Case No. 328163

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

JAMES BLAIR

Plaintiff/Appellant,

v.

NORTHWEST TRUSTEE SERVICES, INC.; BANK OF AMERICA, N.A., MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC.; FEDERAL HOME LOAN MORTGAGE CORPORATION; and DOE DEFENDANTS 1 through 20

Defendants/Appellees.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

DISPUTED FACTS

Mr. Blair will outline below all of the instances of disputed facts which necessitated a denial of the summary judgment motion filed by the Defendants.

All of the parties to this case have referred the court to the Supplemental Declaration of Brieanna Sriwan, an Assistant Vice President of Bank of America ("BofA") in their recitations of the facts. (CP 1140-1145) Notably, this testimony was only presented to the trial court *after* two briefs each had been submitted by the Defendants and *after* oral argument at the hearing on both motions. (CP 516-584, 585-606, 1098-1105, 1106-1115) BofA, MERS and Freddie Mac contended throughout their briefing and at the hearing that BofA was the noteholder and therefore entitled under Washington law to nonjudicially foreclose, but had not presented any clear testimony regarding the location of the Note nor information about possession of the Note before the hearing that was not contradicted by other factual assertions. *Id.* Similarly, NWTS contended in its two briefs that it was entitled to rely upon the representations made about "actual holder" status by BofA, even though it had contradictory information in its records evidencing Freddie Mac was the loan owner. *Id.* Certainly NWTS knew about the relationship between Freddie Mac and loan servicers given that it is in the business of doing but

nonjudicial foreclosures in Washington. *Id.* The trial court permitted the Defendants to submit a supplemental declaration after the hearing to support the oral representations made at the hearing, to which Mr. Blair was not permitted to respond. *Id.*

Not only are there evidentiary problems with the testimony of Ms. Sriwan, who opined about matters which were entirely outside of the scope of her knowledge in her job capacity, which she refused to even describe, and outside the scope of the business records which she reviewed, the Defendants have made factual assertions about the contents her Declaration that are inaccurate. BofA in its Brief at 2, asserts that "Bank of America's subsidiary ReconTrust Company, N.A. has held the note as the document custodian for Bank of America since 2008." BofA Response Brief, 2. But that is not the testimony provided by Ms. Sriwan. She stated, "On or about September 25, 2008, Freddie Mac became the owner of the Loan and the Original Note was placed in storage with Countrywide Home Loan Servicing, LP . . . for the benefit of Freddie Mac and in accordance with Freddie Mac guidelines." CP 1142. The screenprint attached as Exhibit "A" makes reference to ReconTrust on September 19, 2008, but indicates a "recall" on September 26, 2008, which is unexplained, reference to the manufacture of the MERS Assignment on August 1, 2011 and a reference to CoreLogic on August 1,

2011, which are also unexplained. So, who has actually been in possession of the original Note signed by Mr. Blair since signing? *Id.*

For purposes of responding to the motions for summary judgment, Mr. Blair has assumed that Freddie Mac is actually the holder of the Note through a custodian, presumably Bank of America, and owner of the loan, but the qualified and carefully crafted language used by BofA to avoid telling the trial court and this Court the truth – that it is nothing more than the custodian and loan servicer – demonstrates why there remained genuine issues of material fact that should have been left to a trier of fact, and not decided on summary judgment. *Id.* Moreover, the first declaration submitted by BofA in support of the motion merely states that "the Note was placed in storage for the benefit of Freddie Mac". (CP 852) Notably absent was a description of the identity of the custodian. The Supplemental Declaration is an attempt to correct that omission and Mr. Blair maintains that it does not sufficient do so, but what is interesting is that BofA repeatedly admits that the document custodian is merely "storing" the Note. The custodian does not own the Note and it has no right to enforce the terms of the Note on its own behalf. It is merely storing the Note – nothing more. (CP 1140-1145)

The first BofA declarant, Mr. Daniel Leon, at Paragraph 18, also admits that it was BofA who executed the Appointment of Successor

