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72050-0

NO. 725050-0-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

KEVIN J. SELKOWITZ, an individual,

Appellant,
v.

LITTON LOAN SERVICING LP, a Delaware Limited Partnership; NEW CENTURY MORTGAGE CORPORATION, a California Corporation; QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington Corporation ; FIRST AMERICAN TITLE INSURANCE COMPANY, a Washington Corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation, and DOE Defendants 1-20,

Respondents.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

By way of a short summary, the Deed of Trust Act (*RCW 61.24, et seq.)* (hereinafter "DTA") sets forth an exclusive procedure, to be strictly construed in favor of the borrower, whereby a deed of trust may be non-judicially foreclosed. *Albice v. Premier Mortgage Services*, 174 Wn.2d 560, 276 P.3d 1277 (2012). Consecutive steps must be taken under the statute by the party with authority to take that step; otherwise the attempted non-judicial foreclosure is simply invalid and, moreover, may violate the Consumer Protection Act (RCW 19.86, et seq.) (hereinafter "CPA").

The case at bar is similar to *Walker v. Quality Loan Service Corp.*, 176 Wn.App. 294, 306, 308 P.3d 716 (2013) (hereinafter "*Walker*"), where this Court held:

> Only a lawful beneficiary has the power to appoint a successor trustee, and only a lawfully appointed successor trustee has the authority to issue a notice of trustee's sale. Accordingly, 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.

Here, we are concerned with three documents required under the DTA to evidence the parties' compliance with the DTA: the Notice of Default (*RCW 61.24.030*); the Appointment of Successor Trustee (*RCW 61.24.010*); and the Declaration of Ownership (*RCW 61.24.030(7)(a)*).[1] The identity of the

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[1] Copies of these documents are attached hereto, respectively, at ***Appendix "1", "2"*** and ***"3".***

beneficiary and the authority of each of the signatories to each of these documents is ether a disputed issue of fact or is simply not proven by this record. In their briefs, Respondents ignore and are apparently oblivious to the competing and mutually exclusive claims of beneficial ownership in the Note and Deed of Trust. In the materials presented on summary judgment the trial court was offered documentation that suggested at least four (4) entities claimed to be owners or holders of the obligation: MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation (hereinafter "MERS"); LITTON LOAN SERVICING LP, a Delaware Limited Partnership (hereinafter "Litton"); "Please Consult Cover Letter" and U.S. Bank, N.A. as Trustee for GSAA Home Equity Trust 2007-1, Mortgage Backed Certificates, Series 2007-1 (hereinafter "the Trust"). However, the identity of the true and lawful owner and actual holder of the subject obligation ("beneficiary") was the central material issue in dispute on summary judgment.

II. ARGUMENT

A. Appointment of Successor Trustee (*RCW 61.24.010*).

On May 13, 2010, MERS issued an Appointment of Successor Trustee pursuant to *RCW 61.24.010,* identifying itself as the nominee for New Century Mortgage Corporation – not the Trust, as MERS now represents. CP 475-476; Brief of MERS, page 9. Yet in the next paragraph, MERS represents itself to be the "Beneficiary" of the subject obligation in its own right with full authority under *RCW 61.24.010* to appoint a successor trustee. Did MERS

execute the Appointment of Successor Trustee as nominee for New Century Mortgage at that time New Century Mortgage was under the protection of the U.S. Bankruptcy Court and whose executory contracts with entities such as MERS had been rejected, or was MERS acting in its own right as owner and holder of the Note and Deed of Trust or acting as agent for the Trust or some other undisclosed principal?[2] If so, on summary judgment MERS failed to put anything into the record from the claimed successor beneficiary establishing MERS' agency relationship to the successor beneficiary or the scope of that agency.[3]

Now, for the first time on appeal, MERS claims authority to execute the Appointment of Successor Trustee under its "membership agreements"

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[2] MERS purports to act as "nominee for New Century Mortgage Corporation", but any authority that may have existed for MERS to act on behalf of New Century was extinguished when all executory contacts were rejected by the bankruptcy court on or about March 19, 2008. See *In re: New Century TRS Holdings, Inc,* et al., Case No. 07-10416 (KJC), Notice of Rejection of Executory Contract, based on Court Order Docket #388 http://www.scribd.com/doc/59828999/New-Century-Notice-of-Rejection-of-Exec-Con-MERS). CP 1162. All of MERS' authority as nominee of New Century, if not exercised prior to **March 19, 2008**, ceased to exist after that date as a matter of law and its Appointment of Successor Trustee executed by MERS, dated and notarized on **May 12, 2010,** is invalid because any contractual relationship between MERS and New Century had been voided and rescinded by New Century's Rejection of Executory Contracts. *11 U.S.C. §§365(d) (1), 365(g)* and *§502(g).*

[3] As discussed more fully below, MERS' agency can only be proved by the acts of the principal, not the claims of the alleged agent. *Auwarter v. Kroll*, 89 Wash. 347, 351, 154 Pac. 438 (1916) (hereinafter "*Auwarter*"); *Ford v. UBC&J of Am.*, 50 Wn.2d 832, 836, 315 P.3d 299 (1957); *Lamb v. General Associates, Inc.*, 60 Wn.2d 623, 627, 374 P.2d 677 (1962) (hereinafter "*Lamb*"); *Equico Lessors Inc. v. Tow,* 34 Wn.App. 333, 338, 661 P.2d 600 (1983) (hereinafter *Equico Lessors*"). Without proper authority to appoint a successor trustee, all of the acts of that claimed successor trustee are invalid. *Walker,* at page 306.

with various other Respondents. See MERS' Brief at page 11. However, no such "membership agreement" was offered to the trial court on summary judgement nor is before this Court now; and regardless of these conclusory allegations of authority by MERS, the ambiguity in the representations contained in the Appointment of Successor Trustee created genuine issues of material fact on summary judgment which remain now.[4]

The significance of this inquiry and clarification of MERS' authority is manifest. If MERS cannot establish its grant of authority from the true and lawful owner and actual holder (beneficiary) of Mr. Selkowitz's Note and Deed of Trust, it acted as a "unlawful beneficiary" when it executed the Appointment of Successor Trustee; and, if MERS was acting as an unlawful beneficiary when it appointed QLS as successor trustee, QLS lacked the legal authority to record and serve a notice of trustee's sale. *Walker*, at page 306. Indeed, the entire non-judicial foreclosure process collapses.

