Supreme Court No. 92865-7

Court of Appeals No 72505-0-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.

APPELLANT'S PETITION FOR REVIEW

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I. Identity of Petitioner.

The Petitioner is KEVIN SELKOWITZ (hereinafter "Mr. Selkowitz"), who was the Plaintiff in the original action under King County Superior Court Case No. 10-2-24157-4 KNT and is the Appellant in Court of Appeals, Division I, Case No. 72505-0-I.

II. Court of Appeals Decision.

Mr. Selkowitz seeks review by the Supreme Court of the unpublished Opinion of the Court of Appeals filed November 23, 2015, a copy of which is attached hereto at ***Appendix "A"*** (hereinafter "subject decision") and the Amended Order Denying Appellant's Motion for Reconsideration of January 21, 2016, a copy of which is attached hereto at ***Appendix "B".***

III. Issues Presented for Review.

A. Whether the subject decision affirming the trial court conflicts with the Supreme Court's decision in *Trujillo v. NWTS,* 183 Wn.2d 820, 355 P.3d 1100 (2015) (hereinafter *"Trujillo II"*), as well as *Bain v. Metropolitan Mortgage Group,* 175 Wn.2d 83, 111, 285 P.3d 34 (2012) (hereinafter "*Bain*") and *Lyons v. U.S. Bank*, 181 Wn.2d 775, 336 P.3d 1142 (2014) (hereinafter "*Lyons*") and violates the provisions of *RCW 61.24.030(7)(a)*, where at least 4 separate entities claimed to be holder of the obligation at the time the foreclosure was initiated, thus meriting review under *RAP 13.4(b)(1)* and *RAP 13.4(b)(4).*

B. Whether the subject decision affirming the trial court was contrary to existing precedent and violates the provisions of *RCW*

61.24.030(8)(c), where there was no evidence the "beneficiary" of the obligation ever declared Mr. Selkowitz to be in default, thus meriting review under *RAP 13.4(b)(1)* and *RAP 13.4(b)(4)*.

C. Whether the subject decision affirming the trial court regarding Litton's authority to initiate foreclosure through its Declaration of Ownership (CP 478) violated *RCW 61.24.030(7)(a)* and is in conflict with the Supreme Court's decision in *Trujillo II, Bain,* and *Lyons*, thus meriting review under *RAP 13.4(b)(1)* and *RAP 13.4(b)(4)*, where:

1. There were material issues of fact in dispute regarding the truth of Litton's representations that it is "the actual holder of the promissory note dated 10/31/2006" in its Declaration of Ownership (CP 478).

2. There were material issues of fact in dispute regarding the truth of Litton's representation that it was the "beneficiary" *and* "authorized Agent for the owner and actual holder of that certain promissory note..." in its Declaration of Ownership (CP 478) and whether said representations were not only false but contradictory, rendering the Declaration of Ownership ambiguous.

3. There were material issues of fact in dispute regarding the truth of Litton's representation that "The Note has not been assigned or transferred to any other person or entity" in its Declaration of Ownership (CP 478).

4. There were material issues of fact in dispute regarding the truth of Litton's representation that it was an attorney in fact for the beneficiary in the absence of any evidence that it held a duly executed power of attorney from any holder or beneficiary of the obligation.

D. Whether the subject Declaration of Ownership (CP 478) is ambiguous, violates *RCW 61.24.030(7)(a)* and is in conflict with the Supreme Court's decisions in *Trujillo II, Bain,* and *Lyons* where Litton alternatively identifies itself as the "beneficiary", "authorized agent for the owner" "actual holder" "loan servicer" and "attorney in fact" for the beneficiary, of the

obligation rather than the "actual holder" and where at least 4 separate entities claimed to be holder of the obligation at the time the foreclosure was initiated, thus meriting review under *RAP 13.4(b)(1)* and *RAP 13.4(b)(4).*

E. Whether the subject decision affirming the trial court regarding QLS' authority to act as successor trustee violated *RCW 61.24.010* and whether it is in conflict with the Supreme Court's decision in *Bain,* where QLS' appointment as successor trustee was issued by MERS, an ineligible beneficiary, rather than the beneficiary or holder of the obligation, thus meriting review under *RAP 13.4(b)(1)* and *RAP 13.4(b)(4).*

F. Whether the subject decision affirming the trial court regarding QLS' compliance with the *RCW 61.24, et seq* (hereinafter "DTA") was contrary to existing precedent, thus meriting review under *RAP 13.4(b)(1)* and *RAP 13.4(b)(4),* where:

1. There were material issues of fact in dispute regarding QLS' authority from eligible beneficiary/holder to issue the April 23, 2010 Notice of Default (CP 1136-1141).

2. There were material issues of fact in dispute that the Notice of Default (CP 1136-1141) prepared by QLS violated *RCW 61.24.030(8)* by not identifying by name the beneficiary.

3. There were material issues of fact in dispute regarding whether QLS violated its statutory duty of good faith to Mr. Selkowitz by executing through its purported attorney a Foreclosure Loss Mitigation Form (CP 1141) contrary to *RCW 61.24.031(9)* which requires the form be executed by the beneficiary rather than the trustee.

4. There were material issues of fact in dispute regarding whether QLS was acting as the "agent of the beneficiary" while purportedly acting as trustee in violation of its independent duty of good faith to both parties as required by *RCW 61.24.010(4).*

5. There were material issues of fact regarding whether QLS executed, served and posted a Notice of Foreclosure (CP 1149-1150) that falsely represents MERS to be *"the Beneficiary of your Deed of Trust, and owner of the obligation secured thereby"* when it is established as a matter of law in *Bain* that MERS is not an eligible beneficiary under the DTA if, as admitted in MERS' answer, that it never held or owned the obligation.

6. There were material issues of fact in dispute whether QLS violated RCW *61.24.030(7)(a)* by recording and serving a Notice of Trustee's Sale (CP 1145-1147) without first obtaining proof that the claimed beneficiary was the holder of the note or otherwise conducting an investigation to obtain the required proof.

7. There were material issues of fact in dispute regarding QLS' compliance with its duty of good faith to Mr. Selkowitz in relying on the Declaration of Ownership (CP 478) that was ambiguous on its face.

G. Whether the subject decision holding that substantial evidence of a violation of the Washington Consumer Protection Act (*RCW 19.86, et seq.*) (hereinafter "CPA") did not exist, and contrary to Supreme Court precedent in *Bain, Trujillo, Klem v. Washington Mutual Bank,* 176 Wn.2d 771, 295 P.3d 1179 (2013) (hereinafter *"Klem"),* and *Lyons*, thus meriting review of this Court under *RAP 13.4(b)(1)* and *RAP 13.4(b)(4),* in view of the fact that:

1. At least 4 separate entities claimed to be the holder of the subject obligation and QLS ignored the competing claims by various entities as "beneficiary" and failed to verify the ownership of the obligation.

2. The Declaration of Ownership (CP 478) relied upon by QLS, was ambiguous and contradictory on its face, was not executed by either the beneficiary or actual holder of the subject obligation and could not be reasonably relied upon to comply with the provisions of *RCW 61.24.030(7)(a).*

3. QLS unreasonably relied upon an Appointment of Successor Trustee (CP 37-38) that was not executed by either the beneficiary or actual holder of the subject obligation without verifying the validity of the document, but was in fact executed by an ineligible beneficiary.

4. QLS relied on improperly dated and notarized documents and issued documents that improperly identified the beneficiary, owner and holder of the subject obligation and materially failed to comply with various provisions of the DTA.

5. Respondents failed to obtain authority from the true and lawful owner and actual holder of the obligation (purportedly the Trust), before initiating foreclosure.

H. Whether the subject decision awarding Litton, a non-claimant, reasonable attorney fees and costs under the CPA was contrary to existing precedent in *Sato v. Century 21 Ocean Shores Real Estate*, 101 Wn.2d 599, 681 P.2d 242 (1984), *Lyons,* and *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014) (hereinafter *"Frias")*, meriting review under *RAP 13.4(b)(1)* and *RAP 13.4(b)(4),* where there was no claim for fees, no statutory basis for fees under *RCW 19.86.090* and where Litton or the holder of the obligation retains its rights to enforce the note under *RCW 61.24.100(1).*

I. Whether any or all of the issues set forth above are of substantial public interest, thus meriting review under *RAP 13.4(b)(4).*

IV. Statement of the Case.

On November 1, 2006, Mr. Selkowitz executed a Note in favor of Respondent, NEW CENTURY MORTGAGE CORPORATION, a California Corporation (hereinafter "New Century") in the amount of $309,600.00. CP 1105-1108; 2311-2315. See ***Appendix "C".*** The Note specifically defines the term "note holder" as the "Lender (New Century) or anyone who takes this Note by transfer and who is entitled to receive payments under this Note."

To secure repayment of the Note, Mr. Selkowitz executed a Deed of Trust in which Respondent, FIRST AMERICAN TITLE INSURANCE

COMPANY, a Washington Corporation (hereinafter "FATCO") was named trustee and MERS was named purported beneficiary as nominee for New Century. CP 11-35; 1110-1134.

At no time relevant to this cause of action did Mr. Selkowitz owe MERS, QLS or Litton any monetary or other obligation under the terms of the Note or Deed of Trust.

Respondents allege that at some point between January 1, 2007 to January 30, 2007, Mr. Selkowitz' loan was purportedly assigned to U.S. Bank, N.A. as Trustee for GSAA Home Equity Trust 2007-1, Mortgage Backed Certificates, Series 2007-1 (hereinafter "the Trust"). No evidence of such an assignment was adduced or produced during the course of these proceedings. Moreover, evidence was offered on summary judgment that suggested the loan could not have been transferred to the Trust, as the loan was portrayed. See CP 2171-2415.

On April 2, 2007, New Century filed for relief under Chapter 11 of the United States Bankruptcy Code. CP 1160-1162. On or about May 5, 2007, all executory contracts of New Century were rejected, including those with MERS. CP 1162.

On or about July 1, 2007, Litton apparently assumed responsibility as servicer of Mr. Selkowitz' loan, despite the fact that the identity of the true and lawful owner and actual holder of the obligation remained unidentified and no evidence of a grant of authority to Litton was ever adduced during these proceedings and, assuming the Trust had some interest in the Note and Deed of

Trust, Litton was not identified as an authorized servicer in the Trust's governing documents. CP 570-796; 1136-1139

On April 23, 2010, QLS issued a Notice of Default pursuant to *RCW 61.24.030,* as agent for "Please Consult Cover Letter, the Beneficiary." CP 1136-1141. See ***Appendix "D".*** Unfortunately, it was undisputed that no cover letter accompanied the Notice of Default submitted with these materials to Mr. Selkowitz. The Notice of Default specifically identified Litton as the "Loan Servicer." According to the Notice of Default, "Please Consult Cover Letter" declared Mr. Selkowitz to be in default. Nothing in the Notice of Default alerted Mr. Selkowitz to the identity of the true and lawful holder of his obligation. Significantly, the Notice of Default was signed by Susan Hurley as "Trustee Sale Officer", but QLS had not yet been appointed successor trustee.

On May 12, 2010, MERS, as "beneficiary" of the Deed of Trust, executed an Appointment of Successor Trustee appointing QLS as successor trustee. CP 37-38. At the time this Appointment of Successor Trustee was executed, MERS was neither the owner nor holder of the subject Note and Deed of Trust.

On May 25, 2010, Diana Dixon, as Assistant Vice President of Litton Loan Servicing, LP, "the Loan Servicer/Authorized Agent for Beneficiary", executed a Declaration of Ownership in which she represents that Litton Loan Servicing LP "is the actual holder of the Promissory Note" and that "the Note has not been assigned or transferred to any other person or entity." CP 478, 930. See ***Appendix "E"***. Three things are evident from this document: (1) Litton is merely the loan servicer acting as an agent for an undisclosed principal; (2)

Litton is not the "beneficiary", only at most the agent for the beneficiary, despite alleging it is the "actual holder" of the subject Note; and (3) Litton is apparently acting as "attorney in fact" for the undisclosed principal, but no power of attorney was ever produced during these proceedings to support this contention.

On December 27, 2010, QLS executed, filed, served and posted a Notice of Trustee's Sale in connection with the Property pursuant to *RCW 61.24.040.* CP 40-42. In conjunction with the Notice of Trustee's Sale, QLS executed, served and posted a Notice of Foreclosure that states that "[t]he attached Notice of Trustee's Sale is a consequence of defaults(s) in the obligation to Mortgage Electronic Registration Systems, Inc., the Beneficiary of your Deed of Trust, and owner of the obligation secured thereby." CP 936-937. (Emphasis added) It is undisputed that at no time did MERS ever own or hold the Note. CP 114-115.

On June 24, 2010, Mr. Selkowitz filed suit against the above-named Respondents, seeking injunctive and declaratory relief, quiet title, relief for violation of the DTA (denominated wrongful foreclosure), libel and defamation of title, malicious prosecution, violation of *15 USC §1601*, violation of the CPA and violation of *15 USC §1962* (FDCPA). CP 1-42.[1]

On July 27, 2010, the matter was removed to the United States District Court, pursuant to *28 USC §1446(a).* During the course of the proceedings before the United States District Court, the trial judge, the Honorable John Coughenour, certified three questions to the Washington Supreme Court. Two

[1] At summary judgment, Mr. Selkowitz conceded his claims for malicious prosecution and quiet title based on this Court's rulings in *Walker v. Quality Loan Service Corp, et al.,* 176 Wn.App.294, 308 P.3d 716 (2013) (hereinafter "*Walker*") and *Bavand v. OneWest Bank, FSB, et al.,* 176 Wn.App. 475, 309 P.3d 636 (2013). (hereinafter "*Bavand*").

of these three questions were answered by this Court in the matter of *Bain v. Metropolitan Mortgage Group,* 175 Wn.2d 83, 285 P.3d. 34 (hereinafter *"Bain"*), which is the law of this case. *Greene v. Rothschild*, 68 Wn.2d 1, 10, 414 P.2d 1013 (1966) (quoting *Adamson v. Traylor*, 66 Wn.2d 338, 339, 402 P.2d 499 (1965)); see also *State v. Worl*, 129 Wn.2d 416, 424, 918 P.2d 905 (1996) (Under the law of the case doctrine, the parties, the trial court, and the appellate court are bound by the ruling of the court of appeals on prior appeal until such time as they are authoritatively overruled.)

On or about November 14, 2012, Judge Coughenour remanded the matter back to the King County Superior Court. CP 161.

In June of 2014, Respondents each brought Motions for Summary Judgment against Mr. Selkowitz pursuant to *CR 56.* (CP 290-453; 456-470; 797-820).

On July 11, 2014, the Trust initiated a judicial foreclosure action under King County Superior Court Case No. 14-2-19165-1 KNT, in which the Trust alleged that it was "the current holder" of the loan. CP 2420-2427. The Trust's allegations directly contradict the assertions by each Respondent on summary judgment that they are the holders of the obligation. It is significant to note that at no time relevant to this cause of action has the Trust ever alleged to be the owner or "mortgagee" of the obligation. See *RCW 61.12.040.*

On July 24, 2014, the trial court granted Respondents' Motions for Summary Judgment. CP 2517-2527.

On August 4, 2014, Mr. Selkowitz filed a Motion for Reconsideration, pursuant to *CR 59.* CP 2528-2622.

On September 15, 2014, the trial court denied Mr. Selkowitz' Motion for Reconsideration. CP 2670.

On September 18, 2014, Mr. Selkowitz filed his Notice of Appeal to the Court of Appeals. 2671-2687.

On November 23, 2015, the Court of Appeals issued its unpublished Opinion, affirming the trial court's dismissal of Mr. Selkowitz' claims. See ***Appendix "A".*** Mr. Selkowitz sought reconsideration.

On January 21, 2016, the Court of Appeals denied Mr. Selkowitz' Motion for Reconsideration. See ***Appendix "B".***

Mr. Selkowitz now seeks discretionary review of the trial court's and Court of Appeals' decisions.

V. Argument and Authority.[2]

A. Review should be granted to determine the validity of the Court of Appeals' determination that Litton had "constructive possession" of the Note.

