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STATE OF WASHINGTON

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No. 45953-1-II

**COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON**

SANDRA CABAGE,

Appellant/Plaintiff,

v.

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

Respondents/Defendants.

**RESPONDENT PNC BANK, NATIONAL
ASSOCIATION'S ANSWERING BRIEF**

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I. INTRODUCTION

Despite Appellant Sandra Cabage's invitation to the Court to use her appeal as a vehicle to weigh in on developing issues¹ relating to Washington's Deed of Trust Act ("DTA"), the dispositive issues in this case focus instead on whether Ms. Cabage satisfied the basic, well-established elements of her claims for violation of the Consumer Protection Act ("CPA") and misrepresentation. As the trial court ruled, Ms. Cabage provided no evidence of any damages or other injury she suffered as a result of Respondent PNC Bank, National Association's ("PNC") alleged deceptive acts in connection with its attempts to foreclose non-judicially on her home, including during the Foreclosure Fairness Act ("FFA") mediation in which Ms. Cabage sought a loan modification.

Ms. Cabage now asks this Court to reverse the trial court, but provides no valid basis for the Court to do so. Notwithstanding Ms. Cabage's protestations, the record unambiguously supports the trial court's grant of summary judgment to PNC. Ms. Cabage failed to even allege certain of the damages she now claims to have suffered, and her

¹ See Appellant's Brief at 15 n. 5 (asking this Court to reject Division I's ruling in *Trujillo v. Northwest Trustee Services, Inc.*, No. 705920, 326 P.3d 768 (June 2, 2014) that a non-owner holder of a promissory note is a beneficiary entitled to foreclose); Appellant's Brief at 1-2, 32-40 (suggesting the trial court's grant of summary judgment to PNC was inconsistent with Division I's ruling in *Walker v. Quality Loan Service Corp.*, 176 Wn. App. 294, 308 P.3d 716 (2013) that a cause of action for money damages exists pre-sale for violations of the DTA, an issue that is currently pending before the Washington Supreme Court in *Frias v. Asset Foreclosure Services, Inc.*, No. 89343-8).

other asserted damages are either unsupported by any evidence, or are insufficient to support her claims as a matter of law.

Lacking any evidence that PNC's actions caused her any harm, Ms. Cabage asks this Court to relieve her of her obligation to prove injury and causation on her CPA claim, and damages and reliance on her misrepresentation claim. Appellant's Brief ("App. Brief"), at 45 ("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 damage..."). But, as the Washington Supreme Court recently reiterated in its *Bain* and *Schroeder* opinions, a borrower cannot make out a claim (under the CPA or otherwise), merely by showing an unfair or deceptive act; she must still "produce evidence on *each element required to prove* [her] claim." *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 119, 285 P.3d 34 (2012) (emphasis added); *see also Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94; 114, 297 P.3d 677 (2013). Because Ms. Cabage failed to produce the necessary evidence on either her CPA or misrepresentation claims, the Court properly granted PNC's motion for summary judgment.

Accordingly, this Court should affirm the trial court's grant of summary judgment to PNC on all claims asserted against it.

II. RESPONSE TO APPELLANT'S STATEMENT OF ISSUES

While Ms. Cabage's statement of the issues correctly identifies "injury" under the CPA and "damages" under her misrepresentation claim as central issues in this appeal, PNC disagrees with her framing of those issues, including the lengthy discussion of case law on pages 5-6 of Ms. Cabage's opening brief, on several grounds.

First, as to Ms. Cabage's CPA claim against PNC, the issues on appeal include not only the "injury" prong of the CPA, but also the "causation" prong, and focus on whether Ms. Cabage provided sufficient evidence on (not merely "articulated") each element of her CPA claim to survive summary judgment.

Second, as to Ms. Cabage's misrepresentation claim against PNC, the issues on appeal include not only her evidence of "damages," but also her showing of "reliance" and—to the extent her claim is based on alleged misrepresentations in 2009—whether she presented sufficiently clear, cogent and convincing evidence of misrepresentations to survive summary judgment.

Third, as to Ms. Cabage's claim under the DTA, she asserted that claim solely against NWTS. CP 17-18. While the Washington Supreme Court has recognized the possibility of vicarious liability for DTA violations against a beneficiary, App. Brief at 2 n.1, Ms. Cabage neither

alleged nor introduced any evidence that PNC “so control[led] the trustee so as to make the trustee a mere agent of the beneficiary.” *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 791 n.2, 295 P.3d 1179 (2013). Moreover, Ms. Cabage’s claims against PNC rely on her assertion it was *not* the beneficiary. Therefore, Ms. Cabage’s DTA claim, and any associated issues on appeal, relate solely to NWTS, and not to PNC.

III. STATEMENT OF THE CASE

A. Factual Background

1. Ms. Cabage’s Loan Transaction and Loan Documents

In March 2006, Ms. Cabage borrowed \$212,000 (the “Loan”) from National City Mortgage, a division of National City Bank of Indiana (“NCBI”). CP 3. That same day, Ms. Cabage signed a promissory note in the original principal amount of \$212,000 (the “Note”). CP 481-486; CP 647-823. To secure payment of the Note, Ms. Cabage also executed a deed of trust (the “Deed of Trust”) granting NCBI a security interest in the real property with the street address of 1342 Griggs St., Dupont, Washington, 98237 (the “Property”). CP 487-507; CP 648. The Deed of Trust named First American Title Insurance Co. as the Trustee, and granted the Trustee the power of sale in the event of default. *Id.* The Deed of Trust was recorded on March 9, 2006 as Instrument No. 200603090591 in the Official Records of Pierce County. *Id.*

On or about April 11, 2006, NCBI indorsed the Note to its subsidiary, National City Mortgage Co. (“NCMC”), and executed a corresponding Assignment of Deed of Trust. CP 486, 648-649. NCMC then indorsed the Note in blank and executed a corresponding Assignment of Deed of Trust. *Id.* Through a series of mergers, NCBI and NCMC merged into National City Bank (collectively, “National City”), which ultimately merged into PNC, effective November 6, 2009. CP 1-2, ¶ 1.3; CP 649, ¶ 6. Ms. Cabage received notice of National City’s merger into PNC in 2009. CP 573 at 19:16-20.

2. Sale and Securitization of Ms. Cabage’s Loan & National City’s Continued Role as Loan Servicer

On or about May 23, 2006, National City sold the Loan to Goldman Sachs Mortgage Company (“GSMC”), but remained as the loan servicer under a Second Amended and Restated Flow Seller’s Warranties and Servicing Agreement between GSMC and National City, dated January 1, 2006 (the “Servicing Agreement”). CP 649 ¶ 4. GSMC subsequently transferred the Loan into securitization trust GSAÁ 2006-12, Deutsche Bank National Trust Co. (“Deutsche Bank”) became the custodian of the loan file, and National City remained as the loan servicer until November 2009, when it merged into PNC (when PNC became the servicer). CP 649 ¶¶ 5-6; CP 785. National City and PNC operated as

servicers under the master servicer for the trust, initially JPMorgan Chase and later Bank of New York Mellon (“BONY-Mellon”). CP 785; CP 1430 ¶ 3.

The Servicing Agreement authorized National City (and later PNC) 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.” CP 695. 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.* The Servicing Agreement also required PNC to commence foreclosure proceedings once a borrower defaulted on her loan obligations. *See id.* at CP 695-696 § 4.2.

3. Ms. Cabage’s Default, Abandonment of the Property and Bankruptcy

Ms. Cabage stopped paying her mortgage in May 2009. CP 650, ¶ 8; CP 574-576 (20:11-18, 22:2-3). That fall, she filed for bankruptcy, told the bankruptcy court she intended to abandon her home, and then moved out of the Property in December 2009. CP 513-17 & 527.

PNC moved for relief from stay on February 5, 2010, to permit it to begin foreclosure proceedings on the Property. CP 556-561. Ms.

Cabage did not object to PNC's motion or challenge its security interest in the Property, and the bankruptcy Court granted PNC's motion on March 8, 2010. CP 562-564. Ms. Cabage did not reaffirm the Note in the bankruptcy proceeding, received a discharge on March 25, 2010—ending her personal liability under the Note—and her case was closed on March 29, 2010. *See id.*, CP 565-567 & CP 568-569.

Ms. Cabage has not made any loan payments since April 2009, more than five years ago. CP 592 (50:3-9); CP 586 (40:3-5).

4. PNC's Attempts to Foreclose Non-Judicially

Months after Ms. Cabage defaulted, moved out of her house, and received a bankruptcy discharge, NWTS issued a Notice of Default on June 18, 2010 and recorded the first Notice of Trustee's Sale with the Pierce County Auditor on July 22, 2010 (the "2010 NTS"). CP 371-74. Ms. Cabage has admitted she did not take any action based on the Notice of Default or 2010 NTS. CP 579 (28:4-9); CP 590 (48:23-25). No sale based on the 2010 NTS occurred, and Ms. Cabage moved back into the property in October 2011. CP 5. She did not, however, start making mortgage payments, choosing instead to occupy the property rent-free. CP 591-592 (49:10-50:9).

NWTS recorded another Notice of Trustee's Sale on November 8, 2011 (the "2011 NTS" and, together with the Notice of Default and 2010

NTS, the “DTA Notices”), but that sale ultimately was cancelled as well. CP 404.

Although Ms. Cabage claims in her opening brief that she received “nearly constant threatening letters from PNC about the looming foreclosure,” App. Brief at 7, she failed to provide any evidence to support this statement. Neither PNC nor National City (nor NWTs) commenced non-judicial foreclosure on the Property prior to sending the Notice of Default in 2010. CP 650 ¶ 10; CP 404 ¶ 7. According to the official records of Pierce County, the first Notice of Trustee’s Sale related to the Property was not recorded until July 22, 2010. CP 619-621.

5. The Mediation and Mediator’s Certification

In early 2012, Ms. Cabage sought mediation under the FFA with PNC. CP 195 ¶ 2.9. Prior to the mediation, both PNC and Ms. Cabage provided documentation required by the then-current FFA mediation statute, including the results of PNC’s net present value (“NPV”) calculation. CP 823. PNC also assessed Ms. Cabage’s eligibility for a loan modification under both the Home Affordable Modification Program (“HAMP”) and its own core loan modification programs, and determined she was ineligible for a loan modification.

Ms. Cabage was ineligible for a modification under HAMP because BONY-Mellon, the master servicer on her loan (referenced as the

“investor” in internal PNC documents), did not participate in HAMP and the Servicing Agreement under which PNC serviced Ms. Cabage’s loan was inconsistent with the guidelines governing HAMP. CP 651 ¶ 12; CP 805; CP 695-96. National City contacted BONY-Mellon in June 2009 seeking a waiver of the inconsistent provisions of the Servicing Agreement to allow National City to offer HAMP modifications to borrowers (like Ms. Cabage) in the GSAA 2006-12 pool, but despite extensive discussions, BONY-Mellon declined to grant the necessary waiver. CP 1430-34. As of August 2012—months *after* Ms. Cabage’s mediation with PNC—no waiver had been granted by BONY-Mellon, so Ms. Cabage remained ineligible for a HAMP modification. CP 1431 ¶ 6.²

Ms. Cabage was also ineligible for PNC’s in-house “core” modification programs because she had received a bankruptcy discharge and PNC had a policy prohibiting modification of any discharged loan where the borrower did not reaffirm the debt during the bankruptcy. CP 651 ¶ 12; CP 805-808 (servicing notes reflecting PNC policy and Ms.

² Ms. Cabage seeks to challenge the sufficiency of PNC’s communications with BONY-Mellon about HAMP by citing deposition testimony from PNC representative Christian Martin. App. Brief at 23-24. But Ms. Cabage failed to introduce that testimony into the record before the trial court, and did not seek to supplement the record on appeal. Moreover, Ms. Cabage repeatedly mischaracterizes Mr. Martin’s testimony—for example, while she suggests Mr. Martin did not know when or how BONY-Mellon became the master servicer, *id.*, he actually provided specific testimony on those issues, and simply did not know the precise date when BONY-Mellon purchased JPMorgan Chase’s master servicing business. Martin Dep., 81:8-82:10. Accordingly, the Court should disregard Ms. Cabage’s discussion of Mr. Martin’s deposition testimony.

Cabage's ineligibility). This policy applied to Ms. Cabage's loan pursuant to the Servicing Agreement's directive that PNC service Ms. Cabage's loan using the same procedures it "customarily employs and exercises in servicing and administering mortgage loans for its own account." CP 695.

PNC attended the mediation on May 24, 2012 (the "Mediation"), represented by Chuck Katz of Routh Crabtree, and by Marcus Moreland, a PNC Mortgage Loss Mitigation Mediation Negotiator. *See* CP 822.

Despite Ms. Cabage's unsupported assertions to the contrary, PNC and its representatives were authorized to engage in the Mediation and agree to a resolution. CP 695 § 4.1 (PNC authorized to "waive, modify or vary any term of any Mortgage Loan"); CP 816 (Mr. Moreland's primary job is to attend court-mandated pre-foreclosure mediations "as representat[ative] for the bank with settlement authority."); App. Brief at 12 ("Mr. Katz and Mr. Moreland spent the session insisting that the 'investor' who owned the loan had provided complete authority to PNC...").

At the Mediation, PNC's representatives explained to Ms. Cabage that she was not eligible for a loan modification. CP 594 at 54:1-5; CP 804 (servicing notes describing mediation). Thus, while the parties discussed other issues during the Mediation, including whether the NPV of a modified loan would exceed the anticipated net recovery at foreclosure, PNC's representatives did not offer Ms. Cabage a loan

modification. CP 594-597. Reflecting PNC's good-faith approach to the Mediation, the mediator certified that (1) both parties acted in good faith, and (2) the NPV of the modified loan would not exceed the anticipated net recovery at foreclosure. CP 822-823.

B. Procedural Background

1. Ms. Cabage's Complaint

Shortly after the Mediation—and before she even received the mediator's certification—Ms. Cabage filed this lawsuit, seeking to enjoin the then-pending trustee's sale of the Property and asserting claims against PNC based on alleged misrepresentations during the non-judicial foreclosure process, including the Mediation. CP 1-20. Ms. Cabage did not allege any injury or damage she had suffered as a result of any supposed misrepresentations, or that she had reasonably relied on those misrepresentations. *Id.* However, in a contemporaneous motion seeking a temporary restraining order, Ms. Cabage referenced (1) attorneys' fees and costs associated with the Mediation; (2) attorneys' fees and costs associated with the motion itself; and (3) moving costs associated with her voluntary moves out of the Property in 2009 and back into the Property in 2011. CP 46.

2. Discovery on Ms. Cabage's Damages and Injury

PNC served written discovery on Ms. Cabage about the damages and injury she claimed to have suffered as a result of PNC's alleged misrepresentations. In response to PNC's requests, Ms. Cabage provided both a written response and attorney time sheets listing the costs and fees she incurred in connection with the Mediation and this lawsuit, none of which identified any fees or costs to "investigate" Ms. Cabage's claims. CP 624-631. Ms. Cabage also identified her time off work to attend both the Mediation and a TRO hearing (though no such hearing was ever held in this case), alleged emotional distress damages, and certain foreclosure-related fees listed on the DTA Notices. *Id.*

During her deposition, Ms. Cabage confirmed that the damages she was claiming in this lawsuit were extremely limited. She testified she had not paid any of the amounts listed on the DTA Notices, and that she was a salaried employee whose pay was not affected by the time she took off to attend the Mediation. CP 586 (40:3-8); CP 592 (50:3-9); CP 602 (75:10-17). Ms. Cabage also testified that, apart from attending the Mediation and her deposition in this case, she did not engage in any travel as a result of PNC's actions. CP 603-604 (76:18-77:3). She admitted that she had not suffered emotional damages specifically as a result of her dealings with PNC, the emotional distress she had experienced related to the

possibility of losing her home (rather than any specific misrepresentations by PNC), and she was unable to quantify those emotional damages. CP 605 (78:17-25); CP 606 (79:18-24); CP 610 (83:17-21). Ms. Cabage also testified about a document (Deposition Exhibit 11) itemizing various moving costs she had incurred in connection with her voluntary moves out of the Property in 2009 and back into the Property in 2011, neither of which she tied to any misrepresentations by PNC. CP 608 (81:12-16); CP 610 (83:22-25). Finally, Ms. Cabage testified that, apart from the moving costs, attorneys' fees and emotional distress, *she was not seeking any other money damages* in her lawsuit. CP 611 (87:6-9).

3. PNC's Judicial Foreclosure Counterclaim and Third Party Complaint

In the fall of 2012, PNC terminated its attempts to foreclose non-judicially on the Property, and filed an amended answer in this case, asserting a counterclaim for judicial foreclosure against Ms. Cabage. *See* CP 215-220. PNC also filed a Third-Party Complaint for Judicial Foreclosure against United Guaranty, a junior lienholder on the Property. CP 276. United Guaranty never appeared, answered or otherwise responded to the Third-Party Complaint or to PNC's summary judgment motion.

4. PNC's Summary Judgment Motion

On September 20, 2013, PNC moved for summary judgment on its judicial foreclosure claims against Ms. Cabage and United Guaranty, and on Ms. Cabage's claims against PNC. CP 445-474. In seeking summary judgment on Ms. Cabage's claims, PNC focused on the lack of injury and causation for her CPA claim, and the lack of damages, reliance and evidence of 2009 misrepresentations on her misrepresentation claim. CP 463-473. Ms. Cabage's opposition focused primarily on PNC's alleged deceptive statements, and provided only minimal briefing—and no evidence—of injury, damages, causation or reliance. CP 1247-58.

The trial court held a hearing on PNC's motion on December 18, 2013, and issued its decision granting summary judgment to PNC on January 24, 2014. CP 1610-12. The trial court subsequently entered an order granting PNC's motion and entered a Non-Recourse Judgment and Decree of Foreclosure on January 31, 2014. CP 1613-22. Thereafter, the trial court granted PNC's order of sale, CP 1626-27, resulting in the sheriff's sale of the Property. On February 27, 2014, Plaintiff filed a Notice of Appeal. CP 1630-31.

IV. ARGUMENT

A. Standard of Review

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party bears the initial burden of showing the absence of an issue of material fact. *See Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A material fact is one upon which the outcome of the litigation depends. *See Graham v. Concord Constr., Inc.*, 100 Wn. App. 851, 854, 999 P.2d 1264 (2000) (citing *Doe v. Dep't of Transp.*, 85 Wn. App. 143, 147, 931 P.2d 196 (1997)).

If the moving party meets this initial showing and is a defendant, the burden shifts to the plaintiff to articulate specific facts establishing a genuine issue for trial. *See Young*, 112 Wn.2d at 225; CR 56(e) (“an adverse party may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts . . .”). To satisfy her burden, a plaintiff “may not rely on ‘speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits accepted at face value.’” *Rucker v. Novastar Mortg., Inc.*, 177 Wn. App. 1, 10, 311 P.3d 31 (2013) (quoting *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)). “Mere allegations or conclusory statements of facts unsupported by evidence are not sufficient to establish

a genuine issue.” *Id.* (citing *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989)).

This Court reviews *de novo* an order granting summary judgment, engaging in the same inquiry as the trial court. *See Beaupre v. Pierce Cnty.*, 161 Wn.2d 568, 571, 166 P.3d 712 (2007); *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 63-64, 1 P.3d 1167 (2000). However, the Court may *affirm* the ruling below *on any ground supported by the record*, “even if the trial court did not consider the argument.” *King Cnty. v. Seawest Inv. Assocs., LLC*, 141 Wn. App. 304, 310, 170 P.3d 53 (2007) (citing *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989)).

The trial court correctly applied these standards in granting summary judgment to PNC. This Court should affirm that decision, for the reasons set forth below.

B. The Trial Court Properly Granted PNC Summary Judgment on Ms. Cabage’s CPA Claim.

The Court should affirm the trial court’s grant of summary judgment to PNC on Ms. Cabage’s CPA claim because she cannot show all five essential elements of that claim: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) that impacts the public interest; (4) that causes injury to the plaintiff’s business or property; and (5) which injury is causally linked to the unfair or deceptive act. *See*

Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 917, 32 P.3d 250 (2001). A plaintiff must “produce evidence on each element required to prove a CPA claim.” *Bain*, 175 Wn.2d at 119.

Here, Ms. Cabage bases her CPA claim on two different theories. First, she claims PNC’s actions during the Mediation violated the CPA. Second, she claims PNC violated the CPA based on representations regarding its status as the beneficiary of Ms. Cabage’s Note in the DTA Notices. However, as the trial court found, Ms. Cabage failed to produce evidence on the injury or causation elements required to prove her CPA claim, under either theory. Moreover, Ms. Cabage’s CPA claim based on the Mediation fails for two independent reasons: (i) PNC was authorized to mediate and to consider Ms. Cabage for a loan modification, and (ii) the mediator’s certification of good faith precludes Ms. Cabage’s claim that PNC mediated in bad faith. This Court may affirm the trial court’s grant of summary judgment to PNC on either ground.

1. Ms. Cabage’s CPA Claim Based on the Mediation Fails.

In her opening brief, Ms. Cabage asks this Court to effectively add statutory damages to the FFA mediation statute by presuming injury and causation—in the form of the borrower’s fees and costs to mediate, or denial of proper consideration for a loan modification—for any failure to mediate in good faith. But while the DTA (to which the FFA mediation

statute was added in 2011) is strictly construed in favor of borrowers, a plaintiff asserting a CPA claim for violation of the FFA mediation statute must still *prove all elements of her claim*, including injury and causation. See *Bain*, 175 Wn.2d at 119; *Thurman v. Wells Fargo Home Mortg.*, No. C12-1471-JCC, 2013 WL 3977622 (W.D. Wash. Aug. 2, 2013). The trial court correctly ruled that Ms. Cabage failed to satisfy that burden, and this Court should affirm that ruling, both on the lack of injury and causation grounds the trial court relied on, and for several independent reasons.

a. The Trial Court Correctly Found Ms. Cabage Did Not Provide Evidence of Injury and Causation.

