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Court of Appeals
Division II
State of Washington
Case No. 51297-1-II
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**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

BRIAN J. WINTERS and REBECCA L. WINTERS,

Respondents-Plaintiffs,

v.

WELLS FARGO BANK, NA as Trustee on behalf of the registered holders of Morgan Stanley ABS Capital I Inc. Trust 2007-HE4 Mortgage Pass-Through Certificates, Series 2007-HE4; SELECT PORTFOLIO SERVICING, INC.; QUALITY LOAN SERVICE CORPORATION of WASHINGTON, INC., and DOE Defendants 1-20, inclusive,

Petitioners-Defendants.

**RESPONDENTS BRIAN J. WINTES AND REBECCA L.
WINTERS' RESPONSE TO APPELLANT'S OPENING BRIEF**

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COMES NOW RESPONDENTS Brian and Rebecca Winters, by and through undersigned counsel, to respond to the Appellant's Opening Brief.

I. INTRODUCTION

In spite of numerous Washington Supreme Court and appellate cases making clear that mortgage loan servicers and loan owners cannot avoid the clear requirements of the Deed of Trust Act, RCW 61.24, *et seq.* ("DTA") without facing liability, that is precisely what happened in this case, contrary to the requirements of the DTA and to the detriment of Washington property owners.

The Winters defaulted on their mortgage loan because of financial problems and they tried to get a loan modification. They were never properly reviewed for a loan modification and were wrongfully foreclosed upon by Defendant QLS, who was acting at all times for the benefit of Defendants SPS and the Wells Fargo Trust. They maintain that the non-judicial foreclosure was done in contravention of the requirements of the DTA because documentation was done incorrectly and because the foreclosing trustee company, QLS, was not a proper trustee under Washington law. RCW 61.24, *et seq.*; RCW 61.24.010(2).

The record in this case is replete with the Defendants/Appellees' violations of the DTA requirements in furtherance of their nonjudicial foreclosure of the Winters' home. These violations include intentional misrepresentations about the identity of the noteholder, from which

derives the authority of the purported trustee to act as a foreclosing trustee. Most significantly, no competent evidence, executed in compliance with the requirements of the DTA, was presented to the trial court which demonstrated conformity with the statute, including identification of and action by the “noteholder” during the foreclosure sale process. (“Beneficiary” is defined under the DTA as “noteholder”. RCW 61.24.005(2)). In spite of genuine issues of material fact which permeated the evidence, the trial court ignored the contradictory information provided by the Defendants, in contravention of binding Washington law. Contrary to the determination made by the trial court, Defendants’ deceptive and misleading conduct constituted a Consumer Protection Act violation and support a misrepresentation claim.

II. ISSUES RELATING TO ALLEGED ASSIGNMENTS OF ERROR

(1) Was the trial court in error when it refused to dismiss Plaintiffs’ claims when the documentation used in connection with the completed nonjudicial foreclosure was not compliant with DTA requirements? This includes a purported trustee who could not perform that role in connection with any of the previous attempts at foreclosure nor could it complete a foreclosure because of DTA non-compliance with trustee requirements?

(2) Was the trial court in error when it refused to dismiss Plaintiffs’ claims when the Beneficiary Declaration did not comport with DTA requirements on its face?

(3) Did the trial court properly evaluate the Winters’ claims under the standards for entry of summary judgment (CR 56) when it denied summary judgment to QLS?

III. STANDARD ON REVIEW

An appellate court should independently determine whether the findings of fact support the conclusions of law. *Crystal China and Gold*

Ltd. v. Factoria Center Investments, Inc., 93 Wn.App. 606, 610, 969 P.2d 1093 (1999); *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 222, 797 P.2d 477 (1990); *Martin v. Seattle*, 111 Wn.2d 727, 733, 765 P.2d 257 (1988); and *Persing, Dyckman & Toynebee, Inc. v. George Schofield Co., Inc.*, 25 Wn.App. 580, 582, 612 P.2d 2 (1980). Here, the trial court's factual findings are disconnected from the evidence provided by the Defendants and the standard articulated by the binding authority on the requirements of a non-judicial foreclosure and liability flowing from failure and/or refusal to adhere to DTA requirements.

The Supreme Court has routinely held that courts must consider DTA provisions in the homeowner's favor because it eliminates many protections enjoyed by borrowers in judicial foreclosures. *Bain v. Metropolitan Mortg. Grp., Inc.*, 175 Wn.2d 83, 93, 285 P.3d 34 (2012) (citing *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007)); *see also Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 105, 297 P.3d 677 (2013); *Albice v. Premier Mortg. Svcs. of Wash., Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012). The DTA "must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting non-judicial foreclosure sales." *Bain*, 175 Wn.2d. at 93. When determining whether an issue of material fact exists on summary judgment, a court must construe all facts and inferences in favor of the nonmoving party. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d

545, 552, 192 P.3d 886 (2008); *McNabb v. Dep't of Corrs.*, 163 Wn.2d 393, 397, 180 P.3d 1257 (2008). A “material fact” for summary judgment purposes is one upon which all or part of the outcome of the litigation depends. *Hill v. Cox*, 110 Wn.App. 394, 41 P.3d 495 (Div. III 2002), *review denied* 147 Wn.2d 1024, 60 P.3d 92. Summary judgment is proper if reasonable minds could reach only one conclusion from the evidence presented. *Cano-Garcia v. King County*, 168 Wn.App. 223, 277 P.3d 34 (Div. II 2012), *review denied* 175 Wn.2d 1010, 287 P.3d 594.

