Case No. 32816-3-III

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

JAMES BLAIR

Appellant,

v.

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

Respondents.

RESPONDENT NORTHWEST TRUSTEE SERVICES, INC.'S OPENING BRIEF

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I. STATEMENT OF THE CASE

A. Factual History.

On September 10, 2008, Appellant James Blair ("Blair") executed a promissory note (the "Note") in the amount of $240,000, payable to Countrywide Bank, FSB. CP 645-648.

Blair secured repayment of the Note with a recorded deed of trust (the "Deed of Trust") which encumbers real property located in Chelan County (the "Property"). CP 624-639.

In 2009, Blair defaulted on his obligations under the secured Note, and BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing LP ("BAC Home Loans"), requested that NWTS commence non-judicial foreclosure proceedings against the Property through the issuance of a Notice of Default. CP 559-561; CP 583 (Dec. of Stenman, ¶ 4).

On or about November 18, 2009, NWTS received a beneficiary declaration from BAC Home Loans concerning the Note. *See* CP 562; CP 583 (Dec. of Stenman, ¶ 6).

On December 31, 2009, the foreclosure process was stopped upon Blair's reinstatement of the loan. CP 583 (Dec. of Stenman, ¶ 7).

However, in August 2010, Blair again could not make the required

mortgage payments. CP 563-565; *see also* Brief of Appellant at 5.

On July 20, 2011, Bank of America, as successor by merger to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing LP ("Bank of America"), requested that NWTS again commence non-judicial foreclosure proceedings against the Property. CP 583 (Dec. of Stenman, ¶ 8). Thus, on July 21, 2011, Blair was sent a Notice of Default. CP 563-565; CP 584 (Dec. of Stenman, ¶ 9).

On or about September 29, 2011, NWTS received a new beneficiary declaration from Bank of America concerning the Note. *See* CP 566; CP 584 (Dec. of Stenman, ¶ 10).

On March 7, 2012, Bank of America recorded an Appointment of Successor Trustee with the Chelan County Auditor, vesting NWTS with the powers of the original trustee. CP 567.

On or about March 19, 2012, Blair was sent a new Notice of Default with updated arrearage information. CP 568-571; CP 584 (Dec. of Stenman, ¶ 12).

On April 27, 2012, NWTS recorded a Notice of Trustee's Sale with the Chelan County Auditor concerning the Property, and sent the same to Blair with a Notice of Foreclosure. CP 572-581; CP 584 (Dec. of Stenman, ¶ 13).

B. Procedural History.

On August 7, 2012, Blair filed a Complaint against NWTS, Bank of America, Mortgage Electronic Registration Systems, Inc. ("MERS"), and Federal Home Loan Mortgage Corporation in Chelan County Superior Court. CP 1-19.

On August 10, 2012, the Superior Court entered a restraining order prohibiting the trustee's sale from occurring. CP 69-70.

On May 29, 2014, the Hon. Judge Lesley Allan issued a Memorandum Decision granting summary judgment to the Defendants on all issues. CP 1147-1150. On September 9, 2014, an order to that effect was entered. CP 1161-1164. This appeal followed.

II. RESPONSE TO APPELLANT'S STATEMENT OF ISSUES

1. The Superior Court did not err in finding that Bank of America was the beneficiary.

2. "Ownership" of a loan is not determinative of authority to foreclose, and the record shows sufficient evidence of Bank of America's status as Note holder.

3. The Superior Court did not err in granting summary

judgment to NWTS on Blair's Consumer Protection Act claim.[1]

III. RESPONSE ARGUMENT

A. Standard of Review.

An order granting summary judgment is reviewed *de novo*, with the Court of Appeals engaging "in the same inquiry as the trial court." *Beaupre v. Pierce County,* 161 Wn.2d 568, 571, 166 P.3d 712 (2007). However, this Court may *affirm* the ruling below *on any ground* supported in the record, "even if the trial court did not consider the argument." *King County v. Seawest Inv. Associates, LLC*, 141 Wn. App. 304, 170 P.3d 53 (2007), *citing LaMon v. Butler,* 112 Wn.2d 193, 770 P.2d 1027 (1989).

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* CR 56(c); *see also Knox v. Microsoft Corp.*, 92 Wn. App. 204, 962 P.2d 839 (1998), *rev. denied*, 137 Wn.2d 1022, 980

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[1] Blair does not assign error to the Superior Court's grant of summary judgment to NWTS on his Fraud/Negligent Misrepresentation claim, yet he provides briefing on this ostensible issue. *See* Brief of Appellant at 27-28. NWTS will therefore respond accordingly below. *See Shepard v. Holmes*, -- Wn. App. --, 345 P.3d 786, 789 (Div. 3, Dec. 23, 2014), *publication ordered* (addressing substance of claims despite no assignments of error). Blair also does not assign error to, or supply briefing on, the Superior Court's grant of summary judgment on his Deed of Trust Act ("DTA")-based claim, which is not a cognizable pre-sale cause of action under *Frias v. Asset Foreclosure Services, Inc. et al.*, 181 Wn.2d 412, 334 P.3d 529 (2014).

P.2d 1280 (1999); *Vacova Co. v. Farrell*, 62 Wn. App. 386, 814 P.2d 255 (1991). With the motion, a trial court can consider "supporting affidavits and other admissible evidence based on personal knowledge." *Id.*

If the moving party demonstrates that an issue of material fact is absent, the nonmoving party must then articulate specific facts establishing a genuine issue for trial. *See Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989); *see also* CR 56(e) ("an adverse party may not rest upon the mere allegations or denials of his pleading, but... must set forth specific facts showing that there is a genuine issue for trial."). A genuine issue of material fact does not exist where insufficient evidence exists for a reasonable fact-finder to find for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986).

Unsupported conclusory allegations, or argumentative assertions, are insufficient to defeat summary judgment. *See Vacova Co.*, *supra.* at 395, *citing Blakely v. Housing Auth. of King Cy.*, 8 Wn. App. 204, 505 P.2d 151, *rev. denied,* 82 Wn.2d 1003 (1973), *Stringfellow v. Stringfellow,* 53 Wn.2d 639, 335 P.2d 825 (1959); *see also Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000). "Ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to

raise a question of fact." *Id.*, *citing Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 753 P.2d 517 (1988); *see also Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 769 P.2d 298 (1989). Summary judgment is appropriate if, after considering the evidence, reasonable persons could reach only one conclusion. *See Hansen v. Friend,* 118 Wn.2d 476, 824 P.2d 483 (1992); *Wilson v. Steinbach,* 98 Wn.2d 434, 656 P.2d 1030 (1982).

Because Blair failed to advance a genuine issue of material fact precluding NWTS from receiving summary judgment on all claims, the Superior Court's order should be affirmed for the reasons set forth herein.

B. Bank of America, as the Note Holder, is the Beneficiary.

The DTA defines a beneficiary as "the holder of the instrument or document evidencing the obligations secured by the deed of trust." RCW 61.24.005(2); *see also Jackson v. Qual. Loan Serv. Corp.*, -- Wn. App. --, Slip Opin. No. 72016-3-I (Div. 1, Apr. 6, 2015), *published.*[2]

One becomes a note holder through possession of the instrument

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[2] Washington defines beneficiary strictly in the context of holding a note, not just receiving the beneficial interest in a deed of trust, such as the Oregon or Idaho Trust Deed Acts require. *Compare* RCW 61.24.005(2), ORS 86.705(2) ("Beneficiary means a person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or the persons successor in interest...."), I.C. § 45-1502(1) (same definition).

either payable to that party or to bearer. RCW 62A.3-201 (" 'Negotiation' means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder."); RCW 62A.3-109.[3] "The UCC makes no requirement of actual physical possession to be deemed a 'holder' of a note." *Coble v. Suntrust Mortg., Inc.*, 2015 WL 687381, *6 (W.D. Wash. Feb. 18, 2015), *citing* RCW 62A.3–201; *see also In re Butler,* 512 B.R. 643, 653 (Bankr. W.D.Wash. 2014).

