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Court of Appeals
Division I
State of Washington

No. 71724-3-I

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

MARISA BAVAND

Appellant,

v.

CHASE HOME FINANCE LLC; a Delaware limited liability company; FLAGSTAR BANK, FSB, a federal savings bank; FEDERAL NATIONAL MORTGAGE ASSOCIATION, a United States government sponsored enterprise; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation; NORTHWEST TRUSTEE SERVICES, INC., a Washington corporation; DOE DEFENDANTS 1-10

Respondents

BRIEF OF RESPONDENT NORTHWEST TRUSTEE SERVICES, INC.

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I. STATEMENT OF THE CASE

On or about March 18, 2004, Appellant Marisa Bavand ("Bavand") executed a promissory note (the "Note") in the amount of $160,000.00, payable to Capital Mortgage Corporation. CP 1558-61. Bavand secured repayment of the Note with a Deed of Trust. CP 1650-67. On March 31, 2004, the Deed of Trust was recorded with the Snohomish County Auditor, and encumbered real property located in Snohomish County (the "Property"). *Id.*[1]

On September 1, 2010, Bavand defaulted on the terms of the Note and Deed of Trust when she failed to make any further required loan payments. CP 1554 at ¶ 6; CP 1670.

On or about February 1, 2011, as a result of Bavand's default on payments due under the secured Note, NWTS caused a Notice of Default to be sent to her. CP 1669-71.[2] The following day, an Appointment of Successor Trustee, vesting NWTS with the powers of the original trustee, was recorded with the Snohomish County Auditor. CP 1673.

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[1] On February 2, 2011, an Assignment of Deed of Trust in favor of Chase Home Finance LLC was recorded with the Snohomish County Auditor for notice purposes. CP 1675.
[2] A Notice of Default may be issued by the trustee, beneficiary, or an authorized agent. *See* RCW 61.24.031(1)(a). NWTS acted in the latter capacity prior to its appointment as successor trustee. *Id.*

On January 26, 2012, JPMorgan Chase Bank, N.A. ("Chase") executed a sworn declaration averring to Chase's status as holder of the Note. CP 1677.[3] On February 2, 2012, NWTS received this sworn declaration. CP 1703 at ¶ 8.

On May 10, 2012, a Notice of Trustee's Sale was recorded with the Snohomish County Auditor, setting a sale for August 10, 2012. CP 1679-82. On August 8, 2012, Bavand's counsel sent a letter to NWTS asserting a number of "issues" in the foreclosure documentation, and demanding postponement of the Trustee's Sale. CP 1902-03.

On August 17, 2012, NWTS' counsel responded to this letter, and informed Bavand's counsel that the sale, reset for August 24, 2012, would be cancelled. CP 1686. Nonetheless, on August 20, 2012, Bavand filed suit against a host of Defendants, including NWTS. Snohomish County Superior Court Case No. 12-2-07395-1, Dkt. No. 2.

After a period of discovery, all Defendants moved for summary

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[3] While Bavand feigns confusion to theorize a distinction between Chase Home Finance and JPMorgan Chase Bank, courts routinely recognize the latter is successor by merger to the former. *See, e.g., In re: Mortg. Lender Force-Placed Ins. Litig.*, 2012 WL 4479578, n.1 (Sept. 28, 2012); *Todd v. Chase Manhattan Mortg. Corp.*, 2012 WL 3641457, n.1 (D. Ariz. Aug. 24, 2012); *see also* http://www.occ.gov/static/interpretations-and-precedents/may11/ca996.pdf (OCC approval of merger); *cf.* Brief of Appellant at 34. The fact is clear that they are not different entities. CP 1594-97; *see also Ellis v. J.P. Morgan Chase & Co.*, 950 F. Supp. 2d 1062 (N.D. Cal. 2013); ER 201.

judgment. *Id.*, Dkt. Nos. 26, 28, 33. On March 26, 2014, the trial court granted those respective motions. CP 52-56.[4]

II. RESPONSE TO ASSIGNMENTS OF ERROR[5]

1. The trial court did not err in granting summary judgment to NWTS on causes of action for violations of the Deed of Trust Act ("DTA"), violations of the Consumer Protection Act ("CPA"), and violations of RCW 9A.82 *et seq.*

2. The trial court did not err in denying Bavand's improvident CR 56(f) request, as Flagstar, Chase, and NWTS had already responded to discovery demands that Bavand proffered, and Bavand could not articulate a proper basis for obtaining a continuance.

III. RESPONSE ARGUMENT

A. The Trial Court's Grant of Summary Judgment to NWTS Should be Affirmed.

1. Standard of Review.

An order granting summary judgment is reviewed *de novo*, with

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[4] The trial court also granted the motion of Chase, Federal National Mortgage Association ("Fannie Mae"), Mortgage Electronic Registration Systems, Inc. ("MERS"), and Flagstar Bank, FSB ("Flagstar") to strike a declaration that Bavand submitted in opposition to summary judgment. CP 57-59. NWTS did not participate in that decision.
[5] NWTS also will not address Bavand's Assignments of Error related to declarations that NWTS did not directly submit. *See* n. 3, *supra*. This should not be interpreted, however, as a tacit agreement to the merits of Bavand's arguments on these issues.

the Court of Appeals engaging "in the same inquiry as the trial court." *Beaupre v. Pierce County,* 161 Wn.2d 568, 571, 166 P.3d 712 (2007). However, a ruling may be affirmed on any ground supported in the record, "even if the trial court did not consider the argument." *King County v. Seawest Inv. Associates, LLC*, 141 Wn. App. 304, 170 P.3d 53 (2007).

Summary judgment is proper if the pleadings, depositions, answers to discovery, together with affidavits, show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* CR 56(c); *see also Knox v. Microsoft Corp.*, 92 Wn. App. 204, 962 P.2d 839 (1998), *rev. denied*, 137 Wn.2d 1022, 980 P.2d 1280 (1999); *Vacova Co. v. Farrell*, 62 Wn. App. 386, 814 P.2d 255 (1991).

If the moving party demonstrates that an issue of material fact is absent, the nonmoving party must then articulate specific facts establishing a genuine issue. *See Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989); *see also* CR 56(e) ("an adverse party may not rest upon the mere allegations or denials of his pleading, but... must set forth specific facts showing that there is a genuine issue for trial."). A genuine issue of material fact does not exist where insufficient evidence exists for a reasonable fact-finder to find for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986).

Unsupported conclusory allegations, or argumentative assertions, are insufficient to defeat summary judgment. *See Vacova Co.*, *supra.* at 395, *citing Blakely v. Housing Auth. of King Cy.*, 8 Wn. App. 204, 505 P.2d 151, *rev. denied,* 82 Wn.2d 1003 (1973), *Stringfellow v. Stringfellow,* 53 Wn.2d 639, 335 P.2d 825 (1959). "Ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to raise a question of fact." *Id.*, *citing Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 753 P.2d 517 (1988). Summary judgment is appropriate if, after considering the evidence, reasonable persons could reach only one conclusion. *See Hansen v. Friend,* 118 Wn.2d 476, 824 P.2d 483 (1992).

Here, Bavand failed to advance a genuine issue of material fact precluding NWTS from receiving summary judgment. As such, the trial court's order should be affirmed for the reasons set forth below.

2. Bavand's Wrongful Foreclosure, Violations of the DTA, and Declaratory Relief Claim.

Bavand's Opening Brief contains a key statement that reflects the true nature of her lawsuit, *i.e.*, "Bavand challenged *everything*: the validity, veracity, form and substance of all the documents relied upon by the Respondents to foreclose on her home, as well as the declarations filed in support of the Respondents' motion [*sic*] for summary judgment."

Brief of Appellant at 26 (emphasis added).

In other words, although the DTA authorizes the foreclosure of trust deeds without the need for litigation, Bavand attacked any conceivable aspect of the process through a "kitchen sink" of theories and accusations, while making no mortgage payments yet benefitting from the Property as a rental. Brief of Appellant at 46 (Property was a "source of business income"), CP 1695 at 35:3-20; *cf.* Joseph L. Hoffmann, Comment, *Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59 Wash. L. Rev. 323 (1984).[6]

But despite Bavand's sweeping effort, NWTS showed that it properly followed *all material steps* of the DTA during the uncompleted foreclosure and Bavand was *not prejudiced* by NWTS' actions.

