70706-0

70706-0

No 70706-0-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

KELLY BOWMAN,

Appellant/Plaintiff,
v.

SUNTRUST MORTGAGE, INC., a Virginia Corporation, a subsidiary of SUNTRUST BANKS, INC.; FEDERAL NATIONAL MORTGAGE ASSOCIATION, a United States government sponsored enterprise; NORTHWEST TRUSTEE SERVICES, INC.; a Washington Corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation; and DOE DEFENDANTS 1-10,

Respondents/Defendants.

APPELLANT'S OPENING BRIEF

KOVAC & JONES, PLLC
Richard Llewelyn Jones
WSBA No. 12904
Attorney for Appellant
2050 112th Ave NE Ste 230
Bellevue, WA 98004-2976
(425) 462-7322
rlj@kovacandjones.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. ASSIGNMENTS OF ERROR

A. The trial court erred in accepting the testimony of Carmella T. Norman Young on summary judgment, in the absence of compliance with the provisions of *RCW 5.45.020* and *ER 803(a)(6)*.

B. The trial court erred in refusing to continue the hearing on summary judgment to permit Plaintiff an opportunity to obtain discovery previously propounded to Respondents, pursuant to CR 56(f).

C. The trail court erred in granting summary judgment and dismissing Plaintiff's claims in two separate orders entered July 12, 2013, pursuant to CR 56.

II. STATEMENT OF THE CASE

On September 5, 2008, Appellant, KELLY BOWMAN (hereinafter "Mr. Bowman") executed a Promissory Note in favor of Respondent, SUNTRUST BANK, INC., a Virginia Corporation, (hereinafter "SunTrust"), as lender and the party entitled to payments according to its terms. CP 18-20. To secure repayment of the Note, Mr. Bowman executed a Deed of Trust, pledging his home as collateral, named Washington Administrative Services, Inc., as trustee, and Respondent, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,

INC. (hereinafter "MERS"), as beneficiary, solely as a nominee for Lender and Lender's successors and assigns. CP 22-36. It is significant to note that at no time prior to closing or any time thereafter was Mr. Bowman allowed to modify or re-negotiate any of the terms of the Deed of Trust. CP 292.

As of September 5, 2008, and at no time subsequent to September 5, 2008, did MERS, or Respondent, NORTHWEST TRUSTEE SERVICES, INC. (hereinafter "NWTS") hold any valid legal interest in Mr. Bowman's Note or Deed of Trust. On information and belief, and unbeknownst to Mr. Bowman at the time, Respondent, FEDERAL NATIONAL MORTGAGE ASSOCIATION (hereinafter "Fannie Mae") purchased Mr. Bowman's loan on October 1, 2008. CP 60 and 293. This purchase and sale of the Note and Deed of Trust was conceded by SunTrust in the Declaration of Carmella Young of April 26, 2013. CP 255.

On March 16th, 2012, Alicia James-Mickleberry, an employee of SunTrust, executed a Corporate Assignment of Deed of Trust, on behalf of MERS, in her purported official capacity as a Vice President of MERS. This assignment was allegedly executed in exchange for "good and valuable consideration." No proof of payment of the stated consideration

was provided the trial court by Respondents at hearing on summary judgment. In addition to assignment of the subject Deed of Trust, this assignment appears to also assign the underlying note, which MERS never had an interest in: ". . . the Said Assignor [MERS] hereby assigns unto the above-named Assignee [SunTrust] . . . the said Deed of Trust having an original principal sum of $417,000.00 with interest, secured thereby, with all moneys now owing or that may hereafter become due or owing in respect thereof. . ." CP 43 and 292-293. As noted above, at the time this Corporate Assignment of Deed of Trust was executed, the subject obligation was actually owned by Fannie Mae. There was no evidence presented to the trial court at summary judgment that: (1) Fannie Mae was contacted or consulted by any Respondent named herein prior to execution of the Corporate Assignment of Deed of Trust; or (2) Fannie Mae ever expressly authorized execution of the Corporate Assignment of Deed of Trusts.

On July 23, 2012, SunTrust executed and delivered to NWTS a Beneficiary Declaration stating that it is "holder" of Mr. Bowman's Note. CP 171.

On August 14, 2012, NWTS issued a Notice of Default, as agent for SunTrust. CP 45-48. The Notice of Default alleged SunTrust to be the

"beneficiary" of the Deed of Trust", but also identifies SunTrust as the "servicer" and NWTS' "client". There is no explanation in the document for this apparent contradiction and confusion in terms and identity of the parties. Remarkably, the Notice of Default identifies, for the first time, Fannie Mae was the actual "owner" of the loan, although in other documents, Fannie Mae is identified as the "investor". CP 306. There was no evidence presented to the trial court at summary judgment that SunTrust was ever the owner and holder of the subject Note at any time after October 1, 2008 or that NWTS was ever an agent for the owner of the obligation, Fannie Mae. Moreover, there was no evidence presented to the trial court at summary judgment that: (1) Fannie Mae, as opposed to the other named Respondents, ever explicitly declared the loan to be in default or otherwise authorized any other named Respondents to so declare on its behalf; (2) Fannie Mae was contacted or consulted by any Respondent named herein prior to execution of the Notice of Default; or (2) Fannie Mae ever expressly authorized execution of the Notice of Default.

On November 5, 2012, SunTrust, as "present beneficiary" of the subject obligation, executed and recorded an Appointment of Successor

Trustee, appointing NWTS as successor trustee of the subject Deed of Trust. CP 53.

On November 29, 2012, NWTS recorded a Notice of Trustee's Sale setting a Trustee's Sale date of March 29, 2013. CP 55-58. Although the Notice of Trustee Sale was executed by Nanci Lambert, in her capacity as Assistant Vice President for NWTS, on November 19, 2012, the document was not notarized until November 27, 2012, by Ashley A. Hogan. Submitted with the Notice of Trustee's Sale was a Notice of Foreclosure that did not substantially conform to *RCW 61.24.040(2),* in that it did failed to identify the "owner of the obligation", but identified SunTrust as the entity to whom Mr. Bowman was obligated, in contradiction to the statement contained in the Notice of Default of August 14, 2012 that declared the owner to be Fannie Mae. Please compare CP 47 with CR 497. There was no evidence presented to the trial court at summary judgment that: (1) Fannie Mae, as opposed to the other named Respondents, ever expressly declared the loan to be in default; (2) Fannie Mae was contacted or consulted by any Respondent named herein prior to execution of the Notice of Trustee's Sale; or (2) Fannie Mae ever expressly authorized execution of the Notice of Trustee's Sale.