The Court of Appeals held that "Litton had constructive possession of Selkowitz' note", relying on *RCW 62A.3-201* cmt. 1 and *Gleeson v Lichty*, 62 Wash. 656, 114 Pac 518 (1911). But, more recently, this Court has held that mere "possession of a copy of the original note does not establish possession" for purposes of the DTA, citing *Bavand,* at pg. 498, noting that a servicer could be the holder, "and therefore a valid beneficiary under the DTA, if it actually held the note when it made the declaration [of ownership]". *Trujillo II*, at pg. 828.

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[2] A copy of Mr. Selkowitz' Initial Brief, Reply Brief and Motion for Reconsideration to the Court of Appeals are attached hereto and incorporated herein by this reference collectively at ***Appendix "F".***

This Court has acknowledged constructive possession of notes for purposes of the DTA in *Brown v. Department of Commerce,* 184 Wn.2d 509, 359 P.3d771 (2015) (hereinafter "*Brown*"), but only in the context of a Freddie Mac transaction.

Constructive possession generally appears to be at odds with the plain statutory language of *RCW 61.24.030(7)(a)* that requires the beneficiary to be the "actual holder" of the obligation. See *Bain*, at pg. 104. ("plaintiffs argue that our interpretation of the deed of trust act should be guided by these UCC definitions, and thus a beneficiary must either actually possess the promissory note or be the payee. We agree."). The *Bain* court went on further to hold 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 pg. 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.

As a factual matter, it should be noted that Litton's allegation of constructive possession was 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" rather than "constructive holder".

However, instead of one entity claiming possession of the obligation, either in fact or constructively, there were at least 4 entities identified or claiming to be the beneficiary and actual holder of the subject obligation in this matter: Litton (CP 478), MERS (CP 37-38; 475-476), U.S. Bank (CP 2420-2427) and "Please Consult Cover Letter" (CP 1136-1139). QLS was well

aware of the competing claims of these entities. Litton's claim was based on its representations in its Declaration of Ownership (CP 478) that QLS relied upon in compliance with *RCW 61.24.030(7)(a)* and to initiate foreclosure. MERS' claim was based on its representations in its Appointment of Successor Trustee (CP 478) that QLS relied upon for authority as a qualified trustee to foreclose. "Please Consult Cover Letter" was identified by QLS to be the "owner/beneficiary of the Note" in the Notice of Default (CP 1136-1139) drafted by QLS. And, U.S. Bank claimed to be the holder of the obligation in its Complaint (CP 2420-2427). Any one of these claimants could have possessed the Note at the time the Notice of Trustee's Sale was issued. Accordingly, there was no reasonable basis for the Court of Appeals to rule, as a matter of fact or law, that Litton was the constructive holder of the obligation to the exclusion of another claimant.

This issue is of substantial public importance under *RAP 13.4(b)(4)* because this situation, where there are multiple claimants claiming possession of the obligation, is one that occurs frequently in the foreclosure obligations allegedly owned or held by mortgage backed securities and it is an issue that was not addressed in *Lyons, Trujillo II* or *Brown*. Moreover, there is some conflict between the subject decision and this Court's decisions in *Bain* and *Brown*.

B. Review should be granted because the declarant's status in the Declaration of Ownership relied upon by QLS to initiate foreclosure was ambiguously represented.

The issue of the trustee's possession of proof of ownership of the obligation being foreclosed for purposes of compliance with *RCW*

61.24.030(7)(a) has been addressed in *Lyons* and *Trujillo II.* However, in *Lyons and Trujillo II,* the ambiguity addressed was the status of the alleged owner/holder: was the entity identified "the actual holder of the promissory note or. . . [does it merely have] requisite authority under RCW 62A.3-301 to enforce said obligation". *Lyons*, at pg.780 and *Trujillo II,* at pg. 827-282.

Here, the focus is on the status of the declarant and whether the Declaration of Ownership (CP 478) issued by Litton was issued by the lawful "beneficiary" as required under *RCW 61.24.030(7)(a).* Litton alternatively identifies itself as the "beneficiary", "authorized agent for the owner" "actual holder", "loan servicer" and "attorney in fact" for the beneficiary in the Declaration of Ownership (CP 478). Litton's role as the declarant is clearly ambiguous. If Litton's role as the declarant is ambiguous, how could QLS reasonably rely on the document to fulfill its obligation under *RCW 61.24.030(7)(a)* without conducting an independent investigation into the veracity of the declaration? *Lyons* and *Trujillo II.* And, if the Declaration of Ownership (CP 478) is ambiguous and QLS did not conduct an independent investigation, why wouldn't Mr. Selkowitz be entitled to the same remedies that were approved in *Lyons* and *Trujillo II,* including relief under the CPA? The question of a declarant's status for purpose of proving ownership under *RCW 61.24.030(7)(a)* is fundamental to the non-judicial foreclosure process where the holder, particularly an institutional holder, frequently acts through agents to initiate and prosecute non-judicial foreclosures. This issue recurs in almost every wrongful foreclosure case brought in this State and is a matter of substantial public interest under *RAP 13.4(b)(1).* Moreover, there is a need to

clarify existing law on the declarant's status to issue a reliable beneficiary declaration under *RAP 13.4(b)(3).*

C. Review should be granted to determine whether QLS had the right to rely on the MERS Appointment of Successor Trustee and whether such reliance violated its duty of good faith to Mr. Selkowitz under the DTA, pursuant to *RAP 13.4(b)(1).*

QLS' authority to act under the DTA arose from MERS' Appointment of Successor Trustee. (CP 37-38). Only a lawful beneficiary is entitled to appoint a successor trustee. *RCW 61.24.010(2).* This Court has ruled that MERS is not an eligible beneficiary if it never held the note. *Bain*, at pgs. 99, 110. It is undisputed that MERS never held the Selkowitz note at any time relevant to this cause of action. Accordingly, QLS was never authorized to initiate and prosecute a non-judicial foreclosure of Mr. Selkowitz' home.

Actions taken by unauthorized trustees are the sort of "procedural irregularities" courts of this State have taken pains to remediate. *Albice v. Premier Mortgage Services,* 174 Wn.2d 560, 567, 276 P.3d 1277 (2012) (Because the act dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures, lenders must strictly comply with the statutes and courts must strictly construe the statutes in the borrower's favor."); Bain; Walker, at pg. 306 ("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.").

The subject decision side-steps the impact of MERS' misrepresentations by finding that QLS could have issued the Notice of Default "as Litton's agent". But this ignores the fact that QLS would need to be a lawfully appointed successor trustee, not merely the agent of the servicer, to issue the Notice of Trustee's Sale. See *Walker,* at pg. 306, cited above.

Clearly, the subject decision affirming QLS' authority to foreclose based on an ineligible beneficiary's Appointment of Successor Trustee is a matter of substantial public interest and contradicts existing precedent of this Court. Therefore, review is merited under *RAP 13.4(b)(1)* and *(4).*

D. Review of the subject decision's holding that substantial evidence of a CPA violation does not exist is justified.

The subject decision made no attempt to analyze Mr. Selkowitz' CPA claim.

The unfair and deceptive acts noted above are sufficient to establish a CPA claim under *Bain, Lyons, Trujillo II, Walker* and *Bavand.* Indeed, in *Schroeder v. Excelsior Management Group, LLC,* 117 Wn.2d 93, 297 P.3d 766 (2013) (hereinafter "*Schroeder*"), this Court held that failure to comply with the express provisions of the DTA could satisfy the unfair or deceptive practice or act element of a CPA claim. 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.[3] *Bain* at pgs. 115-

[3] 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) (hereinafter "*Panag*") (deceptive methods used by a collection agency to recover money on behalf of an insurance company). See also *Klem.*

117; *Klem,* at pgs 784-788. See also *Walker,* at pgs. 318-319 and *Bavand,* at pgs. 504-506. Indeed, the improper appointment of QLS by MERS (CP 475-476); the clearly ambiguous, false and improper Declaration of Ownership (CP 478); and issuance of a Notice of Default that falsely and improperly identifies the owner and beneficiary (CP 1136-1141), among other violations of the DTA alleged herein, constitute unfair and deceptive acts or practices. *Walker,* at pages 319-320, and *Bavand,* at page 505. Moreover, the *Lyons* court held that a trustee's failure to act impartially, in violation of its fiduciary duty of good faith under *RCW 61.24.010(4)* as QLS did here, is actionable under the CPA as an unfair and deceptive act or practice. *Lyons,* at pgs 788-789; *Trujillo II* at pgs. 834-837.

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. As noted in *Trujillo II,* at pg. 836, a public interest impact is satisfied because the alleged misconduct relates to the sale of real property that others have or will likely suffer in similar fashion. See *RCW 19.86.010(2).*

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.

Moreover, the Court of Appeals ignored Mr. Selkowitz' injuries and damages based on *Panag, Frias, Lyons*, and *Trujillo II.*

Not one of these issues was addressed in the subject decision. However, given the novelty of the issue concerning the ambiguity inherent in the Declaration of Ownership (CP 487) and the Court of Appeal's finding of constructive possession by Litton as a basis for authority to initiate the subject foreclosure, the subject decision affirming the trial court's dismissal of Mr. Selkowitz' wrongful foreclosure and CPA claims was contrary to existing law of this Court and merits review under *RAP 13.4(b)(1).*

E. Review of the award of costs and attorney fees based on the CPA is warranted as a deviation from existing decisions of this Court and other Courts of Appeals.

The Court of Appeals awarded Litton its costs and fees as the "note holder". As noted above, the Court of Appeals ruled that Litton only had constructive possession of the note, not actual possession. Moreover, even its assertions of status under the Declaration of Ownership (CP 478) were ambiguous at best and more likely were false and deceptive. However, there was no basis to award any fees and costs for several reasons.

First, Litton never claimed entitlement to reasonable attorney fees at the trial level nor was it awarded any. "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." *RAP 9.12.* Thus, consideration of an award of reasonable attorney fees on appeal when not sought at the trial court level is therefore improper.

Second, Selkowitz' action was brought to enjoin the non-judicial foreclosure of the Deed of Trust and for money damages under the CPA; Selkowitz was not found in default nor was that relief sought by Litton. The attorney fee provision in the note is simply inapplicable by its terms. See *Boguch v. Landover Corp.*, 153 Wn.App. 595, 615, 224 P.3d 795 (2009).

Third, Litton's claim that its defense of this action was necessary "to enforce its right to foreclose under the deed of trust" is on its face not within the terms of attorney fee entitlement as quoted above, and, moreover, Litton didn't prevail on such a claim in any event.

Fourth, had the non-judicial foreclosure proceeded to fruition, no money judgment could have been obtained against Selkowitz in any event. *RCW 61.24.100(1).* But here, what amounts to an award of a deficiency judgment is taken against Mr. Selkowitz in the context of an abandoned non-judicial foreclosure in a CPA action. The statute doesn't permit that and it makes no sense.

Finally, an award of reasonable attorney fees to a defendant in a CPA case violates *RCW 19.86.090.* As a matter of public policy as expressed in the statute, only prevailing claimants may recover under the statute. See e.g. *Sato v. Century 21 Ocean Shores Real Estate,* 101 Wn.2d 599, 603, 681 P.2d 242 (1984). Were this Court to allow a prevailing defendant/lender to recover those fees against a CPA plaintiff/homeowner the chilling effect would be enormous. This has never happened and is without precedent.

For these reasons, this Court should grant review because the award of fees and costs to Litton was contrary to existing law and decisions of this Court and merits review under *RAP 13.4(b)(1)*.

F. Conclusion.

Homeowners facing non-judicial foreclosure, such as Mr. Selkowitz, rely upon the DTA's protections to ensure fair treatment by the foreclosing trustee and the entities that authorize them. This Court's prior decisions amply demonstrate that mortgage industry compliance with the DTA has been problematic at best, making it all the more important that the Supreme Court accept review in this case. See *Klem*, at pgs. 788-792, *Schroeder*, at pgs. 105-106; *Bain,* at pages 94-110, Lyons and *Trujillo II.* The misconduct alleged herein by Mr. Selkowitz is typical of what homeowners across this State face at the hands of unscrupulous servicers, foreclosing trustees and lenders and will continue to face in the future, given the continuing mortgage foreclosure crisis.

Accordingly, this Court should accept review of the subject decision and Order on Reconsideration, pursuant to *RAP 13.4(b)(1)* and *(4)*.

REPECTFULLY SUBMITTED this 19th day of February, 2016.

KOVAC & JONES, PLLC

Richard Llewelyn Jones, WSBA No. 12904
Attorney for Appellant.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on February 19th, 2016, I caused to be served a true and correct copy of the foregoing **APPELLANT'S PETITION FOR REVIEW** on the following party(ies) and in the manner(s) indicated:

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SIGNED this 19th day of February, 2016, at Bellevue, Washington.

Dan L. Williams, Paralegal

TABLE OF APPENDICES

APPENDIX A

IN THE COURT OF APPEALS 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 through 20, Respondents.	No. 72505-0-I DIVISION ONE UNPUBLISHED OPINION FILED: November 23, 2015

SPEARMAN, C.J. — Kevin Selkowitz appeals the summary judgment dismissal of his complaint against Litton Loan Servicing LP, Quality Loan Servicing Corporation of Washington (QLS) and Mortgage Electronic Registration Systems (MERS), claiming violations of the Deed of Trust Act (DTA), chapter 61.24 RCW, and the Consumer Protection Act (CPA), chapter 19.86 RCW, as well as slander of title. Because no trustee's sale of Selkowitz's property occurred and Selkowitz identifies no genuine issue

of material fact related to any false, unfair or deceptive act or statement by the respondents, dismissal of his claims was proper. We affirm.

FACTS

On November 1, 2006, Selkowitz executed a promissory note in the amount of $309,600.00 in favor of New Century Mortgage Corporation. The loan was secured by a deed of trust encumbering Selkowitz's real property in Bellevue, Washington. The deed of trust identified New Century as the lender, First American Title Insurance Company as the trustee and MERS, "a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns," as the beneficiary. Clerk's Papers (CP) at 12. Selkowitz made payments on the loan directly to New Century.

In March 2007, New Century sold Selkowitz's loan to a securitized trust known as the GSAA Home Equity Trust 2007-1, Asset-Backed Certificates, Series 2007-1 (the Trust). Deutsche Bank National Trust Company is the custodian responsible for maintaining Trust documents and Avelo Mortgage, LLC assumed the servicing rights to Selkowitz's loan. Selkowitz began making loan payments to Avelo. As custodian, Deutsche Bank placed Selkowitz's note in a secure file room and maintained continuous physical possession of the note from approximately November 2006 until August 2013. Pursuant to the servicing and trust agreement, if the servicer of the loan requested the original note, Deutsche Bank was required to deliver the note within five days.

Litton acquired the servicing rights to Selkowitz's loan from Avelo in July 2008.[1] CP 823, 1764. Selkowitz made payments on the loan to Litton until approximately

[1] Litton was acquired by Ocwen Financial Corporation in September 2011, after non-judicial foreclosure proceedings were initiated, at which time Ocwen obtained the servicing rights to Selkowitz's loan.

November 2009, when he began experiencing financial hardship and defaulted on the loan. Selkowitz contacted Litton seeking a loan modification, but was unsuccessful in obtaining one.

Litton instructed QLS to commence nonjudicial foreclosure proceedings. On April 23, 2010, QLS sent Selkowitz a notice of default. The notice of default identified Litton as "[t]he Loan Servicer managing your loan, and whom you should contact about your loan . . . ," and provided an address and phone number for Litton. CP at 923. The notice identified the "current owner/beneficiary" of the note as "Please Consult Cover Letter."[2] CP at 923. An employee of QLS signed the notice on behalf of QLS "as Agent for Please Consult Cover Letter, the Beneficiary." CP at 926.

On May 20, 2010, approximately three weeks after sending the notice of default, QLS was appointed to succeed First American as trustee under the deed of trust.

On May 25, 2010, Litton executed a Declaration of Ownership. The declaration, signed by Litton's assistant vice president, stated:

> 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:
>
> . . . .
>
> 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 party or entity.