If there is negotiation of a note, that holder possesses the right to enforce it, as well as the right to enforce any instrument securing the note's repayment, *e.g.*, a deed of trust. *See Carpenter v. Longan*, 83 U.S. 271, 21 L. Ed. 313 (1872); *see also* RCW 62A.3-203, cmt. 1 ("the right to enforce an instrument and ownership of the instrument are two different concepts.").[4] If the borrower defaults on the note, a secured party may

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[3] Under RCW 62A.3-201, cmt. 1, "negotiation always requires a change in possession of the instrument because nobody can be a holder without possessing the instrument, either directly or through an agent."

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

exercise its rights with respect to property securing such obligation; this can occur through either judicial or non-judicial foreclosure of a deed of trust. *See, e.g., Kennebec, Inc. v. Bank of the W.*, 88 Wn.2d 718, 565 P.2d 812 (1977); RCW 62A.9A-203(g), RCW 62A.9A-308(e).

In this case, the original Note was payable to Countrywide Bank, FSB. CP 645. As payee, Countrywide Bank, FSB subsequently indorsed the Note in blank, making it enforceable by anyone with possession of that instrument. CP 648; *see also* RCW 62A.3-205(b).

Beginning September 25, 2008, Bank of America took possession of the Note. CP 1142 (Dec. of Siriwan, ¶¶ 5, 6).[5] This fact (possession and blank indorsement) made Bank of America the Note holder, *i.e.*, beneficiary. *See* RCW 62A.3-201(a); RCW 61.24.005(2). Consequently, Bank of America was legally permitted to pursue non-judicial foreclosure of the Property upon Blair's default. *See also* CP 852-853 (Dec. of Leon, ¶ 10) (Bank of America could "take all actions necessary for the collection and enforcement of the Loan....").

Moreover, Blair recognized Bank of America's authority as the

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[5] In addition, as of April 27, 2009, original payee Countrywide Bank, FSB, converted into a national banking association and merged into Bank of America. CP 852 (Dec. of Leon, ¶ 6).

beneficiary when he specifically reached out to Bank of America in order to "obtain a loan modification." CP 7 (Compl., ¶ 2.3); *see also Thurman v. Wells Fargo Home Mortg.*, 2013 WL 3977622 (W.D. Wash. Aug. 2, 2013).[6]

Contrary to Blair's argument, there is ample evidence in the record that Bank of America was the beneficiary at all times relevant to the subject foreclosure.

C. NWTS Cannot be Liable for its Appointment as Trustee.

Blair was not a party to the Appointment of Successor Trustee. CP 567. Therefore, he cannot permissibly insert himself into that transaction for the purpose of questioning its propriety. *See, e.g., Brodie v. NWTS*, 2012 WL 6192723 (E.D. Wash. Dec. 12, 2012), *aff'd*, 2014 WL 2750123 (9th Cir. Jun. 18, 2014) ("[a]t bottom, the alleged misconduct had no bearing whatsoever upon Plaintiff's obligation to make her... payments.").

The United States District Court for the Eastern District of Washington has found that a borrower:

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[6] As the United States District Court for the Western District of Washington observed in *Thurman*,

> [t]he [plaintiffs'] CPA claim is premised on the fact that Wells Fargo [the beneficiary in question] is the lawful owner of the note and beneficiary on the deed of trust. If it isn't, then Wells Fargo would not have been in a position to modify... their loan....

2013 WL 3977622, *3.

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

Brophy v. JPMorgan Chase Bank, N.A., 2013 WL 4048535, *7 (E.D. Wash. Aug. 9, 2013), *citing Javaheri v. JPMorgan Chase Bank*, 2012 WL 3426278 (C.D. Cal., Aug. 13, 2012); *see also Brophy v. JPMorgan Chase Bank, N.A.*, 2015 WL 1439346, *5 (E.D. Wash. Mar. 27, 2015) ("Whatever claim Plaintiffs have regarding the alleged fraudulent execution of the appointment of successor trustee can only be pursued against Defendant JPMorgan Chase, not Defendant NWTS. The DTA does not impose a duty upon Defendant NWTS to verify the validity of an appointment."); CP 633, ¶ 24 (Blair consented in the Deed of Trust to the lender's authority to appoint a successor trustee).[7]

But even if Blair did have standing to challenge Bank of America's decision to appoint a successor trustee, NWTS did not appoint itself. Thus, no liability should accrue to NWTS simply because it was chosen to carry out the non-judicial foreclosure process. *See* CP 567.

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

D. The Concept of "Ownership" is Not Determinative of Authority to Foreclose in Washington.

Blair seeks to alter the definition of beneficiary found in RCW 61.24.005(2), *i.e.* holder, by suggesting that only a note "owner" can non-judicially foreclose under the DTA. Brief of Appellant at 23, *inter alia; cf. Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 99, 285 P.3d 34 (2012) (declining to accept a "more expansive view" of the DTA). Blair's reasoning, however, is unsupported by case law and principles of statutory construction.

Blair's argument is generally predicated on a DTA requirement added in 2009 that a trustee must have "proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust" before recording a Notice of Trustee's Sale. RCW 61.24.030(7)(a).

But because the term "owner" found in RCW 61.24.030(7)(a) has no statutory definition in either the DTA or Uniform Commercial Code ("UCC") as adopted in Washington, the Court should look to its common meaning. *See Int'l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 283, 313 P.3d 395 (2013) ("To determine the plain meaning of an undefined term, courts often refer to standard English dictionaries."); *Vance v. Dep't of Ret. Sys.*, 114 Wn. App. 572, 577, 59 P.3d 130 (2002)

("[i]n the absence of such a definition, statutory construction requires that we give undefined words their common and ordinary meaning. To ascertain this meaning, we may use a dictionary.") (Citation omitted).

An "owner" is "one who has the right to possess, use, and convey something." *See* Black's Law Dictionary at 1214 (9th Ed. 2009); *id.* at 1215 ("ownership" is the "right to possess a thing, regardless of any actual or constructive control."); *see also* Webster's New College Dictionary at 804 (3d ed. 2005) ("own" means "[t]o have or possess."); http://merriam-webster.com ("own" defined as "to have {something} as property; to legally possess {something}.").

Equating "owner" with the right to either actual or constructive possession also comports with the Supreme Court's holding in *Bain v. Metro. Mortg. Group, Inc.*, *supra.*, because one *must* have possession if one is a "holder," or if one can document the chain of transactions. *See* RCW 62A.9A-607(b) (transferee in possession can non-judicially enforce mortgage through recording); RCW 62A.3-203(b) & cmt. 2 (providing example of where transferor does not indorse the note, but nonetheless the person entitled to enforce the note can "account for possession of the unindorsed note by proving the transaction through which the transferee acquired."); *see also Deutsche Bank Nat. Trust Co. v. Pietranico*, 33 Misc.