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[6] As noted to the trial court, Bavand's Complaint contained "form" allegations remarkably alike to those presented by her counsel in other matters, and not even specific to Bavand herself. *See, e.g., Stafford v. SunTrust Mortgage Inc.*, 2014 WL 3767479 (W.D. Wash. July 31, 2014) (summary judgment granted to NWTS); *In re Butler*, 512 B.R. 643 (Bankr. W.D. Wash. July 9, 2014) (summary judgment granted to NWTS); *Johnson v. US Bank, N.A. et al.*, Snohomish County Superior Court Case No. 13-2-06891-3 (dismissed), *Bowman v. SunTrust Mortgage, Inc. et al.*, King County Superior Court Case No. 13-2-08229-2 (on appeal to this court). The presence of these boilerplate statements in various unrelated – and unsuccessful – actions involving different parties underscored the weakness of Bavand's arguments in this case. As the Hon. Judge Jones of the Western District of Washington recently observed, "[d]ecrying the practices of mortgage lenders who use a cookie-cutter process to conduct foreclosures is less effective when the complaint itself bears the hallmarks of a cookie-cutter process." *Singh v. Federal Nat'l Mortg. Ass'n*, 2014 WL 504820, n. 4 (W.D. Wash. Feb. 7, 2014); *cf.* Brief of Appellant at 47.

a. The Note Holder is the Beneficiary.

Washington's negotiable instrument enforcement law adopts the Uniform Commercial Code's ("UCC") Article 3. Under that law, a promissory note is a negotiable instrument. RCW 62A.3-104(a), (b), and (e). A note may be enforced by, "the holder of the instrument...." RCW 62A.3-101. In turn, "holder" is defined as 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(b)(21)(A).[7] In other words, the holder possesses a note payable or indorsed to itself or in blank. The UCC's indorsement provisions are also adopted under Washington law. RCW 62A.3-204(a), 62A.3-205(b).

In addition, "[a] person may be a person entitled to enforce the instrument *even though the person is not the owner* of the instrument[.]" RCW 62A.3-101 (emphasis supplied); *see also* RCW 62A.3-203, cmt. 1 ("the right to enforce an instrument and ownership of the instrument are two different concepts."). The Washington Supreme Court recognized nearly fifty years ago that to enforce a Note the critical distinction is who

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[7] Bavand misunderstands the nature of a promissory note, arguing that the "entity 'entitled' to mortgage payments" should be defined outside the UCC. Brief of Appellant at 23. But "an instrument [such as a note] is a reified right to payment. The right is represented by the instrument itself." RCW 62A.3-203, cmt. 1.

holds the Note, not who *owns* the rights to payments: "The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument. *It is not necessary for the holder to first establish that he has some beneficial interest in the proceeds.*" *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 222-23, 450 P.2d 166 (1969) (citation omitted) (emphasis supplied).

Contrary to Bavand's argument, the Legislature did not alter the definition of "note holder" in 2009 when a beneficiary declaration requirement came into effect. Brief of Appellant at 23. The DTA continues to define a "beneficiary" as "the *holder* of the instrument or document evidencing the obligations secured by the deed of trust." RCW 61.24.005(2) (emphasis added); *cf.* Brief of Appellant at 24.

The Washington Supreme Court recognizes the UCC provisions defining "holder" and "person entitled to enforce" as controlling in nonjudicial foreclosure cases: "The plaintiffs argue that our interpretation of the deed of trust act should be guided by these UCC definitions [of 'holder' and 'person entitled to enforce'] .... We agree." *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 104, 285 P.3d 34 (2012).

To enforce a Deed of Trust by nonjudicial foreclosure, "a beneficiary must either actually possess the promissory note or be the

payee." *Id.*[8] If there is negotiation of a note, the holder possesses the right to enforce it, as well as the right to enforce any instrument securing the note's repayment, *e.g.*, a deed of trust. *See Kennebec, Inc. v. Bank of the W.*, 88 Wn.2d 718, 724-25, 565 P.2d 812 (1977).[9] If the borrower defaults on the note, a secured party may exercise its rights under a deed of trust with respect to any property securing such obligation. *See, e.g.*, RCW 62A.9A-203(g), RCW 62A.9A-308(e).

b. NWTS Did Not Commit a Material Violation of the DTA.

A non-judicial foreclosure of owner-occupied residential real property in Washington includes: 1) issuing a Notice of Default (RCW 61.24.030), 2) recording an Appointment of Successor Trustee if applicable (RCW 61.24.010(2)), 3) possessing proof of the beneficiary's status (given only to a trustee, per RCW 61.24.030(7), not the borrower), 4) recording a Notice of Trustee's Sale (RCW 61.24.040), and 5) delivery

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[8] This comports entirely with long-standing Washington law that the security instrument follows the obligation secured: "[T]ransfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter." *In re Jacobson*, 402 B.R. 359, 367 (W.D. Wash. 2009), *quoting Carpenter v. Longan*, 16 Wall. 271, 83 U.S. 271, 275, 21 L.Ed. 313 (1872).

[9] Washington defines beneficiary strictly in the context of holding a note, not receiving the beneficial interest in a deed of trust, such as the Oregon or Idaho Trust Deed Acts require. *Compare* RCW 61.24.005(2), ORS 86.705(2) ("Beneficiary means a person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or the persons successor in interest...."), I.C. § 45-1502(1) (same definition).

and recording a Trustee's Deed to the purchaser at sale (RCW 61.24.050).[10]

Even if a pre-sale cause of action for "wrongful foreclosure" damages exists, it would be defined as the "[f]ailure of the trustee to materially comply with the provisions of this chapter [i.e. the DTA]." RCW 61.24.127(1)(c); *see also Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 311, 308 P.3d 716 (2013), *as modified* (Aug. 26, 2013).[11] Raising a broad challenge to the beneficiary's identity does not fall under this limited type of claim.

As mentioned above, Bavand's entire lawsuit was premised on challenges to numerous aspects of the non-judicial process, but RCW 61.24.127(1)(c) does not allow for an "open season" type of approach on all of a trustee's actions taken during foreclosure.

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[10] No obligation to execute or record an Assignment of Deed of Trust is found in the DTA. The purpose of an Assignment of Deed of Trust "is to put parties who subsequently purchase an interest in the property on notice of which entity owns a debt secured by the property." *Corales v. Flagstar Bank, FSB*, 822 F. Supp. 2d 1102 (W.D. Wash. 2011), *citing* RCW 65.08.070; *see also Brodie v. NWTS*, 2014 WL 2750123 (9th Cir. June 18, 2014) (borrower has no standing to challenge Assignment). The Assignment related to the subject Deed of Trust also does not name or involve NWTS. *See Lynott v. MERS*, 2012 WL 5995053 (W.D. Wash. Nov. 30, 2012).

[11] Assuming that Bavand could bring a state law-based cause of action for monetary damages due to the wrongful initiation of a foreclosure; an issue the State Supreme Court has certified for review. *See Frias v. Asset Foreclosure Services, Inc.*, 2013 WL 6440205 (W.D. Wash. Sept. 25, 2013).

i. Bavand Cannot Show Prejudice.

It is settled law in Washington that a borrower must show prejudice from actual material defects in foreclosure notices. *See Amresco Independence Funding, Inc. v. SPS Props., LLC*, 129 Wn. App. 532, 119 P.3d 884 (2005); *Steward v. Good*, 51 Wn. App. 509, 515, 754 P.2d 150 (1988) (noting a "requirement that prejudice be established" where a "'technical violation' of the DTA occurs and finding that there [was] no showing of harm to the debtor"); *see also Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 581 n.4, 276 P.3d 1277 (2012) (Stephens, J., concurring); *Udall v. T.D. Escrow Serv., Inc.*, 159 Wn.2d 903, 154 P.3d 882 (2007) (reversing holding that wrongful foreclosure should be vacated).

Although the DTA "must be construed in favor of borrowers," a wrongful foreclosure where the borrower admits default and cannot cure "does not injure the borrower's interests, because the debt secured by the trustee's deed is per se satisfied by the foreclosure sale due to the Act's anti-deficiency provision." *Udall, supra.* at 916 (citations omitted). Bavand is correct that the DTA is strictly construed, but this is not the same as imposing strict liability. Brief of Appellant at 21. Rather, a purported procedural defect must still result in prejudice to a borrower.

For example, in *Koegel v. Prudential Mut. Sav. Bank*, this Court declined to invalidate a sale where a plaintiff identified "technical, formal error[s], non-prejudicial, and correctable." 51 Wn. App. 108, 113, 752 P.2d 385 (1988). In *Koegel*, the Notice of Default erroneously contained an "additional description of a plot that had been conveyed and was no longer part of the transaction." *Id.* at 110. Further, the Notice of Trustee's Sale "was sent only 25 days after the corrected notice of default," which is contrary to RCW 61.24.030. *Id.* at 111.

