While the *Bain* case involved analysis of MERS’ involvement as the purported “beneficiary”, this case involves even more intentional false representations by PNC to disguise its status as nothing but the loan servicer. Just as Ms. Cabage alleged, an employee of PNC signed the Appointment of Successor Trustee document as though it was the beneficiary. A PNC employee signed the Beneficiary Declaration, also as though it was the “beneficiary”. The facts also cannot support the late submitted assertion by PNC that it was an “agent” for the beneficiary and/or loan owner, as there was never any communication with the securitized trust that was the loan owner or even the Master Servicer about

Ms. Cabage's loan. That same false information about the entity foreclosing on her home was included on the NOTS and during the mediation process. *Id.* NWTS and its affiliated law firm RCO knew about the false assertions and in fact, assisted PNC in promulgating the false information so that it could proceed with foreclosing in the absence of any authority under the DTA to so act. *Id.* RCW 61.24.010(4).

As this Court noted in *Bain*, the definition of "noteholder" has remained unchanged since the definitions were added to the DTA in 1998, and is consistent with certain portions of Article 3 of the UCC, as adopted by Washington. *Bain*, 175 Wn.2d at 103-04. Article 3 holds that the person entitled to enforce the terms of a Promissory Note is the holder, a non-holder in possession, or transferee who obtains the right to enforce directly from the holder. RCW 62A.3-203. However, it is essential to note that the DTA does *not* use the additional Article 3 language regarding who may enforce. The DTA only refers to "the holder of the note or other obligation . . ." RCW 61.24.005(2). There is nothing in the DTA which would allow a nonholder, who might otherwise be able to enforce the terms of a promissory note through other means under Article 3, to enforce the terms of the note through the initiation of a nonjudicial foreclosure. *Id.* Rather, the legislature, in enacting the DTA, has specifically limited who may initiate a non-judicial foreclosure and until 2009, that was solely and exclusively the "note holder". RCW 61.24.005(2). In 2009, the legislature amended the DTA to require that certain sensitive actions in the foreclosure process be undertaken by the

“owner” of the Note. RCW 61.24.030(7)(a)-(b), 61.24.163(5)(c).

At this juncture, there is no evidence or even an unsupported assertion that the noteholder and loan owner ever instructed anyone to appoint a new trustee or initiate a nonjudicial foreclosure sale. There is absolutely no evidence at all about the location of Ms. Cabage’s Promissory Note when the two nonjudicial foreclosures were initiated and during the FFA mediation process.

The importance of the foreclosing trustee adhering to the requirements of the DTA is consistently laid out in strong language in the Supreme Court’s recent decisions. In *Albice v. Premier Mortg. Services*, 174 Wn.2d 560, 270 P.3d 1277 (2012), this Court held:

Because the act 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. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 111-12, 752 P.2d 385 (1988). The procedural requirements for conducting a trustee sale are extensively spelled out in RCW 61.24.030 and RCW 61.24.040. Procedural irregularities, such as those divesting a trustee of its statutory authority to sell the property, can invalidate the sale. *Udall*, 159 Wn.2d at 911.

.....

Without statutory authority, any action taken is invalid. As we have already mentioned and held, under this statute, strict compliance is required. *Udall*, 159 Wn.2d at 915-16.

Albice at 564 (emphasis added). Although *Albice* involved a wrongfully completed nonjudicial foreclosure sale, there were no caveats in the

decision which limited the Court's analysis and holding to cases involving a completed foreclosure sale. Rather, *Albice* supports the conclusion that strict adherence to the DTA is an absolute necessity.

The Supreme Court further clarified in the importance of the trustee's duties to the strict requirements of the statute in *Klem*, 176 Wn.2d 771, (discussing RCW 61.24.010(4)). The actions of NWTS as described herein demonstrate clear violations of the duty of good faith owed by the purported trustee to Ms. Cabage. RCW 61.24.010(4). In *Klem*, the Supreme Court reiterated the importance of adherence to the requirements of the DTA:

While the Legislature has established a mechanism for nonjudicial sales, neither due process nor *equity will countenance a system that permits the theft of a person's property by a lender or its beneficiary under the guise of a statutory nonjudicial foreclosure*. An independent trustee owes a duty to act in good faith to exercise a fiduciary duty to act impartially to fairly respect the interests of both the lender and the debtor is a minimum to satisfy the statute, the constitution and equity, at the risk of having the sale voided, title quieted in the original homeowner, and subjecting itself and the beneficiary to a CPA claim.