Trustee (even though it was not a "beneficiary" as defined under RCW 61.24.005(2)), asserts that "the original note is **currently** in the possession of BANA" and that Freddie Mac remains the owner. (CP 854-855) Interestingly, neither of the BofA declarants testifies that its employee signed the Beneficiary Declaration with the improper qualifying language ("or has requisite authority under RCW 62A.3-301") upon which NWTS apparently relied in initiating the nonjudicial foreclosure. This must assume that this absence of an explanation for signing a document with improper qualifying language and which does not comport with the requirements of the statute is intentional on the part of BofA. RCW 61.24.030(7)(a). (CP 852-855)

> BofA asserts in its brief that:
>
> > MERS executed an assignment of deed of trust transferring its interest in the deed of trust to Bank of America. (CP 918) **This assignment did not change Freddie Mac's status as owner of the loan.** Thereafter, Bank of America appointed Northwest Trustee Services, Inc. as successor trustee under the deed of trust by virtue of an appointment of successor trustee recorded in October 2011. (CP 920, emphasis added)

BofA Brief, 3-4. These are the facts as asserted by Mr. Blair, except that BofA continues to falsely assert that "MERS" executed the Assignment, which was recorded in Chelan County in order to make the public records appear as though it were BofA which was the owner of Mr. Blair's loan

and the entity that was nonjudicially foreclosing. In fact, the person who signed the document was an employee of BofA, as evidenced by the screenshot attached as Exhibit "A" to Ms. Sriwan's Declaration. (CP 1145) While Freddie Mac prefers that no one be able to identify from public records that its loan servicers are foreclosing on loans that it owns, such actions are unfair and deceptive because they contain false representations in the public record and because they are in contravention of the requirements for the conduct of a nonjudicial foreclosure under Washington law. RCW 61.24, *et seq.* BofA admits that Freddie Mac was the owner of the loan and the Note at all times, but nevertheless that it caused to be recorded documents in Chelan County that falsely asserted it was the entity who owned the beneficial interest under the Deed of Trust, even though Washington law is clear that the "deed of trust follows the note." *Bain v. Metropolitan Mortg. Grp., Inc.*, 175 Wn.2d 83, 102, 285 P.3d 34 (2012). *See also,* RCW 62A.9A-203(a) ("A security instrument attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.") Here, the promissory note signed by Mr. Blair was sold to Freddie Mac, thereby making that note "personal property" whose sale is governed by Article 9 of the UCC, which is consistent with the Washington common law regarding the transfer of ownership of

mortgages.

The trial court found that the beneficiary declaration supplied by BofA to NWTS was "insufficient" on its own because of the qualifying language in the document. (CP 1148) However, it permitted BofA to supplement the record to establish that it was the "holder" by way of the screenshot provided by Ms. Sriwan. (CP 1045) The trial court completely ignored the fact that Mr. Blair had proven and BofA had admitted that it was merely "storing" the Note for Freddie Mac, and that Freddie Mac's own guidelines made clear that it is the holder and loan owner. (CP 854-855; 1040-1045) Thus, the trial court dismissed all of Mr. Blair's claims based entirely upon its incorrect factual finding that BofA was the "noteholder" and that it was therefore entitled to act as the "beneficiary" to appoint a new trustee, to "assign" the interest in the Deed of Trust to itself and to initiate a nonjudicial foreclosure in its own name, since all of Mr. Blair's claims were predicated upon violations of the requirements of the Deed of Trust Act, supporting claims for violations of the Consumer Protection Act and negligent and intentional misrepresentations. (CP 1147-1150).

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ARGUMENT

1. Bank of America is **not** the noteholder and was never anything more than the document custodian and servicer for Freddie Mac.