Despite these patent instances of non-compliance with the DTA, this Court found that: "[t]his is not to say, however, that the strict compliance requirement eliminates any consideration of prejudice before a sale may be set aside." *Id.* at 112. Furthermore, it was observed that:

> Appellant's contentions that he was prejudiced by this lapse are disingenuous. The notice of default listed the loan which was in arrears. From that information, appellant would be on notice that the property... would be in jeopardy of foreclosure. The purpose of the notice of default is to notify the debtor of the amount he owes and that he is in default. In fact, the notice of default properly listed the amount of arrears and noted the deed of trust that was subject to foreclosure. That deed would also have put appellant on notice as to which property was in jeopardy.

Id. at 112. Thus, even where technical errors exist, and a borrower is in

default, foreclosure may nonetheless proceed in the absence of prejudice.[12]

Nothing about the notices themselves caused prejudice to Bavand, as they accurately identified Chase as the secured party with a right to foreclose on the Property. Given the absence of prejudice, Bavand's DTA-based claim was properly deemed unsuccessful to survive summary judgment on this basis alone.

ii. The Notice of Default.

Under the DTA, a notice of default may be delivered by the beneficiary, its agent, *or* the trustee. *See* RCW 61.24.030(8); *see also* RCW 61.24.031(1)(a); *see also Klinger v. Wells Fargo Bank, NA*, 2010 WL 4237849 (W.D. Wash. 2010). Washington courts have long recognized that even "an employee, agent, or subsidiary of a beneficiary" can be a trustee. *Singh v. Federal Nat'l Mortg. Ass'n, supra.* at *4, *citing Meyers Way Dev. LP v. Univ. Savings Bank*, 80 Wn. App. 655, 910 P.2d 1308 (1996), *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985).

Prior to its appointment as successor trustee, NWTS did not

[12] In *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034 (9th Cir. 2011), the Ninth Circuit Court of Appeals lists several examples of actionable prejudice. Other examples might include: if a sale notice alleged that the sale would take place on a Friday, but instead it took place the day before, such information would materially violate the DTA and prejudice the borrower. *See* RCW 61.24.040(5). Or, if a notice informed the borrower that he or she could reinstate the loan up to five days, as opposed to eleven days, prior to the sale. *See* RCW 61.24.090.

possess any statutory duties with respect to DTA requirements. *Cf.* Brief of Appellant at 38.[13] Nonetheless, Bavand asserted that NWTS "materially failed to comply with portions of the DTA" by not identifying the Note holder in the Notice of Default. *Id.*

Although this allegation does not appear to specifically form a basis for the "wrongful foreclosure" claim stated in ¶¶ 4.2-4.8 of Bavand's Complaint, it primarily relates to RCW 61.24.030(8), concerning the Notice of Default's contents. CP 1844-47.

The Notice of Default need not specifically identify the "note holder." *See* RCW 61.24.030(8)(l); *cf.* Brief of Appellant at 38.[14] Nonetheless, the subject Notice correctly names Chase as the beneficiary. CP 1671. This identification was not material or prejudicial to Bavand, and does not suggest liability against NWTS, for a number of reasons.

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[13] Bavand is incorrect that NWTS was appointed as successor trustee on the same date it issued the Notice of Default. Brief of Appellant at 41. This is yet another example of Bavand's misreading of the DTA in order to suggest malfeasance. The Appointment was recorded on February 2, 2011 – one day after the Notice of Default – and became valid upon its recordation, not its execution. RCW 61.24.010(2); *see also* CP 1673.

[14] Interestingly, Bavand herself lacks knowledge as to the requirements of RCW 61.24.030(8)(l):

> Q. But you would agree earlier you testified that according to the notice of default there was information about the note.
>
> A. It says as required by 61.24.030(8)(1). *I don't know what that means. I don't know what form of notice 61.24.030(8)(l) requires and whether we received that or not.*

CP 1698 at 152:3-9 (emphasis added).

First, the Notice of Default provided relevant and accurate information to Bavand – namely, the identification of Chase as the party to whom she could provide payments, negotiate a loan modification, or coordinate reinstatement. Chase is also named as the creditor to whom the debt is owed. These details are consistent with the Supreme Court's concerns in *Bain*, which reaffirm the importance of a note holder being the beneficiary. *See Bain*, 175 Wn.2d at at 118 ("there are many different scenarios, such as when homeowners need to deal with the holder of the note to resolve disputes or to take advantage of legal protections....").

Second, Bavand asserts the existence a technical, non-material error in one document that cannot indefinitely prevent foreclosure absent a showing of prejudice. Bavand's loan was in default due to her failure to make payments as required by the Note and Deed of Trust, and she failed to timely cure her default. *See Wilson v. Bank of America et al.*, 2013 WL 275018, *8 (W.D. Wash. Jan. 24, 2013), *citing Cervantes*, 656 F.3d at 1044. Moreover, Bavand's Complaint does not even assert that the Notice of Default was of material consequence to *her*; rather she alleged that NWTS "knew or should have known" not to identify Chase in that document. CP 1846 at ¶ 4.8. As a result, Bavand suffered no harm from the accurate designation of Chase as the beneficiary.

Third, Bavand also contends that the Notice of Default should have included a "Beneficiary Declaration," but the DTA does not require a borrower to receive that document. Brief of Appellant at 38; *cf.* RCW 61.24.030(7). Under RCW 61.24.030(7)(a), the trustee – not the borrower – is entitled to receive a beneficiary declaration.

But even if Bavand is referring to the loss mitigation declaration that RCW 61.24.031 often requires to be provided with a Notice of Default, that provision was inapplicable with respect to this Property because it was not owner-occupied. *See* CP 1694 at 35:13-20; *but see* RCW 61.24.031(7)(a). NWTS cannot be liable for failing to provide Bavand with documents that need not have been tendered to her.

In sum, the Notice of Default contained no materially prejudicial information, did not result in a completed trustee's sale, and did not injure Bavand in any alleged manner. There was nothing "wrongful" about the Notice of Default's issuance.

iii. The Appointment of Successor Trustee.

A trustee can either be replaced by the beneficiary, or it may resign. *See* RCW 61.24.010(2). Here, Chase – the beneficiary – made the appointment of NWTS as the successor trustee. *Id.* This Appointment

was executed by an individual based on a recorded Power of Attorney. CP 1688-90.

A power of attorney is a written instrument by which one person, as principal, appoints another as agent, and confers on the agent authority to act in the place of the principal for the purposes set forth in the instrument. *Bryant v. Bryant*, 125 Wn.2d 113, 118, 882 P.2d 169 (1994). Washington courts have historically applied agency law principles to actions taken under the DTA. *See, e.g.*, *Bain*, 175 Wn.2d at 106; *Udall v. T.D. Escrow Servs., Inc.*, *supra*. at 911-14.

Bavand heavily relies on a federal district court decision in *Knecht v. Fid. Nat'l Title Ins. Co.*, 2014 WL 4057148 (W.D. Wash. Aug. 14, 2014). Brief of Appellant at 20, *inter alia*. However, she conveniently ignores an earlier decision from the same case, where the court held that a borrower lacks authority to disavow an attorney-in-fact relationship concerning an Appointment of Successor Trustee. *See Knecht v. Fid. Nat'l Title Ins. Co.*, 2013 WL 7326111 (W.D. Wash. Mar. 11, 2013).

Here, the Power of Attorney expressly grants authority for the execution of foreclosure-related documents, including an Appointment of Successor Trustee, and discloses Chase is the principal giving these rights. *Id.* NWTS did not appoint itself as the trustee, and NWTS should not be

liable for a DTA violation based on Chase's delegation of authority and decision-making.

iv. The Beneficiary Declaration.

The DTA requires a trustee to have "proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust" before recording a Notice of Trustee's Sale. RCW 61.24.030(7)(a). One possible means of accomplishing this requirement is through a declaration averring that "the beneficiary is the actual holder of the promissory note or other obligation." *Id.*[15]

Moreover, "[u]nless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection." RCW 61.24.030(7)(b) (emphasis added); *see also In re Brown*, 2013 WL 6511979, *9 n. 23 (B.A.P. 9th Cir. Dec. 12, 2013) ("a statement that the beneficiary is a note holder suffices.").

