72051-1

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No. 72051-1-I

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

ALEX BARKLEY

Appellant,

v.

GREENPOINT MORTGAGE FUNDING et al.

Respondents.

RESPONDENT NORTHWEST TRUSTEE SERVICES, INC.'S RESPONSE BRIEF ON APPEAL

Submitted By:
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I. STATEMENT OF THE CASE

A. Factual Summary.

On or about November 19, 2002, in order to refinance an existing mortgage, Appellant Alex Barkley ("Barkley") executed a promissory note (the "Note") in the amount of $291,900.00, payable to GreenPoint Mortgage Funding, Inc. ("Greenpoint"). CP 499-504. In the Note, Barkley agreed that if he did "not pay the full amount of each monthly payment on the date it is due," he would be in default. *Id.*, ¶ 7(B).

In connection with receiving this mortgage loan, Barkley also executed a number of disclosures and statements. CP 219-226. The HUD Settlement Statement evidences that Barkley's refinance resulted in a payoff of two existing loans, one to Chase Manhattan Bank and another to NW Federal Credit Union. *Id.* Barkley also received over $18,000 in the transaction, which he used to improve the subject property. *Id.*; *see also* CP 285 (Barkley Dep. at 42:21-24).

Barkley also executed a Deed of Trust securing the Note. CP 228-247. The recorded Deed of Trust encumbers a piece of real property commonly known as 3428 37th Ave. S.W., Seattle, WA 98126 (the "Rental Property"), that Barkley uses strictly for investment purposes. *Id*;

see also CP 276 (Barkley Dep. at 9:7-25).[1] Barkley agreed that the Note and Deed of Trust could be sold one or more times without prior notice to him. *Id.*, ¶ 20. He also agreed that the lender could appoint a successor trustee, who would acquire all "title, power and duties" of the original trustee. *Id.*, ¶ 24; *see also* CP 294 (Barkley Dep. at 81:9-23).

On or about January 19, 2011, as a result of Barkley's August 2010 default on payments due under the Note secured by the Deed of Trust, he was provided with a Notice of Default. CP 251-253. The Notice informed Barkley of the arrearage, then exceeding $16,000, in addition to the identity of the Note's owner (U.S. Bank) and the loan servicer (JPMorgan Chase Bank, N.A., hereinafter "Chase"). *Id.*

On or about October 18, 2012, an unequivocal sworn declaration was executed averring to U.S. Bank's status as actual holder of the Note. CP 255. On October 29, 2012, NWTS received that declaration. CP 354 (Dec. of Stenman, ¶ 6).

On November 26, 2012, an Appointment of Successor Trustee was recorded with the King County Auditor, naming NWTS as the successor

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[1] An Assignment of Deed of Trust was later recorded in favor of U.S. Bank National Association, as Trustee, Successor in Interest to State Street Bank and Trust as Trustee for Washington Mutual MSC Mortgage Pass-Through Certificates Series 2003-AR1 ("U.S. Bank"), on November 26, 2012 with the King County Auditor. CP 249.

trustee under the Deed of Trust. CP 257-259.

On December 13, 2012, a Notice of Trustee's Sale was recorded with the King County Auditor, setting sale of the Rental Property for March 15, 2013. CP 261-264.

On March 4, 2013, Barkley's counsel wrote a letter to NWTS requesting "cooperation" to postpone the scheduled sale. CP 266. On March 6, 2013, NWTS' counsel responded that the sale would be postponed to allow time for a purported review of "Barkley's loan and foreclosure documents." CP 268-269. The sale was then postponed again after Barkley's lawsuit was filed. CP 271-272. The trustee's sale did not occur. CP 354 (Dec. of Stenman, ¶ 10).

In addition to avoiding a completed foreclosure, Barkley continued to reap nearly $4,000/month in profit from using the Rental Property as a "vacation rental" while not making loan payments. CP 751-752.

B. Procedural History.

On May 22, 2013, Barkley filed a complaint against Greenpoint, U.S. Bank, Chase, Mortgage Electronic Registration Systems, Inc. ("MERS"), and NWTS. CP 1-130.

On March 14, 2014, Chase, U.S. Bank, and MERS were awarded $1,068 in attorneys' fees and costs based on a successful motion to compel

Barkley's compliance with discovery demands. CP 1351-1352.

In April 2014, all Defendants respectively moved for summary judgment. CP 187-349; CP 359-494. On May 23, 2014, the trial court granted those motions. CP 1097-1102. On June 9, 2014, Barkley filed a Notice of Appeal. CP 1105-1113.

II. NWTS' RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court did not err in accepting a sworn declaration in support of NWTS' summary judgment motion.

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

3. The trial court did not err in denying Barkley's improvident CR 56(f) request, as Barkley could not articulate a valid basis for obtaining a continuance to pursue some manner of further discovery.

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 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, and declarations, 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 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, Barkley 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. The Declaration of Jeff Stenman in Support of NWTS' Motion for Summary Judgment Was Properly Accepted.

The trial court reviewed several documents and declarations prior to its summary judgment ruling, one of which was a declaration from NWTS Vice-President and Director of Operations Jeff Stenman. CP 352-354.[2] Barkley contends that Mr. Stenman's testimony is "inadequate and

[2] Barkley also challenges the Declaration of Chase Assistant Secretary John Simionidis, which was considered as part of the documentation supporting the award of summary judgment to NWTS. CP 495-525; 1098. However, because this testimony was proffered in connection with Chase's Motion for Summary Judgment, in the interest of economy, NWTS will defer to Chase's briefing concerning the Simionidis Declaration on appeal.

unreliable" for the purpose of supporting summary judgment. Brief of Appellant at 17.

"Affidavits and declarations supporting and opposing a motion for summary judgment 'must be made on personal knowledge, set forth facts that would be admissible in evidence, and show that the affiant is competent to testify on the matter." *Nat'l Union Ins. Co. v. Puget Power*, 94 Wn. App. 163, 178, 972 P.2d 481 (1999); *see also Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988); CR 56(e). "[T]he requirement of personal knowledge imposes only a 'minimal' burden on a witness; if reasonable persons could differ as to whether the witness had an adequate opportunity to observe, the witness's testimony is admissible." *Schultz v. Wells Fargo Bank, NA*, 2013 WL 4782157 (D. Or. Sept. 5, 2013), *citing* 1 *McCormick on Evidence* § 10 (Kenneth S. Broun, 7th ed. 2013); *see also Dyno Constr. Co. v. McWane, Inc.*, 198 F.3d 567, 576 (6th Cir. 1999)[3]; *Nader v. Blair*, 549 F.3d 953, 963 (4th Cir. 2008) (custodian of records can speak from personal knowledge as to whether certain documents are admissible business records for purposes of

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[3] "[I]t is not necessary that the person laying the foundation for the introduction of the business record have personal knowledge of their preparation. All that is required of the witness is that he or she be familiar with the record-keeping procedures of the organization." *Id.*

summary judgment, even when not involved in their creation).