Klem (citations omitted; emphasis added). The Court's conclusion in

Klem also includes the following:

We hold that the right to enjoin a foreclosure sale is an equitable remedy and the failure to enjoin a sale does not operate to waive claims based on the foreclosure process where it would be inequitable to do so. *Where applicable, waiver only applies to actions to vacate the sale and not to damages actions*. We hold that it is an unfair or deceptive practice under the CPA for a trustee of a nonjudicial

foreclosure to fail to exercise its authority to decide whether to delay a sale.

Klem 176 Wn.2d at 796-97 (emphasis added). Thus, a foreclosure that was initiated by someone without the legal authority to initiate or conduct the sale must result in a finding against those person(s).

In the recent Division I decision, *Walker*, the Court considered very similar arguments and assertions about damages that were less extensive and factually supported than those claimed by Ms. Cabage. In doing so, the *Walker* court cited extensively to *Bain* and discussed how that decision provided more clarity as to what claims were available to homeowners whose homes had not yet been foreclosed, including claims for violations of the DTA and under the CPA.

First, the *Walker* Court discussed the facts pled by Walker which supported viable claims for violation of the requirements of the DTA, which are very similar to those pled by Ms. Cabage, except she had more specific information which proved the veracity of her claims regarding the misrepresentations made by PNC and NWTs, as well as her injuries and her monetary damages. The Court of Appeals in *Walker* explained:

Because the assignment to Select was ineffective, Select's designation of Quality as successor trustee was also ineffective, meaning that Quality lacked authority to initiate nonjudicial foreclosure proceedings. ***Although no foreclosure sale occurred, Walker labels this a "wrongful foreclosure" claim. We consider it more accurate to characterize this as a claim for damages arising from DTA violations. Select and Quality respond that Washington does not recognize a claim for "wrongful initiation of foreclosure when, as here, the***

foreclosure sale has been discontinued." We disagree.

.....

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 of trustee's sale.

....

The Washington Supreme Court "has frequently emphasized that the deed 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 nonjudicial foreclosure sales.*'" (citing *Klem*, 176 Wn.2d at 789).

....

The DTA permits a borrower or grantor, among others, "to restrain, on any proper legal or equitable ground, a trustee's sale." But, as Walker correctly observes, the DTA includes "no specific remedies for violation of the statute in the context of pre-sale actions meant to prevent the wrongful foreclosure from occurring." However, in response to a decision of this court, in 2009 the legislature explicitly recognized a cause of action for damages for failure to comply with the DTA. It did so by amending the DTA to include RCW 61.24.127, which provides that a borrower or grantor does not waive certain claims for damages by failing to bring a civil action to enjoin a foreclosure sale. The claims not waived include the "[failure of the trustee to materially comply with the provisions of this chapter." Nothing in the 2009 amendment requires that the violation resulted in the wrongful sale of the property. This provision preserves a cause of action existing at the time a sale could be restrained—in other words, a claim existing before a foreclosure sale. It reflects the legislature's understanding of existing law—that a cause of action for damages existed based upon a trustee's presale failure to comply with the DTA, causing damage to the borrower.

Klem v. Washington Mutual Bank, 176 Wn.2d 771, 295 P.3d 1179 (2013), supports our conclusion that the specific

remedies provided in the DTA are not exclusive. There, the court considered whether the violations of the DTA that the legislature identified in RCW 61.24.135 as unfair or deceptive acts for purposes of the CPA were the only DTA violations that were unfair for CPA purposes. The Klem court held that the legislature's list was not exclusive, observing, "Given that there is 'no limit to human inventiveness,' courts, as well as legislatures, must be able to determine whether an act or practice is unfair or deceptive to fulfill the protective purposes of the CPA."

....

In addition to these procedural violations [violations of the requirements of RCW 61.24.005(2), 61.24.010(2) and 61.24.040], Walker alleges that Quality breached its statutory duty of good faith to him imposed by the DTA. He contends, "If [Quality] intends to foreclose a property non-judicially it is obligated to have evidence that it is doing so on a legitimate and legal basis and not simply acting at the behest of a party that may or may not have the legal right to conduct such an action."

Walker, 308 P.3d at 720-22 (footnotes omitted; emphasis added).

Walker's allegations strongly support recognizing a presale cause of action for damages under the DTA because he pleads facts showing he has suffered prejudice from Select's and Quality's unlawful conduct.

....