This Court's decision in *Trujillo v. NWTS*, -- Wn. App. --, 326 P.3d 768 (2014), is dispositive as to Bavand's allegations relating to the beneficiary declaration. Trujillo argued that, because RCW 61.24.030(7)

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[15] Nowhere does this law require a trustee to have a declaration from the note owner, nor does it suggest that the holder must *also* be the owner. *Cf.* Brief of Appellant at 30.

requires a trustee to obtain proof of a note's owner before recording a sale notice, the beneficiary and owner "must be the same person." Brief of Appellant, Case No. 70592-0-I, at 13. Just like Bavand, Trujillo contended "if anyone other than the *owner* of the promissory note (i.e., the beneficiary) provides the declaration," RCW 61.24.030(7)(a) has been violated. *Id.* at 15 (emphasis in original).

However, as this Court held, "[i]t is the status of holder of the note that entitles the entity to enforce the obligation. Ownership of the note is not dispositive." 326 P.3d at 775. *Trujillo* correctly identifies that, under the UCC, the authority to foreclose on a secured note is not affected by ownership interests in the debt instrument. *See also In re Veal*, 450 B.R. 897, 912 (B.A.P. 9th Cir. 2011) ("the [borrower] should be indifferent as to who owns or has an interest in the note").

Trujillo's analysis of "beneficiary" for purposes of a DTA-based claim was recently cited by the United States Bankruptcy Court for the Western District of Washington. *In re Butler*, *supra.* at 657.[16] Like

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[16] Other courts have already adopted *Trujillo*'s reasoning. *See, e.g., Brodie v. NWTS, supra.*; *Stafford v. SunTrust Mortgage Inc., supra.*; *Bateh v. Wells Fargo Bank, N.A.*, 2014 WL 3739511 (W.D. Wash. July 29, 2014). Even *Knecht* finds that: "*Trujillo* suffices to dispense with Mr. Knecht's argument that the beneficiary declarations on which Fidelity relied are invalid because they do not declare anyone to be the 'owner' of his note." 2014 WL 4057148 at *7.

Trujillo, *Butler* also looks to *Bain* and the UCC definition of "holder". *Id.* at *13, *citing* RCW 62A.1-201(a)(21) ("'holder' means '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.'") (emphasis omitted).

Butler also finds that Washington law permits possession of a note through an agent. *Id.* at *14, *citing Bain* at 106, Permanent Editorial Board for the UCC, Application of the UCC to Selected Issues Relating to Mortgage Notes, p. 7 (Nov. 14, 2011). *Butler* correctly concludes that no DTA violation occurred when the note holder executed a beneficiary declaration, despite Freddie Mac's presence as investor, *i.e.*, owner. *Id.* at *3, 18.

Additionally, state law does not mandate that Bavand should have been provided a copy of the Beneficiary Declaration, nor is it publicly-recorded. It is inconceivable that one can be prejudiced or injured from something never seen, received, or relied upon. *See Massey v. BAC Home Loans Serv. LP*, 2013 WL 6825309 (W.D. Wash. Dec. 23, 2013), *citing Zalac v. CTX Mortg. Corp.*, 2013 WL 1990728 (W.D. Wash. May 13, 2013) ("the issue of ownership... is largely immaterial to the issues before the Court.... [U]nder Washington law, the focus of the analysis is on who

is the *holder* of the note, and thus the *beneficiary*....") (emphasis in original). Thus, the *immateriality* of an ownership interest with respect to the foreclosure process results in NWTS not having committed a *material* violation of the DTA through its reliance on Chase's declaration.

This Court should not accept Bavand's invitation to overrule its well-reasoned *Trujillo* decision. Brief of Appellant at 29. RCW 61.24.030(7) was designed as a safe harbor to protect trustees, not a sword to be used when borrowers seek to undermine a foreclosure's validity. *See US Bank Nat'l Ass'n v. Woods*, 2012 WL 2031122 (W.D. Wash. Jun. 6, 2012) (finding the borrower's claim of a violation under RCW 61.24.030(7) is "without merit.").

Bavand presented no evidence below in contravention to the beneficiary declaration's statement of Chase's authority, and her conjecture "as to who might be the true and lawful owner and holder of the subject obligation" does not compel reversal of the trial court's ruling. *Compare* Brief of Appellant at 30; *Trujillo*, 326 P.3d at 774 ("[a]bsent conflicting evidence, the declaration should be taken as true....").

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v. NWTS Acted in Good Faith.

In terms of NWTS' adherence to its statutory duties, RCW 61.24.010(3) provides that a "trustee or successor trustee shall have *no fiduciary duty* or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust." (Emphasis added.) Yet, Bavand emphatically and erroneously asserts that NWTS breached a "fiduciary duty" that it does not have. Brief of Appellant at 36.

In *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013), the Supreme Court addresses a trustee's "fiduciary duty," although as the concurrence notes, such duty existed in *Klem* only because *the underlying facts dated from an earlier version of the Deed of Trust Act.*[17]

As Chief Justice Madsen notes:

> [t]he majority repeatedly refers to the fiduciary duty of the trustee. In the present case, the trustee owed fiduciary duties because among other things the nonjudicial foreclosure sale occurred early in 2008. However, the judicially imposed 'fiduciary' standard applies, at the latest, only in cases arising prior to the 2008 amendment of RCW 61.24.010. The 2008 amendment expressly rejected the 'fiduciary' standard.

Id. Thus, contrary to Bavand's position, the current statute provides: "[t]he trustee or successor trustee has a duty of good faith to the borrower,

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[17] This version of the DTA – also relied upon in *Walker, supra.* – did not have a "beneficiary declaration" requirement.

beneficiary, and grantor." RCW 61.24.010(4).[18]

In *Trujillo*, this Court noted that citing cases like *Klem* or *Schroeder v. Excelsior Mgmt. Grp.*, 177 Wn.2d 94, 297 P.3d 677 (2013), do not establish a violation of the good faith duty without factual support. *Id.* However, neither Bavand's Complaint nor her opposition to summary judgment described any specific violation of NWTS' duty of good faith besides issuing notices based on Chase's true representation of its status as Note holder. *See* Brief of Appellant at 36-37; CP 1847 at ¶ 4.8.

Bavand further suggests that NWTS also possessed "a duty to verify" the beneficiary declaration and "verify the ownership of the obligation" in some other manner. Brief of Appellant at 37. But there is *no* statutory authority or controlling case law directing NWTS to conduct an additional investigation and "confirm" certain issues regarding the sworn declaration they received.

The *only* opinion Bavand references to bolster her claim is *In re*

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[18] In general, "good faith" is also the "absence of intent to defraud or to seek unconscionable advantage." *See* Black's Law Dictionary, 701 (7th ed. 1999); *see also Indus. Indem. Co. of the Northwest, Inc. v. Kallevig*, 114 Wn.2d 907, 792 P.2d 520 (1990). (A "covenant of good faith and fair dealing cannot be read to prohibit a party from doing that which is expressly permitted by an agreement.").

Meyer, 506 B.R. 533 (Bankr. W.D. Wash. 2014).[19] *Meyer* found that NWTS could not rely on the representation of U.S. Bank as beneficiary, through its attorney-in-fact Wells Fargo, even though the Meyers failed to inform NWTS of any alleged defects, and even though the Court agreed that NWTS was able to prove "U.S. Bank, as trustee for GEL2, was the holder of the Note and that GEL2 was the owner of the Note." *Id.*

Nonetheless, the record in *Meyer* plainly showed the existence of "three separate Limited Power of Attorney documents... [showing] Wells Fargo acted as attorney-in-fact for U.S. Bank...." *Id.* Bavand cannot legitimately propose NWTS violated its good faith duty to her based on a record specific to a bankruptcy case that has no relevance in this proceeding.

Meyer's conclusion has also been rejected by other federal judges. In addressing whether a trustee has an "affirmative duty of investigation," the Hon. Chief Judge Pechman of the Western District of Washington found in *Mickelson v. Chase Home Fin. LLC*, that:

> [t]he duty of good faith does not create a duty to conduct an independent verification of sworn affidavits. This expansive view

[19] *Meyer* is on appeal before the Hon. Judge Martinez of the Western District of Washington. Case No. 14-00297-RSM. It is ironic that Bavand disparages citations to federal court decisions while touting *Meyer* as persuasive. Brief of Appellant at 14.