Courts broadly interpret the terms "custodian" and "other qualified witness" under RCW 5.45.020, the business records statute. *See State v. Smith,* 55 Wn.2d 482, 348 P.2d 417 (1960); *State v. Quincy,* 122 Wn. App. 395, 399, 95 P.3d 353 (2004); *State v. Ben-Neth,* 34 Wn. App. 600, 663 P.2d 156 (1983). In fact, the person who created the record need not be the same individual identifying it. *See Cantrill v. Am. Mail Line, Ltd.,* 42 Wn.2d 590, 257 P.2d 179 (1953); *Ben–Neth, supra.* at 603.

In *Amer. Express Centurion Bank v. Stratman*, this Court upheld the admissibility of an employee declaration expressing the contents of business and financial records. 172 Wn. App. 667, 292 P.3d 128 (2012).[4] Similarly, in *Capitol Specialty Ins. Corp. v. JBC Entm't Holdings, Inc.*, this Court also upheld a declaration although the corporate vice-president did not state personal knowledge of certain aspects related to an insurance policy. 172 Wn. App. 328, 289 P.3d 735 (2012). *Capitol Specialty Ins. Corp.* notes that the scope of knowledge "go[es] to the weight and not the admissibility" of the declaration at issue. *Id.* at 339.

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[4] *Stratman* states: "Lavarta is an American Express employee who had personal knowledge of how American Express's records were kept. His declaration indicated that the account statements were kept in the ordinary course of American Express's business and the transactions within them were recorded at the time of occurrence. The documents were properly admitted." *Id.* at 675.

Additionally, in *Discover Bank v. Bridges*, Division Two affirmed the propriety of declarations where a creditor's employees stated who they worked for, that they had access to relevant account records, testified based on personal knowledge from a review of those records, and the records were made in the ordinary course of business. 154 Wn. App. 722, 226 P.3d 191 (2010).

Here, Mr. Stenman's declaration met the same criteria as the declarations analyzed in *Bridges*. CP 352-354. Mr. Stenman, as Vice-President of NWTS, reviewed his company's business records and explained the chronology of NWTS' involvement in the subject foreclosure. *Id.*[5] Mr. Stenman also authenticated the documents provided with NWTS' Motion for Summary Judgment. *Id.*; *see also* ER 901.[6]

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[5] Ironically, Barkley references testimony from Mr. Stenman in an *unrelated* matter in order to assail NWTS' business procedures, but he refuses to accept Mr. Stenman's sworn statements concerning the timing and reliability of documentation specific to *this particular case*. Brief of Appellant at 17-18, *citing In re Meyer*, 506 B.R. 533 (Bankr. W.D. Wash. Feb. 18, 2014). Indeed, there is no evidence that the same secure website referenced in the *Meyer* trial, *i.e.*, "Vendorscape," was relied upon for information relating to the subject foreclosure. CP 352-354; *cf. id.* at 17-18. Barkley's attempt to discern parallel facts in two distinct cases cannot withstand scrutiny.

[6] CR 56(e) allows papers referred to in a declaration to be either "attached thereto *or* served therewith." Here, all documents referenced in Mr. Stenman's declaration were attached to NWTS' Motion and specifically referenced in the declaration by exhibit number, and the pleadings were served together, *i.e.* "therewith." *See, e.g., Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 749, 87 P.3d 774 (2004), *rev. denied*, 153 Wn.2d 1016 (2004) (rejecting a CR 56(e) challenge to documents attached only to another pleading).

Despite Barkley's objection to Mr. Stenman's competency as a witness, Mr. Stenman's Declaration meets the basic personal knowledge requirements of CR 56(e), and it was suitably admitted as evidence in the summary judgment hearing.

3. The Trial Court Properly Resolved Barkley's Pre-Sale DTA-Based Claims in NWTS' Favor.

Barkley's arguments concerning liability under the DTA are unavailing in light of the recent Washington Supreme Court decision holding that "the DTA does not create an independent cause of action for monetary damages where no foreclosure sale has been completed." *Frias v. Asset Foreclosure Services, Inc. et al.*, -- Wn.2d --, 334 P.3d 529 (2014); *cf.* Brief of Appellant at 2, 29.

Frias overrules earlier case law such as *Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 308 P.3d 716 (2013) on this issue, and instead confirms the holding of *Vawter v. Quality Loan Serv. Corp.*, 707 F.Supp.2d 1115 (W.D. Wash. 2010) (no pre-sale cause of action under the DTA). *Frias* is the final word confirming there is no direct DTA-based claim in Washington absent a completed foreclosure sale.

Barkley's causes of action for "wrongful foreclosure," "violation of RCW 61.24 *et seq.*," and "violation of trustee's fiduciary duty of good

faith" are not cognizable stand-alone claims under state law. ER 11-14 (Compl., ¶¶ 4.1-5.4). Consequently, the only remaining substantive issues on appeal are Barkley's CPA and Criminal Profiteering allegations.

4. NWTS Was Entitled to Prevail on Barkley's CPA Claim.

A violation of the CPA 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. A Defect in the Non-Judicial Process Must Cause Prejudice to a Borrower.

Because Barkley's CPA claim is wholly predicated on pre-sale foreclosure activities taken pursuant to the DTA, his allegations not only needed to satisfy the five-prong test set forth in *Hangman Ridge*, but long-standing case law requires a showing of prejudice in order to establish a material DTA violation. *See Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012) (Stephens, J., concurring);

Amresco Independence Funding, Inc. v. SPS Props., LLC, 129 Wn. App. 532, 119 P.3d 884 (2005); *Steward v. Good,* 51 Wn. App. 509, 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").[7]

The State Supreme Court has held because of the DTA's anti-deficiency provision – providing that after a non-judicial foreclosure, a borrower is absolved of any further liability on the Note, even if the foreclosure is wrongful – that where, as here, a borrower is in default and cannot cure, that borrower is economically indifferent to any procedural defects and cannot suffer prejudice. *See Udall v. T.D. Escrow Servs., 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 non-judicial foreclosure where the borrower admits default and cannot cure "does not injure the borrower's interests, because the debt secured by

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[7] The DTA was adopted "to supplement... existing foreclosure proceedings to better meet the needs of modern real estate financing. *Wash. Fed. v. Gentry*, 179 Wn. App. 470, 319 P.2d 823 (2014). As this Court recently observed, "the Legislature designed this act 'to avoid time-consuming judicial foreclosure proceedings and to save substantial time and money to both the buyer and the lender'." *Id., citing Peoples Nat. Bank of Wash. v. Ostrander,* 6 Wn. App. 28, 491 P.2d 1058 (1971).

the trustee's deed is per se satisfied by the foreclosure sale due to the Act's anti-deficiency provision." *Id.* (citations omitted). Strict construction of the DTA does not mean strict liability. *See, e.g., Mickelson v. Chase Home Fin. LLC*, 579 F. App'x 598, 601 (9th Cir. 2014) (where beneficiary held the note, there could be no prejudice to the borrower even if allegations relating to the propriety of the trustee's "proof" were true).