The evidence presented to the trial court made clear that Bank of America was **not** the noteholder. All of the Defendants contend that Freddie Mac is the loan owner and that it bought the loan on September 25, 2008. There was never any evidence presented to the trial court documenting the sale, but because records checked by Mr. Blair independently reflects this ownership, Mr. Blair has never contested that fact. Since Freddie Mac is the loan owner, the Freddie Mac Guidelines control the relationship that Freddie Mac has with its document custodians and its servicers. (CP 1142) BofA repeatedly asserted that its actions were governed by those same Guidelines. *Id., see also,* CP 854-855. The Freddie Mac Custody Procedures establishes that its loan custodians hold promissory note "in trust" for "sole benefit" of Freddie Mac. CP 1046. Thus, according to the guidelines that the Defendants assert control their relationship, BofA had no authority to act for itself and it certainly was not the "noteholder" when acting as a custodian and loan servicer, because the owner of the loan, Freddie Mac, said that it was not the "holder." *Id.*

BofA maintains that the Supreme Court decision in *Lyons v. U.S. Bank Nat. Ass'n,* 336 P.3d 1142 (2014) is somehow distinguishable from

the facts in this case and contends that this Court should not give much consideration to *Lyons* because its facts are different. BofA, in essence, contends that the Supreme Court accepted direct review of *Lyons* for no reason other than to render a decision based upon the specific facts of that case. BofA Brief, 25-27. Such an interpretation of the basis for the Supreme Court to accept review is expressly contravened by the requirements set forth for accepting direct review in the Rules for Appellate Procedure. The RAP outlining the procedures for direct review includes an allowance for those cases that have a public impact. RAP 4.2(a)(4) ("A case involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.") It was based upon the "public impact" requirement that the Court accepted review in *Lyons*. As this Court is well aware, the Supreme Court is not an "error correcting" court in the way that this Court is designed to function when deciding appeals that are taken as a matter of right. RAP 4.1.

The Supreme Court in *Lyons* did not hold that only when there are two beneficiary declarations with conflicting information is the trustee required to do more than rely upon the bare-faced documents, as the Defendants would have this Court believe. BofA Brief, 24-28; NWTS Brief at 19, 26-27, 33. Rather, the Court began its analysis based upon the premise that RCW 61.14.030(7)(a), "which instructs that a trustee must

have proof the **beneficiary is the owner** prior to initiating a trustee's sale." *Lyons* at 1147-1150 (emphasis added); *see also, Bain v. Metropolitan Mortg. Grp., Inc.*, 175 Wn.2d 83, 102, 285 P.3d 34 (2012) and *Frias v. Asset Foreclosure Services, Inc.*, 181 Wash.2d 412, 334 P.3d 529 (2014).

The Supreme Court held in *Lyons* that "[I]f there is an indication that the beneficiary declaration might be ineffective, a trustee should verify its veracity before initiating a trustee's sale to comply with its statutory duty." *Lyons* at 1150-1151. Holding that the exact same form of beneficiary declaration used in this case, with the qualifying language about the identity of the loan owner, did **not** comply with the requirements of the DTA. *Id.* The Defendants attempt to rewrite the *Lyons* decision to read out of it the requirement that the beneficiary declaration prove the identity of the loan **owner**, which **may** be done through a declaration signed by the "actual holder". *Lyons, supra*; RW 61.24.030(7)(a). However, in this case, the Defendants all admit that BofA is not the owner and that Freddie Mac is and was the owner of the loan. Therefore, the beneficiary declaration upon which the Defendants rely for the proposition that the nonjudicial foreclosure was commenced in conformity with the law is, on its face, untrue because it does not identify in any way the loan owner, Freddie Mac. Moreover, the qualifying language "or otherwise

entitled to enforce" is also not permitted under the statute. Given the fact that all of the Defendants knew that Freddie Mac was the owner and that BofA was merely the custodian and loan servicer, the use of this qualifying language is even more egregious. All of the Defendants knew that they were actively involved in falsifying documentation for purposes of speeding up the nonjudicial foreclosure process for their own benefit.