> of good faith remains untenable. NWTS relied, as they are specifically permitted to do, on a declaration made under penalty of perjury. They did not breach their duty of good faith in so doing.[20]

2012 WL 6012791, *3 (W.D. Wash. Dec. 3, 2012), *aff'd*, 2014 WL 2750133 (9th Cir. June 18, 2014); *see also In re Butler*, *supra*. at 657 (NWTS "had no duty to undertake an independent investigation."); *Zalac v. CTX Mortg. Corp.*, *supra*. at *2.[21]

If the Legislature intended for trustees to somehow "inquire" into a beneficiary declaration's validity or other aspects of the beneficiary's right to foreclose, it could have easily included those mandates into the DTA during each of several amendments to the Act over the past few years – but the Legislature has never compelled trustees to verify or double-check the declaration they receive. This Court should also decline an invitation to create law where none exists. *See Spokane Methodist Homes, Inc. v. Dep't of Labor & Indus.*, 81 Wn.2d 283, 288, 501 P.2d 589, 592 (1972),

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[20] *Mickelson* adds that"Plaintiffs would have every trustee conduct a secondary investigation into the papers filed by the beneficiary, which is simply too great a demand." *Id. See also Hallquist v. United Home Loans, Inc.*, 715 F.3d 1040, 1048 (8th Cir. 2013) ("[I]n the absence of unusual circumstances known to the trustee, he may, upon receiving a request for foreclosure…, proceed upon that advice without making any affirmative investigation and without giving any special notice to the debtor.").

[21] The Court in *Zalac* found, based on a similar set of facts, that the authority to foreclose was derived from possession of a note indorsed in blank, regardless of the plaintiff's claim it "knew or should have known the actual holder to be Fannie Mae." *Id.*, *3. Every claim in *Zalac* was dismissed under Fed. R. Civ. P. 12(b)(6).

citing Anderson v. City of Seattle, 78 Wn.2d 201, 471 P.2d 87 (1970) ("[i]t is not the prerogative of the courts to amend the acts of the legislature."); *see also Udall v. T.D. Escrow Servs., Inc., supra.* at 909, *quoting Tingey v. Haisch,* 159 Wn.2d 652, 657, 152 P.3d 1020, 1023 (2007) (" '[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.' ").

Here, the sworn declaration from Chase is unambiguous concerning its status as Note holder, and NWTS received this declaration prior to recording the Notice of Trustee's Sale. *Compare* CP 1677, CP 1679. Both RCW 61.24.010(4) and RCW 61.24.030(7) were therefore followed.

vi. The Notice of Foreclosure.

Bavand argues that the Notice of Foreclosure which accompanies the Notice of Trustee's Sale failed to comply with the "statutory form provided in RCW 61.24.040(2)." Brief of Appellant at 38. This claim, however, is found nowhere in Bavand's Complaint and should be disallowed on appeal. CP 1836-1976; *see also Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008); *Malstrom v. Kalland*, 62 Wn.2d 732, 735, 384 P.2d 613, 616 (1963) (appellate court will not "search the record for error, or... try the case de novo....").

But even on the merits, Bavand's attack on the Notice of Foreclosure is resolved by *Trujillo*, where this Court finds:

> [t]his form is nothing more than that [*i.e.*, an attachment to a notice]. It does not state the law. Our discussion earlier in this opinion extensively discusses the controlling law. In any event, the statute states that the form need only be 'substantially' followed.

326 P.3d at 780, *citing* RCW 61.24.040(2).

The Notice of Foreclosure suddenly at issue informed Bavand that the "attached Notice of Trustee's Sale is a consequence of default(s) in the obligation to the Beneficiary of your Deed of Trust…." CP 1683. The accompanying Notice of Trustee's Sale – which never resulted in an actual sale – plainly identifies "JPMorgan Chase Bank, National Association, successor by merger to Chase Home Finance LLC," and specifies that Chase is also the beneficiary of record with the County Auditor. CP 1679.

Despite Bavand's statements to the contrary, she knew that Chase had been assigned the Deed of Trust, she knew Chase was the proper recipient for correspondence related to the loan, and she obtained numerous letters from Chase which offer assistance regarding her delinquency on the loan. *See* CP 1391 at ¶¶ 6, 9; CP 1128-1265 (Dec. of Counsel Jones at "Chase 0476-0613"). It is hard to believe that Bavand's so-called efforts to "modify or renegotiate" the loan were frustrated by

NWTS' Notice of Foreclosure when she was sent over 100 pages of letters from Chase explaining how to pursue a workout and avoid foreclosure. Brief of Appellant at 39; *compare* CP 1394 at ¶ 13; CP 1128-1265 (Dec. of Counsel Jones at "Chase 0476-0613").

Given the Supreme Court's principal concern in *Bain* was that "the beneficiary must hold the promissory note," and this Court's holding in *Trujillo*, not including a mention of Fannie Mae in the Notice of Foreclosure was neither a material defect in compliance with the DTA nor was it prejudicial to Bavand. See 175 Wn.2d at 102, 120.

vii. The Notice of Trustee's Sale.

Bavand next argues that NWTS "*appeared* to have engaged in a practice of falsely dating mandated foreclosure documents," *i.e.*, the Notice of Trustee's Sale itself. Brief of Appellant at 39 (emphasis added). Bavand bases her assumption of an "appearance" on the use of an "effective date" in the Notice. *Id.*

Bavand alleges that NWTS acted in a manner similar to the *Klem* trustee, but the facts are distinguishable. In *Klem*,

> [t]he plaintiff submitted evidence that the purpose of *predated* notarizations was to *expedite the date of sale* to please the beneficiary. Given the evidence that if the documents had been properly dated, the earliest the sale could have taken place was one week later. The plaintiff also submitted evidence that with one

> more week, it was 'very possible' Puget Sound Guardians [acting on the borrower's behalf] could have closed the sale [and prevented foreclosure]."

176 Wn.2d at 795 (2013) (emphasis added).

By comparison, the record here includes testimony that NWTS "routinely include[s] an 'effective date' on the Notice of Sale which evidences the date that all figures in the Notice are good through (i.e. Section III in this document)." CP 1703 at ¶ 10. The unambiguous declaration of NWTS' Director of Operations states that, "NWTS' policy is that all notarizations of documents occur upon their execution, which is evidenced in this case as May 8, 2012." *Id.*

Bavand may not believe this declaration, but she offered no *evidence* in opposition to it. *See Laguna v. Wash. State Dep't of Transp.*, 146 Wn. App. 260, 266, 192 P.3d 374, 377 (2008), *quoting Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 626, 818 P.2d 1056 (1991) ("An issue of credibility is present only if the party opposing the summary judgment comes forward with evidence which contradicts or impeaches the movant's evidence on a material issue.").

Instead, as a substitute for actual proof, Bavand speculates that the word "effective" must mean something other than what was testified to.

Brief of Appellant at 40.[22] These are the very sort of "unsupported conclusory allegations" and "argumentative assertions" that this Court has held cannot defeat summary judgment. *See Vacova Co., supra.* at 395.

A Notice of Trustee's Sale must contain some date upon which arrearage figures are effective. RCW 61.24.040(1)(f)(III, IV) (Notice must include information on "the following amounts which are now in arrears."). Consequently, the Notice of Trustee's Sale issued to Bavand included a reinstatement amount as of May 2, 2012 – the very same "effective date" Bavand claims "makes no sense." Brief of Appellant at 40; CP 1679-82. But it makes perfect sense that the Notice lists arrearage figures as of the date it is drafted, because otherwise a trustee would be utilizing either outdated or speculative amounts. This fact does not mean that the Notice of Trustee's Sale was falsely notarized or recorded in a manner that violated NWTS' duty of good faith.

The Notice of Trustee's Sale, like all the other foreclosure documents impugned by Bavand, complied with the DTA. There was no error below on this issue.

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[22] It is illogical to suggest that notarizing a document *later* in time would have resulted in speeding up the sale process like in *Klem*. The key date of recordation occurred after the Notice of Trustee's Sale at issue here was signed and notarized. RCW 61.24.040(1)(a).

viii. Prior Cases From This Court Do Not Help Bavand Establish a DTA Violation.

Bavand cites to certain opinions from this Court, but each of those cases contained markedly different facts from the case at bar. Brief of Appellant at 47, *inter alia*.

For instance, in *Bavand v. OneWest Bank, FSB* – one of several other lawsuits Bavand has pursued – this Court could not identify the beneficiary based on a limited record; the Court observed that it did not have "any declaration or affidavit explaining more." 176 Wn. App. 475, 498, 309 P.3d 636 (2013). Here, such declaration exists, plus the Court can rely on the multiple documents and declarations corroborating Chase's status as Note holder and Bavand's knowledge that Chase was the right party to communicate and negotiate with. CP 1128-1265 (Dec. of Counsel Jones at "Chase 0476-0613"); CP 1554 at ¶ 3; CP 1669-71, CP 1677.