MERS never held the note and, based on Walker's amended complaint, we can hypothesize that MERS never had independent authority to appoint a beneficiary. We can further hypothesize that Select did not hold Walker's note at the time it appointed Quality. No Washington case law relieves from liability a party causing damage by purporting to act under the DTA without lawful authority to act or failing to comply with the DTA's requirements. Notably, the language of RCW 61.24.127(1)(c) refers only to "[failure of the trustee to materially comply with the provisions of this chapter." (Emphasis added.) We need not decide if this may prevent a borrower from suing a beneficiary under some circumstances. Our Supreme Court has recognized, in the context of a CPA claim, "Where the beneficiary so controls

the trustee so as to make the trustee a mere agent of the beneficiary, then as principle [sic], the beneficiary may be liable for the acts of its agent." Here, we can plausibly hypothesize Select controlling Quality's actions violating the DTA. ***Because the legislature recognized a presale cause of action for damages in RCW 61.24.127(1)(c), we hold that a borrower has an actionable claim against a trustee who, by acting without lawful authority or in material violation of the DTA, injures the borrower, even if no foreclosure sale occurred.*** Additionally, where a beneficiary, lawful or otherwise, so controls the trustee so as to make the trustee a mere agent of the beneficiary, then, as principal, it may have vicarious liability.

Walker, 308 P.3d at 723-24 (footnotes omitted; emphasis added). In this case, Ms. Cabage has **proven** that PNC is not the "beneficiary" and not the loan owner. She has **proven** that PNC and NWTS intentionally made false representations about the identity of the "beneficiary" and the loan owner, and they did so in order to pursue a nonjudicial foreclosure and avoid compliance with the FFA mediation requirements. There is ample evidence that Ms. Cabage was injured because she had to attend and pay for a mediation session that was a complete waste of time, including her attorneys' fees and costs. She had to travel to and from the mediation, pay for parking and miss work. She had to investigate her right to do something about the foreclosure by meeting with an attorney, who advised her she had the right to an FFA mediation, because NWTS did not provide her with a notice that she had that right. After the mediation was improperly closed out by the mediator, Ms. Cabage had to pay a lawyer to bring a motion for temporary restraining order and preliminary injunction, which was work that was separate from the bringing of the affirmative

claims in the lawsuit, including the CPA claim. Thus, Ms. Cabage has not claimed as damages the fees incurred in litigating the affirmative claims, but only those attorneys' fees and costs incurred in connection with the injunctive relief, as well as her travel and costs for attending hearings.

Regarding a claim for violation of the Consumer Protection Act related to the breach of duties under the DTA, the *Walker* Court held:

The CPA does not define an "unfair or deceptive act or practice." Whether an alleged act is unfair or deceptive presents a question of law. A consumer may establish an unfair or deceptive act by showing "either that an act or practice 'has a capacity to deceive a substantial portion of the public,' or that 'the alleged act constitutes a per se unfair trade practice.'" "Implicit in the definition of 'deceptive' under the CPA is the understanding that the practice misleads or misrepresents something of material importance." Whether an unfair act has the capacity to deceive a substantial portion of the public is a question of fact. To establish a per se violation, a plaintiff must show "that a statute has been violated which contains a specific legislative declaration of public interest impact."

Walker, 308 P.3d at 726-27.

Citing to this Court's decision in *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 204 P.3d 885 (2009), the *Walker* court noted that Walker had valid claims even though the foreclosure was not completed because he had suffered harm,

In *Panag* . . . , our Supreme Court held, "[T]he injury requirement is met upon proof the plaintiff's 'property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal.'" **Investigative expenses, taking time off from work, travel expenses, and attorney fees are**

sufficient to establish injury under the CPA.

....

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

Walker, at 727-728 (citing *Panag*, 166 Wn.2d at 53) (emphasis added).

Ms. Cabage has alleged the same sort of “harm” with even more specificity: she had to pay for a lawyer to investigate her claims and learn that she could go through the FFA mediation process (information improperly denied her by NWTs); she was denied an opportunity to be reviewed for a loan modification; she paid for and attended a mediation that was completely worthless for no other reason than that PNC lied about its status and refused to comply with the requirements of the FFA; she had time off of work, travel time and parking to attend the mediation; she had to pay for attorneys fees and costs in order to obtain injunctive relief, separate from her affirmative claims, and she had to take time off of work, incurred travel time and parking costs to attend the injunctive relief hearings. Ms. Cabage experienced the stress of not knowing whether she and her children would retain title to her property and whether they would again have to find a place to live in the future. Dollar amounts related to the wrongfully initiated foreclosure were added to her loan balance for some period of time, although it appears that the Defendants did not include those amounts in the judicial foreclosure numbers, presumably to try manipulate Ms. Cabage’s ability to claim damages. Ms. Cabage has suffered significant “injuries” and articulated thousands of dollars in

monetary damages sufficient to sustain her claims for violations of the requirements of the DTA, violations of the CPA and misrepresentation.