The Supreme Court, in remanding the *Lyons* case, instructed the trial court to follow the analysis of Judge Jones, of the U.S. District Court for the Western District of Washington in *Beaton v. JPMorgan Chase Bank N.A.*, No. C11-0872 RAJ, 2013 WL 1282225 (Mar. 26, 2013). *Id.* Judge Jones noted that a beneficiary declaration identical except for the names to the one used in this foreclosure, which read, "' JPMorgan Chase Bank, N.A. successor in interest to Washington Mutual Bank flm Washington Mutual Bank, FA is the actual holder of the promissory note or other obligation evidencing the above-referenced loan or has requisite authority under RCW 62A.3-301 to enforce said obligation."' was not in conformity with the DTA requirements. *Id.* at *5. The court held that the qualifying provision ("or has requisite authority under RCW 62A.3-301") indicated that "Chase could be a nonholder in possession or a person not in possession who is entitled to enforce the instrument, neither of which is proof that 'the beneficiary is the owner of any promissory note or other

obligation secured by the deed of trust.'" *Id.* (citation omitted) (quoting RCW 61.24.030(7)(a)). Because DTA provisions must be strictly complied with, the ambiguity regarding whether the beneficiary declaration satisfied the statutory requirement created enough of a question of whether there was a violation of the DTA to survive summary judgment in that case. *Id.*

There is nothing in either the *Lyons* decision or the *Beaton* Order which supports the Defendants' position that ownership of the loan is irrelevant, and that the only thing that matters is whether BofA had possession of the Note. In fact, *Beaton* contemplates precisely this scenario when Judge Jones noted, "Chase could be a nonholder in possession . . . neither of which is proof that 'the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust." *Id.* (citation omitted) (quoting RCW 61.24.030(7)(a)). The Defendants attempt to parse out individual sentences in order to give a false impression as to the decision rendered by the Supreme Court in *Lyons*, and it is unavailing.

Similarly, the Defendants rely greatly upon the *Trujillo v. Northwest Trustee Services, Inc.*, 326 P.3d 768, 774 (2014), *review granted,* 345 P.3d 784 (2015) but that case has been accepted by the Supreme Court for review. Oral arguments are set for June 23, 2015 and a

decision will be rendered thereafter. As noted previously by Mr. Blair, it was inconsistent with *Bain* and other Supreme Court decisions, including *Lyons*, for the *Trujillo* Court to have found that after the Legislature amended the DTA in 2009 to include an express proof of ownership requirement RCW 61.24.030(7)(a) and (8)(*l*), that there really was no requirement at all for the owner to authorize the non-judicial foreclosure.[1]

The DTA's specific references to owner-beneficiaries are consistent with the legislative intent of facilitating direct borrower-owner negotiation by ensuring that no one stands between the owner and borrower at key points in the foreclosure process. *See Bain*, 175 Wn.2d at 103 ("'[T]he legislature intends to .... [c]reate a framework *for homeowners and beneficiaries to communicate with each other to reach a resolution* and avoid foreclosure whenever possible; and [p]rovide a process for foreclosure mediation.'") (citing legislative findings, Foreclosure Fairness Act of 2011, Laws of 2011, ch. 58, § 3(2)). This is particularly relevant in this case given that the Defendants have all asserted that all of the responsibility for his injury and damages was caused by Mr. Blair's default on the loan. BofA, the servicer, is the entity

[1] The legislature added this additional "proof of ownership" requirement to the DTA in 2009. *See* Laws of 2009, ch. 292, § 8 (7)(a). At the same time, it added the requirement that in any non-judicial foreclosure on residential real property, the notice of default must identify the "name and address of the owner of any promissory notes or other obligations secured by the deed of trust." *Id.* § 8 (8)(*l*).

that has been allegedly reviewing him for a loan modification and denying it for several years for various reasons, while Mr. Blair made all payments to the Court Registry required after he obtained injunctive relief. (CP 458-459) Perhaps if Freddie Mac knew that Mr. Blair clearly had the wherewithal to make modified mortgage payments, this matter would have been avoided, but because it has chosen not to be involved in the attempted nonjudicial foreclosure, no meaningful discussions were ever had between Mr. Blair and the owner of the loan, such that this matter could be resolved.