In *Walker v. Quality Loan Serv. Corp.*, this Court, accepting the factual allegations as true under CR 12(b)(6), found a DTA violation due to an appointment before "MERS purported to assign [the] note." 176 Wn. App. at 308. By contrast, nothing in the record below suggests MERS asserted possession of the Note, attempted to effectuate transfer the Note, or took actions in furtherance of foreclosure.

Walker does not address what constitutes an injurious material violation of the DTA, nor does it analyze the content of any foreclosure notices; rather, the limited analysis was premised entirely on the alleged unlawful appointment of the successor trustee. Indeed, the Notice of Default never made it into the record in *Walker*, "and it is unclear from the record which party mailed the notice to Walker." *Id.* at 303, n.2. Here, the evidence is quite different, and we know precisely when the relevant notices were sent and by whom. CP 1702-03 at ¶¶ 6, 9.

Neither *Bavand* nor *Walker* can defeat the overwhelming documentation establishing Chase's status as beneficiary, and NWTS' subsequent compliance with all aspects of the DTA.

3. Bavand's CPA Claim.

A CPA violation requires:

> (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.

Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 37, 204 P.3d 885, 889 (2009), *citing Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986). The failure to meet any one of these elements is fatal and necessitates dismissal. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002).

a. There Was No Unfair or Deceptive Practice Affecting the Public.

CPA liability requires an act or practice with either: 1) "a capacity to deceive a substantial portion of the public," or 2) that "the alleged act constitutes a per se unfair trade practice." *See Saunders v. Lloyd's of London*, 113 Wn.2d 330, 779 P.2d 249 (1989), *quoting Hangman Ridge, supra*; *see also* RCW 19.86.093. "Implicit in the definition of 'deceptive' under the CPA is the understanding that the practice misleads or misrepresents something of material importance." *Holiday Resort Comm. Ass'n v. Echo Lake Assoc., LLC*, 134 Wn. App. 210, 135 P.3d 499 (2006). An "act performed in good faith under an arguable interpretation of existing law does not constitute unfair conduct violative of the consumer protection law." *Leingang v. Pierce Co. Med. Bureau, Inc.*, 131 Wn.2d 133, 930 P.2d 288 (1997).

The record shows that NWTS' conduct was not contrary to a specific statute giving rise to a *per se* CPA violation. *Accord In re Brown*, *supra.* (DTA contains a list of *per se* violations which do not include plaintiff's allegations); *Babrauskas v. Paramount Equity Mortg.*, 2013 WL 5743903 (W.D. Wash. Oct. 23, 2013) ("Plaintiff offers no support for his theory that a violation of the DTA is a per se violation of the CPA"). Thus, the

only method by which Bavand could possibly establish a CPA cause of action was to show that NWTS engaged in conduct with a capacity to deceive a substantial portion of the public. *See Saunders, supra.* at 344, *quoting Hangman Ridge* at 785.

Bavand's Opening Brief conspicuously omits mentioning NWTS in connection with the CPA. Brief of Appellant at 42-43. Rather, Bavand points to MERS and its role in both the Deed of Trust and Assignment as constituting unfair or deceptive practices. *Id.* However, Bavand's argument does not transmute liability onto NWTS.

b. NWTS is Not Responsible for Claims of Unrelated Conduct.

In *Bain*, the Washington Supreme Court found that MERS's representation that it was the beneficiary of the Deed of Trust in its own right – rather than as an agent for a disclosed principal – had the capacity to deceive within the meaning of the CPA because MERS was not the Note holder. 175 Wn.2d at 117.[23] The Supreme Court also held, however, that "[t]he mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury." *Id.* at 120.

[23] On remand, MERS received summary judgment on the CPA claims of both Ms. Bain and co-Plaintiff Mr. Selkowitz. *See Selkowitz v. Litton Loan Serv., LP*, King County Superior Court Case No. 10-2-24157-4 KNT (Jul. 24, 2014); *Bain*, King County Superior Court Case No. 08-2-43438-9 SEA (Aug. 30, 2013).

The relevant question certified to the Supreme Court was: "[d]oes a homeowner possess a cause of action *against Mortgage Electronic Registration Systems, Inc.*, if MERS acts as an unlawful beneficiary under the terms of the Washington [DTA]?" *Id.* at 115. Nothing in the *Bain* decision, or any case in Washington, holds that the first element of a CPA claim is satisfied against a non-judicial foreclosure trustee. *See generally Cagle v. Abacus Mortg., Inc.*, 2014 WL 4402136, *3 (W.D. Wash. Sept. 5, 2014), *citing Kullman v. NWTS,* 2012 WL 5922166, *2 (W.D. Wash. 2012), *Peterson v. CitiBank, N.A.*, 170 Wn. App. 1035, 2012 WL 4055809, at *4 (2012); *Lynott v. MERS, supra.* at *2 ("*Bain* did not... create a per se cause-of-action based solely on MERS's involvement."), *Zalac v. CTX Mortg. Corp., supra.* at *3, *citing Bain* at 120; *Florez v. OneWest Bank, F.S.B.*, 2012 WL 1118179 (W.D. Wash. Apr. 3, 2012) (authority to foreclose based on holding note, independent of MERS), *Bhatti v. Guild Mortg. Co.*, 2011 WL 6300229 (W.D. Wash. Dec. 16, 2011), *aff'd,* 2013 WL 6773673 (9th Cir. Dec. 24, 2013) (no declaratory relief based on MERS's capacity as nominee in deed of trust).

Because NWTS was not a party to the loan's origination, it did not participate in executing the Deed of Trust, and thus made no representation

that MERS was a Note holder in its own right.[24] The Notice of Trustee's Sale compels a description of the original Deed of Trust, listing MERS as a nominee for the Lender, its successors and assigns, but it did not assert that MERS is the beneficiary or attempting to foreclose. *See* CP 1679-82; *see also* RCW 61.24.040(1)(f). According to *Bain*, any public interest impact would relate to MERS's actions – whatever they may have been – and not those of NWTS. *Accord Estribor v. Mtn. States Mortg.*, 2013 WL 6499535, *6 (W.D. Wash. Dec. 11, 2013) ("[t]he deed of trust clearly states MERS is a nominee for the lender and lender's successors and assigns. It is unclear how actions within that capacity are unfair or deceptive.").

In *Myers v. MERS, Inc. et al.*, the Ninth Circuit Court of Appeals affirmed the Fed. R. Civ. P. 12(b)(6) dismissal of a claim for "wrongful foreclosure" and a "violation of the [DTA]," in addition to claims of fraud, a breach of good faith, the CPA, and gross negligence. 2013 WL 4779758 (9th Cir. Sept. 9, 2013). The District Court opinion upheld in *Myers* rejected the notion that "MERS's involvement taints the foreclosure

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[24] The naming of MERS in the Deed of Trust as a basis for a CPA violation was also time-barred under the four-year statute of limitations applying to claims under RCW 19.86.120. *See Ward v. Stonebridge Life Ins. Co.*, 2013 WL 3155347 (W.D. Wash. Jun. 21, 2013), *citing Moratti v. Farmers Co. of Wash.*, 162 Wn. App. 495, 254 P.3d 939 (2011).

process." *Myers v. MERS, Inc. et al.*, 2012 WL 678148 (W.D. Wash. Feb. 24, 2012). The District Court further found that the plaintiff failed "to allege that MERS took any action in regards to him... [or that] MERS initiated or participated in the foreclosure process in any way." *Id.* at *6.

Moreover, the District Court correctly recognized "the bottom line;" namely that Flagstar (in that action) was "empowered as the beneficiary to appoint the trustee because it holds [the] Note, not because of the Assignment [of Deed of Trust]." *Myers*, 2013 WL 4779758 at *2.[25] The same conclusion was warranted in this case as well.

Likewise, *Bain* should not be stretched to infer presumptions against NWTS, or to suggest it is liable under the CPA – especially when Bavand fails to argue that NWTS acted in an unfair or deceptive manner. *See State v. Johnson*, 119 Wn.2d 167, 829 P.2d 1082 (1992) (argument not properly briefed will not be considered); *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232, 239 (2004), *citing State v. Dennison*, 115 Wn.2d 609, 801 P.2d 193 (1990) ("[w]e need not consider arguments that are not developed in the briefs and for which a party has not cited authority.").