Despite Ms. Cabage's arguments to the contrary, the trial court correctly found that she did not offer evidence of any injury she suffered as a result of PNC's actions during the Mediation. CP 1611. Ms. Cabage's request that this Court lower the CPA's injury and causation requirements in the context of FFA mediation claims does not alter this conclusion.

In her opening brief, Ms. Cabage identifies two categories of injuries she supposedly suffered as a result of PNC's alleged failure to mediate in good faith: (a) her costs, fees and time to attend the Mediation; and (b) denial of an opportunity to be reviewed for a loan modification. App. Brief at 42. However, as Judge Coughenour of the Western District

of Washington explained in granting summary judgment dismissing a largely identical CPA claim, neither the fees and expenses of mediation, nor denial of a loan modification, constitute CPA injury, at least where the borrower—like Ms. Cabbage—is ineligible for a loan modification. *See Thurman*, 2013 WL 3977622.³

Mediation Costs and Fees. In arguing that her fees and costs to mediate constitute CPA injury, Ms. Cabbage assumes that a lender's failure to mediate in good faith ***causes*** any fees and costs associated with a failed mediation. But the CPA's causation standard requires a plaintiff to prove she ***would not have incurred*** those fee and costs had the lender acted in good faith. *See Indoor Billboard/Wash., Inc.*, 162 Wn.2d 59, 84, 170 P.3d 10 (2007) (“[a] plaintiff must establish that, ***but for*** the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury.”) (emphasis added).

Ms. Cabbage has not explained how PNC's purported failure to mediate in good faith ***caused*** her expenses for appearing at the mediation,

³ In *Thurman*, Judge Coughenour dismissed borrower's similar challenge questioning whether Wells Fargo was the holder of their Note, and therefore, whether it could properly participate in an FFA mediation. *See* 2013 WL 3977622, at *3. As Judge Coughenour recognized, if Wells Fargo were not the beneficiary or its authorized agent, with power to modify the loan, the borrower's CPA claim would fail as a matter of law, since “if Wells Fargo is not the beneficiary, then it never had a duty to mediate in good faith, and the Thurmans' lawsuit is moot.” *Id.* Given Ms. Cabbage's allegations that PNC was not the beneficiary of her Note at the time of the Mediation, this serves as an alternative grounds on which this Court may affirm the trial court's dismissal of Ms. Cabbage's CPA claim based on PNC's actions at the Mediation.

when Ms. Cabage voluntarily elected to invoke her right to mediate under the FFA—incurring legal fees to obtain the required referral to mediation, CP 628; Appendix B, at RCW 61.24.163(1) (2011)—and presumably would have appeared at the mediation regardless of whether PNC mediated in good or bad faith.

The voluntarily assumed costs of availing oneself of statutory rights—here, mediation under the FFA—cannot be injury under the CPA. If it were, every borrower unhappy with the outcome of her mediation would automatically have CPA injury. *See Thurman*, 2013 WL 3977622, *2-3 (CPA injury lacking where, among other things, plaintiffs “would have paid an attorney to attend the mediation session even if Wells Fargo *had* mediated in good faith”) (emphasis in original).

Ms. Cabage’s fees and expenses incurred in connection with the Mediation fall under the umbrella of “expense[s] [that] would have been incurred regardless of whether a violation existed, [for which] causation cannot be established.” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 64, 204 P.3d 885 (2009). They are therefore insufficient to satisfy her obligation to prove CPA injury and causation.

Failure to Consider Ms. Cabage for Loan Modification. Ms. Cabage also argues that PNC’s alleged failure to mediate in good faith denied her the opportunity to be properly considered for a loan

modification. App. Brief at 42. As an initial matter, Ms. Cabage has no right to a modification of her loan under Washington law, *see Badgett v. Security State Bank*, 116 Wn.2d 563, 572, 807 P.2d 356 (1991), and the FFA mediation statute—part of the DTA, which the Washington Supreme Court has emphasized is **not a rights-creating statute**, *see Schroeder*, 177 Wn.2d at 114—does not grant her that right. Ms. Cabage cannot manufacture an injury under the CPA by re-casting a rejected substantive right (to a loan modification) as a procedural right (to proper consideration for a loan modification).

Furthermore, as in *Thurman*, Ms. Cabage could not have been harmed by an alleged failure to properly consider her for a loan modification, because she was **not eligible** for a loan modification, either under HAMP or under PNC's core modification programs. In *Thurman*, the borrowers were not eligible for either a HAMP modification, or a modification under Wells Fargo's alternative loan modification program. *See* 2013 WL 3977622, at *2. As a result, Judge Coughenour recognized that the borrowers' arguments regarding Wells Fargo's alleged bad faith and improper NPV calculations were irrelevant, because the borrowers **could not** make the necessary showings of causation and damages to establish a violation of the CPA. *See id.* at *3-4 (“[T]he Thurmans fail to point to any evidence that puts into dispute Wells Fargo's predicate

assertion of fact that the Thurmans were not *eligible* for a HAMP or MAP2R modification If the Thurmans were never *eligible*—and they have pointed to no evidence tending to show they were—then the accuracy or transparency of Wells Fargo’s *qualification* calculations is irrelevant.”) (emphasis in original).

Like the Thurmans, Ms. Cabage was *not eligible for a loan modification*. Despite her mischaracterizations of the evidence and attempts to cloud the record, the undisputed evidence shows that Ms. Cabage was not eligible for either a HAMP modification or for any of PNC’s internal “core” loan modification programs. She was not eligible for HAMP because the master servicer on her loan, BONY-Mellon, did not participate in HAMP, and did not agree to modify or waive the provisions of its Servicing Agreement with PNC that were inconsistent with the HAMP Guidelines, which prevented PNC from offering Ms. Cabage a HAMP modification. *Compare* CP 695-696 § 4.2 (Servicing Agreement provision requiring PNC to foreclose once a borrower defaulted on her loan obligations) with Making Home Affordable Program – Handbook for Servicers of Non-GSE Mortgages, v. 4.3 (effective Dec. 15, 2011), §3.4.1, available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_34.pdf (last visited August 20, 2014); *see also* CP 1396 (75:2-15); CP 651 ¶ 12; CP 1430-31 ¶¶ 2-6;

CP 805 (“This loan is not HAMP eligible, therefore the only review of this file is core loss mitigation. The investor loan type is not participating in HAMP.”).

Separately, Ms. Cabage was not eligible for any of PNC’s internal “core” loan modification programs because she had received a bankruptcy discharge of her loan and had not reaffirmed her debt. CP 651 ¶ 12; CP 805 (“The B filed a Chapter 7 bankruptcy and did not reaffirm the debt. Therefore, the loan is not eligible for loan modification review.”). Under the Servicing Agreement, PNC was required to service Ms. Cabage’s loan in the same way it serviced mortgage loans for its own account. CP 695 § 4.1. As Ms. Cabage’s attorney conceded at oral argument, PNC was entitled to follow this policy in determining whether Ms. Cabage was eligible for a modification under its core modification programs. RP at 22:9-14.

Given Ms. Cabage’s ineligibility for a loan modification, she cannot have been harmed by PNC’s alleged failure to mediate in good faith at the Mediation or other alleged non-compliance with the FFA. Thus, she cannot prove the injury or causation necessary to hold PNC liable under the CPA in connection with the Mediation. *See Thurman*, 2013 WL 3977622, at *3-4. The Court should therefore affirm the trial

court's ruling granting PNC summary judgment on Ms. Cabage's CPA claim.

Further policy grounds supporting the trial court's ruling. The trial court's application of the CPA's injury and causation requirements to Ms. Cabage's claim was also consistent with the policies behind the DTA and the FFA mediation statute. Indeed, strict application of the well-established CPA injury and causation requirements is vitally important in the context of claims for failure to mediate in good faith under the FFA.

The FFA mediation statute governing the Mediation listed numerous potential grounds on which a mediator could find a failure to mediate in good faith. *See* Appendix B, at RCW 61.24.163(8) (2011). As Ms. Cabage's lengthy and scattershot list of PNC's alleged good-faith mediation violations reflects, relaxing the injury and causation requirements would allow any dissatisfied borrower to allege—and likely get to trial—on a claim of failure to mediate in good faith whenever she did not receive a modification at mediation. This would turn the FFA mediation statute—designed to give the homeowner and the lender an opportunity to “reach a fair, voluntary and negotiated agreement”⁴—into a breeding ground for additional litigation by dissatisfied borrowers, wholly

⁴ *See* <http://www.dfi.wa.gov/consumers/homeownership/foreclosure-mediation.htm> (last visited August 19, 2014).

undermining the legislature’s goal of having an “efficient and inexpensive”—non-judicial foreclosure process (of which FFA mediation is now a part). *Frizzell v. Murray*, 179 Wn.2d 301, 309, 313 P.3d 1171 (2013).

In addition, the FFA mediation statute is and has been a work-in-progress since it was initially enacted in 2011, particularly with regard to the documentation the parties are required to exchange. Over the past **three years**, the statute has been amended **three times**, often to address significant flaws in the existing legislation. *See* Appendices A-D. For example, the second iteration of the FFA mediation statute (under which Ms. Cabage has asserted her claims) required both the borrower and beneficiary to exchange documents at the same time, 10 days prior to the mediation. Appendix B, at RCW 61.24.163(8)(b) & (c) (2011). The simultaneous timing of this exchange prevented the beneficiary from using the borrower’s information in running its NPV calculation. The legislature therefore revised the statute in 2012 to require the borrower to provide her documentation first, and for the beneficiary to then provide its documentation 20 days later. Appendix C, at RCW 61.24.163(4) & (5) (2012).⁵

⁵ Similarly, the version of the mediation statute that governed Ms. Cabage’s Mediation only required disclosure of portions or excerpts of a pooling and servicing agreement (“PSA”) and only if the limitations in that PSA were the sole basis on which the

These statutory flaws, combined with the permissive approach to injury and causation Ms. Cabage seeks, would unfairly subject lenders to liability. For example, Ms. Cabage seeks to hold PNC liable for failing to mediate in good faith (a *per se* CPA violation) by not providing a proper NPV at least 10 days prior to the Mediation—even though the flawed second version of the FFA mediation statute effectively prevented it from running an NPV using Ms. Cabage’s documents. CP 44 ¶ 11 (admission Ms. Cabage provide her documents 10 days prior to the Mediation). Nonetheless, the record reflects that the parties “fully explored” PNC’s NPV and its inputs during the Mediation, CP 823, and PNC ultimately did not offer a loan modification because Ms. Cabage was not eligible for one. *See supra*, at 22-23. Thus, Ms. Cabage suffered no harm from receiving a revised NPV and inputs later than the statute required. The trial court thus acted both correctly and equitably in rejecting Ms. Cabage’s argument that her mediation fees or amorphous “lost opportunity to be properly

beneficiary could not grant a loan modification. Appendix B, at RCW 61.24.163(8)(b)(x). But prohibitions on modification can be located in documents other than PSAs, like the Servicing Agreement and PNC’s bankruptcy discharge policy here. Accordingly, the legislature recently revised the statute to require disclosure of “other investor restriction[s],” and to remove the requirement that those restrictions be the “sole” basis a modification is unavailable. Appendix D, at RCW 61.24.163(5)(j) (2014). Thus, Ms. Cabage’s argument that PNC violated the FFA mediation statute by failing to provide a copy of the Servicing Agreement and documentation of PNC’s policy prohibiting core modifications for borrowers who had received a bankruptcy discharge lacks merit. App. Brief at 16.

considered for a loan modification” could serve as sufficient injury to support Ms. Cabage’s CPA claim.

b. This Court May Also Affirm the Trial Court Because PNC Properly Participated in the Mediation in Good Faith.

In addition to the grounds on which the trial court relied, this Court can affirm the trial court’s grant of summary judgment to PNC on two additional grounds, both stemming from record evidence establishing conclusively that PNC participated in the mediation in good faith.

First, setting aside the flawed technical breaches discussed in the prior section (e.g., the failure to provide a proper NPV and excerpt of a PSA), Ms. Cabage’s claim focuses primarily on her assertion that PNC lacked the authority to mediate or consider her for a loan modification. But the undisputed evidence in the record demonstrates that PNC was an authorized agent of the beneficiary—who the FFA mediation statute expressly permitted to participate in the mediation, Appendix B, at RCW 61.24.163(6) (2011)—and had authority to make decisions about Ms. Cabage’s eligibility and qualification for a loan modification. CP 695-696 §§ 4.1-4.2. And PNC representative Marcus Moreland, who attended the Mediation by phone, had the authority to agree to an appropriate resolution, exactly as the statute required. Appendix B, at RCW 61.24.163(6) (2011); CP 816-822. Therefore, Ms. Cabage’s attempt to

challenge PNC's authority to mediate, and the authority of its representatives, cannot support a CPA claim.

Second, this Court may also affirm the trial court's order by ruling that the mediator's certification that PNC mediated in good faith precludes Ms. Cabage from asserting a claim for failure to mediate in good faith. CP 822-823. While the FFA mediation statute that governed the Mediation included a list of acts that "may" constitute a failure to mediate in good faith, Appendix B, at RCW 61.24.163(8), it placed responsibility for determining whether a party had in fact failed to mediate in good faith on the mediator who oversaw the mediation, who had to certify [w]hether the parties participated in the mediation in good faith." *Id.*, RCW 61.24.163(9)(d). The statute made *that certification* the trigger for both the borrower's defenses to, or grounds to enjoin, the non-judicial foreclosure sale, as well as for the beneficiary's right to proceed to foreclose. *See* Appendix B, at 61.24.163(10), (11)(a)-(c) & (12) (2011). And, while the statute expressly permitted a beneficiary to rebut a mediator's certification that it failed to act in good faith, the statute contained *no similar provision* allowing a borrower to challenge a mediator's certification that the beneficiary mediated in good faith. *Id.*, at RCW 61.24.163(10) & (11)(a). Finally, the mediation statute permitted the mediator's certification and the materials presented during the

mediation process to be admitted into evidence in subsequent litigation “pertaining to a foreclosure action between the parties,” but *prohibited* any discovery from or attempt by the parties to take testimony from the mediator. Appendix E, at RCW 61.24.169(4)(b) (2011).

Read together and in the context of the larger goals of the DTA and the FFA, these statutory provisions make sense only if the mediator’s certification that the beneficiary mediated in good faith is treated as binding. Otherwise, the specific provisions authorizing the beneficiary to proceed to foreclose following receipt of the mediator’s certification of good faith would be rendered meaningless. Appendix B, at RCW 61.24.163(10) & (12) (2011). More broadly, given the reality that the parties to a mediation who failed to agree on a loan modification would undoubtedly disagree on what happened at the mediation, and the prohibition on the mediator testifying in a subsequent lawsuit, such claims would likely result in significant numbers of additional trials. As discussed above, this result would be fundamentally inconsistent with the basic policies behind the DTA and FFA. *See supra*, at 23-26.

This Court should therefore interpret the language in RCW 61.24.135(2) referencing a “violat[ion of] the duty of good faith under RCW 61.24.163” to incorporate *all* of the provisions in RCW 61.24.163 relating to good faith, including the provisions placing responsibility for

determining whether the beneficiary mediated in good faith in the mediator's hands. Accordingly, the Court should conclude that a mediator's certification that the beneficiary mediated in good faith not only authorizes the beneficiary to proceed to foreclose, but also precludes the borrower from asserting a CPA claim based on an alleged failure to mediate in good faith. As the mediator in this case certified that PNC mediated in good faith, this Court may affirm the trial court's grant of summary judgment to PNC on this additional basis.

2. Ms. Cabage's CPA Claim Based on the DTA Notices Fails.

Ms. Cabage's second CPA theory—based on her claim that PNC misrepresented itself as the beneficiary of her Deed of Trust in the DTA Notices when it was not the holder of her Note, CP 15-16—likewise fails because Ms. Cabage did not offer any evidence of injury she suffered as a result of that representation.

Ms. Cabage argues she has proven CPA injury, notwithstanding the lack of foreclosure, citing recent Washington Supreme Court and Court of Appeals opinions, particularly *Bain*, 175 Wn.2d 83, and *Walker v. Quality Loan Service Corp.*, 176 Wn. App. 294, 308 P.3d 716 (2013). App. Brief at 32-45.⁶ But neither case supports Ms. Cabage's argument

⁶ Ms. Cabage also references several other recent decisions, including *Albice v. Premier Mortg. Services of Washington, Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012); *Bavand v.*

that her scattershot, conclusory list of supposed injuries—most unsupported by any evidence in the record or unrelated to the alleged misrepresentations—were sufficient to allow her CPA claim to survive summary judgment.

In *Bain*, the Washington Supreme Court reiterated the fundamental requirement that a CPA plaintiff like Ms. Cabage “**produce evidence on each element** required to prove a CPA claim,” including injury and causation. *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 119, 285 P.3d 34 (2012) (emphasis added). Notably, following the Supreme Court’s ruling in *Bain*, Ms. Bain had summary judgment entered against her, dismissing her CPA claim against MERS due to her **failure to prove injury or causation**. See *Bain v. Metro. Mortg. Grp., Inc.*, No. 08-2-43438-9 SEA, 2013 WL 6193887 (Super. Ct. Aug. 30, 2013); see also

OneWest Bank, F.S.B., 176 Wn. App. 475, 309 P.3d 636 (2013); *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013); and *Rucker v. Novastar Mortgage, Inc.*, 177 Wn. App. 1, 311 P.3d 31 (2013). None of these cases support Ms. Cabage’s argument that she has offered sufficient proof of injury to take her CPA claim to trial. *Albice* involved only a request to set aside a completed trustee’s sale and did not involve damages. 174 Wn.2d at 565. *Bavand* involved a rule 12(b)(6) motion and the only injury the court found was the sale of the borrower’s property. 176 Wn. App. at 508. *Klem* involved review of a jury verdict finding a trustee liable for falsely predating a notice of sale and then refusing to postpone the resulting trustee’s sale; the Supreme Court held there was sufficient evidence the premature sale (which occurred early only because of the predated notice of sale) could have prevented the borrower from closing a sale of the property and repaying the debt. 176 Wn.2d at 795. Finally, the borrower in *Rucker* sought only to vacate a completed trustee’s sale, and did not seek to recover damages. 177 Wn. App. at 17.

Oltman v. Holland Am. Line USA, Inc., 163 Wn.2d 236, 248, 178 P.3d 981 (2008).

Walker involved a motion for judgment on the pleadings under CR 12(c), in which the court “examine[s] the pleadings to determine whether the claimant can prove any set of facts, consistent with the complaint, which would entitle the claimant to relief.” *Walker*, 176 Wn. App. at 304. Under the CR 12(c) standard, the court “presume[s] the plaintiffs [sic] allegations are true and may consider hypothetical facts not included in the record.” *Id.* Consequently, the *Walker* court was **required to accept as true** the plaintiff’s allegations that he incurred investigative expenses, travel expenses, and injury from taking time off work. Here, unlike in *Walker*, the trial court denied Ms. Cabage’s CPA claim **on summary judgment** because fact discovery was complete and the undisputed facts showed Ms. Cabage did not suffer any injury or harm caused by alleged misrepresentations by PNC.

Turning to Ms. Cabage’s efforts to prove CPA injury and causation, nothing in her opening brief undermines the trial court’s determination that she had not offered any evidence of injury or “damages sustained as a result of the allegedly deceptive actions of PNC in twice attempting nonjudicial foreclosure of Ms. Cabage’s residence.” CP 1611. Indeed, Ms. Cabage’s discussion of injury in her opening brief is most

notable for the lack of citations to any supporting evidence in the record. App. Brief at 24-26, 30, 40-43. And none of the scattershot categories of damages Ms. Cabage listed in her opening brief, her discovery responses or the declarations she submitted to the trial court satisfy Ms. Cabage's burden to prove she suffered injury to her business or property as a result of relying on a misrepresentation by PNC.

Emotional Distress. While Ms. Cabage referenced emotional distress damages in her Complaint, such damages do not constitute injury under the CPA. See *White River Estates v. Hiltbruner*, 134 Wn.2d 761, 765 n.1, 953 P.2d 796 (1998); *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 318, 858 P.2d 1054 (1993).

Moving Costs and Rent. While Ms. Cabage produced documentation of expenses she paid when moving out of the Property and began renting an apartment from a friend in December 2009, as well as expenses incurred when she moved back into the Property in October 2011, she provided no evidence causally linking those payments to any misrepresentation by PNC. Nor could she. Ms. Cabage did not receive the first allegedly deceptive DTA Notice until June 18, 2010, roughly six months *after* she chose to move out of the Property. CP 365-367; CP 576-577 (22:20-23:7). And in testifying about her decision to move out, Ms. Cabage admitted it was the possibility of losing her house—due to her

May 2009 default on her loan obligations—rather than any misrepresentation by PNC, that led her to leave. CP 616-617 (104:15-105:22). Thus, Ms. Cabage cannot establish that “but for” an allegedly deceptive act by PNC, she would not have incurred those expenses. See *Indoor Billboard/Wash., Inc.*, 162 Wn.2d at 82; *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 792-93, 719 P.2d 531 (1986).