CP at 930.

---

[2] The record does not contain a cover letter, and an employee for QLS admitted she could not locate one in their records.

On May 27, 2010, QLS scheduled a trustee's sale. On July 2, 2010, Selkowitz sued Litton, QLS and MERS, alleging violations of the DTA and the CPA, as well as slander of title.[3] On December 27, 2012, while Selkowitz's suit was pending, QLS discontinued the trustee's sale, and it has never taken place.

The superior court granted summary judgment dismissal of Selkowitz's complaint and subsequently denied Selkowitz's motion for reconsideration. Selkowitz appeals.

DECISION

A. Standard of Review

We review a summary judgment order de novo, engaging in the same inquiry as the trial court. Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). We view the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. Lybbert, 141 Wn.2d at 34. A defendant can move for summary judgment by showing that there is an absence of evidence to support the plaintiff's case. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225-26 n.1, 770 P.2d 182 (1989). The burden then shifts to the plaintiff to set forth specific facts showing a genuine issue of material fact for trial. Young, 112 Wn.2d at 225. Mere allegations or conclusory statements of fact unsupported by evidence are not sufficient to establish a genuine issue of fact. Baldwin v. Sisters of Providence in Wash., Inc., 112 Wn.2d 127, 132, 769 P.2d 298 (1989). Nor may the nonmoving party rely on speculation or argumentative assertions that unresolved factual issues remain. Seven Gables Corp. v. MGM/UA Entertainment Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). If the plaintiff "'fails to make a

[3] Selkowitz also alleged malicious prosecution, quiet title and violation of the federal Fair Debt Collection Practices Act (FDCPA) but later abandoned those claims.

showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,'" summary judgment is proper. Young, 112 Wn.2d at 225 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986)).

B. Consumer Protection Act

As Selkowitz acknowledges, the DTA does not create an independent cause of action for monetary damages when, as here, no trustee's sale has occurred.[4] Frias v. Asset Foreclosure Servs., Inc., 181 Wn.2d 412, 417, 334 P.3d 529 (2014). Thus, Litton, MERS and QLS were entitled to dismissal of Selkowitz's DTA claim as a matter of law.

However, a plaintiff may bring a CPA claim based on alleged DTA violations, even without a completed sale. Lyons v. U.S. Bank Nat'l Ass'n, 181 Wn.2d 775, 784, 336 P.3d 1142 (2014). Washington's CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . ." RCW 19.86.020. To prevail on a CPA claim, a plaintiff must prove (1) the defendant engaged in an unfair or deceptive act or practice, (2) that the act occurred in trade or commerce; (3) that the act affects the public interest; (4) that the plaintiff suffered injury to his business or property; and (5) the injury was causally related to the act. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986). The failure to establish even one of these elements is fatal to the claim. Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., 162 Wn.2d 59, 74, 170 P.3d 10 (2007).

[4] It appears from the briefing that the superior court, in a subsequent action, entered a decree of judicial foreclosure. An appeal of this decree is currently pending in this court, US Bank Nat'l Ass'n v. Kevin Selkowitz, No. 73829-1-I.

1. Claims against Litton

Selkowitz argues that Litton's representation that it was the beneficiary of the deed of trust was deceptive because Litton was not the holder of the note. We disagree.

The DTA defines a "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." RCW 61.24.005(2). The DTA does not define the term "holder." However, the Uniform Commercial Code (UCC) guides our interpretation of the DTA's terms. Bain v. Metro. Mortgage Group, Inc., 175 Wn.2d 83, 104, 285 P.3d 34 (2012). The UCC defines "holder" as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." RCW 62A.1–201(21)(A) (emphasis added). Both the UCC and pre-UCC Washington case law recognize that constructive possession is sufficient to make one a holder of a note. See RCW 62A.3–201 cmt. 1 (a holder may possess a note "directly or through an agent"); Gleeson v. Lichty, 62 Wn. 656, 659, 114 P. 518 (1911) ("But, if we assume that the note was not in [the defendant's] actual possession, it was clearly under his control, and constructively therefore in his possession.")

Here, Litton had constructive possession of Selkowitz's note. The note was stored in Deutsche Bank's secure file facility for the entirety of the relevant time period. Pursuant to the servicing and trust agreement, Litton was entitled to demand the note from Deutsche Bank at any time, and Deutsche Bank was required to turn over the note to Litton within five days. This made Litton the holder of the note.

Selkowitz argues that Litton must physically possess the note to be a holder, and that constructive possession is insufficient. In support of this claim, Selkowitz points to

the following language from Bain: "a beneficiary must either actually possess the promissory note or be the payee." (Emphasis added). Bain, 175 Wn.2d at 104. However, while "Bain called for 'actual possession,' which could at first glance be understood to mean that only physical possession suffices...nothing in Bain suggested that the insertion of the word 'actual' was intended to create a departure from the UCC's definition of 'holder.' And nowhere in Bain did the Washington Supreme Court require 'physical' possession." In re Butler, 512 B.R. 643, 653 (Bankr. W.D. Wash.2014) (quoting Bain, 175 Wn.2d at 106)).

Moreover, the Washington Supreme Court recently recognized that a servicer may be a holder based on constructive possession of the note in Brown v. Dep't of Commerce, 2015 WL 6388153 (Oct. 22, 2015). In Brown, Brown executed a promissory note in favor of Countrywide Bank. Countrywide sold the note to Federal Home Loan Mortgage Corporation (Freddie Mac) and M&T Bank became the servicer of the note. In holding that M&T Bank was the holder of the note and entitled to enforce it, the court noted:

> Before the servicer institutes foreclosure proceedings, Freddie Mac provides the servicer with actual or constructive possession of the original note. See SERVICER'S GUIDE, supra, ch. 18.6(d), (e). Under the Servicer's Guide, the servicer is deemed to be in constructive possession of the note when the servicer commences a legal action or files the form (form 1036) that seeks actual possession of the note from Freddie Mac's note custodian. Id. at 18.6(d). Alternatively, if applicable state law requires the servicer to have actual possession of the note to institute foreclosure proceedings, the servicer submits a form 1036 to Freddie Mac's note custodian, who then delivers physical possession of the note to the servicer. Id. at 18.6(e).

Brown, 2015 WL 6388153, at *6 (Oct. 22, 2015).

Selkowitz next argues that "[t]he beneficiary must be both the actual holder and the owner of the Note to foreclose." Br. of Appellant at 27. But Brown also resolved this question in favor of the respondents, holding that "the statute's definition of 'holder' does not turn on ownership" and "a person need not own a note to be entitled to enforce the note." Brown, 2015 WL 6388153, at *7 (Oct. 22, 2015). See also Trujillo v. Northwest Trustee Services, Inc., 181 Wn. App. 484, 497-98, 326 P.3d 768 (2014), reversed in part on other grounds, 183 Wn.2d 820, 355 P.3d 1100 (2015). ("The UCC does, however, make clear that the 'person entitled to enforce' a note is not synonymous with the 'owner' of the note...[I]t is the status of holder of the note that entitles the entity to enforce the obligation. Ownership of the note is not dispositive."[5]

Finally, Selkowitz argues that the note he signed contained a specific definition of "note holder" as the "party 'entitled to receive payments under [the] Note'" and that, as a result, this court does "not need to analyze any other body of law" for its definition. Br. of Appellant at 22-23. But Selkowitz offers no relevant, controlling authority that the specific definition in the note alters who the holder is for purposes of the UCC or who the beneficiary is for purposes of the DTA.

2. Claims against QLS

Selkowitz first argues that QLS violated the CPA when it sent him a notice of default on April 23, 2010 before being appointed as successor trustee on May 20, 2010. However, under RCW 61.24.031(1)(a), a trustee, beneficiary, or authorized agent has authority to send a notice of default of a deed of trust. QLS was not acting as the

[5] In light of the Washington Supreme Court's decision in Brown, Selkowitz's argument that this court wrongly decided Trujillo is unavailing.

successor trustee when it sent the notice of default. Instead, the record shows that QLS sent the notice of default as agent for the beneficiary, Litton. Therefore, QLS did not engage in an unfair or deceptive practice by sending the notice of default.

Selkowitz argues that QLS's notice of default violated RCW 61.24.030(8)(l) by not identifying the beneficiary in its notice of default.[6] Although Selkowitz assigns error to this alleged deficiency, he fails to support this assignment of error with legal argument, which precludes our review.[7] See Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991).

Selkowitz contends that QLS violated RCW 61.24.031(9) by executing the foreclosure loss mitigation form, which he argues "is required to be executed by the beneficiary, not the trustee." Br. of Appellant at 5. But a plain reading of the statute shows that a foreclosure loss mitigation form may be completed by "beneficiary or authorized agent" for the beneficiary. RCW 61.24.031(9). As we have already established that QLS was acting as Litton's agent, there was no violation.

---

[6] RCW 61.24.030(8)(l) provides that a notice of default must contain "the name and address of the owner of any promissory notes or other obligations secured by the deed of trust and the name, address, and telephone number of a party acting as a servicer of the obligations secured by the deed of trust."

[7] We note that, in any event, Brown establishes that such a claim is without merit:

> A borrower can identify the note holder based on the information provided in the notice of default. The notice of default informs the borrower of the identity of the "servicer." RCW 61.24.030(8)(l). "Servicer" is not a legal term of art. Homeowners use the word to refer to the bank to which they send mortgage payments because they reasonably believe the servicer is the person entitled to enforce the note and because paying the servicer will discharge their obligation. That is true when the servicer holds the note. RCW 62A.3-301(i), -602(a). The inference that a "servicer" denotes a "holder" is therefore apparent. . . .

Brown, No. 90652-1, 2015 WL 6388153, at *13 (Oct. 22, 2015)

Finally Selkowitz argues that QLS violated its duty of good faith under RCW 61.24.010(4) and duty to comply with RCW 61.24.030(7)(a) by relying on Litton's beneficiary declaration without conducting an independent inquiry into the identity of the holder.[8] But Brown establishes that an agent of the beneficiary "can rely on a declaration consistent with its duty of good faith if the declaration unambiguously states the beneficiary is the actual holder." Brown, No. 90652-1, 2015 WL 6388153, at *15 (Oct. 22, 2015). Here, Litton's beneficiary declaration unambiguously states that it is the holder of Selkowitz's note. Thus, QLS did not violate its statutory obligations.

3. Claims against MERS

Selkowitz claims MERS violated the CPA when it appointed QLS as successor trustee. This is so, he asserts, because only a beneficiary has the power to appoint a trustee to proceed with a nonjudicial foreclosure and Bain establishes that MERS is "'an ineligible 'beneficiary' within the terms of the Washington Deed of Trust Act,' if it never held the promissory note or other debt instrument secured by the deed of trust." Bain, 175 Wn.2d at 110. We agree that if QLS's authority to send Selkowitz a notice of default was based on its appointment as successor trustee, this would constitute "an unfair or deceptive practice that serves to fulfill the first element of a CPA claim" because MERS did not have the authority to appoint a successor trustee. Bavand v. OneWest Bank, F.S.B., 176 Wn. App. 475, 506, 309 P.3d 636 (2013). However, as discussed above,

[8] RCW 61.24.010(4) provides that the "trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor." RCW 61.24.030(7)(a) requires that, "for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection."

QLS had authority to send the notice of default as Litton's agent. Thus, even if MERS had no authority to appoint QLS as successor trustee, Selkowitz was not injured by the appointment because QLS sent the notice of default under lawful authority.

C. Slander of Title

Selkowitz claims the trial court erred in dismissing his action for slander of title. The elements of a slander of title claim include: "(1) false words; (2) maliciously published; (3) with reference to some pending sale or purchase of property; (4) which go to defeat plaintiff's title; and (5) result in plaintiff's pecuniary loss." Rorvig v. Douglas, 123 Wn.2d 854, 859, 873 P.2d 492 (1994). Selkowitz contends that Litton made the following false representations to him during the proceedings: (1) that it was an agent for the beneficiary; (2) that it was an attorney in fact for the beneficiary; (3) that it was the beneficiary; (4) that it had determined Selkowitz was in default without having the authority to do so as the beneficiary; and (5) that it was the holder of the note. However, Selkowitz fails to establish the statements were false because Litton was the beneficiary and holder of the note and had authority to direct QLS to send a notice of default. Moreover, because the trustee's sale did not take place, Selkowitz fails to establish that the allegedly false statements were made in connection with a "pending sale" of the property. For these reasons, summary judgment dismissal of the slander of title claim was appropriate.

D. Attorney Fees

Both Selkowitz and Litton request attorney fees and costs pursuant to RAP 18.1(a). Under RAP 18.1, the prevailing party is entitled to attorney fees and costs on appeal if requested in the party's opening brief and if "applicable law grants to a party

the right to recover . . . ." RAP 18.1(a), (b). Both the note and the deed of trust contain attorney fee provisions.

We deny Selkowitz's request for fees and costs because he is not the prevailing party. Selkowitz argues that Litton is not entitled to fees because it was not an original party to the note or the deed of trust. However, the note provides that if Selkowitz is found in default, "the Note Holder will have the right to be paid back...for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees." CP at 827. As Litton is the noteholder and the issues involved in this appeal were resolved in its favor, we award Litton reasonable attorney fees and costs.

We affirm the summary judgment dismissal of Selkowitz's claims. We award attorney fees to Litton.

Spearman, C.J.

WE CONCUR:

Leach, J.

Ian, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KEVIN J. SELKOWITZ, an individual,	)	No. 72505-0-I
	)	AMENDED
	)	ORDER DENYING APPELLANT'S
	)	MOTION FOR
Appellant,	)	RECONSIDERATION AND
	)	APPELLANT'S AND RESPONDENT'S
	)	MOTION TO PUBLISH
v.	)	
	)	
LITTON LOAN SERVICING LP, a Delaware Limited Partnership, et al	)	

Appellant Kevin Selkowitz has filed a motion for reconsideration and both parties have filed a motion to publish the opinion filed in the above matter on November 23, 2105. The respondents filed an answer to the motions. A majority of the panel has determined the motions should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration and motions to publish are denied.

DATED this 21st day of January 2016.

FOR THE COURT:

Presiding Judge

SENT TO CLIENT_____
( ) NO ACTION REQUIRED
( ) PLEASE RESPOND TO THIS

APPENDIX C

CP-001105

Certified True and Correct Copy

ADJUSTABLE RATE NOTE

(LIBOR Six-Month Index (As Published In The Wall Street Journal) - Rate Caps)

THIS NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY INTEREST RATE AND MY MONTHLY PAYMENT. THIS NOTE LIMITS THE AMOUNT MY INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE I MUST PAY. MIN: [redacted]

October 29, 2005 (Date) LYNNWOOD (City) WASHINGTON (State)

6517 SOUTHEAST COUGAR MOUNTAIN WAY, BELLEVUE, WA 98006 (Property Address)

[redacted]

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. $501,600.00 (this amount is called "Principal"), plus interest, to the order of Lender. Lender is NEW CENTURY MORTGAGE CORPORATION, a California Corporation.

I will make all payments under this Note in the form of cash, check or money order.

I understand that Lender may transfer this Note. Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 6.375 %. The interest rate I will pay may change in accordance with Section 4 of this Note.

The interest rate required by this Section 2 and Section 4 of this Note is the rate I will pay both before and after any default described in Section 7(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payments on the first day of each month beginning on December 1, 2005. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on November 1, 2035, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at 19400 Von Karman, Suite 1000, Irvine, CA 92612

or at a different place if required by the Note Holder.

(B) Amount of My Initial Monthly Payments

Each of my initial monthly payments will be in the amount of U.S. $3,044.75. This amount may change.

(C) Monthly Payment Changes

Changes in my monthly payment will reflect changes in the unpaid principal of my loan and in the interest rate that I must pay. The Note Holder will determine my new interest rate and the changed amount of my monthly payment in accordance with Section 4 of this Note.

[redacted]

CP-001106

4. INTEREST RATE AND MONTHLY PAYMENT CHANGES

(A) Change Dates

The interest rate I will pay may change on the first day of November, 2011, and on that day every 6th month thereafter. Each date on which my interest rate could change is called a "Change Date."

