

**FILED**

MAY 13, 2014

Court of Appeals  
Division III  
State of Washington

No. 318176-III

DIVISION III, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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DAVID M. ABERCROMBIE,

Appellant

v.

RECONTRUST COMPANY, INC.; LANDSAFE TITLE OF  
WASHINGTON, INC.; MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC.; COUNTRYWIDE HOME LOANS, INC.; BAC HOME  
LOANS SERVICING, LP; and BANK OF NEW YORK MELLON FKA  
THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE  
HOLDERS OF CWABS, INC., ASSET-BACKED CERTIFICATES,  
SERIES 2006-26,

Respondents

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ON APPEAL FROM CHELAN COUNTY SUPERIOR COURT  
No. 10-200888-2 (Hon. Lesley A. Allan)

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**BRIEF OF RESPONDENTS**

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## I. INTRODUCTION

There is no dispute that David Abercrombie defaulted on the promissory note he signed in connection with a home loan. There is no dispute that the note was secured by a deed of trust on Abercrombie's property that allows the holder of the note to nonjudicially foreclose in the event of default pursuant to Washington's Deed of Trust Act (the "DTA" or "Act"). There is no dispute that Bank of New York Mellon ("BNY Mellon") was the holder of Abercrombie's deed of trust when it initiated nonjudicial foreclosure proceedings against the property. There is no dispute that, despite its right to do so, BNY Mellon ultimately did not go forward with a trustee's sale, and still has not done so.

The focus of Abercrombie's various claims rests on the fact that Mortgage Electronic Registration Systems ("MERS") in its capacity as agent and nominee for BNY Mellon, rather than BNY Mellon itself, executed the document appointing ReconTrust Company as the successor trustee to the deed of trust. The trial court concluded that, while MERS may have lacked authority to appoint ReconTrust, *see Bain v. Metro. Mortg. Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012), Abercrombie had no claim for injunctive relief or damages under the DTA, the Consumer Protection Act ("CPA"), or any of his other causes of action—especially since there was no trustee's sale.

The trial court's conclusion was correct and must be affirmed. On appeal, Abercrombie relies predominantly on Division One's opinion in *Walker v. Quality Loan Services Corp.*, 176 Wn. App. 294, 308 P.3d 716 (2013)—which was decided after judgment below was entered. Although *Walker* does not change the analysis for the bulk of Abercrombie's claims, it does recognize a novel a cause of action for violation of the DTA even where, as here, there is no trustee's sale. The Washington Supreme Court is currently reviewing the holding of *Walker* in the context of questions certified by a federal district court regarding the validity of a pre-sale damages claims under the DTA. Even if the Supreme Court generally affirms the holding in *Walker*, there should be no cause of action for violation of the DTA in the absence of prejudice, which—like causation and damages—Abercrombie cannot show. In any event, this Court should reserve ruling on the DTA issue until after the Supreme Court rules.

## **II. COUNTERSTATEMENT OF ISSUES**

1. Was Abercrombie's claim for declaratory and injunctive relief against ReconTrust under the DTA properly dismissed as moot because ReconTrust no longer serves as a foreclosure trustee?

2. Was Abercrombie's claim for declaratory and injunctive relief against BNY Mellon under the DTA properly dismissed because, as

holder of the Note and beneficiary of the deed of trust, BNY Mellon has authority to initiate a nonjudicial foreclosure?

3. Must this Court defer review of the trial court's dismissal of Abercrombie's claim for damages under the DTA until the Washington Supreme Court issues an opinion in *Frias v. Asset Foreclosure Services, Inc.*, 2013 WL 6440205 (W.D. Wash. Sept. 25, 2013); even if *Frias* recognizes a pre-sale cause of action under the DTA, was Abercrombie's DTA claim properly dismissed because there was no showing of prejudice?

4. Was Abercrombie's claim that ReconTrust did not satisfy RCW 61.24.030(6)'s "physical presence" requirement properly dismissed because ReconTrust maintained a registered agent for personal service of process in Washington?

5. Was Abercrombie's CPA claim properly dismissed because there was no unfair or deceptive act where Abercrombie knew the identities of the Note's holder and loan servicer, and knew that MERS was not the beneficiary of his deed of trust, when nonjudicial foreclosure proceedings were initiated?

6. Was Abercrombie's CPA claim properly dismissed for the separate reason that there was no causation or cognizable injury arising from the characterization of MERS as beneficiary of his deed of trust?

7. Was Abercrombie's federal the Fair Debt Collection Practices Act ("FDCPA") and Washington Collection Agency Act ("CAA") claims properly dismissed because none of the Respondents acted as "debt collectors" or "collection agencies," respectively, when they initiated nonjudicial foreclosure proceedings?

### **III. COUNTERSTATEMENT OF THE CASE**

#### **A. Factual Background**

Abercrombie is a lawyer with 30 years of experience who works in Florida as a "Foreclosure Mediator." CP 145 (¶ 11). On November 22, 2006, Abercrombie borrowed \$277,900 from Countrywide Home Loans, Inc. ("Countrywide"), and he secured the promissory note (the "Note") for the loan with a deed of trust on residential real property in Chelan County, Washington (the "Property"). CP 754-58; CP 38-52.<sup>1</sup> Although the deed identified the Property as owner-occupied, Abercrombie did not live in the residence during the relevant time period, which he apparently uses as a rental property. CP 144 (¶ 3); 8/31/2010 VRP at 34-35. The deed of trust identified Landsafe Title of Washington ("Landsafe") as trustee, and Mortgage Electronic Registration Systems, Inc. ("MERS") as beneficiary and nominee for the lender and its successors and assigns. CP 39.

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<sup>1</sup> Countrywide's corporate parent was acquired by Bank of America Corporation, BANA's corporate parent. CP 750 (¶ 3).

The deed of trust specifically informed Abercrombie that “MERS (as nominee for Lender and Lender’s successors and assigns) has the right to exercise any or all of [the Borrower’s] interests, including, but not limited to, the right to foreclose and sell the Property[.]” CP 40. At the time of closing, Abercrombie also received the following disclosure:

**DISCLOSURE STATEMENT ABOUT MERS**

Mortgage Electronic Registration Systems, Inc. (MERS) is named on your mortgage in a nominee capacity for COUNTRYWIDE HOME LOANS, INC. (Lender). MERS is a company separate from your lender that operates an electronic tracking system for mortgage rights. MERS is not your lender; it is a company that provides an alternative means of registering the mortgage lien in the public records. MERS maintains a database of all the loans registered with it, including the name of the lender on each loan. Your lender has elected to name MERS as the mortgagee in a nominee capacity and record the mortgage in the public land records to protect its lien against your property.