Attorneys’ Fees for Injunctive Relief Claim and Investigative

Costs. As Washington courts have long recognized, a borrower’s “mere involvement in having to defend against [a defendant’s] collection action and having to prosecute a CPA counterclaim is insufficient to show injury to ... business or property.” *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 563-64, 825 P.2d 714 (1992); see also *Demopolis v. Galvin*, 57 Wn. App. 47, 54, 786 P.2d 714 (1990) (plaintiff’s alleged injury resulting from having to bring suit to protect against lender’s foreclosure action not sufficient to satisfy CPA injury element). Based on language in *Panag v. Farmers Insurance Co. of Washington*, 166 Wn.2d at 60, and *Walker v. Quality Loan Service Corp.*, 176 Wn. App. 294, Ms. Cabage argues her CPA claim nonetheless survives because the attorneys’ fees she incurred seeking injunctive relief, along with fees to investigate potential flaws with PNC’s DTA compliance, are sufficient

to satisfy the CPA's injury requirement. This argument fails, for three independent reasons.

First, Ms. Cabage's attempt to separate her claim for injunctive relief from her other claims in this lawsuit lacks support in either the record or the law. App. Brief at 40-41. She sought injunctive relief as an affirmative claim in this lawsuit, just like her CPA and misrepresentation claims, and that claim is indistinguishable from the claims to prevent foreclosure and collection that the Court of Appeals found insufficient to create injury in *Sign-O-Lite* and *Demopolis*. See 64 Wn. App. at 563; 57 Wn. App. at 54.

Second, Ms. Cabage's attempt to analogize to the investigative costs discussed in *Panag* and *Walker* fails because she **did not offer any evidence** she incurred attorneys' fees or costs to investigate PNC's alleged failure to comply with the DTA. CP 624-631 (sole attorney time records Ms. Cabage produced, listing no time investigating DTA compliance).

Third, even if Ms. Cabage had offered evidence she incurred fees to investigate the propriety of PNC's efforts to foreclose, her argument that those fees caused injury under the CPA confuses CPA **remedies** with CPA **elements**. Costs and fees incurred to investigate possible unfair or deceptive acts or practices may be recoverable as a **remedy** for a prevailing plaintiff under the CPA, but do not establish the injury element

of the CPA unless those costs are injuries “resulting from a deceptive business practice.” *Panag*, 166 Wn.2d at 62-63. Ms. Cabage would incur the same fees if she hired an attorney and found *no* flaw. “If [an] . . . expense would have been incurred *regardless* of whether a violation existed, causation [of damages] cannot be established.” *Panag*, 166 Wn.2d at 64 (emphasis added). A borrower may choose to investigate a nonjudicial foreclosure, but it does not follow that any flaw she might find *caused* the time and expense incurred to find it. The borrower’s expenses, like the assistance of an attorney, would be incurred regardless of procedural compliance. If the rule were as Ms. Cabage suggests, every plaintiff could manufacture injury in every case simply by investigating conduct that caused no other harm, eliminating the CPA’s injury and causation requirements. *See Sign-O-Lite*, 64 Wn. App. at 564; *see also Bakhchinyan v. Countrywide Bank, N.A.*, No. C13-2273-JCC, 2014 WL 1273810 (W.D. Wash. Mar. 27, 2014) (dismissing CPA claim for lack of injury and causation, as consulting with attorney to dispel uncertainty, without underlying purpose motivating investigation, is insufficient).

Amounts Allegedly Added to Her Loan Balance. While she claims that “[d]ollar amounts related to the wrongfully initiated foreclosure were added to her loan balance for some period of time,” Ms. Cabage admitted she *never* made any loan payments after her default in

April 2009. CP 592 (50:3-9). And due to her bankruptcy discharge, Ms. Cabage no longer has any personal liability on the loan. Thus, even if PNC had included improper fees or charges to Ms. Cabage's loan balance or listed them on the DTA Notices (which it denies), Ms. Cabage suffered no resulting injury.

Time Off Work. Finally, Ms. Cabage claims she was injured because she took time off work when moving out of—and back into—the Property in 2009 and 2011, attending the Mediation, and attending hearings in this lawsuit. CP 602-603 (75:3-76:4); App. Brief at 25.⁷ While the Court has previously found time off work to constitute CPA injury in *Sign-O-Lite Signs*, it explicitly relied on the fact that the plaintiff in that case was “self-employed and the sole owner of her business.” 64 Wn. App. at 564. By contrast, Ms. Cabage was a salaried employee of a large corporation whose pay was unaffected by the time she took off work. *See* CP 602 (75:15-17).⁸ Moreover, the time Ms. Cabage spent moving in and out of the Property, attending the Mediation and hearings in this lawsuit do not constitute injury under the CPA for the same reasons as the

⁷ In her deposition, Ms. Cabage testified the only travel she engaged in was to attend the mediation. She does not claim to have attended any court hearings. *See* CP 602-603.

⁸ Ms. Cabage offered no evidence of any other harm or injury she suffered as a result of taking time off work.

fees and expenses she incurred in connection with each of those events, as discussed at length above.

C. The Trial Court Properly Granted PNC Summary Judgment on Ms. Cabage's Misrepresentation Claims.

Ms. Cabage's vague and conclusory claims for intentional and/or negligent misrepresentation appear to largely track her CPA claim, with two notable exceptions: (1) she also appears to assert a misrepresentation claim based on supposed "foreclosure notices" from the fall of 2009; and (2) her misrepresentation claim based on the Mediation is necessarily more limited than her corresponding CPA claim, focusing on alleged representations about PNC's authority to mediate, rather than the assertions PNC failed to mediate in good faith that drive her CPA claim. App. Brief at 50. As the trial court found, Ms. Cabage's misrepresentation claims fail because she has not offered requisite clear, cogent, and convincing evidence of a single misrepresentation on which she reasonably relied and that caused her to suffer any damages. *See Ross v. Kirner*, 162 Wn.2d 493, 499, 172 P.3d 701 (2007) (elements of negligent misrepresentation); *Kirkham v. Smith*, 106 Wn. App. 177, 183, 23 P.3d 10 (2001) (elements of intentional misrepresentation).

1. No Misrepresentation Claim Based on Supposed 2009 Foreclosure Notices.

In her deposition testimony, though not in her Complaint, Ms. Cabage asserted PNC's alleged service of "foreclosure notices" and "multiple notices on when that house was going to foreclose" prior to December 2009 constituted actionable misrepresentations in light of its subsequent failure to complete that foreclosure. CP 580-584 (31:8-35:22); CP 614 (102:2-12). Even if Ms. Cabage had properly alleged this claim in her Complaint, that claim would fail for several reasons.

First, Ms. Cabage is judicially estopped from bringing this claim, which is based on pre-bankruptcy facts and therefore belongs to her bankruptcy estate. *See* 11 U.S.C. § 541(a)(1); *Miller v. Campbell*, 164 Wn.2d 529, 541, 192 P.3d 352 (2008); *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 207-08 (5th Cir. 1999) ("It goes without saying that the Bankruptcy Code and Rules impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, including contingent and unliquidated claims."). Ms. Cabage bases this claim on representations in supposed pre-bankruptcy foreclosure notices, but failed to schedule the claim in her sworn bankruptcy schedules. CP 518-555. Thus, she is estopped from pursuing this claim. *See, e.g., Vreugdenhill v. Navistar Int'l Transp. Corp.*, 950 F.2d 524, 526 (8th Cir.

1991); *Levesque v. Shapiro (In re Levesque)*, 473 B.R. 331, 336 (B.A.P. 9th Cir. 2012).

Second, statements regarding future conduct—like the supposed “threats to foreclose” Ms. Cabage identifies—cannot form the basis of a misrepresentation claim. See *Micro Enhancement Int’l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 436, 40 P.3d 1206 (2002); *Westby v. Gorsuch*, 112 Wn. App. 558, 571, 50 P.3d 284 (2002).

Third, Ms. Cabage has not offered clear, cogent, and convincing evidence that PNC provided any foreclosure notices in 2009, or that those alleged notices contained any misrepresentations. Ms. Cabage admitted she does not have copies of the alleged notices and could not recall the substance of those notices or any specific inaccuracies with the information they provided. CP 584 (35:3-22). She identified the notices as either Notices of Trustee’s Sale or Notices of Foreclosure, but neither PNC nor NWTS has any record of a foreclosure notice sent prior to the June 2010 Notice of Default, and the first Notice of Trustee’s Sale was not recorded in the Pierce County Official Records until July 22, 2010. CP 650; CP 404; CP 477; CP 619-621.⁹ And, even if PNC had served the

⁹ Indeed, while Ms. Cabage specifically recalled that PNC (not National City) placed those alleged notices on her door before December 2009, PNC did not begin servicing her loan until November 6, 2009, providing almost no window of opportunity for PNC to have actually sent those notices. CP 588 (42:7-9); CP 649 ¶ 6; CP 650 ¶10.

notices, there was nothing inaccurate or misleading about the sole representation Ms. Cabage recalled from those notices—that the Property was going to be foreclosed on due to Ms. Cabage’s default on her loan obligations. CP 580-584 (31:2-35:22).

Finally, Ms. Cabage has not offered any evidence of damages she suffered—or even an explanation of how she could have suffered harm—from begin told a trustee’s sale would occur, only to have the sale postponed and later cancelled. Rather than causing harm, the failure to complete the trustee’s sale would actually benefit the borrower by giving her additional time to stay in her house without paying rent (as Ms. Cabage has now done for many years).

2. No Misrepresentation Claim Based on the DTA Notices.

Ms. Cabage also alleges that the DTA Notices misrepresented PNC as the beneficiary of her Deed of Trust when it was not the holder of her Note. CP 19; CP 597.¹⁰ However, even if she could prove an actionable misrepresentation, Ms. Cabage’s claim against PNC based on the DTA Notices fails, for several reasons.

¹⁰ Ms. Cabage testified she is not aware of anything else inaccurate with the Notice of Default or Notices of Trustee’s Sale, and also testified she is not aware of any other false statements by PNC prior to the Mediation. CP 589 (47:6-9), CP 591-592 (49:23-50:2), CP 600-601 (73:24-74:6).

First, Ms. Cabage cannot show she reasonably relied on any misrepresentations in the DTA Notices. She admitted she did not do anything in reliance on either the Notice of Default or the 2010 NTS, both of which were served approximately six months *after* she moved out of the Property. CP 579 (28:4-9); CP 586 (40:17-20); CP 590 (48:23-25). And after receiving the 2011 NTS, Ms. Cabage did not take any actions in reliance on its contents, for example, by paying the arrearage owing or moving back out of the Property—instead she *challenged* PNC’s right to foreclose by filing her Complaint. *See* CP 591-592 (49:15-50:9); CP 1-20.

Second, Ms. Cabage did not offer any evidence of damages she suffered as a result of the alleged misrepresentations in the DTA Notices, nor could she. PNC ultimately cancelled the trustee’s sale of the Property and terminated its attempts to foreclose non-judicially, so Ms. Cabage did not lose possession of the Property as a result of the DTA Notices. While Ms. Cabage later sought and obtained an FFA mediation, she did not do so in reliance on the DTA Notices, which said nothing about who she should contact to modify her loan. CP 406-408; CP 412-423. And in any event, PNC was the entity who had the authority to make decisions about her eligibility and qualification for a modification, and Ms. Cabage testified that she knew to contact PNC about a potential loan modification (which

she did on several occasions). CP 695-696 §§ 4.1-4.2; CP 577 (23:12-24); CP 579 (28:4-24); CP 589-590 (47:22-48:12).

3. No Misrepresentation Claim Based on Statements at the Mediation.

Ms. Cabage's opening brief offers a broadly formulated description of her misrepresentation claim based on the Mediation. App. Brief at 50 ("entry into an FFA mediation based [on] false information about the identity of the parties involved and a complete refusal to participate in any meaningful way in the FFA mediation . . ."). But she cannot reformulate her claim on appeal, and she must base a claim of either negligent or fraudulent misrepresentation on a specific false representation of fact. *See Ross*, 162 Wn.2d at 499; *Kirkham*, 106 Wn. App. at 183. Based on the actual allegations of Ms. Cabage's Complaint, her misrepresentation claim actually focuses on statements by PNC and its representatives about their authority to participate in the Mediation and consider her for a loan modification. CP 15-16, CP 18-19. As the trial court ruled, Ms. Cabage failed to provide sufficient evidence to support that claim, for several reasons.

First, to the extent this claim relies on the idea that PNC lacked authority to consider Ms. Cabage for a loan modification because it was her loan servicer, rather than the owner of her loan, the undisputed

evidence demonstrates that PNC was properly authorized to participate in the Mediation and to make decisions about Ms. Cabage's eligibility and qualification for a loan modification. *See* RCW 61.24.163(7)-(8) (authorizing "beneficiary or authorized agent" to participate in the mediation); CP 695-696 §§ 4.1-4.2. And as to Ms. Cabage's challenge to the authority of PNC's designated representatives at the Mediation, CP 600-601 (73:24-74:19), her misrepresentation claim also fails because there is no dispute that Marcus Moreland, PNC's Mortgage Loss Mitigation Mediation Negotiator who attended the Mediation, had the appropriate authority to enter into a resolution at the Mediation. CP 815-820. This is precisely what the governing statute required. *See* RCW 61.24.163(7)-(8).

Second, Ms. Cabage cannot show she suffered any damages as a result of any alleged misrepresentations regarding PNC's or its representatives' authority to participate in the Mediation or to make decisions about her eligibility and qualification for a loan modification. Her opening brief does not identify any damages from such misrepresentations, referencing only the fact that she "had to take extensive affirmative action to put a stop to the foreclosure process, at her own expense." App. Brief, at 50. In any event, as discussed at length in Section IV(B)(1)(a), *supra*, Ms. Cabage cannot show any damages

attributable to the mediation because she voluntarily chose to mediate, and was denied a modification due to her ineligibility for any of the available modification programs. *Id.*; see CP 651 ¶ 12; CP 805 (servicing notes reflecting ineligibility for HAMP or core modification); CP 598-599 (70:19-71:1). And of course, Ms. Cabage had no underlying right to have her loan modified. See *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569-70, 807 P.2d 356 (1991).

V. CONCLUSION

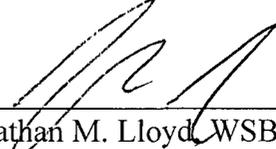
Respondent PNC respectfully asks this Court to affirm the trial court's grant of summary judgment in its entirety.

DATED this 27th day of August, 2014.

Respectfully Submitted By:

DAVIS WRIGHT TREMAINE LLP
ATTORNEYS FOR PNC BANK, N.A.

By


Jonathan M. Lloyd, WSBA #37413
Daniel T. Davies, WSBA #41793

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2014 I caused the document to which this certificate is attached to be filed with the Clerk of the above-entitled Court and served upon counsel of record in the manner as indicated below:

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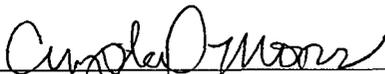
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Declared under penalty of perjury under the laws of the State of

Washington dated at Seattle, Washington this 27th day of August, 2014.



Crystal Moore

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No. 45953-1-II

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

SANDRA CABAGE,

Appellant.

v.

NORTHWEST TRUSTEE SERVICES, INC.; PNC MORTGAGE, a
division of PNC Bank, NATIONAL ASSOCIATION,

Respondents.

APPENDICIES TO RESPONDENT PNC BANK, NATIONAL
ASSOCIATION'S ANSWERING BRIEF

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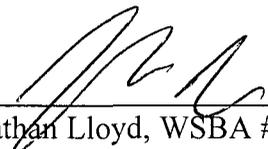
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Index of Appendices

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Appendix C Pages 15-24	RCW 61.24.163 Effective June 7, 2012 to June 11, 2014
Appendix D Pages 25-37	RCW 61.24.163 Effective June 12, 2014
Appendix E Pages 38-40	RCW 61.24.169 Effective December 20, 2011 to June 6, 2012

RESPECTFULLY SUBMITTED this 27th day of August, 2014.

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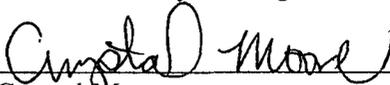
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APPENDIX A

Effective: July 22, 2011 to December 19, 2011

West's Revised Code of Washington Annotated

Title 61. Mortgages, Deeds of Trust, and Real Estate Contracts

Chapter 61.24. Deeds of Trust

→→ 61.24.163. Foreclosure mediation program--Timelines--Procedures--Duties and responsibilities of mediator, borrower, and beneficiary--Fees--Annual report

(1) The foreclosure mediation program established in this section applies only to borrowers who have been referred to mediation by a housing counselor or attorney. The mediation program under this section is not governed by chapter 7.07 RCW and does not preclude mediation required by a court or other provision of law.

(2) A housing counselor or attorney referring a borrower to mediation shall send a notice to the borrower and the department, stating that mediation is appropriate.

(3) Within ten days of receiving the notice, the department shall:

(a) Send a notice to the beneficiary, the borrower, the housing counselor or attorney who referred the borrower, and the trustee stating that the parties have been referred to mediation. The notice must include the statements and list of documents and information described in subsection (5)(b)(i) through (iv) of this section; and

(b) Select a mediator and notify the parties of the selection.

(4)(a) Within forty-five days of receiving the referral from the department, the mediator shall convene a mediation session in the county where the borrower resides, unless the parties agree on another location. The parties may agree in writing to extend the time in which to schedule the mediation session. If the parties agree to extend the time, the beneficiary shall notify the trustee of the extension and the date the mediator is expected to issue the mediator's certification.

(b) Prior to scheduling a mediation session, the mediator shall require that both parties sign a waiver stating that neither party may call the mediator as a live witness in any litigation pertaining to a foreclosure action between the parties. However, the mediator's certification may be deemed admissible evidence, subject to court rules, in any litigation pertaining to a foreclosure action between the parties.

(5)(a) The mediator may schedule phone conferences, consultations with the parties individually, and other communications to ensure that the parties have all the necessary information to engage in a productive mediation.

(b) The mediator must send written notice of the time, date, and location of the mediation session to the borrower, the beneficiary, and the department at least fifteen days prior to the mediation session. At a minimum, the notice must contain:

(i) A statement that the borrower may be represented in the mediation session by an attorney or other advocate;

(ii) A statement that a person with authority to agree to a resolution, including a proposed settlement, loan modification, or dismissal or continuation of the foreclosure proceeding, must be present either in person or on the telephone or video conference during the mediation session;

(iii) A complete list of documents and information required by this section that the parties must provide to the mediator and the deadlines for providing the documents and information; and

(iv) A statement that the parties have a duty to mediate in good faith and that failure to mediate in good faith may impair the beneficiary's ability to foreclose on the property or the borrower's ability to modify the loan or take advantage of other alternatives to foreclosure.

(6) The borrower, the beneficiary or authorized agent, and the mediator must meet in person for the mediation session. However, a person with authority to agree to a resolution on behalf of the beneficiary may be present over the telephone or video conference during the mediation session.

(7) The participants in mediation must address the issues of foreclosure that may enable the borrower and the beneficiary to reach a resolution, including but not limited to reinstatement, modification of the loan, restructuring of the debt, or some other workout plan. To assist the parties in addressing issues of foreclosure, the mediator must require the participants to consider the following:

(a) The borrower's current and future economic circumstances, including the borrower's current and future income, debts, and obligations for the previous sixty days or greater time period as determined by the mediator;

(b) The net present value of receiving payments pursuant to a modified mortgage loan as compared to the anticipated net recovery following foreclosure;

(c) Any affordable loan modification calculation and net present value calculation when required under any federal mortgage relief program, including the home affordable modification program (HAMP) as applicable to government-sponsored enterprise and nongovernment-sponsored enterprise loans and any HAMP-related modification program applicable to loans insured by the federal housing administration, the veterans administration, and the rural housing service. If such a calculation is not required, then the beneficiary must use the current calculations, assumptions, and forms that are established by the federal deposit insurance corporation and published in the federal deposit insurance corporation loan modification program guide; and

(d) Any other loss mitigation guidelines to loans insured by the federal housing administration, the veterans administration, and the rural housing service, if applicable.

(8) A violation of the duty to mediate in good faith as required under this section may include:

(a) Failure to timely participate in mediation without good cause;

(b) Failure of the beneficiary to provide the following documentation to the borrower and mediator at least ten days before the mediation or pursuant to the mediator's instructions:

(i) An accurate statement containing the balance of the loan as of the first day of the month in which the mediation occurs;

(ii) Copies of the note and deed of trust;

(iii) 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);

(iv) The best estimate of any arrearage and an itemized statement of the arrearages;

(v) An itemized list of the best estimate of fees and charges outstanding;

(vi) The payment history and schedule for the preceding twelve months, or since default, whichever is longer, including a breakdown of all fees and charges claimed;

(vii) All borrower-related and mortgage-related input data used in any net present value analysis;

(viii) An explanation regarding any denial for a loan modification, forbearance, or other alternative to foreclosure in sufficient detail for a reasonable person to understand why the decision was made;

(ix) The most recently available appraisal or other broker price opinion most recently relied upon by the beneficiary; and

(x) The portion or excerpt of the pooling and servicing agreement that prohibits the beneficiary from implementing a modification, if the beneficiary claims it cannot implement a modification due solely to limitations in a pooling and servicing agreement, and documentation or a statement detailing the efforts of the beneficiary to obtain a waiver of the pooling and servicing agreement provisions;

(c) Failure of the borrower to provide documentation to the beneficiary and mediator, at least ten days before the mediation or pursuant to the mediator's instruction, showing the borrower's current and future income, debts and obligations, and tax returns for the past two years;

(d) Failure of either party to pay the respective portion of the mediation fee in advance of the mediation as required under this section;

(e) Failure of a party to designate representatives with adequate authority to fully settle, compromise, or otherwise reach resolution with the borrower in mediation; and

(f) A request by a beneficiary that the borrower waive future claims he or she may have in connection with the deed of trust, as a condition of agreeing to a modification, except for rescission claims under the federal truth in lending act. Nothing in this section precludes a beneficiary from requesting that a borrower dismiss with prejudice any pending claims against the beneficiary, its agents, loan servicer, or trustee, arising from the underlying deed of trust, as a condition of modification.