(B) The Index

Beginning with the first Change Date, my interest rate will be based on an Index. The "Index" is the average of interbank offered rates for six month U.S. dollar-denominated deposits in the London market ("LIBOR"), as published in *The Wall Street Journal*. The most recent Index figure available as of the first business day of the month immediately preceding the month in which the Change Date occurs is called the "Current Index."

If the Index is no longer available, the Note Holder will choose a new index that is based upon comparable information. The Note Holder will give me notice of this choice.

(C) Calculation of Changes

Before each Change Date, the Note Holder will calculate my new interest rate by adding two and one-quarter percentage points (2.250 %) to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date.

The Note Holder will then determine the amount of the monthly payment that would be sufficient to repay the unpaid principal that I am expected to owe at the Change Date in full on the Maturity Date at my new interest rate in substantially equal payments. The result of this calculation will be the new amount of my monthly payment.

(D) Limits on Interest Rate Changes

The interest rate I am required to pay at the first Change Date will not be greater than 12.375 % or less than 2.250 %. Thereafter, my interest rate will never be increased or decreased on any single Change Date by more than two percentage point(s) (2.000 %) from the rate of interest I have been paying for the preceding six months. My interest rate will never be greater than 12.375 %.

(E) Effective Date of Changes

My new interest rate will become effective on each Change Date. I will pay the amount of my new monthly payment beginning on the first monthly payment date after the Change Date until the amount of my monthly payment changes again.

(F) Notice of Changes

The Note Holder will deliver or mail to me a notice of any changes in my interest rate and the amount of my monthly payment before the effective date of any change. The notice will include information required by law to be given to me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

5. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under this Note.

I may make a full Prepayment or partial Prepayments without paying any Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount before applying my Prepayment to reduce the Principal amount of this Note. If I make a partial Prepayment, there will be no changes in the due date of my monthly payment unless the Note Holder agrees in writing to those changes. My partial Prepayment may reduce the amount of my monthly payments after the first Change Date following my partial Prepayment. However, any reduction due to my partial Prepayment may be offset by an increase in interest.

6. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (i) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (ii) any sums already collected from me which exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.

[redacted]

LITCON-001106

CP-001107

7. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charge for Overdue Payments

If the Note Holder has not received the full amount of any monthly payment by the end of 15 calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 5.000 % of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal that has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

(D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

8. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Unless the Note Holder requires a different method, any notice that must be given to the Note Holder under this Note will be given by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

10. WAIVERS

I and any other person who has obligations under this Note waive the rights of Presentment and Notice of Dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

11. UNIFORM SECURED NOTE

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses that might result if I do not keep the promises that I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions read as follows:

[redacted]

CP-001108

Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender also may require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

KEVIN J. SELKOWITZ (Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

[Space Below This Line For Acknowledgment]

[redacted]

[illegible] Page 6 of 8 Form 3014 9/01

LITTON 00118003

APPENDIX D

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-10-357564-SH
MERS MIN No.: 100431900102956512 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

800-669-6601

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 11/1/2005 in Auditor's File No. 20051101000310, book xxx and page xxx Records of KING County, Washington, which Deed of Trust encumbers the following described real property:

UNIT 4, BUILDING 2-C OF LAKEMONT RIDGE, A CONDOMINIUM RECORDED IN VOLUME 125 OF CONDOMINIUMS, PAGES 8 THROUGH 14, ACCORDING TO THE DECLARATION THEREOF, RECORDED

UNDER KING COUNTY RECORDING NUMBER 9505140732 AND ANY AMENDMENTS THERETO: SITUATE IN THE CITY OF BELLEVUE, COUNTY OF KING, STATE OF WASHINGTON.

Tax Parcel No. 413900-0450

Commonly known as: 6517 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:	10/31/2005
Note Amount:	$309,600.00
Late Charge Amount:	$82.24
Note Maturity Date:	11/1/2035
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:	$525.00
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:	$0.60
	TOTAL CHARGES, COSTS AND FEES:	$963.50

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 $13,103.82, 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 presently unknown expenditures required to preserve the property or to comply with 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
(888) 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;

8. **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

APPENDIX E

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 F

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' OPENING BRIEF

KOVAC & JONES, PLLC
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rsanders@goodsteinlaw.com
Attorney for Appellant

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I. INTRODUCTION

Kevin Selkowitz simultaneously resists a non-judicial foreclosure by parties with whom he never contracted (this action) as well as a *judicial* foreclosure seeking a deficiency brought by yet a separate party, all strangers to his original loan transaction. Ultimately the factual question is who has authority to do what, and where is the clear and undisputed proof of that authority to foreclose. This record of nearly 2,700 pages does not provide the clear and undisputed answers necessary to affirm the trial court's summary judgment dismissing these parties as a matter of law. But it does raise many questions of fact.

This case is no stranger to our state's appellate courts. *Bain v. Metropolitan Mortgage*, 175 Wn.2d 83, 285 P.3d 34 (2012) (hereinafter "*Bain*") answered important questions posed by the federal district court in favor of Selkowitz, deciding that MERS was not a lawful beneficiary under the Washington Deed of Trust Act (*RCW 61.24, et seq.*) (hereinafter "DTA") and representing otherwise was a potential violation of the Consumer Protection Act (*RCW 19.86, et seq.*) (hereinafter "CPA").

And the factual question of lawful authority to act was highlighted by the fact "[a]t oral argument, counsel for MERS was asked to identify its principals in the cases before us and was unable to do so." *Id.*, 175 Wn.2d

at 107, n. 12. If MERS cannot identify its principal, surely this trial court was not in a position to do so under the summary judgment standard.

The events at issue here took place mostly in April and May, 2010, years after the original note and Deed of Trust were executed and recorded. Respondent, LITTON LOAN SERVICING LP, a Delaware Limited Partnership (hereinafter "Litton"), was not a party to the original Deed of Trust, yet claimed authority in its Declaration of Ownership to initiate the foreclosure. However, it fails to establish a clear trail of title and authority from the original beneficiary. And Respondent, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation (hereinafter "MERS"), could not have been the beneficiary entitled to appoint Respondent, QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington Corporation (hereinafter "QLS"), as successor trustee on May 12. 2010, as already decided in *Bain;* which undercuts the claim of QLS that it had authority as a successor trustee to foreclose. Virtually every assertion in the statutorily required foreclosure documents is legally unsound and/or factually questioned.

Reversal is the remedy.

II. ASSIGNMENTS OF ERROR

A. The trial court erred by granting summary judgment on July 24, 2014 dismissing Litton, and denying Appellant's Motion for Reconsideration on September 15, 2014.

Issues

Litton's authority to enable this foreclosure through its Declaration of Ownership (CP 930) is factually disputed.

1. Are there material issues of fact that Litton's representations in its May 25, 2010 Declaration of Ownership that it is "the actual holder of the promissory note dated 10/31/2006" is false?

2. Are there material issues of fact that Litton's representation in the Declaration of Ownership that it *is* the "beneficiary" *and* "authorized Agent for the owner and actual holder of that certain promissory note..." is not only false but self-contradictory?

3. Are there material issues of fact that Litton's representation in the Declaration of Ownership that "The Note has not been assigned or transferred to any other person or entity" is false?

4. Are there material issues of fact that Litton's representation in the Declaration of Ownership that Diane Dixon signs for Litton as attorney in fact for the beneficiary is false?

5. Is there a material issue of fact that Litton's representation in the Declaration of Ownership that it is the "Loan Servicer" is false?

6. Are there material issues of fact that QLS acted as an agent for Litton making Litton vicariously liable under *respondeat superior* for the misconduct of QLS in the foreclosure process?

7. Are there facts and or reasonable inferences in this record that Litton violated Washington's Consumer Protection Act by committing (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) affecting the public interest; and (4) causing injury to a person's business or property?

8. Are there facts and or reasonable inference in the record that Litton slandered title to Appellant's real property through the wrongful recording of a Notice of Trustee's Sale?

B. The trial court erred by granting summary judgment on July 24, 2014 dismissing QLS, and denying Appellant's Motion for Reconsideration on September 15, 2014.

Issues

QLS's authority to act as a successor trustee before and after its alleged appointment by MERS on May 12, 2010 is factually disputed.

1. Are there material issues of fact that QLS lacked authority from the true beneficiary to issue the April 23, 2010 Notice of Default?

2. Are there material issues of fact that the Notice of Default prepared by QLS violated *RCW 61.24.030(8)* by not identifying by name the beneficiary?

3. Are there material issues of fact that QLS violated its statutory duty of good faith to the grantor required by *RCW 61.24.010(4)* by executing through its purported attorney a Foreclosure Loss Mitigation Form contrary to *RCW 61.24.031(9)* which requires the form be executed by the beneficiary rather than the trustee?

4. Are there material issues of fact that QLS was acting as the agent of the beneficiary in violation of its independent duty of good faith to the grantor as required by *RCW 61.24.010(4)?*

5. Are there material issues of fact that QLS on or about December 27, 2010 executed, served and posted a Notice of Foreclosure that falsely states "[t]he attached Notice of Trustee's Sale is *a consequence of defaults(s) in the obligation to Mortgage Electronic Registration Systems, Inc., the Beneficiary of your Deed of Trust, and owner of the obligation secured thereby"* when it is established as a matter of law in *Bain* that MERS is not a beneficiary under the DTA and admitted in MERS' answer that it does not own the obligation?

6. Are there material issues of fact that QLS violated RCW *61.24.030(7)(a)* by recording and serving a Notice of Trustee's Sale

without proof that the claimed beneficiary is the owner of the note secured by the Deed of Trust foreclosed upon?

7. Are there material issues of fact that QLS violated its duty of good faith to the grantor required by *RCW 61.24.010(4)* thus barring it from relying on any beneficiary declaration stating it is the actual holder of the note in accordance with *RCW 61.24.030(7)(b)*?

8. Are there facts and/or reasonable inferences in this record that QLS violated Washington's Consumer Protection Act by committing (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) affecting the public interest; and (4) causing injury to a person's business or property?

9. Are there facts and or reasonable inference in the record that QLS slandered title to Appellant's real property through the wrongful recording of a Notice of Trustee's Sale?

C. The trial court erred by granting summary judgment on July 24, 2014 dismissing MERS and denying Appellant's Motion for Reconsideration on September 15, 2014.

Issues

MERS' claimed authority to appoint QLS as a successor trustee on May 12, 2010 is a disputed issue of fact.

1. Are there material issues of fact that MERS falsely and without authority on May 12, 2010 purporting to be beneficiary of the Deed of Trust executed an Appointment of Successor Trustee, nominating QLS as the successor trustee?

2. Are there facts and or reasonable inferences in this record that MERS violated Washington's Consumer Protection Act by committing (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) affecting the public interest; and (4) causing injury to a person's business or property?

III. STATEMENT OF THE CASE

On November 1, 2006, Appellant, KEVIN SELKOWITZ (hereinafter "Mr. Selkowitz") executed a Note in favor of Respondent, NEW CENTURY MORTGAGE CORPORATION, a California Corporation (hereinafter "New Century") in the amount of $309,600.00. CP 1105-1108; 2311-2315. See ***Appendix "A".*** The Note specifically defines the term "note holder" as the "Lender (New Century) or anyone who takes this Note by transfer and who is entitled to receive payments under this Note."

To secure repayment of the Note, Mr. Selkowitz executed a Deed of Trust in which Respondent, FIRST AMERICAN TITLE INSURANCE COMPANY, a Washington Corporation (hereinafter "FATCO") was

named trustee and MERS, was named purported beneficiary as nominee for New Century. CP 11-35; 1110-1134.

At no time relevant to this cause of action did Mr. Selkowitz owe MERS, QLS or Litton any monetary or other obligation under the terms of the Note or Deed of Trust.

Respondents allege that at some point between January 1, 2007 to January 30, 2007, Mr. Selkowitz's loan was assigned to U.S. Bank, N.A. as Trustee for GSAA Home Equity Trust 2007-1, Mortgage Backed Certificates, Series 2007-1 (hereinafter "the Trust"). No evidence of such an assignment has been adduced during the course of these proceedings. Moreover, evidence was offered on summary judgment that the loan could not have been transferred to the Trust as the loan was portrayed in the materials provided during discovery. See CP 2171-2415. However, on July 11, 2014, the Trust initiated a judicial foreclosure action under King County Superior Court Case No. 14-2-19165-1 KNT, in which the Trust alleged that it was "the current holder" of the loan. CP 2420-2427. The allegations contained in the Trust's Complaint contradict the allegation to be the holder asserted on summary judgment by the Respondents herein. It is also important to note that at no time relevant to this cause of action has the Trust ever alleged to be the owner of the obligation.

On April 2, 2007, New Century filed for relief under Chapter 11 of the United States Bankruptcy Code. CP 1160-1162. On or about May 5, 2007, all executory contracts of New Century were rejected, including those with MERS. CP 1162.

On or about July 1, 2007, Litton apparently assumed responsibility as servicer of Mr. Selkowitz's loan, despite the fact that the identity of the true and lawful owner and actual holder of the obligation remained unidentified and no evidence of a grant of authority to Litton was ever adduced during these proceedings, and, assuming the Trust had some interest in the Note and Deed of Trust, Litton was not identified as an authorized servicer in the Trust's governing documents. CP 570-796; 1136-1139

On April 23, 2010, QLS issued a Notice of Default pursuant to *RCW 61.24.030,* as agent for "Please Consult Cover Letter, the Beneficiary." CP 1136-1141. See ***Appendix "B".*** Unfortunately, no cover letter accompanied the Notice of Default submitted with these materials to Mr. Selkowitz. The Notice of Default specifically identified Litton as the "Loan Servicer." According to the Notice of Default, "Please Consult Cover Letter" declared Plaintiff to be in default. Nothing in the Notice of Default alerted Plaintiff to the identity of the true and lawful owner and holder of his obligation. Significantly, the Notice of Default

was signed by Susan Hurley as "Trustee Sale Officer", but QLS had not yet been appointed successor trustee.

On May 12, 2010, MERS, as "beneficiary" of the Deed of Trust executed an Appointment of Successor Trustee, nominating QLS as successor trustee. CP 37-38. See ***Appendix "C".*** At the time this Appointment of Successor Trustee was executed, MERS was neither the owner nor holder of the subject Note and Deed of Trust.

On May 25, 2010, Diana Dixon, as Assistant Vice President of Litton Loan Servicing, LP, "the Loan Servicer/Authorized Agent for Beneficiary", executed a Declaration of Ownership in which she represents that Litton Loan Servicing LP "is the actual holder of the Promissory Note" and that "the Note has not been assigned or transferred to any other person or entity." CP 478, 930. See ***Appendix "D"***. Three things are evident from this document: (1) Litton is merely the loan servicer acting as an agent for an undisclosed principal; (2) Litton is not the "beneficiary", only at most the agent for the beneficiary, despite alleging it is the "actual holder" of the subject Note; and (3) Litton is apparently acting as "attorney in fact" for the undisclosed principal, but no power of attorney has yet been adduced to date to support this contention.

On December 27, 2010, QLS executed, filed, served and posted a Notice of Trustee's Sale in connection with the Property pursuant to *RCW*

61.24.040. CP 40-42. In conjunction with the Notice of Trustee's Sale, QLS executed, served and posted a Notice of Foreclosure that falsely states that "[t]he attached Notice of Trustee's Sale is a consequence of defaults(s) in the obligation to Mortgage Electronic Registration Systems, Inc., the Beneficiary of your Deed of Trust, and owner of the obligation secured thereby." CP 936-937. (Emphasis added) It is undisputed that at no time did MERS ever own or hold the Note. CP 114-115.