**Naming MERS as the mortgagee and registering the mortgage on the MERS electronic tracking system does not affect your obligation to your Lender, under the Promissory Note.**

CP 167 (emphasis in original).

Countrywide endorsed the Note in blank. CP 750 (¶ 3); CP 756. The Note was then packaged with other home loans and transferred to Bank of New York Mellon, formerly known as Bank of New York (“BNY Mellon”), the trustee of CWABS, Inc., Asset-Backed Certificates, Series 2006-26, a securitized pool of mortgage loans. CP 750 (¶ 3). BAC Home

Loans Servicing, L.P., which was later merged into Bank of America, N.A. (collectively, “BANA”), was and is BNY Mellon’s servicing agent with respect to the pooled loans, including Abercrombie’s Note. *Id.* BNY Mellon has been in continuous physical possession of the Note, through its authorized custodian BNY Western Trust Company, since December 2006. CP 750 (¶ 4); CP 437 (¶¶ 2 & 3).

Abercrombie first defaulted on the Note in or around March 2008. CP 34 (§ VI). On May 19, 2009, in an effort avoid further default, BANA approved a loan modification that capitalized over \$50,000 in arrearages and lowered Abercrombie’s monthly payments going forward. CP 169-73. Abercrombie defaulted again and, as of May 2010, had failed to make over \$25,000 worth of monthly payments under the modified loan. CP 33. As a result, BANA, acting as servicing agent for BNY Mellon, the Note’s holder, began taking the steps—recognized as necessary and proper at the time (*i.e.*, pre-*Bain*)—to initiate a nonjudicial foreclosure pursuant to Abercrombie’s deed of trust.

On March 26, 2010, pursuant to RCW 61.24.030, BANA provided ReconTrust Company, N.A. (“ReconTrust”) a Beneficiary Declaration regarding Abercrombie’s Note, which stated under penalty of perjury:

Bank of New York is the current beneficiary and owner of the promissory note or other obligation secured by the deed of trust or

has the requisite authority under RCW 62A.3-301 to enforce said obligation for the above-mentioned loan.

CP 175. On March 30, 2010, MERS, in its capacity as agent and nominee for BNY Mellon, executed an Appointment of Successor Trustee (the “Appointment”) stating that it had appointed ReconTrust as successor trustee. CP 54-55. Shortly thereafter, on April 15, 2010, MERS executed a Corporation Assignment of Deed of Trust (the “Assignment”) confirming the prior transfer of the beneficial interest in the deed of trust to BNY Mellon. CP 57.

Finally, on or around May 20, 2010, ReconTrust recorded a Notice of Trustee’s Sale of Abercrombie’s Property. CP 32-36. The Notice identified BNY Mellon as the current beneficiary of the deed of trust and, consistent with Abercrombie’s prior dealings with respect to the loan modification, it identified BANA as the loan servicer. *Id.* It informed Abercrombie that a trustee’s sale was scheduled for August 20, 2010. *Id.*

## **B. Procedural Background**

In early August 2010 Abercrombie, acting pro se, filed suit against ReconTrust, MERS, Landsafe, Countrywide, BANA and BNY Mellon seeking declaratory and injunctive relief, and damages, for alleged violations of the DTA, the CPA, the FDCPA, and CAA. CP 13-30.<sup>2</sup> At the same time, Abercrombie filed a motion for TRO to enjoin ReconTrust

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<sup>2</sup> BNY Mellon never appeared in this action. CP 832-33.

from holding the trustee's sale. CP 830-31; CP 123-48. The trustee continued the sale during the pendency of the motion. CP 152. On August 31, 2010, the trial court denied the motion. CP 201-02.

The trustee's sale was continued yet again while Abercrombie attempted to improperly appeal the trial court's interlocutory denial of the TRO. CP 203-06; CP 210-12; CP 285 (¶¶ 4 & 5); CP 319. This Court dismissed that appeal. CP 839-41. Abercrombie, now represented by counsel, then filed a motion for summary judgment, largely duplicative of his earlier motion for TRO, seeking to permanently enjoin the rescheduled trustee's sale. CP 213-30. The sale did not take place and, ultimately, the Notice of Sale expired by operation of law. CP 32-36 (notice); RCW 61.24.040(6) (giving trustee discretion to continue original sale date up to 120 days "for any cause the trustee deems advantageous"). On December 2, 2010, the trial court denied Abercrombie's motion as moot without reaching the merits. CP 842.

Abercrombie made no further payments on the Note. 4/22/11 VRP at 40. So, on February 2, 2011, ReconTrust recorded a new Notice of Trustee's Sale, scheduling the sale of Abercrombie's property for May 6, 2011 (which was later rescheduled to August 5, 2011). CP 374-78. By this time, Abercrombie's default had grown to nearly \$50,000. *Id.* Once again, Abercrombie moved for summary judgment to forestall the trustee's

sale. He argued, among other things, that MERS was not a “beneficiary” under the DTA and, thus, lacked authority to appoint ReconTrust as the successor trustee. Abercrombie also claimed that ReconTrust violated the Act by failing to maintain a physical presence in Washington. CP 320-42; CP 343-83. The trial court denied the motion. CP 446-48. Defendants did not, however, go forward with the sale.

Shortly thereafter, it was Defendants’ turn to move for summary judgment. They also sought an order canceling a *lis pendens* Abercrombie had recorded against the property in August 2010, but refused to remove even after the court denied his motion for summary judgment. CP 449-69; CP 483-85. Abercrombie cross-moved for summary judgment (his third) and opposed cancellation of the *lis pendens*. CP 486-517. On July 20, 2011, the trial court granted Defendants’ motion to cancel the *lis pendens*. CP 592-94.<sup>3</sup> It did not, however, decide the parties’ cross-motions for summary judgment, choosing instead to defer ruling until the Supreme Court rendered a decision in *Bain*. The case was stayed for more than a

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<sup>3</sup> Abercrombie sought discretionary review of the trial court’s order canceling the *lis pendens*. CP 843-48. The Commissioner denied Abercrombie’s motion for discretionary review, finding no obvious or probable error under RAP 2.3(b)(1) & (2). CP 850-51. This Court denied Abercrombie’s motion to modify that ruling. CP 904-06. Although Abercrombie included the order canceling the *lis pendens* with his notice of appeal, CP 910-28, he did not assign error to or argue the issue in his opening brief. Any challenge to that ruling is therefore waived. RAP 10.3(a)(4) & (6); *State v. Sims*, 171 Wn.2d 436, 441, 256 P.3d 285 (2011).

year. Defendants did not reinstitute foreclosure proceedings on the Property.