For example, in *Koegel v. Prudential Mut. Sav. Bank*, the Notice of Default erroneously contained an "additional description of a plot that had been conveyed and was no longer part of the transaction." 51 Wn. App. 108, 110, 752 P.2d 385 (1988). 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. This Court stated: "[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.[8]

Based on this conclusion, *Koegel* found that:

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[8] This Court further wrote:

> Appellant was aware of the technical defects in the notices of default. Nonetheless, appellant neither provided U.S. Trustee with documentation of the precise errors alleged, nor acted to restrain the sale. In fact, the trustee granted appellant a series of continuances.... The continuances alone would ameliorate any harm appellant suffered by having 5 fewer days' notice between the notice of default and notice of sale than required by RCW 61.24.030(6).

Id. at 112. Nothing in the DTA, including recent amendments, changes the necessity of showing prejudice.

> 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 offered as collateral for that loan 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.

Id. at 112.

Just like in *Koegel*, nowhere did Barkley explain the prejudice he suffered merely because NWTS issued essential and timely notices. But even putting aside this failure of proof, Barkley's evidence did not establish *all* requisite elements of a CPA claim.

b. There Was No Unfair or Deceptive Act or 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).

Here, Barkley did not allege a *per se* CPA violation, so he was required to show that NWTS engaged in acts with a capacity to deceive a substantial portion of the public. *See Saunders, supra.* at 344, *quoting Hangman Ridge* at 785.

Klem v. Wash. Mut. Bank states that "The Washington legislature instructed courts to be guided by federal law in the area," and federal law "suggests a practice is unfair [if it] causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits." 176 Wn.2d 771, 787, 295 P.3d 1179 (2013), *citing* 15 U.S.C. § 45(n). Federal law defines an act or practice as "deceptive" when it is material, likely to mislead a consumer, and the consumer's interpretation is reasonable. 15 U.S.C. § 45(n); *see also* 12 C.F.R. 227.1. Unfairness or deception affects the consumer's choice of, or conduct regarding, a product or service. *Id.*

i. There Were No Material Defects in the Foreclosure Process Resulting in an Unfair or Deceptive Act or Practice.

The DTA defines a beneficiary as "the holder of the instrument or document evidencing the obligations secured by the deed of trust." RCW 61.24.005(2); *see also Trujillo v. NWTS*, 181 Wn. App. 484, 326 P.3d 768

(2014).[9] One becomes a note holder through possession of the instrument either payable to that party or to bearer. RCW 62A.3-201; RCW 62A.3-109.[10]

If there is negotiation of a note, that 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 Carpenter v. Longan*, 83 U.S. 271, 21 L. Ed. 313 (1872); *see also* RCW 62A.3-203, cmt. 1 ("the right to enforce an instrument and ownership of the instrument are two different concepts.").[11]

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[9] Washington defines beneficiary strictly in the context of holding a note, not just 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).

[10] Barkley misstates the nature of a promissory note, arguing that the "entity 'entitled' to mortgage payments" should be defined outside the UCC. Brief of Appellant at 21. 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. The UCC additionally dispenses with the notion that an agent is incapable of enforcing a negotiable instrument, such as a promissory note. Brief of Appellant at 22. Under RCW 62A.3-201, cmt. 1, "negotiation always requires a change in possession of the instrument because nobody can be a holder without possessing the instrument, either directly or through an agent."

[11] *See also* Dale A. Whitman & Drew Milner, Foreclosing on Nothing: The Curious Problem of the Deed of Trust Foreclosure Without Entitlement to Enforce the Note, 66 Ark. L. Rev. 21, 22 (2013) ("The [legal] distinction between ownership and PETE status has been widely misunderstood in the past and has been responsible for considerable confusion in judicial decisions and statutes."); Permanent Editorial Bd. for the UCC, Application of the UCC to Selected Issues Relating to Mortgage Notes (2011) ("[A] change in ownership of a note does not necessarily bring about a concomitant change in the identity of a person entitled to enforce the note.").

If the borrower defaults on the note, a secured party may exercise its rights with respect to property securing such obligation; this can occur through either judicial or non-judicial foreclosure of a deed of trust. *See, e.g., Kennebec, Inc. v. Bank of the W.*, 88 Wn.2d 718, 565 P.2d 812 (1977); RCW 62A.9A-203(g), RCW 62A.9A-308(e). Securitization of a loan does not diminish the underlying power of sale that can be exercised upon a borrower's default. *See Hafiz v. Greenpoint Mortg. Funding, Inc.*, 652 F.Supp.2d 1039 (N.D. Cal. 2009) (argument that power of sale is lost upon sale to a loan pool is "unsupported and incorrect").

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) recording a Notice of Trustee's Sale (RCW 61.24.040), and 4) tendering a Trustee's Deed to the purchaser at sale (RCW 61.24.050).

The DTA does not require "proving" one's authority, or executing an Assignment of Deed of Trust in order to foreclose. Indeed, the word "assignment" does not appear in the DTA. *See Florez v. OneWest Bank*, 2012 WL 1118179 (W.D. Wash. Apr. 3, 2012); *Corales v. Flagstar Bank,* 822 F. Supp. 2d 1102 (W. D. Wash. 2011), *citing* RCW 65.08.070; *St.*

John v. NWTS, 2011 WL 4543658 (W.D. Wash. Sept. 29, 2011) ("Washington State does not require recording of such transfers and assignments.").

In this case, Barkley was unable to articulate *anything* about NWTS' actions beyond the bare notion that the incomplete foreclosure was improper. *See* CP 296 (Barkley Dep. at 89:13-24; Barkley "not sure" and "not certain" if the Notice of Default is unfair or deceptive); CP 299 (Barkley Dep. at 99:4-13; Notice of Trustee's Sale "not come by legally"); CP 300 (Barkley Dep. at 104:11-105:10; Assignment of Deed of Trust was not "legal"); *cf.* CP 300 (Barkley Dep. at 102:21-23; Barkley agreed foreclosure is a proper remedy).

Based on the facts presented, Barkley was incapable of establishing the first prong of the CPA test. Yet, on appeal, Barkley nonetheless continues to allege a host of perceived problems with virtually every aspect of the foreclosure process.

ii. NWTS Correctly Issued the Notice of Default.

Barkley contends that NWTS could not issue the Notice of Default as U.S. Bank's agent, and the document itself contained procedural flaws that resulted in DTA violations. Brief of Appellant at 33, 37.