On March 14, 2013, Mr. Bowman filed this action for violation of *RCW 61.24, et seq.* (hereinafter "DTA"), violation of *RCW 19.86, et seq.* (hereinafter "CPA); and violation of *RCW 9A.82, et seq.* CP 1-66.

On or about May 22, 2013, Respondents moved for summary judgment, pursuant to *CR 56,* to dismiss Mr. Bowman's claims, despite the existence of outstanding discovery and limited time to conduct depositions. CP 188-260; 300-563. Remarkably, in its pleadings in support of its motion for summary judgment, SunTrust offered a copy of Mr. Bowman's Note that bears an undated blank endorsement by SunTrust. CP 260.

On July 12, 2013, the trial court granted Respondents' motions for summary judgment. CP 716-720.

On July 13, 2013, Mr. Bowman filed a Notice of Appeal, seeking review of the trial court's Orders of July 12, 2013. CP 741-749.

On August 5, 2013, this Court filed its opinion in the matter of *Walker v. Quality Loan Service Corp.*, 176 Wn.App. 294, 308 P.3d 716 (2013) (hereinafter "*Walker*").

III. ARGUMENT

A. Standard of Review

A trial court's summary dismissal of claims under *CR 56* is reviewed *de novo*, taking all inferences in the record in favor of the non-moving party. *Hayden v. Mutual of Enumclaw Insurance Co.*, 141 Wn.2d 55, 1 P.3d 1167 (2000); *Schroeder v. Excelsior Management Group, LLC*, 117 Wn.2d 94, 297 P.3d 677 (2013) (hereinafter "*Schroeder*") (citing *Dreiling v. Jain,* 151 Wn.2d 900, 93 P.3d 861 (2004); *Hauber v. Yakima County*, 147 Wn.2d 655, 56 P.3d 559 (2002); *Bavand v. OneWest Bank, FSB*, 176 Wn.App 475, 485, 309 P.3d 636 (2013) (hereinafter "*Bavand*"). Summary judgment is only appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Balise v. Underwood*, 62 Wn.2d 195, 381 P2d 966 (1963); *Schroeder*; *Herring v. Texaco, Inc.*, 161 Wn.2d 189, 165 P.3d 4 (2007); *Bavand,* at page 485.

The initial burden on summary judgment is on the moving party to prove that no material issue is genuinely in dispute. *CR 56.* Sworn statements on summary judgment must be (1) made on personal knowledge, (2) setting forth facts as would be admissible in evidence and (3) showing affirmatively that the affiant is competent to testify to the matter stated in the sworn statement. *Snohomish County v. Rugg*, 115 Wn.App. 218, 61 P.3d 1184 (2002); *Blomster v. Nordstrom*, 103 Wn.App.

252, 11 P.3d 883 (2000); *Lilly v. Lynch,* 88 Wn.App. 306, 945 P.2d 727 (1997).

In reviewing the evidence submitted on summary judgment, facts asserted by the non-moving party and supported by affidavits or other appropriate evidentiary material must be taken as true. *State ex rel Bond v. State*, 62 Wn.2d 487, 383 P.2d 288 (1963).

Summary judgment is appropriate if reasonable persons can reach only one conclusion from all of the evidence, viewed in a light most favorable to the non-moving party. *Shows v. Pemperton*, 73 Wn.App. 107, 868 P.2d 164 (1994); *Doherty v. Munipality of Metro*, 83 Wn.App. 464, 921 P.2d 1098 (1996); *Goad v. Hambridge*, 85 Wn.App. 98, 931 P.2d 200 (1997). When there is contradictory evidence, or the moving parties' evidence is impeached, an issue of credibility is presented and the Court should not resolve issues of credibility on summary judgment, but should reserve the issue of credibility for trial. *Balise v. Underwood, supra.*

B. The trial court erred in accepting the testimony of Carmella T. Norman Young.

On summary judgment, Respondents relied primarily on the Declaration of Carmella T. Norman Young. CP 254-260. However, Ms. Young's sworn statements failed to demonstrate sufficient personal and

testimonial knowledge of the facts she offered the trial court. She offered the trial court only her conclusory statement that she has "personal knowledge" and has reviewed the "records regularly kept by SunTrust," but failed to provide the trial court facts that would establish that (1) the computer equipment used by SunTrust is standard; (2) the identity of who compiled the information contained in the computer printouts; (3) a statement of how the information is maintained, (4) when the entries were made and whether they were made at or near the time of the happening or event; and (5) how SunTrust relies on these records. See *RCW 5.45.020*; *State v. Smith*, 16 Wn.App. 425, 558 P.2d 265 (1976) and *State v Kane*, 23 Wn.App. 107, 594 P.2d 1357 (1979). There were simply no facts offered the trial court that would justify the trial court's reliance on the information provided by Ms. Young, especially in view of the fact that Ms. Young has failed to define or describe the tasks customarily handled by her, or a "loan servicer" generally or actually done in this particular case for Fannie Mae. Absent a proper foundation, Ms. Young's testimony constitutes rank hearsay. See *ER 803(a)(6)* and *RCW 5.45.020.*

Under *CR 56(e),* conclusory statements or "mere averment" that the affiant has personal knowledge are insufficient to support a motion for summary judgment. *Blomster v. Nordstrom, Inc.*, 103 Wn.App. 252, 11

P.3d 883 (2000); Editorial Commentary to *CR 56* (citing *Antonio v. Barnes*, 464 F2d 584, 585 4th Cir. 1972).

Moreover, without a proper foundation, Ms. Young's testimony fails to meet the requirements of *CR 56(e)* that mandates supporting affidavits be "made on personal knowledge" setting forth such facts "as would be admissible in evidence" and affirmatively showing the "affiant is competent to testify to the matters stated." Since Ms. Young has failed to establish the basis of her knowledge, personal knowledge is lacking and her testimony should have been given no weight by the trial court. See *CR 56(e); Loss v. DeBord,* 67 Wn.2d 318, 407 P.2d 421 (1965). Although Ms. Young asserts that SunTrust is the current loan servicer for Fannie Mae, nowhere does she identify the actual transaction (or any details) or any legal document from which this relationship arose or its terms.