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[25] In *Coble v. SunTrust Mortgage, Inc. et al.*, the Hon. Judge Coughenour of the Western District of Washington addressed this issue, and found that "the presence of MERS on the deed of trust is not fatal." 2014 WL 631206, *4 (W.D. Wash. Feb. 18, 2014). *Coble* resulted in the dismissal of both DTA and CPA claims against the trustee. *Id.*

c. Bavand Identified No Impact on the Public Interest.

"The public interest in a private dispute is not inherent." *Tran v. Bank of America*, 2013 WL 64770 (W.D. Wash. Jan. 4, 2013), *citing Hangman Ridge*, *supra.* at 790; *see also Segal Co. (Eastern States), Inc. v. Amazon.com*, 280 F.Supp.2d 1229, 1234 (W.D. Wash. 2003) (granting motion to dismiss CPA claim as allegation "on information and belief that defendant engages in a 'pattern and practice' of deceptive behavior" is insufficient to meet public interest requirement); *but see Bain* at 118 ("*considerable evidence* that MERS is involved with an enormous number of mortgages in the country (and our state), perhaps as many as *half nationwide*.") (emphasis added). As the Hon. Judge Lasnik of the Western District of Washington states in *McCrorey v. Fed. Nat. Mortg. Ass'n*, "[t]he purpose of the CPA is to protect consumers from harmful practices, which is why plaintiff must allege an actual or potential impact on the general public, not merely a private wrong." 2013 WL 681208 (W.D. Wash. Feb. 25, 2013).

All of Bavand's claims in the Complaint exclusively related to conduct directed at her personally, *i.e.*, whether NWTS had authority to commence foreclosure of the Property, whether NWTS properly issued the

Notice of Default, whether NWTS could rely on Chase's declaration. These acts did not, and could not, have the capacity to deceive other individuals, let alone a substantial portion of the general public.

Importantly, Bavand's opposition to summary judgment offered *nothing whatsoever* on how the public was likely affected by NWTS' conduct in the subject uncompleted foreclosure. Therefore, Bavand did not meet her burden of proving the public interest prong of the CPA test.

d. NWTS Did Not Cause Injury to Bavand.

CPA liability requires a causal link between the alleged misrepresentation or deceptive practice and the purported injury. *Hangman Ridge*, *supra* at 793. On causation, the Washington Supreme Court instructs that if the expense would have been incurred regardless of whether a violation existed, causation is not established. *See Panag*, *supra*. at 64. A plaintiff must prove that the "injury complained of... would not have happened" if not for defendant's acts. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 82, 170 P.3d 10 (2007).

The Supreme Court, in *Bain*, cites to *Bradford v. HSBC Mortgage Corp.*, 799 F.Supp.2d 625 (E.D. Va. 2011), for an example of an injury in the foreclosure context. 175 Wn.2d at 119. In *Bradford*, three different

companies attempted to foreclose on Bradford's property after he attempted to rescind a mortgage under the federal Truth in Lending Act. All three companies claimed to hold the promissory note. Observing that "[i]f a defendant transferred the Note, or did not yet have possession or ownership of the Note at the time, but nevertheless engaged in foreclosure efforts, that conduct could amount to a [Fair Debt Collection Practices Act, 15 U.S.C. § 1692k] violation." *Id.* There was nothing like the harm in *Bradford* alleged here.

As the Ninth Circuit Court of Appeals recently held concerning a CPA claim in the foreclosure context:

> Plaintiffs' foreclosure was not caused by a violation of the DTA because Guild [the foreclosing entity] was both the note holder and the beneficiary when it initiated foreclosure proceedings, and therefore the 'cause' prong of the CPA is not satisfied.

Bhatti v. Guild Mortg. Co., 2013 WL 6773673, *3 (9th Cir. Dec. 24, 2013).

In the same way, none of Bavand's purported injuries were proximately caused by NWTS. Brief of Appellant at 45; *cf. Demopolis v. Galvin*, 57 Wn. App. 47, 786 P.2d 804 (1990) (litigation expenses are *not* an "injury" under the CPA); *see also Mickelson v. Chase Home Fin. LLC*, 2014 WL 2750133 (9th Cir. Jun. 18, 2014); *Massey v. BAC Home Loans*

Servicing LP, *supra.* at *8 (W.D. Wash. Dec. 23, 2013) (a "laundry list... including attorney fees, 'wear and tear' on [a] vehicle, and buying postage stamps, is inapposite."); *Gray v. Suttel & Assocs.*, 2012 WL 1067962 (E.D. Wash. Mar. 28, 2012) ("time and financial resources expended to... pursue a WCPA claim do not satisfy the WCPA's injury requirement."), *Coleman v. Am. Commerce Ins. Co.*, 2010 WL 3720203 (W.D. Wash. Sept. 17, 2010) ("The cost of having to prosecute a CPA claim is not sufficient to show injury to business or property.").

NWTS issued the foreclosure notices only *after* Bavand failed to make her loan payments, and it was Bavand's default that precipitated the commencement of foreclosure in the first place. *See Reid v. Countrywide Bank, N.A.*, 2013 WL 7801758, *5 (W.D. Wash. Apr. 3, 2013) (alleged deception in making payments to "parties who are not the true holders and owners of the Note" suggested no factual basis for injury); *Babrauskas v. Paramount Equity Mortg.*, *supra.* (plaintiff's failure to meet obligation "is the 'but for' cause of the default" and foreclosure); *McCrorey v. Fed. Nat. Mortg. Ass'n*, *supra.* (same).

Bavand's allegation that NWTS injured her is fictitious. Brief of Appellant at 45. Bavand openly admitted that she continues to *generate income* from the very property she purchased with a loan that she failed to

repay. *See* CP 1394-95 at ¶ 15. Bavand's so-called "qualified written request" sent to Chase ascribed no responsibility to NWTS, as trustees are not obligated to make any response to even a valid "QWR" under 12 U.S.C. §2605(e). Brief of Appellant at 3-4. Bavand's inability to obtain mediation could not have been caused by NWTS either, as she was *ineligible* for that process due to the property's rental status. *Compare* Brief of Appellant at 45; RCW 61.24.165 ("RCW 61.24.163 applies only to deeds of trust that are recorded against owner-occupied residential real property of up to four units.").

In sum, Bavand could not satisfy either the causation or damages prongs of her CPA claim, and the trial court correctly found in NWTS' favor.

4. Bavand's Criminal Profiteering Claim.

Bavand's final cause of action asserted a violation of RCW 9A.82 *et seq.* – the criminal profiteering law. CP 1648-50.[26] RCW 9A.82.100 restricts the nature of suits brought under that chapter (within a three-year

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[26] The definition of "criminal profiteering" is found in RCW 9A.82.010(4):

> [a]ny act, including any anticipatory or completed offense, committed for financial gain, that is chargeable or indictable under the laws of the state in which the act occurred and, if the act occurred in a state other than this state, would be chargeable or indictable under the laws of this state had the act occurred in this state and punishable as a felony and by imprisonment for more than one year....

statute of limitations) to occurrences where a person has sustained injury from "an act of criminal profiteering that is part of a pattern of criminal profiteering activity," or because of specific statutes such as relating to organized crime. *See, e.g.*, RCW 9A.82.060.[27] Bavand's assertion of a RCW 9A.82 violation was unsupported for multiple reasons.

First, a non-judicial foreclosure, even if defective under the DTA, is not listed as one of the felonies which constitute criminal conduct under Washington law, nor is compliance with the DTA a "threat."

Second, Bavand did not plead the elements of her claim with the particularity required by CR 9(b), including the "time, place, and specific content of the false representations." *See Kauhi v. Countrywide Home Loans Inc.*, 2009 WL 3169150, *4 (W.D. Wash. Sept. 29, 2012) (applying heightened pleadings standard to criminal profiteering claim). In fact, she did not offer any specific allegations relating to this claim at all; she simply tossed out general allegations implicating every Defendant. CP 1848-49 at ¶¶ 6.2, 6.3.

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[27] It is unclear whether Bavand followed RCW 9A.82.100(10). That subsection states, in relevant part: "A person other than the attorney general or county prosecuting attorney who files an action under this section shall serve notice and one copy of the pleading on the attorney general within thirty days after the action is filed with the superior court." The statute does not prescribe what Bavand's penalty for non-compliance would be, although an inability to prosecute the claim may be a reasonable outcome.

Third, several identified bases for the claim are undercut by other assertions in Bavand's Complaint. For example, she seems to believe that a trustee's sale has already occurred. *Id.* at ¶ 6.2(A) (deception allegedly affects "potential buyers [of] foreclosed properties"); CP 1849 at ¶ 6.2(C) (Defendants "exert[ed] possession and control over real property"); CP 1849 at ¶ 6.2(F) ("means by which they could resell unlawfully obtained (stolen) home of Plaintiff"). But Bavand could not possibly allege that a trustee's sale occurred, because it did not.