First, under the DTA, a notice of default may be delivered by the beneficiary, its agent, *or* the trustee. *See* RCW 61.24.030(8); RCW 61.24.031; *see also Neess v. NWTS*, 2012 WL 10277178, at *3 (W.D. Wash. Apr. 6, 2012) (NWTS, "while not yet foreclosure trustee, was authorized to issue the Notice of Default" as beneficiary's agent); *Gossen v. JPMorgan Chase Bank*, 819 F. Supp. 2d 1162, 1170 (W.D. Wash. 2011) (NWTS was acting as agent to issue Notice of Default before appointment as successor trustee).

Agency relationships are a long-established part of Washington common law. *See, e.g., Udall v. T.D. Escrow Servs., Inc., supra.* at 911-14; *Moss v. Vadman*, 77 Wn.2d 396, 463 P.2d 159 (1970).[12] The DTA also expressly contemplates that the actions of the trustee or beneficiary will be performed by authorized agents. *See Bain v. Metro. Mortg. Group, Inc.*, 2010 WL 891585 (W.D. Wash. Mar. 11, 2010) ("[t]here is simply nothing deceptive about using an agent to execute a document, and this practice is commonplace in deed of trust actions.").

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[12] The Court in *Moss* states: "[w]e have frequently cited the Restatement of Agency for the proposition that an agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control." *Id.* at 164. Courts in other jurisdictions have also recognized this practice as acceptable. *See, e.g., Russell v. Lundberg,* 120 P.3d 541, 544 (Utah. App. 2005).

Here, because NWTS acted as U.S. Bank's authorized agent prior to NWTS' appointment as trustee, *no duty of good faith existed at the point when the Notice of Default was issued. Compare* RCW 61.24.010(4) (duty accrues upon appointment); Brief of Appellant at 37 (Barkley suggests NWTS violated its DTA-based duty by acting as an agent).

NWTS was allowed to issue the Notice of Default as U.S. Bank's agent; this capacity is clearly shown in the document. CP 253.[13] In fact, Barkley was "not sure" about the factual basis for alleging the Notice of Default was prepared without the consent of the "true" Note holder. CP 298 (Barkley Dep. at 92:7-12); *see also* CP 296 (Barkley Dep. at 87:2-9; Barkley not involved in agreement between U.S. Bank and NWTS).

Second, among certain information, a notice of default requires:

> [t]he name and address of the owner of any promissory notes or other obligations secured by the deed of trust and the name,

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[13] In *Singh v. Fed. Nat. Mortg. Ass'n*, the Western District of Washington observed:

> [e]ven before the Washington Legislature amended the deed of trust act to abolish a trustee's fiduciary duty to a borrower, its courts recognized that 'an employee, agent, or subsidiary of a beneficiary' could serve as a trustee.... [N]o authority of which the court is aware, prohibits a subsidiary of the beneficiary from serving as a trustee.

2014 WL 504820 (W.D. Wash. Feb. 7, 2014). *Singh* cites with approval to *Cox v. Helenius,* 103 Wn.2d 383, 693 P.2d 683 (1985) and *Meyers Way Development LP v. Univ. Savings Bank,* 80 Wn. App. 655, 910 P.2d 1308 (1996). In *Meyers Way*, this Court found that a trustee could even serve "simultaneously as the creditor's attorney, *agent*, employee or subsidiary." *Id.* at 1315-16, n. 8 (emphasis added). NWTS' actions prior to its appointment as successor trustee were completely permissible.

> address, and telephone number of a party acting as a servicer of the obligations secured by the deed of trust.

RCW 61.24.030(8)(l).

The Notice of Default plainly listed U.S. Bank as the Beneficiary and Note owner, and Chase as the loan servicer. CP 252-253. There was no statutory prohibition on listing Chase's address as contact information for the Note owner; in fact, Chase was the party to whom Barkley could provide payments, negotiate a loan modification, or coordinate reinstatement.[14] The Notice of Default was simply not unfair or deceptive.

iii. NWTS Became the Successor Trustee.

Barkley was not a party to the Appointment of Successor Trustee. CP 257-259. Therefore, he cannot permissibly insert himself into that transaction for the purpose of questioning its propriety. *See, e.g., Brummett v. Washington's Lottery,* 171 Wn. App. 664, 288 P.3d 48 (2012); *Ullery v. Fulleton,* 162 Wn. App. 596, 256 P.3d 406 (2011), *citing Haberman v. Wash. Pub. Power Supply Sys.,* 109 Wn.2d 107, 138, 744

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[14] Barkley did not introduce evidence that the mere presence of Chase's contact information in a "care of" capacity on behalf of U.S. Bank prejudiced him or deceived *him* in some manner. Instead, Barkley primarily relies on findings specific to the Bankruptcy Court decision of *In re Meyer*, which is currently on appeal before the Western District of Washington. *See* Case No. 14-00297-RSM (W.D. Wash. 2014). The borrower's testimony in *Meyer* does not impute liability to NWTS in Barkley's case.

P.2d 1032, 750 P.2d 254 (1987).

The Eastern District of Washington has found that a borrower:

> [d]oes not have standing to contest the appointment [of successor trustee]. Because Plaintiff is neither a party to nor a third-party beneficiary of this agreement, he could not have been injured by the alleged fraud.

Brophy v. JPMorgan Chase Bank, 2013 WL 4048535, *7 (E.D. Wash. Aug. 9, 2013), *citing Javaheri v. JPMorgan Chase Bank,* 2012 WL 3426278 (C.D. Cal., Aug. 13, 2012); *see also Brodie v. NWTS*, 2012 WL 6192723 (E.D. Wash. Dec. 12, 2012), *aff'd*, 2014 WL 2750123 (9th Cir. June 18, 2014) (Plaintiff lacked standing to challenge trustee appointment; "[a]t bottom, the alleged misconduct had no bearing whatsoever upon Plaintiff's obligation to make her… payments.").[15]

Because NWTS did not appoint itself, it cannot be liable for its selection as the successor trustee, which is fully authorized under the terms in the Deed of Trust that Barkley assented to. CP 240, ¶ 24; CP 257-259.

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[15] *See Javaheri* at *6 ("The only injury [plaintiff] alleges is the pending foreclosure on his home, which is the result of his default on his mortgage. The foreclosure would occur regardless of what entity was named as trustee, and so [plaintiff] suffered no injury as a result of this substitution.").

iv. NWTS Had Sufficient Evidence of U.S. Bank's Authority to Foreclose, and Barkley Did Not Suggest Concerns at Any Time.

Barkley argues that NWTS should have inquired into U.S. Bank's authority as beneficiary through an undefined form of "verifying" information provided in connection with the foreclosure. Brief of Appellant at 5, 8, 9, 30, *inter alia*.[16]

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, Barkley emphatically and wrongfully asserts that NWTS breached a "fiduciary duty" that it does not have. Brief of Appellant at 29, *inter alia*. In *Klem v. Wash. Mut. Bank, supra.*, the State 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 DTA. 176 Wn.2d at 806, n. 1.