3d 528, 545, 928 N.Y.S.2d 818, 830 (Sup. Ct. 2011), *aff'd*, 102 A.D.3d 724, 957 N.Y.S.2d 868 (2013) ("The mere possession of a promissory note endorsed in blank {just like a check} provides presumptive ownership of that note by the current holder. Such is the foundation of negotiable instruments law."); M.B.W. Sinclair, *Codification of Negotiable Instruments Law: A Tale of Reiterated Anachronism*, 21 U. Tol. L. Rev. 625 (1990) (discussing the history of negotiable instruments).[8]

An "owner" is not necessarily some third-party such as an investor, who ultimately acquires a portion of loan payments, although an investor

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[8] *Accord In re Veal*, 450 B.R. 897, 917 (B.A.P. 9th Cir. 2011) (one can be an owner and yet not qualify as a "person entitled to enforce" ["PETE"]; likewise, one can be a PETE and not have ownership, because PETE status under UCC 3-301 does not automatically require possession). The Sinclair article succinctly explains one situation where one is deemed a note owner without also being a holder:

> [f]inally, the debtor has attacked the process whereby the owner of the note came into possession of it. If that was not by the method prescribed by the U.C.C. for negotiation, then its present owner is not a holder, and so cannot be a holder in due course. Negotiation, for an order instrument, requires the indorsement of the assignor on the instrument or on an allonge, 'a paper so firmly affixed to the instrument as to become a part thereof.' A signature on a paper that is not 'so firmly affixed to the instrument as to become a part thereof' is not an indorsement. Thus, the person who takes an instrument but with the assignor's signature on a supplementary paper infirmly attached to the instrument will not be a holder....

Id. at 662-63; *see also Adams v. Madison Realty & Dev., Inc.*, 853 F.2d 163, 166 (3d Cir. 1988) (addressing indorsement; observing "[m]ere ownership or possession of a note is insufficient to qualify an individual as a 'holder'."); U.C.C. § 3-203, cmt. 1 (an example of how possessory rights to a negotiable instrument through an agreement can make one an "owner," but not convey sufficient authority to become a "person entitled to enforce").

could be considered an "owner" if it has the right to constructively possess the Note. In fact, the DTA's mediation statute clearly differentiates the terms "beneficiary" and "investor," substantiating that an investor and beneficiary are not per se synonymous, as Blair otherwise contends. *See* RCW 61.24.163(5)(j).[9]

1. The Use of "Owner" in RCW 61.24.030(7)(a) Evidences the Legislature's Concern that Trustees Learn Who Has the Note.

Numerous courts – in Washington and elsewhere – have concluded that possessory "ownership" alone is not dispositive when analyzing the right to enforce a note. *See, e.g., John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 223, 450 P.2d 166, 171 (1969) ("The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument. It is not necessary for the holder to first establish that he has some beneficial interest in the proceeds."); *Trujillo v. NWTS*, 181 Wn. App. 484, 326 P.3d 768 (2014)

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[9] RCW 61.24.163(5)(j) requires that, in mediation, a beneficiary must provide:

> [t]he portion or excerpt of the pooling and servicing agreement or other *investor restriction that prohibits the beneficiary from implementing a modification*, if the beneficiary claims it cannot implement a modification due to limitations in a pooling and servicing agreement or other investor restriction, and documentation or a statement detailing the *efforts of the beneficiary to obtain a waiver of* the pooling and servicing agreement or other *investor restriction provisions*.

(Emphasis added.)

(an investor's ownership interest in a note is "irrelevant" to enforcement by the holder)[10]; *PHH Mortg. Corp. v. Powell*, 2014 PA Super 197, 100 A.3d 611, 621 (2014) ("[t]he entity with the right to enforce the Note may well not be the entity entitled to receive the economic benefits from payments received thereon."); *Bank of Am., N.A. v. Inda*, 48 Kan. App. 2d 658, 667, 303 P.3d 696 (2013) ("Bank of America had the authority under the UCC to enforce the Note even though it had sold the beneficial interest in the Note to Freddie Mac."); *JPMorgan Chase Bank, N.A. v. Erlandson*, 821 N.W.2d 600, 607 (Minn. Ct. App. 2012) ("[o]wnership or possession of the note associated with a security instrument is not relevant to identifying who has the authority to foreclose that security instrument...."); *Martin v. New Century Mortg. Co.*, 377 S.W.3d 79, 84 (Tex. App. 2012) ("[u]nder common-law principles of assignment, a party who fails to qualify as a 'holder' for lack of an indorsement may still prove that it owns the note."); *SMS Fin. Liab. Co. v. ABCO Homes, Inc.*, 167 F.3d 235, 239 (5th Cir. 1999) ("Whether the FDIC reacquired the

[10] The State Supreme Court will likely address the question of "ownership" upon reviewing *Trujillo*. *See* Case No. 90509-6 (Supr. Ct.).

ownership of the note... is irrelevant to the issue of whether SMS is the holder....").[11]

A loan's ownership is simply not germane to non-judicial foreclosure because the DTA was "designed to supplement the existing foreclosure procedure of the trust deed." John A. Gose, The Trust Deed Act in Washington, 41 Wash. L. Rev. 94 (1966). The DTA was first created to correct the "shortcomings" of a foreclosure process that had become "complicated and inconsistent with the needs of modern real estate financing." *Id.* at 94, 95-96 (DTA created to permit time savings; trade-off is that lender cannot seek deficiency judgment against borrower).

At the same time, the DTA was *not* intended to restrict non-judicial foreclosures to a small subset of loans where an investor is concurrently the note's holder. *Id.*, Appx. B (diagram showing relationships between lender, trustee, and borrower during foreclosure; an investor plays no

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[11] The application of the term "ownership" to possession of a promissory note was evident to the Supreme Court of Ohio as far back as 1885. *See Osborn v. McClelland*, 43 Ohio St. 284, 309, 1 N.E. 644, 657 (1885) ("The law-merchant, as it is commonly called, or the statute in regard to negotiable instruments, has no special application in this case. It is a mere question of ownership,—nothing more, nothing less.... Smith proposed to transfer them to McClelland. His (Smith's) *possession was prima facie evidence of his ownership.*") (emphasis added).

role).[12]

Additionally, because "ownership" encompasses a range of possessory interests, there can even be multiple "owners" of a note, such as certificate-holders for a securitized loan, just like there can be multiple owners of property. *See* UCC § 3-203, cmt. 1 ("[o]wnership rights in instruments may be determined by principles of the law of property, independent of Article 3, which do not depend upon whether the instrument was transferred under Section 3-203.").[13]

Indeed, Freddie Mac is truthfully listed as an "owner" in the Notice of Default because the concept of "ownership," the right to a form of possession, is not exclusive. CP 563-565; CP 852 (Dec. of Leon, ¶ 7); *see also Cameron v. Acceptance Capital Mortg. Corp.*, 2013 WL 5664706, *3

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[12] Legislative history also favors this conclusion. The Senate Report for the bill that created a beneficiary declaration observes: "[t]here must be proof that the beneficiary is the actual holder of the obligation secured by the deed of trust." 5810.E SBR HA 09. The Legislature's focus was clearly on ensuring that a trustee establish the holder's identity, even though the word "owner" was inserted in the bill before its adoption.

[13] UCC § 3-203 articulates an example of how constructive possession of a negotiable instrument through an agreement can make one an "owner," but not convey sufficient authority to become a "person entitled to enforce":

> [s]uppose X is the owner and holder of an instrument payable to X. X sells the instrument to Y but is unable to deliver immediate possession to Y. Instead, X signs a document conveying all of X's right, title, and interest in the instrument to Y. Although the document may be effective to give Y a claim to ownership of the instrument, Y is not a person entitled to enforce the instrument until Y obtains possession of the instrument. No transfer of the instrument occurs under Section 3-203(a) until it is delivered to Y.

Id., cmt. 1.