B. Declaration of Ownership (*RCW 61.24.030(7)*.

Twelve days later, on May 25, 2010, the Declaration of Ownership was signed by "Litton Loan Servicing LP Attorney in Fact" as "Loan Servicer/Authorized Agent for Beneficiary." CP 478. Although in the first paragraph of the Declaration of Ownership Litton claims to be the

[4] 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., supra.;* Editorial Commentary to *CR 56* (citing *Antonio v. Barnes*, 464 F2d 584, 585 4th Cir. 1972

"Beneficiary [who] declares that it is the authorized Agent for the owner and actual holder" of the Note, how can Litton be the beneficiary *and* agent of the beneficiary at the same time? Moreover, Litton further contradicts itself in the fourth paragraph, where it claims to be the "actual holder of the Promissory Note dated 10/31/2006."[5] CP 478. Which is it? Is Litton the agent for the actual holder or the actual holder itself? Litton is silent as to the identity of the "Beneficiary" and the "owner and actual holder" Litton purports to act for.

Litton's concurrent representations of ownership and agency in the Declaration of Ownership were further contradicted at summary judgment by Litton's own witness, Kevin Flannigan. CP 822-823. See also testimony of Jay Patterson. CP 2192. The apparent ambiguity of Litton's ownership status as beneficiary or agent for the beneficiary created a genuine issue of material fact as to Litton's right to foreclose on summary judgment.

C. Notice of Default (*RCW 61.24.030*).

Only the true and lawful owner and actual holder (beneficiary) may declare an obligation to be in default under the DTA. *RCW 61.24.030(8)(c).*

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[5] At no point does Litton represent that it is the owner or reveal the source of its authority for executing the Declaration of Ownership that was relied upon by QLS to initiate and prosecute its foreclosure efforts. No assignment of the obligation or duly executed power of attorney was presented on summary judgment to support the actions taken by Litton against Mr. Selkowitz. Indeed, assuming there is any truth to the allegation that the subject Note and Deed of Trust was sold and assigned to the Trust in a timely fashion prior to foreclosure, Litton was specifically forbidden to "hold" the Note under the terms of the Trust's Master Servicing and Trust Agreement (hereinafter "MST Agreement"), assuming there is any basis for the Trust's involvement whatsoever. See CP 570-796; 1177-1178.

However, the Notice of Default sent to Mr. Selkowitz was signed by "Quality Loan Service Corp. of Washington as Agent for Please Consult Cover Letter, the Beneficiary." CP 1136-1139. In the body of the Notice of Default, QLS represents that the "current owner/beneficiary of the Note secured by the Deed of Trust is: Please Consult Cover Letter" and goes on to represent that "Please Consult Cover Letter" "has declared you [Mr. Selkowitz] in default on the obligation secured by a Deed of Trust recorded on 11/1/2006." CP 1136-1139. No cover letter was ever furnished by QLS with the Notice of Default to identify its principal and the owner and actual holder (beneficiary) referred to in the document. CP 1094-1095. Moreover, there is no proof in this record on appeal from the true and lawful owner and actual holder (beneficiary) that Litton is its authorized agent. No agency agreement or contract was offered on summary judgment to establish the existence or scope of QLS' purported agency relationship or even the identity of the party for whom QLS was supposedly acting.

D. Duty to investigate and verify beneficial interest.

While it might be easy to dismiss QLS' representations in the Notice of Default as scrivener's errors, it highlights one of QLS' numerous violations of the DTA. The competing and mutually exclusive claims of beneficial interest in the subject Note and Deed of Trust identified above divested QLS of any right to rely on Litton's Declaration of Ownership

under *RCW 61.24.030(7)(b),* because it did not fulfill its duty of good faith to Mr. Selkowitz under *RCW 61.24.010(4).* Moreover, given the conflicting information regarding the ownership of the obligation, QLS had an affirmative duty to investigate and verify the ownership of the obligation and Litton's right to foreclose before initiating any action against Mr. Selkowitz and his home, but QLS failed to conduct any such investigation. *RCW 61.24.010(4); RCW 61.24.030(7)(a); Lyons v. U.S. Bank,* 181 Wn.2d. 775, 783, 336 P.3d 1142 (2014) (hereinafter *"Lyons"*). In fact, QLS had no procedures in place at the time to verify the information it was provided by Respondents as to the beneficial interest in the obligation and was apparently totally ignorant to the involvement of the Trust. See CP 1770-1872 (Herbert-West deposition, specific relevant portions of which were cited at length in Appellant's Opening Brief, pages 17-18).