The Washington Court of Appeals issued two published opinions on the same day, *Walker* and *Rucker*. *Rucker* continues, like *Walker*, to follow the reasoning outlined in the Supreme Court's recent foreclosure cases. See *Rucker*, ___ Wn. App. ___, ___ P.3d ___, 2013 WL 5537301 at *6 (“[W]hen an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice of trustee’s sale;” “such actions by the improperly appointed trustee, we have explained, constitute ‘material violations of the DTA.’”) (citing *Walker*) (quotation marks omitted). See also, *Bavand v. One West Bank, FSB*, *supra*, 309 P.3d at 647. (It should be noted that the *Rucker* decision states that it refers to “former” versions of RCW 61.24.005(2) and 61.24.010(2), but these specific subsections have not been changed by the Legislature.)

A slightly older appellate decision reiterates a long standing principle of Washington Deed of Trust Act law, and that is “[b]ecause the DTA dispenses with many protections commonly enjoyed by borrowers, ‘lenders must strictly comply with the statutes, and courts must strictly construe the statutes in the borrower’s favor.’” *Rucker*, at 12, citing to *Amresco Independence Funding, Inc. v. SPS Props., LLC*, 129 Wn. App. 532, 537, 119 P.3d 884 (2005). The *Rucker* plaintiffs did not make a claim for damages, as Ms. Cabage has done in this case, and for that reason the Court was required only to determine whether the completed foreclosure was invalid. Relying upon the Supreme Court’s decisions in

Albice and *Schroeder*, the *Rucker* Court found that the sale must be invalid, noting that, “If the failure of a properly-appointed trustee to follow statutory procedures can result in the vacation of a sale, this remedy is equally appropriate where an entity conducts a trustee sale in the complete absence of authority.” *Rucker*, at 16. Similarly, Ms. Cabage has suffered injury and damages as a result of the actions of the Defendants herein and she is entitled to pursue her claims under now well-settled Washington state law, especially since she has taken steps to mitigate her damages by acting to obtain an injunction.

Although the Supreme Court was considering a post-sale challenge in *Albice* which resulted in a much stronger remedy than payment of damages—the invalidation of a completed foreclosure sale years after its conclusion—it nevertheless found that by enforcing statutory compliance “encourages trustees to conduct procedurally sound sales.” *Albice*, 174 Wn.2d at 572. The Court explained that when trustees strictly comply with their legal obligations under the act, “interested parties will have no claim for postsale relief, thereby promoting stable land titles overall.” *Albice*, 174 Wn.2d at 572. This Court should be seriously concerned with the complete and utter disregard for the requirements of the DTA by the Defendants herein. PNC and NWTs intentionally violated the DTA requirements and have been absolved for their actions by the trial court. If this sort of express refusal to comply with even the minimum requirements of the DTA is not actionable, then none of the DTA

requirements have any meaning.¹¹

B. Washington affords relief to homeowners under the CPA and the DTA irrespective of whether or not a trustee's sale occurs.

As this Court held in *Bain*, violations of the DTA can constitute violations of the CPA. It is not a *per se* violation, but if a plaintiff can prove the required five elements, it can support a CPA claim. Those elements are: “(1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or their business or property; (5) causation.” *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, (1986). These Defendants have committed numerous unfair and deceptive acts and practices, as described in great detail above. Given the complete and utter disregard that the Defendants have shown for complying with the requirements of the DTA and the FFA, Ms. Cabage has clearly demonstrated her injuries and damages, and that this business model of both PNC and NWTS is part of a larger pattern and practice and will be repeated as they both excused their actions as being “business as usual” and consistent with the requirements of the DTA. This allows Ms. Cabage to prove a violation of the CPA. RCW 19.86, *et seq.*

Ms. Cabage has proven that the Defendants all have made

¹¹ Ms. Cabage also argued that the DTA contains provisions allowing for recovery of attorneys' fees and costs when seeking injunctive relief and prevailing on it, as was the case here, RCW 61.24.090(2) and under 61.24.127(2)(f); and that Washington's attorney fee reciprocity statute allows for such recovery, RCW 4.84.330.