(W.D. Wash. Oct. 16, 2013), *citing Corales v. Flagstar,* 822 F.Supp.2d 1102, 1107 (W.D. Wash. 2011) ("Flagstar derived its appointment authority from its position as the *holder* of the indorsed Note, a position that is not undermined by the fact that Fannie Mae *also had* an ownership interest in the Note at the time the appointment was made.") (Secondary emphasis added). Compliance with RCW 61.24.030(8) *cannot give rise to liability* against a trustee, and the inclusion of such information has no bearing on the note holder's legal right to enforce that instrument.

2. RCW 61.24.030(7)(a) Should be Construed in a Logical Manner.

Blair's interpretation of RCW 61.24.030(7)(a) invites the Court to incorrectly "read a statute [the DTA, here] in a way that renders 'unlikely, absurd, or strained' results" for two reasons. *See City of Yakima v. Godoy*, 175 Wn. App. 233, 236, 305 P.3d 1100, *review denied*, 178 Wn.2d 1019, 312 P.3d 650 (2013), *citing State v. Elgin,* 118 Wn.2d 551, 825 P.2d 314 (1992); *see also State v. Delgado*, 148 Wn.2d 723, 733, 63 P.3d 792 (2003) (Madsen, J., dissenting) ("a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results.").

First, Blair's argument absurdly gives rise to a "magic" declaration

under RCW 61.24.030(7)(a) that converts an averment of holder status into proof of being a loan's investor or other entity receiving economic proceeds.[14] It is unlikely the Legislature intended the DTA to allow for a bizarrely transformative and false declaration.

Second, Blair provides no support for his contention that the beneficiary *must simultaneously be* an investor, in this case, Freddie Mac. Requiring the foreclosing entity to strictly be a loan's investor would improperly stretch the statutory definition of beneficiary beyond just "holder," and depart from both the UCC and common law by limiting who can enforce a negotiable instrument. *See, e.g.*, RCW 61.24.005(2).[15]

Notably, Blair's briefing offers no case law or statutory support for whatever he believes "owner" should mean. He simply asserts that Freddie Mac is the *only* entity that must have been entitled to foreclose on

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[14] The proof required under RCW 61.24.030(7)(a) is that "the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust." The statute adds, "[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." (Emphasis added.)

[15] Blair incorrectly asserts that the Supreme Court in *Lyons v. U.S. Bank, N.A. et al.*, 181 Wn.2d 775, 336 P.3d 1142 (2014), found that a beneficiary must be a holder and owner as if they were two wholly unrelated concepts. Brief of Appellant at 19. Rather, *Lyons* uses the terms "holder" and "owner" almost interchangeably, implicitly recognizing that one must be a note holder when one also has note ownership, *i.e.*, actual or constructive possession. *Accord In re Brown*, 2013 WL 6511979, *14 (B.A.P. 9th Cir. Dec. 12, 2013) ("Washington law makes clear that the distinction between an owner of the Note and a beneficiary who is a holder of the relevant note is not significant.").

the Property, because of Freddie Mac's "ownership" interest. Brief of Appellant at 20-22.

However, when "ownership" is defined as a right to possession, the import of RCW 61.24.030(7)(a) becomes clearly understood: a trustee must have proof that the beneficiary possesses, or has a right to possess, the Note. A beneficiary's declaration that it is the Note holder satisfies this requirement because being a holder *ipso facto* establishes possession of the instrument. *See* RCW 62A.3-201(a); *accord Bank of Am., N.A. v. Cloutier*, 2013 ME 17, ¶ 21, 61 A.3d 1242, 1247 ("[t]he phrase 'certify proof of ownership of the mortgage note' requires only that a foreclosure plaintiff identify the owner or economic beneficiary and, if it is not itself the owner, prove that it has power to enforce the note.").

In other words, when RCW 61.24.030(7)(a) mandates that trustee have proof the "beneficiary is the owner" of a secured note subject to foreclosure, the statute compels a trustee to become aware of who has the right to a note's possession before recording a sale notice.[16]

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[16] It is important to observe the beneficiary declarations are not publicly-recorded or issued to borrowers; rather, they are solely intended as a safe harbor to trustees in the event the beneficiary purporting to have authority does not. *See Meyer v. U.S. Bank Nat. Ass'n*, -- F.Supp.3d --, 2015 WL 1619048, *8 (W.D. Wash. Apr. 10, 2015) ("as with the Beneficiary Declaration, the Act provides trustees a safe harbor to rely on this declaration, absent a violation of the trustee's duty of good faith to the borrower.").

Because the ability to non-judicially foreclose in Washington rests with the note holder, "ownership" (possessory) rights are not material to a determination of beneficiary status.

Consequently, the Court should reject Blair's attempt to characterize the proper party to foreclose as the "owner." Brief of Appellant at 19-20, 23; *cf.* RCW 61.24.005(2) (proper party is the holder). Bank of America produced evidence it was the Note holder, and therefore, Bank of America could lawfully appoint NWTS and proceed with foreclosing on the Property due to Blair's admitted default.

E. Blair Lacked Evidence of Each Essential Element of His CPA Claim Against NWTS.

1. Requirements for CPA Liability.

A CPA claim can only be maintained upon proving:

> (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation.

Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 37, 204 P.3d 885, 889 (2009), *citing Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986). The failure to meet any one of these elements is fatal to the claim's viability. *Sorrel v. Eagle Healthcare*,

110 Wn. App. 290, 298, 38 P.3d 1024 (2002).[17]

Blair does not contend the existence of a *per se* CPA violation; therefore, he must initially show NWTS engaged in misleading acts or material misrepresentations with a capacity to deceive a substantial portion of the public. *See, e.g., Holiday Resort Comm. Ass'n v. Echo Lake Assoc., LLC,* 134 Wn. App. 210, 135 P.3d 499 (2006); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 779 P.2d 249 (1989); *see also Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013), *citing* 15 U.S.C. § 45(n).[18] To establish an unfair or deceptive act under this first prong test, there must be shown a real and substantial potential for repetition, as opposed to a hypothetical possibility of an isolated act being repeated. *Michael v. Mosquera–Lacy*, 165 Wn.2d 595, 604-05, 200 P.3d 695 (2009).

The Consumer Finance and Protection Bureau states that the Federal Trade Commission "four Ps" test can assist in the evaluation of

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[17] NWTS agrees that it carried out its statutorily-mandated responsibilities in "trade or commerce."

[18] 15 U.S.C. § 45(n) suggests an "unfair" practice is one that can cause substantial injury which is not reasonably avoidable by a consumer and is not outweighed by countervailing benefits, while a "deceptive" practice is material and likely to mislead a consumer based on his or her reasonable interpretation. A key question is *not* whether a consumer could have made a better choice. Rather, the question is whether an act or practice hinders a consumer's decision-making. *Id.*; *see also* 12 C.F.R. 227.1.

whether a representation, omission, act, or practice is likely to mislead or deceive consumers, *i.e.*:

> * Is the statement *prominent* enough for the consumer to notice?
> * Is the information *presented* in an easy-to-understand format that does not contradict other information in the package and at a time when the consumer's attention is not distracted elsewhere?
> * Is the *placement* of the information in a location where consumers can be expected to look or hear?
> * Finally, is the information in close *proximity* to the claim it qualifies?

See CFPB Supervision and Examination Manual (Oct. 2012) (emphasis in original).

Next, Blair needed to show a likely impact on the public interest because of the actions alleged. *See Hangman Ridge Training Stables, Inc., supra.* at 784, 790; *see also McCrorey v. Fed. Nat. Mortg. Ass'n*, 2013 WL 681208 (W.D. Wash. Feb. 25, 2013)[19]; *Tran v. Bank of Am.*, 2013 WL 64770 (W.D. Wash. Jan. 4, 2013) ("[t]he public interest in a private dispute is not inherent.").