E. <u>The Trust.</u>

Finally, although not a party to this action, Respondents allege that the Trust was the true owner or "investor" of the obligation at the time the non-judicial foreclosure was initiated. CP 800; CP 821-824 (Declaration of Kevin Flannigan); CP 1538 (Blake deposition, page 60, line 24 to page 61, line 13); and CP 2416-2427. The mere allegation of the Trust's ownership of the Note and Deed of Trust created a material issue of disputed fact and repudiated MERS' and Litton's claims as holders and beneficiaries of the

obligation, upon which the trial court relied in granting summary judgment. But, there was no clear evidence before the trial court on summary judgment to establish the Trust's involvement in this transaction. Indeed, there was testimony offered on summary judgment that raised considerable doubt that the subject obligation was ever properly endorsed (CP 623-628; CP 1170-1178; CP 2181-2187) assigned and transferred to the Trust (CP 600; CP 602; CP 623-628; CP 1170-1180; CP 2201-2203). Absent proper endorsement and transfer, the subject Note and Deed of Trust could never have been accepted by the Trust and the Trust could not be a true and lawful owner and actual holder of the obligation authorized to declare the obligation to be in default nor authorized to appoint a successor trustee or authorize anyone else to do so on its behalf. *RCW 61.24.010* and *RCW 61.24.030(8)(c).*

Based on the foregoing and the evidence before the trial court on summary judgment, neither the named Respondents nor the Trust established themselves to be owners or actual holders of the Note and Deed of Trust to affect a non-judicial foreclosure against Mr. Selkowitz. Without establishing the ultimate source of authority to act under the DTA, none of the Respondents named herein acted with authority or lawfully and the trial court's findings otherwise must be reversed.

F. Burden of proving the existence of an agency relationship rests with the Respondents.

Following from the foregoing, Respondents variously assert that they were each entitled to clothe themselves with the title "beneficiary" of the subject Note and Deed of Trust in their own right. But, they assert, if that fails, they were acting as agents for the true and lawful owner and actual holder of the obligation: MERS through its "membership agreements" and Litton through the MST Agreement. Unfortunately there was no documentary evidence of any express agreements offered to the trial court on summary judgment.

As noted in the case of *Smith v. Hansen, Hansen & Johnson*, 63 Wn.App. 335, 363-4, 818 P.2d 1127 (1991):

> Both actual and apparent authority depend upon objective manifestations. Restatement (Second) of Agency § 7, comment b, at 29 (1958) (hereinafter Restatement) (actual authority); Restatement § 26, comments a-f, at 101-03 (same); Restatement § 8, comment a, at 30-31; Restatement § 27, comments a-f, at 103-06 (apparent authority); *Barnes v. Treece,* 15 Wash.App. at 442, 549 P.2d 1152 (apparent authority). The objective manifestations must be those of the principal. *Schoonover v. Carpet World, Inc.*, 91 Wash.2d 173, 178, 588 P.2d 729 (1978); *Lamb v. General Associates, Inc.*, 60 Wash.2d 623, 627, 374 P.2d 677 (1962) (apparent authority); *Lumber Mart Co. v. Buchanan,* 69 Wash.2d 658, 661, 419 P.2d 1002 (1966) (actual authority); *Bill McCurley Chevrolet, Inc. v. Rutz,* 61 Wash.App. at 57, 808 P.2d 1167; *Mauch v. Kissling,* 56 Wash.App. 312, 783 P.2d 601 (apparent authority). With actual authority, the principal's objective manifestations are made to the agent; with apparent authority, they are made to a third person. Barnes, 15 Wash.App. at 442, 549 P.2d 1152 (apparent authority); Restatement § 8 & comment a; § 27 & comment a. An agent'sexercise of either type of authority results in the principal's

being bound. *Petersen v.* Pacific Am. Fisheries, 108 Wash. 63, 68, 183 P. 79, 8 ALR 198 (1919).

The *Smith* court went on to hold that a party's subjective belief that another has apparent authority to bind a principal is not objectively reasonable when the principal has not represented that the person has such authority, no documentation of such authority has been produced, and the person's job title and role in the principal's organization does not reasonably imply such authority. *Smith v. Hansen, Hansen & Johnson*, supra, at pages 366-368.

It is long standing Washington law that actual or apparent authority can only be inferred from the acts and conduct of the principal – not the agent. *Autwarter* ("the rule is universal that the declarations of a supposed agent are inadmissible to prove the fact of agency."); *Turnbull v. Shelton*, 47 Wn.2d 70, 72, 286 P.2d 676 (1955); *Lamb.* Moreover, the burden of establishing the existence and scope of any agency relationship rests upon the party asserting it. *Lamb. Smith v. Hansen, Hansen & Johnson, supra; Equico Lessors.*

Here, Respondents' principal – the true and lawful owner and actual holder of the obligation - was never disclosed, so there was no evidence from which the trial court could infer Respondents alleged agency relationship.

To the extent Respondents failed to identify their principal from whom their purported agency relationship could be inferred, their assertions of an agency relationship with an undisclosed principal upon whom they relied for authority for this wrongful foreclosure must also fail. At the very least,

Respondents' failure to establish the existence and scope of any their agency relationship to their principal by competent evidence necessarily defeats their claimed authority to foreclose, rendering the summary judgment error.

G. No acknowledgment of a default under *RCW 61.24.030(8)(c).*

Although Mr. Selkowitz has acknowledged failing to make some payments, he has never admitted the obligation to be in default, as the term is defined under the DTA. But, even if he had, his declaration is irrelevant. See *Bavand v. OneWest Bank, FSB*, 176 Wn.App 475, 497, 485, 309 P.3d 636 (2013) (hereinafter "*Bavand*").

Under *RCW 61.24.030(8)(c),* only the "beneficiary" has the right to "declare the borrower or grantor to be in default." Unless the "beneficiary" has declared the borrower in default, no trustee's sale can be effected regardless of how many payments the borrower may be in arrears or what the borrower or servicer may say about it. *RCW 61.24.030.* The DTA does not authorize or condone vigilantism.

Here, there is no indication in the Notice of Default who declared Mr. Selkowitz to be in default, other than "Please Consult Cover Letter." CP 1136-1141. But, as noted above, there were numerous claimants to the beneficial interest in the Note and Deed of Trust at the time this non-judicial foreclosure was initiated.

If Respondents had no authority to declare a default in their own right, they had no right to initiate non-judicial foreclosure proceedings against Mr. Selkowitz, absent a grant of authority from the true and lawful owner and actual holder of the obligation. But, no proof of such a grant of authority was ever offered to the trial court on summary judgment, beyond Respondents' inadmissible conclusory statements.[6] The extent of an agent's authority cannot be established by his own acts and declarations. *Lamb*, at page 627; and cases cited above.