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[16] In order to have a statutory duty of good faith, one must become a trustee. *See* RCW 61.24.010(4). Moreover, only a beneficiary is vested with the right to appoint a trustee under the DTA. *See* RCW 61.24.010(2). Thus, if NWTS had a duty of good faith, it was because NWTS was properly appointed by the beneficiary. That is the only manner, besides a prior trustee's resignation, in which to become a trustee. *Id.* Because Barkley contends NWTS violated that duty, he necessarily concedes U.S. Bank had the authority to appoint NWTS.

But while the DTA imposes a *good faith* duty on trustees, there is *no* statutory requirement in Washington law compelling trustees to conduct an open-ended investigation into every transfer of a secured note or other documents provided by the beneficiary or its authorized agent.[17]

In the recent *Lyons v. US Bank, N.A. et al.* decision, the State Supreme Court found that questions of fact existed due to one declaration identifying the beneficiary as Wells Fargo as trustee for a securitized loan trust, and another declaration identifying the beneficiary as Wells Fargo in its individual capacity. -- Wn.2d --, 336 P.3d 1142 (2014).[18]

The Court further held that Ms. Lyons could maintain a CPA claim against NWTS based on her expressed concerns about the beneficiary's identity prior to sale, finding that a trustee must "adequately inform" itself of a beneficiary's authority through a "cursory" investigation. 336 P.3d at 1149, *citing Walker v. Quality Loan Serv. Corp.*, *supra.* at 308; *but see In re Butler*, 512 B.R. 643, 657 (Bankr. W.D. Wash. 2014) (implicitly

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[17] In general, "good faith" is 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 NW v. Kallevig,* 114 Wn.2d 907, 792 P.2d 520 (1990). (A "covenant of good faith… cannot be read to prohibit a party from doing that which is... permitted by... agreement.").

[18] As of this briefing, no mandate has yet issued, as the *Lyons* Opinion is subject to a pending Motion for Clarification which the Supreme Court is treating as a reconsideration request under R.A.P. 12.4, and the Supreme Court has asked for, and received, a response from Lyons' counsel. Therefore, the Court's ruling is not final.

rejecting the holding of *Meyer*; stating NWTS "had no duty to undertake an independent investigation."); *Mickelson v. Chase Home Fin. LLC*, 2012 WL 6012791 (W.D. Wash. Dec. 3, 2012), *aff'd* 579 F. App'x 598 (9th Cir. Jun. 18, 2014) ("[t]he duty of good faith does not create a duty to conduct an independent verification of sworn affidavits. This expansive view of good faith remains untenable.").[19]

The record shows that, unlike Ms. Lyons, Barkley never questioned NWTS concerning foreclosure activities; rather, his *only* direct communication with NWTS involved merely seeking the sale's status. CP 299 (Barkley Dep. at 98:1-9); CP 316 (Response to Interrogatory No. 11) ("Plaintiff has no recollection of corresponding or communicating with NWTS at all, other than through counsel relating to this lawsuit."). Moreover, when Barkley's counsel wrote to NWTS demanding a unilateral postponement of the sale date, NWTS responded through its counsel *just two days later* and *acceded to Barkley's request*. CP 266-269.

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[19] The Ninth Circuit Court of Appeals has ruled that *Walker* "do[es] not change the result" when a foreclosing entity "actually holds the note," which the Court described as "the bottom line." *Myers v. MERS et al.*, 2013 WL 4779758 (9th Cir. Sept. 9, 2013); *accord Mickelson v. Chase Home Fin. LLC*, 2011 WL 5553821 (W.D. Wash. Nov. 14, 2011) ("Plaintiffs would have every trustee conduct a secondary investigation into the papers filed by the beneficiary, which is simply too great a demand."); *Hallquist v. United Home Loans*, 715 F.3d 1040 (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.").

Contrary to Barkley's theories, the DTA *does not require* any form of investigation outside receipt of a valid beneficiary declaration; this statutory provision is designed to protect trustees from the very type of "verification" argument raised in this case.

v. NWTS Could Rely on the Unequivocal 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.* (emphasis added); *see also Trujillo v. NWTS, supra.*; *Mulcahy v. Fed. Home Loan Mortg. Corp.*, 2014 WL 1320144 (W.D. Wash. Mar. 28, 2014)[20]; *Massey v. BAC Home Loans Serv. LP*, 2013 WL 6825309 (W.D. Wash. Dec. 23, 2013), *citing Zalac v.*

[20] "NWTS was therefore obligated to ascertain only whether Wells Fargo was the *holder* of the... note before issuing the notice of trustee's sale, *not whether some other entity had a beneficial interest in the proceeds of the note.*" *Id.* at *3 (emphasis added, citation omitted).

CTX Mortg. Corp., 2013 WL 1990728 (W.D. Wash. May 13, 2013)[21]; *Beaton v. JPMorgan Chase Bank N.A.*, 2013 WL 1282225, at *4 (W.D. Wash. Mar. 26, 2013). 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 [of being the holder] as evidence of proof required under this subsection." RCW 61.24.030(7)(b).[22]

Despite the fact that a beneficiary declaration is not publicly-recorded or provided to a borrower, and it is inconceivable that Barkley could have been prejudiced or injured from something he was never given, Barkley challenges NWTS' reliance on that document with a number of different assertions.

First, Barkley argues that Chase could not sign the declaration pursuant to a power of attorney. Brief of Appellant at 32.[23] But contrary to Barkley's argument, there is no prohibition on a beneficiary's attorney-

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[21] "The issue of ownership... is largely immaterial to the issues.... [U]nder Washington law, the focus of the analysis is on who is the holder of the note, and thus the beneficiary...." *Id.* at *5.

[22] It is circular reasoning to believe that, although the statute expressly permits NWTS to rely on a declaration of the beneficiary's status, the duty of good faith was breached *because* NWTS received that same declaration. *See Arnett v. MERS*, 2014 WL 5111621, *4 (W.D. Wash. Oct. 10, 2014) (it is "nonsensical" to suggest that a trustee's acceptance of a beneficiary declaration is "in itself, a violation of the duty of good faith.").

[23] 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, 882 P.2d 169 (1994).

in-fact executing the declaration. *See Knecht v. Fid. Nat. Title Ins. Co.* 2013 WL 7326111 (W.D. Wash. Mar. 11, 2013)[24]; *US Bank Nat. Ass'n v. Woods*, 2012 WL 2031122 (W.D. Wash. Jun. 6, 2012).[25] Chase was the attorney-in-fact for U.S. Bank, and Barkley produced no evidence to the contrary. CP 496 (Dec. of Simonidis, ¶ 4); CP 509-525 (power of attorney).

Second, Barkley cites *Lyons* to claim liability against NWTS. Brief of Appellant at 31. However, the facts of *Lyons* are completely distinct. In *Lyons*, the State Supreme Court found that a beneficiary declaration's reference to RCW 62A.3-301 was ambiguous, and NWTS could not rely on it; however, NWTS could still show compliance with RCW 61.24.030(7)(a) through other evidence. 336 P.3d at 1151 (2014).