After *Bain* was decided, Defendants renewed their motion for summary judgment. CP 714-28. In a memorandum dated April 10, 2013, the trial court granted the motion. CP 804-08. The court recognized that Abercrombie had no claim for damages under the DTA. CP 806 (citing *Vawter v. Quality Loan Service Corp.*, 707 F. Supp. 2d 1115 (W.D. Wash. 2010)). And, it rejected his claims for declaratory and injunctive relief because, as to ReconTrust, they were moot and, as to BNY Mellon, they were baseless; BNY Mellon was the “holder” of the Note, and thus entitled to institute nonjudicial foreclosure proceedings. *Id.* The court also rejected Abercrombie’s CPA, CAA and FDCPA claims. *Id.* A final order was entered on June 24, 2013. CP 822-25.

Just weeks after Abercrombie filed his notice of appeal, the Court of Appeals, Division One, decided *Walker*. *Walker* held, contrary to *Vawter* and other federal district court decisions, that a damages claim existed under the DTA based on “wrongful initiation of foreclosure” even if there was no completed foreclosure sale. *Id.* at 304-13. The United States District Court for the Western District of Washington in *Frias*, certified the issue of whether *Walker* was correctly decided to the

Washington Supreme Court, which accepted review. No. 89343-8. The matter was argued on February 27, 2014.

#### IV. ARGUMENT

This Court reviews summary judgment *de novo*, engaging in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Summary judgment is proper if the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hearst*, 154 Wn.2d at 501.

**A. The Trial Court Properly Dismissed Abercrombie's Deed of Trust Act Claims Under Existing Law; This Court Should Wait Until The Supreme Court Decides *Frias* To Reach The Merits Of Abercrombie's Claim For Damages Under The Act.**

There is no dispute that BNY Mellon and its loan servicing agent BANA were entitled to initiate nonjudicial foreclosure proceedings against Abercrombie in May 2010. Abercrombie's Note was endorsed in blank and BNY Mellon had possession of it since late 2006. *See* CP 750 (§ 4); CP 437 (§§ 2 & 3). Under the UCC, BNY Mellon was the "holder" of the Note and, thus, under the DTA, it was the "beneficiary" of Abercrombie's deed of trust. *Bain*, 175 Wn.2d at 89, 104; RCW 61.24.005(2); RCW 62A.1-201(21); RCW 62A.3-205(b); RCW 62A.3-301; 62A.3-109.

MERS, on the other hand, was not the holder of the Note, and the trial court concluded that it did not satisfy the definition of “beneficiary” under the Act. CP 824; *Bain*, 175 Wn.2d at 89.

Only a “beneficiary” may appoint a successor trustee. *Bain*, 175 Wn.2d at 89; RCW 61.24.010(2). This case arose because MERS, rather than BNY Mellon, executed the Appointment of Successor Trustee. CP 54-55. Abercrombie claimed that Respondents violated the DTA because ReconTrust was never properly appointed successor trustee and, thus, it lacked authority to record and serve the Notices of Trustee’s Sale. Abercrombie also claimed that ReconTrust violated the Act because it did not maintain a “physical presence” in the state pursuant to RCW 61.24.030(6). Op. Br. at 11-15. This Court must affirm the dismissal of Abercrombie’s claims for declaratory and injunctive relief and defer ruling on his claim for damages until the Supreme Court decides *Frias*.

**1. Abercrombie’s Claims for Declaratory And Injunctive Relief Against ReconTrust Are Moot.**

Abercrombie sought declaratory and/or injunctive relief against ReconTrust to enjoin it from acting as trustee or otherwise initiating nonjudicial foreclosure proceedings against his property. The trial court properly dismissed these claims because they were moot. CP 805-806. A claim is moot if there is no continuing justiciable controversy, there is no

need for judicial relief, and the issue is not likely to reoccur. *See Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984); *Eugster v. City of Spokane*, 110 Wn. App. 212, 228-29, 39 P.3d 380 (2002). This standard is easily satisfied here—both when the trial court ruled and today.

ReconTrust issued Notices of Trustee's Sale in May 2010 and February 2011. CP 32-36; CP 374-78. Under the DTA, a trustee's sale must be completed no later than 120 days after the notice of sale. RCW 61.24.040(1). By the time the trial court heard Respondents' motion for summary judgment in February 2013, the notices had long since expired and, to this day, no new notices have been recorded by ReconTrust (or other party). Nor is there any possibility that ReconTrust will act as trustee for Abercrombie's deed of trust in the future. As the trial court recognized, ReconTrust entered into a consent decree with the State of Washington in August 2012, CP 734-46, in which it agreed to no longer conduct business as a foreclosure trustee in Washington. *Id.*

**2. Abercrombie Has No Declaratory Or Injunctive Claim Against BNY Mellon Because It Is The Holder Of The Note And Beneficiary Of The Deed Of Trust.**

The trial court also properly dismissed Abercrombie's claim for declaratory and injunctive relief against BNY Mellon. CP 823. Abercrombie does not argue the point on appeal, nor could he. As "holder" of the Note since December 2006, BNY Mellon was and is the

“beneficiary” of the deed of trust, and can enforce the Note upon default through nonjudicial foreclosure.<sup>4</sup> *Bain*, 175 Wn.2d at 104. As the trial court recognized, the Assignment by MERS to BNY Mellon, even if invalid, does not affect BNY Mellon’s status as holder. CP 806.<sup>5</sup>

This is so because BNY Mellon became and remains holder by virtue of its possession of the Note endorsed in blank, not the Assignment. *Id.* at 111; RCW 62A.3–205(b); RCW 62A.3-201(b); RCW 62A.3–301 (holder includes any party who takes possession of the note, endorsed in blank, by transfer); *Babrauskas v. Paramount Equity Mortg.*, 2013 WL 5473909, \*3 (W.D. Wash. Oct. 23, 2013) (“Charter Bank’s claim to

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<sup>4</sup> In opposing summary judgment, Abercrombie objected to the admissibility of Respondents’ declaration establishing BNY Mellon’s status as holder. CP 771-73; CP 512-13. The trial court properly rejected those arguments in its memorandum decision, CP 806, and cited the declaration in its final order. CP 823. Because Abercrombie does not assign error to the court’s consideration of the declaration, nor argue the point in his opening brief, his evidentiary objections are waived. *See* RAP 10.3(a)(4) & (6); *Conrad ex rel. Conrad v. Alderwood Manor*, 119 Wn. App. 275, 297, 78 P.3d 177 (2003) (“Alderwood did not assign error to the admission of any of the above evidence, nor did it argue the points in its opening brief. The arguments are thus waived.”).