It is "the likelihood that additional plaintiffs have been or will be injured in *exactly the same fashion* that changes a factual pattern from a

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[19] As the Hon. Judge Lasnik of the Western District of Washington stated in *McCrorey*, "[t]he purpose of the CPA is to protect consumers from harmful practices, which is why plaintiff must allege an actual or potential impact on the general public, not merely a private wrong." *Id.* at *3, *citing Lightfoot v. Macdonald,* 86 Wn.2d 331, 333, 544 P.2d 88 (1976).

private dispute to one that affects the public interest." *Id.* at 790 (emphasis added); *see also Segal Co., Inc. v. Amazon.com*, 280 F.Supp.2d 1229 (W.D. Wash. 2003) (dismissing CPA claim as allegation "on information and belief that defendant engages in a 'pattern and practice' of deceptive behavior" is insufficient to satisfy public interest requirement).

Lastly, Blair was required to prove the existence of a compensable injury and causation, *i.e.*, that the "injury complained of... would not have happened" if not for NWTS' actions. *See Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 82, 170 P.3d 10 (2007); *see also Panag v. Farmers Ins. Co. of Wash.*, *supra.* (if an expense would have been incurred regardless of whether a violation existed, causation is not established); *Bhatti v. Guild Mortg. Co.*, 2013 WL 6773673 (9th Cir. Dec. 24, 2013)[20]; *Massey v. BAC Home Loans Serv. LP*, 2013 WL 6825309 (W.D. Wash. Dec. 23, 2013), *citing Babrauskas v. Paramount Equity Mortg.*, 2013 WL 5743903 (W.D. Wash. Oct. 23, 2013) (plaintiff's failure to meet obligation "is the 'but for' cause of the default" and

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[20] The Ninth Circuit Court of Appeals stated in *Bhatti*:

> Plaintiffs' foreclosure was not caused by a violation of the DTA because Guild [the foreclosing entity] was both the note holder and the beneficiary when it initiated foreclosure proceedings, and therefore the 'cause' prong of the CPA is not satisfied.

Id. at *3.

foreclosure); *Reid v. Countrywide Bank, N.A.*, 2013 WL 7801758, *5 (W.D. Wash. Apr. 3, 2013) (alleged deception in making payments to "parties who are not the true holders and owners of the Note" suggested no factual basis for injury).

An award under the CPA is strictly limited to damage "in... business or property...." RCW 19.86.090, *see also Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009). Lost wages or personal injuries, including pain and suffering, are not compensable under the CPA. *See Wash. State Physicians Ins. Exch. & Ass'n v. Fisons,* 122 Wn.2d 299, 858 P.2d 1054 (1993); *Demopolis v. Galvin,* 57 Wn. App. 47, 786 P.2d 804 (1990) (litigation expenses are *not* an "injury" under the CPA); *Massey v. BAC Home Loans Serv. LP*, *supra.* at *8 (W.D. Wash. Dec. 23, 2013) (a "laundry list... including attorney fees, 'wear and tear' on [a] vehicle, and buying... stamps, is inapposite."); *Thurman v. Wells Fargo Home Mortg.*, *supra.*, *citing Gray v. Suttel & Assocs.*, 2012 WL 1067962 (E.D. Wash. Mar. 28, 2012) ("time and financial resources expended to... pursue a WCPA claim do not satisfy the WCPA's injury requirement."), *Coleman v. Am. Commerce Ins. Co.*, 2010 WL 3720203 (W.D. Wash. Sept. 17, 2010) ("The cost of... [prosecuting] a CPA claim is not sufficient to show injury to business or property."); *see also Alejandre v. Bull*, 159 Wn.2d

674, 153 P.3d 864 (2007) (tort recovery is barred where damages are purely economic losses based on a contract).

Because Blair did not present sufficient evidence to raise a genuine issue of material fact on each of the aforementioned elements, the Superior Court properly granted summary judgment to NWTS.

2. RCW 61.24.030(7)(a) and the *Lyons* Case.

As mentioned above, the DTA requires "proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust" before recording a Notice of Trustee's Sale. RCW 61.24.030(7)(a).

One possible means of accomplishing this requirement is through an unequivocal declaration averring that "the beneficiary is the actual holder of the promissory note or other obligation." *Id.*; *see also Lyons v. U.S. Bank, N.A. et al., supra., citing Beaton v. JPMorgan Chase Bank N.A.*, 2013 WL 1282225, *4 (W.D. Wash. Mar. 26, 2013).

In *Lyons*, the Washington Supreme Court identified three grounds for reversing a summary judgment order. First, the Court held that a beneficiary declaration's reference to RCW 62A.3-301 was ambiguous, and NWTS could not rely on it. *Id.* at 791. However, *Lyons* did not impose strict CPA liability on NWTS. Rather, the Court found that other

evidence of the beneficiary's right to possess the Note, *i.e.* ownership as discussed above, can satisfy compliance with RCW 61.24.030(7)(a). *Id.* at 791.

Second, *Lyons* concluded that the borrower could support a CPA claim based on concerns allegedly expressed to NWTS about the beneficiary's identity prior to recording a Notice of Trustee's Sale. The Court stated:

> [*i*]*f* 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.

Id. at 789 (emphasis added).

Third, *Lyons* found questions of fact existed due to particular facts showing a second, earlier declaration identifying Wells Fargo as the beneficiary in a different capacity. *Id.*[21] That specific problem is not an

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[21] *Lyons* observed: "[i]t is not entirely clear how Wells Fargo could give its interest to Soundview and then give it back to itself eight months later. Material questions of fact remain as to whether the second beneficiary declaration was valid and whether NWTS should have questioned its efficacy in light of the prior beneficiary declaration." *Id.* at 791.

issue in this case.[22]

The facts pertinent to the uncompleted foreclosure of the Property – which commenced after Blair stopped making loan payments nearly five years ago – demonstrate that this litigation is wholly distinguishable from *Lyons*.

3. The Beneficiary's Identity was Established as Bank of America.

The *Lyons* Court relied heavily on *Beaton v. JPMorgan Chase Bank N.A.* for the proposition that "there are probably *many ways* to satisfy the statute's [RCW 61.24.030(7)(a)'s] proof requirement, [but] the statute itself establishes one way." 2013 WL 1282225, *4 (W.D. Wash. Mar. 26, 2013) (emphasis added).

In *Beaton*, the Hon. Judge Jones of the United States District Court for the Western District of Washington considered a Fed. R. Civ. P. 12(b)(6) motion to dismiss, and observed:

> *[i]f Chase was not the holder* of the note, it did not have the authority to appoint NWTS as a successor trustee, and NWTS did not have authority to initiate foreclosure proceedings without knowledge of the beneficiary as required by RCW 61.24.030(7).

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[22] A 2009 declaration named BAC Home Loans Servicing, LP as the beneficiary, but the 2011 declaration identified Bank of America as the successor to BAC Home Loans Servicing, LP by merger. *Compare* CP 562, CP 566. No other entity asserted being the beneficiary, and unlike in *Lyons*, Bank of America's capacity did not change.