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[24] In *Knecht*, the Western District of Washington stated:

> [a]n AHMSI representative signed the document in which DB [Deutsche Bank] purports to appoint Fidelity as a successor trustee, stating that AHMSI was DB's 'attorney in fact.' Mr. Knecht complains that there is no recorded power-of-attorney document establishing AHMSI's right to act on DB's behalf, but he points to no authority requiring AHMSI to record such a document. He also fails to establish his own standing to object to AHMSI's acting on DB's behalf.

Id. at *7.

[25] In *Woods*, the Western District of Washington stated:

> Lenders have submitted evidence to show that NWTS is in possession of a declaration signed by Wells Fargo *as "attorney in fact"* for U.S. Bank.... Borrowers have failed to submit any evidence to show how Lenders have failed to show sufficient proof that the beneficiary is the owner of the promissory note secured by the deed of trust. Accordingly, *Borrowers' claim brought under RCW § 61.24.030(7)(a) is without merit.*

Id. at *6 (emphasis added).

By contrast, the declaration NWTS received in the subject foreclosure is *unequivocal* concerning U.S. Bank's status as Note holder. CP 255.

Third, Barkley seeks to contradict his prior testimony by alleging that NWTS violated its good faith duty and could not rely on the beneficiary declaration prior to recording a Notice of Trustee's Sale. Brief of Appellant at 32. However, Barkley testified in a deposition that NWTS did not violate its duty of good faith *at all* before the Notice of Trustee's Sale was issued. CP 298 (Barkley Dep. at 97:15-22). Barkley's briefing on this point is therefore unsupported.

In sum, NWTS obtained a beneficiary declaration that precisely satisfied the mandate of RCW 61.24.030(7)(a) as interpreted in *Lyons*, *i.e.* an unequivocal averment of U.S. Bank's holder status. This proof was sufficient as set forth in RCW 61.24.030(7)(b), and consequently, NWTS' reliance on the declaration was not a DTA violation constituting an unfair or deceptive act.

vi. The Notice of Trustee's Sale Was Not Falsely Notarized.

Barkley also raises an attack on the Notice of Trustee's Sale, decrying a "practice of falsely dating mandated foreclosure documents."

Brief of Appellant at 35.[26] Although Barkley presented no actual evidence on this point below, his position is based on a "suspect" explanation of terminology in that Notice. *Id.* at 37; *cf. 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.").

However, Barkley misunderstands the word "effective," which does *not* evidence a signature date. CP 354 (Dec. of Stenman, ¶ 9). Rather, "effective" pertains to the date upon which arrearage figures become operative; this information is compulsory in the Notice of Trustee's Sale. *See* RCW 61.24.040(1)(f)(III, IV) (Notice shall include "amounts which are now in arrears.").

The Ninth Circuit Court of Appeals recently addressed this exact issue in *Mickelson v. Chase Home Fin. LLC, supra.* The *Mickelson* Court ruled in NWTS' favor, finding that"[t]he disparity between the date on which a document becomes effective and the date on which it was

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[26] It is illogical for Barkley to suggest that notarizing a document *later* in time would have resulted in speeding up the sale process like in *Klem, supra.* 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).

notarized does not indicate that it was signed on one day and notarized on another." *Id.* at 602.

The evidence in the record shows that the Notice of Trustee's Sale complied with the requirements proscribed in RCW 61.24.040(1)(f), which permits a Notice of Trustee's Sale to be in "substantially" the form shown in the statute. NWTS carried out its obligation to record this Notice and provide a copy to Barkley. CP 261-264; CP 354 (Dec. of Stenman, ¶ 8); *see also* RCW 61.24.040(1). There was no unfair or deceptive DTA violation resulting from that procedural step.

vii. The Notice of Foreclosure Was in a Permissible Form.

Barkley next turns his attention to the Notice of Foreclosure which accompanies the Notice of Trustee's Sale. Brief of Appellant at 34.[27]

A Notice of Foreclosure must be provided in "substantially" the form proscribed by statute. RCW 61.24.040(2); *cf.* Brief of Appellant at 34 (erroneously arguing "substantial compliance is not sufficient."). Barkley states that the Notice did not "identify U.S. Bank as either the

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[27] This new argument was neither pled in the Complaint nor raised as part of the summary judgment proceeding. CP 1-130, CP 359-494. Thus, NWTS separately filed a Motion to Strike. *See Cannabis Action Coal. v. City of Kent*, 180 Wn. App. 455, n. 10, 322 P.3d 1246 (2014) (striking arguments not raised to the trial court), *review granted sub nom., Sarich v. City of Kent* (Oct. 9, 2014).

beneficiary or the owner...." Brief of Appellant at 34. But the Notice of Foreclosure advised Barkley that the "Notice of Trustee's Sale is a consequence of default(s) in the obligation to the [*sic*] U.S. Bank...." CP 99.

Strangely, Barkley claims that the Notice of Foreclosure did not name the loan's owner, but U.S. Bank was listed in the Notice of Default as both the owner *and* beneficiary. *Compare* Brief of Appellant at 35; CP 253. In sum, the evidence reveals that NWTS adhered to the DTA by substantially following the Notice of Foreclosure form and including pertinent information regarding the beneficiary that was seeking to foreclose, *i.e.*, U.S. Bank.

viii. The Role of MERS Does Not Impute Liability to NWTS.

Barkley incorrectly attempts to link his CPA claim against NWTS to the "business model" of MERS, based on *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012). Brief of Appellant at 38.

In *Bain*, the State Supreme Court found that MERS's representation that it was a beneficiary 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. 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.[28]

The relevant question certified to the State 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 Deed of Trust Act?" *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, e.g., Coble v. SunTrust Mortg., Inc.*, 2014 WL 631206, *4 (W.D. Wash. Feb. 18, 2014) ("the presence of MERS on the deed of trust is not fatal."); *Lynott v. MERS,* 2012 WL 5995053, *2 (W.D. Wash. Nov. 30, 2012) ("*Bain* did not… create a per se cause-of-action based solely on MERS's involvement."), *Florez v. OneWest Bank, F.S.B.*, *supra.* (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

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[28] On remand, the trial court granted MERS' Motion for Summary Judgment on Plaintiff's CPA claim due to a lack of injury and causation. *See* Summary Judgment Order, King County Superior Court Case No. 08-2-43438-9 SEA (Aug. 30, 2013).

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.[29] In fact, Barkley agreed that NWTS had nothing to do with MERS being named in the Deed of Trust. CP 295 (Dep. of Barkley at 83:1-4).

Therefore, *Bain* should not be stretched to infer presumptions against NWTS, or to propose that NWTS is somehow liable under the CPA. *Cf.* Brief of Appellant at 39 (speculating that Barkley need only prove two claim elements because others are supposedly "presumed.").

ix. NWTS Acted Based on a Reasonable Interpretation of Existing Law.