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

IV. FACTS

The Winters owned the Property for many years and they still reside there with their children. Mr. Winters worked in construction for many years and Mrs. Winters is a childcare professional. In October 2006, the Winters obtained a new mortgage loan from Decision One Mortgage Company, LLC (“Decision One”) and in connection therewith, they signed a Promissory Note and a Deed of Trust on October 23, 2006. Decision One was identified as the “Lender” on the Note and Deed of Trust and MERS was identified as the “beneficiary” in the Deed of Trust, even though that contravenes the requirements of the Washington Deed of Trust Act. The Deed of Trust was recorded in Grays Harbor County, Washington on October 26, 2006. CP 32-55.

The Winters made payments on the mortgage loan for years, going through a series of mortgage loan servicers. In 2011 Mr. Winters' construction business started struggling and in March 2012 the business failed. He struggled to find work and eventually began working for others. In Fall of 2013, Mr. Winters suffered a work injury and was unable to work. This significantly diminished the Winters' ability to make the mortgage payment because although Mrs. Winters does work, their primary source of income was from Mr. Winters' employment. They had been intermittently behind on the mortgage over the years but by January 2012, they could not catch up. CP 24. The Winters began talking to their loan servicer about obtaining a loan modification; however, Mr. Winters was receiving medical care and treatment for his injury and could not work. He applied for disability, but that process takes a long time. He had to get legal counsel to reopen his Labor and Industries case, which took until December 2014, and he did not have surgery until February 2015. The Winters communicated his status and income issues to his mortgage loan servicer. He is currently receiving vocational training. *Id.*

Given that they were struggling financially, the Winters were forced to file for a Chapter 7 bankruptcy in March 2014. They filed the bankruptcy and participated in the case, receiving a discharge in July and August 2014. *Id.*

By 2014, the servicing of the mortgage loan was transferred to Defendant SPS and the Winters were communicating with SPS about a

possible loan modification, after receiving the bankruptcy discharge. In August 2014, the Winters received a letter from Defendant SPS about alleged deficiencies in their loan modification application and they worked on getting that documentation completed and re-submitting it. *Id.* At this point in time, the Winters did not know the identity of the owner of their loan and all communications were with Defendant SPS. They received two letters dated August 25, 2014 from Defendant SPS about the alleged inadequacy of the documentation. CP 57-62.

While the Winters were working on obtaining a loan modification, they were served with a Notice of Default (“NOD”) posted at the Property on or about **August 4, 2014**. The Winters maintain that since they were in the process of applying for a loan modification, no foreclosure activity should have begun, as this activity is known as “dual tracking”. *Id.* By 2014, there had been numerous actions taken by federal and state regulators to make clear to loan servicers that they were prohibited from engaging in dual tracking. CP 105-114.

The NOD indicated that the Winters were due for January 1, 2012 and demanded payment of the defaulted amount and “corporate advances” in the amount of \$1,734.00. The Winters have no idea what these “corporate advances” represented, nor why they were being demanded. CP 64-75. Winters Dec. The NOD was issued by Defendant QLS, acting as the “trustee” and it also demanded payment of numerous foreclosure fees, including a “trustee fee” of \$600.00. It included a Debt Validation Notice

reading that the “current creditor” was Defendant Wells Fargo. The Foreclosure Loss Mitigation form, signed by an employee of Defendant SPS, indicated that the Winters had been contacted about foreclosure avoidance options, but that they did not request an in-person meeting. The Winters believe that they did request an in-person meeting, but do not have a copy of any documentation about that request. CP 24-25.

The Winters kept on with submitting loan modification documents even after receipt of the NOD because that is what they understood to be the only option available for saving their house. CP 25-26. Unbeknownst to them, on or about June 3, 2011, an employee of ReconTrust, another foreclosing trustee company that is a wholly owned subsidiary of Bank of America, signed an Assignment of Deed of Trust as an “Assistant Secretary” of MERS, purporting to transfer the beneficial interest in the Winters’ Deed of Trust to Defendant Wells Fargo. It was recorded in Grays Harbor County on June 14, 2011. The Winters’ previous experience with Bank of America was as a loan servicer and/or loan owner. The Winters actually thought that Bank of America was the owner of the loan. CP 26, 77.

In a rush to foreclose as soon as possible, Defendant QLS issued a Notice of Trustee’s Sale (“NOTS”) on **September 5, 2014** (only **31 days** after the NOD was served) to the Winters by posting and mailing. Mr. Winters was in contact with Defendant SPS about a loan modification and the pending foreclosure sale, but he was shocked by how soon he received

the Notice of Trustee Sale, in spite of his modification efforts. The NOTS set a sale date of **January 9, 2015**. The Winters were told by employees of Defendant SPS that the foreclosure would be stopped so long as they were continuing to work on the loan modification. Mr. Winters continued to work with SPS on the loan modification, and he was simultaneously trying to get his disability benefits, as well as receiving medical treatment for his injuries. CP 26, 79-82.