Moreover, Ms. Young does not indicate how the records of SunTrust or its predecessors were kept or the basis of her knowledge of the same, aside from her bare conclusory statements. There is absolutely no basis upon which to rely on any of the statements contained in Ms. Young's Declaration. We know nothing about her actual activities or how she is qualified to speak to the issues she attempts to address, nor was there any showing that SunTrust was acting within the scope of any

authority granted by Fannie Mae, the basis of the purported accounting for the debt, the chain of custody for alleged possession of the Note, or the maintenance of the records. There is no factual basis upon which to gauge the reliability of Ms. Young's testimony. Since Ms. Young cannot verify the reliability of the business records she has produced or the basis and reliability of the information she provides, her testimony is at best hearsay and her Declaration should have been be stricken and ignored by the trial court.

C. Application of CR 56(f).

CR 56(f) provides as follows:

> (f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

In May of 2013, Mr. Bowman, through counsel, propounded Requests for Production to each of the above-named Respondents. CP 312-396.

On or about June 10, 2013, the Requests for Production to SunTrust were returned. CP 397-427. Little of value was provided due to Respondent's extensive use of boilerplate objections. See *Johnson v.*

Mermis, 91 Wn.App. 127, 955 P.2d 826 (1998). The only document produced was Mr. Bowman's loan file, which was not responsive to the specific discovery requests propounded. Moreover, the responses were not verified by any representative of SunTrust.

On the same day, the Requests for Production to NWTS were returned. CP 428-563. Like the responses from SunTrust, the responses from NWTS were of little value due to Respondent's use of boilerplate objections. See *Johnson v. Mermis*, *supra*. The only document produced was, again, Mr. Bowman's foreclosure file, which was not responsive to the specific discovery requests. Again, the responses were not verified by any representative of NWTS.

No responses to Mr. Bowman's discovery requests to Fannie Mae or MERS were received prior to hearing on summary judgment and remain outstanding. CP 303.

As argued by Mr. Bowman's counsel at hearing on summary judgment, without full and complete responses to Plaintiff's discovery requests, Mr. Bowman could not adequately defend against portions of Respondents' motion or seek additional affidavits in opposition to the motion. Accordingly, Respondents' motion for summary judgment should have been continued or denied without prejudice to permit Mr. Bowman

time to obtain the requested discovery, pursuant to *CR 56(f)*. However, the trial court denied Mr. Bowman's request.

The trial court's refusal to provide Mr. Bowman additional time for discovery was particularly prejudicial because *RCW 61.24.130* essentially reverses the typical burden of proof from the party initiating the foreclosure action to the party defending against the action. Instead of mortgage lenders, servicers and successor trustee's bearing the burden of proving their actions are consonant with the provisions of the DTA, the homeowner bears the burden of proving there has been a violation of the DTA. This requires the homeowner to seek from reluctant and/or recalcitrant institution/corporate players, information that only the they have within their possession and control – largely due to their reliance on organizations such as MERS.

Based upon the foregoing, the trial court should have granted Mr. Bowman additional time to "permit affidavits to be obtained", "depositions to be taken" or "discovery had", but did not do so. *CR 56(f)*. Accordingly, this Court should remand this matter back to the trial court for further consideration and to provide Mr. Bowman the opportunity to obtain the discovery denied to him by the trial court.

D. Violations of the DTA.

The Washington Supreme Court has often stated that the DTA must be strictly construed in the borrower's favor. *Albice v. Premier Mortgages Services of Washington, Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012) (hereinafter "*Albice*") (citing *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 915-916, 154 P.3d 882 (2007); *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 93, 285 P.3d 34 (2012) (hereinafter "*Bain*"); *Schroeder*, at page 105. See also *In re Fritz*, 225 BR 218 (E.D. Wash. 1997); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 752 P.2d 385 (1988); *Walker*, at page 306; *Bavand,* at pages 485-486. Substantial compliance with the statutory provisions is not enough.

Strict compliance with the provisions of the DTA and construction of the statute in favor of the borrower is necessary and justified because "of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting non-judicial foreclosure sales." *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 789, 295 P.3d 1179 (2013) (hereinafter "*Klem*") (citing *Udall v. T.D. Escrow Serivces, Inc.*, 159 Wn.2d 903, 915-916, 154 P.3d 882 (2007)

On summary judgment, the trial court was presented a number of genuine issues of material fact in dispute as to lawfulness of Respondents'

prosecution of a non-judicial foreclosure against Mr. Bowman and their strict compliance with the DTA. Relying largely on Respondents' arguments based on *Vawter v. Quality Loan Service Corp. of Washington*, 707 F.Supp.2d 1115 (W.D. Wash. 2010) (hereinafter "*Vawter*"), the trial court ignored these clearly apparent factual disputes.

i. Only the true and lawful owner and holder of a Note and Deed of Trust can initiate a non-judicial foreclosure.

Under the DTA only the duly authorized "beneficiary" has the right to declare a default, under *RCW 61.24.030*, or appoint a successor trustee, under *RCW 61.24.010*. *RCW 61.24.005(2)* defines the term "beneficiary" as the "holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation." As the court in *Bain* noted, the definition of "note-holder" has remained unchanged since the definitions were added to the DTA in 1998, and is consistent with certain portions of Article 3 of the UCC, as adopted by the Washington legislature. *Bain*, at pages 103-104. Article 3 holds that the person entitled to enforce the terms of a promissory note is the holder, a non-holder in possession, or transferee who obtains the right to enforce directly from the holder. *RCW 62A.3-203*. However, the DTA does not use the

additional Article 3 language regarding who may enforce. The DTA only refers to "the holder of the note or other obligation." *RCW 61.24.005(2).* Significantly, there is nothing in the DTA that would allow a non-holder, who might otherwise be able to enforce the terms of a note though other means under Article 3, to enforce the terms of the note through the initiation of a non-judicial foreclosure. *RCW 61.24.005(2).* Rather, it appears the legislature has specifically limited who may initiate a non-judicial foreclosure under the DTA and, until 2009, that was solely and exclusively the note-holder. *RCW 61.24.005(2).*

In 2009, the legislature amended the DTA to require that certain sensitive actions in the foreclosure process be undertaken by the "owner" of the note. See *RCW 61.24.030(7)(a)* and *(b)* and *RCW 61.24.163(5)(c).* Drawing on these changes in the DTA, the *Bain* court specifically held that "if the original lender had sold the loan, the purchaser (Fannie Mae in this case) would need to establish ownership of that loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions." *Bain* at page 111. In particular, the *Bain* court cited to some portions of the statute to illustrate this point:

> Among other things, "the trustee shall have proof that the beneficiary is the ***owner*** of the promissory note or other obligations secured by the deed of trust" before foreclosing on an owner-occupied home. RCW 61.24.030(7)(a), (8)(*l*).