Fourth, the primary case Bavand relies on, *Bowcutt v. Delta North Star Corp.*, 95 Wn. App. 311, 976 P.2d 643 (1999) is distinguishable on its facts. In *Bowcutt*, the foreclosing lender did not dispute the existence of a scheme through which "Delta North Star Corporation sought out vulnerable homeowners with substantial equity in their homes…." *Id.* at 315. Division Three observed that the corporation's president was "a convicted felon and bankrupt to whom no reputable lender would advance funds…." *Id.* The corporation arranged to buy homes by persuading the homeowners to finance the purchase with a deed of trust. *Id.* Another lender financed the balance "at 25 percent interest; the entire principal was due as a balloon payment after one year." *Id.* The Court's opinion addressed whether RCW 9A.82 permitted private plaintiffs from obtaining

injunctive relief based on those uncontested allegations. That scenario presents neither the facts nor the legal issue germane to this action.

Fifth, it is unclear how a litany of other case law, including "*Bain, Klem, Schroeder, Walker, Bavand, Knecht*, etc." tended to show a genuine issue of fact in *this case*. Brief of Appellant at 47. Interestingly, NWTS was not the foreclosure trustee in any of the cited matters, so perhaps Bavand is mistaken as to how the facts of those decisions implicate NWTS in felonious misconduct.

Ultimately, Bavand's criminal profiteering claim was premised on the belief that NWTS conspired with its co-Defendants to initiate and execute an unlawful non-judicial foreclosure through filing false documents and executing false statements in various notices. CP 1848-49.[28] In other words, Bavand relied on the same flawed theories underlying her wrongful foreclosure and CPA claims.[29] There was no error in the trial court's summary judgment ruling.

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[28] Bavand's allegations need not be "accept[ed] as true under CR 56;" she confuses the applicable standard of review with CR 12(b)(6). Brief of Appellant at 47.
[29] Bavand's averments in the Complaint of "unjust fees," manipulating the interest rate, extorting payments, or reselling "stolen" property do not apply to NWTS in its capacity as trustee. CP 1849 at ¶ 6.2(D). In fact, NWTS is precluded by law from bidding at the Trustee's Sale to purchase the Property. *See* RCW 61.24.070.

B. Bavand Did Not Deserve a CR 56(f) Continuance.

A trial court "may deny a motion for a continuance when (1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact." *Butler v. Joy*, 116 Wn. App. 291, 65 P.3d 671 (2003); *see also Molsness v. City of Walla Walla*, 84 Wn. App. 393, 400, 928 P.2d 1108 (1997), *citing Coggle v. Snow*, 56 Wn. App. 499, 504, 784 P.2d 554 (1990) (standard of review is a manifest abuse of discretion). Here, Bavand failed to overcome *any* of those bases, and even one reason is sufficient under *Butler* to defeat a CR 56(f) request.

First, CR 56(f) is not intended to reward procrastination. *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999 (9th Cir. 2005).[30] Bavand's lawsuit was filed in August 2012; she then proffered twenty pages of Interrogatories and Requests for Production on NWTS in December 2012, and those were all answered within the required timeframe. CP 1283-1367 (Dec. of Counsel Jones, Ex. G). During the eighteen-month period

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[30] Washington state courts interpret CR 56(f) consistently with its federal counterpart. *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989) (looking to Fed. R. Civ. P. 56(f)).

between commencement and summary judgment, she conducted no depositions, and did not seek to follow-up on NWTS' responses to her inquiries.

Second, Bavand does not indicate how further discovery would have been of assistance to her. *See Stranberg v. Lasz*, 115 Wn. App. 396, 63 P.3d 809 (2003); *see also Molsness, supra.* at 401, *citing Lewis v. Bell*, 45 Wn. App. 192, 196, 724 P.2d 425 (1986) (mere possibility that discoverable evidence exists is not sufficient). Despite Bavand's argument, NWTS did not provide "computer dumps of information," but rather specific documents responsive to the questions presented. *Compare* CP 1317-67; Plaintiff's Response at 48. Further, Bavand's counsel made no effort to confer about supposed deficiencies in NWTS' responses but now implies that a discovery violation occurred in 2012. *Cf.* CR 26(i).

Third, Bavand does not identify how she was somehow unable to "present by affidavit facts essential to justify [her] opposition." CR 56(f). She does not state how discovery on the "ownership of the subject Note and Deed of Trust" or "agency relationships" would raise a genuine issue of material fact. Brief of Appellant at 48. Clearly she was able to produce a 49-page brief responding to every issue in NWTS' Motion for Summary Judgment, and then some. CP 1449-1497. CR 56(f) is not meant to allow

a party to claim inadequate discovery after producing comprehensive briefing in opposition to a summary judgment motion.

Fourth, Bavand's request was not properly noted for the trial court's consideration. She asserted the need for a continuance in her response to NWTS' Motion, but did not note a hearing. CP 1494. This violates the Snohomish County Local Rules, requiring service and filing with a Note for Motion form. LCR 7(b)(2).

Bavand's application for more time was both substantively and procedurally infirm, and the trial court did not abuse its discretion in denying a continuance.

IV. CONCLUSION

The record in this case demonstrates that: 1) Bavand signed the Note and secured its repayment with the Deed of Trust naming the Property as collateral (CP 1646-67); 2) Bavand agreed in the Note that if she did not "pay the full amount of each monthly payment on the date it is due," she would be in default (CP 1647, ¶ 7(B)); 3) Bavand also agreed that the Note and Deed of Trust could be sold one or more times without notice to her (CP 1658, ¶ 20); 4) Bavand knew that Chase was the correct entity to send payments to, and communicate with, concerning the loan (CP 1128-1265); 5) NWTS issued all DTA-required notices (CP1669-71;

1679-82), and 6) the trustee's sale never occurred (CP 1703 at ¶ 7).

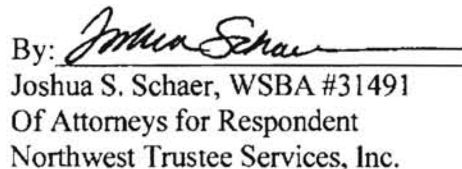
The totality of Bavand's allegations in this case disagree with Chase's authority as the beneficiary, yet they conspicuously downplay Bavand's default since September 2010 and her agreement in the loan documents that foreclosure was a proper remedy.

Throughout Bavand's Opening Brief, she argues that ownership is the key to enforcement of a secured note. This Court has declined to adopt that argument. *See Trujillo, supra.* Bavand further assails each step NWTS in the foreclosure process, but without any supporting evidence besides her mistaken legal theories.

Thus, the trial court did not err by granting summary judgment, and this Court should affirm the ruling below.

DATED this 16th day of September, 2014.

RCO LEGAL, P.S.

By: 
Joshua S. Schaer, WSBA #31491
Of Attorneys for Respondent
Northwest Trustee Services, Inc.

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

MARISA BAVAND Appellant, v. CHASE HOME FINANCE LLC; a Delaware limited liability company; FLAGSTAR BANK, FSB, a federal savings bank; FEDERAL NATIONAL MORTGAGE ASSOCIATION, a United States government sponsored enterprise; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation; NORTHWEST TRUSTEE SERVICES, INC., a Washington corporation; DOE DEFENDANTS 1-10 Respondent.	No. 71724-3-I **DECLARATION OF SERVICE**

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. That on September 16, 2014, I caused the copies of the BRIEF OF RESPONDENT NORTHWEST TRUSTEE SERVICES, INC. and

this DECLARATION OF SERVICE to be served to the following in the

manner noted below:

Richard L. Jones Kovac and Jones, PLLC 2050 112th Ave. NE, Suite 230 Bellevue, WA 98004	**[X]** US Mail, Postage Prepaid
Fred B. Burnside Ryan C. Gist Davis Wright Tremaine, LLP 1201 Third Ave., Suite 2200 Seattle, WA 98101	**[X]** US Mail, Postage Prepaid
Adam G. Hughes Katie A. Axtell Bishop, Marshall & Weibel, P.S. 720 Olive Way. Ste. 1201 Seattle, WA 98101	[X] US Mail, Postage Prepaid

I declare under penalty of perjury under the laws of the state of

Washington that the foregoing is true and correct.

DATED this 16th day of September, 2014.

RCO LEGAL, P.S.

By:
Brandi Stevens, Legal Assistant