The foreclosure sale that was scheduled to take place in January 2015 was eventually discontinued by Defendant QLS, presumably because of the Winters' application for loan modification. Mr. Winters was told about the discontinuance by the persons with whom he was communicating at Defendant SPS. They also received a Notice of Discontinuance from Defendant QLS. Mr. Winters was assured by persons at Defendant SPS that the foreclosure would not go forward and those representations were accurate, at the time. CP 26-27, 84.

Unbeknownst to the Winters, on or about December 5, 2013 an employee of Defendant SPS, Stormie Medina, signed an Appointment of Successor Trustee for SPS, which was purportedly acting as "Attorney in Fact" for Defendant Wells Fargo. *Id.* It was recorded in Grays Harbor County on December 17, 2013. The Deed of Trust Act ("DTA") requires that this document be signed by the "beneficiary", rather than an alleged "agent". RCW 61.24.010(2); 61.24.005. While Defendant QLS (not Defendant Wells Fargo) provided the Court with a copy of a Limited

Power of Attorney between Defendants Wells Fargo and SPS which purports to give SPS authority to sign on behalf of Wells Fargo, there is no evidence of any actions taken that would support a principal-agency relationship as defined under Washington law as between Defendants SPS and Wells Fargo. *Moss v. Vadman*, 77 Wn.2d 396, 402-03, 463 P.2d 159 (1970). Thus, even if an agent were permitted to execute the Appointment of Successor Trustee, which the Winters dispute, there is no evidence that Wells Fargo ever exercised any control of SPS such that SPS was acting as an “agent” for Wells Fargo. Further, especially since this appeal is **only** as regards claims against Defendant QLS, there was no evidence presented that QLS knew of the existence or contents of the Limited Power of Attorney at any time before litigation was commenced. CP 105-114.

The Winters argued below that Defendant QLS was not authorized to act as a foreclosing trustee under Washington law in 2013 through to dates in 2015, as it did not have an officer of the corporation who resided in the State of Washington until late in 2015. That is a requirement of the statute and QLS was not in compliance therewith. RCW 61.24.010(1)(a). *See*, CP 109, 111-113. The Findings of Fact and Conclusions of Law in the *Hooker* case, (CP 105-114) confirms the findings made by another trial court about QLS’ lack of a corporate officer, as defined under Washington law, who lived in Washington state during the relevant time periods. *Id.*¹

The attempted foreclosure and completed foreclosure of the

¹ The *Hooker* case was confidentially settled after a Judgment was entered (later vacated), but before an appeal was filed.

Winters' property was initiated in apparent reliance upon a Beneficiary Declaration or Declaration of Ownership that was not signed by the alleged noteholder, Defendant Wells Fargo. Instead, it was signed by Tina Martin, an employee of SPS, who asserts under penalty of perjury that she can attest to Wells Fargo's status as the "actual noteholder" on November 25, 2013. CP 163. No evidence was presented to the Court that Ms. Martin or anyone else at Defendant SPS had any personal knowledge of the location of the Winters' Promissory Note. But as to the claims against Defendant QLS only, which are the subject of this appeal, QLS did not testify that it had any documentary proof of the alleged relationship between Wells Fargo and SPS which permitted SPS to act as an "attorney-in-fact" for Wells Fargo. *Id.*

While the Winters continued to work with Defendant SPS on trying to get a loan modification in 2015, they also sought help from a housing counseling agency, Parkview Services. They were too late in seeking help to ask for mediation under the Foreclosure Fairness Act (RCW 61.24.163, *et seq.*), but Parkview was able to assist them with completing the loan modification application, which resulted in them receiving a trial period loan modification offer. CP 27.

Mr. Winters was in the midst of significant mental issues related to all of the stress caused by the loss of income and a job, as well as the stress of trying to save his home for his family. He was concerned about what the potential terms of any loan modification would be, including his

belief that there would be a large balloon payment due at the end of the loan term. Mr. Winters did not understand that even if there was a balloon payment at the end of the loan term, it would be the result of an artificially low monthly payment – and not a sum added to the loan balance without explanation. Mr. Winters sought to understand the ramifications of entering into the Trial Period Payment plan before sending in a payment and accepting it, so he sent an email to his housing counselor and called, but did not receive a response to either. Therefore, he called a representative at Defendant SPS to discuss the proffered loan modification and he came away believing that if he made the trial period payments, he would be agreeing to pay more than \$100,000.00 as an additional amount on the loan, over and above what he actually owed. He now knows that his understanding was not correct. CP 27-28.

As a result of Mr. Winters' misunderstanding, the Winters did not make the TPP payments. He continued to be in communication with representatives at Defendant SPS about obtaining a loan modification, as he wanted to receive an offer that did not include what he believed was an additional \$100,000.00 being added to the loan balance. *Id.*

The Winters were eventually served with another NOTS posted at their residence. The second NOTS was signed in California by a Lauren Esquivel who identifies herself as an "Assistant Secretary" of Defendant QLS. Ms. Esquivel is not listed as an officer of Defendant QLS on the

Washington Secretary of State website.² The second NOTS was recorded in Grays Harbor County on August 27, 2015. It set a new sale date on January 8, 2016. CP 91-94.

Mr. Winters continued with the work on the loan modification paperwork and he was repeatedly advised by the persons at Defendant SPS that so long as he continued to work on the loan modification paperwork, the foreclosure sale would not go forward. In reliance upon the representations made to him by the representatives of Defendant SPS and the fact that the foreclosure did not previously occur because they were submitting loan modification paperwork, he did not take action to stop the foreclosure sale by filing suit or otherwise taking action. CP 28.