Id. at *5 (emphasis added). Based on the logic of the *Beaton* holding, if an entity *was in fact* the note holder, then it would have authority to appoint a trustee in order to initiate foreclosure. *Accord* RCW 61.24.005(2) (beneficiary is the note holder); RCW 61.24.010(2) (only a beneficiary can appoint the successor trustee).[23]

In *Myers v. Mortgage Elec. Registration Sys. Inc.*, the Ninth Circuit Court of Appeals echoes *Beaton*, holding that the "bottom line" supporting dismissal of DTA-based claims is when an entity "actually holds the Note." 540 F. App'x 572 (9th Cir. 2013). *Myers* finds that case law such as *Klem v. Wash. Mut. Bank, supra.*, and *Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 308 P.3d 716 (2013), "does not change the result." *Id.*

More recently, Division One did not even reach the form of a beneficiary declaration, and upheld a trustee's reliance on the same, when "there was no allegation of bad faith." *Jackson v. Quality Loan Serv. Corp.*, *supra.*, *citing Lyons*, 181 Wn.2d at 789-90.

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[23] Blair argued below that NWTS was "not appointed as the successor trustee" and attempted to foreclose "without legal authority to do so," yet NWTS apparently also "did violate its duty of good faith owed to [him]...." *Compare* CP 1079, 1080 (Plaintiff's Response to NWTS' Motion for Summary Judgment at 10, 11). But if NWTS owed a duty of good faith to Blair, then it was necessarily appointed as the trustee – which only a beneficiary has the power to do. Blair's latter position therefore implicitly recognizes that Bank of America was the beneficiary.

Similarly, the United States District Court for the Western District of Washington just reversed a Bankruptcy Court verdict against NWTS, finding:

> Courts have clarified that, in accordance with the plain language of the statute, the trustee is entitled to treat the representations made in a beneficiary declaration as true and rely on the declaration in initiating nonjudicial foreclosure proceedings, absent evidence conflicting with the declaration's representations or a separate violation of the trustee's duty of good faith.
>
> [...]
>
> Absent a showing that NWTS violated its duty of good faith *independent* of its reliance on the declarations, the vast weight of case law now deems NWTS's reliance without further inquiry to be proper.

Meyer v. U.S. Bank Nat. Ass'n, supra. at **15, 17 (W.D. Wash. Apr. 10, 2015) (emphasis in original); *see also Arnett v. MERS*, 2014 WL 5111621, *4 (W.D. Wash. Oct. 10, 2014) (it is "nonsensical" to suggest that a trustee's acceptance of a beneficiary declaration is "in itself, a violation of the duty of good faith."); *accord Forsberg v. Ocwen Loan Serv., LLC*, 2014 WL 6791956, *3 (W.D. Wash. Oct. 30, 2014) ("Contrary to Plaintiff's argument about this issue, the Court finds no contradiction between *Bain* and *Trujillo,* which is indeed binding precedent. Because the beneficiary is the holder of the note, Northwest Trustee's Beneficiary Declaration was not misleading.").

Here, Blair's Complaint did not identify any violation of NWTS' duty of good faith apart from alleging an improper reliance on Bank of America's accurate representation of its authority. CP 17 (Compl., ¶ 3.13), *inter alia*; *see also* Brief of Appellant at 21.

Blair's Complaint *did not allege* a single problem with NWTS' "reliance on a declaration" or *even mention* RCW 61.24.030(7). CP 1-19; *cf.* Brief of Appellant at 21.[24] Yet, incredibly and disingenuously, Blair focused significant briefing in response to NWTS' summary judgment motion on the "language of RCW 61.24.030(7)(a)" in order to claim NWTS violated the CPA. CP 1080-1081; *see also* Brief of Appellant at 20.

Given that the record evidences Bank of America's authority as beneficiary, the Court should not give credence to Blair's shifting theories. *See Dewey v. Tacoma Sch. Dist. No. 10,* 95 Wn. App. 18, 26, 974 P.2d 847 (1999) ("A party who does not plead a cause of action or theory of

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[24] Blair's Complaint alleges documents exist that "falsely assert" Bank of America is the beneficiary, but "these documents were recorded in the records of Chelan County, Washington." CP 12 (Compl., ¶ 2.16). Additionally, Blair contended that NWTS made "misrepresentations... in its Notice of Trustee's Sale and who may bring a non-judicial foreclosure proceeding...." CP 15 (Compl., ¶ 3.8). However, a beneficiary declaration is *not* recorded and it *precedes* the Notice of Trustee's Sale. *See* RCW 61.24.030(7).

recovery cannot finesse the issue by later inserting the theory into… briefs and contending it was in the case all along.").

4. Blair Did Not Communicate a Concern About the Beneficiary's Identity to NWTS.

There is no statutory requirement compelling trustees to conduct a *sua sponte* investigation into every transfer of a secured note or other documents provided by the beneficiary or its authorized agent. *See Meyer*, *supra.* at **17-18. The *Lyons* Court found that a trustee must "adequately inform" itself of a beneficiary's authority through a "cursory" investigation. 336 P.3d at 1147, *citing Walker*, *supra.; see also Mickelson v. Chase Home Fin. LLC*, 2012 WL 6012791 (W.D. Wash. Dec. 3, 2012), *aff'd* 579 Fed. Appx. 598 (9th Cir. Jun. 18, 2014) ("[t]he duty of good faith does not create a duty to conduct an independent verification of sworn affidavits. This expansive view of good faith remains untenable.").[25]

Blair's complete and uncontroverted lack of communication with

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[25] *See also Mickelson v. Chase Home Fin. LLC*, 2011 WL 5553821 (W.D. Wash. Nov. 14, 2011) ("Plaintiffs would have every trustee conduct a secondary investigation into the papers filed by the beneficiary, which is simply too great a demand."); *accord Hallquist v. United Home Loans*, 715 F.3d 1040 (8th Cir. 2013) ("[I]n the absence of unusual circumstances known to the trustee, he may, upon receiving a request for foreclosure… proceed upon that advice without making any affirmative investigation and without giving any special notice to the debtor.").

NWTS concerning a perceived problem with the beneficiary's identity stands in marked contrast to the *Lyons* case. *See Lyons*, *supra.* at 781 (Lyons' counsel informed NWTS that "Wells Fargo no longer had any beneficial interest in the loan;" Lyons' counsel informed NWTS of a loan modification and "sale of the loan;" Lyons' counsel sent a "cease-and-desist letter" to NWTS).

Instead of notifying NWTS when he was "facing foreclosure" and supposedly "not being properly reviewed for a loan modification," Blair immediately contacted and retained counsel to file suit and prevent a sale from taking place. CP 1094-1095 (Dec. of Blair, ¶¶ 2-3).

Because there is no evidence that "NWTS knew about… conflicting information" concerning the beneficiary, the Superior Court did not err in refusing to hold NWTS liable for an unfair or deceptive act. *See Lyons*, *supra.* at 789; *see also Meyer*, *supra.* at *18 ("NWTS had no notice of errors in the declarations or problems in the foreclosure proceeding, and all parties recognized that NWTS possessed authority to foreclose.").

5. NWTS' Conduct as Trustee Did Not Create a Likely Public Interest Impact.

"Speculation that an… act had the capacity to deceive a substantial

portion of the public is insufficient to survive summary judgment" under the CPA. *Brown ex rel. Richards v. Brown*, 157 Wn. App. 803, 239 P.3d 602 (2010), *citing Burns v. McClinton,* 135 Wn. App. 285, 290-91, 143 P.3d 630 (2006) (CPA claim defeated because of no evidence that Wells Fargo's actions had "the capacity to deceive a large portion of the public.").

Blair argued below that "the evidence of record shows that NWTS has repeatedly disregarded the strict statutory scheme for conducting nonjudicial foreclosures...." CP 1090-1091 (Plaintiff's Response to NWTS' Motion for Summary Judgment at 21-22). But Blair's only so-called "evidence" consisted of a declaration from his counsel, stating that she has sued NWTS ten times "in the last few years," and is "aware of other attorneys" making similar arguments. CP 1096-1097 (Dec. of Hulesman, ¶¶ 2, 3).