Bain, at page 93-94 (emphasis added).

The use of the term "owner" in *RCW 61.24.030(7)(a)* and *(8)(l)* is not isolated. *RCW 61.24.040(2),* adopted by the legislature in 1998 without subsequent amendment, requires the trustee to declare that the issuance of a notice of trustee's sale "is a consequence of defaults in the obligation to . . . . , the Beneficiary of your Deed of Trust and owner of the obligation secured thereby." Similar language is found in *RCW 61.24.163(5)(c).*

There is no reasonable way to read *Bain* and the statutory provision cited above in any other manner except that being the holder is a necessary, but not a sufficient condition to conducting a non-judicial foreclosure: the "holder" must also be the "owner" of the obligation, particularly when declaring a default in the obligation and when appointing a successor trustee.[1] *RCW 61.24.030* and *RCW 61.24.010.* However, no Washington court has gone this far.

---

[1] It is important to note that in this case, the provisions of *RCW 61.24.030(7)* requiring the trustee "have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust" were in effect at the time the notice of trustee's sale was issued on November 29, 2012, unlike the situation addressed by this Court in *Walker*, where the notice of trustee's sale was issued on July 21, 2009 and apparently prior to the effective date of the current statutory requirements

ii. Only a duly authorized trustee may initiate a non-judicial foreclosure.

Washington courts have gone so far as to hold that only a lawful beneficiary of a deed of trust has the power to appoint a successor trustee under *RCW 61.24.010(2),* and only a lawfully appointed successor trustee has the authority to foreclosure a deed of trust. *Walker*, at page 306 (citing *Bain,* at page 89, and *RCW 61.24.010*); *Bavand*, at page 486-487. It is Mr. Bowman's position that SunTrust was never a lawful beneficiary of the subject obligation and never had the authority to appoint NWTS to prosecute a non-judicial foreclosure.

In addressing SunTrust's authority to act against Mr. Bowman, the first question that arises is whether SunTrust was a valid "beneficiary" under *RCW 61.24.005* when the subject foreclosure was initiated. There were numerous open questions of material fact before the trial court on this issue.

Although SunTrust was identified as the "lender" in Mr. Bowman's Note and Deed of Trust of September 4, 2008, SunTrust admitted "selling" the loan to Fannie Mae on or about October 1, 2008. CP 92-110 and 255. Upon selling Mr. Bowman's Note and Deed of Trust to Fannie Mae, all SunTrust retained was servicing rights and possession of the Note and Deed of Trust, presumably as agent and custodian for

Fannie Mae. CP 255. Certainly, this is the only conclusion one can draw from the testimony of Ms. Young, if her testimony can be given any weight at all. CP 254-260.[2] Thus, the real owner and holder of the Note and Deed of Trust, the real "beneficiary", at the time Respondents initiated a non-judicial foreclosure against Mr. Bowman was Fannie Mae, not SunTrust.

Turning to the facts presented to the trial court, Respondents provided the trial court no evidence of the terms of SunTrust's sale of Mr. Bowman's Note and Deed of Trust to Fannie Mae. CP 254-260 and 300-563. Respondents provided the trial court no evidence of SunTrust's retention of the servicing rights or the terms upon which SunTrust retained possession of the Note and Deed of Trust. CP 254-260 and 300-563. Respondents provided the trial court no evidence of the terms of the agency relationship between SunTrust and Fannie Mae. CP 254-260 and 300-563. Respondents provided the trial court no evidence that Fannie Mae ever explicitly declared a default on Mr. Bowman's obligation, as opposed to a declaration of a default by one of Fannie Mae's agents acting on its behalf. CP 254-260 and 300-563. Respondents provided the trial

[2] Despite Mr. Bowman's genuine concerns regarding Ms. Young's competence to offer much of the evidence she offers in her Declaration of April 26, 2013, as argued above, for purposes of this appeal, SunTrust must live with and be bound by its employees admissions offered on SunTrust's behalf on summary judgment.

court no evidence that SunTrust ever contacted Fannie Mae to obtain approval for initiating a non-judicial foreclosure. CP 254-260 and 300-563. Indeed, it appears from the record that SunTrust was acting on its own without any authority from its principal, Fannie Mae, whatsoever.

Moreover, it is important to note that SunTrust endorsed the subject Note in blank, thus divesting itself of any and all interest in the Note, under *RCW 62A.3-203*. CP 260. The endorsement was not dated, so there was no way to determine if the endorsement was affixed prior to contemporaneously with or after the sale of the obligation to Fannie Mae. Arguably, this endorsement rebuts SunTrust's assertion that it was a "holder" of the obligation at the time Respondents initiated non-judicial foreclosure proceedings against Mr. Bowman. Nevertheless, the trial court was confronted with a material issue of fact in dispute regarding SunTrust's status as a holder, given the blank endorsement by SunTrust, even under Respondents' analysis of applicable law.

A second set of open questions of material fact arise from the Corporate Assignment of Deed of Trust of March 16, 2012, in which MERS purportedly assigned Mr. Bowman's Note and Deed of Trust to SunTrust, for "good and valuable consideration." CP 43. As the Supreme Court in *Bain* noted, if MERS never held Mr. Bowman's Note, it was not

a lawful beneficiary and had nothing to assign to SunTrust. *Bain*, at pages 110-111; *Bavand*, at page 488. Accordingly, SunTrust could not rely on the MERS assignment of Mr. Bowman's Deed of Trust to provide it authority to initiate a non-judicial foreclosure.

Again, turning to the facts presented to the trial court on summary judgment, Respondents provided the trial court no evidence that MERS ever held Mr. Bowman's Note. CP 254-260 and 300-563. Respondents provided the trial court no evidence that Fannie Mae was ever consulted about the assignment of Mr. Bowman's Deed of Trust, much less whether Fannie Mae authorized execution of the Corporate Assignment of Deed of Trust of March 16, 2012. CP 254-260 and 300-563. Finally, Respondents provided the trial court no evidence of any consideration being paid for the purported assignment of the Deed of Trust or by whom. CP 254-260 and 300-563.