The foreclosure sale apparently took place on January 8, 2016 and the Winters did not know it had happened until they received a posting at their home afterwards. At some point after the sale, the Winters received a letter from Defendant SPS confirming that the property had “reverted to the investor” at the foreclosure sale. *Id.* On January 15, 2016 another “Assistant Secretary” of Defendant QLS signed a Trustee’s Deed Upon Sale purportedly transferring title to the Property to Defendant Wells Fargo. The Trustee’s Deed asserts at Paragraph 9 that “all legal requirements and all provisions of said Deed of Trust have been complied with, as to acts to be performed and notices to be given, as provided in Chapter 61.24 RCW.” The Winters maintain, as noted above, that this

² Notably, all of the QLS employees with the QLS defined “corporate officer” designation of “Assistant Secretary” are in California and are the signers of form foreclosure documents.

assertion is false. The Trustee's Deed was recorded in the records of Grays Harbor County on January 20, 2016. CP 28-29.

The Winters were stunned to learn that their Property had been foreclosed. They immediately contacted Defendant SPS but were simply advised that the Property had been sold and there was nothing else that could be done about the loan. Thereafter, they received notices relating to attempts to remove them from the Property which have been the subject of contention in the eviction litigation. CP 28-29.

The Winters understand that they were not entitled to a loan modification and that Mr. Winters' misunderstanding of the TPP and the terms of any subsequent permanent loan modification have added to the circumstances that they presently find themselves in. However, they were also misled by the actions of the employees of Defendant SPS when they were confronting the prospect of another pending foreclosure sale. They did not re-engage with the housing counselors because they had not received a response to their last communications and they just continued communicating with Defendant SPS. Had they known that the foreclosure sale was going to happen, and that it would not be continued or discontinued as it was previously because of the loan modification applications, they would have taken action to stop it. *Id.*

The Winters are aware that because they did not enjoin the foreclosure sale or otherwise take action to prevent the sale, they may be precluded from seeking to retain title to the Property. RCW

61.24.127(2)(b). However, they maintain that because the foreclosure was not completed in conformity with the requirements of the Deed of Trust Act, they do seek to regain title to the Property. But even if that relief is precluded, they are entitled to bring these claims for violations of the Consumer Protection Act. RCW 61.24.127(1). They maintain that they were injured by way of the Defendants' actions as complained of herein, including the loss of their home to a process that is not in conformity with the requirements of the DTA, and that they were damaged by having to pay attorneys' fees in the amount of \$400 to Ms. Huelsman for an initial consultation to investigate their claims and costs incurred in traveling to Seattle to do so, of at least \$50. They have also incurred damages and attorney's fees related to defending the eviction case in the amount of more than \$3,000.00. The loss of their family home has caused them a great deal of stress, anxiety, sleeplessness and depression. *Id.*

In support of its Motion for Summary Judgment, Defendant QLS presented its factual assertions and the Winters presented theirs, including their arguments about why there remained genuine issues of material fact about the validity of the information provided to Defendant QLS in support of the foreclosure; whether QLS acted appropriately in its capacity as a purported foreclosing trustee and its duties to the Winters (RCW 61.24.010(4)); whether QLS made the appropriate inquiries about the information provided in support of the foreclosure, including the fact that QLS did not provide any information about when it obtained a copy of the

Limited Power of Attorney that Ms. Herbert-West attached to her Declaration merely stating that it was in QLS' file; and whether QLS had at least one officer who was a resident of the State of Washington at the time that it purportedly became the substitute trustee. RCW 61.24.010(2).

While Defendant QLS maintains that the trial court's decision was entirely predicated upon the *Hooker* Findings of Fact and Conclusions of Law, contending without any factual support whatsoever that Judge McCauley denied summary judgment because of it, (Opening Brief, 4-5; CP 105-114), there is nothing in the Court Order which supports such an assertion. Further, there was virtually no mention in the Winters' Response to MSJ regarding the issues related to QLS' officer designations. The *Hooker* case was not cited in the briefing as binding authority, but a copy of the Findings was included since there was some reference to those issues. CP 105-114.

During oral argument and in connection with Court questions about the nature of the Winters' CPA claims and their request for damages, counsel for the Winters and the Court engaged in a discussion about QLS' status as a foreclosing trustee during the relevant time periods. VRP 15:2-21:24. QLS's counsel was asked by the Court about the importance of residency of a QLS officer and he responded, which including yelling at opposing counsel and being admonished for so doing by the trial court. VRP 26:11-30:4. It also included misrepresentations about the record before the Court, with QLS asserting that its by-laws

specifically authorized “assistant officers” as officers of the company. VRP 28:19-22. CP 122-124. While the Winters maintain that the question of whether QLS has properly complied with the requirements of the DTA by having an officer who is a Washington resident remains unanswered and gives rise to an issue of genuine material fact, it was not the only factual issue in dispute. There were numerous other significant genuine issues of material fact in question and for that reason, summary judgment was properly denied.