(9) Within seven business days after the conclusion of the mediation session, the mediator must send a written certification to the department and the trustee and send copies to the parties of:

(a) The date, time, and location of the mediation session;

(b) The names of all persons attending in person and by telephone or video conference, at the mediation session;

(c) Whether a resolution was reached by the parties, including whether the default was cured by reinstatement, modification, or restructuring of the debt, or some other alternative to foreclosure was agreed upon by the parties;

(d) Whether the parties participated in the mediation in good faith; and

(e) A description of the net present value test used, along with a copy of the inputs, including the result of the net present value test expressed in a dollar amount.

(10) If the parties are unable to reach any agreement and the mediator certifies that the parties acted in good faith, the beneficiary may proceed with the foreclosure.

(11)(a) The mediator's certification that the beneficiary failed to act in good faith in mediation constitutes a defense to the nonjudicial foreclosure action that was the basis for initiating the mediation. In any action to enjoin the foreclosure, the beneficiary shall be entitled to rebut the allegation that it failed to act in good faith.

(b) The mediator's certification that the beneficiary failed to act in good faith during mediation does not constitute a defense to a judicial foreclosure or a future nonjudicial foreclosure action if a modification of the loan is agreed upon and the borrower subsequently defaults.

(c) If an agreement was not reached and the mediator's certification shows that the net present value of the modified loan exceeds the anticipated net recovery at foreclosure, that showing in the certification shall constitute a basis for the borrower to enjoin the foreclosure.

(12) The mediator's certification that the borrower failed to act in good faith in mediation authorizes the beneficiary to proceed with the foreclosure.

(13)(a) A trustee may not record the notice of sale until the trustee receives the mediator's certification stating that the mediation has been completed.

(b) If the trustee does not receive the mediator's certification, the trustee may record the notice of sale after ten days from the date the certification to the trustee was due. If the notice of sale is recorded under this subsection (13)(b) and the mediator subsequently issues a certification alleging the beneficiary violated the duty of good faith, the trustee may not proceed with the sale.

(14) A mediator may charge reasonable fees as authorized by this subsection and by the department. Unless the fee is waived or the parties agree otherwise, a foreclosure mediator's fee may not exceed four hundred dollars for a mediation session lasting between one hour and three hours. For a mediation session exceeding three hours, the foreclosure mediator may charge a reasonable fee, as authorized by the department. The mediator must provide an estimated fee before the mediation, and payment of the mediator's fee must be divided equally between the beneficiary and the borrower. The beneficiary and the borrower must tender the loan mediator's fee seven calendar days before the commencement of the mediation or pursuant to the mediator's instructions.

(15) Beginning December 1, 2012, and every year thereafter, the department shall report annually to the legislature on:

(a) The performance of the program, including the numbers of borrowers who are referred to mediation by a housing counselor or attorney;

(b) The results of the mediation program, including the number of mediations requested by housing counselors and attorneys, the number of certifications of good faith issued, the number of borrowers and beneficiaries who failed to mediate in good faith, and the reasons for the failure to mediate in good faith, if known, the numbers of loans restructured or modified, the change in the borrower's monthly payment for principal and interest and the number of principal write-downs and interest rate reductions, and, to the extent practical, the number of borrowers who report a default within a year of restructuring or modification;

(c) The information received by housing counselors regarding outcomes of foreclosures; and

(d) Any recommendations for changes to the statutes regarding the mediation program.

CREDIT(S)

[2011 c 58 § 7, eff. July 22, 2011.]

HISTORICAL AND STATUTORY NOTESFindings--Intent--Short title--2011 c 58: See notes following RCW 61.24.005.UNITED STATES CODE ANNOTATED0WAPForeclosure mitigation and credit availability, enhancement of depository institutions' liquidity, see 12 U.S.C.A. § 5241.West's RCWA 61.24.163, WA ST 61.24.163

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APPENDIX B

Effective: December 20, 2011 to June 6, 2012

West's Revised Code of Washington Annotated

Title 61. Mortgages, Deeds of Trust, and Real Estate Contracts

Chapter 61.24. Deeds of Trust

→ → 61.24.163. Foreclosure mediation program--Timelines--Procedures--Duties and responsibilities of mediator, borrower, and beneficiary--Fees--Annual report

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(2) A housing counselor or attorney referring a borrower to mediation shall send a notice to the borrower and the department, stating that mediation is appropriate.

(3) Within ten days of receiving the notice, the department shall:

(a) Send a notice to the beneficiary, the borrower, the housing counselor or attorney who referred the borrower, and the trustee stating that the parties have been referred to mediation. The notice must include the statements and list of documents and information described in subsection (5)(b)(i) through (iv) of this section; and

(b) Select a mediator and notify the parties of the selection.

(4) Within forty-five days of receiving the referral from the department, the mediator shall convene a mediation session in the county where the borrower resides, unless the parties agree on another location. The parties may agree in writing to extend the time in which to schedule the mediation session. If the parties agree to extend the time, the beneficiary shall notify the trustee of the extension and the date the mediator is expected to issue the mediator's certification.

(5)(a) The mediator may schedule phone conferences, consultations with the parties individually, and other communications to ensure that the parties have all the necessary information to engage in a productive mediation.

(b) The mediator must send written notice of the time, date, and location of the mediation session to the borrower, the beneficiary, and the department at least fifteen days prior to the mediation session. At a minimum, the notice must contain:

- (i) A statement that the borrower may be represented in the mediation session by an attorney or other advocate;
 - (ii) A statement that a person with authority to agree to a resolution, including a proposed settlement, loan modification, or dismissal or continuation of the foreclosure proceeding, must be present either in person or on the telephone or video conference during the mediation session;
 - (iii) A complete list of documents and information required by this section that the parties must provide to the mediator and the deadlines for providing the documents and information; and
 - (iv) A statement that the parties have a duty to mediate in good faith and that failure to mediate in good faith may impair the beneficiary's ability to foreclose on the property or the borrower's ability to modify the loan or take advantage of other alternatives to foreclosure.
- (6) The borrower, the beneficiary or authorized agent, and the mediator must meet in person for the mediation session. However, a person with authority to agree to a resolution on behalf of the beneficiary may be present over the telephone or video conference during the mediation session.
- (7) The participants in mediation must address the issues of foreclosure that may enable the borrower and the beneficiary to reach a resolution, including but not limited to reinstatement, modification of the loan, restructuring of the debt, or some other workout plan. To assist the parties in addressing issues of foreclosure, the mediator must require the participants to consider the following:
- (a) The borrower's current and future economic circumstances, including the borrower's current and future income, debts, and obligations for the previous sixty days or greater time period as determined by the mediator;
 - (b) The net present value of receiving payments pursuant to a modified mortgage loan as compared to the anticipated net recovery following foreclosure;
 - (c) Any affordable loan modification calculation and net present value calculation when required under any federal mortgage relief program, including the home affordable modification program (HAMP) as applicable to government-sponsored enterprise and nongovernment-sponsored enterprise loans and any HAMP-related modification program applicable to loans insured by the federal housing administration, the veterans administration, and the rural housing service. If such a calculation is not required, then the beneficiary must use the current calculations, assumptions, and forms that are established by the federal deposit insurance corporation and published in the federal deposit insurance corporation loan modification program guide; and
 - (d) Any other loss mitigation guidelines to loans insured by the federal housing administration, the veterans administration, and the rural housing service, if applicable.
- (8) A violation of the duty to mediate in good faith as required under this section may include:

- (a) Failure to timely participate in mediation without good cause;
- (b) Failure of the beneficiary to provide the following documentation to the borrower and mediator at least ten days before the mediation or pursuant to the mediator's instructions:
 - (i) An accurate statement containing the balance of the loan as of the first day of the month in which the mediation occurs;
 - (ii) Copies of the note and deed of trust;
 - (iii) 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);
 - (iv) The best estimate of any arrearage and an itemized statement of the arrearages;
 - (v) An itemized list of the best estimate of fees and charges outstanding;
 - (vi) The payment history and schedule for the preceding twelve months, or since default, whichever is longer, including a breakdown of all fees and charges claimed;
 - (vii) All borrower-related and mortgage-related input data used in any net present value analysis;
 - (viii) An explanation regarding any denial for a loan modification, forbearance, or other alternative to foreclosure in sufficient detail for a reasonable person to understand why the decision was made;
 - (ix) The most recently available appraisal or other broker price opinion most recently relied upon by the beneficiary; and
 - (x) The portion or excerpt of the pooling and servicing agreement that prohibits the beneficiary from implementing a modification, if the beneficiary claims it cannot implement a modification due solely to limitations in a pooling and servicing agreement, and documentation or a statement detailing the efforts of the beneficiary to obtain a waiver of the pooling and servicing agreement provisions;
- (c) Failure of the borrower to provide documentation to the beneficiary and mediator, at least ten days before the mediation or pursuant to the mediator's instruction, showing the borrower's current and future income, debts and obligations, and tax returns for the past two years;
- (d) Failure of either party to pay the respective portion of the mediation fee in advance of the mediation as re-

quired under this section;

(e) Failure of a party to designate representatives with adequate authority to fully settle, compromise, or otherwise reach resolution with the borrower in mediation; and

(f) A request by a beneficiary that the borrower waive future claims he or she may have in connection with the deed of trust, as a condition of agreeing to a modification, except for rescission claims under the federal truth in lending act. Nothing in this section precludes a beneficiary from requesting that a borrower dismiss with prejudice any pending claims against the beneficiary, its agents, loan servicer, or trustee, arising from the underlying deed of trust, as a condition of modification.

(9) Within seven business days after the conclusion of the mediation session, the mediator must send a written certification to the department and the trustee and send copies to the parties of:

(a) The date, time, and location of the mediation session;

(b) The names of all persons attending in person and by telephone or video conference, at the mediation session;

(c) Whether a resolution was reached by the parties, including whether the default was cured by reinstatement, modification, or restructuring of the debt, or some other alternative to foreclosure was agreed upon by the parties;

(d) Whether the parties participated in the mediation in good faith; and

(e) A description of the net present value test used, along with a copy of the inputs, including the result of the net present value test expressed in a dollar amount.

(10) If the parties are unable to reach any agreement and the mediator certifies that the parties acted in good faith, the beneficiary may proceed with the foreclosure.

(11)(a) The mediator's certification that the beneficiary failed to act in good faith in mediation constitutes a defense to the nonjudicial foreclosure action that was the basis for initiating the mediation. In any action to enjoin the foreclosure, the beneficiary shall be entitled to rebut the allegation that it failed to act in good faith.

(b) The mediator's certification that the beneficiary failed to act in good faith during mediation does not constitute a defense to a judicial foreclosure or a future nonjudicial foreclosure action if a modification of the loan is agreed upon and the borrower subsequently defaults.

(c) If an agreement was not reached and the mediator's certification shows that the net present value of the modi-

fied loan exceeds the anticipated net recovery at foreclosure, that showing in the certification shall constitute a basis for the borrower to enjoin the foreclosure.

(12) The mediator's certification that the borrower failed to act in good faith in mediation authorizes the beneficiary to proceed with the foreclosure.

(13)(a) A trustee may not record the notice of sale until the trustee receives the mediator's certification stating that the mediation has been completed.

(b) If the trustee does not receive the mediator's certification, the trustee may record the notice of sale after ten days from the date the certification to the trustee was due. If the notice of sale is recorded under this subsection (13)(b) and the mediator subsequently issues a certification alleging the beneficiary violated the duty of good faith, the trustee may not proceed with the sale.

(14) A mediator may charge reasonable fees as authorized by this subsection and by the department. Unless the fee is waived or the parties agree otherwise, a foreclosure mediator's fee may not exceed four hundred dollars for a mediation session lasting between one hour and three hours. For a mediation session exceeding three hours, the foreclosure mediator may charge a reasonable fee, as authorized by the department. The mediator must provide an estimated fee before the mediation, and payment of the mediator's fee must be divided equally between the beneficiary and the borrower. The beneficiary and the borrower must tender the loan mediator's fee seven calendar days before the commencement of the mediation or pursuant to the mediator's instructions.

(15) Beginning December 1, 2012, and every year thereafter, the department shall report annually to the legislature on:

(a) The performance of the program, including the numbers of borrowers who are referred to mediation by a housing counselor or attorney;

(b) The results of the mediation program, including the number of mediations requested by housing counselors and attorneys, the number of certifications of good faith issued, the number of borrowers and beneficiaries who failed to mediate in good faith, and the reasons for the failure to mediate in good faith, if known, the numbers of loans restructured or modified, the change in the borrower's monthly payment for principal and interest and the number of principal write-downs and interest rate reductions, and, to the extent practical, the number of borrowers who report a default within a year of restructuring or modification;

(c) The information received by housing counselors regarding outcomes of foreclosures; and

(d) Any recommendations for changes to the statutes regarding the mediation program.

CREDIT(S)

[2011 2nd sp.s. c 4 § 1, eff. Dec. 20, 2011; 2011 c 58 § 7, eff. July 22, 2011.]

HISTORICAL AND STATUTORY NOTES Findings--Intent--Short title--2011 c 58: See notes following RCW 61.24.005. UNITED STATES CODE ANNOTATED 0 WAP Foreclosure mitigation and credit availability, enhancement of depository institutions' liquidity, see 12 U.S.C.A. § 5241. West's RCWA 61.24.163, WA ST 61.24.163

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APPENDIX C

Effective: June 7, 2012 to June 11, 2014

West's Revised Code of Washington Annotated

Title 61. Mortgages, Deeds of Trust, and Real Estate Contracts

Chapter 61.24. Deeds of Trust

→ → 61.24.163. Foreclosure mediation program--Timelines--Procedures--Duties and responsibilities of mediator, borrower, and beneficiary--Fees--Annual report

(1) The foreclosure mediation program established in this section applies only to borrowers who have been referred to mediation by a housing counselor or attorney. The referral to mediation may be made any time after a notice of default has been issued but no later than twenty days after the date a notice of sale has been recorded. The mediation program under this section is not governed by chapter 7.07 RCW and does not preclude mediation required by a court or other provision of law.

(2) A housing counselor or attorney referring a borrower to mediation shall send a notice to the borrower and the department, stating that mediation is appropriate.

(3) Within ten days of receiving the notice, the department shall:

(a) Send a notice to the beneficiary, the borrower, the housing counselor or attorney who referred the borrower, and the trustee stating that the parties have been referred to mediation. The notice must include the statements and list of documents and information described in subsections (4) and (5) of this section and a statement explaining each party's responsibility to pay the mediator's fee; and

(b) Select a mediator and notify the parties of the selection.

(4) Within twenty-three days of the department's notice that the parties have been referred to mediation, the borrower shall transmit the documents required for mediation to the mediator and the beneficiary. The required documents include an initial Making Home Affordable Application (HAMP) package or such other equivalent homeowner financial information worksheet as required by the department. In the event the department is required to create a worksheet, the worksheet must include, at a minimum, the following information:

(a) The borrower's current and future income;

(b) Debts and obligations;

- (c) Assets;
 - (d) Expenses;
 - (e) Tax returns for the previous two years;
 - (f) Hardship information;
 - (g) Other applicable information commonly required by any applicable federal mortgage relief program.
- (5) Within twenty days of the beneficiary's receipt of the borrower's documents, the beneficiary shall transmit the documents required for mediation to the mediator and the borrower. The required documents include:
- (a) An accurate statement containing the balance of the loan within thirty days of the date on which the beneficiary's documents are due to the parties;
 - (b) Copies of the note and deed of trust;
 - (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);
 - (d) The best estimate of any arrearage and an itemized statement of the arrearages;
 - (e) An itemized list of the best estimate of fees and charges outstanding;
 - (f) The payment history and schedule for the preceding twelve months, or since default, whichever is longer, including a breakdown of all fees and charges claimed;
 - (g) All borrower-related and mortgage-related input data used in any net present values analysis. If no net present values analysis is required by the applicable federal mortgage relief program, then the input data required under the federal deposit insurance corporation and published in the federal deposit insurance corporation loan modification program guide, or if that calculation becomes unavailable, substantially similar input data as determined by the department;
 - (h) An explanation regarding any denial for a loan modification, forbearance, or other alternative to foreclosure in sufficient detail for a reasonable person to understand why the decision was made;
 - (i) Appraisal or other broker price opinion most recently relied upon by the beneficiary not more than ninety

days old at the time of the scheduled mediation; and

(j) The portion or excerpt of the pooling and servicing agreement that prohibits the beneficiary from implementing a modification, if the beneficiary claims it cannot implement a modification due solely to limitations in a pooling and servicing agreement, and documentation or a statement detailing the efforts of the beneficiary to obtain a waiver of the pooling and servicing agreement provisions.

(6) Within seventy days of receiving the referral from the department, the mediator shall convene a mediation session in the county where the borrower resides, unless the parties agree on another location. The parties may agree to extend the time in which to schedule the mediation session. If the parties agree to extend the time, the beneficiary shall notify the trustee of the extension and the date the mediator is expected to issue the mediator's certification.

(7)(a) The mediator may schedule phone conferences, consultations with the parties individually, and other communications to ensure that the parties have all the necessary information and documents to engage in a productive mediation.

(b) The mediator must send written notice of the time, date, and location of the mediation session to the borrower, the beneficiary, and the department at least thirty days prior to the mediation session. At a minimum, the notice must contain:

(i) A statement that the borrower may be represented in the mediation session by an attorney or other advocate;

(ii) A statement that a person with authority to agree to a resolution, including a proposed settlement, loan modification, or dismissal or continuation of the foreclosure proceeding, must be present either in person or on the telephone or videoconference during the mediation session; and

(iii) A statement that the parties have a duty to mediate in good faith and that failure to mediate in good faith may impair the beneficiary's ability to foreclose on the property or the borrower's ability to modify the loan or take advantage of other alternatives to foreclosure.

(8)(a) The borrower, the beneficiary or authorized agent, and the mediator must meet in person for the mediation session. However, a person with authority to agree to a resolution on behalf of the beneficiary may be present over the telephone or videoconference during the mediation session.

(b) After the mediation session commences, the mediator may continue the mediation session once, and any further continuances must be with the consent of the parties.

(9) The participants in mediation must address the issues of foreclosure that may enable the borrower and the beneficiary to reach a resolution, including but not limited to reinstatement, modification of the loan, restructur-

ing of the debt, or some other workout plan. To assist the parties in addressing issues of foreclosure, the mediator may require the participants to consider the following:

(a) The borrower's current and future economic circumstances, including the borrower's current and future income, debts, and obligations for the previous sixty days or greater time period as determined by the mediator;

(b) The net present value of receiving payments pursuant to a modified mortgage loan as compared to the anticipated net recovery following foreclosure;

(c) Any affordable loan modification calculation and net present value calculation when required under any federal mortgage relief program, including the home affordable modification program (HAMP) as applicable to government-sponsored enterprise and nongovernment-sponsored enterprise loans and any HAMP-related modification program applicable to loans insured by the federal housing administration, the veterans administration, and the rural housing service. If such a calculation is not provided or required, then the beneficiary must provide the net present value data inputs established by the federal deposit insurance corporation and published in the federal deposit insurance corporation loan modification program guide or other net present value data inputs as designated by the department. The mediator may run the calculation in order for a productive mediation to occur and to comply with the mediator certification requirement; and

(d) Any other loss mitigation guidelines to loans insured by the federal housing administration, the veterans administration, and the rural housing service, if applicable.

(10) A violation of the duty to mediate in good faith as required under this section may include:

(a) Failure to timely participate in mediation without good cause;

(b) Failure of the borrower or the beneficiary to provide the documentation required before mediation or pursuant to the mediator's instructions;

(c) Failure of a party to designate representatives with adequate authority to fully settle, compromise, or otherwise reach resolution with the borrower in mediation; and

(d) A request by a beneficiary that the borrower waive future claims he or she may have in connection with the deed of trust, as a condition of agreeing to a modification, except for rescission claims under the federal truth in lending act. Nothing in this section precludes a beneficiary from requesting that a borrower dismiss with prejudice any pending claims against the beneficiary, its agents, loan servicer, or trustee, arising from the underlying deed of trust, as a condition of modification.

(11) If the mediator reasonably believes a borrower will not attend a mediation session based on the borrower's conduct, such as the lack of response to the mediator's communications, the mediator may cancel a scheduled

mediation session and send a written cancellation to the department and the trustee and send copies to the parties. The beneficiary may proceed with the foreclosure after receipt of the mediator's written confirmation of cancellation.

(12) Within seven business days after the conclusion of the mediation session, the mediator must send a written certification to the department and the trustee and send copies to the parties of:

(a) The date, time, and location of the mediation session;

(b) The names of all persons attending in person and by telephone or videoconference, at the mediation session;

(c) Whether a resolution was reached by the parties, including whether the default was cured by reinstatement, modification, or restructuring of the debt, or some other alternative to foreclosure was agreed upon by the parties;

(d) Whether the parties participated in the mediation in good faith; and

(e) If a written agreement was not reached, a description of any net present value test used, along with a copy of the inputs, including the result of any net present value test expressed in a dollar amount.

(13) If the parties are unable to reach an agreement, the beneficiary may proceed with the foreclosure after receipt of the mediator's written certification.

(14)(a) The mediator's certification that the beneficiary failed to act in good faith in mediation constitutes a defense to the nonjudicial foreclosure action that was the basis for initiating the mediation. In any action to enjoin the foreclosure, the beneficiary is entitled to rebut the allegation that it failed to act in good faith.

(b) The mediator's certification that the beneficiary failed to act in good faith during mediation does not constitute a defense to a judicial foreclosure or a future nonjudicial foreclosure action if a modification of the loan is agreed upon and the borrower subsequently defaults.

(c) If an affordable loan modification is not offered in the mediation or a written agreement was not reached and the mediator's certification shows that the net present value of the modified loan exceeds the anticipated net recovery at foreclosure, that showing in the certification constitutes a basis for the borrower to enjoin the foreclosure.