It is clear that the Supreme Court has determined that it needs to resolve the conflict between its decisions and that rendered by Division I in *Trujillo*, and all of the parties in this case have their opinions about which way the Supreme Court should rule, but the mere fact that Court accepted review indicates that it is aware that there is a conflict between the decisions that must be resolved – one way or another.

The recent case of *Jackson v. Quality Loan Serv. Of Wash.*, __ P.3d __, 2015 WL 1542060 (Wash. App., Div. 1, April 6, 2015) does not stand for the proposition asserted by the Defendants. The first premise of *Jackson* was that the DTA is unconstitutional and the arguments flowed from that false premise. Mr. Blair has never made such a ridiculous argument. Further, Ms. Jackson did not apparently bother to provide the

appellate court with any arguments in support of her claims other than the constitutionality claims. *Jackson* at *6. As noted by the Court in *Jackson,* the DTA was promulgated by the Legislature in to create a process that was (1) efficient and inexpensive; (2) provide an adequate opportunity for interested parties to prevent wrongful foreclosure; and (3) promote the stability of land titles." *Id.* at *9, citing to *Cox v. Helenius,* 103 Wn.2d 383, 387, 693 P.2d 6873 (1985).

In *Jackson*, there apparently was some agreement that the plaintiff's loan had been sold to a securitized trust for which US Bank was the trustee (as opposed to a trustee under the DTA). *Jackson*, at *4. But Ms. Jackson argued that the loan was really owned by the investors who invested in the securitized trust and therefore they should have been participants in the nonjudicial foreclosure process. *Id.* at *10. Further, Ms. Jackson did not make any allegations of bad faith in relation to the subject beneficiary declaration. *Id.* Thus, in the second to last paragraph the Court in *Jackson* made some statements about holdings in other cases (*Trujillo* and *Lyons*) but did not and could not engage in any analysis that is useful in this or any other case where is a record established by the plaintiff and where arguments have been properly made and presented to the Court of Appeals. The *dicta* in *Jackson* is just that, and it does not change and cannot change the holdings in Supreme Court decisions. The

Jackson case stands for nothing more than confirmation that the DTA is a constitutionally valid statute and that appellants need to make proper arguments to the Court of Appeals or it cannot resolve any issues relating to those arguments.

Defendants also cite to the case of *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 450 P.2d 166 (1969) in support of their position regarding the rights of a holder of a promissory note. Unfortunately for the Defendants, that case involved a judicial foreclosure and did not involve the Deed of Trust Act. An analysis of what is appropriate at the common law and in connection with a judicially supervised proceeding as occurred in the *Davis* case, is not in any way analogous to the statutory scheme of the nonjudicial foreclosure process designed by and modified numerous by the Legislature that is codified in the Deed of Trust Act. RCW 61.24, *et. seq.* ("DTA"). While the Legislature used a "holder" definition contained in the UCC for defining the word "beneficiary", the rest of the statute is a process that is completely separate and ungoverned by the UCC. In fact, asserting that this Court should be persuaded by the UCC provisions for enforcing the terms of a Promissory Note defies logic and any sort of common sense. As noted by the Defendants, the UCC has been codified in Washington for many years. If the Legislature intended that all foreclosures of real

property be conducted according to the parameters of the UCC, there would be no need for the DTA. Holders of promissory notes secured by deeds of trust would simply use the judicial foreclosure process and other provisions permitted under the UCC. But the Washington Legislature made a choice to create a nonjudicial foreclosure process which contains protections not afforded to a property owner under the UCC, and this Court is required to make certain that entities using that process, without judicial oversight, comply with all of its provisions or face the liability attendant with a business model that ignores the requirements of Washington law.

2. Because Bank of America was not the loan owner, it could not appoint NWTS as the successor trustee and the attempt to nonjudicially foreclose on Mr. Blair supports his claims for relief.