V. AUTHORITY AND ARGUMENT

A. Standard for summary judgment.

A motion for summary judgment is to be granted only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c); *Jackowski v. Borchelt*, 174 Wn.2d 720, 729, 278 P.3d 1100 (2012). When determining whether an issue of material fact exists on summary judgment, a court must construe all facts and inferences in favor of the nonmoving party. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008); *McNabb v. Dep't of Corrs.*, 163 Wn.2d 393, 397, 180 P.3d 1257 (2008). A “material fact” for summary judgment purposes is one upon which all or part of the outcome of the litigation depends. *Hill v. Cox*, 110 Wn.App. 394, 41 P.3d 495 (Div. III 2002), *review denied* 147 Wn.2d 1024, 60 P.3d 92. Summary judgment

is proper if reasonable minds could reach only one conclusion from the evidence presented. *Cano-Garcia v. King County*, 168 Wn.App. 223, 277 P.3d 34 (Div. II 2012), *review denied* 175 Wn.2d 1010, 287 P.3d 594. But Washington courts are “reluctant to grant summary judgment when ‘material facts are particularly within the knowledge of the moving party.’” *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn.App. 649, 661-62, 240 P.3d 162 (Div. II 2010).

B. QLS did not adhere to the requirements of the DTA and has therefore engaged in unfair and deceptive practices, which constitute violations of the CPA.

1. Deed of Trust Act Requirements.

The Washington DTA has three objectives: (1) that the nonjudicial foreclosure process remains efficient and inexpensive; (2) that the process provides an adequate opportunity for interested parties to prevent wrongful foreclosure; and (3) that the process promotes the stability of land titles. *Cox v. Helenius*, 103 Wn.2d 383, 387-88, 693 P.2d 683 (1985). *See also* RCW 61.24.030(6). “Because the deed of trust foreclosure process is conducted without review or confirmation by a court, the fiduciary duty imposed on the trustee is exceedingly high.” *Id.* at 388-89. In *Cox*, the Supreme Court noted that even if the plaintiffs had not properly acted to restrain the sale, it would have nevertheless been voided because of the trustee’s action. *Id.* Here, the analysis should be the same. There was no adherence to DTA requirements.

Where parties purporting to conduct a nonjudicial foreclosure sale

of residential real property fail to conform to the requirements of the DTA, their actions are without legal effect and the sale is invalid. *See Albice v. Premier Mrtg.*, 174 Wn.2d 560, 568, 276 P.3d 1277 (2012) (“Without statutory authority, any action taken is invalid.”); *Rucker v. Novastar, Inc.*, 177 Wn.App. 1, 16-17 (2013) (“the vacation of a foreclosure sale *is required* where a trustee has conducted the sale without statutory authority”); *id.* (“[i]f the failure of a properly-appointed trustee to follow statutory procedures can result in the vacation of a sale, *this remedy is equally appropriate where an entity conducts a trustee sale in the complete absence of authority*”). (Emphasis added).

Here, the requisites to a trustee’s sale were never met and Supreme Court case law makes clear that even a completed a sale can be found invalid when it does not meet the requirements. *See, Albice, supra*, (sale not in compliance with the statute is invalid); *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 106-07, 297 P.3d 677 (2013) (claims arising from violation of requisites to a trustee’s sale in RCW 61.24.030 not barred by waiver; requisites set forth in statutory list “*are not, properly speaking, rights held by the debtor*; instead, they are limits on the trustee’s power to foreclose without judicial supervision”) (emphasis added). *See also, Walker v. Quality Loan Serv. Corp of Wash.*, 176 Wn.App. 294, 309-10, 308 P.3d 716 (2013) (“[W]hen an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice of trustee’s sale.”); “Such actions by the improperly

appointed trustee, we have explained, constitute ‘material violations of the DTA.’” *Rucker*, 177 Wn.App. 1, 15-17, (citing to *Walker*); *Barrus v. ReconTrust Co.*, No. 11-1578-KAO, Dkt. No. 114, *13-15 (Bkrcty. W.D. Wash., May 6, 2013).

2. Applying the Consumer Protection Act to DTA Requirements.

When analyzing CPA claims, a plaintiff must prove five elements: “(1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or their business or property; (5) causation.” *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, (1986). Beginning with *Bain v. Metropolitan Mortg. Grp., Inc.*, 175 Wn.2d 83, the Washington Supreme Court has been clear that a homeowner may pursue a CPA claim for violations of the DTA. *Bain*, at 98-110, noting that “characterizing MERS as the beneficiary has the capacity to deceive” and that there is certainly a presumption that the public interest element is met because MERS is involved in “an enormous number of mortgages in the country”. *Id.* The same analysis applies here. Consistent with long standing case law, there are genuine issues of material fact that prevent summary judgment here. *Sato v. Century 21*, 101 Wn.2d 599, 681 P.2d 242 (1984); *St. Paul Ins. Co. v. Updegrave*, 33 Wn.App. 653, 656 P.2d 1130 (1983); *Talmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 605 P.2d 1275 (1979). Under the CPA, specific monetary damages are not necessary, but a court is nevertheless required to award a prevailing plaintiff attorneys’ fees.

Mason v. Mortgage America, 114 Wn.2d 842, 792 P.2d 142 (1990). The Winters have testified about their out of pocket damages relating to investigation of claims, defending against an eviction following the sale, and the injuries they have suffered in relation to the demand for unearned amounts even though they were not paid. *See, Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014) and *Walker, supra*. CP 29.

a. Unfair and deceptive practices.