Although both MERS and Litton falsely represent themselves to be "beneficiaries" of the obligation at approximately the same time, their representations were ambiguous/equivocal and the true basis of their authority to take action against Mr. Selkowitz was a disputed issue of material fact on summary judgment.

H. Borrower's alleged failure to make payment does not excuse violations of the DTA.

Despite the plain reading of *RCW 61.24.030(8)(c),* Respondents go on to argue that Mr. Selkowitz's failure to make payment under the Note and Deed of Trust excuse their apparent violations of the DTA and obviate any claims he might have under the CPA. The Washington Supreme Court has held otherwise. As noted by the in *Frias*, at page 431:

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[6] See footnote 3, above.

> Because the CPA addresses "injuries" rather than "damages," quantifiable monetary loss is not required. *Panag*, 166 Wn.2d at 58. A CPA plaintiff can establish injury based on unlawful debt collection practices even where there is no dispute as to the validity of the underlying debt. *Id.* at 55-56 & n.13. Where a business demands payment not lawfully due, the consumer can claim injury for expenses he or she incurred in responding, even if the consumer did not remit the payment demanded. *Id.* at 62 (" Consulting an attorney to dispel uncertainty regarding the nature of an alleged debt is distinct from consulting an attorney to institute a CPA claim. Although the latter is insufficient to show injury to business or property, the former is not." (citations omitted)). The injury element can be met even where the injury alleged is both minimal and temporary. *Mason v. Mortg. Am., Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990). (Emphasis added).

Accordingly, Respondents' misconduct in the initiation and prosecution of this non-judicial foreclosure action is not excused because Mr. Selkowitz may have failed to make payment under the Note and these Respondents, as opposed to the true and lawful owner and actual holder of the Note, had no right *sua sponte* to declare him to be in default.

I. Establishment of CPA claim.

Respondents allege Mr. Selkowitz has failed to establish all of the elements of a CPA claim on summary judgment and that if the elements have been established, Mr. Selkowitz has not been injured or damaged by Respondents apparent misconduct. While damages for pre-sale violations of the DTA are not recoverable, a CPA claim may be maintained regardless of the status of the property. *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 417, 334 P.3d 529 (2014) (hereinafter "*Frias*"), *Lyons*, at page 784.

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) (hereinafter "*Hangman Ridge*"). As to each element, there was a genuine issue of material fact in dispute on summary judgment.

1. Unfair and Deceptive Acts.

In his Opening Brief, Mr. Selkowitz identified several unfair and deceptive acts of Respondents. Many of the unfair and deceptive acts alleged herein are similar to those alleged in *Walker* and *Bavand.* However, in supplement to his previous arguments, Mr. Selkowitz offers the following.

At the outset it should be noted that in determining whether a particular act or practice is unfair or deceptive, establishing an intent to deceive is not necessary. Rather, the alleged act or practice need only have the "capacity to deceive a substantial portion of the public." *Sing v. John L. Scott, Inc.,* 134 Wn.2d 24, 948 P.2d 816 (1997). See also *Bain v. Metropolitan Mortgage Group*, 175 Wn.2d 83, 115-116, 285 P.3d 34 (2012) (hereinafter "*Bain*"); *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2012) (hereinafter "*Klem*"); *Walker; Bavand.*

In *Schroeder v. Excelsior Management Group, LLC*, 117 Wn.2d 94, 297 P.3d 677 (2013) (hereinafter "*Schroeder*"), the Supreme Court held that failure to comply with the express provisions of the DTA could satisfy the

unfair or deceptive practice element of a CPA claim. Certainly, Mr. Selkowitz has alleged numerous violations of the DTA against each of the named Respondents, which remained material issues of disputed fact on summary judgment.

Specifically, characterizing MERS as the beneficiary has the capacity to deceive. *Bain,* at page 117. Here, MERS, an ineligible beneficiary, executed the Appointment of Successor Trustee, misrepresenting itself to be the beneficiary of the obligation. CP 37-38. This representation was clearly false and deceptive. And, this misrepresentation was not harmless, because "but for" the recording of the instrument, QLS would have had no colorable authority to initiate or prosecute a non-judicial foreclosure. See *RCW 61.24.010.*

In *Bavand*, this Court held that anyone who holds themselves out to be the beneficiary of a deed of trust when they know or should know that they do not meet the requirements under *RCW 61.24.005(2)* acts unfairly and deceptively, which will support a private action under the CPA. See *Bavand*, at page 504-506. See also *Walker,* at page 319. Here, both MERS and Litton falsely represented themselves to be the beneficiary of the subject Deed of Trust for the purpose of furthering the wrongful foreclosure of Mr. Selkowitz's home. At the very least, there was a genuine issue of material fact as who the real beneficiary of the obligation was, given the number of claimants to that status, as discussed above.

Among other acts, including the referral of Mr. Selkowitz's loan to QLS for foreclosure when it did not have the right or authority to do so, Litton's false and misleading representations regarding its status as a beneficiary in the Declaration of Ownership (CP 478) should also be characterized as unfair and deceptive because "but for" the execution and submission of this document, QLS would have had no colorable proof of compliance with the provisions of *RCW 61.24.030(7)(a),* which requires the trustee to have proof of ownership or a competent declaration from the owner that it is the "actual holder" of the obligation. See *Walker,* at page 319.

Moreover, as the party in apparent control of the process, Litton should be liable for the unfair and deceptive acts of its purported agents, MERS and QLS, by application of the doctrine of *respondeat superior. Nelson v. Broderick & Bascom Rope Co.*, 53 Wn.2d 239, 332 P.2d 460 (1958) ("the master is liable for the acts of his servant committed within the scope or course of his employment").