Clearly, there were numerous issues of material fact before the trial court on summary judgment regarding SunTrust's authority to initiate a non-judicial foreclosure as there was no evidence that SunTrust was the true and lawful owner and holder of the subject obligation or had obtained the express authorization from the purported owner of the obligation, Fannie Mae, to initiate foreclosure.

If SunTrust was not the duly authorized owner and holder of the subject obligation or otherwise failed to obtain such authority from the true and lawful owner and holder of the obligation, SunTrust's appointment of NWTS as successor trustee was not valid or lawful. *Walker,* at page 306 and *Bavand*, at page 486-487. As noted by this Court in *Walker*, "when an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice of trustee's sale. *Walker*, at page 306. Accordingly, absent proof of authority, all actions taken by NWTS, based upon SunTrust's Appointment of Successor Trustee of November 5, 2012, were unlawful. *Bavand*, at page 488.

iii. NWTS failed to comply with the DTA and its fiduciary duty of good faith.

Notwithstanding serious doubts regarding SunTrust's standing as a qualified "beneficiary" to initiate a non-judicial foreclosure against Mr. Bowman and the lawfulness of SunTrust's appointment of NWTS as successor trustee, there were genuine issues of material fact raised on summary judgment as to whether NWTS breached its fiduciary duty of good faith to Mr. Bowman. *Klem*, at page 790. Under *RCW 61.24.010(4)* and *Klem*, NWTS, as successor trustee, had a fiduciary duty to act in good faith in its dealings with Mr. Bowman, but instead engaged in an unethical

process of recording and relying upon documents it knew or should have known to be false and misleading. It is Mr. Bowman's contention that by relying on an endorsement that appears to be inconsistent with SunTrust's assertions of ownership, failing to verify the ownership of the obligation, relying on improperly dated and notarized documents and assignments of his Note and Deed of Trust without express authority from the true and lawful owner and holder, NWTS breached the "fiduciary duty of good faith" by attempting to prosecute a non-judicial foreclosure on Respondents' behalf without strictly complying with all requisites of sale.

Specifically, under *RCW 61.24.030(7(a)* a trustee must ensure that the beneficiary is the *owner and holder* of any promissory note or other obligation secured by the deed of trust before a notice of trustee's sale is recorded, transmitted, or served. Ordinarily, a trustee may rely on a declaration to that effect. However, that cannot be the case where the trustee has actual knowledge or should have known that the "owner" of the obligation and entity in possession of the note and deed of trust are separate entities, as is the case in this matter. Moreover, a trustee has a duty to be sure that the documents recorded are properly dated and notarized. In both regards, NWTS has failed to comply with its statutory mandate.

As noted above, SunTrust has admitted that it sold the loan to Fannie Mae on or about October 1, 2008. CP 255. NWTS was aware that Fannie Mae, rather than SunTrust, was the owner of the subject loan at the time NWTS prepared the Notice of Default on August 14, 2012, as SunTrust's "duly authorized agent," as evidenced by the statements contained in Paragraph K of the subject Notice of Default. CP 47. This Notice of Default was prepared, executed and served prior to the appointment of NWTS as successor trustee on November 5, 2012. Once aware of this fact, NWTS had a fiduciary obligation to halt the prosecution of the non-judicial process to clarify the identity of the true party in interest and obtain, if necessary, the express authority from the owner of the obligation to proceed further in the foreclosure process, to ratify its appointment under *RCW 61.24.010* and verify the existence of a default, under *RCW 61.24.030.* Upon being provided information suggesting Fannie Mae was the owner of the obligation, NWTS could no longer rely on SunTrust's representations of authority to foreclose or the existence of a default or rely on the Beneficiary Declaration. See CP 171. NWTS had a duty to confirm each of these issues before proceeding further.

At hearing, the trial court was confronted by contradictory evidence regarding the ownership of the loan. The Notice of Default

declared the owner to be Fannie Mae. CP 47. However, the Notice of Foreclosure identified the party to whom the debt was due to be SunTrust. CP 497. The Beneficiary Declaration declared SunTrust to the "holder" of the promissory note. CP 171. Yet, Mr. Bowman testified that Fannie Mae obtained the loan on or about October 1, 2008. This conflicting evidence provided the trial court sufficient dispute of material fact to deny Respondents' motions for summary judgment, but the trial court chose to ignore this conflicting testimony.

Two additional issues merit consideration in evaluating NWTS' compliance with the provisions of the DTA.

First, the Notice of Foreclosure issued by NWTS on or about November 11, 2012 fails to comply with *RCW 61.24.040(2)*, which provides, in pertinent part, as follows:

> 2) In addition to providing the borrower and grantor the notice of sale described in subsection (1)(f) of this section, the trustee shall include with the copy of the notice which is mailed to the grantor, a statement to the grantor in substantially the following form:
>
> NOTICE OF FORECLOSURE
>
> Pursuant to the Revised Code of Washington, Chapter 61.24 RCW.
>
> The attached Notice of Trustee's Sale is a consequence of default(s) in the obligation to . . . . . ., the Beneficiary of your Deed of Trust and owner of the obligation secured thereby.
>
> (Emphasis added)

The Notice of Foreclosure prepared and served on Mr. Bowman provided failed to substantially comply with foregoing portions of *RCW 61.24.040(2)* and provided false and/or misleading information. The NWTS' Notice of Foreclosure provided as follows:

> The attached Notice of Trustee Sale is a consequence of default(s) in the obligation to the SunTrust Mortgage, Inc. of your Deed of Trust.

(Emphasis added) CP 497.

Completely left out of NWTS' Notice of Foreclosure is any declaration that SunTrust was the beneficiary and the owner of the obligation as required under *RCW 61.24.040(2).* Moreover, the reasonable inference form the way in which the subject sentence is structured by NWTS is that SunTrust was the creditor to whom Mr. Bowman owed money, which NWTS knew to be false, based upon its declarations in the Notice of Default. CP 47. See also CP 255.