The Supreme Court noted in *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013) that CPA claims can be brought against defendants for acts that are “unfair **or** deceptive”, including in the context of a non-judicial foreclosure sale. *Klem* at 11. *Klem* went on to cite extensively and discuss its decision in *Panag v. Farmers Ins. Co. of WA*, 166 Wn.2d 27, 48, 204 P.3d 885 (2009) to expressly clarify that a violation of the CPA may be brought because of a “. . . an act or practice that has the capacity to deceive the substantial portions of the public, or an unfair or deceptive practice not regulated by statute but in violation of public interest.” *Klem* at 16. In describing the “unfair or deceptive” standard, the Supreme Court quoted from this portion of *Panag*:

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

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

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

....

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

Walker, 176 Wn.App. 294, 309-10, citing to *Panag*, 166 Wn.2d at 53; *see also, Rucker*, at 16-17 (2013) (“[W]hen an unlawful beneficiary appoints a successor trustee, **the putative trustee lacks the legal authority to record and serve a notice of trustee’s sale;**” “such actions by the improperly appointed trustee, we have explained, constitute ‘material violations of the DTA.’”).

The Defendants have repeatedly ignored the requirements of the DTA. Just as in *Rucker*, QLS, the purported foreclosing trustee, was not appointed by the “beneficiary,” but by the loan servicer and the

Beneficiary Declaration was not signed by the “actual noteholder.” Instead, it was signed by an employee of the servicer who could not have any personal knowledge about the location of the Note and the identity of the noteholder. There is no testimony whatsoever proffered about the alleged physical location of the Winters’ Note nor is it supported by any documentation provided, which means the identity of the noteholder remains in question. *See*, Herbert-West Dec. There is no testimony from Defendant Wells Fargo nor from SPS which would support the alleged principal-agent relationship, nor about the location of the Note except for the proffering of the Limited POA, with no information about when it was received by QLS.

In this case, the copy of the Note proffered indicates it is indorsed in blank, making its possession even more important to this Court’s analysis. Ms. Herbert-West, the QLS declarant, merely provides a recitation of documents from QLS’ foreclosure file – nothing more specific about the Winters. If Wells Fargo is in physical possession of the Note, then it could have provided QLS and the Court with that testimony. It has made a choice not to do so and there are obvious inferences that should be drawn in favor of the Winters by the Court since they are not the moving party. QLS does not identify when it allegedly received the Limited POA, which matters greatly since it is alleging that it relied upon that document in connection with its initiation of the non-judicial foreclosure.

A “Holder” of a negotiable instrument is defined in Washington as:
RCW 62A.1-201...

(21) "Holder" with respect to a negotiable instrument, means:

(A) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;

RCW 62A.1-201(21)(A). *See also*, RCW 61.24.005(2). This means that

Wells Fargo was required to execute the Appointment of Successor

Trustee (RCW 61.24.010(2)); Beneficiary Declaration (RCW

61.24.030(7)); and it was supposed to be the entity that gave direction to

the properly appointed trustee to foreclose (RCW 61.24.030; .031; .040).

Consistent with the Supreme Court’s decision in *Bain*, parties who utilize

the Deed of Trust Act cannot alter its requirements by contract.

QLS contended in its briefing that it believed that SPS employees could execute documents under the POA as “attorney in fact” even though it did not identify when it received the Limited POA, which would be necessary in order to accept representations of signing authority because of the statutory requirements. Further, there was no testimony from anyone at QLS about this alleged belief by its employees. CP 115-117. Nothing in the DTA permits anyone other than the “Beneficiary” to execute the Appointment of Successor Trustee and Beneficiary Declaration documents, so assertions of a purported agency relationship in relation to signing authority would need to be documented. RCW 61.24.005(2); 010(2); 030(7)(a)). Further, even if the Court accepts the Defendants’ position that SPS employees could take those actions through

the use of a POA, at least as to the relationship with a foreclosing trustee, Washington case law makes clear that there must be evidence of an actual principal/agent relationship. QLS contends that *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 106, 285 P.3d 34 (2012) stands for the proposition that Washington law allows the use of agents in spite of the plain language in RCW 61.24.010(2) (“[t]he trustee may ... be replaced by the *beneficiary*”) (emphasis added). Compare to the actual language of *Bain*, 175 Wn.2d at 107 (“[w]e have repeatedly held that a prerequisite of an agency is *control* of the agent by the principal”) (quotation marks and citation omitted) (emphasis in original). As *Bain* acknowledges, there are portions of the DTA which allows the use of “authorized agents” to perform certain specific acts (RCW 61.24.030; .031(1)(a), (b); .050(2); .143; and .163(8)(a)). The actions complained of herein do not include those sections of the DTA. The remainder of the DTA ***does not empower an agent to act in the beneficiary’s stead***. See *In re Swanson*, 115 Wn.2d 21, 27, 804 P.2d 1 (1990) (“Where the legislature uses certain statutory language in one instance, and different language in another, there is different legislative intent.”). While there are a couple of Division I cases which affirm the use of an entity purporting to be an agent in signing the Appointment and Beneficiary Declaration, that does not change the fact that Supreme Court case law, including *Bain*, does not stand for this proposition.