<sup>5</sup> The purpose of an assignment is to put third parties on notice. *See Corales v. Flagstar Bank*, 822 F. Supp. 2d 1102 (W.D. Wash. 2011) (citing RCW 65.08.070 and stating that the purpose of an assignment “is to put parties who subsequently purchase an interest in the property on notice of which entity owns a debt secured by the property.”). Moreover, it is well-settled that Abercrombie, as a borrower, has no standing to challenge the Appointment. *See Zhong v. Quality Loan Service Corp. of Wash.*, 2013 WL 5530583, \*3 (W.D. Wash. Oct. 7, 2013); *Ukpoma v. U.S. Bank Nat. Ass’n*, 2013 WL 1934172 (E.D. Wash. May 9, 2013).

beneficiary status for purposes of the DTA comes not from MERS' purported assignment—defective or not—but rather from its physical possession of plaintiff's original note.”<sup>6</sup> In short, no alleged violation of the DTA adversely affected BNY Mellon's status as the beneficiary of Abercrombie's deed of trust during the relevant period.

**3. This Court Should Await The Outcome Of *Frias* Before Determining The Viability Of Abercrombie's Wrongful Initiation Of Nonjudicial Foreclosure Claim.**

The trial court ruled that Abercrombie had no claim under the DTA for “wrongful initiation of a non-judicial foreclosure action.” CP 806. At the time, every court to consider the issue agreed that the Act did not give rise to a damages action in the absence of a completed trustee's sale. *Vawter*, 707 F. Supp. 2d at 1123-24; *Frias*, 2013 WL 6440205, at \*1 (citing cases). There was no, and still has not been, a trustee's sale in this case. In *Walker*, the Court of Appeals has since held otherwise. 176 Wn. App. at 304-313. Respondents believe *Walker* was wrongly decided, but

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<sup>6</sup> See *McPherson v. Homeward Residential*, 2014 WL 442378, \*5 (W.D. Wash. Feb. 4, 2014); *Johnson v. CitiMortgage, Inc.*, 2013 WL 6632108, \*3 (W.D. Wash. Dec. 17, 2013); *Cameron v. Acceptance Capital Mortg. Corp.*, 2013 WL 5664706, \*3 (W.D. Wash. Oct. 16, 2013); *Ukpoma supra*, 2013 WL 1934172, at \*3; *Florez v. One West Bank, F.S.B.*, 2012 WL 1118179, \*1 (W.D. Wash. April 3, 2012); *Myers v. Mortg. Elect. Registration Sys. Inc.*, 2012 WL 678148, \*3 (W.D. Wash. Feb. 12, 2012).

recognize that the Supreme Court's forthcoming decision in *Frias* will likely provide the final word on the issue.

In any event, even if *Frias* affirms *Walker*, the viability of Abercrombie's DTA claim is doubtful. It is settled that technical violations of the DTA are not grounds for avoiding a trustee's sale; the borrower must make a showing of prejudice. *Amresco Independence Funding, Inc. v. SPS Props., LLC*, 129 Wn. App. 532, 537, 119 P.3d 884 (2005); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 112-13, 752 P.2d 385 (1988); *Steward v. Good*, 51 Wn. App. 509, 515, 754 P.2d 150 (1988). For the same reasons, even if the Supreme Court recognizes a pre-sale cause of action under the DTA, it should be contingent upon a showing of prejudice. Of course, Abercrombie can make no such showing here by the mere fact that MERS, instead of BNY Mellon, executed the Appointment of Successor Trustee.

Regardless, in the interest of judicial economy, this Court should not reach the merits of Abercrombie's "wrongful initiation of nonjudicial foreclosure" claim until *Frias* is decided. If *Frias* rejects *Walker*, then the dismissal of Abercrombie's DTA claim must be affirmed. In the event *Frias* affirms *Walker* and/or otherwise recognizes a pre-sale claim for damages under the DTA, Respondents reserve their right to provide supplemental briefing on the effect, if any, of the decision.

**4. ReconTrust Satisfied The Deed Of Trust Act's Physical Presence Requirement Through Its Appointment Of An Agent For Service Of Process In Washington.**

In the event *Frias* revives some of Abercrombie's claims under the DTA, it will not affect the analysis on whether ReconTrust satisfied RCW 61.24.030's "physical presence" requirement. That issue is squarely presented here. The statute states in relevant part:

That prior to the date of the notice of trustee's sale and continuing thereafter through the date of the trustee's sale, the trustee must maintain a street address in this state where personal service of process may be made, and the trustee must maintain a physical presence and have telephone service at such address; ...

RCW 61.24.030(6). The trial court correctly concluded, consistent with every court to consider the issue, that a trustee satisfies this requirement if it has a registered agent for service of process that maintains a Washington street address with a telephone service at that address. VRP 5/2/11 at 48; *Singh v. Federal Nat. Mortg. Ass'n*, 2014 WL 504820, \*4 (W.D. Wash. Feb. 7, 2014); *Douglas v. ReconTrust Co.*, 2013 WL 5356843, \*4-5 (W.D. Wash. Sept. 25, 2013); *Ramirez-Melgoze v. Countrywide Home Loan Servicing, LP*, 2010 WL 4641948, \*7 (E.D. Wash. Nov. 8, 2010).

ReconTrust plainly satisfied this requirement. As disclosed in the Notices of Trustee's Sale, ReconTrust appointed CT Corporation System ("CT Corp.") as its agent for service in Washington, and CT Corp. maintained an Olympia, Washington street address and telephone number.

CP 35; CP 382. There is no allegation, or evidence, that this address or phone number was a sham. Indeed, there is no dispute that Abercrombie was able to serve his summons on ReconTrust and speak to CT Corp.'s employees at this Washington address and phone number. CP 145 (¶ 10). The DTA's mechanism for stopping an allegedly wrongful sale is for the borrower to serve the trustee with his lawsuit and motion to enjoin the sale. *See* RCW 61.24.130(1). That is exactly what Abercrombie did here. He was not deprived of the benefit of the DTA's protections nor was he prejudiced by ReconTrust's lack of a physical location in Washington.