Second, NWTS appears to have engaged in a practice of falsely dating mandated foreclosure documents. Specifically, the Notice of Trustee's Sale was executed by Nanci Lambert of NWTS "effective" November 19, 2012, but not notarized until November 27, 2012. This issue was specifically addressed in *Klem*,[3] where the Washington State

[3] While the *Klem* Court specifically addressed the issue of "pre-dating" notarial signatures, this case involves the "post-dating" of notarial signatures. Under *RCW 42.44*

Supreme Court held that the act of false dating by a notary employee of the trustee in a non-judicial foreclosure constitutes a misdemeanor under *RCW 42.44.160* and constitutes an unfair and deceptive act and practice and satisfies the first three elements of a claim under *RCW 19.86, et seq. Klem*, at pages 792-795. As noted by the *Klem* court: "the court does not take lightly the importance of a notary's obligation to verify the signor's identity and the date of signing by having the signature performed in the notary's presence." *Klem* at page 793, citing *Werner v. Wener*, 84 Wn.2d 360, 526 P.2d 370 (1974). Clearly, Ms. Lambert's signature was not affixed on the Notice of Trustee's Sale before the notary in this case. Otherwise the "effective" date of execution and the date of the notary would be the same. By permitting this sort of misconduct in its role as trustee, NWTS has clearly violated its fiduciary duty of good faith to Mr. Bowman, for which he should be entitled to a claim for injury under *RCW 19.86. Klem,* pages 794-795.

In response to Mr. Bowman's concerns about dating of the Notice of Trustee's Sale, Mr. Jeff Stenman of NWTS testified that the use of the term "effective date" "evidences the date of drafting." CP 636-637.

---

there should be no distinction between the two forms of misconduct for purposes of this Court's analysis of NWTS' actions and for purposes of evaluating Mr. Bowman's claims under *RCW 19.86.*

However, this explanation makes no sense. NWTS' use of the term has no statutory basis within *RCW 61.24, et seq.,* and deviates from the form adopted by the Washington Legislature in *RCW 61.24.040(f).* Moreover, one of the primary definitions of the term "effective" is to "execute". See Black's Law Dictionary, 4th Ed., Rev. (1968). A similar definition is found elsewhere: "concerning with, or having the function of, carrying into effect, executing, or accomplishing. . . ." Oxford English Dictionary, Oxford Press (1979). None of these definitions supports Mr. Stenman's definition of the term. And, why would the date of drafting be noted rather than the draft number (i.e. draft II or draft IV or final draft)? Mr. Stenman doesn't explain. Applying common sense to the definitions offered by Black's Law Dictionary and the Oxford English Dictionary and applying the plain and ordinary meaning to the term, "drafting" a document doesn't make it "effective", signing the document makes it "effective". Mr. Stenman's testimony regarding NWTS' use of the term "effective" is suspect and draws his credibility into question. Such questions should never be resolved on summary judgment. *Balise v. Underwood*, supra.

Based upon the foregoing, there were clear issues of material fact before the trial court of manifest violations of the DTA that should have

mitigated against summary judgment, based upon the record before the trial court. Accordingly, this Court should reverse the trial court's summary judgments of July 12, 2013 and remand this matter back to the trial court for consideration of Mr. Bowman's claims for violation of the above-referenced provisions of the DTA on the merits.

E. Violation of the CPA.

The elements of a claim under the CPA include the following: (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. *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wn.2d 778, 719 P.2d 531 (1986). The CPA should be "liberally construed that its beneficial purposes may be served." *RCW 19.86.920; Short v. Demopolis,* 103 Wn.2d 52, 691 P.2d 163 (1984).

The *Bain* court specifically held that a homeowner might have a CPA claim against MERS if MERS acts as an ineligible beneficiary. *Bain* at pages 115-120. The *Bain* court specifically ruled that the unfair and deceptive act or practice element can be presumed based upon MERS' business model and the manner in which it has been used.[4] *Bain* at pages

[4] This is in accord with other case law in Washington. An unfair or deceptive act can include misrepresentations of facts related to the legal status of a debt. *Panag v. Farmers Ins. Co. Of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009) (deceptive

115-117; *Klem,* at pages 784-788. See also *Walker,* at pages 318-319 and *Bavand,* at pages 504-506. Indeed, the improper appointment of NWTS, among other violations of the DTA alleged herein, can constitute unfair and deceptive acts or practices. *Walker*, at pages 319-320, and *Bavand*, at page 505.

The *Bain* court specifically ruled that the public interest impact element can also be presumed, based on the number of mortgages that utilized MERS as a nominee for an undisclosed principal. *Bain,* at page 118; *Bavand,* at pages 506-507.

Although the *Bain* court did not specifically address the trade or commerce element, that could also be presumed from the court's analysis of the public interest element. See *Walker,* at page 318. All of the named Respondents are in the business of making or servicing loans for hundreds, if not thousands, of businesses and residents in the State of Washington. See *Bain*, at page 118. In sum, the only elements that cannot be presumed in a typical MERS case are the fourth and fifth elements: the elements of damages/injury and causation. Thus, on summary judgment, Mr. Bowman needed only to allege facts regarding the fourth and fifth elements of a CPA claim by asserting his claims of injury/damages and causation.

---

methods used by a collection agency to recover money on behalf of an insurance company). See also *Klem.*

As to the damages/injury and causation elements of a CPA claim, the analysis set forth in *Panag v. Farmers Insurance Co.*, 166 Wn.2d 27, 204 P.3d 885 (2009) is the most useful to the present case, because it also involved improper efforts to collect on a debt. There the Washington Supreme Court held that:

> Monetary damages need not be proved; unquantifiable damages may suffice. *Id.* (loss of goodwill); *NW. Airlines, Inc. v. Ticket Exch., Inc.,* (proof of injury satisfied by "stowaway theory" where damages are otherwise unquantifiable in case involving deceptive brokerage of frequent flier miles); *Fisons,* (damage to professional reputation); *Sorrel v. Eagle Healthcare, Inc.,* (injury by delay in refund of money); *Webb v. Ray,* (loss of use of property).

Panag at pages 58. (internal citations omitted). The *Panag* analysis was cited with approval by this Court in *Walker*, at page 320, and *Bavand,* at pages 508-509.

Thus, "investigation expenses and other costs" establish injury and are compensable under a CPA claim. *Panag* at page 62. Other injuries may include injury to financial reputation or professional goodwill. *Physicians Insurance Exchange & Association v. Fisons, Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993), citing to *Nordstrom, Inc, v. Tampourlos*, 107 Wn.2d 735, 733 P.2d 208 (1987), *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 792 P.2d 142 (1990), and *Rasor v. Retail*

Credit Co., 87 Wn.2d 516, 554 P.2d 1041 (1976) (holding that injury to one's credit reputation constitutes injury).