QLS distorts the law in its attempt to bootstrap those specific provisions of the DTA allowing authorized agents to take certain actions into a generalized conclusion that the DTA, and *Bain*, freely allows beneficiaries to delegate their responsibilities to unsupervised “agents.” But, even supposing that an agent *could* lawfully take an action like appointing a successor trustee on behalf of the beneficiary, material questions of fact prevent them from obtaining summary judgment as QLS have not provided any evidence which demonstrates its knowledge of the existence of a principal-agent relationship at the time that it relied upon the documents in initiate a non-judicial foreclosure. In fact, all of the evidence presented to the Court makes clear that SPS was independently performing all functions and never communicated with Wells Fargo, nor that anyone at SPS did or could know whether or not Wells Fargo had physical possession of the Note. There is no evidence that the Wells Fargo exercised control as a “principal” over SPS as an alleged “agent.” *Bain*, 175 Wn.2d at 106, requires that ““an agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, ***with a correlative manifestation of consent by the other party to act on his behalf and subject to his control***”” (citing *Moss v. Vadman*, 77 Wn.2d 396, 402-03, 463 P.2d 159 (1970)) (emphasis added). Because QLS did not identify the date on which it received the Limited POA, there remain genuine issues of material fact as to whether SPS had the authority to initiate a non-judicial foreclosure on behalf of

Wells Fargo and whether QLS knew of this alleged authority and properly initiated and completed a non-judicial foreclosure of the Winters' residence.

Because of the insufficiency of the documentation used in connection with the nonjudicial foreclosure at issue in this case, QLS has engaged in "unfair **and** deceptive" practices. Further, these actions were intentional because the documentation used in support of the foreclosure was defective on its face. The "Appointment of Successor Trustee" was not signed by the "Beneficiary" but rather by an alleged "attorney in fact" who asserts that she has personal knowledge of information in the possession of the alleged "beneficiary." QLS provides no testimony or documentation which indicates that it received the POA when it relied upon the Appointment and the same is true as regards the Beneficiary Declaration. It was defective on its face because an SPS employee signing as an "attorney in fact" could not personally attest under penalty of perjury that a third party – Wells Fargo – had physical possession of the Note, irrespective of the POA. These actions all constitute "unfair and/or deceptive" actions under the CPA.

QLS also did not have the requisite authority to act as a foreclosing trustee in years prior, just as outlined in the Findings of Fact and Conclusions of Law from the *Hooker* decision, attached to Ms. Huelsman's Declaration. CP 244-253. It did not have actual officers of the corporation who resided in Washington State for years.

b. Occurring in trade or commerce.

QLS' actions were done in the course of performing its non-judicial foreclosure business by having its employees execute documents that are recorded in all Washington counties and to complete non-judicial foreclosures of Washington real property. Thus, the complained of acts occurred in the course of trade or commerce. RCW 19.86.020.

c. Public Interest Element.

Proof of the public interest element may be proven through evidence of actual injury to others or a finding that it "had the capacity to injure other persons" or "has the capacity to injure other persons." RCW 19.86.093. Proof that the QLS' business practices will and has injured others is evident in its assertions that it did comply with Washington law and asks this Court to affirm its actions, which are in direct contravention of the requirements of the DTA. The Supreme Court found in *Bain, Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, and *Lyons v. U.S. Bank National Ass'n*, 181 Wn.2d 775, 336 P.3d 1142 (2014) that provision of and reliance upon the same sort of false information and noncompliant documentation is "unfair" and "deceptive" under the CPA, as did the Court of Appeals in *Walker and Rucker*. Numerous other DTA cases decided by the Supreme Court require that language in the DTA be construed strictly in the homeowner's favor because it eliminates many protections enjoyed by borrowers in judicial foreclosures. *Bain*, 175 Wn.2d. at 93 (citing *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903,

915-16, 154 P.3d 882 (2007)); *see also Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013); *Albice v. Premier Mortg. Svcs. of Wash., Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012). DTA “must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers’ interests and the lack of judicial oversight in conducting non-judicial foreclosure sales.” *Bain*, 175 Wn.2d. at 93. QLS has contended that its actions were done in conformity with the requirements of the DTA and therefore have proven through its own response to the Winters’ allegations demonstrates that they have already and will engage in the same actions in the future. RCW 19.86.093(3)(b) & (c) allow for proof of the public interest element by demonstrating that the complained of act “has” or “had” the “capacity” to injure other persons.

d. The Winters were damaged and injured by the actions of the Defendants.

The Winters have testified about their out of pocket damages incurred as a result of the actions of the Defendants. CP 29. **“Even when there is no completed foreclosure sale and no allegation that plaintiff has paid foreclosure fees, it is possible for a plaintiff to suffer injury to business or property caused by alleged DTA violations that could be compensable under the CPA.”** *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 430, 334 P.3d 529 (2014), citing to *Panag v. State Farm Ins. Co. of WA*, 166 Wn.2d 27, 57 (2009); *Lyons*, 336 P.3d at 1142 (emphasis added).