IV. PROCEDURAL HISTORY

On June 24, 2010, Mr. Selkowitz filed suit against the above-named Respondents, seeking injunctive and declaratory relief, quiet title, relief for violation of the DTA (denominated wrongful foreclosure), libel and defamation of title, malicious prosecution, violation of *15 USC §1601*, violation of the CPA and violation of *15 USC §1962* (FDCPA). CP 1-42.[1]

On July 27, 2010, the matter was removed to the United States District Court, pursuant to *28 USC §1446(a)*. During the course of the proceedings before the United States District Court, the trial judge, the Honorable John Coughenour, certified three questions to the Washington Supreme Court. These three questions were answered by the Washington

[1] At summary judgment, Mr. Selkowitz conceded his claims for malicious prosecution and quite title based on this Court's rulings in *Walker v. Quality Loan Service Corp, et al.*, 176 Wn.App.294, 308 P.3d 716 (2013) (hereinafter "*Walker*") and *Bavand v. OneWest Bank, FSB, et al.*, 176 Wn.App 475, 309 P.3d 636 (2013). (hereinafter "*Bavand*").

Supreme Court in the matter of *Bain,* which is the law of this case. *Greene v. Rothschild*, 68 Wn.2d 1, 10, 414 P.2d 1013 (1966) (quoting *Adamson v. Traylor*, 66 Wn.2d 338, 339, 402 P.2d 499 (1965)); see also *State v. Worl*, 129 Wn.2d 416, 424, 918 P.2d 905 (1996) (Under the law of the case doctrine, the parties, the trial court, and the appellate court are bound by the ruling of the court of appeals on prior appeal until such time as they are authoritatively overruled.)

On or about November 14, 2012, Judge Coughenour remanded the matter back to the King County Superior Court. CP 161.

In June of 2014, Respondents each brought Motions for Summary Judgment against Mr. Selkowitz pursuant to *CR 56.* (CP 290-453; 456-470; 797-820).

On July 24, 2014, the trial court granted Respondents' Motions for Summary Judgment. CP 2517-2527.

On August 4, 2014, Mr. Selkowitz filed a Motion for Reconsideration, pursuant to *CR 59.* CP 2528-2622.

On September 15, 2014, the trial court denied Mr. Selkowitz's Motion for Reconsideration. CP 2670.

On September 18, 2014, Mr. Selkowitz filed his Notice of Appeal to this Court. 2671-2687.

V. 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. *State ex rel Bond v. State*, 62 Wn.2d 487, 383 P.2d 288 (1963) (hereinafter "*Bond*"); *Lilly v. Lynch*, 88 Wn.App. 306, 945 P.2d 727 (1997) (hereinafter "*Lilly*"); *Snohomish County v. Rugg*, 115 Wn.App. 218, 61 P.3d 1184 (2002) (hereinafter "*Rugg*"); *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, 908, 93 P.3d 861 (2004)); *Bavand*, at page 485 and *Lyons v. U.S. Bank*, 181 Wn.2d. 775, 783, 336 P.3d 1142 (2014) (hereinafter "*Lyons*"). 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) (hereinafter "*Balise*"); *Schroeder*; *Bavand*, at page 485 and *Lyons*, at page 783. The initial burden on summary judgment falls on the moving party to prove that no material issue is genuinely in dispute. *CR 56*.

Summary judgment is appropriate if reasonable persons can reach but one conclusion from all of the evidence, viewed in a light most favorable to the non-moving party. *Rugg; Doherty v. Municipality of*

Metro, 83 Wn.App. 464, 921 P.2d 1098 (1996). In reviewing the evidence submitted on summary judgment, facts asserted by the non-moving party and supported by affidavits or other appropriate evidentiary materials must be taken as true. *Bond*; *Reid v. Pierce Co.*, 136 Wn.2d 195, 961 P.2d 333 (1998). When there is contradictory evidence or the moving parties' evidence is impeached, an issue of credibility is presented that the court cannot resolve on summary judgment. *Balise*.

Based upon the foregoing and the testamentary and documentary evidence that was offered to the trial court on summary judgment, particularly the Declaration of Sierra Herbert-West (CP 471-482); the Declaration of Barbara Campbell (CP 568-796); the Declaration of Mr. Selkowitz (CP 1090-1150); the Declaration of Tim Stephenson (CP 1151-1517); the deposition transcript of Brian Blake (CP 1523-1594); the deposition transcript of Kevin Flannigan (CP 1595-1769); the deposition transcript of Sierra Herbert-West (CP 1770-1884); the deposition transcript of Kevin Selkowitz (CP 2050-2126); the Declaration of Jay Patterson (2171-2415); and Plaintiff's Request for Judicial Notice (CP 2416-2427), there were genuine issues of material fact before the trial court inconsistent with any summary dismissal of Mr. Selkowitz's claims.

B. Strict Compliance with DTA Required.

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) (hereinafter "*Udall*")). Substantial compliance with the statutory provisions of the DTA is not enough.

C. Actual "Beneficiary" Entitled to Initiate Foreclosure is a Disputed Question of Fact.

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*. See *RCW 61.24.005(2)*. However in this case there are competing and mutually exclusive claims of beneficial ownership in the Note and Deed of Trust and status as holder in this matter that must preclude summary judgment.

In reviewing the documentation before the trial court on summary judgment, the only direct evidence of the chain of ownership of the obligation is the original Note (CP 1105-1108), apparently endorsed in

blank.[2] There the chain of title to the Note ends. See generally the testimony of Jay Patterson. CP 2171-2415.

QLS alleges that this non-judicial foreclosure was initiated by Litton and that "Litton represented that [it] was the beneficiary under the Note authorized to foreclose on the Property." CP 472. Indeed, Litton purportedly prepared and presented to QLS a Declaration of Ownership that "Litton Loan Servicing LP is the actual holder of the Promissory Note"[3] and that the "Note has not been assigned or transferred to any other person or entity." CP 478. But these representations are contradicted by Litton's own witness, Kevin Flannigan, who testifies that: (1) "after

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[2] Respondents offered various versions of the Note, some endorsed, some not. The attorney for QLS offered an endorsed copy of the Note (CP 491-495), but her witness, Sierra West, did not and QLS apparently did not rely on a copy of the endorsed Note to initiate foreclosure proceedings. CP 471-482. MERS offered no version of the Note on summary judgment. Litton's counsel testified that his offices had possessed the Note from January 3, 2014 to June 26, 2014, but did not offer a copy of the Note in his firm's possession. (CP 532-567). The Trust's Custodian, Deutsche Bank, offered the testimony of Barbara Campbell, who possessed the Note November 7, 2006 to August 6, 2013, when the Note was transferred to Ocwen Loan Servicing, but does not provide a copy of the Note, endorsed or otherwise. (CP 568-796). The representative of Litton and Ocwen, Kevin Flannigan, offers of copy of the Note (CP 825-829), duly endorsed, but his testimony in unverifiable, unreliable and inadmissible as rank hearsay. See *RCW 5.45.020; CR 56(e); ER 803; 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). It should also be noted that there is doubt that the endorsement on the copy of the Note offered by Mr. Flannigan was made prior to August 8, 2008, when Mr. Nagy's authorization expired or was ever properly affixed to the Note. See testimony of Tim Stevenson (CP 1163-1165) and Jay Patterson (CP 2193). See ***Appendix "A"***. Even Mr. Flannigan couldn't confirm that Mr. Nagy's endorsement was properly affixed to the Note after inspecting it. CP 1608 (Page 52, line 13 to Page 53, line 6).

[3] Contrary to the title of the document, Litton has never alleged that it was the true and lawful owner of the obligation nor is there any factual basis for Litton to do so as it appears to have only acquired the "servicing rights" to the Note. CP 823.

origination of the Loan, it was securitized and transferred to GSAA Home Equity Trust 2007-1"; and (2) Litton and Ocwen were mere servicers of the loan. CP 822-823. See also testimony of Jay Patterson. CP 2192. At no point does Litton represent that it is the true owner and actual holder of the Note and Deed of Trust or reveal the source of its authority for executing the Declaration of Ownership that was relied upon by QLS to initiate foreclosure proceedings. 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, Litton was specifically forbidden to "hold" the Note under the terms of the Trust's Master Servicing and Trust Agreement (hereinafter "PSA"), assuming there is any basis for the Trust's involvement whatsoever. See CP 570-796; 1177-1178.

QLS alleges that it relied on Litton's declaration of Mr. Selkowitz's default. CP 472. However, QLS had no procedures in place to verify that information and apparently was ignorant to the involvement of the Trust. CP 1778-1779; 1790; 1803. See CP 1770-1872 (Herbert-West deposition, page 34, line1-16, page 39, lines 2-17, 22-25, page 40, lines 1-25, page 41, lines1-25, page 42, lines 1-21, page 60, lines4-25, page 62, lines 9-25, page 63, lines 1-25, page 64, lines 1-21, page 66, lines 1-19, page 74, lines 3-14, page 75, lines 1-24, page 77, lines 11-22, page

82, lines 9-17, page 83, lines5-25, page 84, lines 1-25, page 85, lines 1-5, page 85, lines15-25, page 86, lines1-2, page 92, lines24-25, page 93, liens 1-2, page 99, lines12-19, page 102, lines 2-7, page 113, lines 16-25, page 114,lines 14, page 115, lines 22-25, page 116, lines 1-7, page 123, lines1-20, page 147, lines 12-18, page 149, lines17-20, . page 34, lines 1-25, page 73, lines 18-25, page 74, lines 1-14, page 92, lines 24-25, page 93, lines 1-2, page 99, lines 6-10, page 123, lines 1-20, page 131, lines14-20, page 147, lines 12-18). Although Litton apparently believed that the Trust was the owner of the obligation when this action was initiated and that it was acting in the role of the servicer, no evidence before the trial court indicated that the Trust or the true owner and actual holder of the obligation ever declared Mr. Selkowitz to be in default.[4]

MERS also claimed to be the "beneficiary" of the obligation on May 12, 2010, when it appointed QLS Successor Trustee. CP 37-38; 475-476. However, it was undisputed that MERS never owned or held the Note and Deed of Trust and could never have been an eligible beneficiary to so act. See *Bain*; CP 114-115. See also the testimony of Jay Patterson. CP 2187-2191. If MERS did not own or hold the subject obligation and

[4] Despite Litton's assertions that there exists an agency relationship between it and the Trust, issues of material fact were presented to the trial court to dispute the existence of such a relationship as Litton is not specifically identified as a servicer or is otherwise authorized to so act under the PSA. CP 570-796. See also the testimony of Tim Stephenson. CP 1177-1178.

was not an eligible beneficiary, it had no independent authority to appoint a successor trustee under *RCW 61.24.010(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).*

Moreover, no credible evidence was offered on summary judgment to establish an agency relationship between MERS and the true and lawful owner and actual holder of the obligation, whoever that may be, nor was there any evidence of authority for MERS' execution of the Appointment of Successor Trustee. On this issue, nothing has changed since this case

was before the Washington Supreme Court. See *Bain*, at pages 106-107. It is Mr. Selkowitz's position that all action taken by QLS in reliance on the Appointment of Successor Trustee was unlawful and wrongful.

Comically, in its Notice of Default, QLS represents that the "current owner/beneficiary of the Note secured by the Deed of Trust is: Please Consult Cover Letter." CP 1136-1139. No cover letter was ever furnished by QLS with the Notice of Default. CP 1094-1095. Therefore, the identity of "Please Consult Cover Letter" remains a mystery.

Based on the foregoing, none of the Respondents named herein can establish their *bona fides* as owner and actual holder of the obligation. *RCW 61.24.005(2).*

Although not a party to this action, Respondents suggest that the Trust was the true owner or "investor" of the obligation at the time the non-judicial foreclosure was initiated. CP 800; CP 1538 (Blake deposition, page 60, line 24 to page 61, line 13). The mere allegation of the Trust's ownership by the Trust repudiates Respondents' claims to be holders and beneficiaries of the Note and Deed of Trust, 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 this fact. Indeed, there was testimony that raised considerable doubt that the subject obligation was ever properly assigned and transferred to the Trust.

According to the PSA, all loans had to be assigned to the Trust between January 1, 2007 and January 31, 2007. See CP 600; 602 and testimony of Tim Stephenson. CP 1170. According to the PSA, the Note was specifically required to be endorsed by New Century (Originator) to Goldman Sachs Mortgage Co. (Sponsor); from Goldman Sachs Mortgage Co. (Sponser) to GS Mortgage Securities Corp (Depositor); and endorsed by GS Mortgage Securities Corp (Depositor) in blank to be transferred to the Custodian, Deutsche Bank. See CP 623-628; see also testimony of Jay Patterson (CP 2181-2187) and testimony of Tim Stephenson (CP 1170-1178). These endorsements were required to be affixed to the Note prior to the Trust closing date of January 31, 2007. CP 624-626. Here, the only endorsement that shows up on any version of the Note is the endorsement of New Century, in blank. See ***Appendix "A".*** Missing are the endorsements of the Sponsor and Depositor. Absent these endorsements, there is substantial and material doubt that the Note was ever properly assigned and transferred to the Trust. See testimony of Tim Stevenson (CP 1177-1180) and Jay Patterson (CP 2201-2203). Absent proper endorsement, 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 and authorized to declare the obligation

to be in default or authorized to appoint a successor trustee. *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.

D. Terms of Note Define "Note Holder".

The identity of the "actual holder" of the obligation for purposes of the DTA could be simplified by looking to the terms in the Selkowitz Note, which contains a specific definition of note holder: the "Note Holder" is defined as the party "*entitled to receive payments* under [the] Note," a definition that corresponds nicely with the provisions of *RCW 61.24.030(8)(c)* that limits the right to declare the note in default to the "beneficiary". CP 1039. The subject Note does not contain the term "loan servicer" or "loan servicing." Mr. Selkowitz did not contract for an alternative basis by which someone who did not take the Note for value and was not entitled to the stream of payments could declare a default, appoint a successor trustee or otherwise affect his rights as a borrower.

Thus, for Respondents to suggest, as they did on summary judgment, that the fundamental *indicia* of ownership of a note, the right to enforce and to "hold" can be separated, is simple erroneous.

Since the "Note Holder" is specifically defined within the parties' contract (the Note), the trial court did not need to analyze any other body of law, including the DTA or the UCC for the definition of "Note Holder." *Hawk v. Branjes*, 97 Wn. App. 776, 780, 986 P.2d 841 (1999) *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 288, 787 P.2d 946 (1990); *Mut. Of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 425, 191 P.3d 866 (2008); *Vadheim v. Cont'l Ins. Co.*, 107 Wn.2d 836, 734 P.2d 17 (1987). Although Litton's attorney alleges to have had physical custody of the Note (CP 533), there was no evidence before the trial court to establish that any named Respondent was ever "entitled to receive payments" under the Note in their own right.

E. Agents of the owner are not "holders".

Whoever it turns out actually owns the subject obligation, it is clearly not any of the named Respondents, who are at most acting as agents for an undisclosed principal: the true and lawful owner and actual holder of the Note and Deed of Trust. See CP 823. Certainly, Respondents offered the trial court on summary judgment no more information regarding ownership of Mr. Selkowitz's Note than they

offered the Washington Supreme Court during oral argument in *Bain*. *Bain*, at 175 Wn.2d at 107, n. 12.

If Respondents are mere agents of an undisclosed principal, mere physical possession of the Selkowitz Note does not provide them authority under the DTA to initiate and prosecute a non-judicial foreclosure against Mr. Selkowitz. Under Washington law, a party who accepts a secured instrument as an agent for the owner of the instrument cannot qualify as a holder. *Central Washington Bank v. Mendelson-Zeller*, 113 Wn.2d 346, 358, 779 P.2d 697 (1989) (hereinafter "*Central Washington Bank*").

F. Custody is not legal possession of the obligation.

While Litton, through its attorneys of record, may have temporary physical custody of the Note, there is no evidence that Litton ever obtained "legal possession" of the obligation. *See* 18 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate Transactions* § 18.31 at 365 (2d ed. 2004) (discussing mortgage notes and the role of loan servicers as collection agents, emphasizing that the owner of the mortgage note, and not the servicer, is "the mortgage holder"). Certainly there was no credible evidence of transfer of the obligation by New Century before the trial court on summary judgment – only Litton is self-serving and apparently unauthorized Declaration of Ownership. CP 478. Moreover, equating temporary physical custody of a note with legal possession does

not make commercial sense because should physical possession equate to legal possession, anyone who touches the note for any purpose, including the lawyer holding it for the temporary purpose of litigation, or the carrier who transports it from one place to another, or the custodian who maintains the note and deed of trust for safekeeping, can arguably initiate non-judicial foreclosure.