The State Supreme Court has ruled that an "act performed in good faith under an arguable interpretation of existing law do[es] not constitute unfair conduct violative of the consumer protection law." *Leingang v. Pierce Co. Med. Bureau*, 131 Wn.2d 133, 930 P.2d 288 (1997); *see also Perry v. Island Sav. & Loan Ass'n*, 101 Wn.2d 795, 684 P.2d 1281 (1984).

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[29] The naming of MERS in the Deed of Trust as a basis for a CPA violation would be 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).

In *Leingang*, the plaintiff contended that the his insurer "failed to make a good faith investigation of the legal validity of the UIM exclusion, and that its reliance on an exclusion which ultimately was determined to violate public policy was an unfair or deceptive act in violation of the [CPA]." 131 Wn.2d at 154-55. The State Supreme Court identified the question as whether an insurer "had a reasonable justification for relying on the exclusion which was ultimately determined to be unenforceable...." *Id.* at 155. *Leingang* held that the insurer "was relying on a reasonable interpretation of existing law to contend that the exclusion was valid," as supported by the decisions of "at least four trial courts and two Court of Appeals decisions." *Id.*

Likewise, NWTS was entitled to rely on existing law when it received a beneficiary declaration and subsequently recorded the Notice of Trustee's Sale. It cannot be an unfair or deceptive act for NWTS to have based its foreclosure activities on judicial interpretations of the law that existed in late 2012 – before decisions in the few cases Barkley repeatedly cites.[30] As such, NWTS' actions do not satisfy the requisite standard for the first CPA element under *Hangman Ridge*.

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[30] Even assuming the facts of those cases are applicable to the disposition of this matter.

c. NWTS' Actions Were Not Likely to Impact the Public Interest.

Concerning the second prong of a CPA claim, "[t]he 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*, *supra.* 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 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 Barkley's claims in the Complaint exclusively related to conduct directed at him 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 the beneficiary declaration. These acts did not, and could not, have the capacity to deceive other individuals, let alone a substantial portion of the general public. Barkley even admitted that he was not aware of similar transactions or foreclosures involving any member of the general public. CP 301 (Barkley Dep. at 107:10-108:2).

Because Barkley's opposition to summary judgment offered *no fact* as to how the public was affected by NWTS' conduct in the subject uncompleted foreclosure, he did not meet his burden of demonstrating a genuine issue of fact on the public interest element of the CPA test.

d. NWTS Did Not Cause Injury to Barkley.

Finally, a CPA claim must plead and prove that there is a causal link between the alleged misrepresentation or deceptive practice *and* the purported injury. *Hangman Ridge, supra.* at 793; *see also Cooper's Mobile Homes, Inc. v. Simmons,* 94 Wn.2d 321, 617 P.2d 415 (1980) (alleged deceptive acts must result in injury).

A plaintiff must demonstrate that the "injury complained of... would not have happened" if not for defendant's acts. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.,* 162 Wn.2d 59, 82, 170 P.3d 10 (2007); *see also Schnall v. AT&T Wireless Servs., Inc.,*

171 Wn.2d 260, 278, 259 P.3d 129, 137 (2011) (proximate cause means an unbroken chain of events); *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 194 P.2d 280 (2008) ("The injury must be expressly "*by*" a violation of RCW 19.86.020, meaning that "but for" a defendant's conduct, the alleged injury would not have occurred.").

An award under the CPA is strictly limited to damage "in… [a plaintiff's] business or property…." RCW 19.86.090, *see also Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009). Lost wages or personal injuries, including pain and suffering, are not compensable under the CPA. See *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.,* 122 Wn.2d 299, 858 P.2d 1054 (1993).

As the Ninth Circuit Court of Appeals 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). Likewise in this case, Barkley did not plead an injury that was proximately caused by NWTS' conduct, *i.e.*, related to NWTS' role as successor trustee in conducting the unfinished non-judicial foreclosure.

Cf. Demopolis v. Galvin, 57 Wn. App. 47, 786 P.2d 804 (1990) (litigation expenses are *not* an "injury" under the CPA); *Massey v. BAC Home Loans Servicing LP*, *supra.* at *8 (a "laundry list… including attorney fees, 'wear and tear' on [a] vehicle, and buying postage stamps, is inapposite.").

But even if the trial court had accepted Barkley's injury claims as factually accurate, he failed to demonstrate how his asserted injuries flowed from the initiation of the non-judicial foreclosure process – an occurrence caused by *Barkley's own default*. *See Massey*, *supra.* at *8, *citing Babrauskas v. Paramount Equity Mortg.*, 2013 WL 5743903 (W.D. Wash. Oct. 23, 2013) (plaintiff's failure to meet obligation "is the 'but for' cause of the default" and foreclosure), *McCrorey v. Fed. Nat. Mortg. Ass'n*, *supra.* (plaintiffs' failure to pay led to default and foreclosure); *see also 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).

Barkley understood that executing the Note required him to repay the loan. CP 285 (Barkley Dep. at 43:9-11). As a real estate professional, Barkley also was aware that the Deed of Trust secured the loan, and if he failed to make payments, the Property could be foreclosed. *Id.* (Barkley

Dep. at 45:14-18); *see also* CP 295 (Barkley Dep. at 84:13-16).

Between 2002 and 2010, Barkley made all loan payments through the servicer, Chase. CP 290 (Barkley Dep. at 63:18-23). Barkley knew, however, the Note could be sold to another entity regardless of who was servicing the loan. CP 239, ¶ 20.[31] During this eight-year span, no one attempted to foreclose on the Property. CP 295 (Barkley Dep. at 83:9-11).

But in Fall 2010, Barkley completely stopped paying back the loan he received. CP 286 (Barkley Dep. at 46:5-7); *see also* CP 292 (Barkley Dep. at 71:21-24). Barkley spoke with Chase about the possibility of a loan modification. CP 286 (Barkley Dep. at 47:2-24). Barkley knew to contact Chase because he did not receive any letters or demands for payment from a different entity. CP 287 (Barkley Dep. at 52:9-15).

The result of Barkley's non-compliance with the loan's terms is clear: Barkley did not "pay the full amount of each monthly payment on the date it is due…," and therefore he was in default. CP 501, ¶ 7(B).[32]

As such, Barkley acknowledged the "but for" cause of receiving

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[31] Despite Barkley's verification of the Complaint as being based on "personal and testimonial knowledge," he had no idea about the factual basis for many of the allegations asserted therein, such as his claim that U.S. Bank is *not* the lawful beneficiary. *Compare* CP 11 (Compl., ¶ 4.4); CP 297 (Barkley Dep. at 90:1-16; 92:7-22).

[32] As a consequence of Barkley's default, the Deed of Trust authorizes the trustee to provide required notices and sell the Property at auction in satisfaction of the debt owed. *See* Ex. 3 at 3; ¶ 22; *see also* Ex. 12 (Barkley Dep.) at 103:3-6.

notices from NWTS was his failure to make obligatory loan payments. CP 301 (Barkley Dep. at 108:20-109:2).[33] But Barkley did not cure his default, and he was appropriately sent notices under the DTA as a result.