In *Lyons,* the court held that a trustee's failure to comply with the provisions of the DTA and act impartially, by essentially deferring to the "lender" in the face of ambiguous or contradictory information concerning the identity of the real party in interest and the beneficiary with the right to foreclose without taking action to investigate and verify, is unfair and deceptive. See also *Klem,* at page 792 ("failure to exercise it independent discretion as an impartial third party with duties to both parties is an unfair or

deceptive act or practice and satisfies the first element of the CPA"). Here, as argued above, in May of 2010 QLS was confronted with numerous conflicting and mutually exclusive claims of beneficial interest in the subject Note and Deed of Trust and failed to exercise its independent discretion as an impartial third party by failing to take any action to investigate or verity the claimants' claims. In fact, as noted above, QLS had no procedures in place to conduct such investigations at that time.

2. Trade or Commerce.

That Respondents are in the business of servicing of mortgage loans is undisputed. Although the *Bain* court did not specifically address the trade or commerce element, it could 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

3. Affecting the Public Interest.

Generally, the public interest element of a CPA claim can be established upon a showing that (1) the acts occurred in the course of the defendant's business; (2) the acts were part of a pattern or generalized course of conduct; (3) the acts were repeated; (4) there is a real and substantial potential for repetition; and (5) the acts complained of do not involve a single transaction. See *Hangman Ridge,* at page 790.

In analyzing this CPA element on facts similar to those presented here, this Court held:

> In the context of a similar CPA claim based on MERS's representation that it was a beneficiary, the *Bain* court noted that "there is considerable evidence that MERS is involved with an enormous number of mortgages in the country (and our state)...." It then concluded that " [i]f in fact the language is unfair or deceptive, it would have a broad impact. This element is also presumptively met."
>
> Here, MERS's status as the named beneficiary in this deed of trust presumptively meets the public interest element of a CPA claim. As in *Bain,* the alleged acts of MERS were done in the course of its business, and MERS listing as a "beneficiary" was a generalized practice that was a course of conduct repeated in hundreds of other deeds of trust. Further, as the *Bain* court held, MERS's attempt to assign "all beneficial interest" in this deed of trust, where it had no such interest to assign, also satisfies the public interest element. And, OneWest also purported to appoint a successor trustee when it had no authority to do so, both because its assignment occurred a day before MERS attempted to "assign" its interest to OneWest and because, even if such an assignment had occurred a day prior, MERS had no interest to assign. Given these three facts, Bavand pled sufficient information for the public interest element of her CPA claim to withstand summary judgment.
>
> MERS and OneWest argue that all of Bavand's arguments are predicated on ***OneWest's*** actions, not those of MERS. Thus, they argue that the conclusion in *Bain* regarding the public interest prong does not apply here. They are mistaken.
>
> MERS purported to assign its beneficial interest to OneWest one day after the latter purported to appoint RTS as successor trustee. But under the Deeds of Trust Act, MERS was never a holder of the note or deed of trust, meaning it had no beneficial interest in the note to assign. Thus, MERS's role in Bavand's deed of trust is central to the alleged CPA violation.

Bavand, at pages 506-507.

There is no reasonable or justifiable basis to distinguish the public impact of MERS' wrongful assignment of a deed of trust from its wrongful appointment of a successor trustee or, for that matter, Litton's wrongful Appointment of Successor Trustee, for purposes of this Court's CPA analysis.

4. Injury.

As noted in *Panag v. Farmers Insurance Co. of Washington*, 166 Wn.2d 27, 58, 204 P.3d 885 (2009) (hereinafter "*Panag*"):

> 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).

In addition to his claims for declaratory relief and injunctive relief, Mr. Selkowitz has clearly articulated injury as a direct and proximate result of Respondents' misconduct, well established in *Panag, Lyons, Walker* and *Bavand.* CP 1098-1101.

In addition to the foregoing, Mr. Selkowitz has necessarily suffered injury through (1) the threat of losing all of his equity in his property without compensation; (2) a substantial reduction in his ability to sell the condo as a result of the recording of the Notice of Trustee's Sale; (3) damages to his credit as a result of Respondents' unlawful acts, (4) the inability to take full

advantage of the protections of the federally mandated HAMP program and the FFA mediation process (*RCW 61.24.163*); and (5) consequential damages arising by the wrongful foreclosure action. 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.

5. <u>Causation.</u>

As noted by this Court in *Bavand,* at page 509:

> OneWest and MERS also contend that Bavand cannot demonstrate that any of her alleged injuries were proximately caused by their commercial practices. But, if reasonable minds could differ, as is the case here, proximate cause is a factual issue to be decided by the jury.

"But for" MERS' execution of the Appointment of Successor Trustee (CP 475-476) that misrepresented its status as beneficiary of the Deed of Trust, QLS would not have had colorable authority to initiate a non-judicial foreclosure. *RCW 61.24.010.* "But for" Litton's execution of its Declaration of Ownership (CP 478) that misrepresented its status as actual holder of the Promissory Note, QLS would not have been able to establish colorable compliance with *RCW 61.24.030(7)(a).* "But for" QLS' failure to investigate and verify the competing and mutually exclusive claims of beneficial ownership in the Note and Deed of Trust at issue herein (CP 1136-1139), Respondents non-judicial foreclosure would never have been

initiated in the first place. Clearly, Respondents were the proximate cause of the wrongful foreclosure injuries suffered by Mr. Selkowitz.

As argued in Appellants Opening Brief and discussed above, all five elements for a private cause of action for violation of the CPA have been met.

J. Constructive Possession.

Litton alleges that it "held the Note at all time during the non-judicial foreclosure, through the custodian, DBNTC" – essential claiming constructive possession of the Note and Deed of Trust. Litton's Answering Brief, page 31.