Respondents argue that if they didn't have actual custody of the Note, they had "constructive possession of the Note via DBNTC" at the time these foreclosure proceedings were initiated by Litton. CP 800. As a matter of fact, Respondents' claim is incorrect because DBNTC was acting as agent for the Trust – not Litton – until August 6, 2013, two years after the Declaration of Ownership was executed by Litton. CP 569.

Moreover, Respondents claim of constructive possession through DBNTC presumes the Note was lawfully transferred to the Trust for DBNTC to take "custody" of, for which there was inadequate and contradictory evidence.

Finally, notwithstanding *Gleeson v. Lichty*, 62 Wash 656, 114 Pac. 518 (1911), 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." *RCW 61.24.030(7)(a)*; See *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.

However, the *Bain* court went even further and specifically held that "if the original lender (New Century) 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. *Lyons* affirmed this view. However, no such "chain of transactions" was offered to the trial court by Respondents on summary judgment. Indeed, as argued above, the required endorsements pursuant to the PSA were missing.

Clearly, on this record the trial court did not and could not, without ignoring disputed facts, distinguish between Litton's physical custody of the subject Note and legal possession of the Note, with right to foreclose, declare a default and appoint a successor trustee under the DTA. The trial court erred and this matter should be remanded.

G. The beneficiary must be both the actual holder and the owner of the Note to foreclose.

This issue runs deeper. Under Washington law, it is not enough for the "beneficiary" to be merely a "holder" of the obligation secured by a deed of trust. The "beneficiary" must also be the "actual holder" and "owner" of the promissory note. This contention is not only based on *Bain, Walker, Bavand,* and *Lyons,* but is supported by a plain reading of various sections of the DTA, including *RCW 61.24.030(7)(a), RCW 61.24.030(8)(l)* and *RCW 61.24.040(2).* These are "requisites" of the statute and cannot be waived. *Albice,* at page 568 (citing *Udall,* at 915-916)*; Schroeder, Klem* and *Lyons.* There is no reasonable way to read *Bain* and the statutory provision cited above in any other manner except to conclude that being the holder is a necessary, but not a sufficient condition to conduct a non-judicial foreclosure: the "holder" must also be the "owner" of the obligation. This is particularly so once the sale is challenged and supports the competing interests of the Act as stated in *Cox v. Helenius,* 103 Wn.2d 383, 387, 693 P.2d 683 (1985): to ensure that the non-judicial foreclosure process should remain efficient and inexpensive, should provide an adequate opportunity for interested parties to prevent wrongful foreclosures, and should promote the stability of land titles.

In sum, there were material issues of fact in dispute on the record

that was before the trial court on summary judgment regarding Litton's status as a "holder" of the Note and "beneficiary" of the Deed of Trust with authority to foreclose. Indeed, there was no evidence before the trial court on summary judgment that the purported owner, the Trust, either knew or approved of Litton's and QLS' foreclosure activities. Certainly, there was no evidence before the trial court the QLS ever investigated or verified Litton's authority to initiate a non-judicial foreclosure. CP 1778-1779 (Herbert-West deposition, page 33, line 1 to page34, line 16). See *Lyons*.

However, on summary judgment, Respondents argued that "ownership" was irrelevant, drawing the trial court's attention to *Trujillo v. Northwest Trustee Services Inc., et al.*,181 Wn.App. 484, 326 P.3d 768 (2014) (hereinafter "*Trujillo*") (petition for review pending and deferred to March 31, 2015). But, as to the issue concerning the trustee's fiduciary duty of good faith regarding compliance with the provisions of *RCW 61.24.030(7)(a)*, *Trujillo* has largely been made irrelevant by the Supreme Court's ruling in *Lyons*.

At most, application of *Trujillo* to this case should be limited, if relied upon at all. In order to arrive at its conclusion that the trustee did not violate its duty of good faith, the *Trujillo* court suggested that the first sentence of *RCW 61.24.030(7)(a)* should be ignored in its entirety: "the

required proof is that the beneficiary must be the holder of the note. It need not show that it is the owner of the note." *Trujillo*, at page 776. In apparent disregard of long standing rules of statutory construction, the *Trujillo* court justified its holding by noting that the first sentence of *RCW 61.24.030(7)(a)* was a "legislative error" and should be disregarded in its entirety: "[b]etter still, the legislature could have eliminated any reference to 'owner' of the note in the provision because it is the 'holder' of the note who is entitled to enforce it, regardless of ownership." *Trujillo*, at page 776. While writing the first sentence of *RCW 61.24.030(7)*(a) out of the statute, the *Trujillo* court failed entirely to address the provisions of *RCW 61.24.030(8)(l)* and *RCW 61.24.040(2)*, which now conflict with the re-written provisions of *RCW 61.24.030(7)(a)*. This sort of judicial legislation and re-write of statutes adopted by the legislature invites this Court to limit the application of *Trujillo*. *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous") (citing *Davis v. Dept. of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) and *Whatcom Co. v. City of Bellingham*, 128 Wn.2d 537, 909 P.2d 1303 (1996)) and *G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 310-311, 237 P.3d 256 (2012).

Following the Supreme Court's mandate set out in *State v. J.P.*,

supra, the plain reading of *RCW 61.24.030(7)(a)* requires that the two provisions be harmonized and read together, where the conclusion is certain: **where A [Owner] = B [Beneficiary] and B [Beneficiary] = C [Actual Holder]; A [Owner] should equal C [Actual Holder].** This is incontrovertible logic.

It follows that only the owner and actual holder of the obligation can be the "beneficiary" entitled to declare a default and appoint a successor trustee under *RCW 61.24.030(8)(c)* and *RCW 61.24.010*. However, there was no credible evidence the true and lawful owner and actual holder of the Mr. Selkowitz's loan ever took these actions.

H. No Evidence of a Default

Only the true and lawful owner and holder of the obligation had the right and authority to declare Plaintiff to be in default. *RCW 61.24.030(8)(c)* ("A statement that the beneficiary has declared the borrower or grantor to be in default, and a concise statement of the default alleged;"). By beneficiary, as argued above, the statute refers to the "owner" of the obligation. See *RCW 61.24.030(7)(a)* (". . . the trustee shall have proof that the beneficiary is the *owner* of any promissory note or other obligation secured by the deed of trust."). See *Bain* and *Lyons*.

Based on the evidence produced on summary judgment, no true and lawful owner and actual holder of the Note and Deed of Trust ever

declared Mr. Selkowitz to be in default. Litton claimed on summary judgment that Mr. Selkowitz "admitted he defaulted on the Loan" during his deposition. CP 800. However, this misstates Mr. Selkowitz's deposition testimony. CP 2060-2069. In none of the excerpts cited by Litton on summary judgment does Mr. Selkowitz ever mention or use the word "default". CP 2060-2069.

Here, there is absolutely no evidence that the Trust ever declared Mr. Selkowitz to be in default. CP 1612 (Flannigan deposition, page 68, lines 5-10.). Indeed, the only party to declare such a default was Litton, the servicer. CP 472. No provision in the DTA permits a servicer to issue a declaration of default. Only the beneficiary can issue such a declaration. *RCW 61.24.030(8)(c)*. Absent a lawful declaration of default by the true and lawful owner and actual holder of the obligation, there was no legal basis for Litton or QLS to initiate a non-judicial foreclosure against Mr. Selkowitz.

I. **QLS' violation of its duty of good faith.**

Although Mr. Selkiowitz has identified several violations of the DTA above, the most significant is QLS' violation of its fiduciary duty of good faith under *RCW 61.24.010. Klem,* at page 790.

Under current Washington law, private trustees, such as QLS, are obligated by common law and equity to be evenhanded to both sides and

to strictly follow the provisions of the DTA. See *Cox; Albice,* at page 934; *Lyons,* at page 787. This is a *fiduciary* duty. *Klem* at page 790 ("An independent trustee who owes a duty to act in good faith to exercise a fiduciary duty to act impartially to fairly respect the interest of both the lender and debtor is a minimum to satisfy the statute, the constitution and equity. . .").

Notwithstanding serious doubts that any named Respondent had standing as a true and lawful owner or actual holder of the subject obligation to initiate a non-judicial foreclosure against Mr. Selkowitz and the lawfulness of MERS' appointment of QLS as successor trustee, QLS engaged in an unethical process of unreasonably relying upon documents, without verification or inquiry, it knew or should have known to be false and misleading. *Lyons*. QLS made no inquiry to verify the information it received from Litton to initiate a foreclosure, relying exclusively on Litton's assertion of a default. See CP 1770-1872 (Herbert-West deposition cited at length above.).

By failing to verify any of the records it was provided by Litton to initiate a non-judicial foreclosure; relying on an Appointment of Successor Trustee that had not yet been issued and, even then, executed by an ineligible beneficiary without verifying MERS' authority (CP 475-476); relying on a Declaration of Ownership that failed to identify the true and

lawful owner of the obligation (CP 478), arguably executed by an entity that was not, in fact, the beneficiary, but an "authorized agent for the Beneficiary", and otherwise failed to comport with *RCW 61.24.030(7)(a)*[5] (CP 478); and otherwise failing to verify the ownership of the obligation and representations of Litton, QLS breached its fiduciary duty of good faith by attempting to prosecute a non-judicial foreclosure on Respondents' behalf without strictly complying with all requisites of sale. As noted by the Washington Supreme Court in *Lyons*, at page 787:

> A foreclosing trustee must "adequately inform" itself regarding the purported beneficiary's right to foreclose, including, at a minimum, a "cursory investigation" to adhere to its duty of good faith. *Walker*, 176 Wn.App. at 309-10. A trustee does not need to summarily accept a borrower's side of the story or instantly submit to a borrower's demands. But a trustee must treat both sides equally and investigate possible issues using its independent judgment to adhere to its duty of good faith. See *eg., Cox v Helenius,* 103 Wn.2d 383, 388, 693 P.2d 683 (1985). A trustee's failure to act impartially between note holders and mortgagees, in violation of the DTA, can support a claim for damages under the CPA. *Klem,* 176 Wn.2d at 792.

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. *RCW 61.24.030(7)(a), RCW 61.24.030(8)(l)* and *RCW 61.24.040(2). Lyons,* page 786, 789. Despite

[5] See *Lyons*, at page 791 (beneficiary declarations that ambiguously represent the signer to be the holder, a non-holder in possession or a person not in possession does not comply with *RCW 61.24.030(7)(a)* and creates a material issue of fact).

Trujillo, a trustee's violation of obtaining proof of ownership violates the trustee's fiduciary duty of good faith and remains a viable basis of trustee liability under the CPA. See *Lyons*, at pages 786-789:

> The allegedly improper acts of NWTS are intertwined but can be generally categorized as violations of two DTA statutes – violation of the duty of good faith under RCW 61.24.010(4) and noncompliance with RCW 61.24.030(7)(a), which instructs that a trustee must have proof the beneficiary is the owner prior to initiating a trustee's sale. . .
>
> * * *
>
> . . . If Lyons' alleged violations are true, NWTS' actions would likely be considered unfair acts. . . .
>
> * * *
>
> . . . If Lyons' allegations are true and NWTS knew about the conflicting information regarding their right to initiate foreclosure but did not look into this matter, there are issues regarding whether this indicates deferral to Wells Fargo and therefore lack of impartiality. These issues of fact regarding NWTS' actions must be resolved before a court can determine if they have violated the duty of good faith. Considering the evidence in the light most favorable to Lyons, this claim (proof of ownership and status as beneficiary) should have survived summary judgment.
>
> * * *
>
> . . . Lyons claims NWTS did not have proper proof that Wells Fargo was the owner of the note and could not direct NWTS to foreclose. Thus, Lyons alleges that NWTS violated RCW 61.24.030(7)(a), which requires that "before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust." The trial court determined there were no issues of material fact and granted summary judgment. We disagree. . . .[6]

With regard to QLS' compliance with its duty to investigate and

[6] It is significant to note that in its discussion of Ms. Lyons' claims regarding NWTS' violation of *RCW 61.24.030(7)(a)* – specifically, the claim that NWTS failed to obtain proof of ownership of the obligation prior to issuance of a notice of trustee's sale – the *Lyons* court unanimously ignored the ruling in *Trujillo*.

verify, it is important to reiterate that during this period of time, QLS had no procedures in place to verify any of the information it received from its "clients", such as Litton. See CP 1770-1872 (Herbert-West deposition, cited at length above). Clearly, QLS blindly accepted whatever information was provided by its "clients" and failed to engage in the sort of investigation necessary to verify the information QLS relied upon to initiate non-judicial foreclosures and its duties of good faith described in *Lyons*. QLS' failure to comply with its fiduciary duties of good faith and the disputed issues of fact associated therewith were completely ignored by the trial court.

Litton called the shots and assumed the authority to start and stop the foreclosure efforts. CP 1808-1810, (Herbert-West deposition, page 153, line 20-25, pages 157-161). This was authority not shared with Mr. Selkowitz. As the party in control of the process, Litton should be as liable for the violations of the DTA as QLS by application of the doctrine *respondeat superior*. See *Bain, Walker* and *Klem*. See also *Nelson v. Elmview Group Home,* 131 Wn.2d 39, 929 P.2d 420 (1958). Moreover, Litton and QLS should be held jointly responsible for Mr. Selkowitz's claims under theories of civil conspiracy and joint venture liability subsumed in his claim of joint and several liabilities based upon these facts. See *Gilbrook v. City of Westminster*, 117 F.3d 839, 856 (9th Cir.

1999), *Sterling Business Forms, Inc. v. Thorpe*, 82 Wn.App. 446, 918 P.2d 531 (1996), *Refrigeration Engineering Co. v. McKay*, 4 Wn.App. 963, 486 P.2d 304, 311 (1971) and *Knisely v. Burke Concrete Accessories, Inc.*, 2 Wn.App. 533, 468 P.2d 717, 720-21 (1970). The undisputed fact is that Litton referred this matter to QLS for foreclosure and controlled the process to the extent that it could start and stop the process and if that referral was wrongful and Litton failed to stop the process, Litton shares in the responsibility of that misconduct along with QLS.

J. **Violation of CPA.**

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). 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.

In *Lyons,* the court held that when a CPA claim is predicated on an alleged violation of the DTA, a question of fact is created if the issue is disputed. *Lyons,* at pages 786-787. Here, Respondents' violations of the DTA were hotly contested, but ignored by the trial court.

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.[7] *Bain* at pages 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 QLS by MERS (CP 475-476); the clearly false and improper Declaration of Ownership (CP 478); and issuance of a Notice of Default that falsely and improperly identifies the owner and beneficiary (CP 1136-1141), among other violations of the DTA alleged herein, constitute unfair and deceptive acts or practices. *Walker,* at pages 319-320, and *Bavand,* at page 505. Moreover, the *Lyons* court held that a trustee's failure to act impartially, in violation of its

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

fiduciary duty of good faith under *RCW 61.24.010(4)* as QLS did here, is actionable under the CPA as an unfair and deceptive act or practice. *Lyons*, at page 788-789.

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 on summary judgment are the fourth and fifth elements: the elements of damages/injury and causation. Thus, on summary judgment, Mr. Selkowitz needed only to allege facts regarding the fourth and fifth elements of a CPA claim by asserting his claims of injury/damages and causation.

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) (hereinafter "*Panag*") 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 the court in *Walker*, at page 320, *Bavand*, at pages 508-509; *Frias*, at pages 431-433 and *Lyons*, at page 786, ftn. 4.

As noted in *Frias*, since "the CPA addresses 'injuries' rather than 'damages,' quantifiable monetary loss is not required" in a CPA claim for violation of the DTA, citing *Panag*, at page 58. *Frias*, at page 431. Comparing a DTA claim to an unlawful debt collection action, the *Frias* court noted: "[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. [citing *Panag* 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. . . . The injury element can be met even where the injury alleged is both minimal and temporary." *Frias*, at page

431. Accordingly, Mr. Selkowitz can establish a claim for injury and damage for Respondents' violations of the DTA, even without challenging the underlying debt. Such claims could include threatened loss of title, impact on credit and legal fees. *Frias,* at page 432.