Unabashedly, Barkley emphasizes the fact that he was earning significant income from the Rental Property while refusing to pay back the loan. Brief of Appellant at 42, *citing* CP 751-752, ¶ 17. Viewed in this light, the record is clear: NWTS did not cause injury to Barkley during the briefly-active foreclosure. Summary judgment was the justifiable outcome for Barkley's CPA claim.

5. Barkley's Criminal Profiteering Claim was Meritless.

Barkley's last cause of action asserted a violation of RCW 9A.82 *et seq.* – the criminal profiteering law. CP 16-17.[34] RCW 9A.82.100 restricts the nature of suits brought under that chapter (within a three-year statute of limitations) to occurrences where a person has sustained injury

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[33] Barkley conceded that the appointment of NWTS as trustee, by itself, did not cause harm to him. CP 298 (Barkley Dep. at 95:11-14).

[34] 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....

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. Barkley's assertion of a RCW 9A.82 violation was unfounded 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, Barkley did not plead the elements of his 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, he did not offer any specific allegations relating to this claim at all; instead, he simply tossed out general allegations implicating every Defendant. CP 16-17 (Compl. ¶¶ 7.2, 7.3).

Third, several identified bases for the claim are undercut by other assertions in Barkley's Complaint. For example, he seems to believe that a trustee's sale has already occurred. CP 16 (Compl., ¶ 7.2(A)) (deception allegedly affects "potential buyers [of] foreclosed properties"); *Id.* (Compl., ¶ 7.2(C)) (Defendants "exert[ed] possession and control over real

property"); CP 17 (Compl., ¶ 7.2(F)) ("means by which they could resell unlawfully obtained (stolen) home of Plaintiff"). But Barkley could not possibly allege that a trustee's sale of the Rental Property occurred, because it did not.

Fourth, the primary case Barkley 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 unknown whether Barkley 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 Barkley's penalty for non-compliance would be, although an inability to prosecute the claim may be a reasonable outcome.

Sixth, it is unclear how a litany of other cases, including "*Bain*, *Klem*, *Schroeder*, *Walker*, *Bavand*, *Knecht*, etc." tended to show a genuine issue of fact in *this case*. Brief of Appellant at 46. Barkley's sole basis for his Criminal Profiteering claim was simply that NWTS was "a party to the foreclosure." CP 301 (Dep. of Barkley at 109:6-16).[35] That statement does not amount to supporting evidence.

Overall, Barkley'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 16.[36] In other words, Barkley relied on the same flawed theories underlying his DTA and CPA

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[35] In his deposition, Barkley could not even testify as to specific factual bases for the allegations in Paragraph 7.2 of the Complaint. *Id.* (Barkley Dep. at 109:17-110:8).
[36] Barkley's allegations need not be "accept[ed] as true under CR 56;" he confuses the applicable standard of review with CR 12(b)(6). Brief of Appellant at 46.

claims.[37] There was no error in the trial court's summary judgment ruling.

B. Barkley 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) (standard of review is a manifest abuse of discretion); *Tellevik v. Real Property*, 120 Wn. 2d 68, 90, 838 P.2d 111 (1992). Here, Barkley failed to overcome *any* of those bases, and even one reason is sufficient under case law to deny 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); *see also Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989) (Washington state courts interpret CR 56(f) consistently with its federal counterpart). Barkley's lawsuit was filed in May 2013; he then proffered a host of

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[37] 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.

Interrogatories and Requests for Production on MERS and NWTS, and those were timely answered in April 2014. CP 703-744 (Dec. of Counsel Jones, Exs. 2, 3). During the year-long period between commencing the action and the summary judgment hearing, Barkley conducted no depositions, and did not seek to follow-up on the written responses to his inquiries.[38]

Second, Barkley has never indicated how further discovery would have been of assistance to him. *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). Notwithstanding Barkley's argument, NWTS did not provide "computer dumps of information," but rather specific documents and information responsive to the questions presented. *Compare* CP 723-744; Brief of Appellant at 47. Further, Barkley's counsel made no effort to confer about supposed deficiencies in NWTS' responses but now implies that a discovery violation occurred.

Third, Barkley does not identify how he was somehow unable to "present by affidavit facts essential to justify [his] opposition." CR 56(f).

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[38] The trial court also awarded $1,068.00 *against* Barkley for having to procure his compliance with discovery demands. CP 1351-52.

He does not state how discovery on an "undisclosed investor" or "agency relationships" would raise a genuine issue of material fact. Brief of Appellant at 48. Clearly he was able to produce a 41-page brief and 18-paragraph declaration responding to every issue in NWTS' Motion for Summary Judgment – and even raising some new issues for the first time. CP 528-569; CP 745-835. 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, Barkley's request was not properly noted for the trial court's consideration. He asserted the need for a continuance in response to NWTS' Motion, but he did not note a hearing. CP 567-568. This violates the King County Local Rules, requiring service and filing with a Note for Motion form. LCR 7(b)(4), (5).

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

C. NWTS Should be Granted Costs.

Under R.A.P. 14.2, "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating

review." Under R.A.P. 14.3(a), certain expenses are allowed as awardable costs.

R.A.P. 18.1(b) requires that a "party must devote a section of its opening brief to the request for the fees or expenses." Thus, in accordance with R.A.P. 14.2, and upon presentation of a cost bill pursuant to R.A.P. 14.4, NWTS requests a cost award if the Court determines that NWTS is the substantially prevailing party on appeal.

IV. CONCLUSION

Despite Barkley's attempts to inject an element of confusion into the prior uncompleted foreclosure process, the record in this case is clear.

Barkley obtained a refinance loan, plus $18,000 at closing, and then he defaulted on that secured loan in August 2010. CP 228-247; CP 251-253; CP 285; CP 499-504. Barkley's testimony reveals his acceptance of the fact that NWTS only provided foreclosure notices to him *because of his default*. CP 301 (Barkley Dep. at 108:24-109:2).

During the time Barkley refrained from making loan payments, he used the Rental Property as an investment, accruing thousands of dollars in profit while seeking to obtain a beneficial loan modification from Chase. *See* Brief of Appellant at 42, *citing* CP 751-752; *see also* CP 286 (Barkley Dep. at 47:2-24). Even after over four years of non-payment,

Barkley was not divested of ownership of the Rental Property because NWTS stopped the sale process after Barkley's lawsuit was filed. CP 354 (Dec. of Stenman, ¶ 10).

Barkley's claims attacked each document at every step of the non-judicial process based on a host of mistaken legal theories, but he lacked sufficient facts to defeat summary judgment in NWTS' favor. For these reasons, this Court should affirm the ruling below.

DATED this 8th day of January, 2015.

RCO LEGAL, P.S.

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