In addition, courts across the country have acknowledged the emotional impact of loss of home. Foreclosure or the prospect of foreclosure is almost *per se* an emotional harm. *Cf. Parks v. Wells Fargo Home Mortg., Inc.,* 398 F.3d 937, 941 (7th Cir. 2005) (denying emotional distress damages because no independent tort, only a breach of contract, but noting, "We have no doubt that anyone would suffer emotional harm from losing his or her home, or even from facing such a possibility."); *Matthews v. Homecoming Fin. Network*, 2005 U.S. Dist. LEXIS 21535 (N.D. Ill. 2005) (foreclosure without cause sufficient basis for intentional infliction of emotional distress claim); *Johnstone v. Bank of Am., N.A.,* 173 F. Supp. 2d 809 (N.D. Ill. 2001) (possibility of foreclosure sufficient to state emotional distress damages and survive motion to dismiss RESPA claim); *Stafford v. Puro*, 63 F.3d 1436, 1442 (7th Cir. 1995) ($100,000 in emotional distress damages to wrongfully terminated employee supported by loss of home in foreclosure, ruined credit, as well as physical symptoms including spastic colon and high blood pressure); *Peeler v. Kingston Mines,* 862 F.2d 135, 136 (7th Cir. 1988) ($50,000 in emotional distress damages in retaliatory discharge supported by homelessness and

reliance on charity care to pay bills; physical symptoms included high blood pressure and difficulty sleeping). The likelihood of foreclosure from these loans and the devastating personal impact of foreclosure should be enough to demonstrate both outrageous conduct and knowledge that severe emotional distress is likely to result.

In addition to his claims for declaratory relief, injunctive relief and damages, Mr. Bowman's claims that by concealing the October 1, 2008 sale of the loan to Fannie Mae, the Respondents have deceived and prevented Mr. Bowman from meaningfully pursuing his options under the federal Home Affordable Modification Program (HAMP). In particular by failing to disclose the sale and the existence of an agent-principal relationship, Mr. Bowman was not aware of his full legal rights. Had Mr. Bowman known that Fannie Mae's owned his loan, he could have pursued Fannie Mae sponsored programs that might have provided him a modification of his loan. As provided by Fannie Mae borrowers are eligible to a modification of the loan when:

- You are ineligible to refinance
- You are facing a long-term hardship
- You are behind on your mortgage payments or likely to fall behind soon
- Your loan was originated on or before January 1, 2009 (i.e., the date you closed your loan)

- Your loan is owned by Fannie Mae or Freddie Mac –or is serviced by a participating mortgage company.[5]

Significantly, among the companies listed as participating mortgage companies SunTrust is not listed and has been exempted.[6] Mr. Bowman did not become aware of Fannie Mae's ownership until receiving a Notice of Default on August 14, 2012 and did not verify this information until January 22, 2013. CP 45-48, 60 and 291-298. By that time Mr. Bowman owed over $100,000 in payments, making any modification problematic. Respondents all participated in a collusion that led Mr. Bowman to believe he did not have options under the federal programs, when the fact was just the opposite was true.

Specifically, as a direct and proximate result of Respondents' misconduct, Mr. Bowman testified on summary judgment that he had suffered damages through (1) the threat of losing all of his equity in his home without compensation, (2) a substantial reduction of his ability to be able to sell the house after the time the trustee records the notice of sale; (3) a substantial reduction in any equity to borrow against at the time of the recording of the notice of sale; (4) damages to his credit as a result of Respondents' unlawful acts, (5) the inability to take full advantage of the

---

[5] http://www.knowyouroptions.com/modify/home-affordable-modification-program

[6] http://www.makinghomeaffordable.gov/contact_servicer.html

protections of the federally mandated HAMP program and the Washington State Fair Foreclosure Act mediation process; and (6) consequential damages arising by the wrongful foreclosure action. CP 291-299. As to this last item the expenditure of out-of-pocket expenses for postage, parking, and consulting an attorney are sufficient proof of an injury under *Hangman Ridge*. *Panag* at page 902.[7]

Injury to a person's business or property is broadly construed and in some instances, where "no monetary damages need be proven, and that non-quantifiable injuries, such as loss of goodwill would suffice for this element of the *Hangman Ridge* test." *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987); *Klem.* The expenditure of out-of-pocket expenses for postage, parking, and consulting an attorney are sufficient proof of an injury under *Hangman Ridge*. *Panag,* at pages 59-65. Here, Mr. Bowman had to repeatedly take time off from his work schedule at a loss of wages and incurred travel expenses to consult with an attorney to dispel uncertainty regarding the ownership of his Note and to address the misconduct of the Respondents. CP 291-299.

All of the injuries and damages alleged by Mr. Bowman were the direct and proximate cause of the misconduct alleged in the Complaint

---

[7] See also *In re John Patrick Keahev*, BAP No. WW-08-1151.

related to Respondents' wrongful foreclosure of Mr. Bowman's home and, had the trial court properly presumed the validity of all of Mr. Bowman's allegations and all inferences that could be inferred therefrom, all five elements for a private cause of action under the CPA would have been met. Accordingly, this Court should reverse the trial court's summary judgments of July 12, 2013 and remand this matter back to the trial court for consideration of Mr. Bowman's CPA claims on the merits.

F. Violation of *RCW 9A.82.*

RCW 9A.82.045 provides as follows:

It is unlawful for any person knowingly to collect any unlawful debt. A violation of this section is a class C felony.

RCW 9A.82.100(1)(a), provides as follows:

(1)(a) A person who sustains injury to his or her person, business, or property by an act of criminal profiteering that is part of a pattern of criminal profiteering activity, or by an offense defined in RCW 9A.40.100, 9.68A.100, 9.68A.101, or 9A.88.070, or by a violation of RCW 9A.82.060 or 9A.82.080 may file an action in superior court for the recovery of damages and the costs of the suit, including reasonable investigative and attorney's fees.

RCW 9A,82.010(4) defines 'criminal profiteering" as follows:

4) "Criminal profiteering" means any 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, regardless of whether the act is charged or indicted, as any of the following:

* * *

> (k) Extortion, as defined in RCW 9A.56.120 and 9A.56.130;
>
> * * *
>
> (p) Collection of an unlawful debt, as defined in RCW 9A.82.045;

There is little Washington law construing the civil limits of *RCW 9A.82*, but the statute has been applied to misconduct associated with the DTA. *Bowcutt v. Delta North Star Corp.*, 95 Wn.App. 311, 976 P.2d 643 (1999).