Notably, however, Blair's counsel failed to mention *any* instance where these lawsuits against NWTS were *successful* because of a lack of "lawful authority" to foreclose. CP 1091 (Plaintiff's Response to NWTS' Motion for Summary Judgment at 22). In fact, there is *no* evidence in the record suggesting that NWTS' uncompleted foreclosure activities with respect to Blair were likely to affect – or deceive – other homeowners.

In sum, each of Blair's allegations exclusively related to conduct directed at him personally, *i.e.*, whether NWTS had authority to commence foreclosure of the Property. These acts did not, and could not, have the capacity to deceive other individuals, let alone a substantial portion of the general public.[26] As such, Blair did not have sufficient evidence to create a genuine issue on the second prong of the CPA test. *See, e.g., Westview Investments, Ltd. v. U.S. Bank Nat. Ass'n*, 133 Wn. App. 835, 855, 138 P.3d 638, 648 (2006).

6. NWTS Did Not Cause Injury to Blair.

In *Bain*, the Supreme Court cited to *Bradford v. HSBC Mortgage Corp.*, 799 F.Supp.2d 625 (E.D. Va. 2011), for an example of an injury in the foreclosure context. 175 Wn.2d at 119. In *Bradford*, three different companies attempted to foreclose after Bradford tried to rescind a mortgage under the Truth in Lending Act. All three companies claimed to hold the promissory note. Observing that "[i]f a defendant transferred the Note, or did not yet have possession or ownership of the Note at the time, but nevertheless engaged in foreclosure efforts, that conduct could amount

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[26] Blair's citation to *Bain* is inapposite. Brief of Appellant at 25. The Supreme Court found "*considerable evidence* that MERS is involved with an enormous number of mortgages in the country (and our state), perhaps as many as *half nationwide*." *Bain*, 175 Wn.2d at 118 (emphasis added). No similar quantity of evidence is found in the record with respect to NWTS.

to a [Fair Debt Collection Practices Act, 15 U.S.C. § 1692k] violation." *Id.*

However, there was nothing like the harm in *Bradford* alleged in this case. Rather, Blair asserts that he had to incur costs associated with "investigating" and seeking to enjoin the uncompleted foreclosure. Brief of Appellant at 27.

But when Blair signed the Note and Deed of Trust, he knew precisely what he was obtaining – a loan for $240,000 in exchange for continuing to possess the Property. CP 624-639, CP 645-648. It was Blair's inability to make payments associated with keeping the Property that caused the initiation of foreclosure and NWTS' subsequent issuance of statutorily-required notices. CP 559-561, CP 563-563, CP 568-571, CP 572-581; *see also* Brief of Appellant at 5. Moreover, Blair's supposed "injuries" are non-compensable under the CPA because they do not constitute harm to business or property. Brief of Appellant at 27; *cf.*, *e.g.*, RCW 19.86.090; *Massey*, *supra.*

As such, based on the record, Blair could not establish the causation and injury elements of his CPA claim below.

7. Blair Was Not Prejudiced by NWTS' Actions.

Blair's entire CPA cause of action was based on alleged DTA violations. CP 15-16 (Compl., ¶¶ 3.7-3.10). Thus, he needed to have shown prejudice to support his arguments. *See Amresco Independence Funding, Inc. v. SPS Props., LLC*, 129 Wn. App. 532, 119 P.3d 884 (2005), *citing Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 752 P.2d 385 (1988) (court will not consider DTA violation absent prejudice); *see also Mickelson v. Chase Home Fin. LLC*, 579 F. App'x 598, 601 (9th Cir. Jun. 18, 2014) (where beneficiary held the note, there could be no prejudice to the borrower even if allegations relating to the propriety of the trustee's "proof" were true).[27]

Because of the DTA's anti-deficiency provision – providing that after a nonjudicial foreclosure, a borrower is absolved of further liability on the Note – where a borrower concedes default and is unable to cure, that individual is economically indifferent to asserted defects in the foreclosure process and cannot suffer prejudice. *Udall v. T.D. Escrow Serv., Inc.*, 159 Wn.2d 903, 154 P.3d 882 (2007) (reversing holding that

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[27] A showing of prejudice should be maintained even in a CPA claim wholly predicated on DTA liability. It would be inapposite to require prejudice in a post-sale DTA action, allowed under RCW 61.24.127, yet eliminate the same requirement for "DTA violations that could be compensable under the CPA." *Frias v. Asset Foreclosure Servs., Inc., supra.* at 430.

wrongful foreclosure should be vacated), *citing Steward v. Good,* 51 Wn. App. 509, 754 P.2d 150 (1988), *review denied,* 111 Wn.2d 1004 (1988).[28] Strict construction of the DTA does not mean strict liability.

In *Koegel*, for example, the Notice of Default erroneously contained an "additional description of a plot that had been conveyed and was no longer part of the transaction." 51 Wn. App. 108, 110, 752 P.2d 385 (1988). Further, the Notice of Trustee's Sale "was sent only 25 days after the corrected notice of default," which is contrary to RCW 61.24.030. *Id.* at 111.

Division One found no error in the *Koegel* foreclosure process, stating: "[t]his is not to say, however, that the strict compliance requirement eliminates any consideration of prejudice before a sale may be set aside." *Id.* at 112.[29]

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[28] Although the DTA "must be construed in favor of borrowers," even a wrongful foreclosure where the borrower admits default and cannot cure "does not injure the borrower's interests, because the debt secured by the trustee's deed is per se satisfied by the foreclosure sale due to the Act's anti-deficiency provision." *Id.* at 915-16 (citations omitted).

[29] The *Koegel* Court further wrote:

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

Id. at 112.

Likewise, in *Mickelson*, the Ninth Circuit Court of Appeals recognized the prejudice requirement to prove claims predicated on a DTA-based violation, stating:

> [t]he Mickelsons allege that NWTS failed to secure adequate proof that Chase owned the note. Chase actually held the promissory note during the relevant period. For this reason, even if the Mickelsons were correct that Chase's beneficiary declaration was inadequate under Washington Revised Code § 61.24.030(7)(a), any such failing could not have prejudiced them....

2014 WL 2751033 at *1 (citation omitted), *citing Udall v. T.D. Escrow Servs., Inc., supra.*; *see also Bavand v. OneWest Bank, FSB*, 587 F. App'x 392, 394 (9th Cir. 2014) (no prejudice in connection with borrower's DTA challenges); *Meyer*, *supra.* at *19 (no prejudice when information NWTS received was correct); *Rubio v. U.S. Bank N.A.*, 2014 WL 1318631, at *7 (N.D. Cal. Apr. 1, 2014) ("Prejudice is not presumed from 'mere irregularities' in the foreclosure process."); *Gens v. Wachovia Mortg. Corp.*, 2010 WL 1924777 (N.D. Cal. May 12, 2010) ("Courts have 'rejected claims... where no prejudice was suffered as the result of a procedural irregularity'.") Case law is in accord that, should technical errors exist, foreclosure may nonetheless proceed in the absence of prejudice. *Id.*

Here, just like in *Mickelson* and related cases, NWTS' foreclosure activities did not cause prejudice to Blair. No other entity besides Bank of America, or its subsidiary BAC Home Loan Servicing, demanded payment from Blair on the loan. CP 7 (Compl., ¶ 2.2). Blair also conceded default and an inability to cure the loan's arrearage. CP 11 (Compl., ¶ 2.14).[30] Thus, even if Blair had identified a procedural error in NWTS' notices, his DTA-based CPA claim failed to show prejudice.