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e. Causation

QLS has cited to *Blair v. Northwest Tr. Servs., Inc.*, 193 Wn.App. 18, 37 (Wash. Ct. App. 2016) and contend that it basically stands for the proposition that the trustee is entitled to rely upon the Beneficiary Declaration irrespective of whether it adhered to the requirements of the statute. That assertion is in direct contravention of Supreme Court holdings in *Bain, Frias, Lyons and Trujillo v. NW Trustee Servs., Inc.*, 183 Wn.2d 820, 355 P.3d 1100 (2015), but more importantly, QLS' assertions do not reflect the nature of the *Blair* holding. Once the case was decided on appeal, the *Blair* Court was focused exclusively on the actions of the foreclosing trustee. The Court held that Mr. Blair could not prove his injury was caused by all of the violations of the DTA which it identified the foreclosing trustee had committed, in spite of the Supreme Court holding in *Trujillo* that the actions of the defendants in a wrongful foreclosure case are measured at the time that they took the action, not based upon what might be learned later by the foreclosure trustee. *Trujillo*, 183 Wn.2d at 834, n. 10.

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

Trujillo, 183 Wn.2d at 834, n. 10. The *Blair* Court held:

To satisfy the causation element, a "plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 84, 170 P.3d 10 (2007). This requires "a causal link between the misrepresentation and the plaintiffs' injury." *Id.* at 83. The existence of a causal link is usually a factual question. *Id.*

Id. The Court held that Mr. Blair could not prove the causal connection because he did not testify about the impact of the beneficiary declaration upon him. *Id.* This conclusion is disconnected from the facts of nonjudicial foreclosures and misconstrues what is properly identified as the "unfair or deceptive act." RCW 19.86.020.³ The initiation of the nonjudicial foreclosure predicated upon improper documents was what caused the "injury" and "damages", a position which comports with the holdings in other Supreme Court decisions. Here, none of the foreclosure activity could have been initiated nor could the sale have occurred if the other Defendants had not provided noncompliant documentation in support of the foreclosure. QLS also cited to *Brown v. Dept. of Commerce*, 184 Wn.2d 509, 539, 359 P.3d 771 (2015) and contends that it supports its position. However, the *Brown* case was not about the actions of the foreclosing trustee. Rather, it was focused on the issues relating to loan ownership vs the "noteholder" (RCW 61.24.005(2) in the particular context of loans owned by Fannie Mae and Freddie Mac.⁴ Neither of the

³ The beneficiary declaration is not a document that is provided to a homeowner. RCW 61.24.030(7) requires that the document be provided to the **trustee**.

⁴ The GSEs and servicers enter into agreements that allow servicers to be treated as the noteholder in bankruptcy and foreclosure cases. The Supreme Court emphasized its interest when interpreting the DTA on the identity of the "noteholder" since the DTA repeatedly requires actions by the "beneficiary". RCW 61.24.005(2)

GSEs are involved in this case so the analysis of the Court in *Brown* would not apply to the parameters of a securitized trust whose formation documentation is not before the Court. There are no documents evidencing that anyone, including Wells Fargo, physically possessed the Note once it was indorsed in blank.

Just as the Supreme Court found in *Lyons*, there was no authority to foreclose based upon the documents relied upon and for that reason alone, Ms. Lyons could proceed with her CPA claims. The *Lyons* Court never indicated in its opinion that Ms. Lyons needed to testify that she relied upon the beneficiary declarations nor could she since it is not a document that a borrower usually sees. But for the use of the defective documents, the attempted non-judicial foreclosures and the completed foreclosure that is the subject of this litigation would not have occurred. Thus, the Winters made the causal connection for their CPA claim. As Division I emphasized in *Walker*, “No Washington case law relieves from liability a party causing damage by purporting to act under the DTA without lawful authority to act or failing to comply with the DTA’s requirements.” *Walker, supra*.

VI. CONCLUSION

For these reasons, the Winters maintain that the trial court’s denial of summary judgment should be affirmed because there remain genuine issues of material fact unresolved and they should have an opportunity for trial of this matter.

Dated: May 29, 2018

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Melissa A. Huelsman". The signature is written in a cursive style with a large initial "M".

Melissa A. Huelsman, WSBA # 30935
Attorney for Respondents Brian and
Rebecca Winters

CERTIFICATE OF SERVICE

I declare under penalty of perjury of laws of the state of Washington that on May 29, 2018, I caused to be served in the manner indicated below a true and accurate copy of the foregoing document upon the following:

Ryan M. Carson, WSBA #41057 Wright, Finlay, & Zak LLP 3600 15 th Ave. W, Suite 200 Seattle, WA 98119 206-946-8109 rcarson@wrightlegal.net Attorney for Select Portfolio Servicing, Inc. and Attorney for Wells Fargo	<input checked="" type="checkbox"/> By Email <input type="checkbox"/> Legal Messenger <input type="checkbox"/> By Facsimile <input type="checkbox"/> By Air Courier
Joseph McIntosh, WSBA #39470 Lance E. Olsen, WSBA #25130 McCarthy & Holthus LLP 108 1 st Avenue South, Suite 300 Seattle, WA 98104 206-319-9100 jmcintosh@McCarthyHolthus.com lolsen@McCarthyHolthus.com Attorney for Quality Loan Service	<input checked="" type="checkbox"/> By Email <input type="checkbox"/> Legal Messenger <input type="checkbox"/> By Facsimile <input type="checkbox"/> By Air Courier

I certify under penalty of perjury under the laws of the State of Washington that the foregoing statement is both true and correct.

Dated May 29, 2018, at Seattle, Washington.



Tony Dondero, Paralegal

LAW OFFICES OF MELISSA HUELSMAN

May 29, 2018 - 12:00 PM

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