This Court can reject Abercrombie's claim that RCW 61.24.030(6) requires the trustee itself to be present in Washington. Op. Br. at 12. The statute's plain language says otherwise. *Douglas, supra*, 2013 WL 5356843, at \*4 ("The statute does not suggest that it is impermissible for a trustee to ... designating an agent in Washington."). Section (6) requires the trustee to maintain a location for "personal service" and, to that end, it requires not just a "street address," but also "physical presence" at that address. The "physical presence" requirement is not separate from the "street address" requirement; the later modifies the former, and ensures that personal service can in fact be made at the designated "street address." Put simply, the requirement prevents a trustee from avoiding personal service by maintaining only a PO Box as its "street address."

There also is no merit to Abercrombie's argument that a trustee must be physically present to deal with a borrower regarding the default. The trial court correctly recognized that, "nothing in the statute ... requires that there be someone at that address to negotiate some kind of settlement on a foreclosure[.]" VRP 5/2/11 at 48-49. The legislature addressed that goal through other provisions in the DTA that require, among other things, the beneficiary or its agent to contact the borrower, and to send notice of default with the name and address of the note owner, as well as name, address and telephone number of the party servicing the loan. RCW 61.24.030(8)(l); RCW 61.24.031. Of course, Abercrombie did not and could not claim that he was unable to contact those responsible for servicing his loan; he had already negotiated a loan modification with BANA once, and he knew it continued to service his loan. CP 169-73.

That leaves only Abercrombie's disingenuous suggestion that the ReconTrust consent decree somehow binds this Court. Op. Br. at 13-14. In Washington, consent decrees have no preclusive effect outside the parties to the settlement. *Dunning v. Paccarelli*, 63 Wn. App. 232, 242, 818 P.2d 34 (1991); K. Tegland, 14A Wash. Prac., Civ. Pro. § 35:48 (2d ed.) ("consent judgments ordinarily have res judicata (claim preclusion)

effect but not collateral estoppel (issue preclusion) effect”).<sup>7</sup> Indeed, the Attorney General agreed that the settlement “does not constitute evidence or an admission by any party regarding the existence or non-existence of any issue, fact, or violation any law[.]” CP 735-36. In sum, the decree has no significance whatsoever, and certainly cannot supersede the plain meaning of RCW 61.24.030(6) and the clear weight of authority.

**B. The Trial Court Properly Dismissed Abercrombie’s CPA Claim Because There Was No Unfair Or Deceptive Act, And No Injury Or Causation, From The Characterization Of MERS As Beneficiary Of The Deed Of Trust.**

The trial court properly dismissed Abercrombie’s CPA claim. Neither *Bain*, which was decided before the trial court ruled, nor *Walker*, which was decided after, change the analysis. The CPA declares unlawful unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. RCW 19.86.020. Under the CPA, Abercrombie had to prove: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person’s business or property, and (5) causation. *Bain*, 175 Wn.2d at 115 (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986)). The trial court concluded that

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<sup>7</sup> The reason there is no issue preclusion “is that ‘the parties could settle for myriad reasons not related to the resolution of the issues they are litigating.’” *Dunning*, 63 Wn. App. at 242 (quoting *Marquardt v. Fed. Old Line Ins. Co.*, 33 Wn. App. 685, 689, 658 P.2d 20 (1983)).

Abercrombie failed to establish the fourth and fifth elements, CP 807, but it is equally clear he cannot prove the first element either.

***No Unfair or Deceptive Act.*** “To prove that an act or practice is deceptive, neither intent nor actual deception is required. The question is whether the conduct has ‘the capacity to deceive a substantial portion of the public.’” *Id.* (quoting *Hangman Ridge*, 105 Wn.2d at 785). As noted, in *Bain*, the Supreme Court held that, if MERS is not the actual “holder” of the promissory note (as that term is defined by the UCC), then it is not the “beneficiary” of the deed of trust under RCW 61.24.005(2). *Id.* at 89, 99-104. The Court went on to hold that, while not per se deceptive, “characterizing MERS as the beneficiary has the capacity to deceive and, thus, ... presumptively the first element is met. *Id.* at 117.<sup>8</sup>

The Court was careful to recognize, however, that MERS could act as an agent for the actual holder of the note. *Id.* at 106 (citing RCW 61.24.031).<sup>9</sup> The problem in *Bain* was that, while the Court assumed MERS was indeed acting as an agent, the identities of the successor note

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<sup>8</sup> Indeed, the Washington legislature is the proper body to declare whether conduct is *per se* unfair or deceptive by enactment of a statute to that effect. See *Hangman Ridge*, 105 Wn.2d at 786; *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 786-787, 295 P.3d 1179 (2013).

<sup>9</sup> Courts routinely acknowledge that the DTA permits the use of agents. Indeed, the United States District Court for the Western District of Washington recently affirmed that “MERS may act as an agent of the note-holder.” *Petheram v. Wells Fargo Bank*, 2013 WL 6173806, \*2 (W.D. Wash. Nov. 21, 2013) (citing *Bain*, 175 Wn.2d at 110).

holders were unknown and apparently not disclosed to the borrower. *Id.* at 107 & n. 12.<sup>10</sup> As the Court noted, “nothing on the deed of trust itself would alert a careful reader to the fact that MERS would *not* be holding the promissory note.” *Id.* at 116 (emphasis in original).

The same cannot be said here. Unlike *Bain*, the record shows that Abercrombie knew that MERS was acting in its nominee capacity and he knew who the principal was. First, Abercrombie’s knowledge of MERS’ was not limited to the deed of trust; he was separately provided a “DISCLOSURE STATEMENT ABOUT MERS” that expressly informed him that “MERS is not your lender,” and was named as “nominee” in the deed of trust in order to “provide[] an alternative means of registering the

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<sup>10</sup> In *Bain* (and the companion *Selkowitz* case) the Washington Supreme Court was not able to determine whether MERS was an agent because of the limited record provided to it. When the United States District Court certified the record to the Supreme Court, it transmitted only a small portion of the record (mainly pleadings and briefs, but not evidentiary materials). *See, e.g., Bain v. Metro. Mortg. Group, Inc.*, No. 2:09-cv-149-JCC, Dkt. 159, Order Certifying Question to the Washington Supreme Court, at 4 (W.D. Wash. June 27, 2011) (listing docket entries for transmittal in *Bain* and *Selkowitz* cases); *compare id.* at Dkt. 150 & 150-1 (Declaration of Ronaldo Reyes identifying Deutsche Bank as Note holder and listing specific trust owning and holding the Note and the date of acquisition); *see also Selkowitz v. Litton Loan Servicing*, Case No. 3:10-cv-5523-JCC, Dkt. No. 15-1 (W.D. Wash. Aug. 24, 2010) (declaration stating Litton Loan Servicing was Note holder). The incomplete record (and the admittedly flawed assignment) resulted in the mistaken impression at the Washington Supreme Court that MERS had no principal controlling MERS’s actions and was acting as beneficiary not as an agent, but for itself. *See Bain*, 175 Wn.2d at 90 & n.12. The complete record clarifies that MERS did have a principal for whom it was acting.