However, there is no basis in Washington law for one to have "constructive possession" of a Note under the DTA. For purposes of the DTA, one must have "actual possession." See RCW *61.24.030(7)(a); Bain* at page 104 ("The plaintiffs argue that our interpretation of the deed of trust act should be guided by theses UCC definitions, and thus a beneficiary must either ***actually possess*** the promissory note or be the payee. E.g., Selkowitz Opening Brief, at 14. We agree.") So, constructive possession is simply not enough under the DTA.

However, the *Bain* court went even further and specifically held that "if the original lender had sold the loan, the purchaser (the Trust 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 111. The *Bain* court's emphasis was on the ownership of the obligation and saw the right to hold the note as an incident of ownership.

Litton's allegation of constructive possession is repudiated by the language used in its own Declaration of Ownership (CP 478) where Litton represents that it is the "actual holder of the Promissory Note dated October 31.2006". It doesn't say "constructive holder". Moreover, as noted above, the MST Agreement for the Trust, which Litton claims to be the owner or "investor" of the obligation, expressly prohibits any party "holding" the Note and Deed of Trust other than the custodian: Deutsche Bank. See Declaration of Tim Stephenson (CP 1177). Litton is not even identified as an entity that can act as a servicer under the governing documents of the Trust, much less a holder of the obligation. See Declarations of Tim Stephenson, B. Jay Patterson and Barbara Campbell. CP 568-569, 1151-1500, 2171-2415. Indeed, Barbara Campbell testified that the only entities that had actual possession of the Note and Deed of Trust were Deutsche Bank (from 11/7/06 to 8/6/13) and Ocwen Loan Servicing, LLC (8/6/13 to the present). CP 568-569.

Litton's allegation of constructive possession of the Note makes no sense factually or statutorily.

K. Litton not entitled to fees and costs.

Although Litton requests this Court grant it fees and costs on appeal, there is not reasonable basis for doing so. First, unlike Mr. Selkowitz, Litton is not a party to or otherwise identified in the Note and Deed of Trust, so there is no contractual basis for awarding Litton fees under *RCW 4.84.330*. Second, Litton and the above-named Respondents have abandoned their non-judicial foreclosure efforts in favor of the Trust's judicial foreclosure. CP 2420-2427. Finally, the trial court didn't award Litton fees on summary judgment and this Court shouldn't either. CP 2681-2684.

III. CONCLUSION

It is Appellant's firm belief that the trial court's summary judgment was based on disputed factual claims. The trial court misread the requirements of the DTA and relevant case law and excused Respondents from their responsibility to clearly establish their factual and legal entitlement to summary judgment and to foreclose on Mr. Selkowitz's home. And, more importantly, QLS failed to provide the impartial oversight of the process by failing to investigate and verify Respondents' right to foreclose prior to taking any action. Indeed, the safeguards embodied in the DTA that would otherwise protect homeowners from wrongful foreclosure failed Mr. Selkowitz miserably in view of

Respondents' misrepresentations, misconduct and bad faith. Reversal is the remedy.

Finally, Appellants should be awarded taxable costs, expenses and reasonable attorney's fees on appeal, pursuant to *RAP 18.1,* based on the terms of the subject Deed of Trusts and the CPA.

REPECTFULLY SUBMITTED this 15th day of June, 2015.

KOVAC & JONES, PLLC.

Richard Llewelyn Jones, WSBA No. 12904
Attorney for Appellant

GOODSTEIN LAW GROUP, PLLC

Richard B Sanders, WSBA No. 2813
Attorney for Appellant

CERTIFICATE OF MAILING

The undersigned declares under penalty of perjury under the laws of the state of Washington that the following is true and correct. On June 15, 2015, I arranged for service of the foregoing Reply Brief of Appellant on the following parties in the manner(s) indicated:

Hugh R. McCullough Davis Wright Tremaine, LLP 1201 Third Avenue, Suite 2200 Seattle, WA 98101	____	Facsimile
	X	Messenger
	____	U.S. 1st Class Mail
	____	Overnight Courier
	____	Electronically
Robert W. Norman, Jr. Emilie Edling Houser & Allison 1601 5th Avenue, Suite 850 Seattle, WA 98101	____	Facsimile
	X	Messenger
	____	U.S. 1st Class Mail
	____	Overnight Courier
	____	Electronically
Mary Stearns McCarthy & Holthus LLP 108 1st Ave S., Suite 300 Seattle, WA 98104	____	Facsimile
	X	Messenger
	____	U.S. 1st Class Mail
	____	Overnight Courier
	____	Electronically
Clerk of the Court Washington Court of Appeals Div. I One Union Square 600 University Street Seattle, WA 98101-1176	____	Facsimile
	X	Messenger
	____	U.S. 1st Class Mail
	____	Overnight Courier
	____	Electronically
Goodstein Law Group, PLLC Richard B. Sanders 501 S G St Tacoma, WA 98405-4715	____	Facsimile
	____	Messenger
	X	U.S. 1st Class Mail
	____	Overnight Courier
	X	Electronically (courtesy)

SIGNED this 15th day of June, 2015, at Bellevue, Washington.

Susan L. Rodriguez

Susan L. Rodriguez
Legal Assistant

TABLE OF APPENDICES

1. Appointment of Successor Trustee (CP 475-476).

2. Declaration of Ownership (CP 478).

3. Notice of Default (CP 1136-1139).

APPENDIX "1"

Electronically Recorded CP-000475
20100520000866
SIMPLIFILE AST 15.00
Page 001 of 002
05/20/2010 02:36
King County, WA

When recorded return to:

Quality Loan Service Corp. of Washington
2141 5th Avenue
San Diego, CA 92101

Space above this line for recorders use only

TS # WA-10-357584-SH Order # 100254607-WA-GSI
APN: 413980045004
MERS MIN No.: Investor No.