NWTS spends much of its briefing trying to rewrite the facts of this case, including references to Freddie Mac as an "investor". NWTS Brief, 13-14, 19. In its briefing to the trial court, NWTS never once referred to Freddie Mac as an "investor" and there would be no reason to do so, since Freddie Mac is not an "investor" as the word is used in the DTA. In fact, the only place where the DTA uses the word "investor" is in the Foreclosure Fairness Act provisions at RCW 61.24.163(5)(j). RCW 61.24.163(5)(j) requires that in the event a "beneficiary" is prohibited from "implementing a modification" due to "limitations in a pooling and

servicing agreement or other **investor** restriction", the beneficiary must seek a waiver of the "pooling and servicing agreement or other **investor** restriction provisions." RCW 61.24.163(5)(j) (emphasis added). NWTS suggests that equating "beneficiary" with Freddie Mac in this case would put the use of that word in conflict with the use of the "investor" in the FFA, but this is not true. RCW 61.24.163(5)(j) clearly refers to those loans which have been securitized and are subject to the requirements of "pooling and servicing agreements" or "other investor restrictions" as a result of the securitization. A "beneficiary" in that instance would be the securitized trust itself, but its ability to allow modifications would be contained in the pooling and servicing agreements and other documents related to the requirements of the pooling of the loan assets, which are described as "investor" restrictions, since it is the investors – those who invest in the securitized trust – who have signed on to an investment with the prohibitive restrictions.

In the case of Freddie Mac, when it owns a loan for itself, there are no "investors" in the individual loans, and again, there is no factual record which exists wherein anyone from BofA or Freddie Mac asserts that it is merely an "investor" in a pool of securitized loans. NWTS' attempt to mislead this Court about Freddie Mac's role with regard to this loan should be unavailing, and Mr. Blair maintains that NWTS is merely trying

to conflate his situation and arguments with those made in *Jackson* in order to avoid liability and confuse this Court.

No one except NWTS has ever previously contended in briefing that Freddie Mac is an "investor" as contemplated by the language in RCW 61.24.163(5)(j). Similarly, NWTS' citation to RCW 62A.9A-607 is inapposite. There is nothing in the DTA which references this portion of the UCC and the process described in RCW 62A.9A-607 is different from that proscribed by the DTA. RCW 62A.9A-607(b)(1) first requires the creation of a document which includes "the secured party's sworn affidavit stating that: (1) Default has occurred with the respect to the obligation secured by the mortgage . . ., that the security agreement is attached to the affidavit and that the secured party is entitled to enforce the mortgage nonjudicially. It further indicates that affidavit with attachments should be recorded. *Id.* [2] In case of a normal mortgage transaction in Washington, a deed of trust has already been recorded, rendering another recording superfluous. In addition, the DTA does not require a sworn affidavit from the "secured party" attesting to existence of a default on the

[2] "Secured party" is defined at RCW 62A.9A-102(73)(A) as "A person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding." *Id.* RCW 62A.9A-102(73)(D) defines it as "A person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold." *Id.* and RCW 62A.9A-102(73)(E) defines it as "A trustee, indenture trustee, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for." *Id.*

loan. Is NWTS contending that Freddie Mac, the secured party, should have provided it with a sworn affidavit attesting to the default before it attempted to nonjudicially foreclose? Or is it asserting that BofA, as the "agent" of Freddie Mac (a role neither BofA or Freddie Mac have contended it was fulfilling), should have provided NWTS with a sworn affidavit to that effect? Or is NWTS contending that BofA and/or Freddie Mac should have created a sworn affidavit and then recorded it?

The assertions by NWTS that Freddie Mac is an "investor" and that ownership of the loan is irrelevant under Washington law are not supported by any Washington case law. NWTS spends a great deal of its briefing citing to outdated orders from federal district courts which did not have the benefit of the Washington Supreme Court decisions in *Bain, Frias* and *Lyons,* and the Washington appellate decisions which followed. At the same time, all of the Defendants have asserted that *Walker* and *Bavand* are no longer good law. This is not correct, as this Court well knows. *Walker v. Quality Loan Service Corp.*, 176 Wn.App. 294 (2013) and *Bavand v. OneWest Bank,* FSB, 175 Wn.2d 77 (2013). While the portion of *Walker* which held that a homeowner can pursue claims directly under the DTA is no longer good law, the Supreme Court has never held any other portion of the decision to be in error and in fact, has cited favorably to other portions of it. *See, Frias,* 181 Wash.2d at 538 and

Lyons, supra.