mortgage lien in the public records.” CP 167. The disclosure does not describe MERS as a holder or beneficiary. Indeed, just the opposite; it warned Abercrombie that “[n]aming MERS as the mortgagee ... does not affect your obligation to your Lender, under the Promissory Note.” *Id.*

Second, the Notice of Trustee’s Sale informed Abercrombie that BNY Mellon was the holder and current beneficiary of the deed of trust. CP 32; CP 57. It also identified BANA as BNY Mellon’s loan servicer, a fact Abercrombie already knew because he dealt with BANA to modify the loan a year earlier. *Id.*; CP 169-73. In short, the characterization of MERS as “beneficiary” in the deed of trust or Notice of Trustee’s Sale had no capacity to deceive a substantial portion of the public, much less a foreclosure mediator like Abercrombie; the disclosure statement and other documents, as well as Abercrombie’s own dealings with BANA, revealed that MERS was acting solely as a nominee, not as a holder of the note.

***Injury and Causation.*** Moreover, Abercrombie must also show that “but for” the allegedly deceptive practice, he would not have suffered injury to his business or property. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 84, 170 P.3d 10 (2007). In *Bain*, the Court held that “the mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury,” but concluded that such a characterization could, depending on the facts, satisfy the CPA’s fourth

and fifth elements. *Bain*, 175 Wn.2d at 118-20. Abercrombie did not, and could not, show any actual injury as a result of the listing of MERS as a beneficiary, or its appointment of ReconTrust as successor trustee.

To start, there was a failure of proof. Respondents moved for summary judgment, specifically pointing to the lack of evidence regarding a CPA injury. CP 724-25. In response, Abercrombie argued “he had no burden to produce anything” and, sure enough, refused to even articulate what his injury was. CP 774. While the “injury involved need not be great, or even quantifiable,” *Ambach v. French*, 167 Wn.2d 167, 171-72, 216 P.3d 405 (2009) (quotation marks omitted), to survive summary judgment, Abercrombie had to come forward with specific facts on the essential elements of his claim. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). But, without exaggeration, there is absolutely nothing in the record to show what “injury” Abercrombie supposedly suffered, or how it was caused by Respondents’ conduct. Summary judgment was proper on this basis alone.

Indeed, it is clear that Abercrombie did not suffer any cognizable CPA injury. It is undisputed that Abercrombie defaulted on his loan and it was this default that led to the nonjudicial foreclosure proceedings; the listing of MERS as “beneficiary” had nothing to do with it. Thus, to the extent Abercrombie could claim that the foreclosure proceedings affected

his reputation, credit rating or the like, his own failure to pay the loan was the “but for” cause of the loss. *Massey v. BAC Home Loans Servicing LP.*, 2013 WL 5652514, \*8 (W.D. Wash. Dec. 23, 2013) (“any injuries associated with the foreclosure proceedings ... were caused solely by her own default”); *Wear v. Sierra Pac. Mortg. Co., Inc.*, 2013 WL 6008498, \*5 (W.D. Wash. Nov. 12, 2013) (same); *Babrauskas*, 2013 WL 5743903 at \*4 (same).

In *Bain*, the Court noted that MERS’ presence on a deed of trust could cause CPA injury if it led to confusion regarding the identity of the holder or the party to deal with to resolve disputes regarding the loan. 175 Wn.2d at 118-20. But here, Abercrombie never claimed to be confused about the identity of the note holder or loan servicer, CP 143-48; CP 231-35; CP 343-47—for good reason. Not only is Abercrombie a professional foreclosure mediator who understands the MERS system, as discussed above, he knew from his prior loan modification and Notice of Trustee’s Sale that BNY Mellon was the holder/beneficiary and BANA was the loan servicer. *See Massey, supra*, 2013 WL 5652514, \*8 (no CPA injury where plaintiff testified that she knew who to contact for loan payments and was not confused by presence of MERS on deed of trust or other documents).

Finally, although there is no evidence that Abercrombie paid his attorneys anything, he cannot bootstrap litigation costs into a CPA injury.

It is well-established that the cost of hiring an attorney to prosecute a lawsuit or defend a collections action, as distinct from consulting an attorney to investigate uncertainty regarding the underlying debt, does not satisfy the CPA's injury element. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 59-62, 204 P.3d 885 (2009); *Wright v. Safeco Ins. Co. of Am.*, 124 Wn. App. 263, 280, 109 P.3d 1 (2004); *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 564, 825 P.2d 714 (1992); *Demopolis v. Galvin*, 57 Wn. App. 47, 54-55, 786 P.2d 804 (1990).

But that is all there could be here. Abercrombie initiated this suit on his own, and litigated it pro se for months before retaining counsel. CP 1-30; CP 830-31; CP 123-48; CP 176-206. There is no evidence that, either before or after he filed suit, Abercrombie incurred any legal fees to investigate the status of his loan. Indeed, at no point during the litigation did Abercrombie or his attorneys assert any defense to his default. If Abercrombie paid any fees at all, they were devoted exclusively to prosecution of his claims and, therefore, do not constitute a cognizable "injury" under the CPA. *See Massey v. BAC Home Loans Servicing LP.*, 2013 WL 5652514, \*3 (W.D. Wash. Oct. 15, 2013) (citing *Panag*);

*Babrauskas, supra*, 2013 WL 5743903, at \*4. The trial court properly dismissed Abercrombie’s CPA claim for this reason as well.<sup>11</sup>

**C. The Trial Court Properly Dismissed Abercrombie’s FDCPA Claim Because Respondents Were Not Acting As “Debt Collectors” In Initiating Nonjudicial Foreclosure Proceedings.**

The FDCPA “applies to ‘debt collectors,’ which are entities who regularly collect debts for others, not to ‘creditors,’ who are collecting on their own behalf.” *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 676, 292 P.3d 128 (2012) (citing 15 U.S.C. § 1692a(6)). Both Washington and federal courts agree that lenders, loan servicers and trustees are not “debt collectors” when they participate in nonjudicial foreclosure proceedings. *Walker*, 176 Wn. App. at 316; *Deissner v. Mort. Elect. Registration Sys.*, 618 F. Supp. 2d 1184, 1189 (D. Ariz. 2009), *aff’d*,

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<sup>11</sup> Abercrombie suggests that *Walker* somehow changed the law in this regard. Op. Br. at 16. It didn’t. Citing to *Panag*, *Walker* notes that “Investigative expenses, taking time off from work, travel expenses, and attorney fees are sufficient to establish injury under the CPA.” *Walker*, 176 Wn. App. at 727. That’s true. As noted, *Panag* held that attorney’s fees might constitute an injury if they were related to investigation of the debt, rather than merely bringing the claim. *Panag*, 166 Wn.2d at 62. Nothing in *Walker* expands that rule. Indeed, *Walker* was dismissed on the pleadings, not the proof, and thus the court had to accept as true the plaintiff’s allegations that he suffered cognizable CPA injuries.