While Mr. Bowman expected the Respondents named herein and the trial court to respond incredulously at the suggestion that well-heeled banks, mortgage lending and servicing companies could be accused of "racketeering", the allegations contained in his Declaration of June 17, 2013 and his verified Complaint, which the Court must accept as true under *CR 56,* clearly establish such a claim. CP 1-62 and 291-299. Proof that these lending behaviors are being pursued by these Respondents and others in the mortgage lending industry is amply documented in the cases offered by Mr. Bowman herein: *Bain, Klem, Schroeder, Walker, Bavand,* etc.

First, Respondents' attempt to collect a debt for which they have no lawful interest in constitutes a violation of *RCW 9A.82.045.*

Second, Respondents' efforts in demanding payment on a debt to which they have no lawful interest and threatening to take Mr. Bowman's home by non-judicial means constitutes extortion, within the terms of *RCW 9A.56.120* and *RCW 9A.56.130.* See also *RCW 9A.04.110(27)(j).*

In response to these claims, Respondents attempted to mislead the trial court by alleging that Mr. Bowman's claims are time barred under *RCW 4.16.040(1).* However, Mr. Bowman's "racketeering" claims are not based on the Note alone, as argued by Respondents, but on Respondents' foreclosure efforts, which did not begin until July 9, 2010 and continue to this day. CP 45-48.

The pattern of misconduct alleged herein is the similar to what others in the State of Washington in Mr. Bowman's position suffer. The pervasiveness of MERS transactions in the mortgage lending marketplace were noted by the *Bain* court. See *Bain* at page 38. The misconduct of the servicers takes on fairly predictable patterns as they are intentionally transacted as "cookie cutter" transactions to lower costs and speed the process. See *Bain, Klem, Schroeder, Walker, Bavand,* etc. Unfortunately, the trial court cut short Mr. Bowman's discovery efforts by failing to grant

his request for additional time to conduct the discovery necessary to flesh out his claims under *RCW 9A.82*, pursuant to *CR 56(f)*. For these reasons, this Court should reverse the trial court's summary judgments of July 12, 2013 and remand this matter back to the trial court for consideration of Mr. Bowman's claims under *RCW 9A.82* on the merits.

G. Application of *Vawter*.

Respondents argued to the trial court that "the DTA does not authorize a cause of action for damages for the wrongful initiation of non-judicial foreclosure proceedings where no trustee's sale has occurred," citing *Vawter*. CP 243. This argument was apparently accepted by the trial court in the absence of any apparent authority to the contrary. However, subsequent to the trial court's consideration and hearing on Respondent's motion for summary judgment, *Vawter* and its progeny on this issue were thoroughly repudiated by this Court in *Walker* and *Bavand*. These decisions are in accord with the treatment of these cases by the Washington State Supreme Court in *Bain,* where the court noted "MERS asserts that 'the United States District Court for the Western District of Washington has recently issued a series of opinions on the very issues before the Court, finding in favor of MERS'. . . . We do not find these cases helpful." *Bain* at page 109.

In *Walker,* this Court repudiated *Vawter* for the following reasons: (1) the *Vawter* case was decided prior to *Bain*; (2) *Vawter* did not contemplate the

2009 amendments to the DTA, specifically the explicit recognition of a cause of action for failure to comply with the act found in *RCW 61.24.127*; and (3) the availability of a cause of action for violation of the DTA could actually address the fear expressed in *Vawter* regarding "flood gate" of litigation. *Walker*, at pages 310-313.[8] See also *Bavand,* at pages 496-497. The arguments repudiating *Vawter* and its progeny are as relevant now as when this Court filed its opinions in *Walker* and *Bavand* and Mr. Bowman would have this Court reaffirm its opposition to *Vawter* in this matter.

IV. CONCLUSION

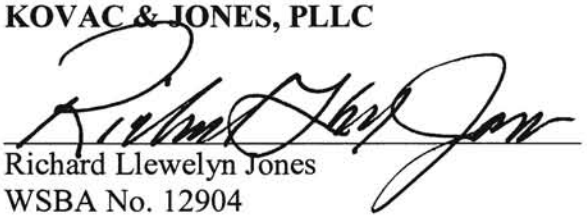
Based on the foregoing argument and analysis, clearly demonstrate that the trial court had numerous issues of material fact in dispute before it when it entered summary judgment dismissing Mr. Bowman's claims on July 12, 2013. There were questions regarding Respondents' standing and authority to initiate a non-judicial foreclosure, questions regarding the credibility of Ms. Young's and Mr. Stenman's testimony, upon which Respondents' relied, questions regarding Respondents' compliance with the DTA and questions regarding application of the CPA and *RCW 9A.82,* given the allegations raised from the pleadings submitted in support of and in opposition to summary judgment. Accordingly, Mr. Bowman

[8] The Washington Supreme Court's consideration of *Walker* as it relates to the repudiation of *Vawter* now pending before that court in the matter of *Frias v. Asset Foreclosure Services, Inc., et al.,* Case No. 89343-8.

respectfully request that this Court to: (1) reverse the trial court's Orders of July 12, 2013; (2) remand this matter for trial on the merits; and (3) award Mr. Bowman his taxable costs and reasonable attorney's fees incurred herein, pursuant to Paragraph 26 of the subject Deed of Trust. CP 34.

REPECTFULLY SUBMITTED this 3rd of February, 2014.

KOVAC & JONES, PLLC



Richard Llewelyn Jones
WSBA No. 12904
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

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

2. That on February 4, 2014, I caused a copy of the foregoing APPELLANTS' OPENING BRIEF to be served to the following in the manner indicated:

John S. Devlin, III, WSBA No. 23988 Andrew C. Yates, WSBA No. 34239 Abraham K. Lorber, WSBA No. 40668 LANE POWELL PC 1420 Fifth Avenue, Suite 4100 Seattle, WA 98101 Telephone (206) 223-7000 Facsimile (206) 223-7100	____ X ____	Facsimile Messenger U.S. 1st Class Mail
Joshua Schaer, WSBA No. 31491 ROUTH CRABTREE & OLSEN PS 13555 SE 36th Street, Suite 300 Bellevue, WA 98006 Telephone (425) 458 2121 Facsimile (425) 458 2131	____ X ____	Facsimile Messenger U.S. 1st Class Mail
Washington State Court of Appeals Division One – Court Clerk 600 University Street One Union Square Seattle, WA 98101-1176 Telephone (206) 464-7750 Facsimile (206) 389-2613	____ X ____	Facsimile Messenger U.S. 1st Class Mail

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 FEB -4 AM 11:31

DATED this 4th day of February, 2014, at Bellevue, Washington.

Dan L. Williams, Paralegal