NWTS also contends that Mr. Blair does not understand the *Lyons* decision because the Supreme Court held that the holder and the owner must be the same entity, and that this must be demonstrated through some sort of proof such as the beneficiary declaration. NWTS Brief, fn. 15. This argument intentionally misconstrues Mr. Blair's position. Mr. Blair agrees completely that the *Lyons* decision confirms that the Legislature intends that the holder and the owner be one and the same entity, and that this is the purpose behind the language in RCW 61.24.030(7). Where Mr. Blair and NWTS differ is in whether or not the DTA allows for the sort of "constructive" possession which NWTS contends is permissible. *Id.* Here, neither BofA nor Fannie Mae has ever asserted that BofA had "constructive" possession of Mr. Blair's Note, so it is fairly astonishing that NWTS makes such a factual assertion which is not made by the parties themselves.[3] Rather, BofA has always asserted that it had "actual" possession of the Note (about which Mr. Blair maintains there is still a dispute), but that its possession rose to the level of "noteholder" status. It never addressed head on in any way its role as custodian for Freddie Mac, instead attempting to mislead all of the Courts with the use of the word

[3] Mr. Blair maintains that this attempt to recreate the facts demonstrates further that NWTS has no interest in adhering to its duty of good faith to him, even in the context of appellate briefing where it is content to make up facts that suit its purposes.

"possession" when referring to the Note and never describing its relationship to BofA. Mr. Blair has always maintained that, consistent with the requirements of the Freddie Mac Guidelines, BofA was not the noteholder or the owner, but was merely the custodian and the loan servicer.

While the UCC and in particular Article 3 allow for someone other than the owner of a promissory note to enforce its terms, the DTA has specific ownership requirements. And while the DTA also permits "agents' to perform certain very specific acts in the DTA, the entity claiming to be an "agent" must actually adhere to the legal requirements in Washington for such relationship. *See* RCW 62A.3-201, Comment 1 (note may be held "either directly or through an agent"); 1B *Lawrence's Anderson on the Uniform Commercial Code* § 1-201:270 at 401 (3d ed. 1981) ("a person is a 'holder' of a negotiable instrument when it is in the physical possession of his or her agent"); *see also* RCW 62A.1-103(b) (under Washington's UCC, "[u]nless displaced by the particular provisions of this title, the principles of law and equity, including . . . principal and agent . . . supplement its provisions"). In *Bain*, the Supreme Court noted that "Washington law, and the deed of trust act itself, approves of the use of agents," adding that nothing in its opinion "should be construed to suggest that an agent cannot represent the holder of a note." *Bain*, 175 Wn.2d at

106. But it made clear that using an agent required demonstrating that there was a principal who exercised control over the alleged agent. *Id.* No such thing has occurred in this case and in fact, the record does not include any facts indicating that Freddie Mac knew anything at all about this foreclosure and Mr. Blair. Rather, all of the factual assertions made here and all of the executed documents were done by employees of BofA and/or NWTS. Freddie Mac, except for the provisions in its guidelines, is entirely absent from this record.

Mr. Blair proved that he could meet the elements for a CPA claim using the *Hangman Ridge* standards. A cause of action is available if the claim satisfies five elements: "(1) [an] unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.' " *Klem v. Wash. Mut. Bank,* 176 Wn.2d 771, 782, 295 P.3d 1179 (2013) (alteration in original) (quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wash.2d 778, 780, 719 P.2d 531 (1986)). The Defendants all engaged in unfair and deceptive practices by initiating a nonjudicial foreclosure without adhering to the statutory requirements; it occurred in "trade or commerce" as the Defendants were engaged in the business of nonjudicially foreclosing on Mr. Blair's property (and that is NWTS' entire business model); it had and has the potential to affect others in the

public because the Defendants regularly engage in this activity, as indicated by the other lawsuits involving this same activity and it is demonstrated because they have argued that this is Freddie Mac's business model; Mr. Blair has proven he sustained injuries and has damages; and the entirety of the **wrongful** initiation of a nonjudicial foreclosure done in contravention of the requirements of the DTA caused his injury and damages. If the Defendants had adhered to the requirements of the DTA, they might well have successfully completed a nonjudicial foreclosure and would certainly have avoided liability. The Defendants' attempts to argue that because Mr. Blair, he caused them to violate the requirements of the DTA is legally and factually unsound.