384 Fed. App'x 609 (9th Cir. 2010).<sup>12</sup> The same is true for MERS. *In re Brown*, 2013 WL 6511979, \*12 (9th Cir. BAP Dec. 12, 2013).<sup>13</sup> The trial court properly dismissed Abercrombie's FDCPA claim on this basis.

*Walker* does not compel a different result. *See* Op. Br. at 16. In *Walker*, the court adopted the general rule with respect to Section 1692e of the FDCPA (which addresses false and misleading representations), but recognized that nonjudicial foreclosure proceedings could violate a separate section of the FDCPA. 176 Wn. App. at 316. That section, Section 1692f, prohibits persons from "threatening to take any nonjudicial action to effect dispossession or disablement of property if ... there is no present right to possession of the property claimed as collateral through an enforceable security interest." 15 U.S.C. § 1692f(6)(A).

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<sup>12</sup> *See also Hulse v. Ocwen Fed. Bank*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002); *Dietz v. Quality Loan Servs. Corp. of Wash.*, 2014 WL 29672, \*4 (W.D. Wash. Jan. 3, 2014); *Fagerlie v. HSBC Bank, NA*, 2013 WL 1914395, \*5 (W.D. Wash. May 8, 2013); *Nixon v. Regional Trustee Services Corp.*, 2012 WL 6114848, \*3 (W.D. Wash. Dec. 10, 2012); *Ness v. N.W. Trustee Servs., Inc.*, 2012 WL 10277178, \*6 (W.D. Wash. Apr. 6, 2012); *Tuttle v. Bank of N.Y. Mellon*, 2012 WL 726969, \*3 (W.D. Wash. Mar. 6, 2012).

<sup>13</sup> *See also Diessner*, 618 F. Supp. 2d at 1189; *Wear, supra*, 2013 WL 6008498, at \*5; *Mickelson v. Chase Home Fin., LLC*, 2012 WL 3230496, \*1 (W.D. Wash. Aug. 6, 2012); *Lara v. Aurora Loan Servs. LLC*, 2013 WL 1628955 (S.D. Cal. Apr. 16 2013); *Ronzone v. Aurora Loan Servs., LLC*, 2012 WL 502685, \*2 (W.D. Wash. Feb. 14, 2012); *Amador v. Cent. Mortg. Co.*, 2012 WL 405175, \*3 (W.D. Wash. Feb. 8, 2012).

Abercrombie, however, did not allege violation of Section 1692f in his complaint, nor did he cite it anywhere in his briefing below. CP 24 & 26 (¶¶ 59 & 63); CP 30; CP 140; CP 515; CP 775. Rather to the extent he asserted the claim at all, Abercrombie, relied exclusively on Section 1692e of the FDCPA. *See* CP 30; CP 140. Simply put, the decision in *Walker* (which relied on existing federal law distinguishing between sections 1692e and 1692f) cannot revive a claim or theory that Abercrombie never plead, did not argue, and failed to preserve below. RAP 2.5(a); RAP 9.12; *Karlberg v. Otten*, 167 Wn. App. 522, 531-32, 280 P.3d 1123 (2012).

There is no basis for liability under Section 1692f in any event. Again, it is undisputed Abercrombie's Note was endorsed in blank, and that BNY Mellon has had physical possession of it since December 2006. CP 750 (¶¶ 3 & 4). BNY Mellon was therefore both the "holder" of the Note and "beneficiary" of the deed of trust when its agent BANA initiated foreclosure proceedings against Abercrombie's property by providing ReconTrust with the Beneficiary Declaration in March 2010. RCW 61.24.005(2); 62A.1-201(21); 62A.3-205(b); 62A.3-301; 62A.3-109.

Because BNY Mellon, acting through BANA, did have a "present right to possession of the property" when it initiated nonjudicial foreclosure proceedings in Abercrombie's case, there is no liability under Section 1692f(6) as a matter of law. *Thepvongsa v. Reg. Trustee Servs.*

*Corp.*, --- F. Supp. 2d ---, 2013 WL 5366065, \*6 (W.D. Wash. Sept. 25, 2013) (“Because Deutsche Bank was the holder of the promissory note at that time, defendants had the right to effect dispossession of plaintiff’s property.”); *Mickelson v. Chase Home Fin., LLC*, 2012 WL 6012791, \*3 (W.D. Wash. Dec. 3, 2012) (“as the actual holder of the note, Chase had the proper authority to initiate foreclosure proceedings”).<sup>14</sup>

Finally, even if there was a basis for FDCPA liability here, the act specifically exempts banks and servicing companies that acquire the debt before default. 15 U.S.C. § 1692a(6)(F)(ii); *Walker*, 176 Wn. App. at 315 (“mortgage servicer companies and others who service outstanding debts for others [are not debt collectors] so long as the debts were not in default when taken for servicing”) (internal quotation marks and citation omitted). BNY Mellon acquired the Note in December 2006—before Abercrombie

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<sup>14</sup> This fact distinguishes this case from *Walker* and other cases that have recognized a claim under Section 1692f. In those cases, unlike here, it was assumed or proved that the transferee bank was not the “holder” or “owner” of the note and therefore not a “beneficiary” of the deed of trust. *Walker*, 176 Wn. App. at 317 (“[a]ssuming that Walker’s allegations are true, neither Quality nor Select had a present right to possess the property ... because they never held the note”); *McDonald v. OneWest Bank, FSB*, 929 F. Supp. 2d 1079, 1096-97 (W.D. Wash. 2013) (“NWTS had not been appointed successor trustee and was not acting on behalf of the entity that had actual physical possession of the note”); *Beaton v. JP Morgan Chase Bank, N.A.*, 2013 WL 1282225, \*3 (W.D. Wash. Mar. 26, 2013) (“Beaton alleges that the identity of the ‘Note Bearer/Creditor remains unknown,” and, thus, “it remains undetermined if Chase is the actual beneficiary pursuant to RCW 61.24.005(2)”).

defaulted on loan in or around March 2008 and before he entered into a modified loan with BANA in May 2009. CP 750 (§§ 3 & 4); CP 34; CP 169. The FDCPA claims were properly dismissed for this reason too.