(15) The mediator's certification that the borrower failed to act in good faith in mediation authorizes the beneficiary to proceed with the foreclosure.

(16)(a) If a borrower has been referred to mediation before a notice of trustee sale has been recorded, a trustee may not record the notice of sale until the trustee receives the mediator's certification stating that the mediation has been completed. If the trustee does not receive the mediator's certification, the trustee may record the notice of sale after ten days from the date the certification to the trustee was due. If, after a notice of sale is recorded under this subsection (16)(a), the mediator subsequently issues a certification finding that the beneficiary violated the duty of good faith, the certification constitutes a basis for the borrower to enjoin the foreclosure.

(b) If a borrower has been referred to mediation after the notice of sale was recorded, the sale may not occur until the trustee receives the mediator's certification stating that the mediation has been completed.

(17) A mediator may charge reasonable fees as authorized by this subsection and by the department. Unless the fee is waived or the parties agree otherwise, a foreclosure mediator's fee may not exceed four hundred dollars for preparing, scheduling, and conducting a mediation session lasting between one hour and three hours. For a mediation session exceeding three hours, the foreclosure mediator may charge a reasonable fee, as authorized by the department. The mediator must provide an estimated fee before the mediation, and payment of the mediator's fee must be divided equally between the beneficiary and the borrower. The beneficiary and the borrower must tender the loan mediator's fee within thirty calendar days from receipt of the department's letter referring the parties to mediation or pursuant to the mediator's instructions.

(18) Beginning December 1, 2012, and every year thereafter, the department shall report annually to the legislature on:

(a) The performance of the program, including the numbers of borrowers who are referred to mediation by a housing counselor or attorney;

(b) The results of the mediation program, including the number of mediations requested by housing counselors and attorneys, the number of certifications of good faith issued, the number of borrowers and beneficiaries who failed to mediate in good faith, and the reasons for the failure to mediate in good faith, if known, the numbers of loans restructured or modified, the change in the borrower's monthly payment for principal and interest and the number of principal write-downs and interest rate reductions, and, to the extent practical, the number of borrowers who report a default within a year of restructuring or modification;

(c) The information received by housing counselors regarding outcomes of foreclosures; and

(d) Any recommendations for changes to the statutes regarding the mediation program.

CREDIT(S)

[2012 c 185 § 6, eff. June 7, 2012; 2011 2nd sp.s. c 4 § 1, eff. Dec. 20, 2011; 2011 c 58 § 7, eff. July 22, 2011.]

HISTORICAL AND STATUTORY NOTES Effective date--2011 2nd sp.s. c 4: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [December 20, 2011]." [2011 2nd sp.s. c 4 § 3.] Findings--Intent--Short title--2011 c 58: See notes following RCW 61.24.005. 2012 Legislation Laws 2012, ch. 185, § 6, rewrote the section, which formerly read: "(1) The foreclosure mediation program established in this section applies only to borrowers who have been referred to mediation by a housing counselor or attorney. The mediation program under this section is not governed by chapter 7.07 RCW and does not preclude mediation required by a court or other provision of law. "(2) A housing counselor or attorney referring a borrower to mediation shall send a notice to the borrower and the department, stating that mediation is appropriate. "(3) Within ten days of receiving the notice, the department shall: "(a) Send a notice to the beneficiary, the borrower, the housing counselor or attorney who referred the borrower, and the trustee stating that the parties have been referred to mediation. The notice must include the statements and list of documents and information described in subsection (5)(b)(i) through (iv) of this section; and "(b) Select a mediator and notify the parties of the selection. "(4) Within forty-five days of receiving the referral from the department, the mediator shall convene a mediation session in the county where the borrower resides, unless the parties agree on another location. The parties may agree in writing to extend the time in which to schedule the mediation session. If the parties agree to extend the time, the beneficiary shall notify the trustee of the extension and the date the mediator is expected to issue the mediator's certification. "(5)(a) The mediator may schedule phone conferences, consultations with the parties individually, and other communications to ensure that the parties have all the necessary information to engage in a productive mediation. "(b) The mediator must send written notice of the time, date, and location of the mediation session to the borrower, the beneficiary, and the department at least fifteen days prior to the mediation session. At a minimum, the notice must contain: "(i) A statement that the borrower may be represented in the mediation session by an attorney or other advocate; "(ii) A statement that a person with authority to agree to a resolution, including a proposed settlement, loan modification, or dismissal or continuation of the foreclosure proceeding, must be present either in person or on the telephone or video conference during the mediation session; "(iii) A complete list of documents and information required by this section that the parties must provide to the mediator and the deadlines for providing the documents and information; and "(iv) A statement that the parties have a duty to mediate in good faith and that failure to mediate in good faith may impair the beneficiary's ability to foreclose on the property or the borrower's ability to modify the loan or take advantage of other alternatives to foreclosure. "(6) The borrower, the beneficiary or authorized agent, and the mediator must meet in person for the mediation session. However, a person with authority to agree to a resolution on behalf of the beneficiary may be present over the telephone or video conference during the mediation session. "(7) The participants in mediation must address the issues of foreclosure that may enable the borrower and the beneficiary to reach a resolution, including but not limited to reinstatement, modification of the loan, restructuring of the debt, or some other workout plan. To assist the parties in addressing issues of foreclosure, the mediator must require the participants to consider the following: "(a) The borrower's current and future economic circumstances, including the borrower's current and future income, debts, and obligations for the previous sixty days or greater time period as determined by the mediator; "(b) The net present value of receiving payments pursuant to a modified mortgage loan as compared to the anticipated net recovery following foreclosure; "(c) Any affordable loan modification calculation and net present value calculation when required under any federal mortgage relief program, including the home affordable modification program (HAMP) as applicable to government-sponsored enterprise and nongovernment-sponsored enterprise loans and any HAMP-related modification program applicable to loans insured by the federal housing administration, the veterans administration, and the rural housing service. If such a calculation is not required, then the beneficiary must use the current calculations, assumptions, and forms that are established by the federal deposit insurance corporation and published in the federal deposit insurance cor-

poration loan modification program guide; and“(d) Any other loss mitigation guidelines to loans insured by the federal housing administration, the veterans administration, and the rural housing service, if applicable.”(8) A violation of the duty to mediate in good faith as required under this section may include:“(a) Failure to timely participate in mediation without good cause;“(b) Failure of the beneficiary to provide the following documentation to the borrower and mediator at least ten days before the mediation or pursuant to the mediator's instructions:“(i) An accurate statement containing the balance of the loan as of the first day of the month in which the mediation occurs;“(ii) Copies of the note and deed of trust;“(iii) 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);“(iv) The best estimate of any arrearage and an itemized statement of the arrearages;“(v) An itemized list of the best estimate of fees and charges outstanding;“(vi) The payment history and schedule for the preceding twelve months, or since default, whichever is longer, including a breakdown of all fees and charges claimed;“(vii) All borrower-related and mortgage-related input data used in any net present value analysis;“(viii) An explanation regarding any denial for a loan modification, forbearance, or other alternative to foreclosure in sufficient detail for a reasonable person to understand why the decision was made;“(ix) The most recently available appraisal or other broker price opinion most recently relied upon by the beneficiary; and“(x) The portion or excerpt of the pooling and servicing agreement that prohibits the beneficiary from implementing a modification, if the beneficiary claims it cannot implement a modification due solely to limitations in a pooling and servicing agreement, and documentation or a statement detailing the efforts of the beneficiary to obtain a waiver of the pooling and servicing agreement provisions;“(c) Failure of the borrower to provide documentation to the beneficiary and mediator, at least ten days before the mediation or pursuant to the mediator's instruction, showing the borrower's current and future income, debts and obligations, and tax returns for the past two years;“(d) Failure of either party to pay the respective portion of the mediation fee in advance of the mediation as required under this section;“(e) Failure of a party to designate representatives with adequate authority to fully settle, compromise, or otherwise reach resolution with the borrower in mediation; and“(f) A request by a beneficiary that the borrower waive future claims he or she may have in connection with the deed of trust, as a condition of agreeing to a modification, except for rescission claims under the federal truth in lending act. Nothing in this section precludes a beneficiary from requesting that a borrower dismiss with prejudice any pending claims against the beneficiary, its agents, loan servicer, or trustee, arising from the underlying deed of trust, as a condition of modification.”(9) Within seven business days after the conclusion of the mediation session, the mediator must send a written certification to the department and the trustee and send copies to the parties of:“(a) The date, time, and location of the mediation session;“(b) The names of all persons attending in person and by telephone or video conference, at the mediation session;“(c) Whether a resolution was reached by the parties, including whether the default was cured by reinstatement, modification, or restructuring of the debt, or some other alternative to foreclosure was agreed upon by the parties;“(d) Whether the parties participated in the mediation in good faith; and“(e) A description of the net present value test used, along with a copy of the inputs, including the result of the net present value test expressed in a dollar amount.”(10) If the parties are unable to reach any agreement and the mediator certifies that the parties acted in good faith, the beneficiary may proceed with the foreclosure.”(11)(a) The mediator's certification that the beneficiary failed to act in good faith in mediation constitutes a defense to the nonjudicial foreclosure action that was the basis for initiating the mediation. In any action to enjoin the foreclosure, the beneficiary shall be entitled to rebut the allegation that it failed to act in good faith.”(b) The mediator's certification that the beneficiary failed to act in good faith during mediation does not constitute a defense to a judicial foreclosure or a future nonjudicial foreclosure action if a modification of the loan is agreed upon and the borrower subsequently defaults.”(c) If an agreement was not reached and the mediator's certification shows that the net present value of the modified loan exceeds the anticipated net recovery at foreclosure, that showing in the certification shall constitute a basis for the borrower to

enjoin the foreclosure.”(12) The mediator's certification that the borrower failed to act in good faith in mediation authorizes the beneficiary to proceed with the foreclosure.”(13)(a) A trustee may not record the notice of sale until the trustee receives the mediator's certification stating that the mediation has been completed.”(b) If the trustee does not receive the mediator's certification, the trustee may record the notice of sale after ten days from the date the certification to the trustee was due. If the notice of sale is recorded under this subsection (13)(b) and the mediator subsequently issues a certification alleging the beneficiary violated the duty of good faith, the trustee may not proceed with the sale.”(14) A mediator may charge reasonable fees as authorized by this subsection and by the department. Unless the fee is waived or the parties agree otherwise, a foreclosure mediator's fee may not exceed four hundred dollars for a mediation session lasting between one hour and three hours. For a mediation session exceeding three hours, the foreclosure mediator may charge a reasonable fee, as authorized by the department. The mediator must provide an estimated fee before the mediation, and payment of the mediator's fee must be divided equally between the beneficiary and the borrower. The beneficiary and the borrower must tender the loan mediator's fee seven calendar days before the commencement of the mediation or pursuant to the mediator's instructions.”(15) Beginning December 1, 2012, and every year thereafter, the department shall report annually to the legislature on:“(a) The performance of the program, including the numbers of borrowers who are referred to mediation by a housing counselor or attorney;“(b) The results of the mediation program, including the number of mediations requested by housing counselors and attorneys, the number of certifications of good faith issued, the number of borrowers and beneficiaries who failed to mediate in good faith, and the reasons for the failure to mediate in good faith, if known, the numbers of loans restructured or modified, the change in the borrower's monthly payment for principal and interest and the number of principal write-downs and interest rate reductions, and, to the extent practical, the number of borrowers who report a default within a year of restructuring or modification;“(c) The information received by housing counselors regarding outcomes of foreclosures; and“(d) Any recommendations for changes to the statutes regarding the mediation program.”UNITED STATES CODE ANNOTATED0WAPForeclosure mitigation and credit availability, enhancement of depository institutions' liquidity, see 12 U.S.C.A. § 5241.West's RCWA 61.24.163, WA ST 61.24.163

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APPENDIX D



Effective: June 12, 2014

West's Revised Code of Washington Annotated Currentness

Title 61. Mortgages, Deeds of Trust, and Real Estate Contracts (Refs & Annos)

Chapter 61.24. Deeds of Trust (Refs & Annos)

→→ 61.24.163. Foreclosure mediation program--Timelines--Procedures--Duties and responsibilities of mediator, borrower, and beneficiary--Fees--Annual report

(1) The foreclosure mediation program established in this section applies only to borrowers who have been referred to mediation by a housing counselor or attorney. The referral to mediation may be made any time after a notice of default has been issued but no later than twenty days after the date a notice of sale has been recorded. If the borrower has failed to elect to mediate within the applicable time frame, the borrower and the beneficiary may, but are under no duty to, agree in writing to enter the foreclosure mediation program. The mediation program under this section is not governed by chapter 7.07 RCW and does not preclude mediation required by a court or other provision of law.

(2) A housing counselor or attorney referring a borrower to mediation shall send a notice to the borrower and the department, stating that mediation is appropriate.

(3) Within ten days of receiving the notice, the department shall:

(a) Send a notice to the beneficiary, the borrower, the housing counselor or attorney who referred the borrower, and the trustee stating that the parties have been referred to mediation. The notice must include the statements and list of documents and information described in subsections (4) and (5) of this section and a statement explaining each party's responsibility to pay the mediator's fee; and

(b) Select a mediator and notify the parties of the selection.

(4) Within twenty-three days of the department's notice that the parties have been referred to mediation, the borrower shall transmit the documents required for mediation to the mediator and the beneficiary. The required documents include an initial Making Home Affordable Application (HAMP) package or such other equivalent homeowner financial information worksheet as required by the department. In the event the department is required to create a worksheet, the worksheet must include, at a minimum, the following information:

(a) The borrower's current and future income;

- (b) Debts and obligations;
 - (c) Assets;
 - (d) Expenses;
 - (e) Tax returns for the previous two years;
 - (f) Hardship information;
 - (g) Other applicable information commonly required by any applicable federal mortgage relief program.
- (5) Within twenty days of the beneficiary's receipt of the borrower's documents, the beneficiary shall transmit the documents required for mediation to the mediator and the borrower. The required documents include:
- (a) An accurate statement containing the balance of the loan within thirty days of the date on which the beneficiary's documents are due to the parties;
 - (b) Copies of the note and deed of trust;
 - (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);
 - (d) The best estimate of any arrearage and an itemized statement of the arrearages;
 - (e) An itemized list of the best estimate of fees and charges outstanding;
 - (f) The payment history and schedule for the preceding twelve months, or since default, whichever is longer, including a breakdown of all fees and charges claimed;
 - (g) All borrower-related and mortgage-related input data used in any net present values analysis. If no net present values analysis is required by the applicable federal mortgage relief program, then the input data required under the federal deposit insurance corporation and published in the federal deposit insurance corporation loan modification program guide, or if that calculation becomes unavailable, substantially similar input data as determined by the department;
 - (h) An explanation regarding any denial for a loan modification, forbearance, or other alternative to foreclosure in sufficient detail for a reasonable person to understand why the decision was made;

(i) Appraisal or other broker price opinion most recently relied upon by the beneficiary not more than ninety days old at the time of the scheduled mediation; and

(j) The portion or excerpt of the pooling and servicing agreement or other investor restriction that prohibits the beneficiary from implementing a modification, if the beneficiary claims it cannot implement a modification due to limitations in a pooling and servicing agreement or other investor restriction, and documentation or a statement detailing the efforts of the beneficiary to obtain a waiver of the pooling and servicing agreement or other investor restriction provisions.

(6) Within seventy days of receiving the referral from the department, the mediator shall convene a mediation session in the county where the property is located, unless the parties agree on another location. The parties may agree to extend the time in which to schedule the mediation session. If the parties agree to extend the time, the beneficiary shall notify the trustee of the extension and the date the mediator is expected to issue the mediator's certification.

(7)(a) The mediator may schedule phone conferences, consultations with the parties individually, and other communications to ensure that the parties have all the necessary information and documents to engage in a productive mediation.

(b) The mediator must send written notice of the time, date, and location of the mediation session to the borrower, the beneficiary, and the department at least thirty days prior to the mediation session. At a minimum, the notice must contain:

(i) A statement that the borrower may be represented in the mediation session by an attorney or other advocate;

(ii) A statement that a person with authority to agree to a resolution, including a proposed settlement, loan modification, or dismissal or continuation of the foreclosure proceeding, must be present either in person or on the telephone or videoconference during the mediation session; and

(iii) A statement that the parties have a duty to mediate in good faith and that failure to mediate in good faith may impair the beneficiary's ability to foreclose on the property or the borrower's ability to modify the loan or take advantage of other alternatives to foreclosure.

(8)(a) The borrower, the beneficiary or authorized agent, and the mediator must meet in person for the mediation session. However, a person with authority to agree to a resolution on behalf of the beneficiary may be present over the telephone or videoconference during the mediation session.

(b) After the mediation session commences, the mediator may continue the mediation session once, and any further continuances must be with the consent of the parties.

(9) The participants in mediation must address the issues of foreclosure that may enable the borrower and the beneficiary to reach a resolution, including but not limited to reinstatement, modification of the loan, restructuring of the debt, or some other workout plan. To assist the parties in addressing issues of foreclosure, the mediator may require the participants to consider the following:

(a) The borrower's current and future economic circumstances, including the borrower's current and future income, debts, and obligations for the previous sixty days or greater time period as determined by the mediator;

(b) The net present value of receiving payments pursuant to a modified mortgage loan as compared to the anticipated net recovery following foreclosure;

(c) Any affordable loan modification calculation and net present value calculation when required under any federal mortgage relief program, including the home affordable modification program (HAMP) as applicable to government-sponsored enterprise and nongovernment-sponsored enterprise loans and any HAMP-related modification program applicable to loans insured by the federal housing administration, the veterans administration, and the rural housing service. If such a calculation is not provided or required, then the beneficiary must provide the net present value data inputs established by the federal deposit insurance corporation and published in the federal deposit insurance corporation loan modification program guide or other net present value data inputs as designated by the department. The mediator may run the calculation in order for a productive mediation to occur and to comply with the mediator certification requirement; and

(d) Any other loss mitigation guidelines to loans insured by the federal housing administration, the veterans administration, and the rural housing service, if applicable.

(10) A violation of the duty to mediate in good faith as required under this section may include:

(a) Failure to timely participate in mediation without good cause;

(b) Failure of the borrower or the beneficiary to provide the documentation required before mediation or pursuant to the mediator's instructions;

(c) Failure of a party to designate representatives with adequate authority to fully settle, compromise, or otherwise reach resolution with the borrower in mediation; and

(d) A request by a beneficiary that the borrower waive future claims he or she may have in connection with the deed of trust, as a condition of agreeing to a modification, except for rescission claims under the federal truth in lending act. Nothing in this section precludes a beneficiary from requesting that a borrower dismiss with prejudice any pending claims against the beneficiary, its agents, loan servicer, or trustee, arising from the underlying deed of trust, as a condition of modification.

(11) If the mediator reasonably believes a borrower will not attend a mediation session based on the borrower's conduct, such as the lack of response to the mediator's communications, the mediator may cancel a scheduled mediation session and send a written cancellation to the department and the trustee and send copies to the parties. The beneficiary may proceed with the foreclosure after receipt of the mediator's written confirmation of cancellation.

(12) Within seven business days after the conclusion of the mediation session, the mediator must send a written certification to the department and the trustee and send copies to the parties of:

(a) The date, time, and location of the mediation session;

(b) The names of all persons attending in person and by telephone or videoconference, at the mediation session;

(c) Whether a resolution was reached by the parties, including whether the default was cured by reinstatement, modification, or restructuring of the debt, or some other alternative to foreclosure was agreed upon by the parties;

(d) Whether the parties participated in the mediation in good faith; and

(e) If a written agreement was not reached, a description of any net present value test used, along with a copy of the inputs, including the result of any net present value test expressed in a dollar amount.

(13) If the parties are unable to reach an agreement, the beneficiary may proceed with the foreclosure after receipt of the mediator's written certification.

(14)(a) The mediator's certification that the beneficiary failed to act in good faith in mediation constitutes a defense to the nonjudicial foreclosure action that was the basis for initiating the mediation. In any action to enjoin the foreclosure, the beneficiary is entitled to rebut the allegation that it failed to act in good faith.

(b) The mediator's certification that the beneficiary failed to act in good faith during mediation does not constitute a defense to a judicial foreclosure or a future nonjudicial foreclosure action if a modification of the loan is agreed upon and the borrower subsequently defaults.

(c) If an affordable loan modification is not offered in the mediation or a written agreement was not reached and the mediator's certification shows that the net present value of the modified loan exceeds the anticipated net recovery at foreclosure, that showing in the certification constitutes a basis for the borrower to enjoin the foreclosure.

(15) The mediator's certification that the borrower failed to act in good faith in mediation authorizes the benefi-

ciary to proceed with the foreclosure.

(16)(a) If a borrower has been referred to mediation before a notice of trustee sale has been recorded, a trustee may not record the notice of sale until the trustee receives the mediator's certification stating that the mediation has been completed. If the trustee does not receive the mediator's certification, the trustee may record the notice of sale after ten days from the date the certification to the trustee was due. If, after a notice of sale is recorded under this subsection (16)(a), the mediator subsequently issues a certification finding that the beneficiary violated the duty of good faith, the certification constitutes a basis for the borrower to enjoin the foreclosure.

(b) If a borrower has been referred to mediation after the notice of sale was recorded, the sale may not occur until the trustee receives the mediator's certification stating that the mediation has been completed.

(17) A mediator may charge reasonable fees as authorized by this subsection or as authorized by the department. Unless the fee is waived, the parties agree otherwise, or the department otherwise authorizes, a foreclosure mediator's fee may not exceed four hundred dollars for preparing, scheduling, and conducting a mediation session lasting between one hour and three hours. For a mediation session exceeding three hours, the foreclosure mediator may charge a reasonable fee, as authorized by the department. The mediator must provide an estimated fee before the mediation, and payment of the mediator's fee must be divided equally between the beneficiary and the borrower. The beneficiary and the borrower must tender the loan mediator's fee within thirty calendar days from receipt of the department's letter referring the parties to mediation or pursuant to the mediator's instructions.