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 deposition, Mr. Selkowitz identified stress and loss of creditworthiness as specific issues of injury as a direct and proximate result of Respondents' misconduct. CP 2059-2092 (Selkowitz deposition, page 59, line 8 through page 63, line 11; page 63, line 12 through page 67, line13; page 73, line 24 through page 75, line 21; page 92, line 24 through page 93, line 5; and page 94, lines 12-23). While the *Frias* court excluded personal injuries such as "mental distress, embarrassment, and inconvenience" from a CPA claim, citing *Panag*, the *Lyons* court appears

to approve recovery of emotional distress if the complainant is able to bear a high burden of proof required to establish the claim. *Frias,* at page 431; *Lyons,* at page 792-793. But, that is an issue of fact that should have mitigated against the trial court's grant of summary judgment.

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:

> 17. Many have the wrong impression that homeowners like me rather pay the legal fees to fight foreclosure than to pay the mortgage. The reality is that I couldn't, as a lay person, obtain any information from these defendants to solve the small delinquency I had at the time and I had to get an attorney to save my home even though I couldn't afford one. When I received the NOD in 2010, the arrears were about $15,000. In the time that it has taken for this case to make it through the court system, from the superior court, federal district court, supreme court and back to the superior court, I no longer receive monthly statements and I have no idea what the outstanding balance is now, but the arrears must have grown in excess of $100,000. Of course, if I had received accurate information about who owns my loan, which, according to my Note should be the same person or company who holds my Note, I could contact them directly and I could have asked them to work with me to resolve the arrears. Even if they were not going to modify the loan, I could have requested a short sale or deed in lieu, and be on my way with a financial fresh start. Instead, because of the manipulations and misinformation of the Defendants, I had to start the lawsuit to get my questions answered and I still don't have all the answers necessary to resolve my mortgage loan.
>
> 18. Not having access to the owner of my loan makes it extremely difficult, if not impossible, to have a meaningful opportunity to resolve the mortgage arrears in whatever fashion that would mitigate the losses for me as well as the owner. I am sure they want for me to resume payments and not lose their collateral on a foreclosure or fire sale. Keeping my home and allowing me to

resume payments is a win-win situation for me and the owner of my loan. However, this litigation has served to polarize, rather than draw near, the essential parties to resolve the dispute which are the owner of my loan and I as the borrower.

19. I have spent a lot of time in my quest of getting to the real stakeholder. Before I met my attorney, I was being haunted with questions that resulted in all the documents that the Defendants sent to me and recorded in the public records. I tried to research on my own and spent approximately 20 hours doing so without any success.

20. In the beginning, I did see a psychologist/therapist for my symptoms including obsessive thoughts and constant stress as a result of loss of my business and the journey I've undertaken to challenge the Defendants. This did not last long because I ran out of funds. I am however still having some of these symptoms including obsessive thoughts and worries, occasional loss of appetite and loss of sleep, occasional stomach upset, sudden bursts of anxiety, anger and outrage for no apparent reasons.

21. Once I hired Richard Jones, I had to sit down, collected my thoughts and made notes to facilitate my discussion with him and that took approximately 5 hours. Thereafter, I have been talking and meeting with my attorney regularly and have been spending on the average 10 hours per month doing so. Outside of the conferences with my attorney, I continue to obsess over the subject matter. The foreclosure issue occupies my thought on a daily basis. The uncertainty of the status of my mortgage loan, which is the same as the fear of losing my home, is present in my consciousness all the times. While I don't know how to put a value on the time, over the last two years I've spent working and worrying about the status of my home, I received $150.00 for every hour from my employer, WCI. I am now again self-employed and bill at the rate of $150.00 per hour.

22. In addition to time spent, I have incurred costs including fuel cost, parking cost, purchase of office supplies, copying, faxing, and postage. While I was not keeping track of everything, I estimate that these have totaled approximately $75.00. Additionally, I have paid for the investigation into the representations made by the defendants and this cost is $3,500.00. Please see the Declarations of Tim Stephenson and B. Jay Patterson. My damages are not concluded; they are ongoing.

23. The most substantial injury that I have suffered as a consequence of the Defendants' action against me is the uncertainty that this situation has brought. Most people assume that because I continue to occupy my home, I have gained more than what I claim to be my losses. Nothing is further from the truth. It is terrible to live under the uncertainty of foreclosure. I don't want to put up a new picture on a wall, buy some new furniture, or put on some crown moldings to beautify my place because I never know how long I will be there. Even though I perform regular maintenance, it is difficult for me to decide, in the event of a needed major repair, to incur the expense because the place may not be mine at all at the end of this process. I am waiting for the other shoe to drop and I can assure the Court that there is no gain that is worth living simply to wait for the other shoe to drop. This uncertainty produces lots and lots of anxiety for me and the anxiety hits me unexpectedly but regularly in my daily life; it affects my ability to concentrate on my work or to enjoy the simple pleasures.

24. This limbo status of my mortgage loan has affected my credit so severely that I don't know how to get out of it. The lawyers told me that my credit was ruined when I stopped making my mortgage payments and that the defendants did not contribute to the diminution of my credit. But that is not true at all. Yes, my credit tanked in the beginning, but if I could have resolved the dispute timely, say in 2010, 2011 or even 2012, Litton would not have been able to report me as delinquent and under foreclosure status after that time and I would have been able to rebuild my credit. Instead, I have been languishing in default and foreclosure for the past four years and now that the servicing right had been sold to Ocwen, there is another entity that is adversely affecting my credit by the continuing report of loan delinquency and default.

25. In addition to my individual suffering, the Defendants' obvious and total lack of care for the formality of legal documents and legal process of nonjudicial foreclosure is evidenced by their robotic practices and documents. These practices hurt everybody and not just me the homeowner. For QLS, as a huge forcclosing trustee company to refer repeatedly in my case that the beneficiary as "Please consult the cover letter" and not providing the cover letter, is simply inexcusable and it makes you wonder how many homes have been lost to their shoddy practices. I am under the impression that this is a number game for Litton, QLS, and MERS where they foreclose enormous volume of homes hoping that very

> few homeowners would catch their mistakes. And even when their mistakes are caught, the Defendants exhibit arrogance and self-righteousness instead of offer remedies and solutions. This fact contributes to the outrage that I feel regularly about my situation.
>
> CP 1098-1101 (Emphasis added).

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.[8]

As noted above, injury to a person's business or property is "relatively expansive" and 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." *Frias*, at page 431; *Nordstrom, Inc. v.*

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

Tampourlos, 107 Wn.2d 735, 740, 733 P.2d 208 (1987); *Klem. Lyons*, at page 9, ftn 4. 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. Selkowitz had to repeatedly take time off from work at a loss of wages and incurred travel expenses to consult with an attorney to dispel uncertainty regarding the ownership of his Note. CP 1090-1102. Such damages have been recently found to be compensable under Washington law. See *Lyons* and *In re Meyer*, 506 B.R. 533 (2014).

All of the injuries and damages alleged by Mr. Selkowitz were the direct and proximate cause of Respondents' misconduct, including QLS', and viewing the evidence in a light most favorable to the non-moving party, all five elements for a private cause of action under the CPA have been met.

K. Slander of Title.

QLS, at the insistence of Litton and relying on unverified representations by MERS and Litton, recorded its Notice of Trustee's Sale without the legal authority to do so, thus defaming Mr. Selkowitz's title to his property.

Under Washington law, a claim for slander of title requires the proponent to establish, by a preponderance of the evidence, the following elements:

1. the statements concerning the proponent's title must be false;
2. the statements must be maliciously published;
3. the statements must be spoken with reference to some pending sale or related transaction concerning the proponent's property;
4. the proponent must suffer pecuniary loss or injury as a result of the false statements; and
5. the statements must be such as to defeat the proponent's title.

Lee v. Maggard, 197 Wash. 380, 85 P.2d 654 (1938); *Brown v. Safeway Stores*, 94 Wn.2d 359, 617 P.2d 704 (1980); *Rogvig v. Douglas*, 123 Wn.2d 854, 873 P.2d 492 (1994).

The element of falsity is established by the recording of a document known to contain or relying on false declarations. *Rogvig v. Douglas, supra.* Litton retained the services of QLS to dispossess Mr. Selkowitz of his real property and instructed QLS to publicly record documents to this effect. See CP 471-472; CP 1770-1872 (Herbert-West deposition, page 17, lines 7-10, page 32, lines 12-18, page 33, lines 1-12.) Specifically, QLS relied on the information provided by Litton without investigation or verification that: (1) it was an "authorized agent for the Beneficiary" (CP 478), for which there was no evidence; (2) that it acted

on the basis of a power of attorney (CP 478), that does not exist; (3) that it was the "beneficiary under the note and authorized to foreclose" (CP 472), which it was not; (4) that it had declared Mr. Selkowitz to be in default (CP 472), which it had no authority to declare without owning and holding the Note; and (5) that it was the "actual holder" of the Note (CP 472), which was never established (CP 472). See also Declarations of Tim Stephenson (CP 1151-1517) and Jay Patterson (CP 2171-2415). Each of these statements by Litton was false and known to be false when uttered. Moreover, these statements were clearly intended to be relied upon by QLS in the initiation of a non-judicial foreclosure.

The element of "malice" is established by false statements that are not made in good faith or otherwise based on a reasonable belief in the veracity of the statements. *Rogvig v. Douglas, supra.* The statements noted above were made in furtherance of a Trustee's sale and further served to diminish the value of Mr. Selkowitz's property, his ability to sell the condo, and were intended to defeat his title to the property.

Here, Litton and its agent, QLS, knew or should have known that at the time QLS recorded its Notice of Trustee's Sales, that the prerequisites to the issuance of the filing of a Notice of Trustee's Sales had not been met. See *RCW 61.24.030(7)*, *RCW 61.24.030(8)* and *RCW 61.24.040.* Indeed, as noted above, QLS made no effort to verify the

misinformation it received from Litton. See CP 1770-1872 (Herbert-West deposition cited at length above.).

Litton's statements to the contrary notwithstanding, the false and misleading representations noted above were made to support the initiation and prosecution of a non-judicial foreclosure sale of Mr. Selkowitz's home. In fact, it was on the basis of these false and misleading statements the QLS issued its Notice of Trustee's Sale, setting a sale date for Plaintiff's home for September 3, 2010. CP 480-482. The ultimate end of Respondents' misconduct would have resulted in a sale of Mr. Selkowitz's property from which Respondents would have derived financial benefit. Moreover, had this action not been initiated, Mr. Selkowitz would have in fact lost his home. Without Litton and QLS uttering these false and misleading statements noted above, the non-judicial foreclosure process could not have been initiated or prosecuted.

Accordingly, on the basis of the foregoing, there were genuine issues of material fact in dispute on Mr. Selkowitz's claim for slander of title before the trial court that mitigated against summary judgment.

VI. CONCLUSION

Defending simultaneous foreclosure actions brought by different parties on the same Note and Deed of Trust is the ultimate evil against which no homeowner should have to contend. But failing to strictly

enforce the DTA, and excusing Respondents from their duty to prove their authority to act, the trial court put Mr. Selkowitz in exactly that position.

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. 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.

REPECTFULLY SUBMITTED this 12th day of March, 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 March 12, 2015, I arranged for service of the foregoing Initial 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
	____	Messenger
	X	U.S. 1st Class Mail
	____	Overnight Courier
	X	Electronically
Robert W. Norman, Jr. Houser & Allison 3780 Kilroy Airport Way, Suite 130 Long Beach, CA 90806-2458	____	Facsimile
	____	Messenger
	X	U.S. 1st Class Mail
	____	Overnight Courier
	X	Electronically
Lauren Humphreys Houser & Allison 1601 5th Avenue, Suite 850 Seattle, WA 98101	____	Facsimile
	____	Messenger
	X	U.S. 1st Class Mail
	____	Overnight Courier
	X	Electronically
Mary Stearns McCarthy & Holthus LLP 19735 10th Avenue N.E., Suite N200 Poulsbo, WA 98370	____	Facsimile
	____	Messenger
	X	U.S. 1st Class Mail
	____	Overnight Courier
	X	Electronically

SIGNED this 12th day of March, 2015, at Bellevue, Washington.

Susan L. Rodriguez
Legal Assistant

TABLE OF APPENDICES

APPENDIX "A"

100055134

ADJUSTABLE RATE NOTE

(LIBOR Six-Month Index (As Published In The Wall Street Journal) - Rate Caps)

THIS NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY INTEREST RATE AND MY MONTHLY PAYMENT. THIS NOTE LIMITS THE AMOUNT MY INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE I MUST PAY.

MIN: 100431900103955913

October 30, 2005 (Date) | LYNNWOOD (City) | WASHINGTON (State)

9837 SOUTHEAST COUGAR MOUNTAIN WAY, BELLEVUE, WA 98006 (Property Address)

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. $349,600.00 (this amount is called "Principal"), plus interest, to the order of Lender. Lender is NEW CENTURY MORTGAGE CORPORATION, a California Corporation.

I will make all payments under this Note in the form of cash, check or money order.

I understand that Lender may transfer this Note. Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 6.875 %. The interest rate I will pay may change in accordance with Section 4 of this Note.

The interest rate required by this Section 2 and Section 4 of this Note is the rate I will pay both before and after any default described in Section 7(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payments on the first day of each month beginning on December 1, 2005. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on November 1, 2035, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at 18400 Von Karman, Suite 1000, Irvine, CA 92612

or at a different place if required by the Note Holder.

(B) Amount of My Initial Monthly Payments

Each of my initial monthly payments will be in the amount of U.S. $1,844.75. This amount may change.

(C) Monthly Payment Changes

Changes in my monthly payment will reflect changes in the unpaid principal of my loan and in the interest rate that I must pay. The Note Holder will determine my new interest rate and the changed amount of my monthly payment in accordance with Section 4 of this Note.

[redacted]

[redacted]

4. INTEREST RATE AND MONTHLY PAYMENT CHANGES

(A) Change Dates

The interest rate I will pay may change on the first day of November, 2011 , and on that day every 6th month thereafter. Each date on which my interest rate could change is called a "Change Date."

(B) The Index

Beginning with the first Change Date, my interest rate will be based on an Index. The "Index" is the average of interbank offered rates for six month U.S. dollar-denominated deposits in the London market ("LIBOR"), as published in The Wall Street Journal. The most recent Index figure available as of the first business day of the month immediately preceding the month in which the Change Date occurs is called the "Current Index."

If the Index is no longer available, the Note Holder will choose a new index that is based upon comparable information. The Note Holder will give me notice of this choice.

(C) Calculation of Changes

Before each Change Date, the Note Holder will calculate my new interest rate by adding two and one-quarter percentage points (2.250 %) to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date.

The Note Holder will then determine the amount of the monthly payment that would be sufficient to repay the unpaid principal that I am expected to owe at the Change Date in full on the Maturity Date at my new interest rate in substantially equal payments. The result of this calculation will be the new amount of my monthly payment.

(D) Limits on Interest Rate Changes

The interest rate I am required to pay at the first Change Date will not be greater than 12.375 % or less than 2.250 %. Thereafter, my interest rate will never be increased or decreased on any single Change Date by more than two percentage point(s) (2.000 %) from the rate of interest I have been paying for the preceding six months. My interest rate will never be greater than 12.375 %.

(E) Effective Date of Changes

My new interest rate will become effective on each Change Date. I will pay the amount of my new monthly payment beginning on the first monthly payment date after the Change Date until the amount of my monthly payment changes again.

(F) Notice of Changes

The Note Holder will deliver or mail to me a notice of any changes in my interest rate and the amount of my monthly payment before the effective date of any change. The notice will include information required by law to be given to me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

5. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under this Note.