Appointment of Successor Trustee

NOTICE IS HEREBY GIVEN that **QUALITY LOAN SERVICE CORPORATION OF WASHINGTON**, a corporation formed under RCW 61.24, whose address is 2141 5th Avenue San Diego, CA 92101 is hereby appointed Successor Trustee under that certain Deed of Trust dated **10/30/2006**, executed by **KEVIN J. SELKOWITZ , AN UNMARRIED MAN** as Grantor, in which **FIRST AMERICAN TITLE INSURANCE COMPANY** was named as Trustee, **MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR NEW CENTURY MORTGAGE CORPORATION, A CALIFORNIA CORPORATION A CORPORATION** as Beneficiary, and recorded on **11/1/2006**, under Auditor's File No. **20061101000910** as book xxx and page xxx , Official Records. Said real property is situated in **KING** County, Washington and is more particularly described in said Deed Of Trust.

IN WITNESS WHEREOF, the Beneficiary, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., has hereunto set his hand; if the undersigned is a corporation, it has caused its corporate name to be signed and affixed hereunto by its duly authorized officers.

Appointment of Successor Trustee
TS # WA-10-357584-SH
Page 2

Dated: MAY 12 2010

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

By: Debra Lyman Vice President

State of Texas)
County of Harris)

On MAY 12 2010, personally appeared Debra Lyman of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., the corporation that executed this document. He/She acknowledged that executing this document was his/her free and voluntary act and that he/she is authorized to execute this document.

Witness my hand and official seal hereto affixed this day and year.

Brenda McKinzy, Notary Public

Notary Public in and for the State of Texas

My Commission expires: 12-5-10

BRENDA MCKINZY
Notary Public, State of Texas
My Commission Expires
December 05, 2010

CP-000476

APPENDIX “2”

TS #: WA-10-357584-SH
Loan #:

DECLARATION OF OWNERSHIP

The undersigned Beneficiary, declares that it is the authorized Agent for the owner and actual holder of that certain promissory note or other obligation which is secured by the following Deed of Trust, and hereby represents and declares as follows:

1) I am an employee of Litton Loan Servicing LP and am duly authorized to make this declaration on behalf of Litton Loan Servicing LP.

2) The real property involved is commonly known as 6617 Southeast Cougar Mountain Way
Bellevue, WA 98006.

3) Litton Loan Servicing LP is the actual holder of the Promissory Note dated 10/31/2006, in the principal amount of $309,600.00, recorded in KING County under Auditor's File No. 20061101000910. The Note is secured by a Deed of Trust encumbering the aforementioned real property.

4) The Note has not been assigned or transferred to any other person or entity.

I declare under PENALTY OF PERJURY under the laws of the State of Washington, that the foregoing is true and correct, and that this declaration was executed this 25 day of May 2010 at Houston, Texas.

DATED: 5/25/2010

Loan Servicer/Authorized Agent for Beneficiary

Diane Dixon

By: Diane Dixon

Its: Asst Vice President

Litton Loan Servicing LP
Attorney In Fact

APPENDIX "3"

NOTICE OF DEFAULT

Pursuant to the Revised Code of Washington 61.24, et seq.

To: KEVIN J. SELKOWITZ , AN UNMARRIED MAN

T.S. No. WA-10-357584-SH
MERS MIN No.: 100431900103955512 Investor No. [redacted]

You should take care to protect your interest in your home. This notice of default (your failure to pay) is the first step in a process that could result in you losing your home. You should carefully review your options. For example:

Can you pay and stop the foreclosure process?
Do you dispute the failure to pay?
Can you sell your property to preserve your equity?
Are you able to refinance this loan or obligation with a new loan or obligation from another lender with payments, terms, and fees that are more affordable?
Do you qualify for any government or private homeowner assistance programs?
Do you know if filing for bankruptcy is an option? What are the pros and cons of doing so?

Do not ignore this notice; because if you do nothing, you could lose your home at a foreclosure sale. (No foreclosure sale can be held any sooner than ninety days after a notice of sale is issued and a notice of sale cannot be issued until thirty days after this notice.) Also, if you do nothing to pay what you owe, be careful of people who claim they can help you. There are many individuals and businesses that watch for the notices of sale in order to unfairly profit as a result of borrowers' distress.

You may feel you need help understanding what to do. There are a number of professional resources available, including home loan counselors and attorneys, who may assist you. Many legal services are lower-cost or even free, depending on your ability to pay. If you desire legal help in understanding your options or handling this default, you may obtain a referral (at no charge) by contacting the county bar association in the county where your home is located. These legal referral services also provide information about lower-cost or free legal services for those who qualify.

You may contact the Department of Financial Institutions or the statewide civil legal aid hotline for possible assistance or referrals.

The current owner/beneficiary of the Note secured by the Deed of Trust is:
Please Consult Cover Letter

The Loan Servicer managing your loan, and whom you should contact about your loan is:
Litton Loan Servicing LP
Litton Loan Servicing LP
4828 Loop Central Drive
Houston, TX 77081

800-999-8501

1. DEFAULT:

You are hereby notified that the Beneficiary has declared you in default on the obligation secured by a Deed of Trust recorded on 11/1/2006 in Auditor's File No. 20061101000910, book xxx and page xxx Records of KING County, Washington, which Deed of Trust encumbers the following described real property:

UNIT 4, BUILDING 2-6 OF LAKEMONT RIDGE, A CONDOMINIUM RECORDED IN VOLUME 125 OF CONDOMINIUMS, PAGES 6 THROUGH 14, ACCORDING TO THE DECLARATION THEREOF, RECORDED

UNDER KING COUNTY RECORDING NUMBER 9606140732 AND ANY AMENDMENTS THERETO: SITUATE IN THE CITY OF BELLEVUE, COUNTY OF KING, STATE OF WASHINGTON.