numerous misrepresentations about who had the legal authority to initiate a nonjudicial foreclosure and act as a foreclosing trustee, the ownership of the Promissory Note, the identity of the Note Holder and loan owner, and the requirements to participate in an FFA mediation. These acts constituted violations of the requirements of the DTA, which support violations of the CPA and an award of damages and attorneys' fees and costs. *Sato v. Century 21*, 101 Wn.2d 599, 681 P.2d 242 (1984); *St. Paul Ins. Co. v. Updegrave*, 33 Wn. App. 653, 656 P.2d 1130 (1983); *Talmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 605 P.2d 1275 (1979). Specific monetary damages are not even necessary in a CPA claim but a court is nevertheless required to award a prevailing plaintiff who has suffered an injury attorneys' fees and costs. *Mason v. Mortgage America*, 114 Wn.2d 842, 792 P.2d 142 (1990). Certainly, the Supreme Court has made clear in *Bain* that plaintiffs are able to bring these claims for violations of the DTA and the facts here support the claims.

The Supreme Court noted in *Klem* that claims for violations of the CPA, RCW 19.86, *et seq.* can be brought against defendants for acts that are “unfair *or* deceptive”, including in the context of a non-judicial foreclosure sale. *Klem* at 11. The Court went on to cite extensively and discuss its decision in *Panag*, 166 Wn.2d at 48, 204 P.3d 885 (2009), and it expressly clarified that a violation of the CPA may be brought because of a “*per se* violation of a statute, an act or practice that has the capacity to deceive the substantial portions of the public, or an unfair or deceptive practice not regulated by statute but in violation of public interest.” *Klem*,

176 Wn.2d at787. The Court quoted from *Panag* (as did *Walker*):

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

Id. (citing *Panag*, 166 Wn.2d at 48) (quoting *State v. Schwab*, 103 Wn.2d 542, 558, 693 P.2d 108 (1985) (Dore, J. dissenting) (quoting H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914))). The *Klem* Court further noted that “an act or practice can be unfair without being deceptive” and that the statute clearly allows claims for “unfair acts *or* deceptive acts or practices.” *Klem*, 176 Wn.2d at787. Here, the actions of PNC and NWTS were both unfair and deceptive. The Defendants affirmatively lied and misrepresented loan ownership and beneficiary status (deception) and they unfairly prevented Ms. Cabage from having a meaningful FFA mediation and being properly reviewed for a loan modification. Therefore, the Defendants are liable to Ms. Cabage under the CPA and she is entitled to recover her damages and attorneys’ fees and costs.

C. Ms. Cabage’s claims for misrepresentation should advance as she has proven the claims and the damages resulting therefrom.

The numerous misrepresentations made to Ms. Cabage in the course of the foreclosure process have been laid out in detail herein. The Washington Supreme Court has adopted the definition of negligent misrepresentation in the Restatement (Second) of Torts as follows:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 826, 959 P.2d 651 (1998). When a court determines whether a party had a right to rely upon the representations made by another, it must engage in an analysis that involves consideration of the party's "diligence in ascertaining the facts for himself" and the "exercise of care and judgment in acting upon representations which run counter to knowledge within his possession or reach." *Rummer v. Throop*, 38 Wn.2d 624, 231 P.2d 313 (1951).

Washington adopts the position of the *Restatement (Second) of Torts* (1977), Section 551, which provides that:

- (1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.
- (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,
 - (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and
 - (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading

Rest. (Second) of Torts, Section 551 (1977), cited with approval in Oates v. Taylor, 31 Wn.2d 898, 903, 199 P.2d 924 (1949); *Sigman v. Stevens-Norton*, 70 Wn.2d 915, 918-919, 425 P.2d 891 (1967) (relating to *Rest. (Second) of Torts, Section 551(2)(a)*); *Boonstra v. Stevens-Norton, Inc.*, 64 Wn.2d 621, 625, 393 P.2d 287 (1964) (relating to *Rest. (Second) of Torts, Section 551(2)(a)*). Similarly, Section 552 provides:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Rest. (Second) of Torts, Section 552 (1977), cited with approval in Lawyers Title Ins. Corp. v. Baik, 147 Wn.2d 536, 545, 55 P.3d 619 (2002). The suppression of a material fact which a party is bound in good faith to disclose is the equivalent of a false representation. *Oates*, 31 Wn.2d at 902.