I may make a full Prepayment or partial Prepayments without paying any Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount before applying my Prepayment to reduce the Principal amount of this Note. If I make a partial Prepayment, there will be no changes in the due date of my monthly payment unless the Note Holder agrees in writing to those changes. My partial Prepayment may reduce the amount of my monthly payments after the first Change Date following my partial Prepayment. However, any reduction due to my partial Prepayment may be offset by an interest rate increase.

6. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (i) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (ii) any sums already collected from me which exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.

[redacted]

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Form 3520 1/01

Initials: LV

LITTON 59 of 692

7. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charges for Overdue Payments

If the Note Holder has not received the full amount of any monthly payment by the end of 15 calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 5.00 % of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal that has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

(D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

8. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Unless the Note Holder requires a different method, any notice that must be given to the Note Holder under this Note will be given by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE.

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

10. WAIVERS

I and any other person who has obligations under this Note waive the rights of Presentment and Notice of Dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

11. UNIFORM SECURED NOTE

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses that might result if I do not keep the promises that I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions read as follows:

[redacted]

Form 3200 1/01

Page 2 of 4

VMP

Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender also may require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

KEVIN J. SELKOWITZ _____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

Sign Original Only

[redacted]

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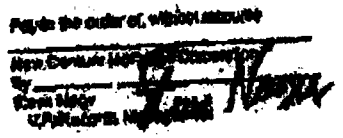
[redacted]



APPENDIX "B"

NOTICE OF DEFAULT

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

To: KEVIN J. SELIKOWITZ , 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. 20061101002910, 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. 413980-0480

Commonly known as: 9817 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	$1,944.75	$9,868.50

Late Charges:

From	Through	# Late Charges	Total Late Charges
11/1/2009	4/23/2010	6	$62.24

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:	$62.24
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:	$628.00
b.	Service or posting Notice of Default:	$80.00
c.	Postage:	$50.00
d.	Attorney Fee:	$0.00
e.	Trustee's Fee:	$357.50
f.	Inspection Fee:	$0.00
g.	Recording Fee:	$0.00
	TOTAL CHARGES, COSTS AND FEES:	$1,295.50

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 $13,166.82, 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 presently unknown expenditures required to preserve the property or to comply with 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 $300,000.00, 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.

8. DOCUMENTS ATTACHED

- Beneficiary or agent's Loss Mitigation Form declaring compliance with section 2 of Chapter 282, Laws of 2009.
- Notice to Occupants and Tenants pursuant to section 10 of Chapter 282, 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

APPENDIX "C"

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: 413960045004
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.

CP-000475

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

Dated: MAY 19 2010

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

By: Debra Lyman Vice President

State of Texas)
County of Harris)

On MAY 19 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 McKinney, Notary Public

Notary Public in and for the State of Texas

My Commission expires: 12-5-12

BRENDA MCKINNEY
Notary Public, State of Texas
My Commission Expires
December 05, 2012

CP-000476

APPENDIX "D"

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

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

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

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RULES

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. **The Trust.**

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. **Causation.**

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.

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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
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	____	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
Legal Assistant

TABLE OF APPENDICES

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: 4139600450O4
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. 200611010000910 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.

Dated: MAY 12 2010

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

By: Debra Lyman Vice President

State of [redacted])
County of [redacted])

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 McKinney, Notary Public

Notary Public in and for the State of [redacted]

My Commission expires: 12-5-10

BRENDA MCKINNEY
Notary Public, State of [redacted]
My Commission Expires
December 05, 2010

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. SELIKOWITZ , AN UNMARRIED MAN

T.S. No. WA-10-367564-SH
MERS MIN No.: 100491800109955512 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 low-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 holder/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

800-999-8601

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 128 OF CONDOMINIUMS, PAGES 6 THROUGH 14, ACCORDING TO THE DECLARATION THEREOF, RECORDED

UNDER KING COUNTY RECORDING NUMBER 9609140732 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:	$828.80
b.	Service or posting Notice of Default:	$50.00
c.	Postage:	$30.00
d.	Attorney Fee:	$0.00
e.	Trustee's Fee:	$357.50
f.	Inspection Fee:	$0.00
g.	Recording Fee:	$0.00
	TOTAL CHARGES, COSTS AND FEES:	$1,266.30

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 $13,106.82, 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 payments, late charges, and other charges that become due after the date of this notice, or which are not now known to Quality Loan Service Corp., of Washington, the total amount required to reinstate may be greater than the amount listed above. Therefore, in addition to paying the amount listed above, you will be required to pay any further 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 $309,800.00, 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 282, Laws of 2009.
- Notice to Occupants and Tenants pursuant to section 10 of Chapter 282, 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

COURT OF APPEALS DIVISION I
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.	**COA NO. 72505-0** **MOTION FOR RECONSIDERATION AND MOTION TO PUBLISH**

1. IDENTITY OF MOVING PARTIES.

Appellant KEVIN J. SELKOWITZ, an individual, respectfully requests the Court grant the relief designated in Part 2.

2. STATEMENT OF RELIEF SOUGHT.

Appellant Selkowitz seeks (1) reconsideration of reasonable attorney fees award to Litton, and (2) publication of the Court's Opinion of November 23, 2015.

3. REFERENCE TO RELEVANT PARTS OF THE RECORD.

This court's unpublished Opinion of November 23, 2015

Selkowitz' Amended Complaint. CP 150

Litton's Answer to Selkowitz' Amended Complaint. CP 136

Litton's Motion for Summary Judgment. CP 797

Summary Judgment dismissing Litton. CP 2513

Litton's Answering Brief, at pg. 42

4. STATEMENT OF GROUND FOR RELIEF AND ARGUMENT.

A. The Reasonable Attorney Fee Award Should be Reconsidered.

This Court's Opinion of November 23, 2015 awards Litton its reasonable attorney fees to be taxed against Selkowitz based on an attorney fee provision in the note. The Court is asked to reconsider for the following reasons.

First, Litton never claimed entitlement to reasonable attorney fees at the trial court level nor was it awarded any. There was no such claim in its answer to the amended complaint, CP 150. There was no such claim in its motion for summary judgment, CP 797. There was no such award in the trial's order granting Litton's motion for summary judgment. CP 2513 "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." *RAP 9.12.* Consideration of an award of reasonable attorney fees on appeal when not sought at the trial court level is therefore improper.

Second, Litton admits ". . . Plaintiff's claims for relief cannot be construed as litigation to enforce or interpret the provisions of the contract. . ", which contains the attorney fee clause. Litton Responding Brief, pg. 42. Rather the basis of Selkowitz' complaint was violation of the Consumer Protection Act, not the note. See Opinion, pg. 5. Litton claims, however, it is entitled to avail itself of the

attorney fee clause because ". . Litton's defense of the lawsuit has been necessary to enforce its right to foreclose under the deed of trust." Litton's Responding Brief, pg. 42. This claim is not accompanied by citation to authority and violates the plain language of the attorney fee clause as quoted by the court: ". . . the note provides that if Selkowitz is found in default, 'the note holder will have the right to be paid back...for all of its costs and expenses in enforcing this note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorney fees." CP at 827; Opinion, pg. 12.

But this was not an action to "enforce this note." The action was brought to enjoin the non-judicial foreclosure of the Deed of Trust and for money damages under the CPA; Selkowitz was not found in default nor was that relief sought by Litton. The attorney fee provision in the note is simply inapplicable by its terms.

> A prevailing party may recover attorney fees under a contractual fee-shifting provision such as the one at issue here only if a party brings a "claim on the contract," that is, only if a party seeks to recover under a specific contractual provision. If a party breaches a duty imposed by an external source, such as a statute or the common law, the party does not bring an action on the contract, even if the duty would not exist in the absence of a contractual relationship. *Hemenway v. Miller*, 116 Wn.2d 725, 743, 807 P.2d 863 (1991); *Burns v. McClinton*, 135 Wn. App. 285, 310-11, 143 P.3d 630 (2006), review denied, 161 Wn.2d 1005 (2007); *G.W. Constr. Corp. v. Prof'l Serv. Indus., Inc.*, 70 Wn. App. 360, 366, 853 P.2d 484 (1993).

Boguch v. Landover Corp., 153 Wn. App. 595, 615, 224 P.3d 795 (2009).

Third, Litton's claim that its defense of this action was necessary "to enforce its right to foreclose under the deed of trust" is on its face not within the

terms of attorney fee entitlement as quoted above, and, moreover, Litton didn't prevail on such a claim in any event. Recall, Litton abandoned any action for a non-judicial foreclosure. Opinion, pg. 4. An abandonment of a non-judicial foreclosure does not prevent its reinstitution or initiation of a judicial foreclosure. *RCW 61.24.100(2)*. That is precisely what happened here.

Subsequently a completely different entity, U.S. Bank, started a judicial foreclosure and not only foreclosed but obtained a deficiency money judgment against Selkowitz including over $18,000 in attorney fees. Opinion, pg. 5, n.4. How many times can a holder of the note pass it on to someone else to obtain a new award of attorney fees against the same maker on the same note?

Fourth, had the non-judicial foreclosure proceeded to fruition no money judgment could have been obtained against Selkowitz in any event. *RCW 61.24.100(1)*. But here, what amounts to a deficiency judgment is taken against Selkowitz in the context of an abandoned non-judicial foreclosure in a CPA action. The statute doesn't permit that and it makes no sense.

Fifth, an award of reasonable attorney fees to a defendant in a Consumer Protection Act case violates *RCW 19.86.090*. As a matter of public policy as expressed in the statute, only prevailing claimants may recover under the statute. See e.g. *Sato v. Century 21 Ocean Shores Real Estate*, 101 Wn.2d 599, 603, 681 P.2d 242 (1984). CPA cases against financial institutions involving promissory notes and/or deeds of trust almost invariably involve reasonable attorney fee

provisions where there has been no completed foreclosure sale. See *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014). Were this Court to allow a prevailing defendant/lender to recover those fees against a CPA plaintiff/homeowner the chilling effect would be enormous. As far as the undersigned can tell, this has never happened and is without precedent.

For these reasons Selkowitz respectfully requests the Court reconsider its award of reasonable attorney fees to Litton and/or award those fees to Selkowitz since he, not Litton, was the prevailing party on non-judicial foreclosure of this deed of trust.

B. The Court's Opinion Should be Published.

Particularly if the foregoing motion to reconsider is denied, the court is asked to publish its opinion pursuant to *RAP 12.3(e)* for the following reasons.

Publication is necessary to give future parties proper notice that the judiciary will award reasonable attorney fees to CPA defendants in situations where there may be a contractual entitlement to an award of reasonable attorney fees, even though breach of the contract is not the cause of action asserted. This is devastating to CPA plaintiff and an unprecedented boon to CPA defendants, particularly financial institutions. This is a new principle of law which in effect reverses many CPA cases holding precisely the opposite. Certainly it is of general public interest and importance and conflicts with many other CPA decisions which hold attorney

fees are not available to prevailing defendants under the act.

REPECTFULLY SUBMITTED this 10th day of December, 2015.

KOVAC & JONES, PLLC.

Richard Llewelyn Jones, WSBA No. 12904
1750 - 112th Ave., N.E., Suite D-151
Bellevue, WA 98004
425.462.7322
rlj@kovacandjones.com
Attorney for Appellant

GOODSTEIN LAW GROUP, PLLC

Richard B Sanders, WSBA No. 2813
501 S G St
Tacoma, WA 98405-4715
(253) 779-4000
rsanders@goodsteinlaw.com
Attorney for Appellant

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on December 10, 2015, I caused to be served a true and correct copy of the foregoing Motion for Reconsideration and Motion to Publish on the following party(ies) and in the manner(s) indicated:

Lauren Davidson Humphreys, WSBA 41694 FIRST AMERICAN TITLE INSURANCE 818 Stewart Street, Suite 800 Seattle, WA 98101-3328 lhumphreys@firstam.com	___ Facsimile ___ Messenger ✓ U.S. 1st Class Mail ___ Overnight Courier ✓ Electronically (courtesy)
Robert W. Norman, Jr., WSBA 37094 HOUSER & ALLISON APC 1601 5th Avenue Suite 850 Seattle, WA 98101-1642 Email: rnorman@houser-law.com *Attorneys for Litton Loan Servicing, LP*	___ Facsimile ___ Messenger ✓ U.S. 1st Class Mail ___ Overnight Courier ✓ Electronically (courtesy)
Emilie K. Edling, WSBA No. 45042 HOUSER & ALLISON, APC 9600 S.W. Oak Street Suite 570 Portland, OR 97223 Email: eedling@houser-law.com *Attorneys for Litton Loan Servicing LP*	___ Facsimile ___ Messenger ✓ U.S. 1st Class Mail ___ Overnight Courier ✓ Electronically (courtesy)
Annette Cook, WSBA No. 31450 Joseph Ward McIntosh, WSBA No. 39470 McCARTHY HOLTHUS LLP 108 1st Avenue South, Suite 300 Seattle, WA 98104-2538 Tel. (206) 319-9100 acook@mccarthyholthus.com jmcintosh@mccarthyholthus.com *Attorneys for Quality Loan Service Corporation of Washington*	___ Facsimile ___ Messenger ✓ U.S. 1st Class Mail ___ Overnight Courier ✓ Electronically (courtesy)

Hugh McCullough, WSBA No. 41453
Fred B. Burnside, WSBA No. 32491
DAVIS WRIGHT TREMAINE LLP
1201 3rd Avenue, Suite 2200
Seattle, WA 98101
Email: hughmccullouogh@dwt.com
Email: FredBurnside@dwt.com
Attorneys for Mortgage Electronic Registration Systems, Inc.

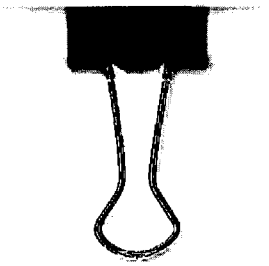
___ Facsimile
___ Messenger
_✓_ U.S. 1st Class Mail
___ Overnight Courier
_✓_ Electronically (courtesy)

Clerk of the Court
Washington Court of Appeals Div I
One Union Square
600 University Street
Seattle, WA 98101-1176
Fax No. (206) 389-2613

___ Facsimile
___ Messenger
___ U.S. 1st Class Mail
___ Overnight Courier
_✓_ Electronically

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

Paralegal



Kovac & Jones, PLLC

FEB 16 2016

INVOICE

Invoice #: 35209735

Inv. Date: 2/9/2016
Due Date: 2/19/2016
Terms: Net 10

Patient: SUVER, KEVIN
Account #: 3974094
Claim/File #:

Shipping:
1750 112TH AVE NE STE D151

BELLEVUE, WA 98004-3769

249

KOVAC & JONES
IN C/O KEVIN SUVER
1750 112TH AVE NE STE D151

BELLEVUE, WA 98004-3769

Facility: **OVERLAKE MEDICAL CLINICS** Rec Location: OMC - MEDICAL TOWER

Description	Quantity	Unit Price	Extension
* Note: Hard Copy Page Count: 49	49	$0.00	$0.00
Labor Cost $0.36 Per Image, Pages 1-200	49	$0.36	$17.64

Product Total:	$ 17.64	
Shipping & Handling:	$ 2.96	
State Tax:		6.50%
City/local Tax:		3.00%
Sales Tax:	$ 1.96	(9.50%)
Grand Total:	$ 22.56	
Credits/Payments:	$ 0.00	
Amount Due:	**$ 22.56**	

Please Note: This information has been disclosed to you from records that may be protected by state and federal confidentiality rules (42 CFR, part 2). The federal rules prohibit you from making any further disclosure of protected information unless further disclosure is expressly permitted by written consent of the person to whom it pertains, or is otherwise permitted by 42 CFR, part 2.

Payment Options:

- Use your credit card online at payportal.iodincorporated.com
- Use your credit card by phone at 866-420-7455 Option 1
- By mail; please include the payment sheet (page 2) with your check to ensure that your payment is properly applied!

IOD Incorporated TaxID No. 65-0765287
PO Box 19072, Green Bay WI, 54307-9072
*Phone: 866-420-7455 Option 1 * Fax: 920-406-6537*

Page 1 of 2