(18) Beginning December 1, 2012, and every year thereafter, the department shall report annually to the legislature on:

(a) The performance of the program, including the numbers of borrowers who are referred to mediation by a housing counselor or attorney;

(b) The results of the mediation program, including the number of mediations requested by housing counselors and attorneys, the number of certifications of good faith issued, the number of borrowers and beneficiaries who failed to mediate in good faith, and the reasons for the failure to mediate in good faith, if known, the numbers of loans restructured or modified, the change in the borrower's monthly payment for principal and interest and the number of principal write-downs and interest rate reductions, and, to the extent practical, the number of borrowers who report a default within a year of restructuring or modification;

(c) The information received by housing counselors regarding outcomes of foreclosures; and

(d) Any recommendations for changes to the statutes regarding the mediation program.

CREDIT(S)

[2014 c 164 § 3, eff. June 12, 2014; 2012 c 185 § 6, eff. June 7, 2012; 2011 2nd sp.s. c 4 § 1, eff. Dec. 20, 2011; 2011 c 58 § 7, eff. July 22, 2011.]

HISTORICAL AND STATUTORY NOTES

Effective date--2011 2nd sp.s. c 4: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [December 20, 2011]." [2011 2nd sp.s. c 4 § 3.]

Findings--Intent--Short title--2011 c 58: See notes following RCW 61.24.005.

2012 Legislation

Laws 2012, ch. 185, § 6, rewrote the section, which formerly read:

"(1) The foreclosure mediation program established in this section applies only to borrowers who have been referred to mediation by a housing counselor or attorney. The mediation program under this section is not governed by chapter 7.07 RCW and does not preclude mediation required by a court or other provision of law.

"(2) A housing counselor or attorney referring a borrower to mediation shall send a notice to the borrower and the department, stating that mediation is appropriate.

"(3) Within ten days of receiving the notice, the department shall:

"(a) Send a notice to the beneficiary, the borrower, the housing counselor or attorney who referred the borrower, and the trustee stating that the parties have been referred to mediation. The notice must include the statements and list of documents and information described in subsection (5)(b)(i) through (iv) of this section; and

"(b) Select a mediator and notify the parties of the selection.

"(4) Within forty-five days of receiving the referral from the department, the mediator shall convene a mediation session in the county where the borrower resides, unless the parties agree on another location. The parties may agree in writing to extend the time in which to schedule the mediation session. If the parties agree to extend the time, the beneficiary shall notify the trustee of the extension and the date the mediator is expected to issue the mediator's certification.

"(5)(a) The mediator may schedule phone conferences, consultations with the parties individually, and other communications to ensure that the parties have all the necessary information to engage in a productive mediation.

“(b) The mediator must send written notice of the time, date, and location of the mediation session to the borrower, the beneficiary, and the department at least fifteen days prior to the mediation session. At a minimum, the notice must contain:

“(i) A statement that the borrower may be represented in the mediation session by an attorney or other advocate;

“(ii) A statement that a person with authority to agree to a resolution, including a proposed settlement, loan modification, or dismissal or continuation of the foreclosure proceeding, must be present either in person or on the telephone or video conference during the mediation session;

“(iii) A complete list of documents and information required by this section that the parties must provide to the mediator and the deadlines for providing the documents and information; and

“(iv) A statement that the parties have a duty to mediate in good faith and that failure to mediate in good faith may impair the beneficiary's ability to foreclose on the property or the borrower's ability to modify the loan or take advantage of other alternatives to foreclosure.

“(6) The borrower, the beneficiary or authorized agent, and the mediator must meet in person for the mediation session. However, a person with authority to agree to a resolution on behalf of the beneficiary may be present over the telephone or video conference during the mediation session.

“(7) The participants in mediation must address the issues of foreclosure that may enable the borrower and the beneficiary to reach a resolution, including but not limited to reinstatement, modification of the loan, restructuring of the debt, or some other workout plan. To assist the parties in addressing issues of foreclosure, the mediator must require the participants to consider the following:

“(a) The borrower's current and future economic circumstances, including the borrower's current and future income, debts, and obligations for the previous sixty days or greater time period as determined by the mediator;

“(b) The net present value of receiving payments pursuant to a modified mortgage loan as compared to the anticipated net recovery following foreclosure;

“(c) Any affordable loan modification calculation and net present value calculation when required under any federal mortgage relief program, including the home affordable modification program (HAMP) as applicable to government-sponsored enterprise and nongovernment-sponsored enterprise loans and any HAMP-related modification program applicable to loans insured by the federal housing administration, the veterans administration, and the rural housing service. If such a calculation is not required, then the beneficiary must use the current calculations, assumptions, and forms that are established by the federal deposit insurance corporation and published in the federal deposit insurance corporation loan modification program guide; and

“(d) Any other loss mitigation guidelines to loans insured by the federal housing administration, the veterans administration, and the rural housing service, if applicable.

“(8) A violation of the duty to mediate in good faith as required under this section may include:

“(a) Failure to timely participate in mediation without good cause;

“(b) Failure of the beneficiary to provide the following documentation to the borrower and mediator at least ten days before the mediation or pursuant to the mediator's instructions:

“(i) An accurate statement containing the balance of the loan as of the first day of the month in which the mediation occurs;

“(ii) Copies of the note and deed of trust;

“(iii) 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);

“(iv) The best estimate of any arrearage and an itemized statement of the arrearages;

“(v) An itemized list of the best estimate of fees and charges outstanding;

“(vi) The payment history and schedule for the preceding twelve months, or since default, whichever is longer, including a breakdown of all fees and charges claimed;

“(vii) All borrower-related and mortgage-related input data used in any net present value analysis;

“(viii) An explanation regarding any denial for a loan modification, forbearance, or other alternative to foreclosure in sufficient detail for a reasonable person to understand why the decision was made;

“(ix) The most recently available appraisal or other broker price opinion most recently relied upon by the beneficiary; and

“(x) The portion or excerpt of the pooling and servicing agreement that prohibits the beneficiary from implementing a modification, if the beneficiary claims it cannot implement a modification due solely to limitations in a pooling and servicing agreement, and documentation or a statement detailing the efforts of the beneficiary to obtain a waiver of the pooling and servicing agreement provisions;

“(c) Failure of the borrower to provide documentation to the beneficiary and mediator, at least ten days before the mediation or pursuant to the mediator's instruction, showing the borrower's current and future income, debts and obligations, and tax returns for the past two years;

“(d) Failure of either party to pay the respective portion of the mediation fee in advance of the mediation as required under this section;

“(e) Failure of a party to designate representatives with adequate authority to fully settle, compromise, or otherwise reach resolution with the borrower in mediation; and

“(f) A request by a beneficiary that the borrower waive future claims he or she may have in connection with the deed of trust, as a condition of agreeing to a modification, except for rescission claims under the federal truth in lending act. Nothing in this section precludes a beneficiary from requesting that a borrower dismiss with prejudice any pending claims against the beneficiary, its agents, loan servicer, or trustee, arising from the underlying deed of trust, as a condition of modification.

“(9) Within seven business days after the conclusion of the mediation session, the mediator must send a written certification to the department and the trustee and send copies to the parties of:

“(a) The date, time, and location of the mediation session;

“(b) The names of all persons attending in person and by telephone or video conference, at the mediation session;

“(c) Whether a resolution was reached by the parties, including whether the default was cured by reinstatement, modification, or restructuring of the debt, or some other alternative to foreclosure was agreed upon by the parties;

“(d) Whether the parties participated in the mediation in good faith; and

“(e) A description of the net present value test used, along with a copy of the inputs, including the result of the net present value test expressed in a dollar amount.

“(10) If the parties are unable to reach any agreement and the mediator certifies that the parties acted in good faith, the beneficiary may proceed with the foreclosure.

“(11)(a) The mediator's certification that the beneficiary failed to act in good faith in mediation constitutes a defense to the nonjudicial foreclosure action that was the basis for initiating the mediation. In any action to enjoin the foreclosure, the beneficiary shall be entitled to rebut the allegation that it failed to act in good faith.

“(b) The mediator's certification that the beneficiary failed to act in good faith during mediation does not constitute a defense to a judicial foreclosure or a future nonjudicial foreclosure action if a modification of the loan is agreed upon and the borrower subsequently defaults.

“(c) If an agreement was not reached and the mediator's certification shows that the net present value of the modified loan exceeds the anticipated net recovery at foreclosure, that showing in the certification shall constitute a basis for the borrower to enjoin the foreclosure.

“(12) The mediator's certification that the borrower failed to act in good faith in mediation authorizes the beneficiary to proceed with the foreclosure.

“(13)(a) A trustee may not record the notice of sale until the trustee receives the mediator's certification stating that the mediation has been completed.

“(b) If the trustee does not receive the mediator's certification, the trustee may record the notice of sale after ten days from the date the certification to the trustee was due. If the notice of sale is recorded under this subsection (13)(b) and the mediator subsequently issues a certification alleging the beneficiary violated the duty of good faith, the trustee may not proceed with the sale.

“(14) A mediator may charge reasonable fees as authorized by this subsection and by the department. Unless the fee is waived or the parties agree otherwise, a foreclosure mediator's fee may not exceed four hundred dollars for a mediation session lasting between one hour and three hours. For a mediation session exceeding three hours, the foreclosure mediator may charge a reasonable fee, as authorized by the department. The mediator must provide an estimated fee before the mediation, and payment of the mediator's fee must be divided equally between the beneficiary and the borrower. The beneficiary and the borrower must tender the loan mediator's fee seven calendar days before the commencement of the mediation or pursuant to the mediator's instructions.

“(15) Beginning December 1, 2012, and every year thereafter, the department shall report annually to the legislature on:

“(a) The performance of the program, including the numbers of borrowers who are referred to mediation by a housing counselor or attorney;

“(b) The results of the mediation program, including the number of mediations requested by housing counselors and attorneys, the number of certifications of good faith issued, the number of borrowers and beneficiaries who failed to mediate in good faith, and the reasons for the failure to mediate in good faith, if known, the numbers of loans restructured or modified, the change in the borrower's monthly payment for principal and interest and the number of principal write-downs and interest rate reductions, and, to the extent practical, the number of borrowers who report a default within a year of restructuring or modification;

“(c) The information received by housing counselors regarding outcomes of foreclosures; and

“(d) Any recommendations for changes to the statutes regarding the mediation program.”

2014 Legislation

Laws 2014, ch. 164, § 3, in subsec. (1), inserted the third sentence; in subsec. (5)(j) inserted “or other investor restriction”; following “due” deleted “solely”; twice inserted “or other investor restriction”; in subsec. (6), substituted “property is located” for “borrower resides”; in subsec. (17), substituted “or as authorized” for “and”; made nonsubstantive change; and inserted “of the department otherwise authorizes,”.

UNITED STATES CODE ANNOTATED

Foreclosure mitigation and credit availability, enhancement of depository institutions' liquidity, see 12 U.S.C.A. § 5241.

West's RCWA 61.24.163, WA ST 61.24.163

Current with 2014 Legislation effective on June 12, 2014, the General Effective Date for the 2014 Regular Session, and other 2014 Legislation effective through October 1, 2014

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APPENDIX E

Effective: December 20, 2011 to June 6, 2012

West's Revised Code of Washington Annotated

Title 61. Mortgages, Deeds of Trust, and Real Estate Contracts

Chapter 61.24. Deeds of Trust

→→ 61.24.169. Department maintains list of approved foreclosure mediators--Training program

(1) For the purposes of RCW 61.24.163, the department must maintain a list of approved foreclosure mediators. The department may approve the following persons to serve as foreclosure mediators under this section:

(a) Attorneys who are active members of the Washington state bar association;

(b) Employees of United States department of housing and urban development-approved housing counseling agencies or approved by the Washington state housing finance commission;

(c) Employees or volunteers of dispute resolution centers under chapter 7.75 RCW; and

(d) Retired judges of Washington courts.

(2) The department may establish a required training program for foreclosure mediators and may require mediators to acquire training before being approved. The mediators must be familiar with relevant aspects of the law, have knowledge of community-based resources and mortgage assistance programs, and refer borrowers to these programs where appropriate.

(3) The department may remove any mediator from the approved list of mediators.

(4)(a) A mediator under this section who is an employee or volunteer of a dispute resolution center under chapter 7.75 RCW is immune from suit in any civil action based on any proceedings or other official acts performed in his or her capacity as a foreclosure mediator, except in cases of willful or wanton misconduct.

(b) A mediator is not subject to discovery or compulsory process to testify in any litigation pertaining to a foreclosure action between the parties. However, the mediator's certification and all information and material presented as part of the mediation process may be deemed admissible evidence, subject to court rules, in any litigation pertaining to a foreclosure action between the parties.

CREDIT(S)

[2011 2nd sp.s. c 4 § 2, eff. Dec. 20, 2011; 2011 c 58 § 10, eff. July 22, 2011.]

HISTORICAL AND STATUTORY NOTES Findings--Intent--Short title--2011 c 58: See notes following RCW 61.24.005. 2011 Legislation Laws 2011, 2nd Sp.Sess. ch. 4, § 2, added subsec. (4). West's RCWA 61.24.169, WA ST 61.24.169

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No. 45953-1-II

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

SANDRA CABAGE,

Appellant.

v.

**NORTHWEST TRUSTEE SERVICES, INC.; PNC MORTGAGE, a
division of PNC Bank, NATIONAL ASSOCIATION,**

Respondents.

**COPIES OF OPINIONS CITED IN BRIEF OF RESPONDENT PNC
BANK, NATIONAL ASSOCIATION**

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13-19	<i>Bakhchinyan v. Countrywide Bank, N.A.</i> , No. C13-2273-JCC, 2014 WL 1273810 (W.D. Wash. Mar. 27, 2014)

RESPECTFULLY SUBMITTED this 27th day of August, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2014 I caused the document to which this certificate is attached to be filed with the Clerk of the above-entitled Court and served upon counsel of record in the manner as indicated below:

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Declared under penalty of perjury under the laws of the State of Washington dated at Seattle, Washington this 27th day of August, 2014.


Crystal Moore

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STATE OF WASHINGTON
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2013 WL 6193887 (Wash.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Washington.
King County

Kristin BAIN, Plaintiff,

v.

METROPOLITAN MORTGAGE GROUP INC., et al., Defendants.

No. 08-2-43438-9SEA.
August 30, 2013.

Order Granting Mortgage Electronic Registration Systems, Inc.'s Motion for Summary Judgment

Davis Wright Tremaine, LLP, Attorneys for MERS, Inc., Fred B. Burnside, WSBA #32491, 1201 Third Avenue, Suite 2200, Seattle, Washington 98101-3045, Telephone: (206) 757-8016, Fax: (206) 757-7016, Email: fredburnside@dwt.com.

Honorable Catherine Shaffer.

Hearing Date: August 30, 2013

Hearing Time: 9:00 a.m.

This matter came before the Court on a Motion for Summary Judgment submitted by Defendant Mortgage Electronic Registration Systems, Inc.'s ("MERS"). The Court having considered the motion, support declarations, responses and replies, as follows:

1. *Amended Complaint* Substituting Deutsche Bank National Trust Company and One West Bank, F.S.B. in the Place and Stead of FDIC against defendants;
2. Defendant MERS's *Answer* to Amended Complaint;
3. Defendant MERS's Motion for Summary Judgment;
4. Declaration of Fred B. Burnside (*with exhibits*);
5. Declaration of Ronaldo Reyes (*with exhibits*);
6. Plaintiff Kristin Bain's *Response* to Defendant MERS's Motion for Summary Judgment;
7. Declaration of Melissa A. Huelsman (*with exhibits*);
8. Defendant MERS's *Reply* In Support of Its Motion for Summary Judgment;
9. Second Declaration of Fred B. Burnside (*with exhibits*);
10. _____

Based on the above materials, the briefing and argument of counsel, the Court HEREBY ORDERS that Defendant MERS's Motion for Summary Judgment is GRANTED. Accordingly, all claims against Defendant MERS are hereby dismissed with prejudice.

DATED: 8/30/13

<<signature>>

The Honorable Catherine Schaffer

Presented by:

Davis Wright Tremaine, LLP

Attorneys for MERS, Inc.

<<signature>>

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Approved as to form:

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

<<signature>>

By: /s/ *Melissa A. Huelsman*

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sale. Never had any contact with the trustee. Didn't contact trustee at all. And there was no sale going forward that was being hampered in any way. There is no injury here, and certainly none caused by MERS.

The Supreme Court held that the right to foreclose is tied to who holds the note. IndyMac has never represented it was foreclosing based on a MERS assignment; it was representing it was foreclosing based on his status as a noteholder.

Now, plaintiff disagrees with that, and I get that. And Deutsche Bank is doing it separately now, because it gave the authorization to IndyMac, but it can take that away.

We don't really care about that, that's not our issue. And the word agency didn't escape my lips during my argument. I'm not relying on agency. I don't really --

THE COURT: No.

MR. BURNSIDE: -- care about agency.

While Deutsche Bank owned the note, it gave IndyMac the authority to modify and foreclose on the loan and use MERS as an agent. That's what it looks like from the documents I see. And Deutsche Bank executed power of attorney to allow IndyMac to take any actions necessary to foreclose on the deed of trust.

Plaintiff was aware, and it was made very clear to her even at the inception of the loan whatever other representations were made to her at the time of the loan origination, that she had to pay \$1,721 each month to keep her loan current.

At the time she had a full-time job at AT&T and she had regular small disbursements from her trust fund and she thought she could make those payments. But in May of 2008 her employment situation changed and she defaulted on her mortgage payments.

She was given an opportunity to cure, she didn't do that. Very likely, from the record I have before me, because she had hopes of renegotiating the loan so that the monthly payments dropped considerably.

In any event, after her default, according to MERS, IndyMac instructed MERS to transfer the deed of trust back to IndyMac and MERS's involvement was terminated.

There are disputes here about the meaning of what has been characterized as a scrivener's error on the assignment documents and the involvement of IndyMac, because IndyMac went under, it was grabbed by the federal authorities in July of 2008, and this notice of default was a good month later in August of 2008.

So I'm going to accept the plaintiff's recitation and interpretation of the facts here as accurate for purposes of this motion.

Among other things, I'm going to accept that it was RTS that caused the notice of default to be posted at Bain's residence, and that the assignment of deed of trust occurred on September 3, 2008, after the notice of default was posted.

There are plenty of potential violations of the Deed of Trust Act enunciated by plaintiff on this motion. And again, I just accept all of that as accurate for purposes of the motion. I'm not saying I will for purposes of an RTS motion; we'll take that up when we come to it, if we do.

After plaintiff failed to cure her default, the trustee issued and recorded a notice of trustee's sale on September 25, 2008, and a sale was scheduled for December 26. Plaintiff filed this case and halted the sale. There aren't any resources expended by plaintiff in this case other than the legal fees she's paid to her attorney and her court costs.

She has continued to reside at the property without paying fees, charges, taxes, insurance, or the monthly payments that were initially agreed to.

As of October 16, 2012, it appears that the principal owing was \$192,547.92, plus interest of \$64,197.54, plus late fees of \$3,482.54, far more than the initial loan amount.

Turning now to the analysis of the CPA claim that remains in this case. We all know the Hangman Ridge factors. This is not, and perhaps that's not a good thing legally, or as a matter of justice, a per se claim under the CPA.

To prevail on this claim, therefore, the plaintiff has to show, first, an unfair or deceptive act or practice. Second, that it occurs in trade or commerce. Third, that it impacts the public interest. Fourth, that it causes injury to plaintiff or her business or her property. And fifth, a causal link between the injury and the unfair or deceptive act.

I accept, and I think probably rightly, if we got to the merits here, that plaintiff has satisfied the first three requirements. There are credible arguments here, and I take very seriously the Supreme Court's comments on this, that there were multiple violations of the Deed of Trust Act during the period of time when Bain defaulted on her loan and it went into foreclosure.

Certainly the documents that MERS was involved in do not appear to be accurate in all respects, whether due to scrivener's error or otherwise, and I don't have a problem construing that as a showing as an unfair or deceptive act or practice within the meaning of Hangman Ridge.

Nor do I have any problem with this occurring in trade or commerce. MERS trade is maintaining information on behalf of mortgage loan servicers and executing documents to speed up the foreclosure process. And given the volume of mortgages handled by MERS and the fact that we're dealing with regular consumers here for almost all of these mortgages, we obviously have an impact on the public interest.

But that's not really what the defendants are arguing to me today; they have been quite zeroed in like lasers on the last two factors of the CPA, which are the requirement of a showing of injury and a causal link. And here I think Ms. Huelsman has used all of her creativity and has come up with nothing that really shows me primarily that there was an injury here.

I can visualize, I think we can all visualize circumstances where what happened here would have created an injury had there been a pending sale, had there been an effort to mortgage this property further, had there been some kind of damage to plaintiff's credit rating that affected her. Had there been something like that, I think we would have injury within the meaning of the CPA. And I agree heartily that money damages aren't required. But we don't have any of that.

In fact, I have to say at least for the past five years plaintiff has been in good shape because she's been living in the home without interference, without any mortgage payments, and indeed any costs but legal fees.

Also under *Panag v. Farmers Insurance Company*, 166 Wn.2d 27 (2009), legal fees are not enough for an injury, even though we all know that you can't possibly do anything about a foreclosure realistically without hiring a lawyer. Nonetheless, that's the law.