In addition to making many of the same arguments as the other Defendants, in its briefing NWTS falsely asserted to the trial court that it never made a demand for payment upon Mr. Blair, even though the Notice of Default, Notice of Trustee's Sale and Notice of Foreclosure were explicit demands for payment (or Mr. Blair would face the consequence of losing title to his home), which included hundreds of dollars in "trustee fees" and costs directly payable to NWTS. (CP 516-584) NWTS indicated it was signing the Notice of Default as the "duly authorized agent" of BofA, and as the "trustee" (as defined by Washington law) in the Notice of Trustee's Sale and Notice of Foreclosure. (CP 922-932), and

these documents by their plain language demanded monies from Mr. Blair. The Notice of Default included fees related to the issuance of that document in the amount of $1,147.87 identified as Trustee Fees (CP 924-925) and $1,648.77 identified as Trustee's Expenses (CP 928)

In *Frias*, the Supreme Court stated: "even when there is no completed foreclosure sale and no allegation that plaintiff has paid foreclosure fees, it is possible for a plaintiff to suffer injury to business or property caused by alleged DTA violations that could be compensable under the CPA." *Frias* 181 Wn.2d at 18, citing to *Panag v. State Farm Ins. Co. of WA,* 166 Wn.2d 27, 57 (2009); *Lyons,* 336 P.3d at 1142. Here, Mr. Blair provided the trial court with testimony in support of the out of pocket damages that he incurred as a result of the actions of the Defendants herein. The Supreme Court held that Ms. Frias' injuries could include the demand by the foreclosing trustee defendants for fees not permitted by the Deed of Trust Act, the cost of investigating the legality of LSI and Asset's demand for fees, and Frias' inability to obtain a loan modification based on the Defendants' lack of good faith in her Foreclosure Fairness Act ("FFA") mediation. *Id.* (CP 924-925; 928) The same analysis should have been applied to Mr. Blair's situation, but because the trial court determined that there were no DTA violations, it did not analysis Mr. Blair's claims for damages and injury.

CONCLUSION

The record is clear that Mr. Blair raised genuine issues of material fact such that his claims should have survived summary judgment. He asks this Court to remand the case to the trial court.

Respectfully submitted this 16th day of June, 2015.

LAW OFFICES OF MELISSA A. HUELSMAN, P.S.

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CERTIFICATE OF SERVICE

I, Carl Turner, declare under penalty of perjury as follows:

1. I am over the age of eighteen years, a citizen of the United States, not a party herein, and am competent to testify to the facts set forth in this Declaration.

2. That on the Tuesday, June 16, 2015, I caused the attached document with any exhibits and supporting pleadings to be served upon the following individuals via the methods outlined below:

Jacob M. Downs & John Devlin Lane Powell, PLLC 1420 Fifth Ave, Suite 4200 P.O. Box 91302 Seattle, WA 98111-1302 downsj@lanepowell.com devlinj@lanepowell.com	☐ Legal Messenger ☒ Electronic Mail ☐ Federal Express ☒ Other: Regular U.S. Mail
Joshua Schaer RCO Legal, P.S. 13555 SE 36th Street, Suite 300 Bellevue, WA 98006-1263 jschaer@rcolegal.com	☐ Legal Messenger ☒ Electronic Mail ☐ Federal Express ☒ Other: Regular U.S. Mail

I certify under penalty of perjury under the laws of the State of Washington that the foregoing statement is both true and correct.

Dated this Tuesday, June 16, 2015, at Seattle, Washington.

/s/ Carl Turner