Tax Parcel No. 413960-0460

Commonly known as: 6617 SOUTHEAST COUGAR MOUNTAIN WAY, BELLEVUE, WA 98006

2. STATEMENT OF DEFAULT AND ITEMIZED ACCOUNT OF AMOUNT IN ARREARS:

The present beneficiary under said Deed of Trust alleges that you or your successors in interest are in default for the following reasons:

Failure to make the 11/1/2009 payment of principal and/or interest and all subsequent payments, together with late charges, impounds, advances, taxes, delinquent payments on senior liens, or assessments, if any. To wit:

Payments:

From	Through	# Payments	Monthly Payment	Total Payments
11/1/2009	4/23/2010	6	$1,644.75	$9,868.50

Late Charges:

From	Through	# Late Charges	Total Late Charges
11/1/2009	4/23/2010	6	$82.24

Beneficiary's Advances, Costs, And Expenses:

Escrow Advances	$1,579.09
Total Advances:	$1,579.09

Promissory Note Information:

Note Dated:	10/31/2006
Note Amount:	$309,600.00
Late Charge Amount:	$82.24
Note Maturity Date:	11/1/2036
Interest Paid To:	10/1/2009
Next Due Date:	11/1/2009

3. OTHER CHARGES, COSTS AND FEES:

In addition to the amounts in arrears specified above, you are or may be obligated to pay the following charges, costs and fees to cure the default under the Deed of Trust if cure is made before recording the Notice of Trustee's Sale:

No.	Description	Amount
a.	Cost of title report for foreclosure:	$825.00
b.	Service or posting Notice of Default:	$50.00
c.	Postage:	$50.00
d.	Attorney Fee:	$0.00
e.	Trustee's Fee:	$337.50
f.	Inspection Fee:	$0.00
g.	Recording Fee:	$0.00
	TOTAL CHARGES, COSTS AND FEES:	$1,262.50

4. REINSTATEMENT: IMPORTANT! PLEASE READ!

UNTIL SUCH TIME AS A NOTICE OF TRUSTEE'S SALE IS RECORDED, THE ESTIMATED TOTAL AMOUNT NECESSARY TO REINSTATE YOUR NOTE AND DEED OF TRUST IS THE SUM OF PARAGRAPHS 2 AND 3 IN THE AMOUNT OF $13,106.62, PLUS ANY MONTHLY PAYMENTS, LATE CHARGES, OR BENEFICIARY COSTS WHICH HAVE BECOME DUE SINCE THE DATE OF THIS NOTICE OF DEFAULT. Any new defaults not involving payment of money that occur after the date of this notice must also be cured in order to effect reinstatement. In addition, because some of the charges can only be estimated at this time, and because the amount necessary to reinstate may include property protection expenditures required to preserve the property or its interest under state or local law, it will be necessary for you to contact the trustee before the time you tender reinstatement so that you may be advised of the exact amount you will be required to pay.

Payment must be made in the full amount by certified funds, and delivered or mailed as specified by the Beneficiary. Personal checks will not be accepted.

Reinstatement monies may be tendered to:
Please Consult Cover Letter
c/o Quality Loan Service Corp. of Washington
2141 5th Avenue
San Diego, CA 92101

619-645-7711

For Service of Process on Trustee:
Quality Loan Service Corp., of Washington
19735 10th Avenue NE
Suite N-200
Poulsbo, WA 98370
(866) 645-7711

If your default included a default other than failure to pay payments when due, then in order to reinstate the Note and Deed of Trust before the Notice of Trustee's Sale is recorded, you must cure such other default(s).

5. CONSEQUENCES OF DEFAULT:

a. Failure to cure said alleged default within thirty days of the date of mailing of this notice, or if personally served, within thirty days of the date of personal service hereof, may lead to recordation, transmittal and publication of a Notice of Sale, and that the property described herein may be sold at public auction at a date not less than one hundred twenty days from the date of service of this notice.

b. The effect of the recordation, transmittal and publication of a notice of sale will be to (i) increase the costs and fees and (ii) publicize the default and advertise the grantor's property for sale.

c. Notwithstanding a future recordation of a Notice of Trustee's Sale, you may reinstate the deed of trust, and cure the default described above on or before the eleventh (11th) day before the Trustee's Sale of the property at public auction.

d. The effect of the sale of the grantor's property by the trustee will be to deprive the grantor or his successor in interest and all those who hold by, through or under him of all their interest in the property described herein.

6. ACCELERATION:

You are hereby notified that the beneficiary has elected to accelerate the loan described herein, and has declared the entire principal balance of $309,600.00, plus accrued costs, immediately due and payable. NOTWITHSTANDING SAID ACCELERATION, YOU HAVE THE RIGHT TO REINSTATE THE LOAN BY PAYING THE DELINQUENT PAYMENTS, LATE CHARGES, COSTS AND FEES ON OR BEFORE THE ELEVENTH (11TH) DAY BEFORE THE DATE OF THE TRUSTEE'S SALE WHICH MAY BE SET BY A NOTICE OF TRUSTEE'S SALE, ALL AS EXPLAINED IN PARAGRAPHS 4 AND 5 ABOVE.

7. RECOURSE TO COURTS:

The grantor or any successor in interest has recourse to the courts pursuant to RCW 61.24.130 to contest the alleged default on any proper ground;

6. DOCUMENTS ATTACHED

- Beneficiary or agent's Loss Mitigation Form declaring compliance with section 2 of Chapter 292, Laws of 2009.
- Notice to Occupants and Tenants pursuant to section 10 of Chapter 292, Laws of 2009.

Unless you notify this office within 30 days after receiving this notice that you dispute the validity of the debt or any portion thereof, this office will assume this debt is valid. If you notify this office within 30 days from receiving this notice, this office will obtain verification of the debt and mail you a copy of the verification. If you request this office in writing within 30 days after receiving this notice, this office will provide you with the name and address of the original creditor, if different from the current creditor. This notice is an attempt to collect a debt, and any information obtained will be used for that purpose.

THIS IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

Date: 4/23/2010

Quality Loan Service Corp. Of Washington as Agent for Please Consult Cover Letter, the Beneficiary

/s/ Susan Hurley
Susan Hurley, Trustee Sale Officer