And because I don't see injury here, not on any interpretation of the facts, not even on inferences from the facts before me, I can't find any but for causal relationship between what MERS did and didn't do and the harm that wasn't suffered. Because even if the filing of foreclosure actions is an injury, and I don't think the showing has been made that there was any injury here, I'll point out that it's also clear that MERS didn't initiate those foreclosure proceedings, lend money, make representations to plaintiff, send plaintiff any default notice or initiate the foreclosure. MERS may have greased the wheels for other people, but I don't think that's enough for but for causation in particular, because there is no but for causation to injury that I can detect on this record.

I'll point out the obvious which is if you can't make the showing under prong four injury, it's impossible to make the showing under prong five of causation.

For those reasons I grant MERS's motion. I make no finding whatsoever with regard to any other defendant in this case.

I'll sign your order once you've gotten it together with Ms. Huelsman.

Thanks, everybody. We're going to recess briefly while we set up for my next motion.

MR. BURNSIDE: Thank you, your Honor.

MS. HUELSMAN: Thank you, your Honor.

(End of FTR recording.)

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United States District Court, W.D. Washington,
at Seattle.

Floyd THURMAN and Glenda Thurman, Plaintiffs,

v.

WELLS FARGO HOME MORTGAGE,
Wells Fargo Bank, N.A., Defendant.

No. C12-1471-JCC. | Aug. 2, 2013.

Attorneys and Law Firms

Jonathan S. Smith, Advantage Legal Group, Bellevue, WA,
Richard Llewelyn Jones, Kovac & Jones, Bellevue, WA, for
Plaintiffs.

Daniel J. Park, Robert Joseph Bocko, Keesal Young & Logan,
Seattle, WA, for Defendant.

ORDER

JOHN C. COUGHENOUR, District Judge.

*1 This matter comes before the Court on (1) Defendant Wells Fargo Bank, N.A.'s motions for summary judgment on Plaintiffs Floyd and Glenda Thurman's Washington Consumer Protection Act ("CPA") claim and on its own breach of contract counterclaim (Dkt.Nos.39, 43), (2) the Thurmans' motion to set aside the order of default entered against them (Dkt. No. 57), and (3) Wells Fargo's request for sanctions against the Thurmans and to strike and seal the papers they filed in response to its motions for summary judgment. Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS Wells Fargo's motion for summary judgment on the Thurmans' CPA claim (Dkt. No. 43), STRIKES Wells Fargo's counterclaim, DENIES as moot Wells Fargo's motion for summary judgment on its counterclaim (Dkt. No. 39), VACATES the order of default against the Thurmans (Dkt. No. 38), DENIES as moot their motion to set aside the order of default (Dkt. No. 57), DENIES Wells Fargo's request for sanctions, and GRANTS Wells Fargo's request to strike from the record the Thurmans' references to confidential settlement communications and to seal their opposition papers.

I. APPLICABLE LAW

Under Washington's Foreclosure Fairness Act ("FFA"), if a borrower is referred to foreclosure mediation, the beneficiary on the deed of trust must transmit certain documents to the mediator and the borrower and attend a mediation session. Wash. Rev.Code § 61.24.163(1)-(3), (5), 7(b), 8(a). The borrower and the beneficiary have a duty to mediate in good faith; failure to timely participate in mediation without good cause and failure to provide the documentation required before mediation may constitute a violation of this good-faith mediation duty. *Id.* § 61.24.163(10)(a)(b). A borrower can assert a beneficiary's violation of its good-faith duty as a basis to enjoin the beneficiary's non-judicial foreclosure sale of the borrower's home. *Id.* § 61.24.163(14)(a). However, "[i]n any action to enjoin the foreclosure, the beneficiary is entitled to rebut the allegation that it failed to act in good faith," and "[t]he mediator's certification that the beneficiary failed to act in good faith during mediation does not constitute a defense to a judicial foreclosure" *Id.* § 61.24.163(14)(a)(b) (emphasis added). A violation of the FFA duty of good faith is also actionable as an unfair or deceptive act in trade or commerce under the CPA. *Id.* § 61.24.135(2)(a). The elements of a CPA claim are "(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 719 P.2d 531, 533 (Wash.1986).

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(a); see Fed.R.Civ.P. 50(a) (court may grant judgment as a matter of law if "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue"). The party moving for summary judgment has the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party has satisfied its burden, the burden shifts to the non-moving party to designate "specific facts showing that there is a genuine issue for trial." *Id.* at 324. In deciding a motion for summary judgment, a court draws all inferences in the light most favorable to the party opposing the motion. *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 668 (9th Cir.1980).

*2 Ordinarily, "[t]he court should freely give leave [to amend a pleading] when justice so requires." Fed.R.Civ.P. 15(a)(2). However, when a party moves to amend a pleading after the pleading-amendment deadline, it first "must show

good cause for not having amended [its] complaint[] before the time specified in the scheduling order expired.” *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir.2000); see Fed.R.Civ.P. 16(b)(4) (scheduling order “may be modified only for good cause”). “This standard ‘primarily considers the diligence of the party seeking the amendment.’” *Coleman*, 232 F.3d at 1294 (quoting *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.1992)). Where a party moves to amend its complaint after the pleading-amendment deadline, but does not specifically request that the Court modify its scheduling order, the Court need not construe the motion as a motion to amend the scheduling order; it may instead simply deny the motion as untimely. *Id.* at 608–09; see, e.g., *id.* at 608 (“court may deny as untimely a motion filed after the scheduling order cut-off date where no request to modify the order has been made”) (citing *U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099, 1104 (9th Cir.1985)); *Atwell v. City of Surprise*, 440 F. App’x 585, 586 (9th Cir.2011) (district court did not abuse its discretion in denying plaintiff’s request for leave to amend complaint; plaintiff “should have requested a modification of the district court’s scheduling order before he requested leave to [amend]”) (citing *Johnson*, 975 F.2d at 608–09).

II. THE THURMANS’ CPA CLAIM

In their complaint, the Thurmans allege that Wells Fargo violated its duty to mediate with them in good faith when it allegedly failed to submit the required documents in advance of an FFA mediation session scheduled with the Thurmans, failed to appear for the mediation, and failed to pay its share of the mediation fee, which the mediator found to constitute a violation of the good-faith duty. (Dkt. No. 1 Ex. A at 6 ¶¶ 4.18, 4.204.21; *id.* at 910.) They further allege that this FFA violation “constitutes a per se violation of the [CPA].” (*Id.* at 8 ¶ 6.4.) They seek an injunction against the non-judicial foreclosure sale of their home, “[a]n award of damages in an amount to be proven at trial” and “treble damages, costs, and reasonable attorney’s fees.” (*Id.* at 8 ¶ 7.1.) While the Thurmans’ complaint is devoid of any allegations of how Wells Fargo’s conduct harmed them, their theory of injury—revealed in discovery—is that if Wells Fargo had mediated with them in good faith, (1) they would have secured a favorable loan modification and (2) they wouldn’t have had to pay a lawyer to attend the mediation session. (Dkt. No. 46 Ex. E.)

Wells Fargo moves for summary judgment on the Thurmans’ CPA claim. It argues there is no evidence in the record to support the Thurmans’ theory of injury and causation because

(1) the Thurmans were not eligible for a loan modification under the Home Affordable Mortgage Program (“HAMP”) or Wells Fargo’s Mortgage Assistance Program 2 (“MAP2R”), and (2) they would have paid an attorney to attend the mediation session even if Wells Fargo *had* mediated in good faith. The Thurmans were ineligible for a HAMP modification, Wells Fargo argues, because HAMP requires a maximum unpaid principal loan balance of \$729,750, and the Thurmans’ loan balance exceeded that sum. (Dkt. No. 45 at 3–4 ¶¶ 12–13 & Ex. B at 5.) And the Thurmans were ineligible for a MAP2R modification, Wells Fargo argues, because MAP2R requires a showing by applicants that they intend to remain living in the property securing the loan for more than one year (*id.* at 45 ¶¶ 1516), and the Thurmans had no intention of doing so, as evidenced by the fact that they listed the property securing the loan for sale from June 2011 to January 2012 (Dkt. No. 44 at 2 ¶ 5; Dkt. No. 45 at 5 ¶ 17 & Ex. C) and for rent from October of 2011 to January of 2012 (Dkt. No. 44 at 2 ¶ 6). Even if the Thurmans were *eligible* for a MAP2R modification, Wells Fargo argues, they wouldn’t have *qualified* for one because they couldn’t have achieved the required debt to income level, and the net present value test for their hypothetical modified loan was negative. Since there is no record evidence to support the injury and causation elements of the Thurmans’ CPA claim, Wells Fargo argues, it is entitled to summary judgment. See *Johnson v. Camp Auto., Inc.*, 148 Wash.App. 181, 199 P.3d 491, 493 (Wash.Ct.App.2009) (“The failure to establish any of the elements is fatal to a CPA claim.”).

*3 The Thurmans raise a number of meritless arguments in response, none of which raises a genuine issue of fact as to injury or causation. First, they point the Court to an assurance of discontinuance entered into between the State of Washington and Wells Fargo’s predecessor, in which it agreed, “on an ongoing basis,” to “offer Eligible Borrowers affordable loan modifications in accordance with” certain provisions. (Dkt. No. 49–1 at 10.) The Thurmans argue that “they are third-party beneficiaries of this agreement and should have been provided a modification of their loan a year before they requested an FFA mediation,” and yet they “do not appear to have received any of the notices referred to in the agreement.” (Dkt. No. 58 at 2.) Even if a private right of action based on an alleged violation of the assurance of discontinuance were available—and it is not¹—the Thurmans utterly failed to plead such a claim in their complaint. The Thurmans ask the Court to let them amend their complaint to add such allegations. The Court DENIES this request. Any amendment would be futile because a

violation of the assurance of discontinuance does not create a private right of action. In any event, the Thurmans failed to move to modify the scheduling order to allow a pleading amendment past the deadline and have failed to show good cause for such a modification. *See* Fed.R.Civ.P. 16(b)(4); *Coleman*, 232 F.3d at 1294; *Johnson*, 975 F.2d at 608–09.

The Thurmans also claim that their loan broker over-stated their income on their loan application and that they were “issu[ed] a ‘Pick a Payment’ loan when Plaintiffs [] sought a ‘conventional’ loan”—both allegedly “act[s] of fraud which also give[] rise to a CPA claim.” (Dkt. No. 58 at 12.) Again, the Thurmans alleged nothing to this effect in their complaint, and only lack of diligence can explain their failure to raise these fraud claims sooner. These allegations are simply not a part of this lawsuit, and they do nothing to rebut Wells Fargo’s showing of an absence of evidence to support the injury and causation elements of the claim that *is* a part of this lawsuit—the Thurmans’ CPA claim.

The Thurmans claim there is a genuine dispute of fact as to “whether Wells Fargo actually owns the subject Note and the beneficial interest in the subject Deed of Trust to even have standing to mediate a modification of the obligation in the first place,” and whether “the Note held by Wells Fargo is in fact the original note as claimed by [Wells Fargo].” (*Id.* at 7.) The Court fails to understand the Thurmans’ argument. The Thurmans’ CPA claim is premised on the fact that Wells Fargo is the lawful owner of the note and beneficiary on the deed of trust. If it isn’t, then Wells Fargo would not have been in a position to modify (and cannot be held to have injured the Thurmans by failing to modify) their loan at the FFA mediation session. In other words, if Wells Fargo is not the beneficiary, then it never had a duty to mediate in good faith, and the Thurmans’ lawsuit is moot. Manufacturing a dispute of fact on the issue of note ownership or Wells Fargo’s beneficiary status does not help the Thurmans defeat Wells Fargo’s motion for summary judgment.

*4 The Thurmans argue that “[v]alid questions of material fact exist[] on a number of grounds, including ... whether Plaintiffs had sufficient means to fund a modification of the obligation” and “as to the calculations used by Wells Fargo to conclude that Plaintiffs would not have [qualified] for a modification of their loan” (Dkt. No. 58 at 7.) But the Thurmans fail to point to any evidence that puts into dispute Wells Fargo’s predicate assertion of fact that the Thurmans were not *eligible* for a HAMP or MAP2R modification in the first place because their unpaid principal balance exceeded

HAMP’s limit and they had no intention of staying in their home for more than one year. *See* Fed.R.Civ.P. 56(c)(1). If the Thurmans were never *eligible*—and they have pointed to no evidence tending to show that they were—then the accuracy or transparency of Wells Fargo’s *qualification* calculations is irrelevant.

The Thurmans also cite as “injury” the fees they incurred in participating in the mediation of *this lawsuit*, which the Court ordered earlier this year. But those fees are not injuries caused by Wells Fargo’s alleged failure to mediate in good faith; they are attorneys’ fees and costs recoverable *only* if the Thurmans prevail on their CPA claim. *See, e.g., Gray v. Suttel & Assocs.*, No. 09–251, 2012 U.S. Dist. LEXIS 43885 at *20, 2012 WL 1067962 (E.D.Wash. Mar. 28, 2012) (“[T]ime and financial resources expended to ... pursue a WCPA claim do not satisfy the WCPA’s injury requirement.”); *Coleman v. Am. Commerce Ins. Co.*, No. 09–5721, 2010 U.S. Dist. LEXIS 97757, at *10, 2010 WL 3720203 (W.D.Wash. Sept. 17, 2010) (“The cost of having to prosecute a CPA claim is not sufficient to show injury to business or property.”).

The Thurmans argue that Wells Fargo’s alleged failure to mediate in good faith somehow “forced [them] to file a Chapter 13 bankruptcy to stay [the scheduled trustee’s] sale of their property,” that they “stand to lose in excess of \$100,000.00 in equity in their home if the loan is not modified and the property sold at trustee’s sale,” and that such events pose the risk of “injury to [their] creditworthiness.” (Dkt. No. 58 at 9–10.) Again, these arguments wrongly assume that good-faith mediation would have resulted in a loan modification and a cancellation of the scheduled trustee’s sale.

The Thurmans confusingly assert, “Wells Fargo would have this Court believe that the[] only means by which it could modify Plaintiffs’ loan was through HAMP.” (*Id.* at 10.) But Wells Fargo discusses the Thurmans’ ineligibility for both HAMP *and* MAP2K in its briefing.

Finally, the Thurmans argue that Wells Fargo “should be barred from profiting from its ‘bad faith.’” (*Id.* at 11.) The relevant inquiry, though, is not whether Wells Fargo “profited” from any failure to mediate in good faith, but rather whether the Thurmans were injured by that alleged conduct. The Thurmans appear to believe that a beneficiary’s breach of its duty of good faith somehow automatically entitles the borrower to a loan modification. That is not the law. *See* Wash. Rev.Code § 61.24.163(14).

*5 The Thurmans have failed to rebut Wells Fargo's showing of an absence of evidence of injury and causation—two elements crucial to the Thurmans' CPA claim. Accordingly, the Court GRANTS summary judgment for Wells Fargo on that claim and DISMISSES it with prejudice.

III. WELLS FARGO'S BREACH OF CONTRACT COUNTERCLAIM

The Thurmans served Wells Fargo on August 10, 2012. (Dkt. No. 1 at 1 ¶ 1.) Wells Fargo removed the action to this Court later that month. In October, the Court held a status conference and established case management dates, including a deadline to amend pleadings of January 4, 2013 and a trial date of September 30, 2013. (Dkt. No. 11.) Wells Fargo did not file an answer to the Thurmans' complaint; instead, on November 1, it filed a motion to dismiss. (Dkt. No. 13.) The Court denied that motion on January 2, 2013. (Dkt. No. 22.) Wells Fargo had 14 days from that date—*i.e.*, until January 16, 2013—to file its answer, but failed to do so. *See* Fed.R.Civ.P. 12(a)(4)(A). However, the Thurmans neither objected nor filed a motion for default. *See Boudreau v. United States*, 250 F.2d 209, 211 (9th Cir.1957) (“[I]t is the plaintiff's duty to expedite the case to its final determination and if he allows delay in the filing of the answer he cannot complain of it.”). On May 14, Wells Fargo filed an answer to the Thurmans' complaint and a counterclaim for breach of contract. (Dkt. No. 33.)

When Wells Fargo added its counterclaim to this lawsuit, it did not move for a modification of the scheduling order—which established a cutoff date of January 4, 2013 for adding claims—and it did not make any showing of “good cause for not having [added its counterclaim] before the time specified in the scheduling order expired.” *Coleman*, 232 F.3d at 1294; *see* Fed.R.Civ.P. 16(b)(4). Accordingly, the Court DENIES Wells Fargo's implicit motion to add its counterclaim as untimely, *see Johnson*, 975 F.2d at 608, and STRIKES the counterclaim (Dkt. No. 33 at 56 ¶¶ 17). Even if the Court were to construe Wells Fargo's filing of its counterclaim as a motion to modify the scheduling order to allow it to add its counterclaim, the Court would reach the same result. Wells Fargo knew all the facts underlying its breach of contract claim the moment the Thurmans filed suit. Only a lack of diligence can explain its decision to wait nine months before asserting it. *See, e.g., In re W. States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 737 (9th Cir.2013) (“district court did not abuse its discretion in concluding that the Plaintiffs were not diligent in seeking to amend their complaints to add federal antitrust claims”

“because they had known since 2007 ... that federal antitrust claims may be viable”). In light of the foregoing, the Court VACATES the order of default against the Thurmans for their failure to timely answer Wells Fargo's counterclaim (Dkt. No. 38) and DENIES as moot the Thurmans' motion to set aside the order of default (Dkt. No. 57) and Wells Fargo's motion for summary judgment on its counterclaim (Dkt. No. 39).

*6 In response to Wells Fargo's motions for summary judgment, the Thurmans filed several papers referencing the parties' confidential mediation discussions (and their version of what transpired therein). The Court GRANTS Wells Fargo's request (Dkt.Nos.53, 59) to STRIKE from the record those references to confidential mediation communications and to SEAL the Thurmans' response papers. *See* Local Civ. R. W.D. Wash. 39.1(a)(6) (“[A]ll ADR proceedings under this rule, including communications, statements, disclosures and representations made by any party, attorney or other participant in the course of such proceeding, shall, in all respects, be confidential, and shall not be reported, recorded, placed in evidence, disclosed to anyone not a party to the litigation, made known to the trial court or jury, or construed for any purpose as an admission or declaration against interest.”). The Court DENIES Wells Fargo's motion to impose sanctions on the Thurmans for their violation of Local Civil Rule 39.1's confidentiality requirement and for their habit to date of failing to comply with the Local Civil Rules and the Federal Rules of Civil Procedure. As the Court's discussion *supra* shows, Wells Fargo's track record of following deadlines and abiding by the Federal Rules also falls short of spotless. The Court would also note that neither party bothered, after the Court-ordered mediation on April 30, to ensure that written notice was provided to the Court stating when the mediation occurred and whether the case was resolved. *See* Local Civ. R. W.D. Wash. 39.1(c)(7).

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Wells Fargo's motion for summary judgment on the Thurmans' CPA claim (Dkt. No. 43), DISMISSES that claim with prejudice, STRIKES Wells Fargo's counterclaim for breach of contract, DENIES as moot Wells Fargo's motion for summary judgment on the counterclaim (Dkt. No. 39), VACATES the order of default against the Thurmans on the counterclaim (Dkt. No. 38), DENIES as moot their motion to set aside the order of default (Dkt. No. 57), DENIES Wells Fargo's request for sanctions, and GRANTS its request to strike from the record the Thurmans' references to confidential settlement communications and to seal the

papers the Thurmans filed in response to Wells Fargo's motions for summary judgment. The Court DIRECTS the Clerk to seal these papers (Dkt.Nos.47–51, 58).

The only claim remaining is the Thurmans' claim to enjoin the non-judicial foreclosure sale of their home. Wells Fargo states that it “is not pursuing non-judicial foreclosure (... because

it is instead pursuing a judgment on the Note), so that aspect of Plaintiffs' complaint is moot.” (Dkt. No. 43 at 8.) Unless and until the Thurmans move to dismiss their action for an injunction, however, that claim (and only that claim) remains. As for a “judgment on the Note,” Wells Fargo will have to pursue that claim in a separate judicial foreclosure action.

Footnotes

- 1 (Dkt. No. 49–1 at 26 (“*No Third Party Beneficiaries Intended*. This Assurance is not intended to confer upon any person any rights or remedies, including rights as a third party beneficiary,” or “to create a private right of action”); *see id.* at 9–10.)

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 (Cite as: 2014 WL 1273810 (W.D.Wash.))

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 Only the Westlaw citation is currently available.

United States District Court, W.D. Washington,
 at Seattle.
 Paranzem BAKHCHINYAN, et al., Plaintiffs,
 v.
 COUNTRYWIDE BANK, N.A., et al., Defendants.
 No. C13-2273-JCC.
 Signed March 27, 2014.

Craig R. Elkins, Magnum Law Group PLLC, Bellevue, WA, for Plaintiffs.

Steven Joseph Dixon, Christopher G. Varallo, Witherspoon Kelley, Spokane, WA, Rebecca Shrader, Bishop White Marshall & Weibel, PS, Seattle, WA, for Defendants.

ORDER DISMISSING CASE

JOHN C. COUGHENOUR, District Judge.

*1 This matter comes before the Court on Defendants Bank of America, N.A.,^{FN1} and Mortgage Electronic Registration Systems, Inc.'s motion to dismiss, (Dkt. No. 11), and Defendant Bishop, White, Marshall & Weibel's separate motion to dismiss. (Dkt. No. 13.) Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motions for the reasons explained herein. The Court hereby dismisses Plaintiffs' fraud and negligence claims with prejudice. Plaintiffs' CPA and wrongful foreclosure claims are dismissed and Plaintiffs are granted leave to file an amended complaint as to those claims. Plaintiffs' claim for a declaratory judgment is dismissed, but they are granted leave to properly assert it as a remedy.