F. Summary Judgment Was Properly Granted to NWTS on Blair's "Intentional/Negligent Misrepresentation" Cause of Action.[31]

1. Elements of Misrepresentation and Fraud.

To prevail on a claim for negligent misrepresentation, a plaintiff must prove by clear, cogent and convincing evidence that (1) a defendant provided false information for his guidance in a business transaction; (2) a defendant knew or should have known that the information was supplied to guide plaintiff in that business transaction; (3) a defendant was negligent in obtaining or communicating the false information; (4) plaintiff relied on a defendant's false information; (5) plaintiff's reliance

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[30] Blair may have intended to bring the loan current, *i.e.* "back on track," but no modification agreement was actually entered. *Id.*

[31] Assuming this issue has been properly raised on appeal. *See* n.1, *supra.*

was reasonable; and (6) the false information was the proximate cause of plaintiff's damages. *Ross v. Kirner*, 162 Wn.2d 493, 499, 172 P.3d 701 (2007), citing *Lawyers Title Insurance Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002). "A party claiming negligent misrepresentation must prove it justifiably relied upon the information negligently supplied [by a defendant]." *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 959 P.2d 651 (1998).

An even higher standard applies to intentional misrepresentation, *i.e.*, fraud. *See W. Coast, Inc. v. Snohomish Co.*, 112 Wn. App. 200, 48 P.3d 997 (2002). Under CR 9(b), "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Washington law requires clear and convincing evidence of nine elements to show fraud:

> (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff.

Stiley v. Block, 130 Wn.2d 486, 504, 925 P.2d 194 (1996).

The Ninth Circuit Court of Appeals has addressed the parallel federal rule in the context of a multi-party lawsuit, holding that:

> [when] the complaint accuses several defendants of participating in an allegedly fraudulent scheme, [F.R.C.P.] 9(b) does not allow a complaint to merely lump multiple defendants together but require[s] plaintiffs to differentiate their allegations... and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.

Swartz v. KPMG LLP, 476 F.3d 756, 764-65 (9th Cir. 2007) (citations and quotations omitted); *see also In re Glenfed, Inc. Securities Litigation*, 42 F.3d 1541, 1547, 1548 (9th Cir. 1994).[32]

2. Blair Did Not Supply Enough Evidence to Overcome Summary Judgment.

As a threshold matter, Blair's Complaint averred that all Defendants should be liable for committing fraud, but none of the allegations themselves were pled with particularity or satisfied the requisite elements for either Negligent Misrepresentation or Fraud. CP 18 (Compl., ¶¶ 3.16-3.19).

Second, Blair's Complaint also strictly relied on his beliefs that

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[32] The Ninth Circuit, in *Glenfed*, states:

> To allege fraud with particularity, a plaintiff must set forth *more* than the neutral facts necessary to identify the transaction. The plaintiff must set forth what is false or misleading about a statement and why it is false. In other words, the plaintiff must set forth an explanation as to why the statement or omission complained of was false or misleading. A plaintiff might do less and still identify the statement complained of; indeed, the plaintiff might do less and still set forth some of the circumstances of the fraud. But the plaintiff cannot do anything less and still comply with *Rule 9(b)*'s mandate to set forth with particularity those circumstances which *constitute* the fraud.

Id. at 1548 (emphasis in original).

Bank of America could not properly appoint NWTS as the trustee, or that *Bank of America* is not the beneficiary, or that *Bank of America* precluded him from obtaining a loan modification. CP 11, 13 (Compl., ¶¶ 2.14, 2.17, 2.18).[33] None of these theories, however, could impute liability to *NWTS* on Blair's "Intentional/Negligent Misrepresentation" cause of action.

Lastly, Blair's claim was barred under the independent duty doctrine. The State Supreme Court notes in *Donatelli v. D.R. Strong Consulting Eng'rs, Inc.*:

> [t]he independent duty doctrine is an analytical framework that is used to determine whether one party to a contract can bring tort claims against another party to the contract. The independent duty doctrine will allow a plaintiff to pursue tort claims against a defendant when the plaintiff can prove defendant's 'breach of a tort duty arising *independently of the terms of the contract'*.

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[33] In terms of Blair's attempts to obtain a loan modification, the United States District Court for the Eastern District of Virginia speaks to the very question of a trustee's involvement in these types of claims. The Court found that:

> [t]he alleged contract dispute between Plaintiffs and [the lender] involves determining whether the Plaintiffs are entitled to a loan modification. The Substitute Trustee has no part to play in that portion of this litigation: '[j]ust because the trustee of [a] deed of trust could enforce something does not mean that it is a necessary party,' especially in cases involving] a title dispute, because the mortgage lender possesses an independent right to pursue its rights under the loan agreement.

Jones v. Bank of Am., N.A., 2012 WL 405053 (E.D. Va. Feb. 7, 2012), *citing Sherman v. Litton Loan Serv.*, 796 F.Supp.2d 753 (E.D. Va. July 1, 2011). Similarly, no evidence can be found in the record that NWTS had anything to do with Blair's attempts to negotiate a modification with Bank of America.

179 Wn.2d 84, 312 P.3d 620 (2013) (emphasis added), *quoting Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 385, 241 P.3d 1256 (2010).

Where a complaint only requests monetary damages for "a homeowner's disappointment in the economic benefit they failed to receive," the issue is "central to contract law and not tort law." *Borish v. Russell*, 155 Wn. App. 892, 902, 230 P.3d 646 (2010), *as amended on denial of reconsideration* (Jun. 29, 2010), *citing Alejandre v. Bull*, 159 Wn.2d 674, 683, 153 P.3d 864 (2007).

In this case, Blair contended that NWTS committed a tort, *i.e.* Negligent Misrepresentation or Fraud, based on foreclosure notices. But those notices are governed by the contractual terms of the Deed of Trust. *See McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 106, 233 P.3d 861 (2010) (terms of deed of trust are a matter of contract law). Given the absence of an independent duty arising outside the Deed of Trust, Blair's arguments could not survive NWTS' Motion for Summary Judgment.

IV. CONCLUSION

The record in this case demonstrates: 1) Blair received a loan for $240,000 and secured its repayment with a Deed of Trust (CP 624-639; CP 645-648); 2) in 2010, after Blair defaulted on his mortgage payments, he sought assistance from Bank of America to seek a modification of the

loan terms (CP 7; Compl., ¶ 2.3); 3) Blair acknowledged Bank of America had the *authority to modify* the loan, but after being denied a modification, and when a sale was imminent, Blair changed his mind and asserted Bank of America lacked the ability to *foreclose and enforce* the same loan (CP 1-19); and 4) the sale did not occur (CP 69-70). But despite Blair's assertion to the contrary, Bank of America was the beneficiary. CP 1142. Ownership rights to the loan were not dispositive in determining that fact.

The trial court's decision to grant summary judgment to NWTS should be affirmed because Blair's claims and responsive arguments were insufficient to create genuine issues and overcome the evidence presented.

DATED this 29th day of April, 2015.

RCO LEGAL, P.S.

By: /s/ Joshua S. Schaer
Joshua S. Schaer, WSBA #31491
Of Attorneys for Respondent
Northwest Trustee Services, Inc.

Declaration of Service

The undersigned makes the following declaration:

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

2. On April 30, 2015 I caused a copy of **Respondent Northwest Trustee Services, Inc.'s Opening Brief** to be served to the following in the manner as noted:

Melissa A. Huelsman, Law Offices of Melissa A. Huelsman 705 2nd Ave., Ste. 601 Seattle, WA 98104-1726 Attorney for Appellant	[X] US Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile [X] Email: mhuelsman@predatorylendinglaw.com
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 30th day of April, 2015.

Kristine Stephan, Paralegal