**D. The Trial Court Properly Dismissed Abercrombie’s CAA Claim Because Respondents Were Not Acting As “Collection Agencies” In Initiating Nonjudicial Foreclosure Proceedings.**

This Court can also easily affirm the trial court’s dismissal of Abercrombie’s CAA claim.<sup>15</sup> The CAA contains no private right of action; rather, violation of the act constitutes an unfair practice under the CPA. RCW 19.16.440; *Paris v. Steinberg & Steinberg*, 828 F. Supp. 2d 1212, 1218 (W.D. Wash. 2011) (“[T]he WCAA does not recognize any liability separate from the CPA.”). Thus, where a plaintiff cannot satisfy all the other elements of the CPA, a violation of the CAA will not support a cognizable claim. *Genschorck v. Suttell & Hammer, P.S.*, 2013 WL 6118678, \*3 (E.D. Wash. Nov. 21, 2013) (“Because Plaintiff’s WCPA cause of action fails ... so too does her WCAA based claim.”). Because Abercrombie did not and could prove the injury or causation elements of his CPA claim, his CAA claim also fails as a matter of law.

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<sup>15</sup> Indeed, this Court can affirm dismissal based on Abercrombie’s failure to sufficiently argue error on appeal; he devotes all of one sentence to the CAA. *See* Op. Br. at 16-17; *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) (“Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.”).

Moreover, for reasons similar to those that support dismissal of the FDCPA claim, there was no violation of the CAA in any event. The CAA forbids a person from acting as a “collection agency” in Washington without first obtaining a license. RCW 19.16.110; 19.16.440. The CAA defines “collection agency” as one who attempts to collect a claim owed to another person, or who attempts to collect on his own claim while passing himself off as another person. RCW 19.16.100(4)(a),(c). The definition, however, specifically excludes “[a]ny person whose collection activities are carried on in ... its true name and are confined and are directly related to the operation of a business other than that of a collection agency, such as ... mortgage banks; and banks.” RCW 19.16.100(5)(c).

None of the Respondents acted as a “collection agency” here. Countrywide and Landsafe, the original lender and trustee, were not involved in the nonjudicial foreclosure proceedings in any way. Neither was MERS, who did nothing more than execute and record the Appointment and Assignment on BNY Mellon’s behalf; even if MERS lacked authority to do so, it had no contact with Abercrombie whatsoever. *Cf. Munger v. Deutsche Bank*, 2011 WL 2930907, at \*6 (N.D. Ohio July 18, 2011) (allegedly defective assignment of mortgage by MERS does not render it a “debt collector” under FDCPA).

That leaves just BNY Mellon, BANA and ReconTrust. Like the FDCPA, it is settled that banks and their agents, both loan servicers and trustees, are not acting as a “collection agency” under the CAA when they initiate nonjudicial foreclosure proceedings. *See Rose v. ReconTrust Co., N.A.*, 2013 WL 1703335, \*4 (E.D. Wash. Apr. 18, 2013); *Lacelle v. 2010-2 SFR Venture, LLC*, 2012 WL 5493999 (E.D. Wash. Nov. 9, 2012); *Barbanti v. Quality Loan Serv. Corp.*, 2007 WL 26775, \*2-3 (E.D. Wash. Jan. 2, 2007). Abercrombie does not cite any contrary authority. There is none. The trial court properly dismissed Abercrombie’s CAA claim.

**E. Respondents Are Entitled To Their Appellate Fees and Costs.**

Under RAP 18.1(a), a prevailing party may recover its reasonable attorney’s fees and expenses on appeal if applicable law grants a party the right to recover these fees and expenses. Applicable law can include contractual attorney’s fees provisions. *Excelsior Mortg. Equity Fund II, LLC v. Schroeder*, 171 Wn. App. 333, 345-46, 287 P.3d 21 (2012). Here, Abercrombie’s deed of trust contains the following provision:

**26. Attorneys’ Fees.** Lender shall be entitled to recover its reasonable attorneys’ fees and costs, in any action or proceeding to construe or enforce any term of this Security Instrument. The term “attorneys’ fees” ... shall include without limitation attorneys’ fees incurred by Lender in any ... appeal.

CP 47. If this Court affirms the trial court’s judgment, as it should, BNY Mellon, the current holder of the Note and beneficiary of the deed of trust, is entitled to award of its fees and expenses on appeal.

Even if this Court were to reverse all or some of the judgment below, it must reject Abercrombie’s cursory request for an award of fees on both procedural and substantive grounds. RAP 18.1(b) requires a party to “devote a section of its opening brief to the request for the fees or expenses.” This requirement is mandatory, and is not satisfied by a passing request for an award of fees in the opening brief, which is all there is here. Op. Br. at 15, 17; *see Wilson Court Ltd. P’ship v. Tony Maroni’s, Inc.*, 134 Wn.2d 692, 710 n. 4, 952 P.2d 590 (1998); *Gardner v. First Heritage Bank*, 175 Wn. App. 650, 676-67, 303 P.3d 1065 (2013).<sup>16</sup>

Substantively, Abercrombie is not entitled to an award of fees or expenses on appeal, under either the deed of trust or the CPA, because, even if this Court reverses, he still has not “prevailed” on any of his claims. The cases are clear that where the disposition on appeal is reinstatement of dismissed claims and remand, there is no prevailing party, and it is premature for the appellate court to award attorney’s fees or costs.

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<sup>16</sup> Of course, this omission cannot be cured by arguing the point in Abercrombie’s reply brief. *See* RAP 18.1(b); *Prosser Hill Coalition v. County of Spokane*, 176 Wn. App. 280, 293, 309 P.3d 1202 (2013); *Hawkins v. Diel*, 166 Wn. App. 1, 13 n. 2, 269 P.3d 1049 (2011).

*See Walker*, 176 Wn. App. at 323; *Ryan v. Dep't of Soc. & Health Servs.*, 171 Wn. App. 454, 476, 287 P.3d 629 (2012). So it would be here.

**V. CONCLUSION**

For the reasons above, Respondents respectfully request this Court to affirm the trial court's rulings and judgment.

RESPECTFULLY SUBMITTED this 13th day of May, 2014.

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 13, 2014, I caused to be served a copy of the foregoing **Brief of Respondents** on the following person(s) in the manner indicated below at the following address(es):

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