^{FN1} Bank of America, N.A. has merged with Countrywide Bank, formerly known as Countrywide Bank, N.A., the original lender. (Dkt. No. 5.) Accordingly, Bank of America, N.A. is appearing not only as a

defendant in its own right, but also as the successor to Countrywide Bank, N.A. (*Id.*)

I. BACKGROUND

On December 2, 2005, Plaintiffs executed a first mortgage Adjustable Rate Note ("Note") in the principal sum of \$520,500 in favor of the lender, defendant Countrywide Bank, N.A. ("Countrywide"), with a deed of trust ("DOT") recorded in King County, securing the Note against the personal residence of Plaintiffs. (Dkt. No. 1, Ex. A at 3 ¶ 3.2.) The DOT stated that Defendant Mortgage Electronic Registration Systems ("MERS"), was the "beneficiary" under the DOT, that Countrywide was the mortgage lender, and that Chicago Title Insurance was the trustee. (*Id.* at 4, ¶¶ 3.3-3.4.) On October 6, 2011, an "Assignment of Deed of Trust was purportedly executed" in Ventura County, California in the name of Ralph Flores, as Assistant Secretary for MERS, that assigned the DOT to Defendant Bank of America, N.A. ("Bank of America"). (*Id.* at 4, ¶¶ 3.6.) Plaintiffs allege that Ralph Flores was not an employee of MERS, was not a corporate officer of that organization, and that the representations in the document were false. (*Id.*) On May 29, 2013, an Appointment of Successor Trustee was purportedly executed in Dallas County, Texas in the name of Kevin Dennison as assistant vice president for Bank of America, appointing Bishop, White, Marshall & Weibel, P.S. ("Bishop White") as the successor trustee under the DOT. (*Id.* at 6, ¶ 3.17.) Plaintiffs allege that Kevin Dennison was not an employee of Bank of America, and that the representations in that document were false. (*Id.*) On July 11, 2013, a Notice of Trustee's Sale was executed by Bishop White, setting the sale date of Plaintiffs' home for November 22, 2013. (*Id.* at 7, ¶ 3.18.)

On November 14, 2013, Plaintiffs sued Defendants, alleging that Bank of America did not properly assign the right to collect mortgage payments to Bishop White, that MERS had no beneficial interest in the Deed of Trust, and that Plaintiffs

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have a “distinct financial interest that necessitates knowing their mortgage payments are being paid to and credited by the actual holder of the Note” (*Id.* at 5, ¶ 3.7–3.10.) They also argue that defendant Bank of America was unwilling to modify the loan, even after their income was reduced, which contradicted its own statements about the availability of hardship assistance. (*Id.* at 5–6, ¶¶ 3.13–3.16.) However, those allegations do not appear to be a basis for any of their claims for relief. Plaintiffs ask for relief on five grounds: fraud, violations of the Washington Consumer Protection Act (“CPA”), negligence, a declaratory judgment, and wrongful foreclosure. Plaintiffs request damages for “attorney fees, audit fees, accounting fees, travel, [and] loss of business and personal time pursuing this action and attempting to unravel the complicated chain of ownership created by Defendants’ [alleged] fraud and deceit.” (*Id.* at 7, ¶ 3.19.) Defendants removed this case to this Court on December 19, 2013. (*See* Dkt. No. 1.)

*2 On January 13, 2014, defendants Bank of America (in its own right and as the successor to defendant Countrywide) and MERS filed a joint motion to dismiss. (Dkt. No. 11.) On January 16, 2014, defendant Bishop White filed a separate motion to dismiss, joining the previous motion to dismiss and asserting additional arguments. (Dkt. No. 13.) The Court granted the parties’ stipulated motion for an extension of time, and ordered that Plaintiffs file their response on or before February 17, 2014, while Defendants’ replies would be due February 21, 2014. (Dkt. No. 17.) Plaintiffs filed their response on February 18, 2014, (Dkt. No. 18), and Defendants filed their replies on February 21, 2014. (Dkt. Nos. 19 & 20.)

II. DISCUSSION

A party may move to dismiss a claim or complaint that fails to state a claim upon which relief may be granted. Fed.R.Civ.P. 12(b)(6). Federal Rule of Civil Procedure 8(a)(2) requires a plaintiff to plead “a short and plain statement of the claim showing that the pleader is entitled to relief.” The

complaint must “contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* A claim is facially plausible when the “plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* In making this assessment, the Court accepts all facts in the complaint as true. *Barker v. Riverside Cnty. Office of Educ.*, 584 F.3d 821, 824 (9th Cir.2009). However, the court need not accept the plaintiff’s legal conclusions. *Iqbal*, 556 U.S. at 678. Finally, the Court dismisses a claim with prejudice only where the pleading could not be cured by the allegation of other facts. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir.2000).

However, under Federal Rule of Civil Procedure 9(b), a plaintiff alleging fraud must “state with particularity the circumstances constituting fraud.” Fed.R.Civ.P. 9(b). Rule 9(b)’s heightened pleading standard requires a plaintiff to include in his or her complaint the “who, what, when, where, and how” of the fraud. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir.2003).

A. The Washington Deed of Trust Act

“In Washington, ‘[a] mortgage creates nothing more than a lien in support of the debt which it is given to secure.’ ” *Bain v. Metro. Mortg. Group, Inc.*, 175 Wash.2d 83, 285 P.3d 34, 38 (Wash.2012) (quoting *Pratt v. Pratt*, 121 Wash. 298, 209 P. 535, 535 (Wash.1922)). Mortgages secured by a deed of trust on the mortgaged property “do not convey the property when executed; instead, ‘[t]he statutory deed of trust is a form of a mortgage.’ ” *Id.* (quoting 18 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Transactions* § 17.1, at 253 (2d ed.2004)). In effect, “ ‘it is a three-party transaction in which land is conveyed by a borrower, the ‘grantor,’ to a ‘trustee,’ who holds the title in trust for a lender, the

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'beneficiary,' as security for credit or a loan the lender has given the borrower.' ” *Id.* (quoting *Stoebuck & Weaver*, § 17.3, at 260). However, “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 nonjudicial foreclosure on real property.” *Id.* at 36. Even so, the holder of the note can appoint an agent with the power to take action on its behalf, even if the agent is not, in its own right, the true beneficiary. *See id.* at 45 (“[N]othing in this opinion should be construed to suggest an agent cannot represent the holder of a note.”). A “trustee” may be either “designated as the trustee in the deed of trust or appointed under RCW 61.24.010(2).” RCW § 61.24.005. Generally, if a trustee is not designated as the trustee in the deed of trust, or if the beneficiary wants to replace the trustee, “the beneficiary shall appoint a trustee or successor trustee.” RCW § 61.24.010(2).

*3 In this case, Countrywide, the lender, was the holder of the promissory note and the beneficiary under Washington law at the time the Note was signed. Because Countrywide has merged with Bank of America, Bank of America may now be the beneficiary of the note, though it is not clear to the Court the date that Bank of America and Countrywide merged. The borrowers, clearly, are Plaintiffs. At issue is the identity of the “trustee” entitled to foreclose on the property. The Court will assume, for the purposes of this order, that MERS was not a proper agent of Countrywide, did not have an actual interest in the DOT, and accordingly could not assign any interest in the deed of trust to any other entity.

B. Timeliness of Plaintiffs' Reponse

On January 31, 2014, the Court granted the parties' stipulated motion for an extension of time. (Dkt. No. 17). The Court gave Plaintiffs until February 17, 2014 to file their response to Defendants' motions to dismiss. Nonetheless, Plaintiffs' Response was filed February 18, 2014, (*see* Dkt. No. 18), which significantly shortened the time Defend-

ants had to draft and file their replies. Accordingly, Plaintiffs' Response, (Dkt. No. 18), is hereby STRICKEN as untimely.

C. Plaintiffs' Fraud Claim

In Washington, to state a claim for fraud, a plaintiff must allege:

- (1) a representation of an existing fact; (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom it is made; (7) the latter's reliance on the truth of the representation; (8) his right to rely upon it; (9) his consequent damage.

Kirkham v. Smith, 106 Wash.App. 177, 23 P.3d 10, 13 (Wash.Ct.App.2001). Moreover, “it is clear that common law fraud requires proof of a knowing and intentional misrepresentation.” *Id.*

Here, the fraudulent conduct argued by Plaintiffs is that Defendants “misrepresented MERS as the beneficiary,” (Dkt. No. 1, Ex. A at 8, ¶ 4.2); that Ralph Flores “robosigned” the purported assignment of the DOT from MERS to Bank of America, (*id.* at 8, ¶ 4.9); and that Bishop White misrepresented itself as a legitimate successor trustee when it served its Notice of Trustee's Sale on Plaintiffs. (*Id.* at 8, ¶ 4.3.)

1. Alleged Fraud by Defendants Bank of America, Countrywide, and MERS by Misrepresenting MERS the “Beneficiary” of the Deed of Trust

Plaintiffs argue that in “purportedly assigning the DOT to the Bank of America, Defendants misrepresented MERS as the beneficiary.” ^{FN2} (Dkt. No. 1, Ex. A at 8, ¶ 4.2.) Plaintiffs have failed to plead a number of required elements of fraud.

FN2. To the extent Plaintiffs' fraud claim relies on the original designation of MERS as the “beneficiary” in the original DOT, it

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was untimely, as the DOT was signed in 2005. Plaintiffs were aware of all provisions in the DOT when it was signed. Fraud has a three year statute of limitations. See RCW 4.16.080(4).

First, when MERS purportedly assigned the DOT to Bank of America, the parties were not making the representation to Plaintiffs, and so Plaintiffs cannot prove that the statement was made to induce Plaintiffs to rely upon it. Second, *Bain v. Metro. Mortg. Group, Inc.*, upon which Plaintiffs rely to show that Defendants committed fraud in assigning MERS as the “beneficiary” of the deed of trust, was decided in 2012. Accordingly, Plaintiffs and Defendants had the same knowledge concerning the identity of the true beneficiary at the time the alleged statement was made in 2011, and Plaintiffs have not alleged that Defendants made a “knowing and intentional” misrepresentation. *Kirkham*, 23 P.3d at 13. Third, Plaintiffs have not alleged specific facts showing that they *actually* relied on the statement in any way, or how they relied on the statement, regardless of whether they were entitled to do so.^{FN3} They do not allege that having MERS misrepresented as being the “beneficiary” induced them to take any specific actions. Fourth, they have not alleged specific damages attributable to listing MERS as the beneficiary on the assignment of the DOT, as is required under Federal Rule of Civil Procedure 9(b). Accordingly, this claim is hereby dismissed with prejudice, as amendment would be futile.

FN3. Plaintiffs conclusorily assert that they “relied on the Defendant’s [sic] representation that MERS was the beneficiary and possessed the legal authority to execute the assignment” signed in October of 2011, (Dkt. No. 1, Ex. A at 9, ¶ 4.10), but do not describe their reliance.

2. Alleged Fraud by Defendants Bank of America, Countrywide, and MERS Due to “Robosigning”

*4 Assuming that the alleged “robosigning” by

Ralph Flores constituted a knowing false statement intended to induce reliance in the party to whom the statements were made,^{FN4} Plaintiffs have still failed to allege sufficient specific facts under Federal Rule of Civil Procedure 9(b). First, the statement was not directed at Plaintiffs, and could not have been intended to induce them to rely on it. Second, Plaintiffs do not plead any facts demonstrating their reliance on the statements or the damages they suffered. Plaintiffs have not alleged that they were unable to make payments on their mortgage due to the robosigning. They have not described what disputes they have been unable to resolve or legal protections of which they have been unable to avail themselves because of the alleged robosigning. Third, Plaintiffs do not state how the actions of non-defendant Ralph Flores, who Plaintiffs specifically allege was *not* an employee of Bank of America at the time he signed the contested document, may be imputed to any of the defendants in this action. Finally, Plaintiffs have not alleged any facts showing *why* they believe the robosigning to have occurred at all; they only state that “upon information,” the signatories were not employees or representatives of the parties they said they represented, and so did not have the power to sign on behalf of those parties. However, without stating the facts behind their allegation, the Court cannot find their allegations plausible, let alone sufficient under Rule 9(b)’s heightened pleading standard.

FN4. Plaintiffs do not base their fraud claims on the alleged robosigning of Kevin Dennison, instead relying solely on the actions of Ralph Flores. (Dkt. No. 1, Ex. A at 8, ¶¶ 4.6–4.12.)

Accordingly, Plaintiffs have not sufficiently alleged that the robosigning occurred at all, that the statement was made to Plaintiffs with the intent to induce reliance, that Plaintiffs relied on the statements, that the statements may be imputed to any of the defendants, or that the statement caused any damages. This claim is hereby dismissed with pre-

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justice, as amendment would be futile.

3. Alleged Fraud by Bishop White for Not Being Valid Trustee

RCW 61.24.030(7) states:

(7) (a) That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the 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.

(b) Unless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection.

RCW § 61.24.030(7). In this case, the relevant declaration states that "BANK OF AMERICA, N.A. is the beneficiary (as defined by RCW § 61.24.005(2)) and actual holder of the promissory note or other obligation secured by the deed of trust or has requisite authority under the RCW 62A.3-301 to enforce said obligation for the above mentioned loan account." (*See* Dkt. No. 14, Ex. A.) It was signed under penalty of perjury. (*Id.*) Under RCW § 61.24.030(7)(b), a trustee who has not breached its duty of good faith under RCW § 61.24.010(4) is entitled to rely on the beneficiary's declaration under oath as evidence that the beneficiary is the owner of the promissory note or other obligation secured by the deed of trust.

*5 Here, Bank of America's assertion, signed under penalty of perjury, that it was the "actual holder" of the promissory note is sufficient to trigger the protections of RCW § 61.24.030(7)(b). The reference to RCW 62A.3-301 is not to the contrary, as that statutory section merely defines who is entitled to enforce the relevant promissory note. *See*

RCW 62A.3-301. Regardless of whether Bank of America is a valid beneficiary, claiming that Bishop White made a knowing false statement, given the declaration signed under penalty of perjury by a representative of the purported beneficiary appointing Bishop White as a trustee, is extremely implausible. Plaintiffs have not alleged that Defendants made a "knowing and intentional" misrepresentation. *Kirkham*, 23 P.3d at 13. Additionally, Plaintiffs have, again, not alleged causation or damages. Because amendment as to this claim would be futile, the Court dismisses this fraud claim with prejudice.

Accordingly, all fraud claims are hereby dismissed with prejudice.

D. Plaintiffs' CPA Claim

A private CPA claim has five elements: "(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 719 P.2d 531, 533 (Wash.1986). The Washington Supreme Court has held that if MERS claims to be a beneficiary when it is not, that assertion "presumptively meets the deception element of a CPA claim." *Bain*, 285 P.3d at 51-52. Even so, "the mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury" under the Washington CPA. *Bain*, 285 P.3d at 52. Plaintiffs must still plead all CPA elements. Here, Plaintiffs' CPA claim arises out of the misrepresentation of MERS as a beneficiary to the DOT, and Bishop White's alleged misrepresentation of itself as a valid successor trustee. (*See* Dkt. No. 1, Ex. A at 10, ¶¶ 5.3-5.5.)

Under the CPA, "[p]ersonal injuries, as opposed to injuries to 'business or property,' are not compensable and do not satisfy the injury requirement." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wash.2d 27, 204 P.3d 885, 899 (Wash.2009) (en banc) (quoting *Wash. State. Physicians Ins. Exch. & Assoc. v. Fisons Corp.*, 122 Wash.2d 299, 858

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P.2d 1054, 1061 (Wash.1993)). “[D]amages for mental distress, embarrassment, and inconvenience are not cognizable under the CPA.” *Panag*, 204 P.3d at 899 (Wash.2009) (en banc). Similarly, litigation expenses incurred to institute a CPA claim do not constitute injury. *Id.* at 902 (citing *Demopolis v. Galvin*, 57 Wash.App. 47, 786 P.2d 804 (Wash.Ct.App.1990)). However, “consulting an attorney to dispel uncertainty regarding the nature of an alleged debt” may be sufficient to show injury to business or property under certain circumstances. *Panag*, 204 P.3d at 902. But such a consultation must still be for a *purpose*: Plaintiffs must have a reason to resolve the particular uncertainty at issue.

*6 Here, Plaintiffs argue that “[d]efendants’ wrongful conduct has caused injury to Plaintiffs including, but not limited to, loss of business and personal time, travel, meeting with accountants and attorneys, professional fees and having to file this action.” (Dkt. No. 1, Ex. A at 11, ¶ 5.6.) But, even assuming that Plaintiffs accrued those expenses in an attempt to “dispel uncertainty” about the debt, Plaintiffs have not put forward any explanation for why they need to clarify the identity of the beneficiary. Plaintiffs, as noted above, have not alleged that they were unable to make payments on their mortgage, or described what disputes they have been unable to resolve or legal protections of which they have been unable to avail themselves. Nor do they describe any future actions that they are unable to take without knowledge of the identity of the beneficiary. They do not allege that they had to leave their business to “respond to improper payment demands,” as they do not allege that the payment demands were improper. *Panag*, 204 P.3d at 901. Nor do they state that defendants have sought to collect monies not actually owed, as occurred in *Panag*. *Id.*

Accordingly, Plaintiffs have failed to allege a CPA claim, as they have failed to allege causation and damages. Plaintiffs’ CPA claim is dismissed with leave to amend.

E. Plaintiffs’ Negligence Claim

“The essential elements of a negligence action

are (1) the existence of a duty to plaintiff; (2) breach of that duty; (3) resulting injury; and (4) proximate cause between the breach and the injury.” *Hutchins v. 1001 Fourth Ave. Associates*, 116 Wash.2d 217, 802 P.2d 1360, 1362 (Wash.1991). “[A] duty of care ‘is defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.’” *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wash.2d 442, 243 P.3d 521, 526 (Wash.2010) (quoting *Transamerica Title Ins. Co. v. Johnson*, 103 Wash.2d 409, 693 P.2d 697, 700 (1985)). “An injury is remediable in tort if it traces back to [a] breach of a tort duty arising independently of the terms of the contract.” *Eastwood v. Horse Harbor Found., Inc.*, 170 Wash.2d 380, 241 P.3d 1256, 1262 (Wash.2010). The Deed of Trust Act specifies that only certain claims, such as claims related to common law fraud or misrepresentation, violations of the CPA, and violations of the DTA, are not waived by failing to bring a civil action to enjoin the initial foreclosure. RCW § 61.24.127(1).

Plaintiffs allege that “Defendants have a strict duty to follow the requirements of the Washington state Deed of Trust Act,” and that Defendants violated that duty. (Dkt. No. 1, Ex. A at 11, ¶ 6 .2.) However, common law negligence is not included in the list of claims allowed to be asserted under the Deed of Trust Act if Plaintiffs failed to bring a civil action to enjoin the initial foreclosure. Plaintiffs have not alleged that they brought an action to enjoin the foreclosure. Under the canon of *expressio unius est exclusio alterius*, a plaintiff may not attempt to enforce the provisions of the Deed of Trust Act by asserting a negligence claim where they never brought an action to enjoin the sale. Accordingly, Plaintiffs’ claim for relief under a theory of negligence is legally barred, and dismissed with prejudice because amendment would be futile.

F. Plaintiffs’ Request for Declaratory Relief

*7 “The Declaratory Judgment Act creates only a remedy, not a cause of action.” *Bisson v. Bank of*

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America, N.A., 919 F.Supp.2d 1130, 1139 (W.D.Wash.2013). “Plaintiffs might have a claim for declaratory relief if they could properly plead a cause of action that establishes that they have a legal right” to the relief they seek. *Id.* at 1139–40. “But without such a cause of action, there is no claim for declaratory relief.” *Id.* at 1140. Accordingly, to the extent Plaintiffs are asserting declaratory relief as a cause of action, that claim is DISMISSED without prejudice to Plaintiffs filing an amended complaint explaining for which claim or claims they are requesting declaratory relief.

G. Plaintiffs' Wrongful Foreclosure Claim

Plaintiffs argue that Defendants have not complied with the Deed of Trust Act, and have wrongfully initiated a foreclosure on Plaintiffs' home. Assuming Plaintiffs are suing for damages under RCW § 61.24.127(1)(c)—that the trustee failed to materially comply with the DTA—it was not stated in the Complaint whether the foreclosure sale actually occurred. See *Frias v. Asset Forfeiture Servs., Inc.*, Case No. C13–0760–MJP, Dkt. No. 48 at 3 (W.D.Wash. Sept. 25, 2013) (certifying questions to the Washington Supreme Court regarding: 1) whether a plaintiff may state a claim for damages related to a breach of the DTA in the absence of a completed trustee's sale; and 2) if so, what principles govern his or her claim under the CPA and the DTA). Even assuming that the foreclosure sale has occurred and Plaintiffs are suing under RCW § 61.24.127(1)(c)-or that the Washington Supreme Court will find that a plaintiff may state a claim for damages even in the absence of a completed trustee's sale-it is not clear: 1) that Bank of America did not have the power to appoint Bishop White as the trustee, though it is now Countrywide's successor; or 2) the damages suffered by Plaintiffs due to the alleged wrongdoing of the defendants.

Accordingly, this claim is dismissed for failure to state a claim on which relief may be granted, and Plaintiffs are granted leave to amend their complaint as to this claim.

III. CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss the Complaint for failure to state a claim, (Dkt. Nos. 11 & 13), are GRANTED. However, Plaintiffs are granted leave to amend their complaint as to the CPA claim and the wrongful foreclosure claim. Plaintiffs' fraud claims and their negligence claims are dismissed with prejudice. Plaintiffs' claim for declaratory relief is dismissed, and they are granted leave to properly assert it as a remedy, provided they explain for which claims they are requesting declaratory relief. Plaintiffs are DIRECTED to file an amended complaint, within 30 days of the date of this Order.

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