In order to prove a claim for fraud or intentional misrepresentation, a plaintiff must prove (1) the representation of an existing fact, (2) materiality, (3) falsity, (4) the speaker's knowledge of its falsity, (5) intent of the speaker that it should be acted upon by the plaintiff, (6) plaintiff's ignorance of its falsity, (7) plaintiff's reliance on the truth of the representation, (8) plaintiff's right to rely upon the representation and (9) damages suffered by the plaintiff. *West Coast, Inc.*

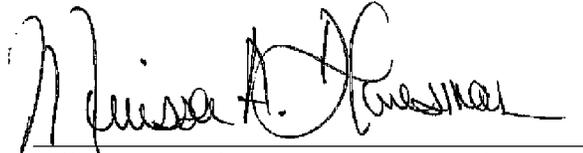
v. Snohomish County, 112 Wn.App. 200, 206, 48 P.3d 997 (2002). Here, Ms. Cabage has laid out the specific misrepresentations that were made by the Defendants about the prerequisites to the foreclosure (issuing the Notice of Pre-Foreclosure Options and a new NOD with accurate information), the authority to foreclose, including the creation, execution and recording of an Appointment of Successor Trustee document signed by PNC rather than the beneficiary and loan owner; NWTS' reliance upon a Beneficiary Declaration also executed by PNC that it was untruthful and it knew to be untruthful; use of a Notice of Default with false information about loan ownership; entry into an FFA mediation based false information about the identity of the parties involved and a complete refusal to participate in any meaningful way in the FFA mediation; and then issuance of an NOTS which also contained false information about the loan owner and beneficiary. Ms. Cabage had to take extensive affirmative action to put a stop to the foreclosure process, at her own expense. Thus, she has met all of the elements necessary to support her claims for negligent and intentional misrepresentations and should be permitted to proceed to trial on those claims.

CONCLUSION

For all the foregoing reasons, Ms. Cabage respectfully urges the Court to find that the trial court did not apply any of the appropriate standards to the analysis of Ms. Cabage's claims and that she had demonstrated cognizable assertions of injury and monetary damages suffered sufficient to prove her claims for violations of the DTA and the

CPA, and claims for intentional and negligent misrepresentation.

Respectfully submitted this 13th day of June, 2014.

A handwritten signature in black ink, appearing to read "Melissa A. Huelsman". The signature is written in a cursive style with a horizontal line underneath it.

Melissa A. Huelsman, WSBA # 30935
Attorney for Plaintiff Sandra Cabage

DECLARATION OF SERVICE

I, Melissa A. Huelsman, certify under penalty of perjury under the laws of the State of Washington, that on the day I signed this declaration of service, I caused a copy of the Plaintiff's Opening Brief, with Request for Judicial Notice and Exhibits, to be electronically mailed and served as follows upon counsel of record and filed with the Court:

Mr. Andrew H. Salter Ms. Lisa Franklin Veris Law Group, PLLC 1809 Seventh Ave, Suite 1400 Seattle, WA 98101 Andy@verislawgroup.com lisafranklinlaw@gmail.com By e-mail per e-service agreement, with hard copy by U.S. Mail.	Ms. Katrina Eve Glogowski Ms. Kimberly M. Hood Glogowski Law Firm, PLLC 506 – 2 nd Avenue Seattle, WA 98104-2343 katrina@glogowskilawfirm.com Kimberly@glogowskilawfirm.com By e-mail per e-service agreement, with hard copy by U.S. Mail.
Mr. Brian L. Lewis Ms. Lauren E. Sanken Mr. David J. Lenci K&L Gates LLP 925 – 4 th Avenue, Suite 2900 Seattle, WA 98104-1158 Lauren.Sancken@klgates.com david.lenci@klgates.com brian.lewis@klgates.com By e-mail per e-service agreement, with hard copy by U.S. Mail.	Fred Burnside Steve Rummage Rebecca Francis Davis Wright Tremaine, LLP 1201 3rd Ave Ste 2200 Seattle, WA 98101-3045 FredBurnside@dwt.com SteveRummage@dwt.com RebeccaFrancis@dwt.com By e-mail per e-service agreement, with hard copy by U.S. Mail.

Signed at Seattle, Washington, this 13th day of June, 2014.

LAW OFFICES OF MELISSA A.
HUELSMAN, P.S.

/s/ Melissa A. Huelsman
Melissa A. Huelsman

MELISSA HUELSMAN LAW OFFICE

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